

1 the water state engineer.

2 Go ahead.

3 MR. RIGDON: And -- and --

4 THE COURT: That's on appeal. I know that,
5 because I just saw it.

6 MR. RIGDON: Yeah. And I'm familiar with that
7 case, but I'm not involved in it. So, I couldn't tell
8 you the details of it.

9 The -- so, there is an important case here.
10 And -- and the state engineer cited to it. We've
11 cited to it. And that case is Revert v. Ray. And
12 that case was decided a while back. And that's where
13 the court -- the state engineer is getting the
14 language about the -- the appeal is limited to the
15 record on appeal and all that type of stuff and -- and
16 the deference. And -- but -- but there is important
17 language in Revert v. Ray that the Supreme Court put
18 in there at the very end. And it's important to the
19 outcome of Revert v. Ray as well. Because in Revert
20 v. Ray they actually held a hearing. They had notice
21 of a hearing below on the issue that was -- on the --
22 on the contested water rights.

23 But the court said, when looking at the
24 NRS 450 factors, when looking at the appeal process
25 that's outlying in NRS 533.450, that is all

1 presupposed. There is an assumption that -- that in
2 giving the state engineer that limited appeal, that --
3 that appeal that's limited to the record, that he's
4 held a full and fair hearing down below and given
5 everybody a full opportunity to be heard. And they
6 said there is three things that he has to do at that
7 hearing below: He has to notice it. He has to
8 provide people an opportunity to be heard. And he has
9 to address, specifically address, every concern that
10 comes up. And in that case in Revert v. Ray he had
11 done that. He had held a hearing. But he had not
12 addressed every single concern that came up.

13 And the state engineer argued, well, but --
14 but you need to -- this is a limited appeal. And the
15 Supreme Court said, Yes, but the limited appeal is
16 presupposed upon you following these procedures below.
17 And where you don't, then court should not hesitate to
18 intervene and correct the problem. And the Supreme
19 Court did just that and remanded the case back to him.

20 THE COURT: So, what if I left the stay in
21 place and remanded it back to the state engineer?

22 MR. RIGDON: Right. And --

23 THE COURT: What if I left the stay in place
24 and remanded it back to the state engineer for
25 hearings?

1 MR. RIGDON: It -- if you issued the stay and
2 remanded it back?

3 THE COURT: And left -- left his order in
4 place and remanded it back to him for hearings.

5 MR. RIGDON: Well, that would just be
6 compounding the harm. The harm is that we would still
7 have the irreparable harm that's occurring from the --
8 if he didn't do it right, then he shouldn't get the
9 benefit of not having a stay. The order should be
10 stayed if it wasn't done right, that it's not valid.
11 And then -- and then it should be remanded back to him
12 to create a record that you can actually review.

13 So -- and there is one other point I wanted to
14 raise with regard to the deference issue that you
15 brought up earlier. And I know that it's -- that
16 there is old case law that -- that outline exactly
17 what you said, that you have to give deference to --
18 deference to his legal interpretation.

19 But that case law has changed. In just --
20 just recently, just this year the state Supreme Court
21 issued a decision in Felton versus Douglas County.
22 And they said in that decision -- this is the exact
23 quote -- that the -- that "Review of -- judicial
24 review of administrative decisions is to decide purely
25 legal questions -- purely legal questions without

1 deference to the aid to determination." Without
2 deference, that's the -- that's the standard now. And
3 that -- that decision was issued, I believe, in
4 February of this year.

5 So, there is no deference to -- he gets to
6 decide what his own power is. That's -- that's not
7 the way it is now and -- and, in fact, we were just
8 doing some checking while we were gone at lunch today,
9 and we found an interesting case. It was a case that
10 was brought before a district judge in Carson City in
11 2007, just happen to be you. And -- and it's
12 called -- it's called McGrath versus Department of
13 Public Safety. And that one got appealed, and you
14 were affirmed. But in -- on the -- when they affirmed
15 you in that, the Supreme Court said, "Because
16 statutory construction is a question of law, our
17 review of an administrative ruling concerning the
18 application of a statute is plenary rather than
19 deferential." That's what they said: It's plenary.

20 And so there is no deference that needs to be
21 provided to his interpretation of what his own powers
22 are. And -- and you would -- we would -- positive
23 that that has been the case in the past but that the
24 law is changing on that issue. Factual
25 determinations -- you're right. He's an expert. He's

1 an expert in water resources and engineering. In our
2 factual determinations that an engineer would make,
3 certainly there is deference to those factual
4 determinations. But he has no legal background, no
5 particular legal education, as an engineer, as to
6 what -- as to how to interpret statutes that provide
7 him with his own power. And so that's why some of
8 that case law is changing these days to take away that
9 deferential standard review.

10 So, the Court must determine, when reviewing
11 the order, whether the state engineer acted
12 arbitrarily, capriciously, or abused his discretion.
13 What does that mean?

14 Arbitrary means the determination made without
15 consideration or regard of facts, circumstances, fixed
16 rules, or procedures. So, if he didn't follow proper
17 procedure, his decision is arbitrary.

18 Capricious means contrary to the evidence or
19 established rules of law. Again, if -- it's not just
20 an evidentiary thing. It's whether he followed
21 established rules of law. And if he didn't, then his
22 action was capricious as well.

23 And then the abuse-of-discretion issue is
24 self-explanatory. Any one of those three things:
25 arbitrary, capricious, or abuse of discretion, and the

1 order is not valid.

2 So, we still haven't heard any dispute over
3 certain basic facts. The basin is not currently over
4 pumped. There have been some discussion over whether
5 it's -- fifteen thousand or sixteen thousand is the
6 current pumping, but the current pumping, as you saw
7 in that graph, is well below the current perennial
8 yield. There is water rights that are not being used,
9 quite a number of water rights that aren't being used.

10 Now, the state engineer brought up that, well,
11 these water rights could be used. Well, maybe they
12 could be. Maybe they can't. There is practical
13 difficulties to try and put the water to use. And the
14 state engineer has the power -- if you don't put your
15 permit to use, if you don't put a permitted but not
16 certificated water right to use, he has the power
17 to -- to cancel that permit, because you haven't put
18 it to use. He hasn't exercised that power. We heard
19 that there was 16,000 acre-feet of certificated water
20 rights that were -- proved beneficial use, but there
21 was thirty -- over -- I forget the number but
22 somewhere in the thirty thousand range of water rights
23 that are permitted that don't have proof of beneficial
24 uses.

25 He could -- another tool that the state

1 engineer could use is, he could issue a call for
2 beneficial use. He could issue an order saying, hey,
3 as of this date, everybody, if you don't prove your
4 beneficial use, you lose your water right. That's
5 another possibility, but he hasn't discussed that
6 here, because he doesn't want the Court -- you know,
7 he doesn't want to know that he has other options
8 available to him, under existing law, to deal with
9 this over appropriation problem, which is a paper
10 problem, not a water supply problem.

11 Every one of the people who testified today
12 testified to the fact that they received no notice and
13 no warning whatsoever that this order was going to be
14 issued. Now, the state engineer is going to tell you
15 that, "Well, people knew there was a water problem out
16 here. I've been holding meetings for years about the
17 water problem out here. They should have known that I
18 would do something like this." But that's not the
19 standard. The standard is not "I should have guessed
20 everything the state engineer might do, just because
21 there is a water problem, to try to solve that water
22 problem." The standard is, he needs to provide
23 notice, and that notice has to be adequate. It has to
24 say, this is what I'm planning on doing. And --
25 and -- and -- so the people have an opportunity to

1 respond to what he's planning on doing. And he never
2 gave anybody any indication of that.

3 In the -- in the presentation that -- that --
4 these newspaper articles that the state engineer
5 submitted in their presentation, on page 85 there is
6 some statements from Mr. King here where he's making
7 them in 2015 saying he's not going to curtail. He
8 says he could curtail but he envisions domestic
9 restrictions to apply to outdoor use for such water in
10 his log but not any kind of curtailment. He never
11 envisions -- he didn't tell anybody at these meetings,
12 "I'm thinking about restricting the drilling of new
13 domestic wells." He didn't tell them that.

14 They can't respond to something that they
15 don't know that he might do, especially when it's not
16 clear that he has the statutory authority to do it,
17 which is what we'll talk about later.

18 So, let's review what we've heard from the
19 testimony that we provided today with regard to harm
20 to Pahrump Fair Water, LLC and its members and harm to
21 members of the public.

22 So, we heard the testimony of Ms. Opatik.
23 Ms. Opatik is a very credible witness. She's a
24 gubernatorial appointee, one of five people on the
25 real estate commission in the state of Nevada. She's

1 been practicing as a real estate broker for decades
2 here in -- in -- in Pahrump.

3 What did she testify about, that this order
4 that -- restricting the drilling of new domestic wells
5 will have a drastic effect on the value of properties
6 and people's investment-backed expectations. That's
7 pretty important, because that shows that there is
8 harm to each and every person that's affected by this
9 order. And that harm is a reduction in property
10 value. They bought their property with a certain
11 investment-backed expectation, and now they can't use
12 it for that purpose.

13 You heard testimony of Mr. Lach, who described
14 how this is really just a paper water problem. He's a
15 board -- former board member of the -- of the water
16 district board here in town. He's been studying this
17 issue for years. He's been acting on this issue.
18 He's provided -- he's worked with -- he doesn't have a
19 grudge against Jason. He doesn't have a grudge
20 against the state engineer. He -- he testified that
21 he's friends with the state engineer and he thinks the
22 state engineer is trying to do something, the right
23 thing to do, like the legislation that he put forward
24 last year.

25 But he -- he -- he -- but he -- he discussed

1 how this has impacted his properties, properties that
2 he's put in his kids' college fund, properties that
3 his father owns.

4 THE COURT: I think he said they all had
5 water.

6 MR. RIGDON: Well, their college fund one I
7 think he did. I think he said that was corrected.

8 THE COURT: Well, I wouldn't be very clear
9 about any of that. So...

10 MR. RIGDON: But one of the other very
11 important things that Mr. Lach said was, after this
12 order was issued and people had only thirty days to
13 decide whether they wanted to appeal -- that's it.
14 They were given thirty days. Okay? The state
15 engineer could not tell people during that thirty days
16 whether this order affected their property.

17 So, if they brought their -- their actions
18 individually at that point, they run the risk of
19 having it dismissed, because they find out later that
20 the information they were acting on is incorrect. So,
21 they formed an association instead. And -- and to
22 discuss that a little bit more than what we did this
23 morning as well, this is very common in Nevada, for
24 citizens to form associations and not name other
25 parties.

1 In fact, we found another case, a case in
2 which I believe you wrote a Supreme Court opinion back
3 in 2006. The case was Great Basin Mine Watch versus
4 Nevada Department of Education. Okay? Oh, no.
5 Nevada Department of Environmental Protection. I'm
6 sorry.

7 THE COURT: If I remember right, the Supreme
8 Court reversed me on that, too.

9 MR. RIGDON: There was no other named
10 plaintiff in that case. It was Great Basin Mine
11 Watch, an association. There was no question of
12 standing or whether that case could be brought by just
13 Great Basin Mine Watch. And the issue didn't even
14 come up.

15 THE COURT: Yeah. That's what I was going to
16 say. It didn't come up.

17 MR. RIGDON: But it's a very, very common
18 practice. And we discussed FACO earlier. We
19 discussed Citizens for Cold Springs earlier. There is
20 Great Basin Water Network versus state engineer where
21 there is a group called Great Basin Water Network,
22 which is protesting SNWA's application.

23 THE COURT: I'm not concerned about that issue
24 for the purposes of this hearing. So --

25 MR. RIGDON: Okay. So -- so, then we heard

1 from Ms. Strickland. Ms. Strickland gave us a good
2 overview of what the drilling process is like and what
3 these notices of intent to drill are all about. And
4 all it is is -- is -- because there is a state statute
5 that says that domestic wells have to be registered.
6 And that's the purpose of the notice of intent to
7 drill: I'm noticing you, state engineer. I'm
8 registering this as a domestic well.

9 But we heard that the state engineer sat on
10 these, knowing he was working on the order. He sat
11 on it. He didn't tell anybody what he was doing,
12 didn't tell anybody he was thinking of restricting it.
13 He sat on these -- these notice of intent to drill and
14 then issued the order and denied those notice of
15 intent to drill. These are people who had already
16 contracted to have a domestic well drilled on their
17 property, and their properties were eligible to have
18 them. That kind of retroactive application of a rule,
19 when people don't even know it's coming, it -- it's
20 hard to fathom a more -- a bigger knock upside the
21 head with a baseball bat than something like that.

22 We heard from Mr. Off and Ms. Campbell,
23 Mr. Peterson, Mr. Peck, and Ms. Harris, all property
24 owners who purchased their property with the
25 investment-backed expectation that they would be able

1 to build a home and all have taken -- taken actions
2 to -- to put that plan into effect. They're not just
3 sitting on this property waiting. They're actually
4 taking actions. They're spending money to put that
5 plan into effect.

6 They were given no notice. They were given no
7 warning of this, just a, again, clock upside the head
8 by order 1293, and now their plans are on hold. Two
9 of them are living in RV type of situations, expecting
10 to be able to move into a home at some point. And --
11 and this is their property that -- that -- this is
12 where their investment is. So...

13 So, the testimony, I think, clearly shows that
14 there are harms to members of PFW and there are harms
15 to members of the public. I don't think we can --
16 anybody can dispute that at this point.

17 Now, what are those harms? Well, the first
18 one is -- is real simple. And -- and we heard some
19 cross-examination testimony trying to get -- or heard
20 some argument about, you know, they're not really
21 harmed because they can go out and buy 2 acre-feet of
22 water rights or whatever. But we need to remember --
23 and -- and we heard about irreparable harm. The
24 Supreme Court has said in three separate cases that an
25 impairment of a property right is irreparable harm.

1 It's per se irreparable harm. Well, we've heard there
2 is impairment of property rights here. People bought
3 property with investment-backed expectations, and the
4 state engineer is removing that stick from the bundle.

5 THE COURT: What law do you have that says
6 they have an expectation? They -- they --
7 historically domestic wells have been allowed, but
8 until you get that permit from the engineer, what
9 expectation do you have?

10 MR. RIGDON: Well, there is no --

11 THE COURT: What property right do you have?

12 MR. RIGDON: There is no permit you have to
13 get from the state engineer. That's the key. There
14 is no permit. Because the statute says he can't
15 permit. He can't -- he can't have a discretionary
16 review and permit it. If he does, if he turns this
17 NOI process -- if that's his testimony today or if
18 that's what they're going to say, that this NOI
19 process is a permit that he has discretion to grant or
20 deny, then they're violating the statute that says
21 domestic wells are exempt from permitting. There is
22 no discretionary permit for domestic wells, never have
23 been --

24 THE COURT: Thank you.

25 MR. RIGDON: -- since -- since 1939 when the

1 statute was passed. 534.181 is explicit, no
2 permitting requirement.

3 So, this is a right. This is an absolute
4 right. If your property is eligible, you have the
5 right to a domestic well, and there is no
6 discretionary action that can stop you from that. And
7 that's a property right. And that's what's being
8 impaired in this case. And -- and that's what's so
9 important, is that impairment is by itself irreparable
10 harm.

11 We've heard about reduction in property
12 values. That's not just harm to individuals who own
13 those pieces of property. That's harm to the county
14 as a whole that relies on property taxes to fund
15 schools and parks and those type of things. Lowering
16 the property values will lower the tax base. And so
17 that's a general harm, but there is actual individual
18 harm for the lowering of property values.

19 There is the effect of loss of the ability to
20 build a home. People can't build their retirement
21 homes, their dream homes, their -- get themselves out
22 of their RV living situation. There is interference
23 with existing contracts. You heard Ms. Strickland and
24 others talk about people had signed these contracts to
25 have these wells drilled. And then all of a sudden

1 this order comes in, and it impairs those contracts.
2 They can no longer -- they can no longer perform under
3 those contracts.

4 And the canceling of property escrows and
5 potential sales, you heard a lot of testimony about
6 that, about properties that were in escrow at the time
7 the order was issued. The very fact that the order
8 was issued, the buyers backed out.

9 So, then what's the harm to the state
10 engineer? You notice I left this place blank, because
11 I still haven't heard it. I still haven't heard what
12 the harm to the state engineer is. I've heard a
13 couple of interesting things, though. I heard that
14 state engineer's claim to speak for these hypothetical
15 438 well owners that under a computer model simulation
16 may have their wells fail over the next couple
17 decades. Okay? That -- that -- that -- he speaks for
18 them.

19 Well, I ask you, who are they? Has he
20 identified a single person? Had he identified who
21 they are, where their property is located? He hasn't.
22 He can't, because the model is not that accurate. The
23 model is not accurate enough to say this guy's well is
24 going to go dry. And so these are hypothetical harms
25 to hypothetical people out there.

1 And it's not even sure that that's going to
2 happen. The model doesn't even have an error -- a
3 margin of error it's reported, and so we can't even
4 know if the margin of error is plus or minus 5 percent
5 or plus or minus 50 percent. We have no idea if it's
6 like a computer weather simulation that we see on the
7 news trying to project, you know, decades out into the
8 future.

9 He brought up the issue of, "Well, if these
10 people don't plug their well, if we later have to have
11 them plug their wells and they don't, well, that's
12 going to be our harm, because we're going to have to
13 go out and enforce this and plug these wells for them.
14 And so that's what -- that's what we need for our
15 harm." But the reality is -- is, the state engineer
16 has statutory tools to force people to comply with his
17 orders. He doesn't need a bond. He's got statutory
18 tools. He can fine people \$10,000 a day for not
19 following his orders. He can go out and plug the
20 wells and charge the cost to the property owner. And
21 if they don't pay it, he can place a lien on their
22 property. He can get a judgement and place a lien.

23 There is no -- there is no harm to the state
24 engineer resulting from people not following orders to
25 plug wells. It's no different than if -- if anybody

1 else doesn't follow the order to plug a well. So, I
2 still don't see where the harm is to the state
3 engineer, and he hasn't articulated any.

4 So, the equities clearly weigh in favor of
5 granting the stay. There is -- there is harm to
6 people if the stay is not granted. There is harms to
7 members of PFW. There is harm to -- to members of the
8 public. And there is no harm to the state engineer,
9 the state engineer himself and his department. There
10 is no harm, no articulable harm that --

11 THE COURT: That's not -- you know, I'm pretty
12 sure the state engineer doesn't own a piece of
13 property in Pahrump. So, that -- I don't understand
14 that argument. So, it's -- you represent he's in
15 charge of the public waters of the state of Nevada.
16 So, some harm comes to it. Then his office, not he
17 particularly, is harmed.

18 MR. RIGDON: But the statute -- but the
19 statute says you're supposed to consider it. It's not
20 that. The statute says you're supposed to consider a
21 harm to the non-moving party. Okay? And that's not
22 harm to the basin. That's not general harm to the
23 basin. That's harm to the non-moving party. So --
24 but...

25 THE COURT: I don't understand your argument.

1 MR. RIGDON: Okay. So, what is our likelihood
2 of success on the merits? Well, let's talk about the
3 three things that we mentioned before.

4 Every state engineer order or regulation must
5 meet three tests: Due process must be afforded. He
6 must have statutory authority to do what he did. And
7 he must have substantial evidence to support it. And
8 he fails all three tests.

9 So, let's talk about due process for just a
10 second. The state engineer failed to -- failed to
11 follow basic principles of due process which said that
12 before you issue an order affecting property rights,
13 you must provide notice of the hearing. Now, the
14 state engineer has argued in briefs and the Supreme
15 Court has upheld him in these briefs that he's -- he's
16 agreed with that. If it affects a property right,
17 notice and a hearing is required. That was the case
18 of Eureka County versus district court case. And the
19 state -- and the Supreme Court upheld him in that.
20 That's what he argued: If a property right is
21 affected, he must -- notice and a hearing are
22 mandatory. Even if it's noticing the whole basin,
23 which is what he was asking the other party to do in
24 that case, was notice the entire basin, which is
25 something you brought up earlier -- that's what he was

1 asking to do and saying it was required if a property
2 right is affected.

3 So, I guess that goes back to determination of
4 whether you believe that the right to drill a domestic
5 well is a property right, because if it is, by his own
6 standard, the state engineer losses. He has not
7 afforded them due process in that case.

8 And then back to -- I've got the slide here on
9 Revert v. Ray, which we discussed earlier. I don't
10 need to go over it again, but due process does
11 require, at a minimum, notice and opportunity to be
12 heard. The state engineer must fully address all the
13 issues presented. And he must provide detailed
14 findings to ensure that there is an adequate
15 opportunity for judicial review.

16 Again I go back to -- if we're going to limit
17 this and say it's limited like an appeal, like an
18 appeal for -- to the Supreme Court from a district
19 court proceeding in a -- in a property dispute or
20 something like that, then that presupposes the fact
21 that there was an actual district court hearing to
22 appeal from. And here there is not. There is no
23 proceeding below to appeal from. And that's the real
24 crux of the issue here.

25 The state engineer in his briefs -- he hasn't

1 said it today, which I -- maybe it's -- may be a step
2 in the right direction -- but in his briefs says,
3 well, because the -- there is a state -- state
4 statutes dealing with domestic wells as a protectable
5 interest. But that protectable interest only attaches
6 if the well is actually drilled -- that, therefore,
7 there is no property right at stake and -- and
8 there -- and there is nothing to protect and,
9 therefore, we don't have a property right at stake. I
10 don't have to hold a hearing. I don't have to notice
11 people. I don't even have to show them the common
12 courtesy of letting them know what I'm going to do
13 ahead of time.

14 So -- but that's a confusion. The
15 protectable-interest language in the statute -- that's
16 in that statute is designed to protect existing -- to
17 include domestic well owners in the appropriations
18 statutes. So, if I'm seeking a new appropriation of
19 water and I need to prove that my use of water isn't
20 going to impact anybody else -- and that
21 protectable-interest language was put in the statute
22 to say it's not only that I can't affect other water
23 right holders, but I also can't affect existing
24 domestic wells. Okay? That's why that language is in
25 there. It has nothing to do with whether the right to

1 drill a domestic well is a property right. It has to
2 do with protecting existing wells that are already
3 drilled from new appropriations that might affect
4 those and bring them into that process.

5 And by -- by necessity, that does require it
6 to be -- to exist. You can't protect a well that
7 doesn't exist. That -- that -- by necessity. But
8 here at the property rights, one of the bundles of
9 sticks that comes with the ownership of real
10 property -- you heard Mr. Taggart talk about it
11 earlier. When I have a piece of property, there is an
12 expectation that I can create a homestead there. And
13 that's been the expectation in Nevada since 1864 when
14 Nevada became a state, that I can buy a piece of
15 property and I can create a homestead there. But in
16 an arid state like Nevada, you have to have access to
17 water.

18 And so the -- the -- the legislature has
19 consistently said, if you do that and you do it and
20 you're drilling a domestic well that just create a
21 single homestead, one house, one single-family home,
22 you can have access to water without regulation by the
23 state engineer.

24 Now, if you -- what they have done over the
25 years is, as municipal water systems has popped up and

1 provided another access to water, they have created
2 some exceptions to the law, and they have said, hey,
3 for these exceptions, you're still going to get water,
4 because you can get it from the water system. So, you
5 can still have your homestead. But those who can't
6 still have their right to drill a domestic well. And
7 the state engineer cannot interfere with that right.

8 And the property -- and we've got cases here,
9 McCarran Airport versus Sisolak and NDOT versus
10 Las Vegas Building Materials, cases where the court
11 has said even unexercised rights are property rights.
12 You don't have to exercise your property right in
13 order for it to be a -- recognized as a property
14 right. Those are takens (phonetic) cases, by the way.

15 So, Mr. Taggart is going to talk about the
16 state engineer's authority to restrict domestic wells.

17 MR. TAGGART: Your Honor, for the record, Paul
18 Taggart. So, we went over this this morning and --
19 and Mr. Rigdon touched on this a bit.

20 When it comes to interpreting statutes, the
21 state engineer is not entitled to deference,
22 particularly when it's his own power. That's what the
23 courts are for. We can go back to Civics 101.
24 Administrative agencies enforce laws. Courts
25 interpret the laws. So, if the state engineer thinks

1 he can step on people's domestic well water rights,
2 this Court has to decide whether he's interpreting the
3 statute correctly.

4 We're -- we're taking the position that the
5 legislature has consistently said that is not a power
6 the state engineer has. No one can dispute that you
7 do not need a permit for domestic water right. No one
8 can dispute that.

9 Now what we're asking is -- is, even though
10 the state engineer cannot permit -- so, your Honor
11 has -- we have to be clear. My clients do not need a
12 permit from the state engineer to have a domestic
13 water right. They're entitled to that. Because they
14 have a parcel in the state of Nevada, they're entitled
15 to that. So, if they haven't exercised that right by
16 putting in a well, does that mean the state engineer
17 can take away their right to drill? Doesn't the
18 taking away the right to drill essentially take away
19 their right to use that domestic water right? And
20 taking away the right to drill just because someone
21 hasn't drilled yet is exactly what happened in the
22 Sisolak case.

23 That individual wanted to build property in
24 a -- in the airspace of the airport. He hadn't built
25 it. But he had the right to build it. In the NDOT

1 case it was a similar situation where a property owner
2 had a right to build on property. They hadn't
3 actually built on it, but it was a recognized property
4 right. If that is a property right, then the
5 government cannot come in and take it away without
6 giving notice and a hearing.

7 And I -- I studied these in law school, and I
8 didn't quite understand why we took the stuff so -- so
9 carefully and what the big deal was, notice and a
10 hearing. Well, the reason for notice and a hearing
11 is, maybe the government can correct mistakes before
12 they enter works, by having a hearing. And hearing
13 the information from the individuals are going to be
14 effective, procedural due process.

15 For instance, the state engineer says eight
16 thousand of these lots exist that now are going to be
17 restricted. That means 2 acre-feet per lot is going
18 to be protected -- is going to be excluded from the
19 books. That's 16,000 acre-feet. That sounds like a
20 great number. If we had a hearing, maybe his
21 information would have been tested, because after he
22 issued the order, his own staff, according to
23 testimony, is indicating 3700 lots is more like the
24 number. We also hear testimony that .5 is about what
25 people use.

1 Now the state wants to say, yeah, but the
2 right is for two. And that's true. But on a lot
3 that's -- that is the size of the lots that have been
4 built here, I mean, isn't there some validity to
5 looking at how all the lots here have used water and
6 understanding that there is a certain amount that
7 they're going to use? And -- and the -- and the --
8 the -- as -- as Mr. Lach stated, you know, this scare
9 tactic that it's 2 acre-feet on every one, if each lot
10 used what was -- what was the average that's been used
11 so far, .5 acre-feet, we're looking at a far less
12 benefit to the basin from this decision.

13 THE COURT: How can you do that? How can you
14 do that if they have the right to use up to
15 2 acre-feet?

16 MR. TAGGART: Because people -- why don't
17 people use 2 acre-feet?

18 THE COURT: I have no idea why they don't.

19 MR. TAGGART: Because their lots are only so
20 big, and they have to pay the power bill to run the --
21 to run the well. They can't waste water. They can
22 only put so much -- I mean, thousands of lots in this
23 basin --

24 THE COURT: But they can use up to
25 2 acre-feet.

1 MR. TAGGART: They can but as --

2 THE COURT: If I understand correctly, you
3 don't have any meters on wells down here. So, how is
4 he supposed to know how much they're using?

5 MR. TAGGART: Well, his own assumption --

6 THE COURT: What he knows is -- is they can
7 use up to 2 acre-feet.

8 MR. TAGGART: Right.

9 THE COURT: Okay.

10 MR. TAGGART: But in his own assumptions he's
11 assumed that all of the existing -- and this pumpage
12 inventory for this basin, the state engineer has made
13 the assumption that they use .5. And that's valid. I
14 mean, if that's -- if that's his assumption, I think
15 that's a piece of information that's important.

16 I guess my point is, they didn't -- they
17 didn't have a hearing. So, we didn't test the -- the
18 validity of the information that he was relying on. I
19 mean, I'm sorry. And I'm no -- offend the state
20 engineer, but I don't understand how -- how hard would
21 it be to hold a hearing, to schedule a hearing, have
22 people come in, talk about the impact that it's going
23 to cause them, ask him to explain the evidence that
24 he's going to rely upon, and -- and do what the
25 constitution requires? Why would it be so hard? Is

1 it just easier to sit there and sign the order and
2 send it out, knowing it's going to have these impacts
3 on people and -- and -- but -- but any other state
4 agency wouldn't be able to do this.

5 THE COURT: I disagree.

6 MR. TAGGART: 233B requires agencies to
7 develop regulations with hearings and have those
8 regulations developed through -- through LCV. And --
9 and that is a process that the state engineer is
10 exempted from. He's abusing that process by -- by
11 entering orders that have effects on people's property
12 rights and not holding hearings.

13 And, I mean, I don't even have to argue about
14 whether the merits of the order make sense, because
15 they don't. We don't even have to get there. But --
16 but --

17 THE COURT: The problem is, I've let you guys
18 have a lot of leeway, but we're here talking about the
19 underlying decisionmaker, what underlies his decision,
20 and you're presenting evidence refuting what underlies
21 it, and I don't have the authority to consider
22 anything other than what he relied on and decide
23 whether I think there is substantial evidence to
24 support it. So, there might have been other things he
25 could do. That's not my job. I have to look at what

1 he's decided and decide if there is substantial
2 evidence to support it. That's the -- that's the
3 administrative review standard.

4 MR. TAGGART: Your Honor, the administrative
5 review standard --

6 THE COURT: And you guys are arguing that he
7 should have done a whole bunch of other things.

8 MR. TAGGART: Well, the administrative
9 review --

10 THE COURT: And that might be relevant. It
11 might be relevant. I haven't decided yet but --

12 MR. TAGGART: The administrative review
13 standard is substantial evidence or arbitrary and
14 capricious.

15 THE COURT: It's the same thing. I mean, if
16 it wasn't substantial evidence, then --

17 MR. TAGGART: No. Arbitrary and capricious
18 means unlawful.

19 THE COURT: Well, when you're talking about
20 the notice and the right --

21 MR. TAGGART: Unlawful means not following
22 statutory authority or not following constitutional
23 authority.

24 THE COURT: Well, why doesn't the legislature
25 tell the state engineer he has to have hearings just

1 like other agencies have to have? So, they can exempt
2 him from that. I suppose at the extreme, you got a --
3 some kind of inverse condemnation action going on
4 but --

5 MR. TAGGART: They can't exempt him from the
6 constitutional requirements. I mean, *Matthews v.*
7 *Eldridge* --

8 THE COURT: That's -- that's the limits of --
9 of how far they can let him go.

10 MR. TAGGART: I mean, we talk about life,
11 liberty, pursuit of happiness. Liberty, if you want
12 to put me in jail, you have to follow steps before you
13 can do that. You can't just come and throw me in
14 jail. If you want to take away my house, you have to
15 follow certain steps before you can do that.

16 THE COURT: I agree.

17 MR. TAGGART: He's taken away these people's
18 ability to have a house. The only difference is -- is
19 it -- do they have to actually have the house and
20 now -- and -- or do they have to have the pursuit of
21 happiness? I mean, those rules are real. And until
22 I've seen cases like this, I didn't understand what we
23 studied in law school.

24 But when the government thinks that they can
25 come in and say "I'm not going to have notice, I'm not

1 going to have a hearing, I'm going to do this because
2 I think it's the right thing to do," and ignore the
3 ramifications on the general public, that's wrong.

4 Now -- now again, we can get into all of the
5 issues about whether -- whether the policy behind the
6 rule is right. I mean, for instance, my clients have
7 to go out and buy 2 acre-feet of water, give it back
8 to the basin, relinquish it. They have to buy that
9 2 acre-feet of water. Then they put in a well. And
10 according to the state, that well becomes the most
11 junior well in the basin, and it's the first one
12 that's going to get cut. How is that fair? And --
13 and this doesn't fix the problem.

14 I mean, the over appropriation problem in this
15 basin is far greater than this small, little fix. So,
16 why pick on all the domestic well owners? Why is it
17 that this is the only place that action is being taken
18 when -- when the permits and certificates are the ones
19 that outweigh the -- the premium yield in the basin?
20 And what steps are being taken to correct that? So --

21 THE COURT: So, you want me to start telling
22 the state engineer how to do his job now?

23 MR. TAGGART: No. I'm giving you an easy
24 way --

25 THE COURT: You know, I would love to have

1 that authority over every agency in the state, but I
2 don't. I can promise you. Five minutes after I --
3 they talked about the Great Basin Watch case. I got
4 reversed on that. I -- I found against the EPA and
5 found in favor of Great Basin Mine Watch or whatever
6 their name was, and I got reversed.

7 So, I don't have -- I'm not -- I'm not -- I
8 don't have the authority to substitute my judgment for
9 the state engineer's. My authority is to review his
10 decision and decide if there is substantial evidence
11 to support it. If there is, I have to uphold it.

12 I am troubled at the lack of notice and a
13 right to be heard. But I said the same thing the last
14 time I reviewed his decision. That appeal -- it's on
15 appeal now. And if the Supreme Court reverses me and
16 says, no, there should have been, then we have some
17 direction. But there is no statute that requires it,
18 but you're asking me to -- to -- to decide that the
19 legislature would have required that. And all I can
20 do is enforce the laws as I see them. And anytime I
21 start trying to usurp executive authority, that's why
22 the Supreme Court reverses me when they do.

23 That's what they found that I did in the -- in
24 the Great Basin Mine case. They also found that I --
25 when Nevada Power asked for a \$900 million rate

1 increase and the PC -- PUC turned it down and I upheld
2 the PUC, they reversed me there. So, sometimes I
3 uphold the agency and I get reversed, and other times
4 I don't and I get reversed.

5 So, I still think there is a deferential -- I
6 can't imagine they're going to tell me that I get
7 to -- to -- to -- and I agree. And I've always talked
8 about this. And sometimes the clarity that we get
9 from the Nevada Supreme Court -- far be it from me to
10 be critical of them, because I work more or less
11 directly for them now as a senior judge. But
12 sometimes they make these little statements in cases
13 that -- that then the attorneys come in and say, well,
14 this is what they're saying. The -- for years the law
15 has been, I show deference to their interpretation of
16 the law; I review it de novo, but I show deference to
17 their interpretation.

18 That makes sense to me, given all the
19 different agencies whose decisions I have to review.
20 It is impossible for me to become an expert in
21 environmental law, public utilities law, in this case
22 water law. And that's why we have this evidence. And
23 it's not carte blanche, because we do -- we can say,
24 no, I think you're wrong on the law. But we show
25 deference to them.

1 MR. TAGGART: Well, it's not a rubber stamp.
2 Deference is not a rubber stamp.

3 THE COURT: No. I agree. I agree. It's not.

4 MR. TAGGART: And even under the deference
5 standard --

6 THE COURT: It's not.

7 MR. TAGGART: Even under the deference
8 standard, the Supreme Court has upheld district court
9 decisions against the state engineer, even under this
10 deference standard. But if we're interpreting words
11 that the legislature has adopted and we're applying
12 rules of statutory construction and -- and we're --
13 and we're doing things like saying that the specific
14 controls the general, that if there is a specific
15 statute on point, it controls the general statute,
16 that that has -- generally controls that.

17 If we're talking about what -- the plain
18 meaning of a statute, why is a -- why is a -- a state
19 agency that -- that may be good at understanding
20 welfare situations or unemployment situations and
21 understanding how to calculate unemployment
22 insurance -- they may be experts at that. But -- but,
23 I mean, is the state engineer an expert at reading
24 534 -- this is on slide 14. I mean, does he get
25 deference when he reads 534.110, sub 8.

1 THE COURT: You gave that to me somewhere.

2 MR. TAGGART: That's on page 14 of what we're
3 looking at right now.

4 And he's -- he's saying, despite the statutory
5 statement that permits for domestic wells are exempted
6 from the state engineer, that you -- that the state
7 engineer's permitting process does not apply to
8 that -- he's saying that he can apply this statute to
9 domestic wells even though it doesn't say that. It
10 doesn't say that on this -- in this -- in this -- it
11 says wells. It doesn't say domestic wells.

12 And the only -- and when we go to the
13 legislature and talk about domestic wells, six, eight
14 hundred people show up. If the state engineer went to
15 the legislature right now and asked the legislature to
16 authorize him to do what he's doing here right now,
17 the answer would be no.

18 MR. STOCKTON: I'm going to object, your
19 Honor. This is pure speculation.

20 MR. TAGGART: I agree. That is speculation.
21 But I will tell you --

22 MR. STOCKTON: I would like to finish my
23 objection if you don't mind.

24 MR. TAGGART: Well, I just agreed with it.

25 MR. STOCKTON: I will still want to make my

1 record.

2 THE COURT: I've often said this: If anybody
3 can figure out what the legislature intends, they're a
4 better person than I am. And I know there is
5 statutory concerns. I understand your argument,
6 Mr. Taggart.

7 MR. TAGGART: Well, I think what's difficult
8 to grasp is that -- and it's something we in
9 the water -- in the water law profession -- is that
10 we -- we know domestic wells aren't part of the state
11 engineer's regulatory scheme. We know that. That's
12 something we just take for granted. But I think
13 somebody coming into it without being familiar with
14 the water law is going to think, well, wait a second.
15 The state engineer is over water rights. But, I mean,
16 it's just one of those things. When I teach seminars,
17 it's just one of those things: domestic wells,
18 2 acre-feet, not regulated by the state engineer.

19 Well, here we have the state engineer taking a
20 step to regulate domestic wells farther than the
21 legislature has authorized. Now, that is not -- that
22 has not deference to the state engineer's -- on a
23 substantial evidence standard. That's, if it's
24 unlawful, if he's exercised the power --

25 THE COURT: I agree. If he doesn't have the

1 power, I can say he doesn't.

2 MR. TAGGART: That is the reason to find that
3 this order should be stayed.

4 THE COURT: Even though I show deference to
5 him in that interpretation, I can overturn it, yes.

6 MR. TAGGART: Yes. So -- so, I will just say
7 that you heard someone mention and it's what is
8 said -- and I've heard it many times: A domestic well
9 is a God-given right in the state of Nevada. That is
10 the common parlance out on the street that is -- that
11 is discussed. And why? Because it's a parcel. It's
12 a God-given right to build a house on a parcel; isn't
13 it, in America?

14 Now, the third reason why you could stay the
15 state engineer's order and we believe you should is
16 substantial evidence. But given the discussion we've
17 had about that deference that you understand you have
18 on the substantial evidence, I understand your
19 position there.

20 But I just want to say that even under the
21 statute that the state engineer relies upon, he is
22 supposed to find that the new wells will unduly
23 interfere with existing wells. And there is no
24 specification -- I mean, when you heard from -- from
25 the witness --

1 THE COURT: Here's a question for you: If --
2 and I know you would all love to present a whole lot
3 of evidence to the contrary.

4 But if I look at what he based his decision on
5 and I find that it was substantial evidence, even
6 though you presented evidence that there might have
7 been other things that he could consider, do I uphold
8 his decision as long as there is substantial evidence
9 to support it?

10 MR. TAGGART: No. Well, the answer -- the
11 answer is yes. But I think the harder question is,
12 what is substantial evidence? And so -- so, we --
13 we -- we have this debate all the time.

