IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Appellants,

vs.

PAHRUMP FAIR WATER, LLC., a Nevada limited-liability company; STEVEN PETERSON, an individual; MICHAEL LACH, an individual; PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an individual,

Respondents.

Electronically Filed
Jan 02 2019 03:53 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 77722

EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY OF DISTRICT COURT'S ORDER GRANTING PETITION FOR JUDICIAL REVIEW PENDING APPEAL PURSUANT TO NRAP 8(a)(2) AND REQUEST FOR ADMINISTRATIVE STAY PENDING DECISION ON UNDERLYING MOTION FOR STAY

IMMEDIATE ACTION REQUESTED

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby moves this Honorable Court on an emergency basis under Nevada Rule of Appellate

Docket 77722 Document 2019-00237

Procedure ("NRAP") 27(e), for a stay of the District Court's Order Granting Petition for Judicial Review pending the State Engineer's appeal of this Order to the Nevada Supreme Court, pursuant to NRAP 8(a). This Motion is based upon the following points and authorities, all pleadings and papers on file in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS AND PROCEDURAL HISTORY FOR STAY

Petitioners Pahrump Fair Water, LLC, Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte (collectively, "Pahrump Fair Water"), filed their Petition for Judicial Review in the Fifth Judicial District Court of the State of Nevada seeking the reversal of State Engineer's Amended Order No. 1293A, on or about August 10, 2018. Following a complete briefing on this matter, and oral arguments on November 8, 2018, in Pahrump, Nevada, the Honorable Senior Judge Steven P. Elliott ordered that Pahrump Fair Water's Petition for Judicial Review be granted, and reversed Amended Order No. 1293A. The district court filed the written order granting the Petition for Judicial Review on December 6, 2018, and the Notice of Entry of Order was served on December 6, 2018. *See* Notice of Entry of Order, attached hereto as Exhibit 1. Based on the arguments made to the district court, the State Engineer is appealing the district court's ruling to this honorable Court. The State Engineer also previously sought this requested stay in district court,

however, the district court denied the requested relief, finding that NRAP 8(c) factors did not weigh in favor of the State Engineer's requested stay.

The State Engineer now moves for this stay in this Court based on the same grounds due to concerns about timing and the effects of the district court's Order during the pendency of this appeal, as the district court's Order states that it is effective 5 days after receipt and Nevada Rule of Civil Procedure ("NRCP") 62(a) permits enforcement proceedings to commence following the expiration of 10 days after service of written notice of entry of an order. Prior to the district court's denial of the State Engineer's Motion for Stay at the district court, the State Engineer complied with the district court's Order, issuing his Notice of Reversal of Order 1293A on December 13, 2018, following the district court's denial of a request for a temporary stay pending a determination on the motion for stay during a teleconference held on December 13, 2018. *See* Notice of Reversal of Order 1293A, attached hereto as Exhibit 2.

The State Engineer seeks a stay of the district court's Order, and for Amended Order No. 1293A to remain in effect, during the pendency of this appeal due to the high likelihood that the purpose of the State Engineer's appeal will be defeated if this stay does not issue, as well as the potential irreparable harm to the resource and impending procedural quagmire should additional domestic wells be freely drilled during the pendency of an eventually successful appeal by the State Engineer.

II. ARGUMENT

A. This Court Should Stay the District Court's Order, Reversing Amended Order 1293A, Pending Appeal

The State Engineer seeks a stay of the district court's Order Granting Petitioner's Petition for Judicial Review. The State Engineer seeks to preserve the status quo during the pendency of this appeal, *i.e.*, continue the prohibition on drilling new domestic wells in the Pahrump Basin without the relinquishment of 2 acre-feet of water rights, pursuant to Amended Order No. 1293A.

In this case, the first factor regarding the potential defeat of the object of the State Engineer's appeal should hold substantial weight. NRAP 8(c)(1). The State Engineer issued Amended Order No. 1293A due to the significant groundwater issues facing the Pahrump Basin, based on studies showing continuing water level declines on the valley floor of the Pahrump Basin, including projecting the failure of thousands of existing wells under existing pumping conditions currently occurring within the basin. *See* State Engineer's Answering Brief, attached hereto as Exhibit 3. These existing conditions are in significant part the result of the Pahrump Basin containing the highest density and proliferation of domestic wells in the State of Nevada. *Id*. It is the State Engineer's position that he is statutorily authorized to issue Amended Order No. 1293A, and that it is necessary to prevent the further proliferation of additional domestic wells that would exacerbate Pahrump's already

troubling groundwater levels, to the detriment of existing holders of water rights and the protected interests of those currently existing domestic wells.

Further, based on this Court's ruling, there is now an outstanding question of whether domestic wells are even subject to the prior appropriation doctrine that has been Nevada's water law since 1885. The district court held that "domestic wells are afforded an exemption from the State Engineer's regulatory purview." Order Granting Petition for Judicial Review, p. 6. Such an exemption is, in effect, a finding that domestic wells hold a superior priority to all other water rights. Allowing additional domestic wells to be drilled, without restriction, during the pendency of the appeal will only compound this issue such that a primary goal of the State Engineer's appeal will be defeated if a stay is not issued.

Since the district court oral argument on November 8, 2018, the State Engineer has received a significant number of Notices of Intent[1] ("NOI") to drill new domestic wells in the Pahrump Basin. *See* Declaration of John Guillory, P.E., Nevada Division of Water Resources, Manager II, Las Vegas Branch Office,

[1] For reference, a query of the State Engineer's well log database, found on the Nevada Division of Water Resources website, shows that approximately 377 domestic wells were drilled in the entire state of Nevada in 2018. The Pahrump Basin is one of 256 groundwater basins in Nevada. Therefore, in just the 55 days between the date of the district court oral argument in this case and the date that the State Engineer filed this Motion for Stay, the State Engineer received 232 NOIs for the Pahrump Basin alone. This number is equivalent to approximately 61.5 percent of the amount of all domestic wells drilled in Nevada in 2018.

attached hereto as Exhibit 4. Should this proliferation of new domestic wells be allowed to proceed, the purpose of the State Engineer's appeal to uphold Amended Order No. 1293A will be defeated. This potential increase in domestic wells, along with the legal entitlement to pump up to 2 acre-feet annually per each domestic well under NRS 534.350(8)(a)(2), will only further compound the extraordinary groundwater declines and threats to existing domestic wells and holders of groundwater rights. This influx of NOIs is the primary reason why the State Engineer requests immediate action on this Emergency Motion.

This result is exactly what the State Engineer sought to prevent when issuing Amended Order No. 1293A under his legal duty to manage Nevada's limited water resources for the benefit of the public. While this Court generally does not hold that one factor under NRAP 8(c) carries more weight than others, the Court previously recognized that if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (*citing Hansen v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000)). In other contexts, specifically regarding an order refusing to compel arbitration, the Nevada Supreme Court held that the first stay factor takes on added significance and generally warrants a stay pending resolution of the appeal. *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38. The other stay factors remain relevant to the Court's analysis, but "absent a strong showing

that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of the appeal." *Id*., 120 Nev. at 251-52, 89 P.3d at 38. This factor is especially strong and justifies the requested stay.

Additionally, the State Engineer, and the State of Nevada as a whole, will suffer irreparable harm should this stay not issue. NRAP 8(c)(2). The issue is twofold. First, should the Supreme Court ultimately reverse this Court's decision and reinstate Amended Order No. 1293A, as noted above, there will have been potentially hundreds, if not thousands, of new domestic wells drilled in violation of Amended Order No. 1293A during the pendency of the appeal. This would lead to procedural disarray, raising significant questions regarding plugging these new wells, who will do the plugging, and who will pay for it. The burden of this problem would fall on the State Engineer. Second, the studies upon which the State Engineer based Amended Order No. 1293A predict continued water level declines and well failures based on existing pumping. Should pumping increase, there is a distinct likelihood that water levels will drop at an increased rate such that it is possible that the Pahrump Basin may drop to an irrecoverable level. The water of all sources of water supply within the boundaries of the State belongs to the public. NRS 533.025. It is the State Engineer's duty to prevent the depletion of designated groundwater basins, like the Pahrump Basin. *See* NRS 534.120. Therefore, Amended Order

No. 1293A should remain in effect until the Nevada Supreme Court reaches a final decision in order to avoid serious, *irreparable* harm to the State Engineer and the State of Nevada.

Conversely, Petitioners will not suffer irreparable harm if this stay is granted. NRAP 8(c)(3). Requiring those seeking to drill new domestic wells in the Pahrump Basin to wait before they drill these new wells without relinquishment of 2 acre-feet of water (in the event the Nevada Supreme Court affirms the district court's decision) is not irreparable harm. The Supreme Court has held that increased costs and delay do not constitute irreparable harm. *See Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. Nonetheless, this factor will generally not play a significant role in the decision whether to issue a stay. *Id*.

Regarding the likelihood of success on the merits factor, NRAP 8(c)(4), this Court has held that where the object of an appeal will be defeated if the stay is denied, a stay is generally warranted; however, "the party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable" particularly where "the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes." *Id*., 120 Nev. at 253, 89 P.3d at 40. Here, the State Engineer is appealing the district court's ruling in good faith, seeking to uphold his legal duties, pursuant to NRS 534.110(8) and NRS 534.120(1), to make such rules and regulations as necessary to prevent the depletion of the Pahrump

Basin via Amended Order No. 1293A, allowing the State Engineer to work towards stabilizing water level declines and limiting well failures, including existing domestic wells, without the need to curtail[2] existing water users.

Despite the district court's finding to the contrary, the State Engineer will argue that he did in fact have authority to issue Amended Order No. 1293A to prohibit the drilling of new domestic wells without the relinquishment of a 2 acre-foot water right, that it was supported by substantial evidence, and that he did not violate due process in issuing the Amended Order. As the district court stated during the hearing on November 8, 2018, this case presents a tight issue. Therefore, the likelihood of success on the merits should not weigh in either side's favor, and should certainly not work in Petitioners' favor to defeat this Motion for Stay.

As shown above, due in large part to the likelihood that the purpose of the State Engineer's appeal will be defeated, either in totality or in part, if this stay does not issue, and because the potential harm to the State Engineer and the State of

[2] Per NRS 534.110(6), the State Engineer has the authority to order that withdrawals, including those from domestic wells, be restricted (or curtailed) to conform to priority rights if the State Engineer's findings indicate that "the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants." NRS 534.080(4) provides that domestic wells have a date of priority equal to the date of completion of the well. Why would the State Engineer want to allow one more domestic well to be drilled in the Pahrump Basin, to serve a home dependent on that water, when that domestic well will be the first one cut off in the event of curtailment? This is the exact situation that the State Engineer tried to prevent by issuing Amended Order No. 1293A.

Nevada as a whole, the State Engineer's Motion for Stay Pending Appeal should be granted.

III. CONCLUSION

For the foregoing reasons, the State Engineer respectfully requests that this Court issue a stay of the district court's Order Granting Petition for Judicial Review pending the instant appeal. Further, given the emergency nature of this Motion and aforementioned timing concerns, the State Engineer respectfully requests a temporary administrative stay pending the briefing and decision on this Motion for Stay.

RESPECTFULLY SUBMITTED this 2nd day of January, 2019.

ADAM PAUL LAXALT
Attorney General

By: /s/ James N. Bolotin
JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: jbolotin@ag.nv.gov
Attorney for Appellant,
State Engineer

NRAP 27(e) CERTIFICATE

I, James N. Bolotin, declare as follows:

1. I am currently employed by the Nevada Office of the Attorney General as a Deputy Attorney General. I am counsel for Appellants named herein.