14 Is -- is -- you can have three different
15 options. They can all be supported by substantial
16 evidence. An administrator at the state of Nevada can
17 pick among those three, and you can't question him.
18 If he has three options, they're all supported by
19 substantial evidence, then he can select which of
20 those three. You have no choice as to accept that.

21 The harder question is, what is substantial
22 evidence? Reasonable -- what a reasonable mind would
23 accept as truth. Okay?

24 THE COURT: Why does the Supreme Court feel
25 compelled to -- to add another type of evidence?

1 Intrigue me.

2 MR. TAGGART: Well, what -- what --

3 THE COURT: -- theory about seven or eight
4 standards we have to consider.

5 MR. TAGGART: Well, what I suggest is that you
6 cannot in isolation understand the state engineer's
7 decision and whether it's -- whether it's reasonable,
8 whether it's supported by substantial evidence.

9 THE COURT: This is appellate -- I mean,
10 normally on appellate review you don't hear evidence.

11 Can you imagine the Supreme Court letting
12 witnesses appear in front of them to testify?

13 MR. TAGGART: Well, they don't have --

14 THE COURT: The reason I did today is because
15 this is a motion to stay.

16 MR. TAGGART: Right. Well, your Honor, on
17 substantial evidence --

18 THE COURT: You're asking me to look outside
19 the record that I'm going to get from him, I assume at
20 some point, and decide that other -- other things
21 should have been considered.

22 If the record before him constitutes
23 substantial evidence, I have to uphold his decision,
24 because he's the state engineer. And that's -- that's
25 the administrative law.

1 MR. TAGGART: Well -- well --

2 THE COURT: And they're -- I'll give you an
3 example. You want to see how clear I -- I overturned
4 the department of taxation on some interpretation they
5 made of tax law in regards to Daimler Chrysler. And I
6 think it was a -- the real fancy automobile they make.
7 And the Supreme Court affirmed me to begin with. It
8 was a three-judge panel and then the seven-judge
9 panel, same thing that happened in the Great Basin
10 Mine Wash. The Supreme Court decided -- because I
11 base my decision on definitions -- at the front of the
12 chapter decided that the -- I interpreted a statute
13 based on the definitions, and they said right in the
14 opinion that that statute I was interpreting was too
15 far away from the definitions, so that I shouldn't
16 have used it. So -- I think it was Justice Hardy said
17 so now we have the distance rule.

18 So, if -- if the definitions are too far away
19 from the statute that you're wanting to interpret,
20 they no longer apply. So...

21 MR. TAGGART: Well, in this case they're close
22 enough.

23 THE COURT: Yeah, I hope.

24 MR. TAGGART: Now -- now, when I talk about
25 substantial evidence and likelihood of success in the

1 merits and -- and -- and I go to substantial evidence.
2 That's the record. Okay?

3 I mean, when we -- when we're arguing that
4 there is three bases for you to stay, one being the
5 "constitutional notice of due process" problem, that's
6 why we had evidence. Okay? That's why we had
7 evidence. We weren't able to put evidence on below.
8 We need to be able to put on evidence. That's the
9 reason for that. The harm to others that -- that you
10 require in the stay, that's why we had evidence.

11 We're not suggesting that that evidence be the
12 basis for your substantial-evidence determination, but
13 what we're suggesting is that the -- that the basis
14 that the state engineer is claiming is -- is not
15 substantial. And just because he says it is doesn't
16 mean it is.

17 THE COURT: We're not going to develop that
18 today. That's going to be developed in a briefing
19 down the road.

20 MR. TAGGART: Agreed. But the -- you know,
21 obviously for us the stronger two points are the first
22 two, because we think they're so clear that obviously
23 it's uncontested that there was no notice. And
24 obviously there was -- there is no language in any
25 statute that authorizes the state engineer to take the

1 steps that he's taken. So -- so, on those two bases
2 the stay should be granted.

3 And with that I'll -- I'll rest my -- my
4 closing.

5 THE COURT: Do you want to take a break, or do
6 you want to go forward?

7 MR. STOCKTON: I do have quite a bit, your
8 Honor, if you want to take a short break.

9 THE COURT: Okay. Let's take a fifteen-minute
10 break and come back.

11 (Recess taken.)

12 THE COURT: Mr. Stockton, go ahead.

13 MR. STOCKTON: Thank you, your Honor. So, I
14 would like to start with the -- the arguments about
15 purely legal questions. And my understanding is, if
16 we did have a purely legal question here, the standard
17 of deference to the state engineer would be much less.

18 The problem is, what you've got here is a
19 question of fact applied to the law, in which case the
20 state engineer is entitled to deference. And the case
21 law is very clear on that, that the state engineer is
22 required to deference, because he's looking at the
23 facts -- and the facts are what's happening in this
24 basin -- and applying the law to those facts.

25 Now, the second preliminary point is, you've

1 heard long and loud that there is a property right to
2 drill a domestic well. What you have not heard is any
3 law that supports that. We have NRS 534.180 that
4 exempts domestic wells from the permitting process.
5 But there are many other limits on domestic wells,
6 such as, if a municipal water supply is in a certain
7 distance, they can be required to hook up to it under
8 certain circumstances. And there is a lot of other
9 places in the -- in the chapter where the legislature
10 has placed limits on domestic wells. And the problem
11 is -- again, I go back to this overarching statute
12 which is 534.020. It says all underground waters
13 belong to the public; right, and that they're only
14 available for appropriation subject to existing
15 rights.

16 And we're before -- before you here today.
17 And I don't think there is any dispute that more than
18 the perennial yield of this basin is already subject
19 to existing rights. So, granting more water is not in
20 the public interest. And again you've heard
21 something: Well, it only says the state engineer can
22 restrict drilling of wells, but it doesn't say
23 domestic wells. Well, that's because the legislature
24 intended all wells to be subject to that restriction.
25 And the reason is -- because I think you mentioned

1 this -- we don't want a wild west where you can just
2 drill domestic wells until the aquifer is dry. And --
3 and that's what -- that's what the legislature
4 intended here, and it's only water that's
5 unappropriated that -- that's still available to the
6 public. And that includes domestic wells. And you
7 haven't heard any law -- you've heard lots of yelling,
8 but you haven't heard any law that supports the
9 proposition that you have an absolute property right
10 to drill a well -- domestic well anytime you want to.

11 So, I would like to go to the "arbitrary and
12 capricious" standard, which we talked about a lot. In
13 the Revert versus Ray case -- in that case, as I
14 recall, the issue was whether the state engineer
15 considered adverse possession. And the Supreme Court
16 remanded it to the state engineer to see whether one
17 or the other parties had -- had obtained the water
18 right by adverse possession. Because it was --
19 originally belonged to the other one. And I think --
20 I think that only resulted in statutory changes. So,
21 we don't have adverse possession anymore.

22 But that -- that was -- well, let me find my
23 notes. Okay. So -- so, that case was not the fact
24 that the state engineer had a hearing or didn't have a
25 hearing. It was that the state engineer didn't

1 consider an important legal concept.

2 And in this case there is no -- there is no
3 law that they can show that hasn't been considered.
4 They misinterpret the law, but they can't show that
5 there is any law that the state engineer didn't
6 consider in making his decision.

7 So, you've heard eight witnesses today.
8 You've heard a lot of argument. And you're going to
9 see some evidence about what's happening in this
10 basin. You've already seen some of it. Those are
11 factual questions. And on those factual questions, as
12 you said -- and I hate to belabor the point, but I'm
13 just making the record. The fact that they can think
14 of other things the state engineer could have done is
15 completely irrelevant. The standard is, was the state
16 engineer's decision, you know, supported by
17 substantial evidence.

18 The Supreme Court, to my knowledge -- and you
19 mentioned eight or -- different standards. I only
20 know of one -- announces there any evidence in the
21 record that a reasonable mind rely on to come to that
22 conclusion.

23 THE COURT: I'm not talking about in this
24 area. I'm talking about all --

25 MR. STOCKTON: Okay. All right.

1 THE COURT: Whenever I reviewed whether a
2 prison guard had acted appropriately, all I had to
3 find is there was some evidence. And then the next
4 thing is probable cause and then clear and convincing
5 and then preponderance of the evidence and substantial
6 evidence. And then I think there is a few more you
7 can throw in there, not in this area. This area is
8 substantial evidence.

9 MR. STOCKTON: And I thought --

10 THE COURT: Where it fits in that compendium,
11 I have no idea, and I don't think they have even told
12 us.

13 MR. STOCKTON: Well, the state engineer has
14 told us. It's pretty clear, if there is any -- any
15 evidence in the record that the state engineer could
16 rely on to come to that conclusion, that it has to be
17 affirmed.

18 Now, we're going to show you the evidence that
19 the state engineer relied on so -- and that goes to
20 the likelihood of success on the merits, which,
21 because the state engineer is entitled to deference,
22 they have no likelihood of success on the merits in
23 this case.

24 So -- and again, just because they say they
25 have a property right doesn't mean it's so. They have

1 to cite you some law that says they have a domestic
2 well property right. In NAC 534.220 it defines a
3 well. And domestic wells are included in the
4 definition of well. So, when the legislature uses the
5 word "well" and doesn't qualify with domestic well,
6 that means all wells, domestic wells included. And I
7 go back to this 020 statute. There is no right to
8 somebody else's water. You can't have a property
9 right and somebody else's water.

10 All right. So, one thing I may have misspoke
11 that I want to clarify on the record --

12 THE COURT: When would you say they have a
13 right in a domestic well?

14 MR. STOCKTON: I think once you have a -- once
15 the well is drilled or even if you have a "notice of
16 intent" card. And that's a point that we wanted to
17 make, you know, and make an offer of proof that the
18 state engineer -- he didn't go back and rescind any
19 "notice of intent" cards that had been approved prior
20 to the date this order was issued. He only approved
21 the -- only disapproved the "notice of intent" cards
22 that were -- that were still pending on the date the
23 order was issued. So, there was no retroactive
24 application. It only applied to the NOI cards that
25 were before the state engineer at the same time. So,

1 what the state engineer in that case decided was that
2 there was enough of a property right if you already
3 had an approved "notice of intent" card. So...

4 So -- okay. So, back to the thing I misspoke
5 on: When we were talking about the stay, if the stay
6 is issued, then people won't need a permit to issue --
7 to -- to drill a water right. And what they're --
8 what they have changed that into is saying, well, if
9 you dedicate this water right, you get a water right
10 the day the well is drilled. And that's not correct.

11 What I was saying is, if you issue a stay and
12 they drill a well without permit, it will have
13 today's -- or the day that it was -- it was drilled
14 will be the priority. However, under NRS 534.350 and
15 subsection 3B, if you dedicate a water right in order
16 to get a domestic well, that well carries the priority
17 date of the underlying water right.

18 So, what I was -- what I was talking about
19 was, if there is a stay and they drill a well without
20 a permit, that -- that well has the priority date the
21 day it was drilled. But if you're dedicating water
22 rights, it's a whole different story.

23 All right. So, just let me go through some of
24 these slides real quickly here and talk about -- I've
25 already talked about that. And it -- this is under

1 533.370, and again I already talked about this.

2 So, if there is no unappropriated water, the
3 state engineer -- or it's going to interfere with
4 existing rights, which the state engineer has found as
5 a matter of fact, that additional appropriations will
6 interfere with existing rights, the state engineer has
7 to deny those applications. And the same standard
8 applies in this case where there is no unappropriated
9 water, in fact, it's over appropriated. So -- so,
10 that's why they issued -- the order was issued.

11 And -- and -- well, I'll get that -- talk
12 about that when I get there. All right?

13 And you are going to have wells fail. I mean,
14 that's -- that's the science. And the fact that they
15 say, oh, well, it's not too many wells or maybe they
16 won't fail, that's contravening evidence. The state
17 engineer's science has to be relied on. You can't
18 weigh the evidence, as you've mentioned -- I'm just
19 putting this on the record. You can't weigh the
20 evidence and say, I like the defendant's science
21 better than the state engineer's science. You have to
22 show that the state engineer's science was
23 unreasonable.

24 All right. So, I've already talked about a
25 lot of this. The harm or hardship -- and I know

1 you've talked about this. So, I'm going to skip
2 through it quickly.

3 There is hardship to the state engineer in
4 having to take draconian measures to keep this basin
5 from being over appropriated. And I showed you the
6 slide -- and it's coming up in a little bit -- that
7 showed you the severe over pumping that went forward
8 in -- or was taking place in the seventies and
9 eighties. And what -- the state engineer calls that
10 the massive pump test; right?

11 So, when you go to a new aquifer in order to
12 test it, you do this pump test. And they pumped all
13 this water, and they found that it caused a lot of
14 problems. It dried up all the springs. Okay? The
15 water table was dropping. So, you had all this over
16 pumping. And if we go back to that situation, you're
17 going to start having those same -- those same
18 problems. And so that's what the state engineer is
19 trying to avoid.

20 And again, the fact that he could have done
21 something else is irrelevant. The question is, was
22 what he did supported by substantial evidence?

23 Okay. I've already talked about a lot of
24 these slides. So, I'm going to skip through them. We
25 talked about the wells that are still declining on the

1 valley floor, still declining where most of the
2 development is. And those are a problem. All right.

3 So, let's talk a little bit about -- I think
4 it was Mr. Lach that testified about the -- the bills
5 in the legislature that would have given the state
6 engineer additional tools, such as -- you know, one of
7 them was to limit -- have a conservation well. No.
8 That was the one -- that was 2015, I think.

9 But there was a portion of this one bill that
10 would have allowed the state engineer -- okay. This
11 basin is critical. We're going to grant you a
12 domestic well. But you can only pump .5 acre-feet.
13 But there was significant opposition to that bill from
14 this valley right here. And that -- that opposition
15 was that they would never give up their 2 acre-feet
16 water right in their domestic well.

17 So, let me just -- let's just talk about some
18 of the facts that you've seen today or heard today.
19 Someone testified that you have to have 1 acre. All
20 right? And -- and if you have 1 acre of grass in this
21 valley, it takes 5 acre-feet a year to maintain 1 acre
22 of grass. So, depending on how big a lawn you have --
23 you know, hopefully nobody will put in an acre of
24 grass down here, because it does take so much water.
25 But that just gives you a -- you know, shows you how

1 the water -- the 2 acre-feet can be used up. And
2 since the legislature said the state engineer cannot
3 use .5 acre-feet for these wells, we still have to
4 apply the 2 acre-feet. Okay?

5 And the fact that they have evidence to say
6 there is 3700 lots versus the 8,000 lots, the -- the
7 deference goes to the state engineer unless they prove
8 that he's wrong. And they haven't proved that he's
9 wrong here. Because I can tell you we're going to go
10 through the county report, and the county thinks there
11 is 8,000 lots and so does the state engineer. So,
12 those facts have to be given deference by this Court.

13 All right. So, the irreparable harm -- and I
14 go back to the thing -- the Supreme Court standard.
15 And this is the standard that the Supreme Court said.
16 And all the evidence you hear here today is that they
17 have to wait to see how this order comes out. They
18 want the stay so they can avoid the effect of the
19 order, but the Supreme Court has said the fact that
20 you have to wait for your case to run its course is
21 not irreparable harm. Okay? So, there is no
22 irreparable harm by law in this case.

23 All right. My PowerPoint closed. But -- so,
24 I'm just going to go to the paper copy. All right.

25 So, next we're on page 30, which is that --

1 that pumping chart. And I would like you to look at
2 that pumping chart because --

3 THE COURT: What page is it?

4 MR. STOCKTON: It's page 30. So, that one
5 shows the massive pump test that took place in the
6 sixties, seventies, and eighties. And there was also
7 over pumping, you can see, all the way up until 2008.
8 So, this basin has not only been over appropriated but
9 been over pumped for most of its history. And so what
10 we have to do is to avoid getting there again. And so
11 these are the restrictions that need to be put on, in
12 the state engineer's opinion, to prevent the over
13 pumping from occurring again because of the damage to
14 the resource. And we're going to talk about that
15 damage a little bit.

16 So, if you look at page 31, 31 is a depiction
17 of -- of wells or -- or actually they're 40-acre
18 parcels with wells on them in the Pahrump basin. So,
19 you can see how concentrated these wells are. All
20 right. So, you can see how concentrated -- these are
21 in quarter -- quarter sections. So, these are 40-acre
22 parcels that have one or more wells on it. And you
23 see how concentrated those wells are. And so putting
24 any more wells in that grid is unreasonable and then
25 justify the state engineer's decision to take some

1 action to try and protect the water rights that
2 already exist.

3 Okay. And on thirty -- thirty-one -- yeah,
4 thirty-one. Thirty-one is a depiction of the --
5 the -- the groundwater, the declines and recoveries.
6 Okay? So, you got the blue area off to the east and
7 the green area around the perimeters of the basin
8 where some recovery is taking place. But you look at
9 the red area where all the development is. There has
10 been no recovery. And some of those areas are still
11 dropping. And so again it's substantial evidence that
12 supports the decision of the state engineer that he
13 needs to do something to protect the resource in this
14 basin. Okay.

15 All right. So, we talked about the fact that
16 as the water levels decline, you have problems. Wells
17 dry up. You have increased pumping lists; right? It
18 cost more money to pump water from deeper and -- and
19 you have conflicts of existing rights. Because if too
20 many wells are pumping, the water goes down too much,
21 they dry out wells, even if it's just temporarily
22 through the cone of depression. There is also
23 problems with subsidence. Okay? Subsidence --
24 because, you know, as a matter of physics, water can't
25 compress. When the water is pumped out of there, it

1 allows the ground to settle down. And there are many
2 places in this basin on the next slide, which is
3 page -- page 39, that shows the red or the areas of
4 subsidence. And in some of those where the subsidence
5 is not equal, it opens up a fissure in the ground,
6 which is the picture on the next page.

7 So, this shows -- this shows fissures that
8 opened up in the ground in October of 2000 as a result
9 of the over pumping. Okay? And those are the kind of
10 problems we're here to try and avoid.

11 And I'm going to go through these slides
12 pretty quickly. These are from Nye County Water
13 District. And -- and I know there has been a lot of
14 objection. So, we may not be able to use this in the
15 main case if they're prevented from using any
16 additional evidence as well. But this is -- this is
17 just Nye County's take on it, and it shows a map that
18 Nye County produced just the same.

19 And if you look at the yellow ring around the
20 outside, that's the area where Nye County predicts
21 that the water level will fall 10 feet every fifty
22 years at current pumping rates. The area in the red
23 is 10 feet every 20 feet {sic}. So, on average that
24 area will lose a half a foot of water every year just
25 at current pumping levels. And -- and it's just

1 patently obvious that more pumping is only going to
2 make it worse.

3 All right. So, the next slide is also from
4 Nye County, and that shows the -- the number of wells
5 that are predicted to fail over time going forward.
6 And so these are not insignificant. These -- you
7 know -- I mean, there is a serious argument that these
8 wells have property rights, because they're existing
9 wells with existing houses. They do have property
10 rights, because they have been allowed to drill that
11 well. And -- and their expectation has ripened into a
12 property interest, because they need that water for
13 their house. If it's not available, then they're
14 going to be out of luck.

15 And I know you've heard witnesses to say, oh,
16 nothing will happen.

17 MR. TAGGART: Your Honor, if I could just
18 interject, could we clarify for the record, this is or
19 is not something the state engineer relied upon?

20 MR. STOCKTON: So, again this was -- this one
21 is different. Okay. So, I'm sorry. My mistake. I
22 thought this was the Nye County water report.

23 But this is the -- see the bottom, John
24 Klenke. That's the one that they were -- they were
25 talking about earlier that the state engineer relied

1 on in making his. So, I misspoke. I had the wrong
2 document.

3 This is the report that the state engineer
4 relied on and cites in his -- in his report. If you
5 see at the top, it was prepared for the Nye County
6 Water District. So, I apologize for that confusion.

7 All right. So, this slide has a picture of
8 the townships -- or not townships -- sections in the
9 Pahrump valley and the number of wells in those
10 particular sections that are predicted to fail. And
11 we put -- we did add the two red circles just to
12 highlight those two sections where you got a hundred
13 and twenty-eight wells in that area that are predicted
14 to fail by 2035. So, that's not an insignificant
15 number. And I think you need to take that into
16 account, and that's what the state engineer was
17 relying on when he decided that he had to do something
18 in this basin. And restricting domestic wells was
19 what he considered the best option. I know there is
20 lots of other options that people think they like
21 better, but that's not the standard here. Okay?

22 So, this slide is a little busy. This is on
23 page 44. And it's just to show that Nye County is
24 also tracking and monitoring wells. And those trends
25 are being tracked, and that's what they're using, the

1 science that they're using to base this report on that
2 the state engineer relied on. And a majority of them
3 are still declining, of these monitoring.

4 So, this is another thing the state engineer
5 relied on, Nye County -- it was the Nye County Water
6 District. They had a board meeting, and they approved
7 this letter on December 11th. And to be clear,
8 though, the state engineer was already working on
9 order 1293 when this letter came in. This was not the
10 only thing he relied on in issuing his decision.

11 But this is a letter from the Nye County Water
12 District approved by that board that says for the
13 state engineer to allow new domestic wells to be
14 drilled without relinquishment of water and water
15 rights in perpetuity, a water balance cannot be
16 achieved for the basin. And they also said that, "Nye
17 County is requesting you issue an order requiring
18 that -- relinquishment or dedication of water rights
19 for new domestic wells." So, even though the state
20 engineer was already working on it, Nye County made a
21 specific request that the state engineer issue an
22 order such as 1293. Okay? And this was approved in
23 an open, public meeting.

24 All right. So, let me just go through
25 order 1293 and hit the highlights. All right? So,

1 the state engineer relied on NRS 534.120 which
2 authorizes him to make rules, regulations, and orders.
3 And again, as you said, if the Supreme Court says we
4 have to hold a hearing, then we'll have to deal with
5 that. But the legislature has said the state
6 engineer, even in contested water rights, only has to
7 hold a hearing if he doesn't feel he has enough
8 information on the application to be able to grant or
9 deny the water rights. And there is no statute that
10 says the state engineer has to hold a hearing before
11 he has to issue these -- before he can issue these
12 orders in these basins.

13 If he believes that the public welfare and the
14 water supply requires some kinds of protections, then
15 he issues these orders, and he's authorized
16 specifically by statute to issue these orders. Okay?

17 THE COURT: All right. Question: Can he
18 amend the orders --

19 MR. STOCKTON: Absolutely.

20 THE COURT: -- to take into consideration
21 circumstances that we've heard here in court today?

22 MR. STOCKTON: Uh-huh. And he often does. If
23 there is new -- NRS 533.024 requires the state
24 engineer to rely on the best available science. He's
25 relying on the best available science here and issued

1 this order. And there are many amended orders. In
2 fact, they did a little "A" next to their name when
3 they're amended. And if the state engineer gets new
4 science that changes his mind, then he can issue an
5 amended order to adjust to that new evidence. But the
6 best scientific evidence before him right now says
7 that this order was necessary at this time.

8 So, yes, he can amend it if -- if --

9 THE COURT: So, all these people here could --
10 that have testified could send him a letter and...

11 MR. STOCKTON: They could. The problem
12 with -- all the testimony you heard here today -- none
13 of the testimony you heard here today was scientific
14 evidence. It's just people's opinion that everything
15 is --

16 THE COURT: -- halfway through the process of
17 building your house and then they get cut off.

18 THE COURT: Right. And that's the problem
19 with having Pahrump Fair Water as the plaintiff here.
20 If that individual person was before you, we could
21 look at their circumstances of their individual claim.
22 But they're not.

23 THE COURT: So, that -- but -- the -- the
24 people whose --

25 MR. STOCKTON: I see. Is your question, can

1 the state engineer make exceptions to the order?

2 THE COURT: Well, could he amend his order to
3 take into consideration people who were halfway
4 through the process?

5 I understand that he stopped -- stopped these
6 notices of intent to drill wells. But it -- you know,
7 this question isn't going to affect my decision one
8 way or the other.

9 MR. STOCKTON: I'm sorry. I missed the
10 last --

11 THE COURT: The answer to the question isn't
12 going to affect my decision one way or the other. I'm
13 just asking if it will do people any good to
14 communicate right directly with the state engineer.

15 MR. STOCKTON: Yeah.

16 THE COURT: Okay.

17 MR. STOCKTON: Okay. So, the state
18 engineer -- he also has authority to make exceptions
19 in certain cases.

20 So, let's talk about Ms. Campbell. She says
21 she's off in the north end of the valley. Maybe she's
22 near a well where there is no problem. And she can
23 prove, to the satisfaction of the state engineer, that
24 she's not going to have an impact on the existing
25 rights. The state engineer does have authority to

1 make exceptions to these orders, okay, based on the
2 scientific evidence, not just based on the fact that
3 people feel they have a God-given right to a domestic
4 well.

5 All right. We already talked about that.
6 And -- all right. And then I already talked about the
7 failure of the wells, but that's in the order.

8 The state engineer cited that as a reason for
9 this order. And so that -- those well failures alone
10 provide substantial evidence for the state engineer to
11 rely on to restrict the new domestic wells and the
12 fact that those are only anticipated to increase as
13 pumping increases.

14 All right. We already talked about that. All
15 right. And -- and just let me reiterate again that
16 when the public health, morals, and welfare are at
17 stake, the police power of the state is at its
18 highest. And what the state engineer has found here
19 is, this groundwater basin is having problems. There
20 is declining water levels on the floor. There is
21 problems that are only going to get worse in the
22 future. And so when he has that -- the police power
23 to act, to take action, to protect the general public,
24 then -- then that's -- that's when his powers are at
25 the highest. Okay?

1 So, just in summation -- and this is on slide
2 59. This order conforms to the doctrine of prior
3 appropriation in that first in time, first in right.
4 We've got 59,000 existing permits and certificates.
5 And let me go back to that.

6 There's been the assertion that people can't
7 pump water under permits, which is just not true. If
8 you have a permit, that means you have an unperfected
9 water right. You must pump that water to prove the
10 beneficial use to get to your certificated water
11 right. So, this assertion that you can't pump water
12 under permitted rights is just false. And a lot of
13 these -- these committed water rights are in municipal
14 purveyor. So, that water is committed to be used.
15 The fact that it's not being used right now doesn't
16 mean you can give it away to somebody or you should
17 give it away to somebody else, which is what we're
18 trying to do here. We stopped the number of domestic
19 wells. And we've got a -- oh, let me se.

20 It's consistent with Nye County's request.
21 They recognized that if you just keep granting
22 domestic wells, the problem is just going to get
23 worse. All right?

24 All right. So -- so, what this does to help
25 restore balance to the Pahrump basin -- because you're

1 not going to -- I know Mr. Lach testified that, oh,
2 it's not going to do anything. Well, it is going to
3 do something in that it puts a cap on the amount of
4 water that's going to be used in this basin. Okay?
5 So, the 59,000 permitted and certificated rights, plus
6 the existing eleven thirty-four domestic wells is all
7 the water that can be used in this valley under
8 order 1293, because you have to take 2 acre-feet out
9 of this column and put it in this column and so that
10 they balance out. So, you're not making it any
11 better, I agree. But you're not making it any worse.
12 And that is the intent of the order, is to keep it
13 from getting worse and to try to bring it as close
14 into balance as we can so we don't have to go to those
15 more draconian measures that the -- that they're
16 saying the state engineer should have gone towards,
17 such as, you know, the critical basin designation,
18 which the state engineer informed me that that
19 critical basin doesn't even take effect until 2011.

20 So, the assertion by Mr. Lach that the state
21 engineer could have done that ten years ago was
22 incorrect. Maybe he could have done it five years ago
23 but -- but he didn't. So, anyway just -- just
24 correcting that for the record.

25 All right. Go ahead. All right. I already

1 talked about that.

2 All right. Now this is where we get into
3 extra-record evidence. And the problem with objecting
4 to this is, you've allowed them to put in eight
5 extra-record witnesses.

6 So -- so, this is the Nye County Groundwater
7 Management Plan, which is entirely consistent with
8 order 1293. When Nye County put in its Groundwater
9 Management Plan -- next slide. Okay. They talk
10 about -- no, back. Yeah.

11 So, again they say, if the state engineer is
12 forced to allow new domestic wells to be drilled
13 without relinquishment of water rights, a water
14 balance cannot be achieved for the basin. So, this is
15 Nye County. This is after the fact, I agree. And so
16 this is only for -- if we're only --

17 MR. TAGGART: Your Honor, we're just going to
18 object for the record. And I want us to be clear that
19 it's not as simple as Mr. Stockton makes it sound, and
20 it's not hard to understand.

21 The additional evidence that we asked you to
22 consider was based upon the stay request and based
23 upon the irreparable-harm standard. That's why that
24 evidence -- we asked you to take that evidence. He's
25 now offering evidence to supplement the

1 substantial-evidence test, which Revert v. Ray tells
2 us the state engineer cannot rely on post-ruling
3 arguments.

4 THE COURT: Okay. That's fine, then. I'll
5 accept --

6 MR. TAGGART: Here's the difference.

7 THE COURT: So, move on.

8 MR. STOCKTON: All right. So, this light is
9 just to depict -- the picture on the -- I mean, if you
10 want to look at the slide, it's number -- I don't
11 know, but it's a letter from Jason King from 1997 when
12 he was the chief of the engineering section of the
13 state engineer's office. It's sixty-seven. And in
14 this letter he talks about the fact that the state
15 engineer's office has been concerned about the Pahrump
16 valley for a long time.

17 Okay. Go ahead. And one more.

18 And it says, "As can be seen, this office is
19 concerned with the water resources supplied in the
20 Pahrump valley and has been for many years."
21 That's -- I read it long, but that's the gist of it.
22 So, that shows that this is not a flash in the pan.
23 The state engineer has been looking at this for a long
24 time.

25 So, the next slide is just a list of forty

1 Pahrump Valley Times articles that show that the state
2 engineer -- and then they mentioned that I would say
3 this. So, I guess they opened the door for me to put
4 it in.

5 The state engineer has been down here many
6 times trying to convince people that there is a
7 problem. And at least the Nye County water board has
8 recognized that there is a problem. You've heard from
9 eight witnesses here that say, nope, there is no
10 problem; everything is fine. But these are articles
11 of where the county has been put on notice by the
12 state engineer and the county water board that there
13 is a problem.

14 Sorry. Our numbers are off again. So, we're
15 having difficulties.

16 Okay. So, this article is from 2014, and it's
17 just emphasizing the fact that the state engineer has
18 been trying to do something about it. And the man in
19 the picture there is part of a group that was
20 protesting and said that they would not accept
21 anything less than the full 2 acre-feet for the
22 domestic water rights.

23 So, this is another thing where -- where Jason
24 King was down here making presentations and telling
25 them that he's working with the stakeholders but if

1 nothing works, then have to -- they would have to
2 limit the drilling of new domestic wells. So, they
3 had notice in 2015. They may not have had notice of
4 this specific order and the specific language. They
5 had notice in 2015 that something needed to be done.

6 All right. And this one is also in 2015 where
7 he talked about the authority to curtail domestic
8 wells. And -- and that is -- that -- all right.

9 Anyway the curtailment statute includes domestic
10 wells, and it specifically applies to the priority
11 date of the well in order to -- when you're dealing
12 with curtailment. So, as junior water rights are cut
13 off, those wells have whatever priority date they
14 have, either the date they were drilled or, like I
15 said, if there is dedicated water rights, the date of
16 the underlying water right. So, he talked about, you
17 know, that's the most draconian measure. That's where
18 we don't want to go. And we're trying to avoid
19 getting there, and that's what order 1293 was designed
20 to prevent.

21 All right. And so this one -- I think we've
22 already talked about it. So, I won't dwell on it, but
23 it's the fact that the state engineer -- and just to
24 correct the record, they -- somebody testified that
25 the 2017 bills were put forward by the state engineer.

1 They weren't. They were someone else's bills. The
2 state engineer testified on them, but they weren't his
3 bills in the legislature. That's just to clarify the
4 record.

5 But he did testify that -- that you have
6 problems. There is a steady decline to the west and
7 south in this basin. And that's what I showed you
8 on -- on the -- on the monitoring well signs. So --
9 and something has got to be done about it. All right.

10 All right. And -- and, you know, I've already
11 talked about this property right. Just an expectation
12 or a need or a desire is not a property right. You
13 have to have a law that says you do have a property
14 right. And we have not heard that today. Thank you.

15 Do you have any questions?

16 THE COURT: No, I don't.

17 MR. RIGDON: Your Honor, I'll try to be brief
18 here.

19 Mr. Stockton said that de novo review doesn't
20 apply because it's where the state engineer applied a
21 lot of facts. But the state engineer -- whether the
22 state engineer has a statutory authority is not an
23 application of law and facts. It's a pure legal
24 question: Does he have the authority or not? That's
25 a pure legal question. So, it's not a matter of

1 applying -- there is no deference. There is not a
2 matter of applying -- we talked about -- discussed
3 deference, but I'm just pointing out that this is a
4 purely legal question, whether or not he has
5 authority.

6 We just heard again -- and he started off with
7 this -- that it's not a property right, that if it's
8 not a -- if it's not granted in statute, it's not a
9 property right. So, our only property rights,
10 according to Mr. Stockton and the state engineer, are
11 those that the legislature gives us, and we have no
12 inherent property rights. That's not true. We know
13 that, first-year property class in law school.
14 Property rights are common-law rights or the right --
15 they're -- they're the right to quiet enjoyment of
16 property. But those things are not
17 statutorily-granted rights. Those are inherent in the
18 ownership of property.

19 And the right to drill a well is inherent in
20 the ownership of property in Nevada. It's a
21 common-law right. It existed prior to the -- to the
22 1939 groundwater act, and the legislature specifically
23 said, "We're not going to interfere with that right,"
24 when we created the groundwater act -- when they
25 created the groundwater act. So, it is a property

1 right.

2 There doesn't -- I -- anyway. We heard that
3 the legislature -- this was an interesting one, and I
4 would like to talk about this a little bit. When the
5 legislature says wells in this statute, NRS 110.008,
6 it automatically includes domestic wells. Now, there
7 is no definition in NRS 534 of wells, of that -- of
8 that statement. But obviously the legislature
9 intended to include it, because they didn't -- because
10 they -- because wells covers that broad definition.
11 But then you have to ask yourself why.

12 If we go just two statutes above that one, to
13 NRS 110.006 -- and I have it right here, 110.006 -- it
14 says that the state may order that withdraws,
15 including, without limitation, withdraws from domestic
16 wells, be restricted to conform to priority rights.
17 Well, why would they have to put that language in
18 there, "including domestic wells," in that statute, if
19 wells constitutes domestic wells, too? Where -- where
20 the legislature uses specific terms in one part of the
21 statute and uses different language in a different
22 part of the statute, they can't -- they can't have
23 been assumed to -- to -- to include that same thing in
24 there. They specifically said in 110.006, We're going
25 to include domestic wells right here. They wouldn't

1 have needed to do that if the term "wells" already
2 included domestic wells. So, that's just -- that's
3 just not the case here.

4 Now, we heard that there is no law that the
5 state engineer did not consider. Well, it's
6 interesting, because in our presentation -- and -- and
7 this is something I have not heard from Mr. Stockton
8 at all today. He keeps going back to NRS 534.181
9 which says that domestic wells are exempt from the
10 permitting requirements. But he's never addressed --
11 he never once addressed in this whole hearing
12 NRS 534.0304 which says the state engineer shall
13 supervise all wells except those wells for domestic
14 purposes, except those wells for domestic purposes.
15 That is a general exemption right there from -- the
16 state engineer does not have supervisory authority
17 over domestic wells. And I've heard nothing from them
18 to explain away NRS -- the -- the direct, plain
19 language of NRS 530.0304.

20 Now, the other interesting thing I heard is,
21 he put up -- and he put up 533.370 that said, look,
22 when appropriating water rights, you can't interfere
23 with the existing wells; you can't cause conflicts
24 with existing wells and -- and that should be the same
25 standard here. Well, again, the state engineer is not

1 allowed to require any permitting process for domestic
2 wells. NRS 533.370 is the permitting process. So,
3 he's asking you to apply standards from a permitting
4 process which the legislature has specifically
5 exempted these wells from to this case. And it just
6 goes to show you that what he's trying to do is -- is
7 use his discretionary permitting power to restrict
8 domestic wells, in contravention of the express
9 direction of the legislature.

10 Okay. So, one other thing I want to bring up
11 is -- Mr. -- Mr. Taggart brought it up in his
12 objection. The state engineer cannot rely on
13 post hoc arguments. He can't say, oh, now that the
14 order has been appealed, I can submit additional
15 evidence about the substance of the order. And --
16 like he tried to do here today. That's not allowed.
17 You're -- and it was just reaffirmed. It's not just
18 in Revert v. Ray. It was just reaffirmed in the
19 Eureka County versus state engineer decision in
20 Diamond Valley regarding the Mount Hope mine project
21 there where the Supreme Court said his decisions have
22 to be made on presently-known substantial evidence,
23 not evidence developed later, presently known at the
24 time he issued the order.

25 THE COURT: Well, I assume they're going to

1 give me a record at some point showing what evidence
2 they relied on. And if they include anything that is
3 after, what, December 22nd or whatever, I wouldn't
4 consider it.

5 MR. RIGDON: Sure. I -- yeah. Absolutely.
6 And when we get to the merits of the case, that will
7 be it. But remember substantial evidence is just one
8 of three tests that's stated in your order -- have to
9 pass. It's just one of three.

10 So, even if he had substantial evidence, he
11 only passes one hurdle. He still has two more
12 hurdles. He still has to pass the hurdle of did he
13 afford appropriate due process under constitutional
14 standards of the NRS, which in this case he did not,
15 because this is a property right. And -- and the
16 state engineer's own brief to the Supreme Court says,
17 if it's a property right, notice and a hearing must be
18 had; individual notice and a hearing must be had.

19 So, he has to clear that burden, and he can't
20 clear that burden. He also has to clear the burden of
21 the de novo review, of whether he has the statutory
22 authority. So, even if substantial evidence exists,
23 those other two hurdles still have to be -- have to be
24 crossed. And he -- he hasn't been able to show to do
25 that.

1 Other than that, I haven't heard anything else
2 in this closing argument that controverts the fact
3 that this is a property right. He didn't provide due
4 process. He -- he -- he didn't notify -- you asked
5 about exceptions, your Honor: Can he make exceptions
6 to the rules for certain people.

7 Had I known that he was going to -- that
8 argument was going to come up, we could have provided
9 you with testimony. The people have called his office
10 and been met with complete indifference as to their
11 plight. Some of these people that you heard from
12 today have contacted the office and said "I'm right in
13 the middle. I'm -- please, give me some relief." And
14 they have been met with complete indifference.

15 So, with that, the state engineer has not
16 proven, has not shown a likelihood of success on the
17 merit and shown likelihood of success on the merit
18 because he can't show that he provided adequate due
19 process. He can't show that he has statutory
20 authority to do what he did, which is a de novo,
21 deferential -- the de novo, non-deferential review
22 standard. And he can't show substantial evidence,
23 which admittedly is a deferential standard on that
24 hurdle.