2. I verify that I have read the foregoing Emergency Motion under NRAP 27(e) for Stay of District Court's Order Granting Petition for Judicial Review Pending Appeal Pursuant to NRAP 8(a)(2) and Request for Administrative Stay Pending Decision on Underlying Motion for Stay, and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. The facts showing the existence and nature of the emergency are set forth in the Motion. As described above, relief is needed as soon as possible to avoid irreparable harm to the State Engineer, the Pahrump Valley Hydrographic Basin, and the State of Nevada as a whole, and to avoid defeating the purpose of the State Engineer's appeal. Immediate action is requested.

4. The relief sought in this Motion was presented to the District Court in a motion filed with the District Court on December 10, 2018. The District Court denied this relief, filing its Order on December 27, 2018, and the State Engineer received the Notice of Entry of this Order on January 2, 2019. The State Engineer is filing this Motion at the earliest possible time.

5. I have made every practicable effort to notify the Supreme Court and opposing counsel of the filing of this Motion. The State Engineer alerted opposing counsel to the filing of this Motion shortly before it was submitted for efiling. I also called the Clerk of Court's Office for the Nevada Supreme Court before filing. A courtesy copy was emailed to all parties.

6. Below are the telephone numbers and office addresses of the known participating attorneys:

Counsel for Pahrump Fair Water, LLC, *et al.*, Respondents

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
T: (775) 882-9900

Executed this 2nd day of January, 2019, in Carson City, Nevada.

/s/ James N. Bolotin
JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 2nd day of January, 2019, I served a copy of the foregoing EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY OF DISTRICT COURT'S ORDER GRANTING PETITION FOR JUDICIAL REVIEW PENDING APPEAL PURSUANT TO NRAP 8(a)(2) AND REQUEST FOR ADMINISTRATIVE STAY PENDING DECISION ON UNDERLYING MOTION FOR STAY, by electronic service to:

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703

/s/ Dorene A. Wright

INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Notice of Entry of Order filed December 7, 2018	15
2.	Notice of Reversal of Order 1293A dated December 13, 2018	1
3.	Respondent State Engineer's Answering Brief filed October 12, 2018	36
4.	Declaration of John Guillory, P.E., Nevada Division of Water Resources, Manager II, Las Vegas Branch Office	3

EXHIBIT 1

EXHIBIT 1

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
TIMOTHY D. O'CONNOR, ESQ.
Nevada State Bar No. 14098
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile
Attorneys for Petitioners

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

* * *

PAHRUMP FAIR WATER, LLC, a Nevada limited-liability company; STEVEN PETERSON, an individual; MICHAEL LACH, an individual; PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an individual, Petitioners, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No. 39524 Dept. No. 2

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on December 6, 2018, the above-entitled Court entered its Order Granting Petition for Judicial Review in the above-captioned matter, a copy of which is attached hereto as Exhibit 1.

///

///

///

///

AFFIRMATION
Pursuant to NRS 239B.030(4)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any persons

DATED this 12 day of December, 2018.

TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

By: _____
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
TIMOTHY D. O'CONNOR, ESQ.
Nevada State Bar No. 14098
Attorneys for Petitioners

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

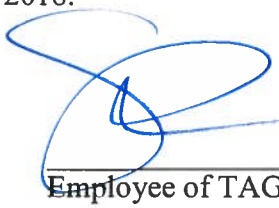
CERTIFICATE OF SERVICE

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

[X] BY **HAND-DELIVERY**:

James N. Bolotin, Esq.
Deputy Attorney General
Nevada Attorney General's Office
100 N. Carson St.
Carson City, NV 89701

DATED this 6th day of December, 2018.



Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile

EXHIBIT INDEX

Exhibit	Document	Pages
1.	Order Granting Petition for Judicial Review	10

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile

EXHIBIT 1

EXHIBIT 1

FILED

2018 DEC -6 P 2:34

NYE COUNTY CLERK

BY TD DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

* * *

PAHRUMP FAIR WATER, LLC, a Nevada limited-liability company; STEVEN PETERSON, an individual; MICHAEL LACH, an individual; PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an individual, Petitioners, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No. 39524 Dept. No. 2

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

THIS MATTER comes before the Court on Petitioners' Petition for Judicial Review of Respondent's Amended Order 1293A. Petitioners filed their Opening Brief on September 11, 2018. Respondent filed his Answering Brief on or around October 8, 2018. Petitioners filed their Reply Brief on November 1, 2018. The Court heard oral argument on November 8, 2018, in Pahrump, Nevada. Petitioners are represented by Paul G. Taggart, Esq. and David H. Rigdon, Esq., of Taggart & Taggart, Ltd. Respondent is represented by Attorney General Adam P. Laxalt and Deputy Attorney General James N. Bolotin.

This Court, having reviewed the record on appeal and Petitioner's Supplemental Record on Appeal, and having considered the parties' arguments, the applicable law, State Engineer Amended Order 1293A, and all pleadings and papers on file herein, hereby **GRANTS** Petitioners' Petition for Judicial Review based upon the following findings of fact and conclusions of law.

I. Facts and Procedural History

On December 19, 2017, the State Engineer issued Order 1293 (the "Order") wherein he restricted the drilling of new domestic wells on existing parcels of land within the Pahrump basin. Despite the fact that the average domestic well in Pahrump uses less than 0.5 acre-feet of water per year, Order 1293 required a property owner to obtain two acre-feet of existing water rights, and relinquish those rights to the State Engineer, in order to drill a domestic well. Prior to issuing Order 1293, the State Engineer did not provide any notice to affected property owners, nor did he provide any opportunity for those property owners to provide comments or submit evidence in opposition to the Order. While it is still unclear exactly how many parcels are directly affected by the Order, the Order could affect as many as 8,000 existing residential lots within the basin that are currently unbuilt.

Petitioner, PFW timely filed a Petition for Judicial Review of Order 1293. PFW filed its Opening Brief in that appeal on July 6, 2018. On July 12, 2018, without providing any notice to the Court or opposing counsel, the State Engineer issued Order 1293A (the "Amended Order"). On July 18, 2018, the State Engineer filed a motion to dismiss PFW's appeal of Order 1293, claiming that the issuance of Order 1293A rendered the appeal moot. The State Engineer stated in the motion to dismiss that "Order 1293A supersedes any legal force and effect of Order 1293" and therefore "Order 1293 is no longer legally valid or enforceable." Like Order 1293, Order 1293A was issued without providing any notice to affected property and without providing an opportunity for affected persons to provide comments or challenge the evidence the State Engineer relied upon. In substance and effect, Order 1293A is nearly identical to Order 1293. The only difference is that Order 1293A provides two additional exemptions to the drilling restriction. Of these exemptions, one allows individuals who filed a notice of intent to drill a domestic well before the issuance of Order 1293, and who had those notices subsequently rejected by the State Engineer, to refile the notices and drill their wells.

On August 8, 2018, the parties entered into a settlement agreement whereby PFW agreed to voluntarily dismiss the appeal of Order 1293 and file a new petition for judicial review of Order 1293A. In exchange, the State Engineer agreed to an expedited briefing schedule and to expedite the scheduling of a hearing on the new appeal. On August 10, 2018, the parties filed a stipulation requesting dismissal of the previous appeal. On that same day, PFW submitted a new petition for judicial review of Order 1293A to the Court and served the same on the State Engineer.

During briefing, Petitioners argued that Respondent did not have legal authority to restrict drilling of domestic wells, Respondent violated constitutional due process in the issuance of the Amended Order, the Amended Order is unsupported by substantial evidence, and that the Amended Order amounts to an unconstitutional taking of private property without just compensation. Respondent argued that he does have the required legal authority to issue the Amended Order and that the Amended Order was based on substantial evidence, the Amended Order does not violate due process protections, Petitioners improperly alleged a taking claim, no taking resulting from the Amended Order occurred, and that Petitioners lack legal standing to bring the instant action. In their reply brief, Petitioners reasserted Respondent's lack of legal authority to issue the Amended Order, the violation of basic constitutional due process in issuing the Amended Order, the lack of substantial evidence in the record to support the Amended Order, the unconstitutionality of the Amended Order, and their constitutional and statutory right to bring this action.

Petitioners claim certain undisputed facts are present in this proceeding. Petitioners claim these undisputed facts include that the Pahrump basin is not currently being over-pumped, groundwater pumping in Pahrump has declined since 1969, as a result of this reduction in pumping, water levels in some portions the basin have leveled off or significantly rebounded (in some cases by as much as 45 feet), and the Amended Order contains no scientific analysis of whether the drilling of additional domestic wells impact existing wells in the basin.

II. Standard of Review

Under NRS 533.450, a party aggrieved by a State Engineer's order or decision is entitled to have the order or decision reviewed in the nature of an appeal. The role of the reviewing court is to determine if the State Engineer's decision was arbitrary, capricious, an abuse of discretion, or is otherwise affected

by prejudicial legal error.[1] A decision is arbitrary if it was made "without consideration of or regard for facts, circumstances, fixed rules, or procedures."[2] A decision is capricious if it is "contrary to the evidence or established rules on law."[3] With regard to factual findings, the Court must determine whether substantial evidence exists in the record to support the State Engineer's decision.[4] Substantial evidence is "that which 'a reasonable mind might accept as adequate to support a conclusion.'"[5]

In *Revert v. Ray*, the Nevada Supreme Court articulated the procedural safeguards the State Engineer must employ prior to issuing an order or decision.[6] First, the State Engineer must provide affected parties with a "full opportunity to be heard" and "must clearly resolve all the crucial issues presented."[7] Next, the State Engineer's order or decision must include "findings in sufficient detail to permit judicial review."[8] Finally, if such procedures are not followed and "the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion," a court should not hesitate to intervene and block the enforcement of the order or decision.[9]

Here, the State Engineer provided no notice that he was intending to issue the Amended Order, nor did he hold any hearing or seek any comments from affected property owners. Accordingly, unlike with other appellate-type proceedings, there is little to no record below for the Court to review. While the State Engineer has provided an ostensible "record on appeal" for the Court's consideration, this record consists of only the documents the State Engineer claims he relied on in making his decision. None of the documents have been authenticated or validated, nor have the authors of the documents been required to testify in a formal hearing or been subjected to cross-examination. In addition, no one from the State Engineer's office has provided any testimony or evidence supporting his claim of reliance on these documents. Accordingly, none of the processes and procedures which are designed to ensure

---

[1] *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Shetakis Dist. v. State, Dep't of Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).
[2] BLACK'S LAW DICTIONARY 125 (10th ed. 2014) (definition of "arbitrary").
[3] BLACK'S LAW DICTIONARY 254 (10th ed. 2014) (definition of "capricious").
[4] *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).
[5] *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Emp. Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).
[6] *Revert*, 95 Nev. 782, 603 P.2d 262.
[7] *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.
[8] *Revert*, 95 Nev. at 787, 603 P.2d at 265.
[9] *Id.*

a full and fair opportunity to challenge evidence before a decision, or to verify that evidence submitted to the Court is relevant and accurate have been followed.

The State Engineer claims "[d]ecisions of the State Engineer are entitled not only to deference with respect to factual determinations, but also with respect to legal conclusions."[10] The Nevada Supreme Court has clearly and unambiguously held that "[w]hile the State Engineer's interpretation of a statute is persuasive, it is not controlling"[11] and that a reviewing court is required to "decide pure legal questions *without deference* to an agency determination."[12] The latter of these holdings was issued this year and reflects the Nevada Supreme Court's current thinking. The State Engineer asserts that this Court should adopt a *Chevron*-like standard of review to the State Engineer's legal conclusions.[13] The State Engineer initially cites NRS 533.450 as the basis for his assertion. However, NRS 533.450 establishes no such standard, either expressly or by implication, and the Nevada Supreme Court has never adopted the *Chevron* standard for purely legal questions. In fact, in *Town of Eureka*, the Supreme Court held just the opposite – that a "district court is free to decide purely legal questions . . . *without deference* to the agency's decision."[14]

III. The State Engineer Exceeded His Statutory Authority.

The language of NRS 534.030(4) is plain and unambiguous. The statute grants the State Engineer general supervisory power over all groundwater wells in Nevada *except* domestic wells. The history of this particular provision, and of the groundwater law in general, demonstrate that the Legislature purposely intended to exempt domestic wells from the State Engineer's regulatory authority except in certain limited circumstances inapplicable to the present case. Accordingly, the Amended Order is an invalid exercise of authority that the State Engineer does not possess.