25 And -- and we've provided plenty of evidence

1 about the harms here. I haven't heard any evidence --
2 I've heard general evidence of general harms but
3 nothing where he -- again, he has never provided any
4 specific -- the statute says harm to members of the
5 public. Who are these members of the public? Why
6 haven't they intervened to protect -- intervened on
7 his side to protect his order? There is no other
8 party here that has intervened to protect this order,
9 not Nye County, the water district who he says he's
10 trying to protect. They haven't intervened, and they
11 could have. The water district could have intervened
12 in this case and been a party and described the harm
13 that they are facing. And they didn't. No other --

14 THE COURT: I wouldn't hear what they have to
15 say, because I'm not supposed to be taking evidence.
16 I'm supposed to look at the decision that he made and
17 decide if it was substantial evidence to support that
18 decision.

19 MR. RIGDON: I agree.

20 THE COURT: So, all these other -- if anybody
21 else asked to intervene, I would deny that motion to
22 intervene. And I guess if they wanted to file a
23 brief -- if they tried to supplement the record, I
24 would strike that, because this is an appeal. It's
25 not -- you know, this is not like I'm having an

1 original hearing here.

2 So, I wouldn't let anybody else intervene, not
3 on -- not for facts I'm not going to anyway. I
4 suppose --

5 MR. RIGDON: I apologize, your Honor. That's
6 been a regular process with state engineer appeals:
7 people intervening. So, that's why I brought it up.

8 THE COURT: Well, I -- are you trying to add
9 evidence to the -- what he based his decision on? If
10 so, then...

11 MR. RIGDON: No, intervening to protect their
12 interest by asserting the harms in these
13 motions-for-stay processes. People regularly
14 intervene on behalf of the state engineer. It happens
15 all the time. So...

16 But anyway -- and again, the substantial
17 evidence is one hurdle. It's one hurdle. There is
18 three hurdles that he has to follow here. He hasn't
19 made those other two hurdles.

20 And with that, we would rest our case and ask
21 that you issue the stay.

22 MR. STOCKTON: Your Honor, can I just say one
23 thing?

24 THE COURT: No. I'm going to make a decision.
25 I'm -- I'm not going to grant the motion to stay. I

1 say that upfront so that there is no question about
2 it. The criteria for that is whether the non-moving
3 party in this case, the state engineer, would incur
4 harm if the stay is granted.

5 In this case the harm he's seeking to keep
6 from happening would be all the water being sucked out
7 of this basin. And that's a way over simplification
8 of it, but it's his responsibility to -- to -- to
9 maintain water in the state and do regulations or
10 whatever.

11 And I'm expressing myself very inartfully
12 (phonetic), but I believe that if -- if what he's
13 trying to accomplish is -- is lost by granting a stay,
14 it would be harm to the state engineer, not to
15 Mr. King but to the state engineer.

16 In this case -- you know, it's a real
17 question -- and this is something I want fleshed out
18 in the briefs -- of whether or not there is a property
19 right in -- just because you buy a piece of property
20 and water, a well. And I -- I've read everything you
21 guys have filed, and I just didn't -- so, I will
22 find -- again the argument that -- that -- just
23 because they're being delayed isn't irreparable.
24 Definitely the members of PFW have been harmed. And I
25 just can't get around that.

1 Now, how you describe it -- but I -- you know,
2 I appreciate all you coming in here and testifying.
3 It sounds hollow to say that I -- I -- I see your pain
4 and it bothers me, but that's just one of the factors.

5 The likelihood a petitioner will succeed on
6 the merits, another observation I'll make is this
7 decision. And this is on this motion that's before
8 me. It has nothing to do with what I ultimately
9 decide once I've gotten all the briefing and we have
10 another hearing.

11 The likelihood the petitioner will succeed on
12 the merits, I have to -- to -- the language here is,
13 the decision of the state engineer is prima facie
14 correct, and the burden of proof is upon the party
15 attacking the same.

16 I don't -- I don't have all the briefs yet,
17 and at this point in time I'm not convinced that the
18 petitioner will succeed on the merits.

19 Finally, harm to the individual members: It
20 doesn't take a rocket scientist to figure out, if
21 you've sucked all the water out, that people who had
22 existing wells or existing water rights are going to
23 be harmed. You know, that to me is just common sense.
24 So, I think there is harm potentially to the public.

25 I -- I'm extremely concerned about there not

1 having been notice and the right to be heard. It's
2 visceral with me, because I'm -- you know, for a good
3 part of my career been a criminal lawyer. And you
4 can't do anything unless you give notice and a right
5 to be heard in a criminal case. So, I feel that. And
6 it's hard for people to understand that haven't been a
7 lawyer for forty years, in some way involved in
8 criminal.

9 I express the same concern in the other case
10 that's now on appeal. And in all my different
11 iterations -- and I was the district attorney in
12 Carson City. Whenever we -- any planning you do, any
13 action you take against anybody, the first thing, you
14 make sure that whatever person you're dealing with
15 is -- figure out who is this going to affect, send
16 them a notice, tell them when they're going to have
17 the hearing, and they can come in.

18 Even as US attorney, and as arrogant as the
19 federal government can be, same thing: It's -- you
20 always advise the agencies you are dealing with -- and
21 I think the federal government maybe isn't as good as
22 the state, but give people notice and the right to be
23 heard. I'm concerned about that. And I was concerned
24 in the other case. I don't know if the Supreme Court
25 is going to address it in that case. But there is no

1 statute that requires it. And there is in most of the
2 233B stuff. And I can't off the top of my head think
3 of any instance where the agencies weren't required to
4 give notice and a right to be heard to people that
5 were going to be affected, whether to their benefit or
6 to their detriment. But we'll hear all of that.

7 I want briefs on that. I want -- I want you
8 to address his authority to do this. I'm not
9 convinced that he has that authority. For purposes of
10 this hearing I'll assume he does. But, like I say,
11 I'm not announcing my ultimate decision on this case
12 until I've seen the briefs and -- until I've seen the
13 briefs.

14 But for right now the motion to stay is
15 denied.

16 Prepare the order, circulate it, give it to
17 me, and I'll sign it, Mr. Stockton.

18 MR. STOCKTON: Thank you, your Honor.

19 THE COURT: That will be the order of the
20 Court.

21 Yeah. You guys have a briefing schedule that
22 ends August 29th? Would the parties be available the
23 next week? I know that's Memorial Day weekend, but
24 I'm advised that Judge Wanker is going to be in
25 Esmeralda doing a trial.

1 So, why don't you all see if you can free up
2 your schedules, and we'll have a hearing on the final
3 thing that week. I'm trying to do this quick as I
4 can, because I understand the impact this is having on
5 people. So --

6 MR. RIGDON: Is that the week of August 29th?

7 THE CLERK: 4th, 5th, 6th, or 7th.

8 THE COURT: Yeah, September.

9 THE CLERK: 4th, 5th, 6th, or 7th.

10 THE COURT: I know I have a jury trial in Ely,
11 but I'm pretty sure it's after that, and I'll confirm
12 that.

13 My e-mail address is BMaddox1004@APP.net. I
14 would like -- if you guys could set it, let me know,
15 and I'll put it on my calendar.

16 THE CLERK: So, don't set it right now?

17 THE COURT: Well, you guys need to look at
18 your calendars, or can you? I am in theory retired.
19 So, I have no life.

20 MR. TAGGART: Any one of those four days?

21 THE COURT: Any one of them.

22 MR. TAGGART: Yeah.

23 MR. RIGDON: Any one of those four days work
24 for us, your Honor.

25 THE COURT: Mr. Stockton? It's Memorial Day

1 weekend.

2 MR. TAGGART: Labor Day.

3 THE COURT: Labor Day, whatever. I don't --
4 yeah.

5 MR. STOCKTON: I get those confused, too.

6 THE COURT: I always get them mixed --

7 MR. TAGGART: I guess because of that, I would
8 suggest not Tuesday.

9 THE COURT: That's fine.

10 MR. TAGGART: Maybe Wednesday.

11 THE COURT: That's fine. I could drive down
12 here on Monday and be here Tuesday if that's what you
13 want.

14 MR. BOLOTIN: Just on a preliminary look, your
15 Honor, looks like the 6th or the 7th works better for
16 me.

17 THE COURT: I don't know that the courtroom is
18 going to be available.

19 THE CLERK: It is, your Honor. So, the 4th,
20 5th, 6th, and 7th is available.

21 THE COURT: Okay. 6th, then? September 6th?

22 MR. RIGDON: September 6th works.

23 THE CLERK: Is it just 9 a.m.? 10 a.m.?

24 THE COURT: Yeah. We'll start at nine.

25 MR. STOCKTON: That will be fine, your Honor.

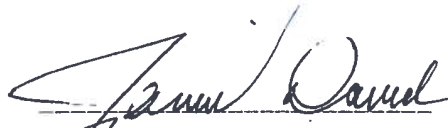
1 THE COURT: Thank you. I want to thank all of
2 you for coming in and testifying, too.

3 MR. RIGDON: Thank you.

4 THE COURT: You can be at ease.

5 * * * * *

6 Attest: Full, true, accurate transcript of
7 proceedings.

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12 Janice David, CCR No. 405
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1 there is no municipal water service anywhere near you,
2 how can you use that parcel if you don't have the
3 ability to put a domestic well in on that parcel?
4 When a parcel is created in the state of Nevada, it
5 comes with it the right to drill a domestic well. You
6 might ask, well, where does it say that in the
7 statute? Where does it say that? Where does it say
8 in statute that you have the right to build a house on
9 a parcel? When you receive a parcel, when you buy it,
10 you have a right to build a house. You have a right
11 to have a bathroom. You have a right to have a
12 kitchen. And you have a right to have water in those
13 locations in that house.

14 Now, the government, the local government, can
15 control how that house is built, but they cannot
16 exclude your right to build that house, nor should --
17 nor should the state engineer be able to exclude the
18 right to have water for that house. And that's what's
19 happening through this order. We believe that's a
20 property right. And solely -- one of the sole issues
21 you need to decide and boil it all down is, is that a
22 property right? Is the right to drill a well a
23 property right? If it is, constitutional due process
24 applies. You have to have a hearing. You have to
25 have notice. We all know that from -- from

1 constitutional law in law school.

2 So, the only question is, is it a property
3 right, the right to drill a well? We say it is. It's
4 part of that bundle of sticks. And it clearly is
5 necessary to -- to enjoy the -- to enjoy someone's
6 home and ability to have the life, liberty, and
7 pursuit of happiness that the constitution protects.
8 So, without express language by statute, the state
9 engineer can -- does not have the authority to
10 implement the order.

11 So, just to conclude, there are four
12 considerations for you to look at to grant a stay.
13 And -- and based upon those considerations, one is
14 likelihood of success in the merits. We believe that,
15 for three reasons, there is not like -- that the order
16 is invalid. There is three reasons that the order is
17 invalid. And we have a likelihood of success in the
18 merits, the lack of due process, the lack of statutory
19 authority, and the lack of substantial evidence.

20 And so we're prepared to call our first
21 witness.

22 MR. STOCKTON: Your Honor, I would like to
23 respond first, because there are numerous statements
24 that the state engineer disputes. And I know you
25 don't want any more paper, but I have some graphs.

1 So, I apologize for that and...

2 THE COURT: You know, I want to make an
3 observation. I've been listening.

4 My review of an administrative decision, which
5 is what this is, is, if I find that there is
6 substantial evidence in the record -- can you hear me?
7 No.

8 My review of an administrative decision, the
9 standards are that if there is substantial evidence to
10 support the decision, then I have to uphold it. I
11 review law, what's called de novo, but I defer to the
12 administrator in his interpretation of the law. And
13 what that means is -- is that -- I think everybody
14 here would recognize that I'm not as much of an expert
15 in water law as the state engineer is. So, I defer to
16 his interpretation of what the law says, even though I
17 review it independently.

18 Now, that might not make much sense in this
19 context, but when you consider that district courts
20 review administrative orders by all of the
21 departments -- and I have -- I've done a EPA case out
22 of Humboldt County. I was reviewing the Nevada
23 Environmental Protection Agency's orders. I reviewed
24 a PUC decision a number of years ago when they
25 declined to give Nevada Power a \$900 million rate

1 increase. I review decisions by workman's
2 compensation administrators when they deny or grant
3 workman's compensation benefits.

4 So, you can see, when I go through the litany
5 of different administrative agencies that I have to
6 review, that it makes sense that I give deference to
7 the administrator that I'm reviewing and his
8 interpretation of the law, because that's all he does.
9 I'm not a hydrologist. I'm not a whole lot of things,
10 probably not more things than I am things. So -- but
11 I got my degree in economics.

12 So -- but I -- I say that because you have to
13 understand my function in this process. It's to
14 review a decision made by an administrator. And it
15 doesn't make any difference what administrator it is.
16 In this case there is separate statutes for the -- the
17 state engineer, but it's the same standard as set out
18 in 233B. And -- and I've just announced what that
19 standard is.

20 So, I -- I just want to make that point. So,
21 when you argue that he doesn't have the authority to
22 do this, he's determined that he does. And I have to
23 defer to his interpretation of the law.

24 So, go ahead, Mr. Stockton.

25 MR. STOCKTON: Thank you, your Honor. I would

1 like to start with Mr. Taggart's rhetorical question.
2 He asked, "Where does it say in the law that you have
3 a right to drill a well?" But he never answered his
4 question. He just said, "We say they have that
5 right." He never pointed to anything in the law that
6 says you have a right to drill a well.

7 And I want to look at NRS 533.450, sub 1,
8 which Mr. Taggart says completely exempts domestic
9 wells from chapter 534. And in there -- and statutes
10 have words for a reason. Okay? And they have a
11 specific meaning, and the courts, as you just said,
12 have to pay attention to those meanings. And in -- in
13 section 1 on -- well, it's the second line of what I'm
14 looking at. It says, "This chapter does not apply in
15 the matter of obtaining permits." So, it doesn't
16 apply to having to go through the permit process.

17 And I'm speaking loud so everybody can hear
18 me, not yelling at you.

19 THE COURT: That's fine.

20 MR. STOCKTON: Just to make that clear. So,
21 that section only exempts domestic rights from the
22 requirement to obtain a permit before they drill their
23 well. It doesn't exempt them from all the other
24 requirements of chapter 534, including regulation by
25 the state engineer. So, there is absolutely no

1 exemption that says the state engineer cannot regulate
2 domestic wells. It says only in the matter of permits
3 is exempted, but it doesn't say it's exempted from
4 everything else.

5 So, let's talk about 534.020, which is the
6 overarching statute that starts this -- this whole
7 chapter. And it says that all underground waters
8 belong to the public and they're available for
9 appropriation, subject to existing rights. And what
10 I'm going to show you is that the existing rights that
11 are already in place are more than the water that's
12 available in this basin.

13 And they have done a lot of parsing of the
14 record. And so this is important for you to hear
15 before you hear the witnesses, because, yes, there are
16 some wells that are recovering, but there is a reason
17 they're recovering, and they're only recovering in a
18 certain area and not in the area where these eight
19 thousand lots are -- exist and where those new
20 domestic wells will be drilled. And all those are
21 going to be part of the record when we get to the
22 merits, because all we're doing right here is -- is
23 the motion for stay.

24 And Pahrump Fair Water, when they did their
25 petition, they recognized that there is a

1 20,000-foot -- acre-feet perennial yield in this
2 basin. So, that's how much water is recharged on
3 average by precipitation. So, the problem is, it's
4 not equally distributed where that recharge occurs.
5 They're out on the playa, in the -- in the, you know,
6 caliche soil or whatever they call it in this valley.
7 Very little -- very few of the playas in Nevada
8 recharge. So, all the recharge comes from the Spring
9 Mountains and comes down from that side.

10 So -- and that's important, because all these
11 lots where they want to drill these new wells are in
12 the playa. And I'm going to show you that there is a
13 problem in the playa, and that's the problem the state
14 engineer was addressing.

15 Now, they said, well, the state engineer could
16 just designate part of the basin as restricted for
17 drilling wells. Well, in this basin all the private
18 land is in that area. So -- so, restricting it just
19 in that area, you know, it would be redundant of what
20 we've already got.

21 So -- so, again I talked about, if there is a
22 conflict with existing rights, the state engineer has
23 to deny that authority. So, if -- if there is a well
24 card that comes in and it's -- they want to drill it
25 right next to another domestic well but drill it

1 20 feet deeper where it's going to dry up that other
2 domestic well, he can deny it for that basis, because
3 you're going to interfere with an existing domestic
4 well. That's exactly what we've got going on in this
5 particular case.

6 Okay. And I'm flashing the slides. I know
7 you're just listening, but the audience can see this.

8 THE COURT: That's fine.

9 MR. STOCKTON: So -- so, this -- this is a big
10 problem in this case, I think, is the -- is that
11 Mr. Taggart -- or the -- the -- Pahrump Fair Water --
12 they say, well, you know, the -- the report says that
13 there is a relatively small number of wells that are
14 going to fail. Well, the problem is, each of those
15 wells that's going to fail is an existing well on an
16 existing house with an existing family living in that
17 house. So, when that well fails, those people are
18 substantially harmed. And if you increase the
19 pumping -- and we've heard a lot, that there is -- has
20 to be specific evidence that there is going to be harm
21 from a specific well. That's not the standard.

22 The standard is, is there going to be harm
23 from drilling these additional wells? And there is no
24 requirement in law and no authority is cited for the
25 fact that the state -- I don't even know how they can

1 make the argument with a straight face that pumping
2 more water is not going to exacerbate the problem.
3 The state engineer, he did say in the order that it's
4 presumed that pumping more water is going to cause a
5 problem, but it's a pretty -- pretty clear
6 presumption. If you're using too much water and
7 you're using more, it's only going to get worst.

8 Am I going too fast? Okay.

9 So -- so, let's talk about the elements of the
10 stay that they talked about, because they don't meet
11 any of these elements, as we're going to go through
12 here. And they talk about whether the non-party --
13 and in their motion for stay they call it irreparable
14 harm to the non-moving party. But that's not the
15 standard. The standard is any harm or hardship to the
16 non-moving party.

17 And I would submit that if you're going to
18 allow them to represent the individual rights of the
19 property owners who don't have a well, then the state
20 engineer represents the individual rights of everybody
21 who does have a well; right? So, you've got to
22 balance the harm to all those well owners as harm to
23 the -- the state engineer as well. Because he's in
24 charge of the state. And if he's not allowed to
25 manage the groundwater in a way that's going to

1 protect those existing wells, then nobody is.

2 So -- so, the first standard is whether the
3 non -- non -- is going to suffer -- I already said
4 that. Never mind.

5 So -- so, I thought I would go through a
6 little history of the valley. So, in the eighteen
7 hundreds they started selling here, and there were
8 springs that were along the Spring Mountains over
9 here, and they flowed 9600 acre-feet a year. So,
10 water was just flowing out of those springs, because
11 it, you know, precipitates on the -- on the mountains.
12 It comes down, hits a divide, and pops out of the
13 ground. So, they had flowing springs. But what
14 happened is, you had another federal act, the Carey
15 Act, the Homestead Act, the Desert Land Entry Act
16 {sic}. As a result of all those, you had accumulative
17 80,000 acres of land that came into private hands.

18 And I'm going to show you some slides in the
19 seventies. There was a lot of cotton growing here.
20 And I read articles that all you could see was white.
21 The cotton was so prolific here that you just had
22 fields of white with -- with the cotton sticking up.
23 And so that was important. The problem is, in the
24 late seventies the price of cotton fell through the
25 floor, and all those cotton farms closed down. So,

1 that water was no longer used for that.

2 So, what happened was, in the sixties you
3 started transitioning to a suburban -- let's see -- a
4 suburban community, right, where people could come
5 live here and work in Las Vegas or whatever. All
6 right?

7 And -- so, I -- I know you're not following
8 the slides. So, I'll just talk about them and --

9 THE COURT: That's fine.

10 MR. STOCKTON: So, there is about sixty
11 thousand parcels in this valley. And we've got eleven
12 thousand and a few -- let me go back a slide. So,
13 we've got 11,280 existing wells. So, that's how many
14 domestic wells are -- have already been drilled, are
15 already pumping water, and people are relying on those
16 for their livelihood; right? Those are the eleven
17 thousand wells.

18 Now, they talked a lot -- and I'll talk about
19 it more in a little bit, the fact that -- that there
20 is an average use of .5 acre-feet. Well, it's not
21 exactly point an acre-feet. It's in that vicinity.
22 The problem is, every one of those wells has the
23 right, if we allow them to drill a domestic well under
24 the exception, to pump 2 acre-feet. So, I don't think
25 you can assume as a Court that, oh, they're only going

1 to pump half an acre-foot, because they're entitled to
2 pump 2. And -- and there is -- most domestic wells
3 don't have a meter. So, you can't really monitor
4 that. All right?

5 There is 60,000 acre-feet of existing
6 appropriated rights. Those are senior appropriated
7 rights. And those rights have the ability to call for
8 their water. And if they call for their water, then
9 we go into curtailment. And what you have to do is,
10 you have to cut off all the junior rights; right?
11 First in time, first in right under prior
12 appropriation. You have to cut off all those junior
13 rights, plug those wells, which is exactly what we're
14 talking about. And -- and -- in -- in the bond
15 analysis; right? Because if those have to be plugged,
16 that cost money. And -- and people don't generally
17 plug their wells just because you tell them to. A lot
18 of times you have to go through a judicial proceeding
19 and -- and -- and I'm not sure on what's -- and
20 division of minerals, and we've had to go out and plug
21 wells for these people, just to protect the
22 groundwater resource.

23 And so that's where the million-dollar bond
24 comes from. Those cost a lot of money to do those
25 proceedings, to do the plugging, to get those plugged

1 to protect the resource. That's what we're here for,
2 is to protect the resource.

3 So -- so, there is 60,000 feet of existing
4 right plus the 11,280 in domestic wells. So, you've
5 got potentially 80,000 acre-feet of demand for
6 20,000 acre-feet of water. So, you can see there is a
7 problem. And I'll show you there is a problem in a
8 minute there. All right.

9 So, you got the transition to -- to -- to a
10 suburban community, right, where they're building more
11 and more houses. And then obviously in 2008 we had
12 the great recession, and the housing kind of leveled
13 off at that time, and it's just -- just barely
14 starting to come back at this point. All right.

15 So, this hardship to the state engineer is
16 that the state engineer has been working for a long
17 time on this basin. This basin was first designated
18 in 1941. So, this first came to the attention of the
19 state engineer as needing additional management in
20 1941. And order 1293 lists out all the steps that the
21 state engineer has taken to this point. And now we're
22 at the point where we need to take this step in
23 order 1293 in order to protect the public health and
24 welfare. And whenever the state is acting to protect
25 the public health and welfare -- and that's those

1 existing wells -- that's when the state's police power
2 is at its strongest. And that's what's happening in
3 this case.

4 So, the state engineer is not just sitting
5 back in his office and watching things happen. They
6 go out, and they -- they make sure -- try to make sure
7 that in each basin that pumping is not exceeding the
8 perennial yield. Now, success -- you know,
9 sometimes -- you're going to see in a minute that that
10 hasn't always been successful. This basin was
11 severely over pumped for a long time. All right?

12 And then they do monitoring of water levels.
13 They use electronic devices that tell them how much
14 water is in a well and -- but they actually go out
15 every spring, and they stick a tape measure down a
16 well, pull it up, and figure out how deep the water
17 is. And then they report that over the years. So,
18 the state engineer is proactive in monitoring the
19 water resources of the state.

20 And then you do checks on water use. So, if
21 you have a place of use for a certain area and you're
22 using water in a different area, the state engineer
23 makes people stop. So -- and then finally, some
24 public outreach on water use and trying to help people
25 with development. You'll review subdivision maps and

1 those kinds of things.

2 So, those are all important, because the
3 hardship is, the state engineer is working very hard
4 to manage the resources of the state so we don't run
5 out of water. We're the driest state in the nation.
6 And so that's a very big, important function of the
7 state engineer's office. And that's why, you know, as
8 you mentioned earlier, he's entitled to deference in
9 administering this statute.

10 So -- so, you know, I already talked about
11 some of the steps that -- that they have taken in the
12 past. But one of the steps is, you got water rights
13 in two different places; right? You have the alluvial
14 fans that are up on the Spring Mountains; right, where
15 the alluvium is the little rocks that tumble down from
16 the mountains over time, and they spread out in a fan
17 shade. And most of the recharge to the aquifer comes
18 down through those alluvial fans.

19 And so what happened was, you got all these
20 water rights all in the flat part of the valley where
21 the water level is dropping. So, the state engineer
22 issued an order that you can't take your place --
23 place a point of diversion from the valley floor and
24 move it up onto the fan to get the water that --
25 that's coming down up there. So, that's important,

1 too, because most of the rights that are existing on
2 that playa are municipal and -- and quasi-municipal
3 rights. So, these are the water purveyors that own
4 the water with a point of diversion up on the fans.
5 Okay?

6 And then they do require, if you come in with
7 a subdivision map, you have to come in with the water
8 to supply those houses. Now, as a public water
9 system, they have a lot more flexibility. They can
10 come in -- I don't know. It's too much detail. Never
11 mind.

12 But anyway they have to approve it for how
13 much water. You have to show the state engineer that
14 you're dedicating enough water for this -- for the
15 uses of the houses in the subdivision. Now -- I
16 forgot what I was going to talk about. I'll come back
17 to that.

18 And then water rights, if they're not used,
19 they're forfeited. So -- so, the -- well, I'll get to
20 that question later, too.

21 So, here's the issue. And this is part of the
22 hardship which happens to the state engineer and to
23 the -- to the public that's not in Pahrump Fair Water,
24 that happens if this order is not effective and we get
25 above the perennial yield pumping again, which I'm

1 going to show you a graph in a minute that shows we
2 were severely above it for many years. But if it goes
3 above, then you're going to have to curtail junior
4 rights.

5 So, if the Pahrum Fair Water members go out
6 and drill their well tomorrow, it will be the most
7 junior well in the basin. So, if we get to a point
8 where we're over pumped and it starts infringing those
9 senior rights, the state engineer is going to have to
10 issue an order to these people saying, you must stop
11 pumping, because you're infringing on the senior
12 rights.

13 And domestic wells have a priority dated the
14 date they were drilled. So, these wells that happened
15 in the interim of the stay will be -- or if you grant
16 the stay, will be the most junior rights in the
17 valley, and they will have to be plugged if they start
18 infringing on the senior rights. All right? So,
19 that's the curtailment order.

20 The other thing you can do is called a
21 critical management area. And the state engineer
22 designates a critical management area. It's kind of a
23 complicated process. Basically the county has ten
24 years to get its act together. And if it doesn't,
25 then we go to curtailment. And that's where he starts

1 curtailing those rights.

2 The other option that's on the slide is, do
3 nothing, which is not an option, because there is a
4 problem here, as I'm going to show you in just a
5 minute. So, if you could turn to page 18 of that
6 packet I gave you -- okay. The next few slides are
7 going to be graphs. So...

8 THE COURT: Is this -- is this PowerPoints --
9 are your PowerPoints -- are they in the record
10 somewhere?

11 MR. STOCKTON: They are in the record of the
12 state engineer, and they're from -- mostly from
13 presentations that the state engineer gave when he
14 came down to Pahrump to explain the problems and
15 explain why they were going to have to do something.

16 THE COURT: I just ask that, because I know if
17 we're talking about something, I want the Supreme
18 Court to be able to look at it the same way I am.
19 Because I'm sure whatever decision I make here,
20 they're --

21 MR. STOCKTON: When we get to --

22 THE COURT: -- law is. So, if you -- I'm
23 looking at this thing here.

24 Is a copy of this in the record?

25 MR. STOCKTON: Well --

1 MR. RIGDON: No.

2 MR. STOCKTON: -- the information that's in
3 these slides will be in the record on appeal when we
4 come to the merits.

5 MR. TAGGART: Right now it's not in the record
6 of this proceeding.

7 THE COURT: Do you want to mark a copy of this
8 just for the purposes of this hearing?

9 MR. TAGGART: If I can just answer your
10 question a little more clearly, is -- so, normally we
11 would have a record on appeal filed, as Mr. Stockton
12 indicated. That has not occurred yet.

13 THE COURT: I understand.

14 MR. TAGGART: So, therefore, you don't have a
15 record before you in this case. So, when I say this
16 is not in the record, that's what I mean.

17 The evidence we want to offer through
18 testimony is -- is -- you know, will become evidence
19 that you can rely on. I think Mr. Stockton would like
20 you to be able to rely upon the information in his
21 PowerPoint today as well. And -- and so we don't
22 object to the -- to the -- to that as long as the same
23 rules apply to all the parties. If they can bring in
24 information today that is not in the record today and
25 before the Court yet, we want to be able to do the

1 same thing.

2 THE COURT: That's fine. Let me -- we're here
3 making a record for the Nevada Supreme Court to
4 review. It doesn't make any difference what decision
5 I make. I'm absolutely certain the state engineer or
6 you will appeal it to them. They will ultimately
7 decide what the law is. And my function, as I've
8 always seen it -- and I've been relatively successful
9 at it -- is to not get something remanded to me for
10 further hearings. I only like to hear things once.

11 So, I make as complete a record as I can and
12 let them decide what the law is. I take my best shot
13 at it down here, but ultimately -- I mean, some of the
14 things we're talking about are issues of the law of
15 first impression, and probably 75 percent of the time
16 I guess right and 25 percent I don't. So -- but I
17 don't get things remanded to me, because I make as
18 good a record as I can.

19 So, what I'm saying is -- is, let's put a copy
20 of what I'm looking at, because I'm looking at it, and
21 mark it, and it will be admitted for this hearing and
22 this hearing alone. For everybody's edification, I
23 may or may not consider anything I'm hearing today in
24 the ultimate decision I make on this case. The -- the
25 AG has pointed out that this is an appeal, that most

1 of the time additional evidence isn't presented in an
2 appeal. And so I might decide, if I'm convinced of
3 that argument, I won't consider any of this in the
4 ultimate decision I make.

5 MR. STOCKTON: Could I just respond real
6 quick, your Honor?

7 THE COURT: Go ahead.

8 MR. STOCKTON: So, the standard is not, as
9 Mr. Taggart mentioned, that the evidence is before the
10 Court. The standard in NRS 533.450 is the evidence
11 that was before the state engineer. So, that's the
12 standard. And so we still object to bringing in
13 evidence that wasn't before --

14 THE COURT: I understand, but I'm going to let
15 it in anyway. So, let's not argue that anymore.
16 Let's -- you go ahead and finish, and we're going to
17 move on to you presenting witnesses.

18 MR. RIGDON: Could I just ask one thing?

19 THE COURT: Go ahead.

20 MR. RIGDON: Because you were asking about
21 whether this PowerPoint presentation -- right?

22 Based upon what Mr. Stockton just said, then,
23 no, the PowerPoint presentation shouldn't be brought
24 in. There is extra-record evidence in this PowerPoint
25 presentation that wasn't in front of the state

1 engineer at the time he made his order, and so --

2 THE COURT: Well, we can argue that.

3 MR. RIGDON: He's talking out of both sides of
4 his mouth on that one.

5 THE COURT: Well, what I'm going to review is
6 the record that was before the state engineer and
7 potentially evidence that you present.

8 MR. STOCKTON: So, I'll move to admit this as
9 an exhibit.

10 THE COURT: Okay, just for the purposes of
11 this hearing.

12 MR. STOCKTON: Correct.

13 THE COURT: And if you have a PowerPoint, you
14 mark yours and put it in, too. Because I don't --
15 this isn't being recorded. I'm always intrigued when
16 attorneys admit visual evidence that I know I'm
17 looking at but the Supreme Court won't be able to look
18 at when they review it. But you've all done a good
19 job of outlining your PowerPoints.

20 So, you guys mark -- I looked at your
21 PowerPoint.

22 You mark your PowerPoint. It will be in the
23 record.

24 MR. TAGGART: Well -- and -- and, your Honor,
25 just for the record, we would just reserve an

1 objection --

2 THE COURT: That's fine.

3 MR. TAGGART: -- to the extent the information
4 being offered in the PowerPoint is not, in fact,
5 information that could have been relied upon by the
6 state engineer when he issued the order.

7 THE COURT: That's fine. You can point that
8 out when you brief it. You guys are all going to
9 brief it again. So...

10 MR. TAGGART: So, just for the record, we
11 would like to reserve that objection.

12 THE CLERK: It's Defendants' A, and it's going
13 to be that packet right there that I'm marking.

14 THE COURT: Yeah, Respondent's A. And then
15 let's get a copy of the other PowerPoint that I was
16 looking at from the petitioners in this case.

17 MR. STOCKTON: So, this is Exhibit A?

18 THE COURT: A, I guess. I don't know.

19 THE CLERK: Yes. That's what I'm going to
20 mark it.

21 THE CLERK: And then this would be Exhibit 1
22 for the plaintiff, your Honor.

23 So, "A" for the defense and then Exhibit 1 for
24 the plaintiff?

25 THE COURT: Yeah.

1 THE CLERK: Okay.

2 MR. TAGGART: And if I may, your Honor, are we
3 going to -- is the intention to go through the hundred
4 pages here prior to our evidence being put on?

5 THE COURT: How long is that going to take?

6 MR. STOCKTON: Your Honor, everything in here
7 is rebuttal to what they have already said. It takes
8 about an hour the last time I practiced. I'm not sure
9 how far we --

10 MR. TAGGART: Well, your Honor, with -- what
11 we suggest is -- as in any evidentiary hearing, we
12 made a brief opening statement. We want to put on our
13 witnesses. Then we would make a closing statement.
14 And we would expect the opposition would make a
15 closing statement as well. We would make a rebuttal
16 closing statement. And we would close the evidentiary
17 hearing.

18 THE COURT: Why don't Mr. Stockton -- I think
19 probably -- wouldn't it be just as well if I heard
20 this after they put their witnesses on?

21 MR. STOCKTON: You know what? If you just
22 give me a few more minutes, I'll breeze through the
23 slide, give the short, short version, and then I can
24 give you the long version at the end.

25 THE COURT: Because I've read some of what you

1 talked about.

2 MR. STOCKTON: But they have made some factual
3 assertions that need to be rebutted right now before
4 we get to the witnesses. And so I would like to do
5 that.

6 And apparently the printed version of the
7 slides is different from my screen version. So,
8 actually the graph we're looking at is on page 15.
9 And I apologize.

10 All right. And so what this graph shows is
11 the water rights that had been appropriated over time.
12 Okay? And that line, the -- the vertical line is --
13 represents 1948. And that's when the paper water
14 rights reached 20,000 acre-feet. So, everything
15 above -- everything above the place where the blue
16 line in that vertical line intersect are -- are water
17 rights that are over and above the perennial yield.

18 So, if you look at the -- so, I'm just going
19 to do the short version. So, we'll go -- so, I just
20 want to talk about irreparable harm real quick. And
21 this is at page 23 -- no. Sorry. Twenty, page 20.

22 So, what we're talking about here is the
23 irreparable-harm standard. And the Nevada Supreme
24 Court in this McComb Gaming versus McCrea has ruled
25 that time -- mere delay in pursuing your litigation is

1 not irreparable harm. Okay? So, all you're going to
2 hear from the witnesses today is that they can't drill
3 their well now. Well, the fact that they have to wait
4 until this litigation is terminated, the Supreme Court
5 has held that that's not irreparable harm. So -- so,
6 you don't have any irreparable harm here just because
7 they have to wait for the case to be heard. All
8 right?

9 As the likelihood of success, you know, the
10 burden is on them to prove it. And you've already
11 said. So, I'm going to skip that. But the
12 likelihood -- the likelihood of success is low,
13 because the statute says the state engineer's decision
14 is prima facie correct.

15 So, now I want to go -- and this is the fast,
16 fast version. So, I'm going to go to the potential
17 harm to the public. And -- and -- so, on page 27 is a
18 map of the state of Nevada, and it shows the density
19 of domestic wells per square mile. And I'm going to
20 skip through the next ones. I'll talk about them
21 later. But you can see the only place in the state
22 with a dark blue cover that goes up to four hundred
23 and fifty-five wells in every square mile is the
24 Pahrump Valley Artesian Basin, okay, the valley part
25 of that basin. That's where these lots are, and

1 that's where the problem is. And so that's why there
2 is a problem. That have the most intense -- or the
3 most dense areas of domestic wells in the state are
4 right here in this valley and right where those eight
5 thousand lots are.

6 All right. So, if we go to -- let's go on to
7 page 30. And what -- what the -- the audience is
8 seeing is a graph of groundwater pumping that's been
9 monitored since 1959 in this basin. And if you look
10 at that graph, that red line that goes across the
11 twenty thousand, that's the perennial yield. So, you
12 can see for many years from the seventies into the
13 eighties we were way above that. Then the price of
14 cotton dropped. The farms closed down. We started
15 converting to -- to commercial. There was still a few
16 farms left. But you can see where we were well above
17 that until the recession in 2008.

18 But what you can see on the right hand of that
19 graph is that it's starting to come back up. And the
20 current pumping in 2017, which was before the state
21 engineer, was 16,416 acre-feet; right? So, the
22 fifteen-thousand number they're talking about is
23 several years ago. The most recent pumping figures
24 are over 16,000 acre-feet. So, that gap, that delta
25 between the pumping and the perennial yield is getting

1 smaller and smaller every year with just what we've
2 got right now. So, something has to be done so we
3 don't go back above that 20,000 acre-feet.

4 Now I'm going to show you just a couple of
5 slides, because I want to show you how the facts are
6 being twisted by Pahrum Fair Water. And I do say
7 that advisedly. Okay? So, we've got some wells. And
8 we're going to show you some well graphs. These are
9 monitoring wells that the state engineer monitors to
10 see where the water level is. This first one you can
11 see is over to the --

12 THE COURT: What page is it on these?

13 MR. STOCKTON: I'm sorry. What is it?
14 Thirty-two.

15 THE COURT: Go ahead.

16 MR. STOCKTON: Okay. So, the first graph
17 shows a well that's over on the alluvial fan on the --
18 on the east side of the valley. And you can see the
19 chart there. It went down until the eighties, started
20 to stabilize, and it's begun to recover now. The
21 reason that it's begun to recover is, most of the
22 water rights up on the fan are now in the hands of
23 municipalities who don't pump all their water, because
24 they haven't fully developed -- not municipality but
25 municipal and quasi-municipal water right holders.

1 All right?

2 So, I want to show you another well, which is
3 on the next page, which is in the north end of the
4 valley.

5 And correct me if I'm wrong, but the flow
6 system goes kind of from north to southwest; right?

7 MR. KING: Northeast to southwest.

8 MR. STOCKTON: Northeast to southwest.

9 So, this is in the north. So, the water
10 generally as it moves, it moves from the north down to
11 the south. So, this well was dropping like a stone
12 until the eighties, and then it began to stabilize,
13 and it's just starting to recover. So, the water
14 levels are coming up. And, frankly -- you know, I was
15 going to say, if they all look like that first well,
16 we wouldn't be here.

17 But here's the wells that are in the area
18 that's developed. And this is the area where these
19 eight thousand lots are. You can see this well
20 decline seven-tenths of a foot every year. All right?
21 And this is right in the middle of the center of the
22 northern portion of the development.

23 So, I'm going to show you another well that's
24 on the west side near the California border. This
25 well is also dropping six-tenths of a foot a year.