Two separate and distinct protections for domestic wells are provided in NRS 534.180(1) and NRS 534.030(4) which are exemptions from the State Engineer's general regulatory control. Under NRS 534.180(1), domestic wells are exempt from the State Engineer's permitting process while NRS

---

[10] Answering Brief at 8:20-21 (citing *State v. State Eng'r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).
[11] *Town of Eureka v. Office of State Eng'r, State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992).
[12] *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).
[13] *See Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a deferential standard of review for federal courts reviewing legal determinations of federal agencies).
[14] *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)) (emphasis added).

534.030(4) separately exempts them from the State Engineer's general supervisory control. Accordingly, the State Engineer is wrong when he claims that "NRS 534.030(4) specifically exempts domestic wells from the permitting process."[15] Instead, as shown above, it is NRS 534.180(1) that exempts domestic wells from the permitting process while NRS 534.030(4) provides an additional exemption that removes domestic wells from the State Engineer's general supervisory control.

Because domestic wells are afforded an exemption from the State Engineer's regulatory purview, the only way he can issue a regulation governing them is if he can point to a specific statute that overrides the general exemption and authorizes him to do so. With respect to the Orders in question, no specific statutory authority exists to justify the Orders. The Legislature must be presumed to mean what it says, and say what it means.[16] When the Legislature has seen fit to apply specific provisions of the water law to domestic wells, it has done so with unambiguous language and clear intent. Where, as here, the Legislature has not clearly expressed such intent in a statute, it cannot be presumed to intend that outcome. Accordingly, the State Engineer is not authorized by the general language in NRS 534.120(1) to place the restrictions contained in NRS 534.110(8) on domestic wells.

IV. The State Engineer Should Have Provided Notice To Property Owners.

The State Engineer issued Order 1293 on December 19, 2017, without any prior notice or publication and without holding a hearing. Order 1293A was issued while the appeal over Order 1293 was pending. The State Engineer issued Order 1293A without any prior notice or publication. These facts are a matter of public record and are undisputed. The Nevada Supreme Court has ruled that prior to issuing a regulation affecting an interest in real property a regulatory body must provide personal notice to each affected property owner.[17] Said notice must include the content of the regulation so that affected parties can adequately prepare to oppose it.[18] Finally, the regulatory body must hold a hearing and allow affected property owners the opportunity to provide testimony and evidence related to the regulation.[19] A failure to follow these steps is a constitutional due process violation that renders the regulation invalid. Because the Orders impair a vested property right, and because the State Engineer

---

[15] Answering Brief at 12:21-22.
[16] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).
[17] *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).
[18] *Id.*
[19] *Id.*

failed to provide notice or hold a hearing before issuing the Orders, the Orders are hereby deemed invalid.

V. Substantial Evidence Does Not Support Order 1293A.

Even if the State Engineer had the authority to apply NRS 534.110(8) to domestic wells, before he can do so he must demonstrate that additional wells will unduly interfere with wells that already exist. In his Answering Brief, the State Engineer makes the conclusory statement that "[i]t is clear that if existing pumping rates will lead to well failures, an increase in the number of wells and therefore an increase in pumping will accelerate the problem · undoubtedly causing an undue interference with existing wells."[20] However, there is a major problem with this statement – it is not backed by any evidence or facts in the record and the State Engineer provides no citation to any evidence.

Here, the State Engineer did not perform a full conflicts analysis or make a determination about how, specifically, the restrictions in Order 1293A will benefit existing wells. Instead, the State Engineer relied exclusively on a groundwater model that was never designed to determine whether new wells would cause undue interference with existing wells.[21] Instead, the model was designed to determine the likelihood of well failures resulting from the pumping of existing wells in the basin.

The State Engineer also did not make any determination or employ any objective standards regarding what constitutes an "undue" interference with an existing well. Under NRS 534.110(4), all appropriations of groundwater must allow for a "reasonable lowering of the static water level at the appropriator's point of diversion." Nowhere in the Orders does the State Engineer set an objective standard for determining whether predicted declines in the water table are reasonable. This is an important pre-requisite for any conflicts analysis because if the declines caused by existing or new wells are reasonable then, by definition, such declines cannot be said to unduly interfere with existing wells.

///

///

[20] Answering Brief at 10:27-11:2.

[21] Notably the State Engineer fails in his Answering Brief to address any of the criticisms of the groundwater study raised by Petitioners' in their Opening Brief. Such failure should be deemed an admission that Petitioners' arguments are meritorious and that the groundwater study is fundamentally flawed and, therefore, cannot be considered substantial evidence supporting the issuance of the Orders.

VI. Petitioner's Claim That Order 1293A Is An Unconstitutional Taking.

Petitioners argue that Order 1293A is an unconstitutional taking of private party without just compensation. They allege that the requirement to purchase and forever relinquish water rights to the State Engineer is a per se taking of that property. They further allege that the ban on the drilling of a new domestic well on an existing parcel is also a regulatory taking. Respondent alleges that NRS Chapter 37 provides the exclusive means to bring an action for a taking and that the issue is not ripe for adjudication at this time.

The Court has already determined that the Respondent (1) did not have legislative authority to issue Order 1293A, (2) violated due process in the issuance of Order 1293A, and (3) issued Order 1293A without substantial evidence to support it. Because of this Oder 1293A is invalid. Accordingly, the Court finds that there is no need at this time to make a determination with respect to whether Order 1293A is an unconstitutional taking of private property without just compensation.

VII. Respondent's Claim That Pahrump Fair Water, LLC Lacks Standing.

Respondent argues that Petitioner PFW has no standing to file or participate in this action.[22] The Court finds that this argument is without merit. PFW has both statutory and constitutional standing to assert the interests of its members because it is an association that was formed for the express purpose of doing so.[23]

In *Citizens for Cold Springs v. City of Reno*,[24] the Court reviewed the grant of statutory standing contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an association of property owners that would be affected by an annexation decision had standing to challenge that decision.[25] The Court interpreted the language of NRS 268.668 which grants standing to "any person or city claiming to be adversely affected by such proceeding."[26] Since the statute says that any person claiming to be adversely affected may bring an action, in the "tradition of [its] long-standing jurisprudence," the Court found that standing rights under NRS 268.668 are broader that what

---

[22] Answering Brief at 29:8-12.
[23] SROA 858:22-859:1.
[24] *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009).
[25] *Id.*, 125 Nev. at 634, 218 P.3d at 853.
[26] *Id.*, 125 Nev. at 629, 218 P.3d at 850.

constitutional standing allows.[27] The Court specifically focused on the NRS 268.668 grant of standing to any person claiming to be aggrieved.[28] Based on that language the Court held that even property owners who do not have constitutional standing because they did not own property in the area of annexation at issue do have standing under NRS 268.668.[29]

Further, an association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to their organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.[30] Here, PFW has members that would otherwise have the right to bring this action on their own. Also, because PFW was formed for the express purpose of fighting the Orders,[31] this challenge is germane to its purpose, and it is not necessary to have individual members participate in the lawsuit. Finally, the participation of the individual members of PFW is not required in order to resolve the issues raised in PFW's Petition because only declarative and injunctive relief is being sought.

///

///

///

///

///

///

///

///

///

///

///

///

---

[27] *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.
[28] *Id.*
[29] *Id.*, 125 Nev. at 631, 218 P.3d at 851.
[30] *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).
[31] SROA 858:22-859:1.

ORDER

UPON CONSIDERATION, and good cause appearing therefore, the Court hereby finds that Amended Order 1293A was arbitrarily and capriciously issued and orders that Amended Order 1293A be reversed.

IT IS HEREBY ORDERED that Petitioners' Petition for Judicial Review is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that Respondent's Amended Order 1293A is **REVERSED**.

IT IS HEREBY FURTHER ORDERED that Respondent shall issue an order noticing the reversal of Amended Order 1293A within five (5) days of the ~~signing~~ receipt of this order.

IT IS SO ORDERED.

DATED this 3 day of December, 2018.

Steven P. Elliott
DISTRICT COURT JUDGE

Respectfully submitted by:

TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

By: _____
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
Attorneys for Petitioners

EXHIBIT 2

EXHIBIT 2

BRIAN SANDOVAL
Governor

STATE OF NEVADA

BRADLEY CROWELL
Director

JASON KING, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
http://water.nv.gov

NOTICE OF REVERSAL OF ORDER 1293A

PLEASE TAKE NOTICE that on December 6, 2018, the District Court entered an Order granting the Petition for Judicial Review in *Pahrump Fair Water, LLC, et al. v. Jason King, P.E.*, Fifth Judicial District Court Case Number 39524 and ordered the reversal of State Engineer's Order 1293A.

PLEASE TAKE FURTHER NOTICE that pursuant to the Order of the Court, the State Engineer hereby rescinds Order 1293A.

PLEASE TAKE FURTHER NOTICE that this Notice is issued subject to ongoing legal proceedings.

Respectfully submitted,

P.E.

JASON KING, P.E.
State Engineer

Dated this 13TH day of
December, 2018.

EXHIBIT 3

EXHIBIT 3

Case No. CV 39524

Dept. No. 2P

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

PAHRUMP FAIR WATER, LLC., a Nevada limited-liability company; STEVEN PETERSON, an individual; MICHAEL LACH, an individual; PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an individual,

Petitioners,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

RESPONDENT STATE ENGINEER'S ANSWERING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
POINTS AND AUTHORITIES 1
I. INTRODUCTION 1
II. FACTUAL SUMMARY 3
III. STANDARD OF REVIEW 7
IV. ARGUMENT 9
A. The State Engineer Has The Legal Authority To Issue Amended Order No. 1293A And He Did So Based On Substantial Evidence In The Record 9
B. Amended Order No. 1293A Does Not Violate Petitioners' Due Process Protections As Protectable Interests In Domestic Wells Arise Only After One Is Drilled 13
C. Petitioners Improperly Allege A Taking Claim For The First Time In Their Petition For Judicial Review 17
D. No Taking Occurred As A Result Of Amended Order No. 1293A 20
E. Petitioner Pahrump Fair Water, LLC Lacks Legal Standing To Bring This Action 23
V. CONCLUSION 29
AFFIRMATION 30
CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Cases

Allstate Ins. Co. v. Fackette,
125 Nev. 132, 206 P.3d 572 (2009) 25

Application of Filippini,
66 Nev. 17, 202 P.2d 535 (1949) 7

Bacher v. State Eng'r,
122 Nev. 1110, 146 P.3d 793 (2006) 7

Bd. of Regents of State Colleges v. Roth,
408 U.S. 564 (1972) 14, 27

Beazer Homes Holding Corp. v. Dist. Ct.,
128 Nev. 723, 291 P.3d 128 (2012) 26

Boucher v. Shaw,
124 Nev. 1164, 196 P.3d 959 (2008) 25

Burgess v. Storey Cnty. Bd. of Comm'rs,
116 Nev. 121, 992 P.2d 856 (2000) 15

Buzz Stew, LLC v. City of No. Las Vegas,
124 Nev. 224, 181 P.3d 670 (2008) 23, 24

Citizens for Cold Springs v. City of Reno,
125 Nev. 625, 218 P.3d 847 (2009) 23, 24, 25, 26

Clark Cnty. v. Alper,
100 Nev. 382, 685 P.2d 943 (1984) 18

Conn. Bd. of Pardons v. Dumschat,
452 U.S. 458 (1981) 14

Deal v. 999 Lakeshore Ass'n,
94 Nev. 301, 579 P.2d 775 (1978) 26, 27

Doe v. Bryan,
102 Nev. 523, 728 P.2d 443 (1986) 19, 23

Euclid v. Ambler Co.,
272 U.S. 365 (1926) 21

Eureka Cnty. v. Seventh Jud. Dist. Ct. ex rel. Cnty. of Eureka,
134 Nev. Adv. Op. 37, 417 P.3d 1121 (2018) 17

Fritz v. Washoe Cnty.,
132 Nev. Adv. Op. 57, 376 P.3d 794 (2016), *reh'g denied* (Oct. 27, 2016),
reconsideration en banc denied (Dec. 21, 2016) 18

Gerhart v. Lake Cnty.,
637 F.3d 1013 (9th Cir. 2011) 14

TABLE OF AUTHORITIES

Cases

Hadacheck v. Los Angeles,
239 U.S. 394 (1915) 21

Hantges v. City of Henderson,
212 Nev. 319, 113 P.3d 848 (2005) 24

Hunt v. Wash. State Apple Adver. Comm'n,
432 U.S. 333 (1977) 27, 28

Ky. Dep't of Corr. v. Thompson,
490 U.S. 454 (1989) 14

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 20

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 28, 29

Malfitano v. Cnty. of Storey by & through Storey Cnty. Bd. of Cnty. Comm'rs,
___ Nev. ___, 396 P.3d 815 (2017) 14, 15, 17

McCarran Int'l Airport v. Sisolak,
122 Nev. 645, 137 P.3d 1110 (2006) 20, 21

Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978) 20

Prosole v. Steamboat Canal Co.,
37 Nev. 154, 140 P. 720 (1914) 16

Pyramid Lake Paiute Tribe v. Washoe Cnty.,
112 Nev. 743, 918 P.2d 697 (1996) 8

Revert v. Ray,
95 Nev. 782, 603 P.2d 262 (1979) 7, 8

State Eng'r v. Morris,
107 Nev. 699, 819 P.2d 203 (1991) 7

State v. State Eng'r,
104 Nev. 709, 713, 766 P.2d 263, 266 (1988) 8

Stockmeier v. Nev. Dept. of Corr.,
122 Nev. 385, 135 P.3d 220 (2006) 24

Szilagyi v. Testa,
99 Nev. 834, 673 P.2d 495 (1983) 26

U.S. v. Alpine Land & Reservoir Co.,
788 F. Supp. 2d 1209 (D. Nev. 2011) 24

U.S. v. State Eng'r,
117 Nev. 585, 598, 27 P.3d 51, 53 (2001) 8

TABLE OF AUTHORITIES

Case

Warth v. Seldin,
422 U.S. 490 (1975) 26

William C. Haas v. City & Cnty. of San Francisco,
605 F.2d 1117 (9th Cir. 1979) 21

Zolezzi v. Jackson,
72 Nev. 150, 297 P.2d 1081 (1956) 16

Statutes

NRS 37 ..... 18, 19
NRS 37.060 18
NRS 37.070 18
NRS 37.085 18
NRS 37.110 18
NRS 86 26
NRS 86.201(3) 26
NRS 86.381 ..... 26, 27
NRS 268.668 ..... 24, 25
NRS 533.024(1)(b) 2, 9, 13, 14, 15, 24
NRS 533.024(1)(c) 9
NRS 533.024(1)(e) 9
NRS 533.024(b) 12
NRS 533.370(2) 13
NRS 533.450 ..... 2, 7, 8, 18, 19, 23, 24, 25
NRS 533.450(1) 23, 25, 27
NRS 533.450(10) 8
NRS 534 11
NRS 534.030 5
NRS 534.030(4) 11, 12
NRS 534.030(5) 5, 10
NRS 534.080(4) 5, 11, 22
NRS 534.110(8) 1, 5, 9, 10, 11, 12, 29

TABLE OF AUTHORITIES

Statutes

NRS 534.120 11
NRS 534.120(1) 11, 12, 29
NRS 534.120(2)-(7) 12
NRS 534.180(1) 22
NRS 534.350(8)(a) 16, 22
NRS 542 5

Rules

NRCP 12(b)(5) 19
NRCP 17(a) 26, 27

Constitutional Provisions

Nev. Const. art. 1, § 8 (5) 13
U.S. Const. amend. V 13
U.S. Const. amend. XIV, § 1 13

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby files his Answering Brief. This Answering Brief is based upon the attached Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

I. INTRODUCTION

Under NRS 534.110(8), the State Engineer has the authority to restrict the drilling of wells in any basin or portion thereof designated by the State Engineer if he determines that additional wells "would cause an undue interference with existing wells." The Pahrump Valley Hydrographic Basin ("Pahrump Basin") is over-appropriated, and evidence shows that groundwater levels on the valley floor are dropping. This lowering of the water table is projected to lead to as many as 3,085 wells failing by the year 2065 based on *current* pumping. *See* State Engineer's Record on Appeal (hereafter "SE ROA") at 1502.

Based upon this evidence, together with substantial evidence of the impacts of pumping within the basin, the projected long-term implications of doing nothing, and the assistance and desire of the Nye County Water District, the State Engineer issued Amended Order No. 1293A. Amended Order No. 1293A prohibits the drilling of any new domestic well within the Pahrump Basin unless the person proposing to drill a new domestic wells "obtain[s] an existing water right in good standing, subject to review of the State Engineer, of not less than 2.0 acre-feet annually and relinquish[es] the water right to serve the domestic well." SE ROA at 8-9. Other exceptions are also included in the Amended Order for persons whom already relinquished sufficient water rights, are rehabilitating, reconditioning, or replacing an existing domestic well, filed a Notice of Intent to Drill between December 15th and 19th, 2017, and/or can demonstrate that they

///

filed an application for a zoning and/or building permit for a parcel eligible for a domestic well. *Id.*

In issuing Amended Order No. 1293A, the State Engineer did not violate due process protections, as protectable interests in domestic wells do not arise until there has been an improvement on the property and a well has been drilled. This is confirmed by the legislative history of the passing of Senate Bill ("S.B.") 159 in 2001, the bill that resulted in NRS 533.024(1)(b) being applicable statewide. *See* SE ROA at 912. Amended Order No. 1293A does not affect existing domestic wells, other than protecting the supply of water serving existing domestic wells and water rights, and in fact includes exceptions for those individuals who filed Notices of Intent to Drill on or prior to December 19, 2017 (the date the State Engineer issued the original Order No. 1293), and those individuals who filed an application for a zoning and/or building permit with the Nye County Departments of Planning or Building and Safety on or before December 19, 2017. SE ROA at 9.

Further, Petitioners improperly allege that the State Engineer's Amended Order No. 1293A is "an unconstitutional taking of private property in violation of the Federal and Nevada Constitutions." Petitioners' Petition for Judicial Review (hereafter "Petition"), p. 5; Petitioners' Notice of Appeal of Nevada State Engineer Amended Order #1293A (hereafter "Notice of Appeal"), p. 2. Actions brought pursuant to NRS 533.450 do not include condemnation or "taking" actions, but rather are conducted in the nature of an appeal and are limited to determining whether substantial evidence supports the State Engineer's decision. Petitioners' "taking" claim is beyond the appropriate scope of judicial review and should be dismissed or, in the alternative, stricken as this claim is not pleaded in accordance with Nevada law.

Even to the extent this Court considers Petitioners' "taking" argument, such a claim is without merit. Amended Order No. 1293A affects only future domestic wells, and does not result in a permanent physical invasion of property by the government, nor does it deprive parcel owners of all economical beneficial use of their property. Existing

domestic wells in the Pahrump Basin can continue to be used, and those who wish to drill a new domestic well on a parcel that is eligible for a domestic well may do so by acquiring an existing water right of not less than 2.0 acre-feet annually ("afa") and relinquishing that water right to serve the domestic well.

Lastly, Petitioner Pahrump Fair Water, LLC, as an independent party, lacks legal standing to bring this action. Pahrump Fair Water, LLC (hereafter "PFW"), a limited liability company, is a separate legal "person" distinct and independent of its members and its members' individualized interests. PFW was organized after the State Engineer's Order No. 1293 was issued in December 2017, the amendment (Amended Order No. 1293A) to which is the basis for the petition for judicial review. At the time of bringing this action, PFW does not have any legal property interest that is affected by Amended Order No. 1293A, but rather brings this lawsuit based upon purely speculative injuries to its undisclosed and unknown members. Most simply stated—PFW is not a person aggrieved by a decision or order of the State Engineer and thus does not have standing to bring this action.

In summation, the State Engineer acted within his statutory authority and, based upon substantial evidence, issued Amended Order No. 1293A to protect existing wells in the Pahrump Basin. While Petitioners focus on an impairment to the mere expectation of theoretical future domestic wells under Amended Order No. 1293A, the focus should be on the impairment to the more than 11,000 *existing* domestic well users, as well as *existing* water right holders, should this Court overturn or otherwise set aside Amended Order No. 1293A. The State Engineer respectfully requests that this Court uphold and affirm Amended Order No. 1293A.

II. FACTUAL SUMMARY

The Pahrump Basin, Basin 162, straddles southern Nye and Clark counties and is one of 256 groundwater basins and sub-basins in Nevada. Historically, the Pahrump Basin is one of the most regulated basins by the State Engineer, illustrated by the number of State Engineer Orders applied to the Pahrump Basin in the past. *See*

SE ROA at 3. The Pahrump Basin is over-appropriated, meaning that the existing committed water rights in the basin, in the form of permits and certificates, exceeds the basin's perennial yield.[1] Specifically, the perennial yield of the Pahrump Basin is 20,000 afa while the total annual duty of existing permitted and certificated rights is approximately 59,175 afa. SE ROA at 4, 39.

While these numbers alone are problematic for the health of the Pahrump Basin, the problem is exacerbated by the fact that the 59,175 afa of existing rights *does not* include the quantity of water allowed to be withdrawn by existing domestic wells. By statute, each domestic well within the State of Nevada is permitted to withdraw up to 2.0 afa for culinary and household purposes in a single-family dwelling, including the watering of a garden, lawn, and domestic animals. NRS 534.350(8)(a). There are approximately 11,280 existing domestic wells in the Pahrump Basin, the greatest proliferation and density of domestic wells in any basin in the State of Nevada by far. SE ROA at 4, 40-513, 975-1110, 1389-1605, 1745-3448. Thus, in addition to the 59,175 afa of existing rights in the Pahrump Basin, there are existing domestic wells which are statutorily permitted to draw approximately 22,560 afa of water—an amount that in and of itself exceeds the perennial yield of the basin.

Taking into account the existing parcels in the Pahrump Basin for which no domestic wells currently exists, there is the potential for up to 8,000 new domestic wells to be drilled in the basin. SE ROA at 5, 40-513, 975-1110, 1389-1605, 1745-3448. Should these domestic wells be drilled, a legal right to an additional 16,000 afa of groundwater would be created. In other words, these potential new domestic wells, together with the existing domestic wells, would have a legal right to withdraw nearly twice the perennial yield of the basin. Without further regulation in the Pahrump Basin, there stands the possibility of having nearly 100,000 afa[2] of legal rights to withdraw groundwater in a

---

[1] Perennial yield is the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir.

[2] Adding together 59,175 afa of existing permitted and certificated rights, 22,560 afa of legally entitled withdrawals from existing domestic wells, and 16,000 afa of legally entitled withdrawals from potential domestic wells equals 97,735 afa.

basin with a perennial yield of 20,000 afa. Further, given that Nevada is a prior appropriation state, and that domestic wells have a date of priority of the date of the domestic well's completion per NRS 534.080(4), these newest wells would have the lowest priority and would in turn be the first ones cut off in the event of a curtailment.