1 So, each of these wells is losing over a half a foot
2 of water-level elevation every year. That's why wells
3 are going to fail. When the water table gets down
4 below your well, then you have to drill a new well.
5 And that's why the wells are failing. And pumping
6 more water by drilling more wells is only going to
7 exacerbate that problem and make those wells fail
8 faster. So, real people will be damaged by this stay.

9 All right. This is a well -- sorry. Pardon
10 me. This is a well that's right in the middle of the
11 development. It's right in the middle of the valley.
12 You can see that this one is dropping precipitously
13 1.2 -- 1.2 feet a year. So, over a foot this well
14 drops every year. And so these water levels --
15 that's -- that's why we're saying, because this is
16 where the development is. The wells where the water
17 is recovering that they're trying to get you to focus
18 on are not where the development is. They're over in
19 the area where there is only municipal and
20 quasi-municipal rights. All that water is spoken for.
21 It's all subject to existing rights. There is no more
22 water to appropriate.

23 And finally you got this well in the very
24 southern end of the valley that is also dropping a
25 foot a year. So, it's at the tail end of the flow

1 system; right? The water comes, as I said, from
2 northeast to southwest. So, it's at the tail end.
3 So, this is what's left after it goes through all
4 those appropriated areas. And there is just not much
5 left. So, it's dropping a foot a year.

6 So, that's why it's urgent the state engineer
7 do something and that this order is appropriate
8 because -- in an attempt to try and arrest that
9 decline.

10 So -- and I think that's enough for the
11 opening, and I'll save the rest for the big finish.

12 THE COURT: Okay. Let's take a fifteen-minute
13 break, ten to eleven.

14 And how much -- your -- how long do you think
15 your witnesses are going to be?

16 MR. RIGDON: I don't believe we'll be longer
17 than two hours, your Honor. We have eight witnesses
18 to call. Some are longer than others, because they
19 have a little more to testify about but --

20 THE COURT: So, you want to -- how much of a
21 lunch break do you want to take? Twelve to 1:30?

22 MR. RIGDON: Yeah. That works for me.

23 THE COURT: Okay. And we'll get it all in if
24 we do that?

25 MR. RIGDON: Yeah.

1 THE COURT: Okay. We'll come back at ten to
2 eleven. Court's in recess.

3 (Recess taken.)

4 THE COURT: Okay. Mr. Rigdon, let's go ahead.

5 MR. RIGDON: Okay. Thank you, your Honor. We
6 would like to call Norma Jean Opatik to the stand.
7 Whereupon --

8 NORMA JEAN OPATIK, having been first duly
9 sworn to tell the truth, the whole truth, and nothing
10 but the truth, was examined and testified as follows:

11 * * * * *

12 DIRECT EXAMINATION

13 BY MR. RIGDON:

14 Q. Ms. Opatik, could you for the record here just
15 say your name and spell it so...

16 A. Norma Jean Opatik, N-o-r-m-a J-e-a-n
17 O-p-a-t-i-k.

18 Q. Thank you. And, Ms. Opatik, you're one of the
19 founding managing members of Pahrum Fair Water; is
20 that correct?

21 A. Yes, I am.

22 Q. Okay. And what was the purpose for which
23 Pahrum Fair Water, LLC was formed?

24 A. To fight the -- order 1293.

25 Q. Okay. And that was the sole purpose for --

1 A. Sole purpose.

2 Q. Okay. The --

3 MR. STOCKTON: Your Honor, if I may make an
4 objection, the witness needs to wait until the
5 question is finished before she answers, because the
6 record is going to be horribly confused.

7 THE COURT: Okay. You can do that. It's hard
8 for the court reporter to take down if two people are
9 talking at the same time. So --

10 THE WITNESS: Yes, sir.

11 THE COURT: Okay.

12 BY MR. RIGDON:

13 Q. So, generally without giving the whole list of
14 names -- generally what types of individuals are
15 members of Pahrump Fair Water?

16 A. Citizens here in Pahrump, people of -- that
17 own property here in Pahrump.

18 Q. Okay. Is there people who -- is there other
19 people as well, well drillers, real estate companies,
20 those types of things?

21 A. There are the companies that -- that actually
22 exist in Pahrump right now that are also members of
23 the Pahrump Fair Water, LLC.

24 Q. Okay. Is there anybody, to your knowledge,
25 who's a member of Pahrump Fair Water, LLC who is not

1 either a property owner who's affected by the order or
2 a business that's being affected by the order here in
3 Pahrump?

4 A. No, sir.

5 Q. Okay. Thank you. And, Ms. Opatik, what's
6 your occupation?

7 A. I'm the owner/broker of Realty Executives in
8 Action.

9 Q. Okay. And how long have you been a real
10 estate broker?

11 A. How long have I -- since 1997.

12 Q. Okay. And how long have you done that here in
13 Nye County?

14 A. Since 2002.

15 Q. Okay. And approximately in that time in Nye
16 County here, how many real estate deals have you
17 personally been involved with in that time, just on
18 average? Is it in the hundreds or --

19 A. Hundred -- sorry. We're --

20 Q. Is it -- go ahead.

21 A. We're hundreds -- thousands if you think about
22 the fact that I am party to all listings that the
23 brokerage has.

24 Q. Okay. And do you sit on any boards or
25 commissions with respect to real estate?

1 A. I'm currently a commissioner for the real
2 estate division, state of Nevada.

3 Q. That's the state real estate commission?

4 A. It is.

5 Q. And what are they?

6 A. We're an advisory board actually to the real
7 estate division, the Nevada Real Estate Division. And
8 in our capacity we adjudicate complaints that come
9 into the division.

10 Q. Okay. Is that -- how are you -- how did you
11 get onto that commission?

12 A. I was appointed by the governor.

13 Q. Okay. And how many real estate brokers,
14 agents are on that commission?

15 A. Five.

16 Q. For the whole state of Nevada?

17 A. For the whole state of Nevada.

18 Q. So, you're one of five real estate experts who
19 was appointed to this Nevada real estate commission?

20 A. Yes, sir.

21 Q. Okay. When you list property for sale in Nye
22 County here, are you familiar with a -- what's called
23 a comparative market analysis?

24 A. Yes, I am.

25 Q. Okay. And do you regularly prepare a

1 comparative market analysis when you list property for
2 sale?

3 A. Yes, we always do.

4 Q. And what is a comparative market analysis?

5 A. It analyzes the properties that are currently
6 on the market, the properties that have sold, that
7 are -- that relate to the subject matter that -- the
8 subject property that we're going to list.

9 Q. And what's the purpose for preparing it?

10 A. So that we can come up with a marketable
11 value.

12 Q. Okay. And so what factors do you look at when
13 you create one of these comparative market analyses?

14 A. We try to do it as exactly as possible. In
15 other words, we compare three-bedroom homes to
16 three-bedroom homes. We compare acre lots to acre
17 lots. So, we try to get the features and the benefits
18 of each property that we are going to list and get
19 subject properties that are similar.

20 MR. STOCKTON: Your Honor, I would like to
21 make an objection here in that the witness is
22 testifying as if and on the basis that she's an expert
23 in real estate law. And I don't think she's been
24 listed as an expert witness in any disclosure, and
25 she's not -- she's not been qualified as an expert.

1 The fact that she hasn't been listed or disclosed as
2 an expert witness means she should only be able to
3 testify as to the things that she does, not the things
4 that other people do.

5 MR. RIGDON: And, your Honor, I'm only asking
6 her about the things she does. She said she creates
7 these comparative market analyses.

8 THE COURT: Let's go ahead. I understand your
9 point, Mr. Stockton, but let's go ahead.

10 BY MR. RIGDON:

11 Q. So, in preparing a comparative market
12 analysis, would the fact -- would a property's ability
13 to have a domestic well make a property -- factor into
14 your comparative market analysis?

15 A. Yes, it does.

16 Q. Okay. And if a property didn't have the
17 ability to have a domestic well or needed to expend a
18 whole bunch of money buying water rights to have a
19 domestic well, would that result in a lower valuation?

20 A. Yes, it does.

21 Q. Okay. So, when did you first learn of
22 order 1293?

23 A. I believe it was December 20th.

24 Q. That would be the day after it was issued?

25 A. Yes.

1 Q. Okay. And did you have any notice at all,
2 prior to its issuance, that the state engineer was
3 considering issuing an order of this type?

4 A. No, I -- no, no -- no prior notice.

5 Q. Okay. But you knew there was water issues in
6 the basin; right?

7 A. I heard that there were issues being
8 discussed.

9 Q. Okay. But nothing specific that would give
10 you -- lead you to believe that the things here were
11 going to restrict drilling of domestic wells?

12 A. Absolutely not.

13 Q. Okay. Were you personally involved in any
14 real estate transactions that were affected by
15 order 1293?

16 A. I was.

17 Q. Okay. And what happened in those
18 transactions?

19 A. The escrows canceled, and property owners
20 lost, buyers lost.

21 Q. So, these were contracts that were entered
22 into before that were going to close after the order
23 was issued?

24 A. Yes.

25 Q. And so right in the middle the order was

1 issued; is that correct?

2 A. That's correct.

3 Q. And then -- and because of that, buyers
4 walked?

5 A. Yes, sir.

6 Q. Okay. Okay. If the stay -- we're here to --
7 to see if this -- this order should be stayed while we
8 argue the merits of this case.

9 If the stay was issued, what effect would that
10 have on -- on your -- your real estate business, on
11 real estate deals? What effect do you believe that
12 that would have?

13 A. As far as our market in general, it would have
14 a great effect, because it would put us back to where
15 we were. When people either originally -- when our
16 clients actually bought the property and -- they could
17 then proceed with their -- their plans.

18 We had clients that bought property, that
19 intended to move quickly into drilling their wells and
20 putting their homes in, that were stopped dead in
21 their tracks at 3 p.m. on December 19th.

22 That's -- and we get the calls. We get the
23 calls saying "But -- but what happened? Why -- why
24 did they do that to us?" And we have no real answer.
25 We just -- we just say that the order was in effect,

1 that the order became effective December 19th at
2 3 p.m.

3 Q. Okay. And as a real estate agent and a member
4 of the real estate commission, you're required to keep
5 up on local trends within the real estate market;
6 correct?

7 A. Yes, I am.

8 Q. Okay. And have you heard anything about
9 the -- whether the -- the existence of this order is
10 causing people to rethink relocating to Pahrump?

11 A. Oh, yes. We had clients that actually --
12 we -- we were showing the property to, not just land.
13 They were planning on buying a home here, that read an
14 article and called us and said, "Evidently Pahrump is
15 out of water, and we don't have any intention of
16 moving into a town that is already in trouble."

17 Q. So, this order is affecting not just people
18 who have vacant lots. It's affecting sales of
19 property that already has water service to it, because
20 people believe that Pahrump is out of water?

21 A. That's right.

22 Q. Okay.

23 MR. RIGDON: Thank you. That's all I have for
24 this witness, your Honor.

25 THE COURT: Mr. Stockton?

1 MR. STOCKTON: Thank you, your Honor. I do
2 have a few questions.

3
4 CROSS-EXAMINATION

5 BY MR. STOCKTON:

6 Q. Ms. Opatik, do you have a basic understanding
7 of Nevada's water law, the prior appropriation system?

8 A. Not specifically.

9 Q. So, when you sell a house, do you disclose to
10 the -- to the -- to the property owner that the well
11 is subject to the prior appropriation system?

12 A. What I -- no.

13 Q. Do you determine the water level in the area,
14 right, the static water level and the depth of the
15 well that's attached to the property to determine
16 how -- how much water is above the bottom of the well?
17 So, in other words, do you disclose to buyers how long
18 they have before their well goes dry?

19 A. No.

20 Q. Do you even look at that?

21 A. Not in those terms.

22 Q. Okay. What do you look at?

23 A. If there is a well on the property, we'll pull
24 up the -- the well log, and we will give them that
25 information.

1 Q. Okay. So, you do determine how deep the well
2 is. You just don't know where the water is in
3 relation to the bottom of the well?

4 A. Just whatever comes off the printed -- yes.

5 Q. Do you understand the priority system in the
6 water log?

7 A. A little.

8 Q. A little? Okay. So -- so, what does it mean
9 to have the junior well in a valley? What does that
10 mean to you?

11 A. It's the latest well drill.

12 Q. What happens to that latest well if there is a
13 shortage of water?

14 MR. TAGGART: Objection, calls for
15 speculation. Even the state engineer hasn't
16 determined what's going to happen when that happens.

17 THE COURT: Well, he's asking her what she
18 thinks.

19 So, go ahead and answer the question.

20 Objection overruled.

21 THE WITNESS: I don't have the expertise.

22 BY MR. STOCKTON:

23 Q. Okay. All right. So, you said you know there
24 is a problem in Pahrump, but you don't know the extent
25 of it or where -- with water -- I'm sorry, with water

1 in Pahrump, but you don't know the extent of it or
2 where it's most severely affected or what areas are
3 most severely impacted; is that correct?

4 A. No. What I said was, I heard that there was
5 an issue.

6 Q. Okay.

7 A. I did not hear specifics.

8 Q. You didn't hear any specifics that there
9 was -- there was any -- about the aquifer or about any
10 wells going dry, those kinds of things?

11 A. Not wells going dry, no.

12 Q. Okay. All right. So, let's just go to the
13 remedy.

14 You're -- what you're -- you're asking the
15 Court here to do is -- is to issue a stay so that you
16 can sell more houses and tell people that they can
17 drill a well on their lot.

18 Is that what I'm hearing?

19 A. No, sir.

20 Q. What am I hearing?

21 A. I'm not sure what you're hearing.

22 Q. I'm sorry?

23 A. I'm not sure what you're hearing.

24 Q. Okay. So -- good point. Good point. So,
25 let's talk about the fact that you said that house

1 sales and lot sales would increase if the stay is
2 issued.

3 Is that correct?

4 A. I believe it would go back to its normal
5 position.

6 Q. Okay. But you said it's down. So, if it goes
7 back to normal, that means it increases; right?

8 A. It would go back to where it was, yes.

9 Q. So, as a real estate agent, would you be under
10 a requirement to disclose to those people that if
11 ultimately the state engineer's order is affirmed,
12 even if your well is drilled during the pendency of
13 the stay, that you're going to be affected by the fact
14 that that order is now in force? Is that --

15 MR. RIGDON: Your Honor, I object to that.
16 That's asking her for -- about -- legal conclusion
17 about what the effect of you reinstating the order
18 after a stay would be. She's not a lawyer. She
19 doesn't know what that is and --

20 THE COURT: You know, I understand where
21 you're going, Mr. Stockton. We don't need to pursue
22 this any further.

23 MR. STOCKTON: All right. Thank you. No
24 further questions.

25 THE COURT: Do you own property that's being

1 affected by this?

2 THE WITNESS: No, sir.

3

4 REDIRECT EXAMINATION

5 BY MR. RIGDON:

6 Q. Just one quick question on redirect: You were
7 asked about the process you go through. You said you
8 pull well logs when you sell a home -- when you sell a
9 vacant lot or there is a home with a well on it.

10 You give those to the client, but is it the
11 client's responsibility, then, to do due diligence and
12 determine what the suitability of that well is?

13 A. Yes.

14 MR. RIGDON: Thank you.

15 THE COURT: Any more questions?

16 MR. STOCKTON: No questions, your Honor.

17 THE COURT: You may step down, ma'am.

18 MR. RIGDON: Your Honor, I would like to call
19 Paul Peck to the stand, please.

20 Whereupon --

21 PAUL PECK, having been first duly sworn to
22 tell the truth, the whole truth, and nothing but the
23 truth, was examined and testified as follows:

24 * * * * *

25

DIRECT EXAMINATION

BY MR. RIGDON:

Q. Mr. Peck, could you just say your name and then spell it for the court reporter?

A. My name is Paul Peck, P-a-u-l P-e-c-k. If I speak to loudly, it might be because of these earphones, but I have a hearing problem.

Q. Okay. Mr. Peck, do you own property in Pahrump?

A. Yes, sir.

Q. And are you a member of Pahrump Fair Water, LLC?

A. Yes, sir.

Q. And when did you purchase your property in Pahrump?

A. May the 31st, 2017.

Q. Okay. So, just in this last year, within the last year?

A. Right.

Q. Okay. Is this property vacant parcel?

A. Yes, sir.

Q. And there is no current well on that property?

A. No, sir.

Q. Okay. What was the purpose for purchasing the property?

1 A. Well, we were -- we're getting up in age.
2 We're about 70 years old. And we were thinking we
3 probably won't be able to maintain 2 1/2 acres, which
4 we have now, and a home on it. So, we thought we
5 might have to downsize. So, if we did that, we wanted
6 to be prepared, and that's why we bought the property.

7 Q. Okay. And when you bought the property, did
8 you do any due diligence to find out if you could have
9 water service to that property?

10 A. Yes, sir.

11 Q. And what did you do?

12 A. Well, we were very specific with our Realtor
13 here in town to ask them is there anything we need to
14 do about the well or anything, because there has been
15 rumors in the past, you know, about certain water
16 things. I don't know. And so we -- we -- he told us
17 that -- that we're not -- we don't have no problem
18 with it.

19 Q. Okay. And you mentioned that you've heard
20 rumors in the past that there is a problem.

21 Were you aware that -- did you get any notice
22 that -- that the state engineer was considering
23 restricting the drilling of domestic wells?

24 A. No, sir.

25 Q. Okay. You didn't get a card in the mail,

1 before he issued the order, saying, "I'm thinking
2 about doing this and give me your comments"?

3 A. No, sir.

4 Q. Okay. How has the issuance of order 1293
5 affected you?

6 A. Well, it's going to affect us extremely
7 financially, I guess, because we're going to -- if we
8 downsize, which we're still going to have to do at one
9 point, we won't be able to -- we probably won't be
10 able to afford to do what's required under the new
11 regulation.

12 Q. Which is to buy water rights and then give
13 them up?

14 A. Right.

15 Q. Okay.

16 A. Yes.

17 MR. RIGDON: All right. I have no further
18 questions.

19 THE COURT: Mr. Stockton?

20 MR. STOCKTON: Thank you, your Honor. I have
21 a couple.

22

23 CROSS-EXAMINATION

24 BY MR. STOCKTON:

25 Q. So, Mr. Peck, do you understand the prior

1 appropriation system for water rights in the state of
2 Nevada?

3 A. Not really. I'm not really into that.

4 Q. Okay. So, let me just ask your background.
5 What's your profession?

6 A. Law enforcement.

7 Q. Law enforcement? Okay. So -- so, when you
8 talked about you bought this with the plans of
9 relocating at some point in the future, is that
10 correct?

11 A. Yes, sir.

12 Q. And when are you going to do that?

13 A. Well, we were -- we were planning on doing
14 that right -- you know, very quickly. We were going
15 to drill the well and get the septic and go look for
16 mobile homes, new mobile homes and set one.

17 Q. What do you mean, very quickly?

18 A. Well, within the next -- within the first six
19 months or a year.

20 Q. Within the next six months or year or...

21 A. From that point when we bought it, from
22 May the 31st of 2017.

23 Q. Well, you bought it in May. The order didn't
24 issue until December. That's seven months later. So,
25 that doesn't make sense.

1 A. Well, we didn't do it, because we were told
2 that we didn't have to do it. We didn't have to put
3 the well in right away.

4 Q. But you haven't taken any steps to move
5 forward since May of last year?

6 A. I did take steps. I researched price of the
7 mobile home and things like that.

8 Q. Okay. All right. So -- so -- so, did your --
9 did the real estate agent talk to you about how deep
10 the water is in the area where your lot is?

11 A. No, sir.

12 Q. If I show you a map of the Pahrump valley, can
13 you show us approximately where your lot is?

14 A. Yes, sir.

15 Q. Okay.

16 MR. STOCKTON: Your Honor, would you indulge
17 me to do that?

18 THE COURT: Go ahead.

19 BY MR. STOCKTON:

20 Q. So, I don't know if -- can you see that,
21 Mr. Peck?

22 A. It seems what it shows.

23 THE COURT: What page are you...

24 MR. STOCKTON: This is page 39 of Exhibit A.

25

1 BY MR. STOCKTON:

2 Q. Can you tell us approximately where your lot
3 is?

4 A. Not -- not from that I can't, no.

5 Q. Okay. Do you need me to give you some
6 reference here?

7 MR. RIGDON: Your Honor, for clarification,
8 he's showing a picture on this -- on this PowerPoint
9 presentation, but I'm curious where this picture comes
10 from.

11 MR. STOCKTON: This is from the state
12 engineer's records, your Honor.

13 MR. TAGGART: Thanks.

14 MR. RIGDON: Where are the records? Is there
15 a report? What records are you talking about? Where
16 would I find this if I want to go look for it?

17 MR. STOCKTON: I don't know. It's in the
18 record.

19 MR. RIGDON: Well, we would object.

20 THE COURT: The objection is overruled.
21 Can -- but he may not be able to testify to this
22 exhibit.

23 MR. STOCKTON: All right. Can you tell us
24 where you are here? I know vaguely where we are
25 but...

1 MR. KING: This is the south end of the valley
2 once -- when you drive in. More towards the north end
3 up to here, here's the fan. Here's the valley floor.
4 But again that's the top from --

5 MR. TAGGART: Are we getting testimony from
6 the state engineer?

7 MR. RIGDON: Is the state engineer testifying?

8 MR. STOCKTON: Your Honor, the state engineer
9 is just orienting the witness to the map.

10 THE COURT: -- to move on from this. I
11 don't -- what part of the valley?

12 THE WITNESS: In the north side.

13 THE COURT: Okay.

14 MR. STOCKTON: All right. All right.

15 BY MR. STOCKTON:

16 Q. And, sir, you were aware of the trends in
17 water levels in the north side of the valley?

18 A. I'm very conservative. I'm aware of water
19 trends everywhere. I mean, you know, not everywhere
20 but -- you know.

21 Q. The fact that the water level was dropping
22 every year?

23 A. I don't know about lately. I think it's been
24 increasing probably because of the rainfall.

25 Q. Okay. So, is it -- so, are you giving

1 scientific testimony that rainfall in your area --

2 MR. TAGGART: Objection.

3 MR. RIGDON: He asked a question.

4 THE COURT: It's just his opinion. Move on.

5 Move on.

6 MR. STOCKTON: All right.

7 BY MR. STOCKTON:

8 Q. So, let me give you a scenario. If you drill
9 your well and you have your mobile home put on it and
10 you're living there, you're the most junior right in
11 this valley.

12 What are you going to do if the state engineer
13 has to curtail water rights to protect senior water
14 rights and you have to stop pumping?

15 MR. RIGDON: Objection, your Honor. This --
16 again this calls for speculation. This calls for a
17 legal opinion on what --

18 THE COURT: Do you understand that question?
19 Mr. Peck, do you understand the question?

20 THE WITNESS: Go ahead and ask it again,
21 please.

22 BY MR. STOCKTON:

23 Q. Okay. All right. So -- so, under the prior
24 appropriation system, if your well is interfering with
25 senior rights, it has to be plugged.

1 What are you prepared to do if your well has
2 to be plugged as the junior well in the valley?

3 A. Move.

4 MR. RIGDON: Objection, your Honor, calls for
5 speculation.

6 THE COURT: Well, he answered the question.
7 So, let's move on.

8 MR. STOCKTON: No further questions.

9 THE COURT: Next witness?

10 You can step down.

11 MR. RIGDON: Okay.

12 THE COURT: I just want to note, 70 isn't that
13 old.

14 THE WITNESS: Pardon me?

15 THE COURT: Seventy isn't that old.

16 MR. RIGDON: Your Honor, we would like to call
17 Debra Strickland.

18 Whereupon --

19 DEBRA STRICKLAND, having been first duly sworn
20 to tell the truth, the whole truth, and nothing but
21 the truth, was examined and testified as follows:

22 * * * * *

23 DIRECT EXAMINATION

24 BY MR. RIGDON:

25 Q. Ms. Strickland, could you say and spell your

1 name for the record, please?

2 A. Yes. Debra, D-e-b-r-a, last name Strickland,
3 S-t-r-i-c-k-l-a-n-d.

4 Q. And, Ms. Strickland, you're a member of
5 Pahrump Fair Water, LLC; is that correct?

6 A. That is correct.

7 Q. Okay. And what is your occupation?

8 A. Well-drilling contractor.

9 Q. Okay. And so are you the president of
10 Strickland Construction?

11 A. I am.

12 Q. And Strickland Construction offer
13 well-drilling services?

14 A. Yes.

15 Q. Okay. Are you also a real estate broker?

16 A. I am.

17 Q. Okay. If a person comes to you as a
18 well-drilling contractor and says "I have a lot. I
19 want to drill a domestic well on it," what's the
20 process?

21 A. We start, of course, identifying the parcel,
22 the surrounding wells and septic to make sure we can,
23 in fact, put the placement of the well where it won't
24 endanger the other surrounding wells and septic, and
25 then go through the process with the Division of Water

1 Resources and file the notice of intent. We, of
2 course, contract them just before that with their
3 estimate being signed.

4 Q. And what is a notice of intent?

5 A. It is notifying the Division of Water
6 Resources that we intend to drill a water well on the
7 parcel identified.

8 Q. Okay. And when the state engineer reviews
9 those, in your experience, how long does it take to --
10 to review those notices of intent?

11 A. If I walk them in the door, drive them to
12 Las Vegas office -- because that's who oversees my
13 notice of intents, is the Las Vegas office -- I've had
14 them approved over the counter the same day under
15 circumstances where it's that imperative. And I've
16 seen it take as long -- and I did some calculations
17 over the course -- I brought my well logs, of course,
18 right. Give me a moment.

19 Along the -- over the course of eighteen
20 wells, 7.8 days is what we're averaging, but three is
21 customary.

22 Q. Okay. Prior to the issuance of order 1293 did
23 you contract to drill domestic wells with individuals
24 in Pahrump?

25 A. Yes, I did, sir.

1 Q. And did you submit notices of intent to drill
2 prior to the issuance of the order?

3 A. Yes, I did.

4 Q. Okay. And how far in advance of the order
5 being issued did you submit those notices of intent to
6 drill?

7 A. I had notice of intent sitting in the Division
8 of Water Resources offices, thirteen to be exact, that
9 were sitting on the desk awaiting approval before the
10 order came out and some of those even before the Oz
11 Wichman letter from the water district came out asking
12 Mr. Jason King to take action.

13 Q. Okay. And those were filed before the order
14 was issued.

15 When did you become aware that the order was
16 issued?

17 A. Three-thirty on the nineteenth.

18 Q. Okay. As a well-driller, you didn't receive
19 any prior notice? The state engineer didn't say, oh,
20 here, well drillers, I'm going to tell you ahead of
21 time I'm -- I'm thinking about doing this?

22 A. I was proactive and contacted Jason King
23 directly after being at the water board meeting.
24 Excuse the slang for the name of the water district
25 meeting. And at that time we had the discussion about

1 how I had intents to drill, at his offices in
2 Las Vegas, on how imperative I thought it was that he
3 did not take any action without notifying the public.

4 Q. Okay. So, after the order 1293 was issued
5 what happened with those notices of intent to drill
6 that you filed beforehand?

7 A. Interesting enough, the notice of intents were
8 received, the check was cashed, and I was notified on
9 the twentieth that -- on some of them -- the twentieth
10 that I would not be allowed to drill those wells.

11 Q. Okay. And you had taken deposits from
12 customers for those wells?

13 A. Absolutely.

14 Q. And so did you end up having to refund those
15 deposits?

16 A. Some clients, yes, of course. Other clients
17 have, believe it or not, homes coming out of the
18 ground, that they do not have water wells and are
19 awaiting the decision of this Court.

20 Q. Okay. So, the -- you had contracts in
21 existence.

22 Had you -- you had scheduled the well drillers
23 to be out there to drill these people's wells?

24 A. Absolutely.

25 Q. And then the order came, and you had to

1 rescind those contracts?

2 A. Yes, sir.

3 Q. Okay. And change that scheduling?

4 A. Yes, sir.

5 Q. Okay. So, you had well rig idle at that
6 point?

7 A. And I purchased the -- the equipment necessary
8 to drill those wells. If you were to drive by my yard
9 right now, you'll see casing sitting in the yard to do
10 twenty wells. That's an expense that we've endured.

11 Q. Okay. Now, it's been contended by the state
12 engineer in his briefing that if this stay is issued,
13 eight thousand wells will be drilled before the judge
14 is able to issue his order.

15 As an experienced well driller, is that
16 possible?

17 A. I certainly don't see how. You can look at
18 the Groundwater Management Plan that has been part of
19 this process. The Groundwater Management Plan was
20 enacted by the board of county commissioners last --
21 last session. It showed that on average that we are
22 drilling a hundred and seventy-one wells a year in
23 that Groundwater Management Plan.

24 My husband is the well-drilling entity that
25 goes out and does the wells. He cannot drill over one

1 a day. We have two other active well-drilling
2 contractors in town and one that periodically comes
3 here. So, we're not looking at the capability of
4 being able to drill at that extent by --

5 Q. So, the most you or your competitors can drill
6 is -- each one of you, is one -- one well a day if
7 you're pushing it?

8 A. Yeah. And it takes time to re-tool up, move
9 the equipment, you know, go from site to site. And
10 so, yes, it's -- it's physically not possible unless,
11 of course, you know, somebody -- madman wants to come
12 from out of town and become a well-drilling -- you
13 know, comes from the North and, you know, go at it. I
14 just don't see that happening.

15 THE COURT: We're madmen up North? Is that
16 what you're saying?

17 THE WITNESS: I did, your Honor.

18 THE COURT: Is Carson City --

19 THE WITNESS: Yes, your Honor. You know those
20 guys up North; right?

21 THE COURT: I do, yeah. We think about
22 southern people coming up to Carson City.

23 THE WITNESS: You think the same thing, do
24 you, your Honor?

25 THE COURT: In the reverse, yes.

1 Go ahead.

2 BY MR. RIGDON:

3 Q. So, you mentioned, in addition to doing the
4 well-drilling, Strickland Construction also provides
5 real estate brokerage services; correct?

6 A. Correct, and septic tank, power. We used to
7 build homes. Yes, sir.

8 Q. And do you broker -- as part of your real
9 estate brokerage, do you help people broker water
10 rights transactions?

11 A. I do.

12 Q. Okay. And so you have an understanding of
13 what the value of water rights is, based upon those
14 transactions?

15 A. Yes. It's been fluctuating quite a bit with
16 these changes, of course.

17 Q. Okay. So, prior to order 1293 being issued,
18 on average what would you say is a range of -- of
19 water rights prices for -- for water per acre-foot in
20 Pahrump?

21 A. I -- I kept logs of that, too, because I would
22 get sellers that would call and say, you know, "I
23 would like to market my water. I'm not going to be
24 using it anymore. Would you find me a buyer?" And
25 I've had sellers that were willing to -- to sell for

1 as little as \$2500 an acre-foot.

2 The day before the order went into place there
3 was a block of water that I could have got my hands on
4 for thirty-two fifty an acre-foot. There were
5 70 acre-feet. And the next day they sold for
6 forty-seven fifty an acre-foot. And now I'm seeing --
7 I'm doing real transactions at 7500 and \$10,000 an
8 acre-foot. And that's a hardship for our community
9 with the current order in place.

10 Q. So, in addition to dropping the -- the -- as
11 we heard earlier, the effect that this order would
12 have on the real estate value of the property that
13 doesn't have a domestic well, the price to go comply
14 with this order has skyrocketed since the order came
15 out?

16 A. Yes, sir. And if we don't get a stay today,
17 it's going to go even further.

18 Q. Okay.

19 A. In my opinion. Excuse me.

20 Q. Did you -- after the order came out did you
21 have any contact with the state engineer's office
22 regarding whether certain properties had already had
23 water rights relinquished for them and therefore were
24 not affected by the order and whether properties had
25 not had water rights relinquished before and therefore

1 were -- were affected by the order?

2 A. That was probably one of the hardest things
3 that we've gone through with the Division of Water
4 Resources. It was hard for them, too.

5 In the original Oz Wichman letter the water
6 board letter said there would be 8500 lots that would
7 be affected by this order. After all of the work that
8 Levi Kreiter (phonetic) had done with Division of
9 Water Resources in Carson City, it was indeed found
10 that only 3700 parcels were affected.

11 And so when you take into consideration that
12 and 2 acre-feet per parcel, are we really making a
13 drop in the bucket, if you don't mind the analogy.

14 Q. Well, let me get back to my line of
15 questioning a little bit here.

16 So, you did have contact with him regarding
17 which properties were eligible or not?

18 A. Well, yes. At first we really didn't know.
19 And I will say that the Division of Water Resources
20 didn't know. They wrote order 1293 without actually
21 knowing which properties had water allocated at the
22 time of division. So, let's say I come to -- I want
23 to do a parceling, a subdivision, a parceling. Those
24 parcels -- some of those parcels out there did not
25 have water allocated at the time of parceling.

1 And the water -- the Division of Water
2 Resources did not even know for sure what parcels were
3 and through this process have now discovered months
4 later -- what are we, into April? Last month the map
5 came up that defined which parcels had water allocated
6 so I can drill without going to the division and
7 asking each time: These parcels are okay. These are
8 not.

9 Q. So, during the thirty-day period the people
10 had to appeal this order, it's your testimony that you
11 contacted the state engineer and he was not able to
12 accurately tell people whether this order would affect
13 them or not with respect to whether they had a right
14 to appeal?

15 A. We haven't talked about this, but there are
16 actually three separate instances where a mistake was
17 made and the person was told no, for us to turn around
18 and have to rescind that, because they were able to
19 drill.

20 Q. Okay.

21 MR. RIGDON: No further questions, your Honor.

22 THE COURT: Mr. Stockton?

23 MR. STOCKTON: Yes, I have a few.

24

25

CROSS-EXAMINATION

BY MR. STOCKTON:

Q. So, Ms. Strickland, you're aware of the prior appropriation system as a well driller; right?

A. Correct.

Q. Okay. So, you understand the priority system?

A. Yes.

Q. So, what priority would a well drill that you drill in the future have?

A. The priority system is based on if we go into a critical management -- if we are driven into a critical management area by the state engineer. And so that in -- in fact -- yes. I'm aware of it.

What other question might you have?

Q. Okay. So, if a junior water right is interfering with a senior water right, how -- what happens to the junior water right?

MR. TAGGART: Objection, calls for a legal conclusion.

THE COURT: Overruled.

Go ahead and answer the question.

THE WITNESS: At -- what date and time is that going to happen? The question is arbitrary.

BY MR. STOCKTON:

Q. Okay. So -- so, you don't want to answer the

1 question?

2 MR. TAGGART: Objection. It's an incomplete
3 hypothetical. You just can't answer the question if
4 it's --

5 THE COURT: I understand the point you're
6 making. Just move on.

7 THE WITNESS: I don't want to be
8 disrespectful. I simply cannot imagine what the
9 future holds with a question like that.

10 BY MR. STOCKTON:

11 Q. All right. So, let me ask you this question,
12 then: If you drill a junior well, it's interfering
13 with senior rights and it's ordered to be plugged --
14 let's assume all those facts are correct -- are you as
15 a well driller going to come in and plug that well for
16 free?

17 A. Of course not.

18 Q. Are you going to guarantee there is water in
19 that well for those people?

20 A. The state says I do not have to guarantee,
21 even at the time of drilling, water quantity or
22 quality. What more would you ask me to do, sir?

23 Q. Okay. All right. When somebody files a
24 parcel map, who -- do you know who they relinquish or
25 they -- what's the term you used for when they

1 dedicate water to the lot?

2 A. The relinquishment of water? The dedication
3 of water?

4 Q. For the parceling.

5 A. With a parceling now we have a planning and
6 zoning department that make sure that those criteria
7 are met prior to parceling. But we had subsequent
8 parceling that was going on in the valley, and at that
9 time water was not being allocated to those parcels.

10 Q. Okay. And when you say we --

11 A. That would be the -- Nye County.

12 Q. Nye County. Okay. All right. So...

13 A. When, in fact, the -- excuse me.

14 Q. So, do you recall testifying in front of the
15 Nye County -- I'm not sure who it was in front of, but
16 do you recall testifying that half an acre-foot was
17 not enough for a domestic well?

18 A. If you can't recall, you may want to be more
19 specific to me, please. You're saying I said
20 something.

21 Can you be more specific time line, the when
22 and where?

23 MR. STOCKTON: All right. Your Honor, I'm
24 looking at page 83 of the presentation. And I'll make
25 an offer of proof that the state engineer does keep

1 track of the articles concerning water in the Pahrump
2 Valley Times. So, all these articles are in the state
3 engineer's files.

4 THE WITNESS: I don't --

5 MR. STOCKTON: But part of the record that was
6 be -- I'm sorry, just a minute -- was before the state
7 engineer when he made his decision.

8 So, this is from July -- the article anyway is
9 from July 30, 2014.

10 MR. TAGGART: I'm just going to lodge an
11 objection that in the past the state engineer's office
12 has strenuously objected to our use of newspaper
13 articles. But if they're conceding now that newspaper
14 articles are part of their files and they have all of
15 these in their records, then we don't object to them,
16 to the use of newspaper articles by all parties.

17 MR. STOCKTON: And I'm not going to make a
18 blanket waiver, your Honor, but these articles are in
19 the files of the state engineer.

20 THE COURT: Go ahead.

21 BY MR. STOCKTON:

22 Q. Okay. So, do you recall this testimony?

23 A. I can't even read it, sir, and neither can the
24 audience.

25 Q. Okay. All right. So, in there it quotes you

1 as saying that -- that metered and those new well
2 owners limited to the half an acre-foot of water per
3 year equals 400 and 50 gallons per day; Strickland
4 said that shouldn't create a hardship in most cases.

5 Do you remember that?

6 A. I do.

7 Q. Do you remember -- there is talking about in
8 this article that you were testifying about a well
9 that had run dry and you had to re-drill it.

10 Do you recall that?

11 A. No. I don't remember being asked anything
12 about a water well running dry in a -- that apparently
13 is a board of county commissioners setting.

14 Q. Do water wells run dry?

15 A. Yes, they do.

16 Q. How many do you feel -- do you -- have you had
17 to re-drill because they have run dry?

18 A. Three is what I recall.

19 Q. Three? Okay. All right.

20 THE COURT: What part of the valley?

21 THE WITNESS: It's quite interesting, your
22 Honor. One of them was near a fissure at Pahrump
23 Valley and Thousandaire. And so when --

24 THE COURT: I'm not familiar with --

25 THE WITNESS: Yeah. It was on the extreme --

1 near BLM. I mean, the property almost touched BLM,
2 near the south -- the extreme southwest.

3 And the water just moved away from the well,
4 is the best way to interpret it. The well itself was
5 a hundred and 40 foot deep. We drilled it 200 foot.
6 The water table then re-acclimated itself back up to,
7 I think, 80 foot, but I would love to have that
8 well-drilling log in front of me.

9 THE COURT: What about the other two?

10 THE WITNESS: One -- one of them was roots in
11 the -- tamarack roots that had gotten inside of the
12 well itself. But that one was unique. And we drilled
13 it and then re-cased it with PVCs to enable the roots
14 not to break through.