Despite past actions by the State Engineer to regulate groundwater in the Pahrump Basin, including designating the Pahrump Basin for his administration pursuant to NRS 534.030, water levels on the valley floor have been declining since the 1950s. SE ROA at 6, 1254-1271, 1338-1605. The well-documented drop in water levels has resulted in corresponding reduced flows from springs and land subsidence. SE ROA at 6, 39-513, 642-701, 975-1110, 1389-1605, 1745-3448. Furthermore, it is predicted that 438 existing wells will fail by 2035, and by 2065, the number of failed wells is predicted to reach 3,085. SE ROA at 7, 1338-1605. This prediction utilizes existing demand; any increase in demand (such as additional domestic wells) would clearly exacerbate and accelerate the problem. *Id.*

Based upon the undoubtedly troubling issues regarding water in Nye County, and especially the Pahrump Basin, the Nevada Legislature enacted the Nye County Water District Act in 2007, creating the Nye County Water District (hereafter "the District"). *See* Ch. 542, Nevada Statutes 2007, p. 3397 (S.B. 222 (2007)). Pursuant to NRS 534.030(5), the State Engineer has properly availed himself of the services of the District as a source of advice and assistance as necessary to conserve groundwater in the Pahrump Basin, a designated basin. The District, after voting to do so, sent a letter to the State Engineer in December 2017 supporting an order from the State Engineer that would require the relinquishment or dedication of water rights for new domestic wells. SE ROA at 1318-1337.

Following receipt of the District's December 2017 letter, the State Engineer issued Order No. 1293 on December 19, 2017, pursuant to his authority under NRS 534.110(8), prohibiting the drilling of new domestic wells without the acquisition and relinquishment of 2.0 afa of water rights to serve the new domestic well. SE ROA at 3. On April 17,

2018, the Nye County Board of Commissioners adopted a Groundwater Management Plan (hereafter "GMP") for the Pahrump Basin, thereby recognizing at the County level that Pahrump has the highest density of domestic wells in Nevada and identifying and relying on Order No. 1293 as a key component of the GMP. SE ROA at 3449-3464. Specifically, the requirement for new domestic wells to be served by water rights relinquished to the State Engineer is vital to the County's GMP, and vital to the desire of both the County and the State Engineer to avoid curtailment in the Pahrump Basin.

Litigation ensued as a result of Order No. 1293, with PFW filing a Petition for Judicial Review. Recognizing that certain individuals, who filed a Notice of Intent to Drill or applied for building permits prior to the issuance of Order No. 1293, may have been unintentionally caught in limbo based upon the issuance of Order No. 1293, the State Engineer issued Amended Order No. 1293A on July 12, 2018. SE ROA at 9. In issuing Amended Order No. 1293A, the State Engineer restated the prohibition on new domestic wells without the relinquishment of 2.0 afa of water rights, but created exceptions for those persons whom (1) filed a Notice of Intent to Drill with the Nevada Division of Water Resources (hereafter "DWR") between December 15th and 19th, 2017, which were denied upon the issuance of Order No. 1293; or (2) could demonstrate that they filed an application for a zoning and/or building permit with the Nye County Departments of Planning or Building and Safety on or before December 19, 2017, for a parcel eligible for a domestic well. SE ROA at 9.

After the issuance of Amended Order No. 1293A, PFW and the State Engineer entered into a settlement agreement, whereby PFW voluntarily dismissed the appeal of Order No. 1293, in exchange for the State Engineer agreeing to an expedited briefing schedule and an expedited scheduling of a hearing of a new appeal of Amended Order No. 1293A.

Following this settlement, PFW, along with new Petitioners Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte (collectively "Petitioners"), timely filed a new Petition for Judicial Review challenging Amended Order No. 1293A.

Petitioners timely filed their Opening Brief,[3] and the State Engineer now timely files his Answering Brief accordingly.

III. STANDARD OF REVIEW

Water law proceedings, like this, are special in character and the provisions of NRS 533.450 establish the boundaries of the court's review and strictly limits the review to the narrow confines established under the statute and as interpreted by the Nevada Supreme Court. *See Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) ("It is also well settled in this state that the 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." (emphasis added)). All proceedings to review a decision of the State Engineer are subject to the provisions of NRS 533.450, which explicitly provides in part that such proceedings are "in the nature of an appeal" and are "informal and summary."

The court's review of a decision brought under NRS 533.450 is limited to deciding whether the State Engineer's decision is supported by substantial evidence. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.* When reviewing a decision or order of the State Engineer, the court may not "pass upon the credibility of the witness nor reweigh the evidence." *Id.*; *see also Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

---

[3] In cases brought pursuant to NRS 533.450, the court will not "substitute its judgment for that of the State Engineer" nor will the court "pass upon the credibility of the witnesses nor reweigh evidence" but rather will be limited to "a determination of whether substantial evidence in the record supports the State Engineer's decision." *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991). Concurrently with their Opening Brief, Petitioners filed a Supplemental Record on Appeal (hereafter "SROA"), consisting of the case file of the related, previous lawsuit filed in this Court, CV38972, challenging Order No. 1293. *See* SROA. This Court's review is limited to a determination of whether substantial evidence in the record supports the State Engineer's decision. *See Morris* (emphasis added). The decision in this case, Amended Order No. 1293A, was issued by the State Engineer on July 12, 2018. Thus, any documents created after July 12, 2018, could not possibly have affected the State Engineer's decision. For this reason, the State Engineer respectfully requests that this Court strike or otherwise ignore SROA at 1187-1245. These documents are dated more recently than July 12, 2018, and therefore could not have affected the issuance of Amended Order No. 1293A on July 12, 2018. The State Engineer additionally, and alternatively, objects to the entire SROA, regardless of the dates, as it consists of documents that the State Engineer did not consider in reaching his decision in Amended Order No. 1293A.

The Legislature has specified that "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(10); *see also Revert*, 95 Nev. at 786, 603 P.2d at 264. A decision of the State Engineer is entitled to deference both as to its factual basis and its legal conclusions. *See U.S. v. State Eng'r*, 117 Nev. 585, 598, 27 P.3d 51, 53 (2001) (The State Engineer's office "has the implied power to construe the statute."); *see also Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996). Generally, the State Engineer's "factual determinations will not be disturbed" by the reviewing court on a Petition for Judicial Review pursuant to NRS 533.450 so long as they are "supported by substantial evidence"; however, if the court determines that the State Engineer's decision was "arbitrary and capricious," and therefore an abuse of discretion, the court may then overrule the State Engineer's conclusions. *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d at 702 (citations omitted).

Decisions of the State Engineer are entitled not only to deference with respect to factual determinations, but also with respect to legal conclusions. The Nevada Supreme Court has explained that "an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action," and therefore "great deference should be given to the agency's interpretation when it is within the language of the statute." *State v. State Eng'r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

Therefore, NRS 533.450 provides the basis and the limit for challenging decisions of the State Engineer. Accordingly, this Court's review is limited to whether substantial evidence in the record on appeal supports the State Engineer's decision.

///

///

///

///

IV. ARGUMENT

A. The State Engineer Has The Legal Authority To Issue Amended Order No. 1293A And He Did So Based On Substantial Evidence In The Record

Petitioners' entire argument is predicated on the idea that domestic wells hold special protections under Nevada law such that State Engineer has no authority to regulate them. While Petitioners break their argument up into separate pieces, it is this incorrect, yet recurring, theme that is the backbone of Petitioners' brief.

The State Engineer does not dispute that domestic wells hold a unique place in Nevada water law. That much is clear from the language of Amended Order No. 1293A itself and the Legislative Declaration found at NRS 533.024(1)(b), declaring the policy of the State of Nevada to "recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot be reasonably mitigated." *See* SE ROA at 3-9. However, the State Engineer *can* and *must* regulate future domestic wells to meet his obligations under this Legislative Declaration, as well as the other Legislative Declarations to "consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada" and to "manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of water." NRS 533.024(1)(c); (e). In fact, the State Engineer is specifically authorized to do so.

NRS 534.110(8) specifically provides that "[i]n any basin or portion thereof in the State designated by the State Engineer, the State Engineer may restrict drilling of wells in any portion thereof if the State Engineer determines that additional wells would cause an undue interference with existing wells." The Pahrump Basin at issue in Amended Order No. 1293A has been designated, a fact that no one disputes. SE ROA at 3, 11-13. In a 2017 report prepared for the Nye County Water District Governing Board entitled

Nye County Water Resources Plan Update, environmental compliance specialist MaryEllen C. Giampaoli, based in part on numerous other scientific studies of the basin, determined that water levels on the valley floor of the basin have declined steadily throughout the period of development. SE ROA at 1494-1503. Further, based on current pumping rates, 438 wells are predicted to fail by the year 2035, while 3,085 wells are predicted to fail by 2065. *Id.* Under NRS 534.030(5), the District appropriately provided advice and assistance to the State Engineer, sending a letter to the State Engineer supporting an order that would require relinquishment or dedication of water rights for new domestic wells, based upon the aforementioned Nye County Water Resources Plan Update, the report prepared by John Klenke in 2017 entitled "Estimated Effects of Water Level Declines in the Pahrump Valley on Water Well Longevity," and its own 2017 Staff Report. SE ROA at 1318-1319; *see also* 1321-1605. This component is key to Nye County's GMP, a plan voted on and approved by the Nye County Board of County Commissioners. SE ROA at 3449-3464.

This scientific data prepared for and provided to the State Engineer by the District, along with the State Engineer's own evidence maintained by DWR, clearly shows troubling water trends in the basin in large part due to the proliferation of domestic wells. SE ROA at 39-1609, 1745-3464. These trends, well known and publicized in various newspaper articles dating back at least to 1974, exist despite many past orders from the State Engineer intended to address groundwater issues in the Pahrump Basin. SE ROA at 11-38, 1610-1744.

Therefore, it was proper for the State Engineer to now take this step, via Amended Order No. 1293A, to prohibit the drilling of new domestic wells unless a water right sufficient to serve that domestic well is acquired and relinquished. This is squarely within the State Engineer's discretionary authority pursuant to NRS 534.110(8): the Pahrump Basin is designated, and the State Engineer has determined that additional domestic wells will lead to the failure of existing wells. It is clear that if existing pumping rates will lead to well failures, an increase in the number of wells and therefore an

increase in pumping will accelerate the problem—undoubtedly causing an undue interference with existing wells. *See* NRS 534.110(8). The only other option would be to curtail by priority, which would lead to individuals who currently have domestic wells or permitted/certificated water rights potentially losing full use of said water rights and wells. In the event that domestic wells were allowed to continue to proliferate, the newest domestic wells would have the most recent priority date and would therefore be the first cut off in a curtailment. *See* NRS 534.080(4). Amended Order No. 1293A, in conjunction with the Nye County GMP, is designed to protect existing water users and prevent curtailment from happening.

Petitioners incorrectly argue that because special provisions exist for domestic wells in Chapter 534 of the Nevada Revised Statutes, and because the term "domestic well" does not specifically exist in NRS 534.110(8), that the State Engineer therefore lacked authority to issue Amended Order No. 1293A. *See* Petitioners' Opening Brief, pp. 9-10. This selective interpretation flies in the face of the plain reading of NRS 534.110(8) and NRS 534.120. Petitioners, in effect, argue that because NRS 534.030(4) explicitly exempts domestic wells from the permitting process, domestic wells are therefore exempted from all other portions of NRS Chapter 534. *See* Petitioners' Opening Brief, pp. 9-10. This is despite the fact than neither NRS 534.110(8) nor NRS 534.120(1) cite to NRS 534.030(4) or include limitations on their application to domestic wells.

In no uncertain terms, NRS 534.120(1) provides that "[w]ithin an area that has been designated by the State Engineer, as provided for in this chapter, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved." This statute provides the State Engineer with broad authority to take the necessary steps to protect designated groundwater basins when there is evidence that the basin is being depleted, such as the Pahrump Basin. While other portions of NRS 534.120 lay out specific actions that the

State Engineer can take regarding temporary permits and preferred uses of water, nothing in these latter provisions cites to subsection 1 of the statute or usurps the power provided to the State Engineer therein. *See* NRS 534.120(2)-(7).