15 And I -- my husband is the well-drilling
16 contractor, and I help with the well reports. But
17 those are readily the two I can think of, your Honor.

18 THE COURT: Go ahead, Mr. Stockton.

19 BY MR. STOCKTON:

20 Q. All right. Ms. Strickland, do you own water
21 rights?

22 A. Yes, sir.

23 Q. What water rights do you own?

24 A. I own water rights that my family had, and my
25 mother left me 15 acre-feet when she left the valley

1 in 2005.

2 Q. Do you know what priority those water rights
3 have?

4 A. They're pretty good priority. I brought my
5 groundwater manage -- excuse me, my pumpage inventory
6 book. And the priority is quite old on those. And
7 then Larry Strickland owns some that are newer
8 priority because of their date of proof.

9 Q. Okay. So, if those rights are infringed by
10 junior rights, are you prepared to just let those go?

11 A. Absolutely, if that's what needs to happen to
12 balance the system. We all need to be thinking in
13 that direction. But this particular course of action
14 you're going in now is not correct.

15 Q. Do you know that water levels are dropping in
16 the valley?

17 A. I would have loved for your graphs to show
18 something beyond 2010.

19 Q. Okay. Let me go to those graphs, then. So,
20 we're looking at page 37 of the -- Exhibit A. So,
21 this is a graph that actually goes up to the water
22 year 2017.

23 A. I don't see that, sir.

24 Q. Well, can you see --

25 A. Is there one that's 2015 there?

1 Q. I'm sorry?

2 A. This one you're pointing out here is 2015? Is
3 that what you're saying?

4 Q. Well, the 2015 is the last number, but the
5 line extends beyond that, doesn't it?

6 A. Is that the only graph you have that's not --
7 that's younger than 2010?

8 Q. They're all 2017.

9 A. Well, how do you see that? I don't see that
10 as a -- there is a '15 on that one. The one you
11 showed before was 2010.

12 Q. I'll make an offer of proof the line extends
13 beyond 2015.

14 MR. TAGGART: Objection. Just for clarity,
15 there is multiple hydrographs in the presentation.
16 Some may have different times on the time line. So,
17 just to make the record clear, some of the hydrographs
18 go to 2010. Some of them go to 2015. I think that's
19 the point that's being debated.

20 MR. STOCKTON: It's not correct. Everything I
21 have in this presentation goes to 2017. The data
22 behind these lines includes the pumpage for 2017,
23 which is 16,416 acres.

24 MR. RIGDON: Is counsel testifying as to
25 what -- what this says? If he wants to put an expert

1 on to testify --

2 MR. STOCKTON: -- making an offer of proof.

3 MR. TAGGART: It says 2010 on it.

4 MR. RIGDON: It says 2010.

5 MR. TAGGART: So...

6 MR. STOCKTON: That -- that's because the
7 other slides are in five-year increments. This is in
8 ten-year increments. And the slide goes beyond.

9 I don't want to get in a fight over this. The
10 problem is, these slides are showing declining waters.
11 They're -- Ms. Strickland is testifying everything is
12 fine. And that's --

13 MR. TAGGART: Objection, misstates the
14 testimony.

15 MR. RIGDON: Exactly.

16 THE COURT: Go ahead and -- do you have any
17 more questions of her?

18 BY MR. STOCKTON:

19 Q. Have you sold any of your water rights during
20 the pendency of this order?

21 A. I sold 5 acre-feet to someone that needed them
22 for medical marijuana. It's not related to domestic
23 water. I have water rights that are waiting to see
24 how this comes out that are other people's. I -- not
25 looking forward to seeing the water-right mark go up.

1 MR. STOCKTON: No further questions.

2 MR. RIGDON: No questions, your Honor.

3 THE COURT: Okay. You can step down, ma'am.

4 THE WITNESS: Thank you.

5 THE COURT: Next witness?

6 MR. RIGDON: Next witness is Michael Lach.

7 Whereupon --

8 MICHAEL LACH, having been first duly sworn to
9 tell the truth, the whole truth, and nothing but the
10 truth, was examined and testified as follows:

11 * * * * *

12 DIRECT EXAMINATION

13 BY MR. RIGDON:

14 Q. Mr. Lach, would you also say your name and
15 spell it for the court reporter?

16 A. Michael Lach, L-a-c-h.

17 Q. Mr. Lach, are you a member of Pahrump Fair
18 Water, LLC?

19 A. I am.

20 Q. Okay. And do you own property in Pahrump?

21 A. I do.

22 Q. Do you own multiple parcels?

23 A. I do.

24 Q. Okay. When did you first learn about?
25 order 1293?

1 A. At the meet -- at the water board meeting
2 where --

3 Q. You learned about order 1293 at the water
4 board meeting?

5 A. No. No. Well, when Jason signed it.

6 Q. Okay. So, you didn't receive any notice from
7 the state department of water resources, as a property
8 owner that might be affected about this -- you didn't
9 receive any notice from them prior to the issuance of
10 the order that said "We're thinking about doing this
11 order. We want comments."

12 A. No.

13 Q. You did know there was a water issue in
14 Pahrump; right?

15 A. I did.

16 Q. Okay. Aren't you, in fact, a former member of
17 the Nye County Water District board?

18 A. I am.

19 Q. And how long did you serve on that board?

20 A. Give or take, two years.

21 Q. And during that time did you get a pretty good
22 understanding of what the water issue is in Pahrump?

23 A. I did.

24 Q. Okay. And in your words, what is the water
25 issue?

1 A. In my words, we have a basin that has a lot of
2 over appropriated paper, that gets blown out of
3 proportion in all the charts and graphs to scare
4 people, and that we are not over-pumping our basin
5 currently. I don't know how to base the recharge of
6 20,000 acre-feet -- whether it's correct or not. But
7 we're not close to that yet, so to place an order like
8 this as if the sky is falling.

9 Q. When you said paper water, what do you mean by
10 that?

11 A. Well, there is certificated water, and there
12 is permanent water. And there is water out there, but
13 the utility, for example, when they show
14 80,000 acre-feet of water permitted out there -- the
15 utility uses on average -- each utility is slightly
16 different, but I can go high and save 300 gallons a
17 day, although I have seen them as low as 200 and
18 20 gallons a day.

19 So, that parcel was -- was given an acre-foot
20 or a thousand gallons a day to create that
21 subdivision. Yet, they're only using 200 and
22 20 gallons a day. They keep that number out there as
23 a -- when I say "they", I'm saying in -- in what I saw
24 them -- their PowerPoint. They leave those big
25 numbers out there, and they don't show what's the

1 actual usage in Pahrump.

2 Q. So, when you say paper water, you're referring
3 to water rights that are issued but not used?

4 A. Yes, that are either being held by utilities
5 that are -- you know, some are being used but not
6 being used at the level that the number on the piece
7 of paper shows.

8 Q. Okay. And after order 1293 was issued did you
9 have any contact with the state department of water
10 resources regarding trying to find out whether
11 properties that you owned were eligible and had
12 previously relinquished water rights or not?

13 A. I did.

14 Q. And did you later find out that the
15 information the state engineer office gave you was
16 correct?

17 A. Was...

18 Q. Did you -- was incorrect?

19 A. I did.

20 Q. And what did they tell you was the reason for
21 that mistake?

22 A. It was a mistake. They just -- I mean, they
23 didn't have all their information at the time, and so
24 they apologized. They said they made a mistake.

25 Q. What did they tell you -- when you first

1 inquired about a particular property, what did they
2 tell you regarding whether it was eligible or not
3 eligible?

4 A. They said it wasn't eligible.

5 Q. Okay. So, they said it wasn't eligible. So,
6 you would have been harmed by this order and had
7 standing to appeal on that property?

8 A. I actually had somebody looking at that
9 particular property at the time and had to tell them
10 that, "It looks as if you're going to have to purchase
11 water," at which time they said, "Well, then, I'm
12 going to go buy something else."

13 Q. And when did you find out that the information
14 they gave you on that was incorrect?

15 A. When I was speaking to Debbie Strickland on
16 the phone and she mentioned to me she was drilling a
17 well on that street, our very neighboring street, and
18 told me -- so, I didn't find out from the state. They
19 never called me back to tell me, hey, by the way, I
20 gave you incorrect information. I had to hear it
21 thirdhand from Debbie, and then I had to contact the
22 state.

23 Q. Okay. Mr. Lach, what I asked was when, but
24 roughly what time frame? Was it January? February?

25 A. It was -- month and a half after. I don't

1 know the exact date.

2 Q. So, it was after the thirty-day appeal period
3 would have passed?

4 A. Yes.

5 Q. And then you find out that, lo and behold, the
6 water -- that the -- that particular property water
7 had been relinquished?

8 A. That is correct.

9 Q. So, that property is not affected by
10 order 1293?

11 A. That is correct.

12 Q. Okay. Let me ask you, do you think this order
13 solves anything with regards to the problem?

14 A. From -- from my -- from a history on the water
15 board -- and I will -- I will say this: I consider
16 Jason King a friend. Okay? I think -- I dealt with
17 him a lot during those two years, trying to solve this
18 problem. I probably spent four hundred hours of my
19 life reading backup and other things in relation to
20 Pahrump water.

21 And you're asking me if I think it solves a
22 problem. I think it solves a paper problem of money
23 transferring hands. But to answer your question, no,
24 it doesn't save a drop of water. Because tomorrow
25 four thousand people could run out and buy

1 8,000 acre-feet of water, and now all those wells can
2 be drilled. So, everything that's being argued
3 becomes irrelevant. I mean, if -- if the argument is
4 that the well shouldn't be drilled, then why would
5 buying extra paper change that?

6 Q. Okay. And --

7 (Applause from the audience.)

8 BY MR. RIGDON:

9 Q. Okay. With respect to whether this order
10 solves the problem or not, we've heard statements
11 being made in this court that -- that the -- that
12 restricting the drilling -- that this policy
13 restricting the drilling of these wells -- that if
14 it's stayed, that those wells will be drilled and be
15 junior in priority.

16 And are you familiar with the priority system?

17 A. I am. And I'm sure I'll be asked that by the
18 other counsel. So, I can answer his question now. I
19 am familiar with it.

20 Q. Okay.

21 A. But let me give you an example.

22 Q. Okay.

23 A. I know someone who had to go out -- they
24 needed to build their house. So, they went, and they
25 purchased water rights. The state doesn't care what

1 date those water rights are. They don't care if
2 they're junior -- junior or senior. So, talking about
3 junior or senior is irrelevant, because they're saying
4 it goes by the date it's drilled.

5 So, again, how does this order solve that
6 problem? They're actually making people pay money to
7 go drill a well that they're saying is going to fall
8 into priority and that they can count.

9 Q. So, if somebody follows the direction of the
10 order, goes and buys water rights with a senior
11 priority, relinquish it under the state engineer, and
12 drills a domestic well, that domestic well has a
13 junior priority and will still be cut off during
14 curtailment?

15 A. That's what the gentleman said in his opening
16 statement. He said that it's the date the well is
17 drilled, is your priority date. So, again, anyone
18 who's going to drill from today forward would be
19 junior.

20 Q. Okay. Why do you think the order was adopted?

21 A. Out of frustration.

22 Q. Okay.

23 A. You know, when -- when --

24 Q. Why do you think this particular path of
25 restricting drilling of new domestic wells was -- was

1 taken by the state engineer?

2 A. Well, the state doesn't like things they can't
3 control. It's hard to control domestic wells. So,
4 they choose municipal systems. Pahrump has the
5 largest population of domestic wells out there in the
6 state. So, we're an anomaly from that standpoint.
7 But that doesn't -- so, they -- why did they choose
8 this? Again, my answer would be, out of frustration
9 that Mr. King attempted to do a conservation well a
10 couple years ago, and then he got shot down in the
11 legislature.

12 I personally agree with it, because I think
13 that everybody should -- just like Ms. Strickland
14 said, everybody should be part of the conservation.
15 Everybody should chip in.

16 And so these people who bought this land to
17 build their house on -- I don't care if they bought it
18 twenty years ago. And I don't care if they bought it
19 six months ago. They purchased it to someday move out
20 here. And all they want to do is put a house and use
21 three, 400 gallons of water. That three or
22 400 gallons of water is not going to affect this
23 table.

24 Q. So, if the order is stayed, what effect --
25 what impact will that have on you?

1 A. Well, if the order is stayed, much like Norma
2 Jean said, things in a sense will go back. But we're
3 still going to have things in the newspaper coming out
4 every day as to whether the order stay means this
5 long. You know, the order staying will allow the
6 courts to determine if this really solves the problem,
7 you know, further on. And I believe that they will
8 see it doesn't save a drop of water. It -- all it
9 does is make people transfer paper for money. It's
10 not saving water. It's not preventing that person
11 from putting the well in that yard.

12 Q. And it's not just you that owns property;
13 right? It's many --

14 A. No. I represent my father who's 76 years old
15 and, you know, is looking to possibly move out here.
16 I represent my 13-year-old son who owns a property in
17 his college education fund.

18 And so, yes, I mean, I -- it affects a lot of
19 people.

20 Q. And the property that your son has in his
21 college education fund, is that one of the properties
22 that's affected by the order?

23 A. Actually my daughter had one that was affected
24 by the order.

25 Q. And that's in her college education fund?

1 A. That is correct.

2 Q. And so the -- if this order affects the value
3 of that property, it's affecting your daughter's
4 college education fund?

5 A. On that one, that is correct. But that was
6 the one that the state made the mistake on.

7 Q. Okay.

8 A. So, she got lucky. I'll use the word "lucky."
9 Because that's all it is. It's just -- it's a
10 crapshoot.

11 MR. RIGDON: Okay. No further questions, your
12 Honor.

13 THE COURT: Mr. Stockton?

14 MR. STOCKTON: Thank you, your Honor.

15

16 CROSS-EXAMINATION

17 BY MR. STOCKTON:

18 Q. Mr. Lach, what dates were you on the Nye
19 County water board?

20 A. I couldn't tell you.

21 Q. You don't recall?

22 A. No. It would be -- it would be approximately
23 '13 to '15, would be my guess.

24 Q. Okay.

25 A. And that's a guess, because I'm really poor

1 with dates.

2 Q. All right. So, you testified that the
3 municipalities have permits and certificates but they
4 don't pump all of that water.

5 Could they pump their senior water rights if
6 they wanted to?

7 MR. TAGGART: Objection, presumes facts not in
8 evidence, that the municipalities have senior rights.

9 MR. STOCKTON: Your Honor, the -- okay. Any
10 rights?

11 THE WITNESS: Well, let me answer your
12 question.

13 If you were going to do a subdivision now, you
14 have to dedicate, over dedicate three times what you
15 plan on using. So, no, you can't pump that extra
16 three times.

17 What the state needs to do is take that extra
18 water away. That's what they need to do. That will
19 solve some of the problem.

20 BY MR. STOCKTON:

21 Q. Is that -- so -- so, in your experience on the
22 water board, are you familiar with the concept that
23 the state engineer is required to put extra
24 restrictions on water use in subdivisions that he
25 can't place on domestic wells?

1 A. I am.

2 Q. Is there any provision in the law that allows
3 a state engineer to restrict a domestic well less than
4 2 acre-feet?

5 A. None that I know of.

6 Q. Okay.

7 A. With that being said, the state engineer has
8 furnished us with documents that show that they use
9 less than 500 gallons a day.

10 Q. But they can use up to the 2 acre-feet
11 which --

12 A. Well, we're going to go with logic of what has
13 been proposed to us, because that's what pushed us to
14 where we are now. So, let's look at that number.
15 Let's not go to something -- a pie in the sky and
16 think that everybody is going to start pumping for no
17 apparent reason. They're going to --

18 MR. STOCKTON: Your Honor, objection. This is
19 nonresponsive.

20 THE WITNESS: You asked me a question. I'm
21 just answering it.

22 BY MR. STOCKTON:

23 Q. You're not answering the question asked. I
24 said --

25 MR. STOCKTON: Sorry, your Honor.

1 THE COURT: Go ahead. Go ahead. Let him...

2 MR. STOCKTON: Got it.

3 THE COURT: I'm hearing evidence today. So...

4 THE WITNESS: Well, I mean, you're assuming
5 that people are going to waste electricity for the
6 purpose of wasting water, and that's a really far
7 reach.

8 BY MR. STOCKTON:

9 Q. So, isn't it true that waste of water is
10 illegal, under the water law?

11 A. You know, that's a great question, because
12 proof of beneficial use has not been followed in this
13 valley. Okay? So, people have been able to hold on
14 to their water rights far beyond they should when they
15 haven't proved the beneficial use.

16 In those wells that are dropping, go look in
17 some of those areas, because somebody is proving up
18 700 acre-feet of valley of them. And pumping and
19 pumping and pumping -- it's not the little, domestic
20 guy next door --

21 MR. STOCKTON: Your Honor, I'm objecting.
22 This is beyond the scope of the question.

23 THE WITNESS: You just asked me questions, and
24 I'm answering.

25 THE COURT: Well, that's -- that's good

1 enough.

2 MR. STOCKTON: Okay. All right. No further
3 questions.

4 MR. RIGDON: Redirect.

5 THE COURT: Let's get all of his opinions.

6 THE WITNESS: Hey, I spent a lot of time
7 learning these things.

8 THE COURT: You think there is a problem with
9 water in Pahrump?

10 THE WITNESS: I think that there should be
11 the -- okay. I think there is the same problem there
12 was in Vegas thirty years ago when they said they ran
13 out of water. And you have to go about it in a very
14 equitable way that everybody conserves. You don't
15 just wave the wand --

16 THE COURT: Who's responsible for addressing
17 that problem?

18 THE WITNESS: The county and the -- I mean,
19 the state could have came in and done a critical
20 management area ten years ago. And there is a number
21 of reasons that they didn't.

22 THE COURT: I don't think Mr. King was the
23 state engineer ten years ago, because I've been
24 through five or six of them.

25 THE WITNESS: No. And I'm just -- you're

1 asking me a question. There is not a -- the sky is
2 not falling right now. There is not a problem. And
3 this doesn't -- this doesn't save a drop of water.

4 THE COURT: But he decided it was, and he's
5 the state --

6 THE WITNESS: He got frustrated that the
7 legislature wouldn't hear but very -- by the way, what
8 he approved, what he proposed to the legislature was
9 very logical. And it could be done in this county.
10 But it could be done without it being a NRS. It could
11 be done by choice of the county. The county could
12 choose to adopt it as an option.

13 THE COURT: I would take judicial notice that
14 lots of people are frustrated with the Nevada
15 legislature.

16

17 REDIRECT EXAMINATION

18 BY MR. RIGDON:

19 Q. Mr. Lach, are you familiar with the -- or
20 generally familiar with the Nye County Water Resources
21 Plan Update that the state engineer cited to in the
22 order?

23 A. I am.

24 Q. Okay. I'm going to show you --

25 MR. RIGDON: If I may, your Honor.

1 BY MR. RIGDON:

2 Q. I'm going to show you a page --

3 THE COURT: Okay.

4 BY MR. RIGDON:

5 Q. Page 6 dash 15 from the -- with -- and I want
6 you to look at that real quick.

7 THE COURT: Is this something I have or that's
8 been put in the record?

9 MR. RIGDON: This is something that's on -- an
10 exhibit to one of the motions. So, it's Exhibit --
11 specifically it's Exhibit 2 to our motion -- our
12 opposition -- our motion for a stay.

13 THE COURT: And it's somewhere in that?
14 Because I know there was multiple pages in the --
15 there were six exhibits to one and...

16 MR. RIGDON: There was five exhibits to our
17 initial motion for opposition.

18 THE COURT: Okay. And this is an exhibit,
19 too? This is Exhibit --

20 MR. RIGDON: This is Exhibit 2 of that, yes.
21 Correct.

22 BY MR. RIGDON:

23 Q. Up at the top there is a table that shows
24 the --

25 MR. STOCKTON: Your Honor, I object. There is

1 no way for me to follow along, because I don't have a
2 copy of that particular document.

3 THE WITNESS: I just looked at it. I'm good
4 with numbers, just not dates.

5 THE COURT: Let's go ahead and give --

6 MR. RIGDON: I'll be happy to show it to --

7 THE COURT: And then if we need to -- I don't
8 know if this gentleman wants to sit around until the
9 end of this here. You're going to take lunch after.

10 MR. RIGDON: This will be real quick, your
11 Honor.

12 THE COURT: Go ahead.

13 MR. RIGDON: I have a real quick question.

14 BY MR. RIGDON:

15 Q. So, when you looked at that -- that table, you
16 talked about paper rights versus -- versus actually
17 used rights.

18 What did it say was the number of
19 certificated -- the acre-feet that is actually
20 certificated, meaning that the -- the owner of that
21 permit has proven beneficial use by using water?

22 A. I want to say it was forty-something. But I'm
23 not -- what --

24 Q. Could I have --

25 THE COURT: Just read the number.

1 BY MR. RIGDON:

2 Q. Okay. Well, it says groundwater 16,300 and --
3 300 and 67 acre-feet of certificated water rights.

4 Would that be...

5 A. You know, I -- I -- I couldn't answer --

6 Q. But that's what it says; right?

7 A. Yeah. That's what it says.

8 Q. Okay. And that the permits that haven't been
9 certificated haven't shown beneficial use is 36,500
10 and 33 acre-feet; correct?

11 A. I remember it being a lot more permitted than
12 certificated.

13 Q. Okay. So, the certificated groundwater, what
14 people have proven beneficial use for, is only 16,300
15 and 67 acre-feet of water, according to this document.

16 A. And where did that thing come from, the
17 Groundwater Management Plan?

18 Q. The Nye County Water Resources Plan Update.

19 A. Yeah. That's what the document says.

20 MR. RIGDON: Okay. That's all.

21 MR. STOCKTON: I have one follow-up question.

22 THE COURT: Go ahead.

23 MR. STOCKTON: Thank you.

24

25

RECROSS-EXAMINATION

BY MR. STOCKTON:

Q. So, is it your testimony today that water that's subject to a permit cannot be pumped?

A. No.

Q. That's not your testimony today. Okay. So -- so, the certificated and permitted water rights can be pumped; isn't that correct?

A. Well, it's -- it's going to be up to the state whether they allow the pumping if it's not certificated, if it's been proved up. I'm not sure -- you could ask it more specific.

Q. Okay. So, let me ask it this way: If you have a permit and you don't pump any water, how can you make your proof of beneficial use?

A. You can't. And they should be taken away, but that hasn't happened in the past.

Q. Okay.

A. They get moved around.

MR. STOCKTON: That's all my question, your Honor.

THE COURT: Okay. We're going to take our lunch break. We'll come back at 1:30. We're in recess.

(Recess taken.)

1 THE COURT: Okay. Now that you're all fed,
2 I'll expect you to be less unruly.

3 Mr. Rigdon, your next witness?

4 MR. RIGDON: Okay. Thank you, your Honor. We
5 would like to call Steve Peterson.

6 THE MARSHALL: Please raise your right hand
7 and face the clerk.

8 Whereupon --

9 STEVEN PETERSON, having been first duly sworn
10 to tell the truth, the whole truth, and nothing but
11 the truth, was examined and testified as follows:

12 * * * * *

13 DIRECT EXAMINATION

14 BY MR. RIGDON:

15 Q. Mr. Peterson, could you say and spell your
16 name for the court reporter?

17 A. Steven, S-t-e-v-e-n, Peterson,
18 P-e-t-e-r-s-o-n.

19 Q. Mr. Peterson, are you a member of Pahrump Fair
20 Water, LLC?

21 A. Yes, I am.

22 Q. And you own property in Pahrump?

23 A. I do.

24 Q. Is it a vacant parcel of land?

25 A. It is vacant.

1 Q. Okay. Is it a single parcel?

2 A. It's a single parcel.

3 Q. Okay. And when did you purchase your
4 property?

5 A. Roughly about a year ago.

6 Q. Okay. And why did you purchase your property?

7 A. We have sold our home, in looking for a
8 retirement place. So, we basically are getting ready
9 to build our retirement home here.

10 Q. Okay. So, you -- where was your other home
11 located?

12 A. In Washington State.

13 Q. Okay. So, you were out of state. Your sold
14 your home --

15 A. Yeah.

16 Q. -- with the intent of buying a lot and
17 retiring here?

18 A. That's correct. We're living in our
19 fifth-wheel trailer at this point.

20 Q. Okay. When you bought the lot here, did you
21 do any due diligence with respect to water
22 availability for the lot?

23 A. Yes. We have a corner lot. And when we -- we
24 initially purchased it, basically what -- you have to
25 have 1 acre in order to drill for a well and have

1 septic. And we checked the county office here in
2 Pahrump, and they basically identified that the -- the
3 lot was .82 of an acre. And we went back and forth
4 through the Realtor and to the county. The Realtor is
5 telling us that it was -- that was not correct.

6 So, we finally went back and got the correct
7 evaluation and basically the -- the -- because it's a
8 corner lot, the value or the -- the property lines go
9 out to the middle of the street on both corners, which
10 make it 1.02 acre. So, that allows us to drill a well
11 and put -- put a septic in. And it also at that
12 time -- we checked to see if there was any issues
13 about drilling the well with the department of water
14 resources.

15 Q. Okay. And what were you told by the
16 department of water resources?

17 A. We were okay. Everything was fine.

18 Q. Okay. When did you find out about order 1293?

19 A. It was -- we were told by a friend who happen
20 to live here from -- there was an article in the
21 valley -- or the Pahrump Valley Times. And we looked
22 at that and then immediately looked at what -- what
23 that said. So -- but we were already in the process
24 of designing the home and -- and moving forward to
25 start building.

1 Q. Okay. That article -- would that article come
2 out after the order was issued?

3 A. Yes. It was sometime in January. I don't
4 remember the correct date.

5 Q. So, you had checked with the department of
6 water resources within the last year; they told you
7 you could have a well.

8 A. Yes.

9 Q. You had no notice -- they had given you no
10 notice that they might be thinking about restricting
11 the drilling of domestic wells; correct?

12 A. None whatsoever, period.

13 Q. Okay. Where do you live right now? If you
14 sold your home up in the northwest, where do you live
15 right now?

16 A. We are mobile. We have a fifth-wheel trailer.
17 So, we are -- currently we are in -- in Utah. So,
18 I'll be going back to Utah. But we'll be heading back
19 to Washington for a -- for a few months, and then
20 we're coming back, in which the plan is to start
21 building the first of October.

22 We're still working through Civilwise
23 engineering, which is right across the street, that's
24 doing -- had did the soil report, the protest for
25 the -- the septic. Because we have a specific

1 requirement for the garage, we -- we needed to put a
2 structured, engineered wall. So, they're doing that
3 as well as the Morales Construction is doing the --
4 the architectural drawings. And all of that's pretty
5 much done.

6 The last item is the -- the -- Desert Trusses
7 {sic} will be providing the trusses. So, I've got
8 their quote that I received yesterday. So, we're
9 still moving forward.

10 Q. But you're living in a fifth-wheel RV while
11 you wait to figure out the -- whether we're going to
12 stay this order or not?

13 A. We are living in a fifth-wheel at this point.

14 Q. Okay. All right. So, you mentioned all this
15 stuff, the Civilwise engineering.

16 How much money have you spent in preparing for
17 construction of this -- this lot?

18 A. I would -- it's several thousand dollars.
19 The -- exactly it's probably closer to 9500 plus.

20 Q. Okay. So, if you're unable to get water, all
21 that -- all that goes out the window?

22 A. Yes.

23 MR. RIGDON: Okay. All right. I think that's
24 all the questions I have for you.

25 THE WITNESS: Okay.

1 MR. RIGDON: Thank you.

2 THE COURT: Mr. Stockton, cross-examination?

3 MR. STOCKTON: Just -- just one question, very
4 simple.

5

6 CROSS-EXAMINATION

7 BY MR. STOCKTON:

8 Q. Can you tell me when you contacted the
9 division of water resources?

10 A. I have a couple of e-mails to it, but the --
11 and I forget the gentleman's name, but it was probably
12 around the end of January or the first part of
13 February.

14 Q. Of --

15 A. Of --

16 Q. -- this year?

17 A. -- of last year.

18 Q. Last year. So, 2017?

19 A. Right.

20 MR. STOCKTON: Thank you. No further
21 questions.

22 THE WITNESS: All right.

23 THE COURT: Thank you, sir.

24 THE WITNESS: Okay.

25 MR. RIGDON: All right. Your Honor, we would

1 like to call Ted Off.

2 Whereupon --

3 TED OFF, having been first duly sworn to tell
4 the truth, the whole truth, and nothing but the truth,
5 was examined and testified as follows:

6 * * * * *

7 DIRECT EXAMINATION

8 BY MR. RIGDON:

9 Q. Mr. Off, could you please say and spell your
10 name for the court reporter?

11 A. Yes. It's Ted, T-e-d, Off, O-f-f, just like
12 off and on.

13 Q. Okay. Mr. Off, are you a member of Pahrump
14 Fair Water --

15 A. Yes.

16 Q. -- LLC? Okay. And do you own property in
17 Pahrump?

18 A. Yes.

19 Q. All right. Do you have -- own more than one
20 lot?

21 A. Yes.

22 Q. Okay. How many lots do you own?

23 A. Three.

24 Q. Three. Okay. Are they immediately adjacent
25 to each other?

1 A. Yes.

2 Q. And why did you purchase those lots?

3 A. For a personal home, a personal home for
4 myself for retirement. I'm getting ready to retire.
5 I'm retired twenty-six years of military, and I'm
6 getting ready to retire from the federal civil
7 service. I'm a disabled veteran.

8 Q. Okay. Have you -- what type of due diligence
9 did you do, before you bought the lot, with respect to
10 finding out if you could have water to it?

11 A. I just simply asked about it when I was
12 purchasing it, and they said -- they simply said that
13 it was a God-given right to have water. It was about
14 2014 when I purchased it.

15 Q. Okay.

16 A. They said it was a God-given right to have
17 water; there was nothing to worry about.

18 Q. Okay. And that was back in 2004?

19 A. '14.

20 Q. Oh, '14. I'm sorry.

21 A. Yes. And I -- and I'm -- did build homes in
22 the -- in the nineties and early two thousands and --
23 in the -- right in the Colorado area where the Denver
24 International Airport is. And I drilled wells there.
25 And -- and I also had -- had no problem drilling water

1 wells there, same type of instance.

2 Q. Okay. So, have you gone through any
3 preparation to build your retirement home on this lot?

4 A. Yes, I have, quite a bit. I've done about
5 \$18,000 roughly of work to -- with engineered plans.
6 I've also been with Civilwise and gone through all of
7 the initial civil engineering. I've paid for -- the
8 engineer for the septic tank and for a flood
9 certificate and -- and gone right up to the point
10 of -- of building permit.

11 Q. Okay. And when did you -- when did you find
12 out about order 1293?

13 A. Well, I found out about it -- I -- I -- I had
14 gone into the building department about December 15th
15 and -- and told them I was on my way to start
16 building, and they gave me some pointers to get things
17 caught up a little bit. And I said I would be in
18 right after Christmas and -- and that's when I was in
19 December 26. And I went in, and that's when they told
20 me that I couldn't have a building permit.

21 Q. So, you went in to file your building permit
22 on December 26?

23 A. That's correct.

24 Q. And that's when you learned about the order,
25 order 1293?

1 A. That's correct.

2 Q. Had you ever received any notice, any courtesy
3 notice that said, hey, we're thinking about doing
4 this; don't make any plans for your lot, anything like
5 that?

6 A. Not even an inkling. I even -- like I said, I
7 even went into the building department just days
8 before that, and they had no idea. They said
9 everything was good, as far as I know. They didn't
10 specifically state about the water, because I
11 literally had no concern about a well prior to --
12 prior to pulling the permit. And I didn't know
13 anything about it until December 26th.

14 Q. Okay. And did you -- I don't know if you -- I
15 don't remember if you said, but how much have you
16 spent on preparing this lot for construction?

17 A. About 18,000 over right now, over the last
18 about three and a half years.

19 MR. RIGDON: Okay. All right. No further
20 questions.

21 THE COURT: Mr. Stockton?

22

23 CROSS-EXAMINATION

24 BY MR. STOCKTON:

25 Q. So, Mr. Off, I just have one question for you.

1 What was the source of the statement that it's a
2 God-given right to put your well on your lot? Who
3 told you that?

4 A. You know what? It was a hearsay thing, I -- I
5 guess. I was -- I'm trying to think of who. It
6 wasn't the Realtor. It was -- it was somebody I had a
7 passing with. It may have been another engineer. I'm
8 an engineer myself. So, I work with engineers. And
9 it may have been another engineer.

10 MR. STOCKTON: Okay. No further questions.
11 Thank you.

12 THE WITNESS: Thank you.

13 THE COURT: Thank you, sir.

14 THE WITNESS: Thank you.

15 MR. RIGDON: We're coming to the end, your
16 Honor. We only have two more witnesses to call.

17 THE COURT: I'm going to be here until five.

18 MR. RIGDON: I would like to call Joyce
19 Harris, please.

20 Whereupon --

21 JOYCE HARRIS, having been first duly sworn to
22 tell the truth, the whole truth, and nothing but the
23 truth, was examined and testified as follows:

24 * * * * *

25

DIRECT EXAMINATION

BY MR. RIGDON:

Q. Ms. Harris, could you say and spell your name for the court reporter?

A. Joyce, J-o-y-c-e, Harris, H-a-r-r-i-s.

Q. Ms. Harris, do you own property in Pahrump?

A. Yes, I do.

Q. Okay. One lot? More than one lot?

A. Two.

Q. Two lots?

A. Uh-huh.

Q. Okay. Is one vacant?

A. One vacant, and one we have a house.

Q. I'm sorry.

A. And we have a house on one lot.

Q. Okay. You have a house on one lot. Thank you.

The vacant parcel, when did you purchase that?

A. 2004.

Q. Okay. And what was the point to purchasing that lot?

A. We bought it for a retirement.

Q. Okay.

A. Investment. And we were going to -- kind of planned on maybe putting a smaller house there when we

1 did retire.

2 Q. Okay. And when you purchased that lot, did
3 you do any due diligence to find out if you could have
4 a water well on that lot or water service to that lot?

5 A. No. We just assumed, since we already had a
6 house two streets over with a well, that there was no
7 problem getting a well there.

8 Q. Okay. So, your house that you have with the
9 well on it, that's two or three blocks from the
10 existing --

11 A. Yeah.

12 Q. From the parcel that you purchased?

13 A. Two streets over.

14 Q. Okay. When did you find out about order 1293?

15 A. Well, we applied for a well when we -- you
16 know, we hired somebody to drill a well and gave them
17 a deposit so we could go ahead with it. And then we
18 got a denial notice in the mail that said we couldn't
19 drill a well.

20 Q. Okay. So, you submitted -- you put a deposit
21 to a well driller. And then you said they, on your
22 behalf, submitted a notice of intent with the state
23 engineer?

24 A. Yes.

25 Q. And that was submitted before order 1293 was

1 issued?

2 A. Yes, early December.

3 Q. In early December?

4 A. Uh-huh.

5 Q. Okay. And then order 1293 came out
6 December 19th; right?

7 A. (No audible response.)

8 Q. And then when did you find out that -- that
9 your notice of intent had been denied?

10 A. Oh, it must have been after that. We received
11 a letter in the mail, and I'm not sure of the date of
12 the letter.

13 Q. Okay. And how -- did you receive any notice
14 from anybody before order 1293 was issued, any
15 courtesy copy, anything saying, hey, we know you filed
16 a notice of intent to drill; we're thinking about
17 doing this; we would like your comments on that? Did
18 you receive any notice at all?

19 A. No notice at all.

20 Q. Okay.

21 A. It was...

22 Q. The state -- they obviously knew who you were,
23 because you filed a notice of intent to drill; right?

24 A. Right.

25 Q. Okay. How much did you -- you entered into a

1 contract.

2 Were you required to put a down payment on the
3 drilling of the well?

4 A. No. We just gave -- yeah. We had to pay the
5 initial permit fee or whatever it is to -- to the
6 driller so they could...

7 Q. Okay. But you didn't have to pay a deposit
8 on --

9 A. For on the well, no.

10 Q. For the drilling of the well?

11 A. No.

12 MR. RIGDON: Okay. All right. Okay. I have
13 no further questions.

14 MR. STOCKTON: No questions, your Honor.

15 THE COURT: You can step down. Thank you.

16 MR. RIGDON: We would like to call Melissa
17 Campbell.

18 Whereupon --

19 MELISSA CAMPBELL, having been first duly sworn
20 to tell the truth, the whole truth, and nothing but
21 the truth, was examined and testified as follows:

22 * * * * *

23 DIRECT EXAMINATION

24 BY MR. RIGDON:

25 Q. Ms. Campbell, can you say and spell your name

1 for the court reporter?

2 A. Melissa, M-e-l-i-s-s-a, Campbell,
3 C-a-m-p-b-e-l-l.

4 Q. Thank you. Ms. Campbell, are you a member of
5 Pahrump Fair Water, LLC?

6 A. Yes, sir.

7 Q. Okay. And do you own property in Pahrump?

8 A. Yeah, 4.7 acres.

9 Q. Is it a single lot?

10 A. Yes, sir.

11 Q. Okay. And when did you purchase that lot?

12 A. October 18, 2017.

13 Q. Okay. And when you purchased that lot, what
14 was the purpose for purchasing it?

15 A. To build a home for our family.

16 Q. Okay. Where is your family currently living?

17 A. We currently live in a 30-foot trailer located
18 on some commercial property.

19 Q. Okay. And you don't own a house. You live in
20 a -- in an RV park right now?

21 A. It's on some commercial property, yes. We
22 rent a space from a man that my husband knows from
23 doing work for him. And it's supposed to be
24 temporary.

25 Q. Okay. And when you purchased your lot, did

1 you do any -- did you ask anybody about how you're
2 going to get water service to the lot or whether water
3 service was available?

4 A. No. We assumed that we would be able to dig a
5 well.

6 Q. Okay.

7 A. We're -- we're all the way up by rangers
8 (phonetic). We're nowhere near town. We're about
9 thirty minutes out of town.

10 Q. Okay. The -- when did you first hear about
11 order 1293?

12 A. My husband called me Friday, December 22,
13 2017, before he came to Vegas, to let me know that our
14 Realtor just called and informed us that we would not
15 be able to dig a well.

16 Q. Okay. And how did that affect your plans?

17 A. Well, I had everything on a halt, completely
18 crushed our dreams, pulled a rug out from underneath
19 us.

20 Q. Do you have kids?

21 A. Two boys.

22 Q. Two boys? So, you and your husband and two
23 boys are living in a 30-foot trailer right now?

24 A. Correct.

25 Q. And you were waiting to build on this lot?

1 A. Correct. We were waiting for my tax return to
2 come through so that we would have the money to dig
3 the well, preferably in January or something. And
4 then after we dug the well and pulled the septic, we
5 would move the trailer onto the property and
6 immediately start building our home from there piece
7 by piece, wall by wall.

8 Q. We're here today to determine whether this
9 order should be stayed while we argue the rest of this
10 case.

11 If the judge was to issue that order for stay,
12 what kind of an impact would that have on you?

13 A. We would be able to dig our well, and then we
14 would be able to follow through with our dreams.

15 It's hard to explain to a 6-year-old that we
16 no longer can move onto the property that he's been to
17 and he's helped us put poles in to put up a gate. And
18 he thinks that it's a joke. In his -- and he told me
19 the other day he was going to take his tent and move
20 out there.