NRS 534.120(1) clearly provides the State Engineer the broad discretion to issue orders, such as Amended Order No. 1293A, that are essential for the welfare of a designated groundwater basin. Similarly, NRS 534.110(8) allows the State Engineer to restrict drilling of *wells* in designated basins where he determines that additional wells would cause an undue interference with existing wells. NRS 534.110(8) and NRS 534.120(1) *do not* include a limitation as to their applicability to domestic wells, and are indeed not so limited. In fact, it is necessary for the State Engineer to apply these statutes in this way to meet the Legislature's directive to protect the supply of water to *existing* domestic wells. *See* NRS 533.024(b). Petitioners fail in their attempt to read special protections for domestic wells (found elsewhere in the Nevada Revised Statutes) into the broad provisions of NRS 534.110(8) and NRS 534.120(1) upon which the State Engineer properly enacted Amended Order No. 1293A. The State Engineer is authorized to prohibit the drilling of new domestic wells in the basin, and he is entitled to deference as to his interpretation of the applicable statutes.

To the extent Petitioners also argue that Amended Order No. 1293A is "overbroad" because it only applies to domestic wells rather than all wells, this assertion is contradicted by their own argument regarding NRS 534.030(4). *See* Petitioners' Opening Brief, pp. 12-14. NRS 534.030(4) specifically exempts domestic wells from the permitting process; the State Engineer does not dispute this interpretation. However, this is the exact reason why Amended Order No. 1293A applies specifically to domestic wells—other wells would be required to go through the application and permitting process, and the State Engineer has already issued an order prohibiting new groundwater appropriations within the Pahrump Basin. Specifically, in Order No. 1252, issued on April 29, 2015, the

///

///

State Engineer stated that, subject to certain exceptions,[4] "any application to appropriate groundwater . . . within the designated [Pahrump Basin] will be denied." SE ROA at 31. Therefore, the State Engineer has applied similar restrictions on all other prospective new uses of groundwater as there is no water available from the proposed source of supply. *See* NRS 533.370(2).

As seen above, there is certainly substantial evidence supporting the State Engineer's decision to issue Amended Order No. 1293A, and legal authority supporting his ability to do so. Therefore, this Court should uphold and affirm Amended Order No. 1293A.

B. Amended Order No. 1293A Does Not Violate Petitioners' Due Process Protections As Protectable Interests In Domestic Wells Arise Only After One Is Drilled

Petitioners correctly state that the Nevada Constitution protects against the deprivation of private property without due process of law. *See* Petitioners' Opening Brief, p. 7 (*citing* Nev. Const. art. 1, § 8 (5)). The same protections exist in the United States Constitution. *See* U.S. Const. amend. V; *see also* U.S. Const. amend. XIV, § 1. However, Petitioners do not have a protectable property interest affected by Amended Order No. 1293A, and therefore the regular standards of procedural due process—notice and a hearing—do not apply in this case.

As stated above, the Nevada Legislature has declared it the policy of Nevada "[t]o recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated." NRS 533.024(1)(b). However, during the 2001 legislative session, where S.B. 159 was passed such that the "protectable interest"

---

[4] Those exceptions include temporary appropriations of groundwater for stockwater purposes during drought declarations, temporary appropriations of groundwater for establishing fire-resistant vegetative cover, and applications to increase diversion rates with no corresponding increase in the duty of the water right(s). SE ROA at 32.

language of NRS 533.024(1)(b) became applicable statewide, it was made clear that "protectable interests"[5] only occur "after there has been an improvement on the property and a well has been drilled" and that citizens cannot claim a "protectable interest" without anything on the property. SE ROA at 912. Petitioners' attempt to argue the opposite in this case—attempting to assert that they hold a protectable interest in *potential* domestic wells based upon a mere *expectation* because they intended to eventually, at some theoretical time in the future, drill a domestic well to serve their parcel of land.

Such a proposition is not supported by law. A due process claim has two (2) steps: first, the Court must determine "whether there exists a liberty or property interest which has been interfered with by the State" and second, the Court must determine "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Malfitano v. Cnty. of Storey by & through Storey Cnty. Bd. of Cnty. Comm'rs*, ___ Nev. ___, 396 P.3d 815, 819 (2017) (*citing Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904 (1989)). The Petitioners fail to meet this first step, and therefore the analysis stops there.

"To have a property interest [. . .] a person must have more than an abstract need or desire for it. [They] must have more than a unilateral expectation of it. [They] must, instead, have a legitimate claim of entitlement to it." *Malfitano*, 396 P.3d at 819-20 (*quoting Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972)). Further, an entitlement to a property interest "cannot be created—as if by estoppel—merely because a wholly and expressly discretionary state privilege has been granted generously in the past." *Malfitano*, 396 P.3d at 820 (*quoting Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S. Ct. 2460 (1981)). A government body's past practice of granting a government benefit is insufficient to establish a legal entitlement to the benefit. *See Gerhart v. Lake Cnty.*, 637 F.3d 1013, 1021 (9th Cir. 2011). "The protections

[5] Throughout the legislative history, the language of S.B. 159 is identified as including a provision about a "protectible [sic] interest." *See, e.g.*, SE ROA at 912, 917. This brief utilizes the language of the actual statute, "protectable interest." NRS 533.024(1)(b).

of due process attach only to **deprivations** of property." *Malfitano*, 396 P.3d at 820 (*quoting Burgess v. Storey Cnty. Bd. of Comm'rs*, 116 Nev. 121, 124, 992 P.2d 856, 857-58 (2000)) (emphasis added).

In *Malfitano*, the Nevada Supreme Court found that the appellant's due process rights were not violated when a county Liquor Board denied his applications for liquor licenses where he previously held temporary licenses, finding that "even assuming the Liquor Board has leniently issued liquor licenses in the past, this does not entitle [appellant] to a permanent liquor license" and the "Liquor Board did not revoke *existing* licenses." 396 P.3d at 820-21. Just as the appellant in *Malfitano* unsuccessfully argued that he had a legal entitlement to a liquor license because the Liquor Board previously leniently issued such licenses, here Petitioners unsuccessfully argue that they are entitled to the right to drill domestic wells because the law has historically been lenient in providing for domestic wells. *See* Petitioners' Opening Brief, pp. 5-9. Similarly, just as the Supreme Court found that the appellant in *Malfitano* failed to show a deprivation of property as the Liquor Board did not revoke an *existing* license, here Petitioners fail to show a deprivation of property as Amended Order No. 1293A does not revoke (or in any way interfere with) *existing* domestic wells.

Petitioners, whom have been identified simply as parcel owners in the basin, real-estate brokers doing business in Pahrump, and owners of well drilling companies, *do not* have a legal claim of entitlement to the ability to drill a domestic well in the Pahrump Basin. *See* Petition, p. 2. Rather, Petitioners only have a mere expectation that such wells would be able to be drilled.[6] This is not enough to create a legal entitlement to this property interest, and Petitioners' entire argument sounds of principles of estoppel—an argument that the Supreme Court specifically denounced in *Malfitano*. In enacting NRS 533.024(1)(b), the Legislature recognized that a "protectable interest" in domestic wells only applies to existing domestic wells. SE ROA at 912.

[6] Plus, domestic wells can still be drilled in the Pahrump Basin on eligible parcels following relinquishment of an adequate water right to serve the proposed domestic well, per Amended Order No. 1293A.

This is in line with the doctrine of appurtenance. Where land is conveyed with an *existing* domestic well that has historically been used to serve the land, the domestic well (and its accompanying statutory, usufructuary right to pump 2.0 afa pursuant to NRS 534.350(8)(a)) is conveyed by deed with the land to which it is applied, by virtue of a deed's appurtenance clause, because the two "become so interrelated and dependent on each other in order to constitute a valid appropriation that the [water] becomes *by reason of necessity* appurtenant to the [land]." *See Zolezzi v. Jackson*, 72 Nev. 150, 153-54, 297 P.2d 1081, 1082-83 (1956) (*quoting Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 164, 140 P. 720, 723 (1914)). Here, where there is no existing domestic well on an undeveloped parcel of land, a conveyance of a deed to the land (even if it included an appurtenance clause) does not convey any such right to a domestic well. Since the domestic well had never been drilled, and the accompanying statutory, usufructuary 2.0 afa of water have never been pumped, there is no interrelation or dependence created between water and land, and thus no protectable interest in the non-existent domestic well is conveyed when the land is purchased.

Since Petitioners do not have legal entitlement to the ability to drill a new domestic well, and do not allege any interference with existing domestic wells, Petitioners lack a legitimate claim of entitlement to a property interest insofar as Amended Order No. 1293A is concerned. Therefore, there has been no deprivation of a property interest, and the protections of procedural due process do not apply. Petitioners' due process argument fails as a matter of law.

Petitioners' due process argument is even more tenuous as it concerns those individuals identified as real-estate brokers and owners of well drilling companies. These unidentified individuals are not alleging that they have property that would previously have been eligible for a domestic well—rather, they are essentially alleging a due process violation based upon a mere expectation that individuals buying property and/or intending to drill a domestic well in the Pahrump Basin would be utilizing their services.

///

This is a prime example of a "unilateral expectation" that is insufficient to warrant due process protections. *See Malfitano*, 396 P.3d at 819-20.

Petitioners argue that *Eureka Cnty. v. Seventh Jud. Dist. Ct. ex rel. Cnty. of Eureka* (hereafter "*Eureka County*") supports their position, such that they were entitled to notice and a hearing prior to the issuance of Amended Order No. 1293A. *See* Petitioners' Opening Brief, pp. 7-8 (*citing* 134 Nev. Adv. Op. 37 at 8, 417 P.3d 1121, 1124 (2018)). This argument is refuted by Petitioners' aforementioned lack of a legitimate claim of entitlement to a property interest in this matter. Petitioners speciously argue that the unilateral expectation of being able to drill a domestic well is a stronger property right than a previously permitted or certificated water right affected by a curtailment order. *See* Petitioners' Opening Brief, pp. 7-8. This proposition is contradicted by the applicable due process precedent cited above. In line with the holding in *Eureka County*, the State Engineer does not dispute the need for notice and a hearing prior to issuing orders affecting a property interest in water to which individuals are legally entitled—such as the water rights that were at issue in *Eureka County*. However, in this case, Petitioners hold only a mere expectation as to the future ability to drill domestic wells in the Pahrump Basin. Under *Malfitano*, such an expectation is insufficient to trigger due process protections.

Petitioners lack a legal claim of entitlement to the ability to drill domestic wells in the Pahrump Basin and, as Amended Order No. 1293A does not affect existing domestic wells, it does not cause a deprivation of property. Therefore, procedural due process protections are not triggered as a result of Amended Order No. 1293A and this Court should affirm the State Engineer's Amended Order.

C. Petitioners Improperly Allege A Taking Claim For The First Time In Their Petition For Judicial Review

In order to establish a claim for inverse condemnation, or takings, a party must demonstrate six elements: "(1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused

by a governmental entity (6) that has not instituted formal proceedings." *Fritz v. Washoe Cnty.*, 132 Nev. Adv. Op. 57, 376 P.3d 794, 796 (2016), *reh'g denied* (Oct. 27, 2016), *reconsideration en banc denied* (Dec. 21, 2016). Inverse condemnation actions are the "constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." *Clark Cnty. v. Alper*, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984). Chapter 37 of the NRS governs eminent domain and, by extension, inverse condemnation claims. In order to initiate an inverse condemnation action, a verified complaint must be filed. *See* NRS 37.060. Discovery is essential, and there must be a hearing to determine the value and damages to the property holder. *See* NRS 37.085, NRS 37.110.

Here, Petitioners have not properly initiated an inverse condemnation action as required under Chapter 37 of the NRS. Petitioners have not filed any "complaint" pursuant to NRS 37.070, there has been no judicial determination finding that the State Engineer's Amended Order No. 1293A constitutes a taking, and there is simply no evidence in the record to provide any guidance or determination as to the value of any alleged taking.

Most significantly, however, is the fact that this action was brought under NRS 533.450 as a Petition for Judicial Review of a decision of the State Engineer. How can this Court, acting in its appellate capacity, render a decision that has not been previously judicially determined? The State Engineer asserts that it would be improper under NRS 533.450 to decide the taking claim in this proceeding. Moreover, to properly defend against Petitioners' alleged taking claim, the State Engineer would require discovery as to the basis of the claim. The State Engineer asserts that discovery would be essential in resolving issues relating to whether there is a taking associated with Amended Order No. 1293A. Further, discovery is beyond the scope of appellate review in a proceeding under NRS 533.450.

Finally, the State Engineer asserts that any alleged taking claim is not yet ripe. The threshold determination before this Court is whether the State Engineer's Amended

Order No. 1293A is supported by substantial evidence. If the Court upholds the State Engineer's decision, then Petitioners *may* be able to assert a taking claim. However, if the State Engineer's decision is not upheld, then Petitioners have no basis to allege a taking based upon Amended Order No. 1293A. *See, e.g., Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) ("Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Moreover, litigated matters must present an existing controversy, *not merely the prospect of a future problem.*" (emphasis added)).

The State Engineer strongly disputes the characterization that the Amended Order No. 1293A constitutes a taking of any property interest. Petitioners have not properly initiated such an action and it would not only be improper under NRS 533.450 to entertain the allegations, but it is improper under NRS Chapter 37. Further, not unless and until this Court sustains the State Engineer's decision is any theoretical taking claim ripe for judicial review or determination. Therefore, Petitioners' taking claim should be dismissed from this action as failing to state a claim upon which relief can be granted. *See* NRCP 12(b)(5).

Alternatively, should the Court not dismiss Petitioners' taking claim under NRCP 12(b)(5), the State Engineer respectfully requests that this portion of Petitioners' Notice of Appeal, Petition, and Opening Brief be stricken. Specifically, the State Engineer asks that the portion of these documents stating ". . . and (5) is an unconstitutional taking of private property in violation of the Federal and Nevada Constitutions" be stricken as immaterial and impertinent to this proceeding. *See* Petitioners' Notice of Appeal, p. 2, ll. 20-21; *see also* Petition, p. 5, ll. 8-9. Further, the State Engineer requests that the portions of Petitioners' Opening brief alleging a taking also be stricken and that Petitioners be precluded from making any reference to this improper taking claim in their eventual oral argument on the merits of this case or, in the alternative, have those references stricken as well. *See* Petitioners' Opening Brief, pp. 14-17. The scope of judicial review under NRS 533.450, under which this action is brought, is expressly limited and in the nature of an appeal. Petitioners improperly raise

this allegation of a taking without properly bringing a civil action and, moreover, it would be proper to strike any reference to a taking claim on the basis that this claim is not yet ripe for judicial review.

D. No Taking Occurred As A Result Of Amended Order No. 1293A

Assuming, *arguendo*, that this Court does take into account Petitioners' argument that Amended Order No. 1293A constitutes a taking, such an allegation is refuted by applying the applicable case law. The State Engineer does not dispute that both the United States Constitution and the Nevada Constitution prohibit governmental takings of private property for public use without just compensation; such propositions have been upheld by the Supreme Court of Nevada. *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661-662, 137 P.3d 1110, 1121 (2006). However, the State Engineer adamantly disputes Petitioners' assertion that Amended Order No. 1293A is a *per se* regulatory taking.

There are two categories of regulatory action that generally will be deemed *per se* takings: (1) when a government regulation requires an owner to suffer a permanent physical invasion of the owner's property; or (2) when a government regulation completely deprives an owner of all economical beneficial use of the owner's property. *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122 (*citing Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S. Ct. 2074 (2005)). Outside of the situations that constitute a *per se* regulatory taking, to determine whether a government regulation nonetheless effects a compensable regulatory taking, a court should consider "(1) the regulation's economic impact on the property owner, (2) the regulation's interference with investment-back expectations, and (3) the character of the government action." *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122 (*citing Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978)). An allegation that a regulation has diminished the property's value, or destroyed the potential for its highest and best use, does not, without more, constitute a taking. *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122. Regulations have been upheld as valid, and therefore not a taking, even where the property value was significantly reduced as a

result of the regulation. *See Sisolak*, 122 Nev. at 663 n.47, 137 P.3d at 1122 n.47 (*citing Euclid v. Ambler Co.*, 272 U.S. 365, 397, 47 S. Ct. 114 (1926) (regulations valid although they effected a 75 percent diminution in value of property); *Hadacheck v. Los Angeles*, 239 U.S. 394, 414, 36 S. Ct. 143, 60 L. Ed. 348 (1915) (ordinance prohibiting highest and best use of land as a brickworks was valid, although it reduced the value of property from $800,000 to $60,000); *William C. Haas v. City & Cnty. of San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000)).

Amended Order No. 1293A only prohibits the drilling of *new* domestic wells in the basin, and this prohibition is not absolute: persons in the Pahrump Basin can still drill a new domestic well if they "obtain an existing water right in good standing, subject to review of the State Engineer, of not less than 2.0 acre-feet annually and relinquish the water right to serve the domestic well." SE ROA at 8. As established above, Petitioners do not possess a protected property interest in their expectations regarding new domestic wells, and therefore no taking occurred as to the potential new domestic wells themselves.

To the extent Petitioners argue that Amended Order No. 1293A effects a regulatory taking as to their currently owned[7] parcels of land, this argument also fails. Amended Order No. 1293A is not a *per se* taking: it does not impose any physical invasion of property on property owners in the Pahrump Basin (let alone a permanent invasion), nor does it deprive parcel owners of all economical beneficial use of their property. Petitioners' arguments that they have had their "dreams extinguished" is pure hyperbole. Individuals who purchased parcels of land in the Pahrump Basin intending to build homes on the property can still do so, and they can even still do so with a domestic well so long as they acquire a water right of at least 2.0 afa and relinquish the right to serve the domestic well. Simply because the value of the property is affected or, conversely,

[7] To the extent that those Petitioners identified as real-estate brokers doing business in Pahrump and owners of well drilling companies argue Amended Order No. 1293A results in a taking against them, such a proposition defies all logic considering they do not allege to own a parcel of land in the Pahrump Basin eligible for a domestic well. *See* Petition, p. 2.

building a home on the property, that will be served by a domestic well, now includes the added expense of acquiring a water right before doing so, does not effect a taking, and certainly does not effect a *per se* taking of private property.

Lastly, Petitioners' argument that Amended Order No. 1293A "forcibly take[s]" more water than an average domestic well uses is a red herring and, frankly, mischaracterizes the effects of the Order. *See* Petitioners' Opening Brief, pp. 15-17. The State Engineer does not dispute that the average domestic well in the Pahrump Basin pumps less than 2.0 afa—such is seen clearly from the State Engineer's ROA. SE ROA at 3383-3448. However, this does not change that fact that domestic wells are defined by statute as having a draught that "does not exceed 2 acre-feet per year." NRS 534.350(8)(a); *see also* NRS 534.080(4) and NRS 534.180(1). Therefore, actual pumping figures do not matter for purposes of Amended Order No. 1293A; in order for a well to be considered a domestic well it must, by law, be able to withdraw up to, and including, 2.0 afa. This alone justifies the amount of water the State Engineer requires to be relinquished[8] for a new domestic well. *See* SE ROA at 8.

Further, the State Engineer is not "forcibly" taking anything by virtue of Amended Order No. 1293A. Rather, given the dire state of the groundwater in the Pahrump Basin, as illustrated earlier in this brief, the State Engineer is prohibiting new domestic wells in the Pahrump Basin with a caveat—that individuals can still drill a domestic well, if so desired, if they obtain and relinquish sufficient water rights to serve a new domestic well. Again, this Order also only applies to *new* domestic wells—existing domestic wells, or those yet to be drilled but to which one of the exceptions found in Amended Order No. 1293A apply, are not negatively affected by this Order. Thus, to say that the State Engineer is "forcibly" taking something from Petitioners in this matter is just as illogical

[8] Relinquishment is a key component of the Amended Order No. 1293A and the Nye County GMP. By requiring relinquishment of an EXISTING water right of at least 2.0 afa before drilling a new domestic well, that acquired water will no longer be used for its original permitted/certificated use. Therefore, the overall allowed use of water in the Pahrump Basin will not increase. However, if relinquishment was not required, any new domestic well would add 2.0 afa of potential use to the basin, while the water that would have been acquired and relinquished (as required by Amended Order No. 1293A) will instead continue to be used under its permit/certificate.

as saying that a store "forcibly" takes customers' money when customers buy items that they desire. Only to the extent that individuals desire to drill a domestic well on their property are they required to relinquish a water right. The State Engineer is not unilaterally taking any existing property by issuing Amended Order No. 1293A. In fact, Amended Order No. 1293A is specifically designed to protect those individuals who currently hold existing water rights and/or own domestic wells.

In summation, to the extent this Court does entertain Petitioners' accusations alleging a taking, no taking of private property occurred as a result of Amended Order No. 1293A. Therefore, Amended Order No. 1293A should also be affirmed, and Petitioners' Petition denied, for this reason.

E. Petitioner Pahrump Fair Water, LLC Lacks Legal Standing To Bring This Action

The threshold requirement when bringing an action is the existence of a genuine controversy. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986), *abrogated on other grounds by Buzz Stew*, 124 Nev. 224, 228 n.6 ("This court has a 'long history of requiring an actual justiciable controversy as a predicate to judicial relief.'"); *see also Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009). The Nevada Legislature has established that "any person aggrieved by any order or decision of the State Engineer . . . affecting the person's interests . . . may have the same reviewed by a proceeding for that purpose . . . ." NRS 533.450(1). Under this statutory structure, the question of whether PFW has standing is subject to a twofold analysis: (1) Who is granted standing under NRS 533.450 to challenge an order or decision of the State Engineer?; and (2) Is PFW a person whose interests have been adversely impacted by the issuance of the State Engineer's Amended Order No. 1293A? *See, e.g., Citizens for Cold Springs*, 125 Nev. at 629, 218 P.3d at 850.

Here, NRS 533.450(1) grants an arguably broader standing than constitutional standing generally provides. Accordingly, an examination of the statute itself must occur to determine whether PFW has standing to bring this action. *Id.* This examination

demonstrates that PFW lacks standing to bring this case. Under the first inquiry, NRS 533.450 affords any person who has an interest that is affected in the subject of a decision or order of the State Engineer standing to bring a petition challenging that decision. This interpretation of the statute is supported by the plain reading of NRS 533.450 and Nevada Supreme Court precedence.

In *Citizens for Cold Springs*, property owners adjacent to undeveloped land in the City of Reno filed a complaint for declaratory relief challenging the annexation of said land. 125 Nev. at 628, 218 P.3d at 849. In that action, the complaint was challenged on the basis that the plaintiff lacked standing as it had not shown that "it had been personally, substantially, and adversely . . . affected by the annexation." *Id.* The district court dismissed the case for failure to state a claim. *Id.* On appeal, the Nevada Supreme Court considered the scope of NRS 268.668, which affords standing to "*any* person . . . *claiming* to be adversely affected" by an annexation." 125 Nev. at 629, 218 P.3d at 850 (emphasis supplied). In examining whether the statute afforded the plaintiff standing, the *Cold Springs* Court conducted an examination of the statute to ". . . 'determine whether the plaintiff had standing to sue.'" 125 Nev. at 630 (*citing Stockmeier v. Nev. Dept. of Corr.*, 122 Nev. 385, 393, 135 P.3d 220, 226 (2006), *abrogated by Buzz Stew*, 124 Nev. 224, 181 P.3d 670).