21 Q. Okay. So, you've already -- you put up a
22 fence. So, you've put some improvements into the
23 property already?

24 A. We started, yes.

25 MR. RIGDON: All right. No further questions.

1 Thank you.

2 THE COURT: Any questions for Mr. Stockton?

3 MR. STOCKTON: No questions, your Honor.

4 THE COURT: Thank you, ma'am.

5 THE WITNESS: Thank you.

6 MR. RIGDON: That's our last witness, your
7 Honor.

8 THE COURT: Okay. You want to make closing
9 argument?

10 MR. TAGGART: Your Honor, if I could just
11 cover an administrative matter, we, when we filed our
12 motion, have six exhibits attached to the motion. And
13 we would like those documents to be considered by the
14 Court as part of the record for this proceeding.
15 They're in the Court's file, because the motion was
16 filed, and those documents exist in that file.
17 However, something that's a pleading doesn't
18 necessarily become an exhibit unless we actually offer
19 it into evidence.

20 So -- so, we have another copy that we could
21 offer into evidence, or we could have the Court --

22 THE COURT: No. I'll consider them for the
23 purposes of this hearing.

24 Go ahead and make your objection,
25 Mr. Stockton.

1 MR. STOCKTON: Thank you, your Honor. As you
2 know, we have a motion to strike Exhibit 5, which is
3 the letters and affidavits. And -- and we're
4 obviously not withdrawing that motion.

5 My -- my position is, the pleadings are part
6 of the record. When it goes up on record on review,
7 the pleadings and all the exhibits go up to the
8 Supreme Court.

9 So, if you want to admit them separately, I
10 don't mind but --

11 THE COURT: For the purposes of this
12 hearing --

13 MR. STOCKTON: -- documents from the state
14 engineer's office or Nye County.

15 THE COURT: That's fine. I'll admit them for
16 the purposes of this hearing.

17 MR. TAGGART: Thank you, your Honor.

18 THE COURT: Or I'll consider them. And I've
19 reviewed almost all of these.

20 MR. RIGDON: Your Honor, that -- those last
21 four witnesses went faster than I anticipated. I'm
22 just waiting for some documents for my closing
23 argument to come in. I expect them to be here within
24 the next five or ten minutes.

25 Would it be appropriate to take a short recess

1 here?

2 THE COURT: Sure. Two-ten. That should give
3 you plenty of time.

4 MR. RIGDON: Yeah.

5 THE COURT: Okay. We'll be in recess until
6 2:10 you can all be at ease.

7 (Recess taken.)

8 THE COURT: Okay. We're back.

9 Mr. Stock -- Mr. Rigdon, go ahead.

10 MR. RIGDON: Thank you, your Honor. And thank
11 you for indulging me with the break there.

12 If I can provide a copy for you and one for
13 the clerk to mark as an exhibit...So, your Honor --

14 MR. STOCKTON: I'm sorry. Before you start --
15 I'm sorry. Just for my records, is this going to be
16 Exhibit C or 3?

17 THE CLERK: This is going to be 3 and then --
18 if judge is admitting it.

19 THE COURT: Yeah. We'll admit it for the
20 purpose of this hearing.

21 Go ahead.

22 MR. RIGDON: Okay. Thank you, your Honor.
23 So, the purpose of this hearing is for the Court to
24 consider those four factors in NRS 533.450, sub 5.
25 The four factors again are whether the non-moving

1 party -- in this case there is only one non-moving
2 party, the state engineer -- will be harmed if the
3 stay is granted. The second one is whether the moving
4 party will be harmed if the stay is denied -- and
5 that's PFW and its members -- and then also whether
6 there is individual members of the public,
7 identifiable individual members of the public, who
8 will be harmed if the stay is granted or denied as
9 well, and then finally whether we have a likelihood of
10 success on the merits of the case.

11 Now, your Honor brought up earlier the
12 deferential standard of review under NRS 233B. And we
13 just wanted to address that for a minute here.

14 First of all, there is a huge difference
15 between NRS 233B appeals and NRS 433.450 appeals. And
16 that huge difference is that under -- under the
17 Administrative Procedures Act {sic}, when there is
18 a -- a contested matter, they're required to have
19 notice of a hearing. It's statutory. There is a
20 statutory requirement that notice of a hearing to
21 create a record before the appeal is -- is -- is
22 heard. Okay. We don't have that in NRS 433 -- or
23 533. The state engineer is not required to
24 necessarily hold hearings. Even on contested matters
25 he's not necessarily required to hold hearings other

1 than the due-process concerns that we'll talk about in
2 a minute.

3 THE COURT: Well -- and it's likely that I had
4 a case from northern Nevada that's on appeal on that
5 exact issue. I upheld the water engineer on a case --
6 I can't remember what valley it was out of, but there
7 was no notice given to one of the people aggrieved
8 with his action, which is to basically extend a water
9 permit or whatever.

10 There was a guy that was wanting to move water
11 into a Lemmon Valley. And he's been saying that he
12 was going to do it for like fifteen, sixteen years.
13 And then there is another company that's doing
14 agriculture work in the valley that he's got the water
15 rights in. And he still hasn't put them to beneficial
16 use in sixteen years, I guess, and the -- the other
17 parties -- keep in mind, if I misstate something, I'm
18 not a young man anymore. My memory isn't as good as
19 it used to be.

20 The -- the aggrieved persons had appeared the
21 year before but didn't receive notice of the new
22 application that was granted. I think they filed some
23 stuff anyway. But their argument was -- is, they
24 should have got notice. But there was no statute
25 requiring that notice. So, I found that -- I upheld

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
JABOUR, an individual; and
GERALD SCHULTE, an individual,

Respondents.

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Elizabeth A. Brown
Clerk of Supreme Court

**RESPONDENTS' OPPOSITION TO 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**

COME NOW, Respondents, PAHRUMP FAIR WATER, LLC. (“PFW”),¹ 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, by and through their counsel, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby submits this opposition to the State Engineer’s emergency motion.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

The State Engineer will not prevail in this appeal for at least two reasons. First, the State Engineer does not contest that Orders 1293 and 1293A were issued without providing prior notice to affected property owners. For the State Engineer to prevail on appeal he will have to convince this Court that he, unlike any other state or local government agency, has plenary power to issue regulations without first providing due process to affected parties in the form of notice and an opportunity to raise objections. Second, the State Engineer issued Orders 1293 and 1293A to prohibit owners of existing parcels of land, who have no other source of water, from drilling domestic wells. Yet, the State Engineer lacks authority over

¹ PFW is a group of property owners, well drillers and real estate professionals that are affected by State Engineer Orders 1293 and 1293A.

domestic wells in Nevada, except in very narrow instances that do not arise here. NRS 534.030(4) unambiguously grants the State Engineer supervisory authority over groundwater wells “except those wells for domestic purposes.”

Also, PFW’s members will continue to suffer harm if the stay is issued, and the object of the appeal will not be frustrated if the stay is denied. Therefore, an emergency stay on appeal should not issue.

STANDARD OF REVIEW

A state agency is not entitled to a stay of a district court judgment.² In reviewing a motion to stay a judgment pending appeal, the Court must consider (1) whether the object of the appeal will be frustrated if the stay is not granted, (2) whether the appellant (here, the State Engineer) will suffer irreparable harm if the stay is denied, (3) whether the respondents (here, PFW) will suffer irreparable harm if the stay is granted, and (4) whether the appellant is likely to succeed on the merits of the appeal.³ These considerations establish an equitable balancing test, and the party requesting the stay has the burden of “show[ing] that the balance of equities *weighs heavily* in favor of granting the stay.”⁴

² *Clark Cty. Office of Coroner/Med. Exam’r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018).

³ NRAP 8(c).

⁴ *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added).

ARGUMENT

I. The Object Of The State Engineer's Appeal Will Not Be Frustrated By Denial Of The Motion.

The State Engineer's claim that the object of his appeal will be frustrated if a stay is not issued is without merit.⁵ The main issues in this appeal are whether the State Engineer can issue regulations that impair property rights without providing the due process to affected property owners that is required by both the Nevada and U.S. Constitutions, and override the Legislature's clear and unambiguous directive that domestic wells are generally exempt from his regulatory authority. The Court's consideration of these issues will not be frustrated if this stay request is denied.

The State Engineer's stated purpose for issuing Orders 1293 and 1293A was a long-term, decadal, concern regarding the effect of additional wells and continued groundwater declines in the Pahrump basin. The State Engineer believes thousands of domestic wells could be drilled in Pahrump and those wells could cause water levels to decline. PFW disputes each of these claims.⁶ Nevertheless, even if they were true, no evidence supports a claim that *thousands of domestic wells* can be drilled during the course of this appeal.

⁵ Emergency Motion at 4-5.

⁶ Evidence in the record shows that pumping has steadily decreased and water levels in some portions of the basin are currently leveling off or even increasing. Exhibit 1.

In fact, the number of domestic wells that could be drilled during this appeal is hardly enough to cause the hydraulic devastation the State Engineer claims. Undisputed evidence in the record shows that current groundwater pumping in the Pahrump basin is 4,000 acre-feet less than the perennial yield of that basin, and on average, each domestic well in the basin only uses a half of an acre-foot per year.⁷ Even if all the property owners the State Engineer claims have expressed an intent to drill wells actually did so during this appeal, withdrawals from the basin would only increase approximately 120 acre-feet per year. And the State Engineer has presented no evidence, by affidavit or otherwise, and no such evidence exists, to support a claim that the additional pumping from domestic wells drilled during this appeal would cause water level declines that would harm existing water rights.⁸

Any claim by the State Engineer that more Notices of Intent will be filed, and more wells will be drilled, during this appeal would be contrary to the evidence. When asked specifically whether a stay at the district court would result in thousands of wells being drilled during the district court's consideration of PFW's petition for

⁷ The perennial yield of the basin is 20,000 acre-feet/year ("afy"), and the current pumping in the basin is only approximately 16,000 afy. Exhibit 1 at 12.

⁸ See NRS 534.110(8) (Requiring an evidentiary showing that new wells will "unduly interfere" with existing wells before the State Engineer can restrict the drilling of the new wells).

judicial review, testimony clearly indicated such a number of wells could not be physically constructed during the that time.⁹

Finally, the State Engineer claims the object of his appeal will be frustrated without a stay because the district court's order grants domestic wells a "super priority" status over all other water rights and users in the basin.¹⁰ But the State Engineer's claim is factually incorrect, contrary to the clear and plain meaning of the relevant statutes, and misstates the district court's determination. As the district court noted:

Neither the priority date assigned to domestic wells nor the issue of whether such wells are subject to the prior appropriations doctrine was argued or decided in this case. Instead, this case was about whether the State Engineer had the legal authority to restrict the drilling of new domestic wells in the Pahrump basin. [. . .] Because NRS 534.110(8) does not specifically state that its provisions apply to domestic wells, the general exemption applied and this Court held that the State Engineer was without authority to impose the subject drilling restriction.¹¹

As noted in *Mikhon Gaming*, the question of whether the object of an appeal will be defeated if a stay is denied is essentially a question of whether the appeal will be rendered moot by subsequent actions.¹² *Mikhon Gaming* requires that the object

⁹ Testimony from a well-driller established that it would be nearly impossible to drill thousands of wells in such a short period of time. Exhibit 5 at 99:11-100:14.

¹⁰ Emergency Motion at 5.

¹¹ Exhibit 4 at 3-4.

¹² *Mikhon Gaming Corp. v. McCrea*, 100 Nev. 248, 253, 89 P.3d 36, 39 (2004).

of the appeal be clearly defined, and here the object of the State Engineer's appeal is to overturn the district court's determination that he lacks the authority to restrict the drilling of domestic wells. Nothing can occur during the course of this appeal to render this question moot. Accordingly, the object of the appeal will not be frustrated by denying the stay.

II. State Engineer Does Not Have High Likelihood Of Success On Merits.

The State Engineer is not likely to prevail on the merits of his appeal because the orders were issued without any prior notice to affected property owners, the State Engineer does not have general regulatory authority over domestic wells, no imminent threat exists to water resources, and the State Engineer provided no evidence that the drilling of new domestic wells will interfere with existing wells.

Every regulatory action of the State Engineer must meet three at least criteria: (1) affected property owners must have been provided the requisite due process *before* the action is commenced, (2) the State Engineer must have statutory authority to take the action, and (3) the State Engineer must have substantial evidence to support the action. Here, the district court determined the State Engineer failed to meet each of these criteria when he issued Orders 1293 and 1293A. Accordingly, the State Engineer has a high burden on appeal because he must convince this Court that the district court was wrong on *all three issues*.

The State Engineer has not contested that he issued Orders 1293 and 1293A without any prior notice, and without providing affected property owners any opportunity to comment. This Court has definitively ruled that property owners must be provided notice and an opportunity to be heard before any action is commenced that could “result[] in [a] possible deprivation of property rights.”¹³ Therefore, neither Order 1293 nor 1293A can stand.

The State Engineer’s lack of authority over domestic wells is clear and unambiguous. NRS 534.030(4) specifically exempts domestic wells from the State Engineer supervisory authority by granting the State Engineer authority over all wells “*except those wells for domestic purposes.*”¹⁴ This exemption was historically well-understood by State Engineers, state legislators, and water law practitioners. As former Assemblyman (now Senator) Goicoechea noted at a 2011 legislative hearing, “if you have a parcel created, you have a right to drill a domestic well and I do not think anyone argues that.”¹⁵ Orders 1293 and 1293A mark the first effort by a State Engineer in Nevada history to claim general regulatory authority over domestic wells. Since domestic wells are exempt from the State Engineer’s control,

¹³ *Eureka County v. Dist. Ct.*, 134 Nev.Adv.Op. 37, 417 P.3d 1121, 1127 (2018).

¹⁴ NRS 534.030(4).

¹⁵ Minutes of the March 30, 2011, Assembly Committee on Government Affairs p. 72.

the State Engineer does not have a high likelihood of success on appeal. Further, the record is devoid of substantial evidence supporting the State Engineer's action.¹⁶

Therefore, the State Engineer does not have a high likelihood of success on appeal, and his stay request should be denied.

III. Property Owners In Pahrump Will Be Irreparably Harmed If The Stay Is Granted.

Parcel owners in Nevada are entitled to drill a domestic well if no other water source is available. This right to water is a unique property right, and the loss of that right results in irreparable harm.¹⁷ “Any act which destroys or results in a substantial change in [a] property[‘s water supply], either physically or in the character in which it has been held or enjoyed, [constitutes] irreparable injury.”¹⁸ Impairing a right to water is regarded as an irreparable injury.¹⁹

The district court determined that Order 1293A significantly impaired property and due process rights. The property owners who formed PFW were forced to suffer this trespass for an entire year without relief. Evidence adduced below proves the issuance of a stay will only prolong their misfortune and continue to delay

¹⁶ Exhibit 2 at 16:1-17:13.

¹⁷ *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).

¹⁸ *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 125 (1972).

¹⁹ *Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971) (internal citations omitted).

efforts to construct their homes.²⁰ Also, the issuance of Order 1293A upset a status quo that had existed for more than 150 years and created an environment of economic uncertainty within the local community. As the district court noted:

[T]he status quo that should be maintained in this case is the situation that existed during the more than 150 years prior to the State Engineer's surprise issuance of Orders 1293 and 1293A. If the State Engineer wants to upset 150 years of prior practice, he bears the heavy burden of showing that such a change is legislatively authorized and that there is substantial evidence supporting it.²¹

Therefore, equity and justice demand that the State Engineer's request for a stay be denied so families are allowed to immediately move forward with their homebuilding plans, and the long-standing status quo is reinstated.

IV. The State Engineer Will Not Suffer Any Harm If The Stay Is Denied.

The district court's written order does not place any substantial burden (financial or otherwise) on the State Engineer or his staff.²² The State Engineer will simply be prohibited from enforcing an unconstitutional and statutorily unauthorized regulation during the time this appeal is pending. The State Engineer claims that a

²⁰ At a prior hearing regarding whether a stay should issue in this case, PFW presented testimony from five individuals who testified that the enforcement of the State Engineer's order is harming them and their families. Exhibit 5 at 86-94 (Paul Peck), 134-140 (Steven Peterson), 140-145 (Ted Off), 145-148 (Joyce Harris), and 148-152 (Melissa Campbell).

²¹ Exhibit 4 at 5.

²² The district court's order does require the State Engineer to publish notice that Order 1293A has been overturned; however, the cost of drafting and publishing such a notice is de minimis and, in any event, this notice has already been issued.

stay is justified because administrative issues will result from potentially having to plug wells. This claim is without merit because the fate of such wells is governed by statute²³ and could be resolved by the district court on remand. In any event, this minor administrative issue pales in comparison to the very real harm that will be borne by property owners if the stay is issued, and the order enforced during the appeal. Therefore, the emergency motion should be denied.

CONCLUSION

For the foregoing reasons, PFW respectfully requests that the Court deny the State Engineer's emergency motion.

Respectfully submitted this 9th day of January, 2019.

TAGGART & TAGGART, LTD.
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By: /s/ David H. Rigdon
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Attorneys for Respondents

²³ NRS 534.160(5).

NRAP 27(E) CERTIFICATE

I, David H. Rigdon, declare as follows:

1. I am an employee of Taggart & Taggart, Ltd.
2. I am counsel for Respondents named herein.
3. I verify that the foregoing opposition complies with the formatting and word count requirements set under NRAP 27(e).

Executed this 9th day of January, 2019.

/s/ David H. Rigdon

DAVID R. RIGDON, ESQ.
Nevada State Bar No. 13567
Attorney for Respondents

CERTIFICATE OF SERVICE

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

[X] By electronic service via the Court's electronic notification system:

James N. Bolotin, Esq.
Nevada Attorney General's Office
100 N. Carson St.
Carson City, NV 89701
jbolotin@ag.nv.gov

DATED this 9th day of January, 2019.

/s/ Sarah Hope
Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

<u>Exhibit</u>	<u>Description</u>	<u>Pages</u>
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2.	Petitioners' Reply Brief, Case No. CV 39524	33
3.	Opposition to Respondent's Motion for Stay of Order Granting Petition for Judicial Review, Case No. CV 39524	11
4.	Order Denying Motion for Stay, Case No. CV 39524	5
5.	Transcript of Proceedings, CV 38972	272

EXHIBIT 1

EXHIBIT 1

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FIFTH JUDICIAL DISTRICT

SEP 11 2018

Nye County Clerk
DEBRA BENNETT Deputy

7
8 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF NYE

* * *

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

Case No. 39524

Dept. No. 2

14 Petitioners,

15 vs.

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

18 Respondent.
19

PETITIONER'S OPENING BRIEF

20 COME NOW, Petitioners, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
21 company (hereinafter "PFW"); STEVEN PETERSON, an individual; MICHAEL LACH, an individual;
22 PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an
23 individual, by and through their counsel, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ.,
24 of the law firm of TAGGART & TAGGART, LTD., to hereby file their opening brief. This opening
25 brief is based on the attached memorandum of points and authorities, all pleadings and papers on file
26 herein, and any argument the Court may allow.
27
28

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The right to drill a domestic well is an important property right in Nevada. Not only are these wells the most practical and efficient source of water available to rural residents throughout the state, in most cases they are the only option a property owner has for obtaining potable water for the development of a household on their property. Accordingly, domestic wells are critical for economic development in rural communities like Pahrump. Where water from a public utility is not available or feasible, domestic wells are the only option for the development of individual residential lots.

The State Engineer significantly impairs this valuable property right in Order 1293A. From the beginning, Orders 1293 and 1293A were ill-conceived, improperly executed, and violated basic constitutional principles of due process. First, the Orders were issued without providing notice to affected property owners or an opportunity for them to be heard. Second, the State Engineer does not have statutory authority to ban the drilling of new domestic wells and violated basic principles of Nevada's water law when he did so. Third, the State Engineer acted arbitrarily, capriciously, and abused his discretion when he issued the Orders without substantial evidence to support them. Finally, Order 1293A constitutes an impermissible taking of private property for public use without providing just compensation.

FACTUAL BACKGROUND

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 only ½ acre-feet of water per year, a property owner could only obtain an exemption from this prohibition by first obtaining two acre-feet of existing water rights and *relinquishing* those rights to the State Engineer.¹ 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.² While it is

¹ SE ROA 8.

² SROA 864:1-12; SROA 873:19-874:3; SROA 901:6-12; SROA 923:9-12; SROA 929:2-13; SROA 933:13-19.

1 still unclear exactly how many parcels are directly affected by the Order, it could affect as many as 8,000
2 existing residential lots within the basin that are currently unbuilt.³

3 Petitioner, PFW timely filed a Petition for Judicial Review of Order 1293.⁴ PFW filed its
4 Opening Brief in that appeal on July 6, 2018.⁵

5 On July 12, 2018, without providing any notice to the Court or opposing counsel, the State
6 Engineer issued Order 1293A (the “Amended Order”) in direct violation of the Court’s exclusive
7 jurisdiction.⁶ On July 18, 2018, the State Engineer filed a motion to dismiss PFW’s appeal of Order
8 1293 claiming that the issuance of Order 1293A rendered the appeal moot.⁷ The State Engineer stated
9 in the motion to dismiss that “Order 1293A supersedes any legal force and effect of Order 1293” and
10 therefore “Order 1293 is no longer legally valid or enforceable.”⁸

11 Like Order 1293, Order 1293A was issued without providing any notice to affected property
12 owners and without providing an opportunity for affected persons to provide comments or challenge the
13 evidence the State Engineer relied upon. In substance and effect, Order 1293A is nearly identical to
14 Order 1293. The only difference is that Order 1293A provides two additional exemptions to the drilling
15 ban. Of these exemptions, one allows individuals who filed a notice of intent to drill a domestic well
16 before the issuance of Order 1293, and who had those notices subsequently rejected by the State
17 Engineer, to refile the notices and drill their wells.⁹

18 The State Engineer’s improper issuance of Order 1293A presented a quandary for the Court and
19 for PFW. While the Order violated the Court’s exclusive jurisdiction, and therefore should have been
20 deemed null and void,¹⁰ neither the Court nor PFW desired to harm the individuals who received the
21 new exemption under Order 1293A.

22 Accordingly, on August 8, 2018, the parties entered into a settlement agreement whereby PFW
23 agreed to voluntarily dismiss the appeal of Order 1293 and file a new petition for judicial review of

24 ³ SE ROA 7.

25 ⁴ SROA 23-35.

26 ⁵ SROA 1069-1186.

27 ⁶ See *Westside Charter Serv., Inc. v. Gray Line Tours of S. Nev.*, 99 Nev. 456, 459, 664 P.2d 351, 353 (1983) (“where an
order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions
raised by the appeal are finally resolved.”).

28 ⁷ SROA 1201-1213.

⁸ SROA 1208:4-6.

⁹ SE ROA 9.

¹⁰ See SROA 1224:1-SROA 1225:17.

1 Order 1293A. In exchange, the State Engineer agreed to an expedited briefing schedule and to expedite
2 the scheduling of a hearing on the new appeal. On August 10, 2018, the parties filed a stipulation
3 requesting dismissal of the previous appeal. On that same day, PFW submitted a new petition for judicial
4 review of Order 1293A to the Court and served the same on the State Engineer.

5 Because the State Engineer failed to provide any due process to affected property owners prior
6 to issuing either of the Orders, there is effectively no record from any proceeding below for this Court
7 to review. Instead, the State Engineer’s “Record on Appeal” is merely a stack of self-selected documents
8 that he claims he relied upon in formulating the Amended Order. None of this “evidence” has been
9 properly verified in any formal evidentiary proceeding nor has any party been afforded an opportunity
10 to challenge it or present conflicting evidence.

11 There are, however, certain facts that no party to this proceeding disputes. Among these are 1)
12 that the Pahrump basin is not currently being over-pumped, 2) groundwater pumping in Pahrump has
13 steadily declined since 1969, 3) as a result of this reduction in pumping, water levels in some portions
14 of the basin have leveled off or significantly rebounded (in some cases by as much as 45 feet), and 4)
15 the Amended Order contains no scientific analysis of whether the drilling of additional domestic wells
16 will impact existing wells in the basin.

17 STANDARD OF REVIEW

18 I. Standard of Review for Petitions for Judicial Review of State Engineer Orders

19 “Any person feeling aggrieved by an order or decision of the State Engineer . . . affecting the
20 person’s interests” may seek judicial review of that order or decision.¹¹ Judicial review is “in the nature
21 of an appeal.”¹² The role of the reviewing court is to determine if the State Engineer’s decision was
22 arbitrary, capricious, or an abuse of discretion, or if it was otherwise affected by prejudicial legal error.¹³
23 A decision is arbitrary if it was made “without consideration of or regard for facts, circumstances, fixed
24 rules, or procedures.”¹⁴ A decision is capricious if it is “contrary to the evidence or established rules on
25 law.”¹⁵

26 ¹¹ NRS 533.450(1).

27 ¹² NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

28 ¹³ *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).

¹⁴ BLACK’S LAW DICTIONARY 125 (10th ed. 2014) (definition of “arbitrary”).

¹⁵ BLACK’S LAW DICTIONARY 254 (10th ed. 2014) (definition of “capricious”).

1 In *Revert v. Ray*, the Nevada Supreme Court articulated the procedural safeguards the State
2 Engineer must employ prior to issuing an order or decision.¹⁶ First, the State Engineer must provide
3 affected parties with a “full opportunity to be heard” and “must clearly resolve all the crucial issues
4 presented.”¹⁷ Next, the State Engineer’s order or decision must include “findings in sufficient detail to
5 permit judicial review.”¹⁸ Finally, if such procedures are not followed and “the resulting administrative
6 decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion,” a court should not
7 hesitate to intervene and block the enforcement of the order or decision.¹⁹

8 **II. The Court Must Conduct a De Novo Review of the State Engineer’s Interpretations of**
9 **Nevada’s Water Laws.**

10 During the prior proceedings, the State Engineer argued that the Court is required to give
11 “deference” to his interpretations of Nevada’s water laws.²⁰ The State Engineer is wrong. The Nevada
12 Supreme Court has clearly and unambiguously held that “[w]hile the State Engineer’s interpretation of
13 a statute is persuasive, it is not controlling.”²¹ Accordingly, a reviewing court is required to “decide
14 pure legal questions *without deference* to an agency determination.”²²

15 In fact, as recently as March of this year, the Nevada Supreme Court reviewed a district court
16 decision where the district court refused to defer to the State Engineer’s interpretation of law.²³ The
17 Supreme Court found that the district court acted properly, stating that:

18 [T]he State Engineer misapplied Nevada law by presuming abandonment
19 based on nonuse evidence alone. In so doing, the State Engineer acted
20 arbitrarily and capriciously. Therefore, *the district court correctly*
overruled the State Engineer’s ruling with regard to abandonment.²⁴

21 Thus, the Nevada Supreme Court has clearly and unambiguously ruled that a court must not blindly
22 defer to the State Engineer’s legal determinations. Instead, the Court is required to conduct an

23
24 ¹⁶ *Revert*, 95 Nev. 782, 603 P.2d 262.

¹⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

¹⁸ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

¹⁹ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

²⁰ SROA 829:11-12 (“I defer to the administrator in his interpretation of the law.”); SROA 829:15-16 (“I defer to his interpretation of what the law says.”); SROA 829:20-23 (“So, when you argue that he doesn’t have the authority to do this, he’s determined that he does. And I have to defer to his interpretation of the law.”).

²¹ *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).

²² *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

²³ *King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314 (2018).

²⁴ *Id.* (emphasis added).

1 independent review of the constitutional provisions, statutes, and caselaw at issue and, with the aid of
2 the canons of statutory interpretation, determine for itself what the law says. As was stated more than
3 200 years ago – “It is emphatically the province and duty of the judicial department to say what the law
4 is.”²⁵

5 ARGUMENT

6 I. The State Engineer Violated Constitutional Due Process Protections When Issuing Order 1293A.

7 A. The right to drill a domestic well is a significant property right.

8
9 In Order 1293A, the State Engineer restricts the drilling of domestic wells on *existing* parcels
10 whose owners would otherwise have the right to drill such a well in connection with the development
11 of a single-family home. Testimony presented at the previous hearing on PFW’s motion for stay of
12 Order 1293 clearly demonstrates that PFW’s members performed their due diligence prior to purchasing
13 their properties and, based on this, had a reasonable investment-backed expectation that they would be
14 allowed to drill a domestic well in conjunction with the development of a single-family home.²⁶

15 From the outset of statehood, Nevada property owners had the right to construct diversion dams
16 and wells to divert surface and groundwater and place such water to beneficial use on their properties.
17 This naturally included the diversion of water to establish a household (domestic use). No permit or
18 other administrative approval was required to divert the water and place it to use. Rather, the right to
19 drill a well to divert groundwater was integrated within the bundle of sticks that constituted real property
20 rights in Nevada and was governed by the common law doctrine of prior appropriations.

21 This changed in 1939, when the Legislature passed Nevada’s first groundwater law. This law
22 applied to groundwater the same permit system that had previously been set up for surface water. After
23 1939, a property owner would be required to obtain permission from the State Engineer before drilling
24 a well and placing water to beneficial use. However, recognizing the importance of domestic wells to
25 the development of rural households, the Legislature specifically exempted domestic wells from the new
26

27 ²⁵ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

28 ²⁶ See e.g., SROA 932:11-17 (testimony of Mr. Peterson) (“And it also at that time [during the due diligence period prior to purchasing the lot] we checked to see if there was any issues about drilling the well with the department of water resources. Q. Okay. And what were you told by the department of water resources? A. We were okay. Everything was fine.”).

1 law and thereby placed them outside the regulatory power of the State Engineer. Specifically, the
2 Legislature established that:

3 This act [the groundwater law] *shall not apply* to the developing and use
4 of underground water for domestic purposes where the draught does not
5 exceed two gallons per minute and where the water developed is not from
6 an artesian well.²⁷

6 This provision has been amended from time to time and is currently codified as NRS 534.180(1).

7 Since 1939, several municipal water utilities have been created to supply water to residential
8 properties. Recognizing this, the domestic well exception has been amended to apply only to those
9 properties that do not have reasonable access to another source of water.²⁸ However, the basic policy
10 that each residential property should have access to enough water to supply the domestic needs of a
11 single-family home has remained unchanged.

12 Real property rights in Nevada include “all rights inherent in ownership, including the
13 inalienable right to possess, use, and enjoy the property.”²⁹ In Nevada’s arid climate, the right to use
14 one’s property to establish a homestead necessarily includes the right to drill a domestic well if no other
15 water source is readily available. Accordingly, any impairment of the right to drill a domestic well is
16 an impairment of a fundamental property right.

17 The Legislature has expressly recognized the importance of the right to drill a domestic well.
18 Pursuant to NRS 533.024(2), Nevada’s policy is “to recognize the importance of domestic wells *as*
19 *appurtenances* to private homes.”³⁰ Other legislatures throughout the western United States have also
20 placed a high importance on the right to drill domestic wells. One scholar who surveyed the water laws
21 of all 19 western states noted that, “in all declarations in which a specific order of preference [of
22 beneficial use] is stated, domestic use has first place” and that “in rural areas, domestic use is most
23 highly favored.”³¹

26 ²⁷ 1939 STATUTES OF NEVADA 274-75 (emphasis added).

27 ²⁸ See e.g., NRS 534.120(3); NRS 534.120(4); NRS 534.120(5); NRS 534.180(3).

28 ²⁹ *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007).

³⁰ Emphasis added.

³¹ WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES: VOL. 1 534 (Natural Resource Division of the Economic Research Service of the United States Department of Agriculture, Publication No. 1206, 1971).

1 **B. The State Engineer’s failure to provide individuals notice and an opportunity to be**
2 **heard before impairing a significant property right violates the Nevada and Federal**
3 **Constitutions.**

4 The State Engineer has argued that he is not *statutorily* required to provide notice and a hearing
5 before issuing an order. However, he is *constitutionally* required to do so when the order impairs a
6 property interest. The Nevada Constitution expressly protects against the deprivation of property
7 without due process of law.³² In *Eureka Cty. v. Seventh Jud. Dist. Ct. ex rel. Cty. of Eureka*, the Nevada
8 Supreme Court confirmed that “[p]rocedural due process [under the Nevada Constitution] requires that
9 parties receive notice and an opportunity to be heard.”³³ As shown above, the right to drill a domestic
10 well on an existing parcel is a significant property interest that has existed in Nevada since statehood.
11 Any impairment of that right requires “personal notice and a hearing to all parties who will be directly
12 affected.”³⁴ Such notice must include the content of any proposed regulation so that affected property
13 owners can effectively prepare to oppose it.³⁵

14 In a brief filed at the Nevada Supreme Court in the *Eureka County* case, the State Engineer,
15 himself, recognized the importance of providing adequate notice before issuing an order that
16 significantly impairs a property right:

17 In order to ensure that due process has been afforded to all interested and
18 impacted parties, when curtailment is at issue, notice and the opportunity
19 to be heard must be afforded to all appropriators of the relevant water
20 source in a basin.³⁶

21 The State Engineer advocated this position even though no specific statute required notice to be
22 provided.

23 In fact, the State Engineer’s administrative repeal of the right to drill a domestic well in this case
24 impairs property rights even more significantly than would an order requiring the curtailment of
25 pumping in a basin. This is because the latter is required to be based on strict priority of right and does
26 not forfeit or otherwise permanently cancel the water right being curtailed. Instead, a curtailment order

27 ³² NEV. CONST. art. 1, § 8 (5).

28 ³³ *Eureka Cty. v. Seventh Jud. Dist. Ct. ex rel. Cty. of Eureka*, 134 Nev. Adv. Op. 37 at 8, 417 P.3d 1121, 1124 (2018)
(internal quotations omitted).

³⁴ *Bing Constr. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770 (1991).

³⁵ *Bing Constr. Co. of Nev.*, 107 Nev. at 266, 810 P.2d at 771.

³⁶ SROA 373 (This brief was filed on May 17, 2017, just seven months before the State Engineer issued Order 1293).

1 only temporarily restricts the use of a water right while there is a shortage in the source. By contrast,
2 the State Engineer's order banning new domestic wells on existing residential parcels is a permanent
3 impairment of a pre-existing property right.

4 Under Article 1, Section 8 of the Nevada Constitution "[n]o person shall be deprived of life,
5 liberty, or property, without due process of law." The Nevada Supreme Court has interpreted this
6 provision as requiring, at a minimum, that affected parties "receive notice and an opportunity to be
7 heard."³⁷ "Due process concerns require that a property owner must be notified when its rights are
8 *changed*, even if those rights are not vested."³⁸ That notice must include a full draft of the proposed
9 order so that affected property owners can prepare to oppose it.³⁹

10 In *Revert v. Ray*,⁴⁰ the Nevada Supreme Court noted the importance of having the State Engineer
11 properly notice and hold administrative hearings prior to issuing orders that may affect property owners'
12 right to use water. The Court stated that the administrative review process the Legislature established
13 in NRS 533.450:

14 [P]resupposes the fullness and fairness of the administrative proceedings:
15 all interested parties must have had a full opportunity to be heard, the State
16 Engineer must clearly resolve all the crucial issues presented, [and] the
17 decisionmaker must prepare findings in sufficient detail to permit judicial
18 review. When these procedures, *grounded in basic notions of fairness and*
due process, are not followed, and the resulting administrative decision is
arbitrary, oppressive, or accompanied by a manifest abuse of discretion,
this court will not hesitate to intervene.⁴¹

19 The State Engineer's proceedings in this case were non-existent. No notice was provided to
20 affected property owners. No draft order was circulated to provide property owners with an opportunity
21 to adequately oppose it. No hearing or other public meeting was held to gather evidence from affected
22 parties or allow them to challenge the evidence the State Engineer relied on. Instead, the State Engineer
23 unilaterally determined what course of action he wanted to take, issued Orders 1293 and 1293A by
24 administrative fiat, and then ruthlessly enforced them without regard to the impact they would have on
25 individual property owners. This imperial style of governance flies in the face of more than 800 years
26

27 ³⁷ *Eureka Cty.*, 134 Nev. Adv. Op. 37, 417 P.3d 1121 (internal quotations omitted).

³⁸ *Bing Constr. Co. of Nev.*, 107 Nev. at 266, 810 P.2d at 770 (emphasis added).

³⁹ *Bing Constr. Co. of Nev.*, 107 Nev. at 266, 810 P.2d at 771.

⁴⁰ *Revert*, 95 Nev. 782, 603 P.2d 262.

⁴¹ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65 (internal quotations and citations omitted) (emphasis added).

1 of settled Anglo-American legal tradition. Accordingly, the State Engineer's blatant disregard of
2 fundamental due process rights renders Order 1293A invalid.

3 **II. The State Engineer Does Not Have Legislative Authority To Restrict Drilling Of Domestic**
4 **Wells.**

5 The State Engineer is a creature of statute. Water law is "special in character" and its provisions
6 "not only lay down the method of procedure but strictly limit the method to that provided."⁴²
7 Accordingly, the State Engineer has only those powers the Legislature expressly granted him and no
8 more. He has no inherent equitable powers to implement what he considers to be "fair" solutions and
9 cannot operate contrary to express statutory limitations.

10 As provided in NRS 534.030(4), in a basin designated for administrative management by the
11 State Engineer (like the Pahump basin), "[t]he State Engineer shall supervise all wells . . . *except those*
12 *wells for domestic purposes for which a permit is not required.*"⁴³ Because domestic wells are exempted
13 from permitting under NRS 534.180(1), the plain language of NRS 534.030(4) precludes the State
14 Engineer from regulating them. This general restriction on the State Engineer's authority can only be
15 overcome if a particular statute includes express language indicating a contrary intent.⁴⁴

16 There have been certain limited cases where the Legislature has seen fit to override the general
17 exemption for domestic wells.⁴⁵ However, these specific exceptions highlight, rather than contradict,
18 the general rule that the State Engineer has no broad-based jurisdiction over domestic wells. After all,
19 if the State Engineer had full authority to regulate domestic wells on the same basis as other wells, the
20 specific exceptions would not be necessary. The fact that the exceptions exist proves that the Legislature
21 intended to strictly limit the State Engineer's authority with respect to domestic wells.

22 This principle can be seen when one compares the statutory language of NRS 534.110(6) (the
23 curtailment statute) with NRS 534.110(8) (the statute the State Engineer relied on in this case). The
24 curtailment statute expressly states that its provisions are applicable to domestic wells – "the State

25 ⁴² *Preferred Equities Corp. v. State Eng'r*, 119 Nev. 384, 388, 75 P.3d 380, 383 (2003).

26 ⁴³ Emphasis added.

27 ⁴⁴ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*
28 183 (2014) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails . . . The most common example of irreconcilable conflict – and the easiest to deal with – involves . . . a general permission that is contradicted by a specific prohibition."). Here, the conflict is between a general exemption and certain limited exceptions to that exemption.

⁴⁵ See e.g., NRS 534.180(2); NRS 534.180(3); NRS 534.110(6); NRS 534.120(3); NRS 534.120(4); NRS 534.120(5).

1 Engineer may order that withdrawals, *including, without limitation, withdrawals from domestic wells* be
2 restricted.”⁴⁶ By contrast, NRS 534.110(8) contains no such express language. Because the Legislature
3 did not expressly state that NRS 534.110(8) applies to domestic wells, the general exemption of NRS
4 534.030(4) controls and the State Engineer is without authority to restrict the drilling of domestic wells.

5 Accordingly, the State Engineer does not have legislative authority to restrict the drilling of new
6 domestic wells on existing residential parcels and, thus, Order 1293A is invalid.

7 **III. Order 1293A Is Arbitrary, Capricious, And An Abuse Of The State Engineer’s Discretion**
8 **Because It Is Not Supported By Substantial Evidence.**

9 **A. Order 1293A does not cite to substantial evidence that new domestic wells will**
10 **interfere with existing wells.**

11 Even if NRS 534.110(8) did apply to domestic wells, which it does not, Order 1293A is not
12 supported by substantial evidence. Under NRS 534.110(8) the State Engineer is allowed to restrict the
13 drilling of new wells *only if* there is substantial evidence showing that “additional wells would cause an
14 undue interference with existing wells.”⁴⁷ Substantial evidence is evidence “which a ‘reasonable mind
15 might accept as adequate to support a conclusion.’”⁴⁸ Here, there is no substantial evidence indicating
16 that the drilling of any additional domestic wells will cause an undue interference with existing wells in
17 the basin.

18 The primary evidence the State Engineer relied on in Order 1293A is a Water Resources Plan
19 prepared for the Nye County Water District in April 2017.⁴⁹ In the plan, the Water District indicates
20 that a groundwater model shows that under *existing* pumping conditions, water level declines could
21 result in as many as 438 wells needing to be re-drilled or deepened by 2035. However, in Order 1293A,
22 the State Engineer expressly acknowledges that this model projection did not calculate the effect *new*
23 wells may have on this projected outcome.⁵⁰ Accordingly, there is no evidence in the record that
24 quantitatively establishes whether additional domestic wells would have any impact on groundwater levels
25 in the basin. Without such a quantitative analysis it is simply impossible to determine whether new
26 domestic wells would cause “*undue* interference with existing wells.”⁵¹ Put another way, if an existing

27 ⁴⁶ NRS 534.110(6) (emphasis added).

28 ⁴⁷ NRS 534.110(8).

⁴⁸ *Bacher v. State Eng’r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

⁴⁹ SROA 76.

⁵⁰ *Id.*

⁵¹ NRS 534.110(8) (emphasis added).

1 well would fail regardless of whether a new domestic well is drilled, then the new well has not caused
2 any undue interference with the existing well and, thus, there is no evidentiary basis to prohibit it.

3 **B. The State Engineer relied on a groundwater study that was not intended to be used**
4 **for this purpose.**

5 The groundwater study the State Engineer relied on was not developed to study the effects of
6 new domestic wells on existing wells in the Pahrump basin and is inadequate for that purpose. Rather,
7 the study was developed at the request of the Nye County Water District as part of its Water Level
8 Measurement Program. The study's purpose was to "examine the longevity of existing shallow wells
9 (mostly domestic wells) in areas of measured and sustained water table declines."⁵² Nowhere does the
10 author of the study discuss the effects that new domestic wells (or any other withdrawals in the basin)
11 may have on water level declines, much less whether those effects will cause undue interference with
12 existing wells.

13 The author of the groundwater study also uses a simplistic analysis to arrive at his determination
14 that a certain number of existing wells will fail based on current water table declines. For example, the
15 model simulation creates its slope of water level declines from water level data gathered over a 17-year
16 period. This period includes years when actual pumping exceeded the basin's perennial yield. However,
17 it is uncontested that during the most recent five-year period, pumping has been reduced below the
18 perennial yield. As a result of this decline in pumping, the slope line used in the study overestimates
19 future water level declines. Despite this, the author of the study provides no error percentage for his
20 predictions. The failure to provide such error percentage means that there is no way to determine the
21 accuracy of the study's predictions.

22 In addition, the author of the study uses a static set of assumptions that does not reflect dynamic
23 changes in groundwater conditions. For example, the author predicts that a certain number of wells will
24 fail by 2035. However, even though he predicts that these wells will no longer be operating, he did not
25 remove the water pumped from these wells in later years. This means that the author of the study is
26 predicting that these "failed" wells will continue to pump water after they fail.

27
28

⁵² SROA 190.

1 Because the groundwater study 1) was never intended to be used for the purpose of determining
2 how new domestic wells might affect existing wells, and 2) is based on a simplistic analysis that fails to
3 account for dynamic changes within the basin, it does not provide the substantial evidence needed to
4 support the State Engineer's issuance of Order 1293A. Without substantial evidence to support it, Order
5 1293A is invalid.

6 **C. The Pahrump Basin is not being over-pumped.**

7 Undisputed by the State Engineer is the fact that the Pahrump basin is not currently being over-
8 pumped. The Pahrump basin's perennial yield is estimated at 20,000 acre-feet annually. According to
9 the State Engineer's own records, current pumping is less than 16,000 acre-feet annually.

10 Instead, the State Engineer argues that Order 1293A is justified because the basin is over-
11 appropriated. PFW does not dispute that the State Engineer has issued water rights in an amount three-
12 times greater than the basin's perennial yield. However, this does not reflect the amount of water that
13 is actually being pumped or whether such pumping interferes with existing wells in the basin. In
14 addition, the State Engineer simply cannot justify impairing existing private property rights to correct a
15 problem that he, himself, created and that he can correct by other means.⁵³

16 Also undisputed is the fact that not only has pumping been reduced below the perennial yield,
17 but water levels in some portions of the basin are actually leveling off or increasing in response to the
18 reduction in pumping. This means that existing efforts to manage water usage in the basin are working
19 and, therefore, there is no need for the State Engineer to enact new, draconian regulations that impair
20 fundamental property rights.

21 **D. Order 1293A is both overbroad and being applied too narrowly.**

22 The State Engineer is applying Order 1293A both overbroadly and too narrowly. The Amended
23 Order is overbroad because it bans the drilling of new domestic wells in the entire basin, even in areas
24 where the evidence indicates that water levels are stable or, in some cases, rising.⁵⁴ The updated Water
25 Resource Plan shows that the well failures projected by the computer model are concentrated in specific
26

27 ⁵³ The low level of actual pumping in relation to the quantity of approved appropriations in the Pahrump Basin indicates that
28 there is a substantial level of non-use of existing permits. Pursuant to NRS 534.090(1), after five years of non-use, the State
Engineer may declare a groundwater permit forfeit. Instead attempting to arrogate to himself a power that the Legislature
has not given him, the State Engineer should instead be using the tools that the Legislature has provided.

⁵⁴ SROA 80-296.

1 areas of the Pahrump basin.⁵⁵ Given this, the plan cannot be used as substantial evidence to support a
2 blanket basin-wide ban on the drilling of new domestic wells.

3 Order 1293A is also being applied too narrowly because it restricts the drilling of only one type
4 of well (domestic) while still allowing other wells (e.g., agricultural or municipal) to be drilled that, due
5 to their high pumping volumes, could have a far greater impact on existing wells. The State Engineer
6 failed to conduct a specific conflicts analysis with respect to domestic wells before issuing Order 1293A.
7 Accordingly, the State Engineer has acted in a discriminatory manner without adequate justification.
8 He has restricted the drilling of new domestic wells without first conducting a thorough analysis
9 regarding whether such wells will unduly interfere with existing wells while, at the same time, still
10 allowing other water users to apply to drill new wells.

11 To the extent it is applicable, under the plain language of NRS 534.110(8), the State Engineer is
12 not authorized to discriminate between water users in this fashion. Rather, under NRS 534.110(8), if
13 the State Engineer finds that the drilling of new wells will cause undue interference with existing wells,
14 he is authorized to issue a blanket restriction on the drilling of all new wells – not just one class of wells.
15 Because the State Engineer impermissibly restricts only the drilling of new domestic wells, he has
16 violated the plain language of NRS 534.110(8) and Order 1293A should be reversed.

17 This overbroad and too narrow application of Order 1293A is the exact opposite of what NRS
18 534.110(8) allows. Under the statute's plain language, the State Engineer is expressly authorized to
19 limit an order restricting the drilling of new wells only to the geographic portion of a basin where a
20 particular problem exists.⁵⁶ Here, even though the evidence shows that water levels are recovering in
21 some portions of the basin, the State Engineer is applying the restriction basin-wide. As provided in
22 NRS 534.110(8), once the portion of the basin where drilling should be restricted has been identified,
23 the State Engineer is then required to ban the drilling of *all* wells, not just one type of well.⁵⁷ If the
24 Legislature had intended to give the State Engineer the power to discriminate between well types, it
25 would have included language to that effect in the statute.

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27
28 ⁵⁵ SROA 194.

⁵⁶ See NRS 534.110(8) (“In any basin or *portion thereof* in the State . . .”) (emphasis added).

⁵⁷ See NRS 534.110(8) (“. . . the State Engineer may restrict the drilling of wells in any portion thereof . . .”).

1 Because Order 1293A's basin-wide ban on the drilling of one specific type of well is not
2 supported by any evidence that shows the prohibition is required to prevent undue harm to existing
3 wells, Order 1293A should be overturned.

4 **IV. Order 1293A Is An Unconstitutional Taking Of Private Property Without Just**
5 **Compensation.**

6 **A. Order 1293A is a per se regulatory taking.**

7 Both the Nevada and Federal Constitutions protect private property owners from seizure by
8 government officials.⁵⁸ These constitutional protections reflect the long-standing Anglo-American legal
9 tradition of respect for private property. As Blackstone noted in 1765:

10 So great moreover is the regard of the law for private property, that it will
11 not authorize the least violation of it; no, not even for the general good of
the whole community.⁵⁹

12 The United States Supreme Court has recognized that constitutional protections against the
13 taking of private property extend beyond outright governmental seizures of individual parcels of land.
14 In *Pa. Coal Co. v. Mahon*, the Court held that "[t]he general rule is that while property may be regulated
15 to a certain extent, if regulation goes too far it will be recognized as a taking."⁶⁰ The Court further
16 cautioned that:

17 We are in danger of forgetting that a strong public desire to improve the
18 public condition is not enough to warrant achieving the desire by a shorter
cut than the constitutional way of paying for the change.⁶¹

19 Regulatory taking challenges are governed by the factors laid out in *Penn Central Transp. Co. v. City of*
20 *New York*.⁶² In determining whether a regulation constitutes a taking a court must consider 1) the
21 regulation's economic impact on the property owner, 2) whether the regulation interferes with
22 investment-backed expectations, and 3) the character of the government action.⁶³

23 Here there is no question that Order 1293A has had a significant economic impact on property
24 owners in the Pahrump basin. Testimony provided at the hearing on PFW's Motion for Stay in the
25

26 ⁵⁸ NEV. CONST. art. 1, § 8 (6) ("Private property shall not be taken for public use without just compensation having first been
made"); U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation.").

27 ⁵⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *135.

28 ⁶⁰ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 159 (1922).

⁶¹ *Id.*

⁶² *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

⁶³ *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 663, 137 P.3d 1110, 1122 (2006).

1 previous case clearly demonstrates that property owners who had purchased property with the intent of
2 establishing a homestead have seen those dreams extinguished.⁶⁴ When purchasing their property, these
3 owners acted in good faith and relied on representations made to them by officials from both the County
4 and the State Engineer's office assuring them that they would be able to drill a domestic well.⁶⁵ They
5 therefore had a reasonable, investment-backed expectation that they would be able to build a home on
6 their lot and provide water to that home using a domestic well.

7 That Orders 1293 and 1293A directly interfere with these investment-backed expectations is
8 beyond dispute. Order 1293 was issued at approximately 3:30 p.m. on December 19, 2017. Prior to
9 that time, PFW's members had an absolute right to drill a domestic well on their property. After Order
10 1293 was issued, that right became conditional on their purchasing, and forfeiting to the government,
11 additional water rights. Order 1293A is simply a continuation of Order 1293 and does nothing to resolve
12 this issue.

13 The right to drill a domestic well is a well-established property right that has been in existence
14 since Nevada became a state. The Legislature recognized and protected this right when it adopted the
15 groundwater law in 1939.⁶⁶ Order 1293A fundamentally changes the nature of this right and, in so
16 doing, effects a taking of an important "stick in the bundle of property rights" that PFW's members
17 acquired when they purchased their properties.⁶⁷ Accordingly, Order 1293A is an unconstitutional
18 taking of public property without just compensation and should be overturned.

19 **B. The requirement to dedicate two acre-feet of water when the average domestic well**
20 **uses only ½ acre-feet of water is an unconstitutional exaction.**

21 The State Engineer's own pumping inventory shows that, on average, domestic wells in Pahrump
22 use only ½ acre-feet of water annually.⁶⁸ Despite this, under Order 1293A, a property owner is required
23 to purchase, and surrender to the State Engineer, not less than two acre-feet of existing permitted water
24 rights if they want to drill a new domestic well on their existing parcel.⁶⁹ From a water resources
25

26 ⁶⁴ SROA 936:16-SROA 937:20.

27 ⁶⁵ SROA 921:20-SROA 922:17.

28 ⁶⁶ 1939 STATUTES OF NEVADA 274-75.

⁶⁷ *McCarran Int'l Airport*, 122 Nev. at 658, 137 P.3d at 1119.

⁶⁸ SE ROA 3383-3448.

⁶⁹ SE ROA 3-10.

1 perspective, this provides the State Engineer a tool to solve the over-appropriation problem. If the
2 owners of the existing 8,000 parcels that do not currently have a drilled domestic well are required to
3 each purchase and surrender two acre-feet of existing water rights, 16,000 acre-feet of permitted water
4 rights will be removed from the basin. However, those 8,000 domestic wells will, on average, only use
5 4,000 acre-feet of water from the aquifer. This represents a net gain to the basin's water budget of
6 12,000 acre-feet of water, or more than 30% of the total over-appropriated permits the State Engineer
7 issued.

8 While this outcome may be good for the public as a whole, the Constitution prohibits requiring
9 individual private property owners to bear the cost and burden of solving public problems. As the United
10 States Supreme Court noted in *Dolan v. City of Tigard*, "[o]ne of the principle purposes of the Takings
11 Clause [of the United States Constitution] is to bar Government from forcing some people alone to bear
12 public burdens which, in all fairness, should be borne by the public as a whole."⁷⁰ Here, the State
13 Engineer is placing the burden of solving the over-appropriation problem (a government-created
14 problem) on individual private property owners.

15 In the updated Water Resource Plan, the Water District does not hide the fact that the acquisition
16 and relinquishment requirement is designed to force a property owner to acquire more water than
17 required to serve their average use. The Water District explicitly states that "[c]ounty ordinances
18 [governing the creation of new parcels] *require more water be dedicated for a parcel than is expected*
19 *to be used.*"⁷¹ The Water District goes on to state that "[t]he relinquished water rights that are in excess
20 of the actual usage will never be used beneficially and in fact return to the [public] basin."⁷² The Water
21 District even includes a proposed basin water budget spreadsheet that includes a row titled "OVER
22 DEDICATION POTENTIAL – DOMESTIC WELLS" where the excess water rights forcibly taken
23 from property owners who seek to drill a domestic well can be used to offset the quantity of water the
24 State Engineer has over-allocated.⁷³ The requirement that individual private property owners acquire
25 and relinquish to the public significantly more water than is required to serve their individual property
26

27 ⁷⁰ *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 2316 (1994).

28 ⁷¹ SROA 202 (emphasis added).

⁷² SROA 202.

⁷³ SROA 203.

1 is exactly the type of unconstitutional exaction the U.S. Supreme Court prohibited *Dolan*. Accordingly,
2 Order 1293A should be overturned.

3 **CONCLUSION**

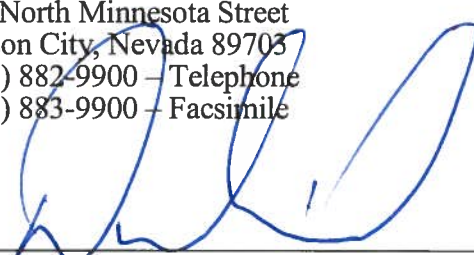
4 For the foregoing reasons, PFW respectfully requests that this Court overturn State Engineer
5 Order 1293A.

6 **AFFIRMATION**
7 **Pursuant to NRS 239B.030(4)**

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

10 DATED this 7th day of September, 2018.

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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 U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 7th day of September, 2018.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT 2

EXHIBIT 2

FILED
FIFTH JUDICIAL DISTRICT

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Nye County Clerk
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7
8 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF NYE

* * *

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

14 Petitioners,

15 vs.

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

19 Respondent.

CV
Case No. 39524

Dept. No. 2

20 **PETITIONERS' REPLY BRIEF**

21 COME NOW, Petitioners, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
22 company (hereinafter "PFW"); STEVEN PETERSON, an individual; MICHAEL LACH, an individual;
23 PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an
24 individual, by and through their counsel, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ.,
25 of the law firm of TAGGART & TAGGART, LTD., to hereby file their reply brief. This opening brief
26 is based on the attached memorandum of points and authorities, all pleadings and papers on file herein,
27 and any argument the Court may allow.

28 ///

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Prior to the issuance of Order 1293 and Order 1293A, the common understanding in Nevada was that the State Engineer cannot and does not regulate domestic wells. Property owners have always been able to drill domestic wells on their property without a water right from the State Engineer. In this sense, domestic wells have always been *exempt* from the State Engineer's regulatory powers. This common and unremarkable understanding of Nevada water law dates back to the statutory adoption of Nevada's water law, and whenever a change has been made to the original water law, special care has been taken to protect the domestic well exemption from the State Engineer's control. Each and every amendment to the water law that addresses domestic wells has been adopted after significant debate that centered on the protection of the right of property owners to drill and use domestic wells. If the Legislature had ever considered the removal of the domestic well exemption that is required to authorize the State Engineer to issue Order 1293A, a large legislative record would exist to reflect such a dramatic change in the water law. No such record exists because the Legislature never considered such a shift in power.

The State Engineer rests his claim of authority in this case on the general regulatory powers contained in NRS 534.120(1) and NRS 534.110(8). Yet, neither of these statutes applies to domestic wells because, indisputably, neither statute mentions domestic wells. 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, and Orders 1293A should be overturned.

Instead of relying on an express power, as a state officer is required to do in Nevada, the State Engineer relies on a legislative declaration and general policy arguments to support his claim that Order 1293A is good. Legislative declarations are clearly not provisions of power for a state agency. And no matter how "good" the State Engineer may think a policy is, without an express statutory power, his office is not empowered to adopt legislative policy. Yet, that is exactly what Order 1293A is, and it should be overturned.

Not only is the State Engineer without statutory power to enact Order 1293A, the adoption of Order 1293A is unconstitutional. The right to drill a well *vests* for a property owner when their parcel is created. That right cannot be taken away without due process. Yet, the State Engineer, without notice

1 or due process of any kind, significantly impaired a fundamental property right. As the Nevada Supreme
2 Court has noted “[e]ight hundred years ago, the Magna Carta laid a foundation for individual property
3 rights, including the protection of private property from unlawful government takings.”¹ The high
4 regard for private property in our Anglo-American legal tradition is reflected in Blackstone’s
5 Commentaries as follows: “[s]o great moreover is the regard of the law for private property, that it will
6 not authorize the least violation of it; no, *not even for the general good of the whole community*.”²
7 Nevada closely adheres to this grand legal tradition and “enjoys a rich history of protecting private
8 property owners against government takings” in part because “the Nevada Constitution contemplates
9 *expansive* property rights.”³ Order 1293A clearly violates this tradition. Since the State Engineer
10 impaired significant property rights, Order 1293A is contrary to the Legislature’s express directive that
11 such wells are exempt from the State Engineer’s supervisory control, and for the other reasons raised
12 below, Order 1293A is unlawful.

13 STANDARD OF REVIEW

14 I. A Record Must Be Properly Developed By The State Engineer For Consideration In This 15 Petitions for Judicial Review.

16 “Any person feeling aggrieved by an order or decision of the State Engineer” may seek judicial
17 review of that order or decision.⁴ Judicial review is “in the nature of an appeal.”⁵ The role of the
18 reviewing court is to determine if the State Engineer’s decision was arbitrary, capricious, or an abuse of
19 discretion, or if it was otherwise affected by prejudicial legal error.⁶ A decision is arbitrary if it was
20 made “without consideration of or regard for facts, circumstances, fixed rules, or procedures.”⁷ A
21 decision is capricious if it is “contrary to the evidence or established rules on law.”⁸

22 In *Revert v. Ray*, the Nevada Supreme Court articulated the procedural safeguards the State
23 Engineer must employ prior to issuing an order or decision.⁹ First, the State Engineer must provide

24 ¹ *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41 at 9, 351 P.3d 736, 741 (2015).

25 ² 1 WILLIAM BLACKSTONE, COMMENTARIES 135 (emphasis added).

26 ³ *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41 at 9, 351 P.3d at 741 (emphasis added).

27 ⁴ NRS 533.450(1).

28 ⁵ NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

⁶ *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)).

⁷ BLACK’S LAW DICTIONARY 125 (10th ed. 2014) (definition of “arbitrary”).

⁸ BLACK’S LAW DICTIONARY 254 (10th ed. 2014) (definition of “capricious”).

⁹ *Revert*, 95 Nev. 782, 603 P.2d 262.

1 affected parties with a “full opportunity to be heard” and “must clearly resolve all the crucial issues
2 presented.”¹⁰ Next, the State Engineer’s order or decision must include “findings in sufficient detail to
3 permit judicial review.”¹¹ Finally, if such procedures are not followed and “the resulting administrative
4 decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion,” a court should not
5 hesitate to intervene and block the enforcement of the order or decision.¹²

6 Here, the State Engineer provided no notice that he was intending to issue the Orders, nor did he
7 hold any hearing or seek any comments from affected property owners. Accordingly, unlike with other
8 appellate-type proceedings, there is little to no record below for the Court to review. While the State
9 Engineer has provided an ostensible “record on appeal” for the Court’s consideration, this record
10 consists of nothing more than hand-picked documents that the State Engineer claims he relied on in
11 making his decision. None of the documents have been authenticated or validated, nor have the authors
12 of the documents been required to testify in a formal hearing or been subjected to cross-examination. In
13 addition, no one from the State Engineer’s office has provided any testimony or evidence supporting his
14 claim of reliance on these documents. Accordingly, none of the processes and procedures which are
15 designed to ensure a full and fair opportunity to challenge evidence before a decision, or to verify that
16 evidence submitted to the Court is relevant and accurate have been followed. Accordingly, the Court
17 should review such materials with a skeptical eye, and, at a minimum, remand this matter for a hearing
18 that properly allows the petitioners with a full opportunity to challenge the evidence the State Engineer
19 now uses to justify his order.

20 **II. The Court Is Required To Conduct A De Novo Review Of The State Engineer’s Erroneous**
21 **Interpretations Of Nevada Water Law.**

22 The State Engineer claims “[d]ecisions of the State Engineer are entitled not only to deference
23 with respect to factual determinations, but also with respect to legal conclusions.”¹³ The only citation
24 provided in support of this claim is to a thirty-year old case. Meanwhile the State Engineer ignores more
25 recent precedent rolling back such deference as well as *Revert v. Ray*’s admonition that any deference
26

27 ¹⁰ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

28 ¹¹ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

¹² *Id.*

¹³ Answering Brief at 8:20-21 (citing *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

1 afforded to the State Engineer is pre-conditioned on his adherence to certain procedural safeguards that
2 were not followed in this case.

3 The Nevada Supreme Court has clearly and unambiguously held that “[w]hile the State
4 Engineer’s interpretation of a statute is persuasive, it is not controlling”¹⁴ and that a reviewing court is
5 required to “decide pure legal questions *without deference* to an agency determination.”¹⁵ The latter of
6 these holdings was issued this year and reflects the Nevada Supreme Court’s current thinking. This
7 more recent precedent effectively overturns the thirty-year old case the State Engineer cited.

8 The State Engineer asserts that this Court should adopt a *Chevron*-like standard of review to the
9 State Engineer’s legal conclusions.¹⁶ The State Engineer’s argument is without merit and fails to
10 consider these recent Nevada Supreme Court cases. The State Engineer initially cites NRS 533.450 as
11 the basis for his assertion. However, NRS 533.450 establishes no such standard, either expressly or by
12 implication, and the Nevada Supreme Court has never adopted the *Chevron* standard for purely legal
13 questions. In fact, in *Town of Eureka*, the Supreme Court held just the opposite – that a “district court
14 is free to decide purely legal questions . . . *without deference* to the agency’s decision.”¹⁷

15 In *Town of Eureka*, the Court specifically reviewed the standard of review that was articulated
16 in *State v. State Engineer*¹⁸ – the standard the State Engineer relied on in his Opposition.¹⁹ Contrary to
17 the State Engineer’s assertion that *State v. State Engineer* established a deferential standard of review
18 for legal questions, the Nevada Supreme Court interpreted the holding of *State v. State Engineer* as
19 follows: “[w]hile the State Engineer’s interpretation of a statute is persuasive, *it is not controlling*.”²⁰
20 This is significantly different than the State Engineer’s assertion that a court should give great deference
21 to the State Engineer’s legal conclusions. Because *Town of Eureka* was decided after *State v. State*
22 *Engineer*, and specifically limited the scope of the standard of review articulated in *State v. State*
23 *Engineer*, *Town of Eureka* controls the review of this case.

24 ¹⁴ *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).

25 ¹⁵ *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

26 ¹⁶ See *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a
27 deferential standard of review for federal courts reviewing legal determinations of federal agencies).

28 ¹⁷ *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).

¹⁸ 104 Nev. 709, 766 P.2d 263.

¹⁹ Opposition at 13:14-19.

²⁰ *Town of Eureka*, 108 Nev. at 165-66, 826 P.2d at 950 (citing *State v. State Eng’r*, 104 Nev. at 713, 766 P.2d at 266)
(emphasis added).

1 Importantly, the non-deferential standard of review enunciated in *Town of Eureka* was
2 reaffirmed by the Nevada Supreme Court as recently as February 15, 2018. In *Felton v. Douglas County*,
3 the Supreme Court noted that the “standard for reviewing petitions for judicial review of administrative
4 decisions is to “decide pure legal questions *without deference* to an agency determination.”²¹ The
5 Supreme Court stated that in such cases, a court should apply “a de novo standard of review to questions
6 of law, which includes the administrative construction of statutes.”²²

7 The Nevada Supreme Court’s recent holding in *Felton* is consistent with the evolving rollback
8 of judicial deference to legal interpretations made by administrative agencies. Several legal scholars
9 and judges have criticized *Chevron*-like standards of review²³ because they create within the judiciary
10 an “institutional bias in favor of the most powerful parties (the [] bureaucracy), which violates parties’
11 due process rights when their life, liberty, or property is at issue.”²⁴ Several prominent legal scholars
12 and judges have criticized deferential standards of review because they create within the judiciary an
13 “institutional bias in favor of the most powerful parties [the administrative bureaucracy] which violates
14 parties’ due process rights when their life, liberty, or property is at issue.”²⁵ Another prominent legal
15 scholar has noted that “when a judge ‘respects,’ ‘defers,’ or otherwise relies on an agency’s judgment
16 about the law . . . she needs to worry not about an agency’s authority, but more centrally about whether
17 she candidly is abandoning her very office as a judge and denying due process of law.”²⁶ Justice Gorsuch
18 has lamented that “under *Chevron*, the problem remains that courts are not fulfilling their duty to
19 interpret the law and declare invalid agency actions inconsistent with those interpretations.”²⁷

21 ²¹ *Felton v. Douglas County*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d at 994 (emphasis added).

22 ²² *Id.*

23 ²³ See e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Jeffery A. Pojanowski, *Without Deference*, 81 Missouri Law Review 1075 (2016); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 Georgetown Journal of Law and Public Policy ____ (forthcoming 2018) (published by The Ohio State University Moritz College of Law, Public Law and Legal Working Paper Series No. 408, September 4, 2017, revised October 3, 2017); John C. Eastman, *The President’s Pen and the Bureaucrat’s Fiefdom*, 40 Harvard Journal of Law and Public Policy 639 (June 2017).

24 ²⁴ Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 Georgetown Journal of Law and Public Policy ____ (forthcoming 2018) (published by The Ohio State University Moritz College of Law, Public Law and Legal Working Paper Series No. 408, September 4, 2017, revised October 3, 2017).

25 ²⁵ Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 Georgetown Journal of Law and Public Policy ____ (forthcoming 2018) (published by The Ohio State University Moritz College of Law, Public Law and Legal Working Paper Series No. 408, September 4, 2017, revised October 3, 2017).

26 ²⁶ Phillip Hamburger, *Chevron Bias*, 84 George Washington Law Review 1192 (2016).

27 ²⁷ *Gutierrez-Brizuela*, 834 F.3d at 1153.

1 As was stated more than 200 years ago “[i]t is emphatically the province and duty of the judicial
2 department to say what the law is.”²⁸ As his title suggests, the State Engineer is a professional engineer
3 by background and training. There is nothing in his educational background that provides him with any
4 special expertise regarding the common law rules of statutory construction or legal interpretation.
5 Rather, it is the courts which possess the greatest expertise in these areas. Accordingly, the Court should
6 not give any deference to the State Engineer’s legal determinations. This is especially true with respect
7 to determinations regarding the scope and limit of his own authority.

8 ARGUMENT

9 **I. The State Engineer Does Not Have Legal Authority To Issue Amended Order 1293A** 10 **Because Domestic Wells Are Exempt From The State Engineer’s Regulatory Powers.**

11 The language of NRS 534.030(4) is plain and unambiguous. The statute grants the State
12 Engineer general supervisory power over all groundwater wells in Nevada *except* domestic wells. The
13 history of this particular provision, and of the groundwater law in general, clearly demonstrate that the
14 Legislature purposely intended to exempt domestic wells from the State Engineer’s regulatory authority
15 except in certain limited circumstances that do not apply to the present case. Accordingly, the Orders
16 are an invalid exercise of authority that the State Engineer does not possess and should be overturned.

17 Also, the State Engineer has no implied powers. The State Engineer is a creature of statute and
18 has only those powers expressly granted to him by the Legislature. Water law is “special in character”
19 and its provisions “not only lay down the method of procedure but strictly limit the method to that
20 provided” in the statutes.²⁹ The State Engineer simply has no inherent equitable powers and is wholly
21 “without discretion to violate express statutory language *even where the equities lie in favor of doing*
22 *so.*”³⁰ Accordingly, the State Engineer’s protestations that the Orders are desperately needed to help
23 him manage groundwater in the basin are wholly irrelevant to a determination of whether he has the
24 power to issue them. The only determination that the Court must make is whether the Legislature has
25 expressly authorized the State Engineer to issue the Orders. In this case, not only has the Legislature
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27

28 ²⁸ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²⁹ *Preferred Equities Corp. v. State Eng’r, State of Nev.*, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003).

³⁰ *State Eng’r v. Am. Nat’l Ins. Co.*, 88 Nev. 424, 426-27, 498 P.2d 1329, 1330-31 (1972) (emphasis added).

1 not provided such an authorization, it has expressly stated the opposite – that domestic wells are exempt
2 from the State Engineer’s supervisory power.

3 **A. Nevada’s groundwater law, NRS 534.030(4), exempt’s domestic wells from the State**
4 **Engineer’s control.**

5 Nevada’s first groundwater law was passed in 1939. The 1939 statute brought groundwater
6 appropriations under the same permitting system that had previously been implemented for surface
7 water. Notably, however, the statute exempted domestic wells from the requirements of its provisions.
8 Specifically, the 1939 statute stated that:

9 This act [the groundwater law] shall not apply to the developing and use
10 of underground water for domestic purposes where the draught does not
11 exceed two gallons per minute and where the water developed is not from
 an artesian well.³¹

12 This exemption meant that the drilling of domestic wells would continue to be governed by the common
13 law in effect at the time.³² Under the common law, a person could drill a domestic well on their parcel
14 without seeking prior permission from the State Engineer or any other government official. If such a
15 well interfered with the wells of a more senior appropriator of groundwater, that senior appropriator
16 could seek an appropriate remedy in a court proceeding. Because under the common law property
17 owners had an absolute right to drill a domestic well to support the development of a household on their
18 property, any provisions of the groundwater law restricting that right must be strictly construed.³³

19 In 1947 the groundwater law was significantly amended. In addition to the provision noted
20 above (which later became codified as NRS 534.180(1)), the 1947 law also included a section providing
21 that that:

22 Upon receipt by the state engineer of a petition requesting him to
23 administer the provisions of this act, as relating to designated areas . . . he
24 shall designate such area by basin, or by subbasin, or by township and
 proceed with the administration of this act as provided for herein. *Such*
 supervision to be exercised on all wells tapping artesian water or water

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26 ³¹ 1939 STATUTES OF NEVADA 274-75.

27 ³² ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) (“statutes will
not be interpreted as changing the common law unless they effect that change with clarity.”).

28 ³³ *Orr Ditch & Water Co. v. Justice Court of Reno Tp., Washoe Cty.*, 64 Nev. 138, 164, 178 P.2d 558, 570 (1947) (“Another
important rule of statutory construction, very generally applied, is the rule which provides that statutes in derogation of the
common law shall be strictly construed, in the absence of any statute changing the rule.”) (quoting Crawford on Statutory
Construction, § 228, pp. 422, 423).

1 *in definable underground aquifers drilled subsequent to March 22, 1913,*
2 *and on all wells tapping percolating water, the course and boundaries of*
3 *which are incapable of determination, drilled subsequent to March 25,*
 1939; save and excepting those wells coming under the provisions of
 *section 3 of this act.*³⁴

4 With minor amendments, the italicized portion of this provision later became codified as NRS
5 534.030(4).

6 The new section included in the 1947 act authorized the State Engineer to move beyond mere
7 permitting of groundwater wells and instead “supervise” all wells and groundwater withdrawals in
8 certain designated basins. Supervision includes all “acts involved in managing, directing, or overseeing
9 persons or projects.”³⁵ Therefore, this section of the groundwater law expressly authorized the State
10 Engineer to generally manage, direct, and oversee groundwater withdrawals in designated basins (like
11 Pahrump) and is the basis for his authority to do so. However, the statute expressly excluded domestic
12 wells from the State Engineer’s regulatory powers by stating “excepting those wells coming under the
13 provisions of section 3 of this act” (i.e., domestic wells).³⁶

14 Two separate and distinct protections for domestic wells are provided under NRS 534.180(1)
15 and NRS 534.030(4) in the form of further exemptions from the State Engineer’s regulatory control.
16 Under NRS 534.180(1), such wells are exempt from the State Engineer’s permitting process while NRS
17 534.030(4) separately exempts them from the State Engineer’s general supervisory control.
18 Accordingly, the State Engineer is wrong when he claims that “NRS 534.030(4) specifically exempts
19 domestic wells from the permitting process.”³⁷ Instead, as shown above, it is NRS 534.180(1) that
20 exempts domestic wells from the permitting process while NRS 534.030(4) provides an additional
21 exemption that removes domestic wells from the State Engineer’s general supervisory control.

22 Because domestic wells are afforded an exemption from the State Engineer’s regulatory purview,
23 the only way he can issue a regulation governing them is if he can point to a specific statute that
24 authorizes him to do so. With respect to the Orders in question, he has not and cannot do this because
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27 ³⁴ 1939 STATUTES OF NEVADA 53 (emphasis added).

28 ³⁵ BLACK’S LAW DICTIONARY 1667 (10th ed. 2014).

³⁶ 1947 STATUTES OF NEVADA 53.

³⁷ Answering Brief at 12:21-22.

1 no such statute exists. Accordingly, the State Engineer is without authority to issue Order 1293A and it
2 must be overturned.

3 **B. Specific exceptions to the general rule do not grant the State Engineer broad**
4 **regulatory power over domestic wells.**

5 Very limited exceptions have been adopted by the Legislature from the general exemption of
6 domestic wells from the State Engineer’s regulatory powers. None of these limited exceptions authorize
7 Order 1293A because none of them allow the State Engineer to ban the drilling of new domestic wells
8 on *existing* parcels.

9 For example, NRS 534.120(3)(d) authorizes the State Engineer to prohibit the drilling of new
10 domestic wells in “areas where water can be furnished by an entity such as a water district or
11 municipality” (i.e., where the property owner can reasonably get water from other sources). Likewise,
12 NRS 534.120(3)(e) allows the State Engineer to require a dedication of water rights when a *new* parcel
13 is created (but not for existing parcels). Clearly, neither of these provisions authorize Order 1293A
14 because Order 1293A prohibits new domestic wells in areas where water cannot be furnished by a water
15 purveyor, and on existing parcels.

16 Further, the enactment of NRS 534.120(3)(d) and (e) demonstrates that an express provision of
17 statute is needed to give the State Engineer the power over domestic wells that is needed to justify Order
18 1293A, and since no such statute exists, Order 1293A is not valid. First, neither of these provisions
19 would be needed if the State Engineer had the implied power he claims. The State Engineer claims that
20 NRS 534.110(8) applies *generally* to domestic wells, and justifies Order 1293A. But if that were true,
21 the language of NRS 534.120(3)(d) would be unnecessary and rendered nugatory. That result is contrary
22 to the foundational principle of statutory interpretation that every provision of a statute is to be given
23 effect and no provision should be given an interpretation that causes it to duplicate another provision or
24 cause another provision to have no consequence.³⁸

25 As noted above, NRS 534.120(3)(d) provides a specific condition under which the State
26 Engineer is authorized to restrict the drilling of new domestic wells – if the property on which the well
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28 ³⁸ *Paramount Ins., Inc. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (“No part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can be properly avoided.”).

1 is proposed to be located can reasonably be served by a municipal utility. The obvious corollary to this
2 rule is that if the condition does not exist (i.e., if no other water source is available to serve the property),
3 the State Engineer is not authorized to restrict the property owner from installing a domestic well.
4 However, if the State Engineer could order, as he claims, a general ban on new domestic wells under
5 NRS 534.110(8) (regardless of whether an alternative source of water is available) then the conditional
6 language of NRS 534.120(3)(d) has no practical effect.

7 The simple question that the State Engineer has never provided a satisfactory answer to is – if,
8 as he claims, NRS 534.030(4) does not exempt domestic wells from his general supervisory powers,
9 why did the Legislature find it necessary to adopt special statutes granting him limited authority over
10 such wells in specific circumstances? For example, NRS 534.110(6) allows the State Engineer to order
11 a curtailment of pumping in a basin in certain limited circumstances. This provision was first enacted
12 in 1955.³⁹ From the time it was enacted until 2011 the statute did not contain language making it
13 applicable to domestic wells. In 2011, the Legislature specifically added the language “including,
14 without limitation, withdrawals from domestic wells”⁴⁰ indicating a specific desire to bring domestic
15 wells within the statute’s reach. This language would be wholly superfluous if the State Engineer has
16 the general regulatory power he claims.