In examining the statute, the *Cold Springs* Court looked to *Hantges v. City of Henderson*, 212 Nev. 319, 113 P.3d 848 (2005), in applying statutory standing in excess of constitutional standing. 125 Nev. at 630-631, 281 P.3d at 851. Constitutional standing requires, at a minimum, that the plaintiff suffered a concrete and particularized and actual 'injury in fact', an underlying connection between the alleged injury and the conduct alleged to cause the injury, and there must be a reasonable likelihood that the alleged injury may be rectified by a decision in the plaintiff's favor. *See U.S. v. Alpine Land & Reservoir Co.*, 788 F. Supp. 2d 1209, 1211 (D. Nev. 2011) (citations omitted). Thus, in *Cold Springs*, the Court found that the plain language of the statute provided broader standing than that afforded strictly under the constitution because NRS 268.668

states that "any person or city claiming to be adversely affected." 125 Nev. at 631, 218 P.3d at 851. Thus, the Court found that the plaintiff landowners and residents whom were living adjacent to or near the annexation were within the scope of NRS 268.668 as "any person . . . claiming to be adversely affected" and had standing to challenge the annexation. *Id.*

However, that finding only addressed the first prong of the Court's analysis in *Cold Springs*. The Court went on to determine whether the plaintiffs were actually "adversely affected." *Id.* Again, the Court looked to the plain language of the statute for guidance. However, the plain language of the statute did not offer any guidance or definition, thus the Court looked to the rules of statutory construction. *Id.* In interpreting a statute, the Court looks "at the 'context' or 'spirit' in which it was enacted to effect a construction that best represents the legislative intent in enacting the statute." *Id.* (*citing Boucher v. Shaw*, 124 Nev. 1164, 1167, 196 P.3d 959, 961 (2008)). The intent is "to read 'statutes with a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result." *Id.* (*citing Allstate Ins. Co. v. Fackette*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009)).

Unlike here with NRS 533.450, where the controlling statutory language was enacted before the retention of a legislative history, in *Cold Springs*, the Court had the benefit of an Attorney General Opinion as well as precedence to rely upon. *Id.*, 125 Nev. at 631-32, 218 P.3d at 851. However, the Court's findings are illustrative and applicable to the interpretation of NRS 533.450. Specifically, the Court held that even though the plaintiff did not own property that was *subject to the annexation*, plaintiff had adequately pled a personal and adverse injury as a result of the annexation. *Id.*, 125 Nev. at 632-33, 218 P.3d at 852. The language contained in NRS 533.450(1) is reasonably similar such that the analysis used by the Court in *Cold Springs* is persuasive here.

First, so long as a person can adequately plead a concrete and particularized actual or imminent injury as a result of a decision of the State Engineer and has a reasonable likelihood of relief from the action, NRS 533.450 conveys standing. Thus, just as the

property owners and residents in *Cold Springs*, the scope of those considered to be any person affected may be quite broad. However, moving to the second prong of the analysis eviscerates PFW's standing.

Quite simply, PFW is not a person whose interests have been adversely impacted by Amended Order No. 1293A. As a preliminary step in reaching this conclusion, one must look to the fact that PFW has been organized as a limited liability company under Chapter 86 of the NRS. "A limited-liability company is an entity distinct from its managers and members." NRS 86.201(3). Accordingly, a limited-liability company, such as PFW, is a legal "person" in the eyes of Nevada law. Further, a limited-liability company only represents the legal interests of the company itself, it cannot, independent of its own legal interests, enforce the interests of rights of its members, except to "enforce the member's rights against or liability to the company." NRS 86.381. An action may only be initiated "by the real party in interest—'one who possesses the right to enforce the claim and has a significant interest in the litigation.'" *Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 730-31, 291 P.3d 128, 133 (2012) (*citing Szilagvi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983)). S*ee also* NRCP 17(a). Thus, "a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court." *Beazer*, 128 Nev. at 731, 291 P.3d at 133 (*citing Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 303, 579 P.2d 775, 777 (1978); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

In *Deal* following a trial, the defendant raised a defense that the plaintiffs lacked standing as a condominium association to bring a construction defect suit on behalf of the condominium owners. The *Deal* Court, in evaluating standing, held that "in the absence of any express statutory grant to bring suit on behalf of the owners, or a direct ownership interest by the association in a condominium within the development, a condominium management association does not have standing to sue as a real party in interest." *Deal*, 94 Nev. at 304, 579 P.2d at 777. Thus, the Court found that the condominium

///

association was not a real party in interest and lacked standing. *Id.*, 94 Nev. at 304-05, 579 P.2d at 777-78.

Here, PFW is not a real party in interest under NRS 533.450 and lacks standing. Based upon a review of the Nye County property records and the records of the Nevada State Engineer, PFW neither owns any real property in the Pahrump Basin nor any water rights. Moreover, there is no record of PFW submitting any Notice of Intent to Drill card or other document pertaining to the drilling of a domestic well prior to December 19, 2017 (the operative date for the exceptions provided under Amended Order No. 1293A). The interests of PFW's members are immaterial to standing in this matter. Just as a homeowner's association or condominium association lacked standing to bring suit on behalf of its members, Petitioner cannot, as a matter of law, bring a petition for judicial review based solely on the interest(s) of its members. *See Deal*, 94 Nev. at 304-05, 579 P.2d at 777-78; *Beazer*, 128 Nev. at 730-31, 291 P.3d at 133-34 ("[W]ithout statutory authorization, a homeowners' association does not have standing to bring suit on behalf of its members."). *See also* NRS 86.381, NRCP 17(a). PFW is an independent legal person under Nevada law, and without having itself an interest affected by Amended Order No. 1293A, it cannot be "adversely affected" in the manner necessary to convey standing under NRS 533.450(1).

To the extent the interests of PFW's members are considered by the Court, this is still insufficient for PFW to have standing as a petitioner in this action. PFW specifically cites *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 97 S. Ct. 2434 (1977), for the proposition that it *does* have standing to bring this action, despite more recent Nevada case law to the contrary. *See* Petition, pp. 2-3. While the U.S. Supreme Court found associational standing in the *Hunt* case, PFW's situation is distinguishable. In *Hunt*, the Court found that the Washington State Apple Advertising Commission (hereafter "Commission"), a state agency, had standing to sue, as it met the following elements:

///

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit.

Hunt, 432 U.S. at 343, 97 S. Ct. at 2441.

PFW fails to meet the first element of the *Hunt* test, and therefore lacks associational standing even under this standard. The Commission in *Hunt* had a membership made up entirely of similarly situated individuals, specifically apple growers and dealers in Washington State. *Id.*, 432 U.S. at 343-45, 97 S. Ct. at 2441-42. Here, PFW (by its own admission) is composed of three (3) very different types of members: "parcel owners in the Pahrump basin who are directly affected by Amended Order 1293A, real-estate brokers doing business in the Pahrump area, and owners of well drilling companies." Petition, p. 2.

Despite Petitioners' blanket assertion to the contrary, it is not clear that the unidentified members of PFW have standing to sue in their own right. In fact, it would seem that these individuals lack standing to sue on their own based on the limited description of these individuals provided by Petitioners. In *Hunt*, the district court found as a fact that a North Carolina statute caused harm to Washington apple growers and dealers, and therefore they would have had standing to sue in their own right. *Hunt*, 432 U.S. at 343-45, 97 S. Ct. at 2441-42. Here, and in specific regard to those unknown members of PFW who are identified merely as "real-estate brokers" and "owners of well drilling companies," any harm to these individuals' businesses is purely speculative. The Petition does not provide any other grounds for how these unidentified individuals are harmed by Amended Order No. 1293A, but rather asks this Court to assume these individuals would have standing to sue in their own right based on an inference that their businesses *might* be affected by Amended Order No. 1293A. This is epitome of a speculative injury, and is neither concrete nor particularized as required for constitutional standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

Following that same logic, it is not likely, and also merely speculative, that a favorable decision in this matter would redress the theoretical injury alleged by PFW's members. *See id.* Thus, PFW fails to meet a necessary requirement for associational standing under U.S. Supreme Court precedents. Further, there would be no tangible prejudice to the remaining Petitioners as they would be able to continue this lawsuit as property owners allegedly affected by Amended Order No. 1293A, despite the aforementioned lack of a protectable interest affected by the Amended Order.

PFW does not have standing to raise a challenge to Amended Order No. 1293A and thus cannot state a claim upon which relief may be granted. Accordingly, even if taking each of the factual allegations set forth in the Petition and Opening Brief as true, PFW itself cannot state a claim and therefore PFW should be dismissed as a party from these proceedings.

V. CONCLUSION

Amended Order No. 1293A was issued pursuant to the State Engineer's statutory authority, and is based on substantial evidence. Despite Petitioners' arguments to the contrary, NRS 534.110(8) and NRS 534.120(1) clearly authorized the State Engineer to issue Amended Order No. 1293A. Further, notions of procedural due process do not apply here as protectable interests in domestic wells only apply to existing domestic wells, which are unaffected by the Order. Petitioners' allegations of a taking are improperly raised in this proceeding; nonetheless, their allegation of a *per se* regulatory taking fails as Amended Order No. 1293A does not result in a permanent physical invasion of Petitioners' property nor does it completely deprive Petitioners of all economic beneficial use of their property. Lastly, individual Petitioner PFW lacks standing to challenge Amended Order No. 1293A, and therefore should be dismissed as a party from this action and the Court should not consider arguments emanating from PFW's position.

For all of the aforementioned reasons, the State Engineer respectfully requests that this Court deny Petitioners' Petition for Judicial Review and affirm Amended Order No. 1293A.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 8th day of October, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____

JAMES N. BOLOTIN (Bar No. 13829)
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1231
Fax: (775) 684-1108
Email: JBolotin@ag.nv.gov
Attorney for Respondent,
State Engineer

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 8th day of October, 2018, I served a true and correct copy of the foregoing RESPONDENT STATE ENGINEER'S ANSWERING BRIEF, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703

_____
Dorene A. Wright

EXHIBIT 4

EXHIBIT 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellants, vs. PAHRUMP FAIR WATER, LLC., a Nevada limited-liability company; STEVEN PETERSON, an individual; MICHAEL LACH, an individual; PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an individual, Respondents.	Case No. 77722

DECLARATION OF JOHN GUILLORY, P.E., NEVADA DIVISION OF WATER RESOURCES, MANAGER II, LAS VEGAS BRANCH OFFICE

I, JOHN GUILLORY, P.E., hereby state that the assertions of this declaration are true:

1. I have personal knowledge of the matters asserted herein and am competent to testify thereto, save for those matters asserted on

///

information and belief, and for those matters, I am informed and believe them to be true.

2. I am currently employed by the Nevada Division of Water Resources (DWR), as a Professional Engineer (P.E.), in the position of Manager II for DWR's Las Vegas Branch Office.

3. In connection with the case of *Jason King, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources v. Pahrump Fair Water, LLC., et al.*, Case No. 77722, in the Nevada Supreme Court, on appeal from Case No. CV 39524 in the Fifth Judicial District Court of the State of Nevada, in and for the County of Nye, the Office of the Nevada Attorney General contacted me and requested that I, as a Manager II with DWR experienced with the Pahrump Basin, provide truthful and accurate information relevant to legal briefs that they intend to file with the Court on behalf of DWR and the State Engineer, and for other proper purposes.

4. Since the oral argument before the District Court, held on November 8, 2018, wherein the District Court, from the bench, granted the Petition for Judicial Review and effectively reversed Amended

Order No. 1293A, DWR has received 232 Notices of Intent to Drill new domestic wells in the Pahrump Basin.

Pursuant to NRS 53.045, I hereby certify, under penalty of perjury, that the foregoing is true and correct.

Executed on this 2ND day of January, 2019.

, P.E.

JOHN GUILLORY, P.E.