17 By contrast, no express language has ever been included in NRS 534.110(8) or NRS 534.120(1).
18 Just as including such language in NRS 534.110(6) demonstrates legislative intent to have its provisions
19 apply to domestic wells, excluding similar language in NRS 534.110(8) or NRS 534.120 demonstrates
20 a legislative intent not to have the statute apply to such wells. Neither a legislative declaration, nor the
21 policy reasons the State Engineer relies on, can provide that power either.⁴¹ The Legislature must be
22 presumed to mean what it says, and say what it means.⁴² When the Legislature has seen fit to apply
23 specific provisions of the water law to domestic wells, it has done so with unambiguous language and
24

25 ³⁹ 1955 STATUTES OF NEVADA 331.

26 ⁴⁰ 2011 Assembly Bill 419.

27 ⁴¹ *Price Dev. Co., L.P. v. Orem City*, 995 P.2d 1237, 1246 (Utah 2000) (“a preamble is nothing more than a statement of policy
28 which confers no substantive rights.”); see *River Dev. Corp. v. Liberty Corp.*, 133 A.2d 373, 383 (N.J. Ch. 1957) (preamble
of a statute is not appropriate too for construing statute, unless the statute itself is ambiguous); *State v. Ohio Oil Co.*, 49 N.E.
809, 813 (Ind. 1898) (“as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of
the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and
meaning of the legislature, is, in itself, fatal to the claim set up.”).

⁴² *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

1 clear intent. Where, as here, the Legislature has not clearly expressed such intent in a statute, it cannot
2 be presumed to intend that outcome. Accordingly, the State Engineer is not authorized by the general
3 language in NRS 534.120(1) to place the restrictions contained in NRS 534.110(8) on domestic wells,
4 and Orders 1293A should be overturned.

5 **II. The State Engineer Violated Basic Constitutional Due Process Safeguards When He Issued**
6 **The Orders Without Providing Notice Or A Hearing.**

7 The State Engineer concedes that if the right to drill a domestic well is a vested property right,
8 constitutional due process protections attach, and notice and hearing are required.⁴³ Accordingly, the
9 State Engineer is left making the rather strained argument that notice was not required because the right
10 to drill a domestic well is not a vested property right. The State Engineer is wrong. His argument is
11 based solely on language in NRS 533.024(1)(b) which establishes a “protectable interest” in already-
12 drilled domestic wells that was intended to protect such wells from unreasonable adverse effects caused
13 by other wells. In making this argument, the State Engineer conflates two separate and distinct property
14 interests and ignores Nevada’s history of interpreting property rights expansively.

15 **A. The right to drill a domestic well is a fundamental property right in Nevada.**

16 Order 1293A applies to existing parcels, and the property interests on those parcels has most
17 certainly *vested* in the constitutional sense. For instance, each parcel owner is entitled to build a home.
18 Each owner is also allowed to a water supply, and that right has been recognized since statehood, in the
19 adoption of the water code, and every amendment to the water code. That right to build a home and
20 have a water supply vested when each parcel was created. After the right to build a house vests, a local
21 government cannot take action to impair that vested right without proper notice and a hearing.⁴⁴
22 Likewise, the State Engineer cannot take an action that impairs the vested right to build a home or build
23 a water supply. Yet, Order 1293A does exactly that, and was adopted without notice and a hearing.
24 Therefore, Order 1293A must be overturned.

25 In 2011, Assemblyman (now Senator) Goicoechea testified during a Legislative hearing that
26 “with domestic wells in the state, if you have a parcel created, you have a right to drill a domestic well
27

28 ⁴³ Answering Brief at 13:13-16.

⁴⁴ *City of Reno v. Nev. First Thrift*, 100 Nev. 483, 686 P.2d 231 (1984).

1 and I do not think anyone argues that.”⁴⁵ At the time he uttered this statement, it was uncontroversial
2 and reflected the conventional understanding regarding domestic wells – that the right to drill a domestic
3 well, if no other source of water is available, is one of the fundamental sticks in the bundle of rights that
4 comes with ownership of property.⁴⁶ In an arid climate such as ours, without this right a parcel of land
5 becomes effectively unusable and valueless. Importantly, Assemblyman Goicoechea’s statement was
6 made almost 20 years after the Legislature passed NRS 533.024(1)(b) giving domestic wells statutory
7 protection from adverse effects caused by other wells.

8 Now the State Engineer argues that the “protectable interest” language in NRS 533.024(1)(b)
9 fundamentally altered prior legislation, and gave the State Engineer the right to prohibit domestic wells.
10 But, in fact, this “protectable interest” language was intended for a whole different purpose.

11 1. **A “protectable interest in a domestic well” is not the same thing as a right to**
12 **drill a domestic well.**

13 The Legislature enacted NRS 533.024(1)(b) for the sole purpose of ensuring that the existing
14 domestic wells would be considered when the State Engineer was reviewing permit applications for
15 other uses of water. This is why it is included in NRS Chapter 533, which governs the application and
16 permitting process, and not in NRS Chapter 534, which governs the management of groundwater
17 resources. This provision was never intended to delimit or restrict a property owner’s right to drill a
18 domestic well. Rather, the intent was clearly to provide extra protection for such a well once it was
19 operational.

20 In presenting an amendment to NRS 533.024(1)(b) in the 2001 Legislature, Ms. Eissmann, a
21 senior research analyst with the Legislative Counsel Bureau, defined the term “protectable interest” as
22 follows – “‘protectible interest’ means protection of the *domestic well’s water supply* from unreasonable
23 impacts [from other wells].”⁴⁷ This was confirmed by Nevada State Engineer Michael Turnipseed who
24 opined that the bill was needed because “a municipal well’s cone of depression could impact domestic
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26 ⁴⁵ March 30, 2011, Assembly Committee on Government Affairs p. 72.

27 ⁴⁶ See generally STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 45-72 (Harvard
28 University Press, 2011) (discussing the origins and history of the “bundle of rights” theory of property ownership). See also
McCarran Int’l Airport v. Sisolak, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006) (“The term ‘property’ includes all rights
inherent in ownership, including the right to possess, use, and enjoy the property.”).

⁴⁷ ROA 910.

1 wells” in a basin.⁴⁸ These statements clearly indicate that the “protectable interest” created by NRS
2 534.024(1)(b) is a right to protect the water supply of an existing domestic well from harm caused by
3 large productions wells.

4 This conclusion is reinforced when one considers how the “protectable interest” language is used
5 in the rest of the water law statute. For example, the provisions of NRS 533.370 set the standards for
6 approvals of permit applications. Under NRS 533.370(2) the State Engineer is forbidden from
7 approving an application that “conflicts with existing rights or with protectable interests in existing
8 domestic wells.” Clearly, this statute is intended to enforce NRS 533.024(1)(b)’s legislative declaration
9 that domestic wells be protected from harm caused by other water users and provides further evidence
10 that in establishing such an interest, the Legislature was not acting in a manner to restrict property
11 owners’ existing common law right to drill a domestic well on their property. This definition did not
12 alter, nor could it alter, the meaning of the right to drill a domestic well in Nevada.

13 **2. Nevada defines property rights expansively.**

14 The Nevada Constitution guarantees every person’s right to acquire, possess, and protect their
15 property.⁴⁹ The Nevada Supreme Court has held that “the Nevada Constitution contemplates expansive
16 property rights” and noted that “our State enjoys a rich history of protecting private property owners
17 against government takings.”⁵⁰ As noted above, the right of a property owner to drill a well on their
18 property to support the development of a household has been a key stick in the bundle of rights that
19 comes with ownership of property in Nevada. This right has existed since before statehood, has been
20 recognized by legislators, judges, lawyers, and ordinary citizens, and has never been abrogated by either
21 a legislative act or judicial determination.

22 **3. The right to drill a domestic well vests when a parcel is created.**

23 As noted above, the right to protect an existing well from adverse effects of other wells naturally
24 arises only after such a well is established. However, the right to drill a well arises when a parcel is
25 created. Nevada Supreme Court decisions regarding the vesting of development rights hold that “[i]n
26 order for rights in a proposed development project to vest, zoning or use approvals must not be subject
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28 ⁴⁸ *Id.*

⁴⁹ *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41 at 9, 351 P.3d at 741.

⁵⁰ *McCarran Int’l Airport*, 122 Nev. at 670, 137 P.3d at 1127.

1 to further governmental discretionary action affecting project commencement.”⁵¹ Under this standard,
2 the right to drill a domestic well becomes vested at the time when the property owner can commence
3 drilling the well without the need to seek further discretionary approval from a governmental entity.

4 Domestic wells are specifically exempt from the discretionary permitting requirements of the
5 statutory water law under NRS 534.180(1). Therefore, once a parcel is created, there are no additional
6 discretionary approvals that are required before the property owner can drill a domestic well on the
7 property. Accordingly, pursuant to the logic of *American West*, the right to drill a domestic well
8 naturally vests once the parcel in question has been created. This is eminently logical, since that is the
9 point in time at which the property owner can also proceed with establishing a household on the property.

10 Because Nevada defines property rights expansively, and because the right to drill a domestic
11 well becomes vested once the parcel is created, the State Engineer is without power to issue a regulation
12 impairing that right unless he first, at a minimum, provides individual notice to affected property owners
13 and allows them the opportunity to be heard. Accordingly, the Order 1293A is invalid and must be
14 overturned.

15 **B. The State Engineer failed to provide notice and a hearing before impairing**
16 **Petitioner’s fundamental property rights.**

17 The State Engineer issued Order 1293 on December 19, 2017, without any prior notice or
18 publication and without holding a hearing. Order 1293A was issued while the appeal over Order 1293
19 was pending. The State Engineer issued Order 1293A without any prior notice or publication (and
20 without notifying either the Court or opposing counsel). These facts are a matter of public record and
21 are undisputed. The Nevada Supreme Court has ruled that prior to issuing a regulation affecting an
22 interest in real property a regulatory body must provide personal notice to each affected property
23 owner.⁵² Said notice must include the content of the regulation so that affected parties can adequately
24 prepare to oppose it.⁵³ Finally, the regulatory body must hold a hearing and allow affected property
25 owners the opportunity to provide testimony and evidence related to the regulation.⁵⁴ A failure to follow
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27 ⁵¹ *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (hereinafter “*American West*”).

28 ⁵² *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

⁵³ *Id.*

⁵⁴ *Id.*

1 these steps is a constitutional due process violation that renders the regulation invalid. Because the
2 Orders impair a vested property right, and because the State Engineer failed to provide notice or hold a
3 hearing before issuing the Orders, the Orders are invalid and must be overturned.

4 **III. The Orders Are Arbitrary, Capricious, And An Abuse Of The State Engineer's Discretion**
5 **Because They Are Not Supported By Substantial Evidence In The Record.**

6 **A. The Court cannot defer to the State Engineer's factual findings because the**
7 **proceedings below were not conducted in a full and fair manner that afforded all**
8 **parties the opportunity to be heard.**

9 To be valid, an Order the State Engineer issues must be supported by substantial evidence
10 existing in the record at the time of issuance.⁵⁵ Substantial evidence is evidence "which a 'reasonable
11 mind might accept as adequate to support a conclusion.'"⁵⁶ Normally, when the State Engineer holds a
12 hearing on a water related matter, interested parties are given an opportunity to view and challenge the
13 evidence the State Engineer will be relying on to make his decision. This evidence is then included in
14 the record on appeal submitted to the district court. Here, none of these procedures were followed and,
15 therefore, the ROA submitted by the State Engineer should be viewed skeptically.

16 When proper evidentiary procedures are followed, the State Engineer's factual findings are
17 accorded deference and the burden is on the party attacking them. However, the Nevada Supreme Court
18 has made clear that this deference is pre-conditioned on the "fullness and fairness of the administrative
19 proceedings" below.⁵⁷ Accordingly, a reviewing court can only defer to the State Engineer's factual
20 findings if: (1) opposing parties were given a "full opportunity to be heard," (2) the State Engineer fully
21 resolved all issues raised by the parties, and (3) the State Engineer prepare written findings "in sufficient
22 detail to permit judicial review."⁵⁸ The Supreme Court's holding that deference will not be granted if
23 certain procedural and evidentiary safeguards are not followed is a recognition of the reality that under
24 such circumstances there is no way to determine the authenticity, relevance, or veracity of the "evidence"
25 the State Engineer relied on.

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27 ⁵⁵ *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 ⁵⁶ *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

⁵⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264.

⁵⁸ *Id.*, 95 Nev. at 787, 603 P.2d at 264-65.

1 **B. There is no evidence in the record that the Pahrump Basin is being over-pumped or**
2 **that additional domestic wells will unduly interfere with existing wells.**

3 The State Engineer does not contest certain key factual contentions raised by PFW in its Opening
4 Brief. First, the State Engineer's own records show that the Pahrump Basin is not currently over-pumped
5 (i.e., pumping does not exceed the established perennial yield). Second, pumping rates in the basin have
6 steadily declined since 1969 and as a result of this decline water levels in some portions of the basin
7 have leveled-off or risen (in some cases by as much as 45 feet). Third, the ROA does not contain any
8 scientific study or other evidence showing that allowing additional domestic wells will unduly impact
9 existing wells in the basin.

10 Even if the State Engineer had the authority to apply NRS 534.110(8) to domestic wells, which
11 he does not, before he can do so he must demonstrate that additional wells will unduly interfere with
12 wells that already exist. In his Answering Brief, the State Engineer makes the conclusory statement that
13 “[i]t is clear that if existing pumping rates will lead to well failures, an increase in the number of wells
14 and therefore an increase in pumping will accelerate the problem – undoubtedly causing an undue
15 interference with existing wells.”⁵⁹ However, there is a major problem with this statement – it is not
16 backed by any evidence or facts in the record and the State Engineer provides no citation to any evidence
17 supporting it.

18 As the State Engineer well knows, the hydrology and hydrogeology of any given groundwater
19 basin is complex. Pumping in one part of a basin may have a variable effect on water levels in another
20 part of a basin. This is why tools like monitoring wells and groundwater models are used to determine
21 the likelihood of conflicts arising from pumping at any specific location. Here, the State Engineer did
22 not perform a full conflicts analysis but instead relied exclusively on a groundwater model,
23 commissioned by an interested and biased party, that was never designed to determine whether new
24 wells would cause undue interference with existing wells.⁶⁰ Instead, the model was designed to
25 determine the likelihood of well failures resulting from the pumping of existing wells in the basin.

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27 ⁵⁹ Answering Brief at 10:27-11:2.

28 ⁶⁰ 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.

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

8 The State Engineer makes much of the fact that water levels in some portions of the basin are
9 continuing to decline while ignoring the fact that water levels in other portions of the basin are static or
10 rising. This variability in basin conditions is precisely why a full conflicts analysis should have been
11 performed. As it stands, there is no evidence in the record to support the idea that the drilling of domestic
12 wells anywhere in the basin will cause undue interference with existing wells. Accordingly, the Orders
13 are invalid and must be overturned.

14 **C. The Orders are both overbroad and being applied too narrowly.**

15 As noted above, the hydrology and hydrogeology of groundwater basins is complex. What little
16 evidence exists in the record shows that water levels in the basin are declining in some areas, remaining
17 static in others, and even rising in some places. Despite this, the Orders impose a basin-wide ban on the
18 drilling of new domestic wells.

19 The State Engineer is specifically authorized under NRS 534.110(8) to limit a ban on the drilling
20 of new wells to only the portions of a basin where evidence shows such wells may unduly interfere with
21 existing wells. Because the evidence in the record indicates that in some areas of the basin water levels
22 are static or rising, and therefore would not be impacted by the drilling of new domestic wells, it was an
23 abuse of the State Engineer’s discretion to impose a basin-wide ban.

24 In addition, the State Engineer’s Orders impose a ban on only domestic wells, not other types of
25 wells. Individual domestic wells are limited to a draught of two acre-feet/year. They are typically the
26 smallest wells in a basin and generally have much smaller cones of depression than the larger municipal
27 or agricultural wells. Accordingly, the potential impacts from drilling a domestic well are usually much
28 smaller than the impacts associated with large production wells. Despite this the Orders continue to

1 allow for the drilling of the much larger wells with potentially greater impacts on existing wells while
2 banning the smaller ones.

3 The State Engineer argues that the larger production wells are exempt from the Orders because
4 they are required to undergo a permitting process that includes a conflicts analysis. This ignores the fact
5 that the State Engineer was required to perform a conflicts analysis before restricting the drilling of wells
6 under NRS 534.110(8) and completely failed to do so. Instead he relied solely on his unsupported hunch
7 that because some existing wells may be causing a problem in some parts of the basin, allowing any new
8 wells (regardless of location) will exacerbate the problem.

9 If the State Engineer truly believes that no conflicts analysis is needed to determine whether new
10 domestic wells will exacerbate certain localized water level issues, then he should apply that same
11 standard and ban all new wells in the basin. Likewise, if the State Engineer believes that a conflicts
12 analysis could show that a large production well could be safely located in certain areas within the basin,
13 he should perform an in-depth conflicts analysis to determine locations where new domestic wells can
14 also be safely allowed.

15 Because the record in this case is unreliable and does not provide substantial evidence supporting
16 the issuance of the Orders, the Orders are invalid and should be overturned.

17 **IV. The Orders Are Unconstitutional Because They Authorize Private Property To Be Taken**
18 **For Public Use Without Compensation.**

19 **A. The Court has the authority to determine the takings issues raised by Petitioners.**

20 The State Engineer claims that because PFW has not brought an action for inverse condemnation
21 under NRS Chapter 37, the Court cannot consider PFW's claims that the Orders are an unconstitutional
22 taking of private property.⁶¹ The State Engineer is correct that any action seeking compensatory
23 damages for an unconstitutional taking must be brought under NRS Chapter 37. However, this is not
24 the relief that PFW is seeking at this time. What PFW is seeking is to have the Orders overturned and
25 declared invalid under the administrative review process of NRS 533.450. If this occurs, there will be
26 no permanent taking of PFW's property rights and thus no need to bring an inverse condemnation action
27 against the State.

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⁶¹ Answering Brief at 17-20.

1 In the present action, Petitioners seek only declarative and injunctive relief, not compensatory
2 damages.⁶² Accordingly, there is no need for discovery or fact-finding to determine the extent of the
3 losses suffered by individual property owners. The only question before the Court is a purely legal one
4 – whether the Orders, as written, constitute an unlawful taking of private property for public use. The
5 parties have fully briefed this issue and it is ripe for adjudication.

6 The State Engineer also argues that the Court cannot make this determination on the takings
7 issue because it is operating in an appellate capacity and no judicial determination has been made on
8 this issue in the proceedings below. This ignores the fact that when the State Engineer issues regulatory
9 edicts he is operating in a quasi-judicial capacity. Prior to issuing an order it is incumbent on the State
10 Engineer to perform a review of the legal authority underlying the proposed order and determine whether
11 its issuance will violate the constitutional or statutory provisions. Accordingly, every order issued by
12 the State Engineer carries with it the presumption that the State Engineer has determined that the order
13 is constitutional. To presume otherwise would lead to the absurd conclusion that the State Engineer is
14 not required to consider the constitutionality of his actions.

15 The State Engineer asserts that to properly defend against PFW's takings claim would require
16 discovery as to the basis of the claim. This is absurd. The basis of the claim is fully articulated in
17 Petitioners' Opening Brief wherein Petitioners assert that the Orders are both a per se taking and a
18 regulatory taking. In addition, the only reason the State Engineer was unable to hold his own
19 proceedings to conduct discovery on these claims is that he chose not to do so. Had the State Engineer
20 followed proper procedure and held a hearing before issuing the Orders, he could have considered
21 testimony and evidence regarding the impacts of the proposed Order on private property owners and
22 whether such impacts would constitute an unlawful taking. Simply put, the State Engineer cannot refuse
23 to hold an evidentiary hearing and then, when his order is appealed, claim that the reviewing Court has
24 no jurisdiction to hear the appeal because of a lack of evidentiary proceedings below.

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⁶² Petitioners reserve the right to file a motion for recovery of attorney's fees and costs incurred in pursuing this action pursuant to NRS 18.010(2)(b).

1 Because the State Engineer can be presumed to have determined that the Orders in question are
2 constitutional before issuing them, the Court has both the authority and duty to consider arguments on
3 appeal challenging the Orders' constitutionality.

4 **B. Requiring a property owner to acquire other valuable property and surrender it to**
5 **the State is a per se taking of private property.**

6 "The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to
7 states through the Fourteenth Amendment, prohibits the government from taking private property for
8 public use without just compensation."⁶³ Likewise, Article 1, Section 8(6) of the Nevada Constitution
9 states "[p]rivate property shall not be taken for public use without just compensation having first been
10 made, or secured." Two types of government actions constitute a per se taking: (1) where the action
11 requires a property owner to suffer a permanent physical invasion of the property, or (2) where the action
12 "completely deprives an owner of all economical beneficial use" of the property.⁶⁴

13 State-issued water right permits are considered real property in Nevada.⁶⁵ In the Orders the State
14 Engineer requires a property owner who desires to drill a new domestic well to first acquire two acre-
15 feet of existing water rights and then forever "relinquish" those water rights to the State Engineer.
16 Relinquishment is defined as "[t]he abandonment of a right or thing."⁶⁶ Accordingly, the Orders require
17 a property owner to forever abandon the acquired water rights to the state. By definition, this is a per se
18 taking of private property – as a result of the relinquishment, the owner of the water right is completely
19 deprived of all beneficial use of it.

20 Since there is no doubt that the acquired water right is being confiscated by the State Engineer,
21 the only question remaining is whether the regulation provides the property owner with just
22 compensation (i.e., whether the government is providing any consideration for the property). In this
23 case, the only thing the State Engineer is giving in exchange for the water right is his permission to drill
24 a domestic well. However, pursuant to NRS 534.180(1), a person seeking to drill a domestic well on
25 their parcel is not required to seek the State Engineer's permission before doing so. Because a property
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27 ⁶³ *McCarran Int'l. Airport*, 122 Nev. at 661-62, 137 P.3d at 1121.

28 ⁶⁴ *Id.*, 122 Nev. at 662, 137 P.3d at 1122.

⁶⁵ *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949).

⁶⁶ BLACK'S LAW DICTIONARY 1482 (10th ed. 2014) (definition of "relinquishment").

1 owner has an absolute common law right to drill a well without permission from the State Engineer, the
2 granting of such permission cannot be deemed to be adequate consideration.⁶⁷ Accordingly, nothing in
3 the Orders provides just compensation for the State Engineer's confiscation of the two acre-feet of water
4 rights.

5 Because the Orders require a property owner to acquire and forever relinquish to the State
6 Engineer valuable property, and provide no adequate compensation for the property seizure, the Orders
7 are an unconstitutional taking of private property for public use and must be overturned.

8 **C. Requiring the relinquishment of four-times the water needed to serve a domestic**
9 **well is an unconstitutional regulatory taking.**

10 In addition to being a per se regulatory taking, the Orders are also an unconstitutional regulatory
11 taking. A regulatory taking occurs when a government regulation requires individual property owners
12 to "bear a burden that should be borne by the public as a whole."⁶⁸ In determining whether a regulation
13 constitutes a taking a court must consider: (1) the regulation's economic impact on the property owner,
14 (2) whether the regulation interferes with reasonable investment-backed expectations, and (3) the nature
15 and the character of the government action.⁶⁹ In examining whether a regulatory taking has occurred,
16 the reviewing court "must consider the property as a whole" and "the purpose of the regulation."⁷⁰

17 Here, the State Engineer is requiring that property owners surrender 2 acre-feet of water rights
18 despite clear evidence showing that the average domestic well in Pahrump uses only ½ acre-foot of
19 water per year. The purpose for this over-dedication requirement is made clear in the Nye County Water
20 Resource Plan 2017 Update (the "Plan") the State Engineer cites in the Orders.⁷¹ The Plan explicitly
21 states that "[t]he relinquished water rights that are in excess of the actual usage will never be beneficially
22 used and in fact return to the [public] basin."⁷² The Plan even includes a proposed water basin budget
23 spreadsheet that includes a row titled "OVER DEDICATION POTENTIAL – DOMESTIC WELLS"
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25 ⁶⁷ *Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650-51, 615 P.2d 939, 944 (1980) ("Consideration is not adequate when it is
26 a mere promise to perform that which the promisor is already bound to do.").

⁶⁸ *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522-23, 122 S. Ct. 1522, 1524 (1992).

⁶⁹ *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978); *see also McCarran Int'l. Airport*, 122 Nev. at 663, 137 P.3d at 1122.

⁷⁰ *Id.*

⁷¹ ROA 7, n.12.

⁷² ROA 1511.

1 where the excess water rights forcibly taken from property owners who seek to drill a domestic well can
2 be used to offset the quantity of water the State Engineer has over-allocated in the basin.⁷³

3 The clear purpose of requiring a property owner to relinquish more water than he will actually
4 use is to assist the State Engineer with solving the public problem of over-allocation of water in the
5 basin. The State Engineer acknowledges this when he states that “[r]elinquishment is a key component
6 of the Amended Order No. 1293A and the Nye County GMP.”⁷⁴ If the owners of the existing 8,000
7 parcels that do not currently have a domestic well each relinquish two acre-feet of water, 16,000 acre-
8 feet of existing permits will be surrendered. However, those parcels will likely only use a combined
9 4,000 acre-feet of water. Accordingly, the net benefit to the public will be 12,000 acre-feet of water, or
10 more than 30% of the total over-appropriated permits. While this may be a good outcome for the public
11 as a whole, it is unconstitutional to require individual property owners to bear the cost of solving public
12 problems.

13 In addition, no reasonable person can dispute that the Orders significantly impair property rights
14 and interfere with the reasonable investment-backed expectations of the owners. Property owners have
15 testified under oath (and subject to the State Engineer’s cross-examination) that when purchasing their
16 property, they performed due diligence to determine whether they would be able to drill a domestic
17 well.⁷⁵ Testimony also established that not being able to drill such a well, or having to purchase other
18 water rights as a prerequisite to being able to drill such a well, significantly reduces the value of the
19 property.⁷⁶ The State Engineer cites no evidence to refute these claims.

20 Because the Orders (1) have a significant economic impact on affected property owners, (2)
21 interfere with the reasonable investment backed expectations of those owners, and (3) require a property
22 owner to dedicate more water than he will use for the explicit purpose of forcing property owners to
23 bear the costs of solving a public problem, the Orders are an unconstitutional regulatory taking and must
24 be overturned.

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27 ⁷³ ROA 1512.

28 ⁷⁴ Answering Brief at 22, n.8.

⁷⁵ SROA 921:20-922:17.

⁷⁶ SROA 863:11-863:20.

1 **V. Petitioner Pahrump Fair Water, LLC Has Both Statutory And Constitutional Standing To**
2 **Bring This Action.**

3 The State Engineer argues that Petitioner PFW has no standing to file or participate in this
4 action.⁷⁷ The State Engineer’s argument is without merit. PFW has both statutory and constitutional
5 standing to assert the interests of its members because it is an association that was formed for the express
6 purpose of doing so.⁷⁸

7 PFW has standing under the United States Constitution. The U.S. Supreme Court has stated that
8 an association can have standing to assert the interests of its members if the association has been injured
9 or one or more of its members are injured.⁷⁹ “[W]hether an association has standing to invoke the court’s
10 remedial powers on behalf of its members depends in substantial measure on the nature of the relief
11 sought.”⁸⁰ If the relief sought by an association is for prospective injunctive relief, courts reasonably
12 presume that remedy, “if granted, will inure to the benefit of those members of the association actually
13 injured.”⁸¹ In fact, in most cases involving associations, like the instant case, “the relief sought has been
14 of this kind.”⁸²

15 Further, an association has standing to bring suit on behalf of its members when (1) its members
16 would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane
17 to their organization’s purpose, and (3) neither the claim asserted, nor the relief requested, requires the
18 participation of individual members in the lawsuit.⁸³ Here, PFW has members that would otherwise
19 have the right to bring this action on their own. Also, because PFW was formed for the express purpose
20 of fighting the Orders,⁸⁴ this challenge is germane to its purpose, and it is not necessary to have
21 individual members participate in the lawsuit. Finally, the participation of the individual members of
22 PFW is not required in order to resolve the issues raised in PFW’s Petition because only declarative and
23 injunctive relief is being sought.

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25 ⁷⁷ Answering Brief at 29:8-12.

26 ⁷⁸ SROA 858:22-859:1.

27 ⁷⁹ *Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 2213 (1975).

28 ⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

⁸⁴ SROA 858:22-859:1.

1 PFW also has standing under state law. When the Legislature enacted NRS 533.450, it continued
2 its longstanding practice of providing standing rights under statute that are even broader than those
3 provided by the Constitution. Standing under NRS 533.450 is provided to “any person feeling aggrieved
4 by any order or decision of the State Engineer.” The Nevada Supreme Court has consistently interpreted
5 similar language in other statutes to broadly grant standing to Nevada’s citizens to challenge decisions
6 by their government.

7 In *Citizens for Cold Springs v. City of Reno*,⁸⁵ the Court reviewed the grant of statutory standing
8 contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an
9 association of property owners that would be affected by an annexation decision had standing to
10 challenge that decision.⁸⁶ The Court interpreted the language of NRS 268.668 which grants standing to
11 “any person or city claiming to be adversely affected by such proceeding.”⁸⁷ Since the statute says that
12 any person claiming to be adversely affected may bring an action, in the “tradition of [its] long-standing
13 jurisprudence,” the Court found that standing rights under NRS 268.668 are broader than what
14 constitutional standing allows.⁸⁸ The Court specifically focused on the NRS 268.668 grant of standing
15 to any person claiming to be aggrieved.⁸⁹ Based on that language the Court held that even property
16 owners who do not have constitutional standing because they did not own property in the area of
17 annexation at issue do have standing under NRS 268.668.⁹⁰

18 The language of NRS 533.450 is even broader than NRS 268.668 because it grants standing to
19 any person feeling aggrieved.⁹¹ Accordingly, just as *Citizens for Cold Springs* was granted standing to
20 assert the rights of its members under NRS 268.668, PFW has standing to do the same under NRS
21 533.450.

22 Forming a limited-liability company for the purpose of challenging a State Engineer
23 determination is not new. In *Farmers Against Curtailment Order, LLC v. State Engineer*,⁹² farmers in
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25 ⁸⁵ *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009).

26 ⁸⁶ *Id.*, 125 Nev. at 634, 218 P.3d at 853.

27 ⁸⁷ *Id.*, 125 Nev. at 629, 218 P.3d at 850.

28 ⁸⁸ *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

⁸⁹ *Id.*

⁹⁰ *Id.*, 125 Nev. at 631, 218 P.3d at 851.

⁹¹ NRS 533.450.

⁹² *Farmers Against Curtailment Order, LLC v. State Engineer*, Case No. 15-CV-00227 (Third Jud. Dist. Ct. of Nevada, May 4, 2015).

1 the Smith and Mason Valleys created a limited-liability company to fight a State Engineer order
2 requiring a curtailment of pumping. While the State Engineer initially raised questions regarding the
3 company's standing to bring an action on behalf of its members, "the State Engineer acknowledged at
4 the hearing that FACO has standing to bring this action."⁹³ Because the State Engineer has formally
5 acknowledged in other cases that limited-liability companies can have standing to assert the interests of
6 their members, the State Engineer's argument in this case is without merit.

7 Because PFW was expressly formed to fight the Orders, and because judicial efficiency will be
8 served by allowing PFW to represent the interests of its members, PFW has standing to do so.

9 **VI. The State Engineer's Request To Strike PFW's Supplemental Record On Appeal Is**
10 **Without Merit.**

11 In a footnote the State Engineer requests the Court strike PFW's Supplemental Record on Appeal
12 because "... it consists of documents that the State Engineer did not consider in reaching his decision .
13 . . ."⁹⁴ Of course, this begs the question of how to verify the State Engineer's claims regarding what
14 documents he relied on when there were no proceedings below during which such documents could be
15 introduced, challenged, and/or authenticated. Despite this, the documents included in PFW's
16 Supplemental Record on Appeal all consist of official court records filed in this jurisdiction.

17 Pursuant to NRS 47.150(2), a court is required to take judicial notice of matter of fact when
18 requested to do by a party. Under NRS 47.130, matters of fact include materials that are (a) generally
19 known within the territorial jurisdiction of the trial court, or (b) capable of accurate and ready
20 determination by resort to sources whose accuracy cannot be questioned. Because the documents in the
21 Supplemental Record on Appeal are all public documents that were filed with this Court in a past
22 proceeding, they are both generally known within the jurisdiction of the Court and capable of easy
23 authentication. Accordingly, the Court is required to take judicial notice of them.

24 The State Engineer argues that the Court can only review documents that the State Engineer
25 claims he relied on in issuing the Orders. However, this statement is correct only with respect to a
26 determination by the Court of whether substantial evidence exists in the record to support the State
27

28 ⁹³ Reply to the State Engineer's Opposition to Pahrump Fair Water, LLC's Motion for Stay of Nevada State Engineer Order No. 1293, Exhibit 3, CV38972.

⁹⁴ Answering Brief at 7 n.3.

1 Engineer's decision. With respect to other matters, like whether the State Engineer failed to adhere to
2 proper procedural process or violated Petitioners' due process and property rights, the Court is free to
3 consider such information. Accordingly, the State Engineer's objection to Petitioners' Supplemental
4 Record on Appeal should be denied.

5 **CONCLUSION**

6 Because (1) the Legislature specifically exempted domestic wells from the State Engineer's
7 regulatory authority, (2) the State Engineer issued the Orders without providing notice or hearing to
8 affected parties, and (3) the State Engineer did not have substantial evidence supporting the issuance of
9 the Orders, Petitioners respectfully request that this Court overturn the State Engineer's Orders. In the
10 alternative, Petitioners respectfully request that enforcement of the Orders be stayed and this case
11 remanded to the State Engineer with instructions to hold a properly noticed evidentiary hearing on the
12 matter.

13 **AFFIRMATION**

14 **Pursuant to NRS 239B.030(4)**

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

17 DATED this 31st day of October, 2018.

18 TAGGART & TAGGART, LTD.
19 108 North Minnesota Street
20 Carson City, Nevada 89703
21 (775) 882-9900 – Telephone
22 (775) 883-9900 – Facsimile

23 By: 

24 PAUL G. TAGGART, ESQ.
25 Nevada State Bar No. 6136
26 DAVID H. RIGDON, ESQ.
27 Nevada State Bar No. 13567
28 Attorneys for Petitioners

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 U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 31st day of October, 2018.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT 3

EXHIBIT 3

DEC 18 2018

Nye County Clerk
Terri Pemberton Deputy

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
2 DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
3 TIMOTHY D. O'CONNOR, ESQ.
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7 Attorneys for Petitioners

8
9 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10 IN AND FOR THE COUNTY OF NYE

* * *

11 PAHRUMP FAIR WATER, LLC, a Nevada
12 limited-liability company; STEVEN PETERSON,
an individual; MICHAEL LACH, an individual;
13 PAUL PECK, an individual; BRUCE JABOUR, an individual;
14 and GERALD SCHULTE, an individual,

Case No. 39524

Dept. No. 2

15 Petitioners,

16 vs.

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

20 Respondent.

21 **OPPOSITION TO RESPONDENT'S**
22 **MOTION FOR STAY OF ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

23 COME NOW, Petitioners, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
24 company (hereinafter "PFW"); STEVEN PETERSON, an individual; MICHAEL LACH, an individual;
25 PAUL PECK, an individual; BRUCE JABOUR, an individual; and GERALD SCHULTE, an
26 individual, by and through their counsel, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ.,
27 of the law firm of TAGGART & TAGGART, LTD., to hereby file their Opposition to Respondent's
28 Motion requesting a stay of the Court's December 6, 2018, Order Granting Petition for Judicial Review.

1 This Opposition is based on the attached memorandum of points and authorities, all pleadings and papers
2 on file herein, and any oral argument the Court may allow.¹

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **INTRODUCTION**

5 A year ago, on December 19, 2017, the State Engineer, without warning, notice, or hearing,
6 arbitrarily issued Order 1293 and banned the drilling of new domestic wells in the Pahrump basin. The
7 issuance of Order 1293 upset a status quo that had existed for more than 150 years and created an
8 environment of economic uncertainty within the local community. The Order also disrupted the plans
9 of numerous individuals who had invested their life savings to purchase property in Pahrump with the
10 hope of building a home for themselves and their families. Now, after these property owners have finally
11 achieved the justice they sought, the State Engineer asks this Court to extend the economic uncertainty
12 and hardship by allowing him to continue to enforce an order that the Court has determined to be both
13 constitutionally and statutorily infirm. Justice demands that the State Engineer's request be denied, and
14 that the basin be allowed to return to the long-standing status quo that existed prior to his arbitrary and
15 capricious action.

16 In his request for a stay, and in public statements made before the Court had even issued its
17 written decision, the State Engineer has fundamentally misrepresented the effect of the Court's ruling.
18 In particular, the State Engineer claims that the Court's ruling grants domestic wells a "super priority"
19 status over all other water rights and users in the basin.² This is factually incorrect. Nowhere in the
20 hearing transcript or written order does the Court make any such pronouncement and the State Engineer
21 provides no citation to anything in the record that supports his contention. Instead, the central questions
22 in this case were whether the State Engineer has authority to ban the *drilling* of new domestic wells and,
23 if so, whether notice and a hearing are required before issuing such a regulation. The Petitioners never
24

25
26 ¹ Respondent has requested a hearing on the motion. Petitioners do not believe that a hearing is necessary or warranted in
27 this matter. However, if the Court believes that a hearing will assist it in deciding the issues raised, Petitioner is willing to
28 participate in such a hearing provided that it can be held at a place and time convenient to allow for Petitioner's full
participation.

² The State Engineer made this same erroneous claim during a presentation he gave at the Nevada Water Law Conference
held in Reno, Nevada, on November 28, 2018 – five days *before* the Court issued its written order. The State Engineer thus
misrepresented the effect of the Court's order before it was even issued.

1 argued, and the Court never ruled, that domestic wells are exempt from the prior appropriations system
2 after they are constructed.

3 In its Order, the Court held that the State Engineer's issuance of Order 1293A violated
4 Petitioner's constitutional due process and property rights. Contrary to Respondent's assertion, the
5 Court's ruling on this particular issue was not a "close call and tight issue."³ Rather, during the course
6 of these proceedings the State Engineer freely admitted that Orders 1293 and 1293A were issued without
7 any form of public notice or other due process. He also conceded in his answering brief that, if Order
8 1293A impairs an existing property right (which the Court determined it does), then the manner in which
9 the Orders were adopted violated constitutional due process protections.⁴ The likelihood of the Supreme
10 Court arriving at a different position on this issue is extremely minimal.

11 Finally, the State Engineer claims that since November 8, 2018, his office has received an
12 "onslaught" of property owners who have filed a Notice of Intent to drill domestic wells on their parcels.⁵
13 However, the affidavit supplied in support of this assertion indicates that only 154 such notices have
14 been filed.⁶ Given that Order 1293A stated that it would impact over 8,000 parcels of land within
15 Pahrump,⁷ describing the filing of 154 notices as an "onslaught" is pure hyperbole.⁸ In fact this relatively
16 small spike in the filing of notices reflects nothing more than a temporary release of pent-up demand
17 from property owners who were ready to build their homes but were held in limbo for the past year
18 while the State Engineer's orders were being litigated.

19 STANDARD OF REVIEW

20 A state agency is not entitled to a stay of a district court judgment.⁹ An initial request for a stay
21 of judgment pending appeal must be made to the court that entered the judgment.¹⁰ If the court denies
22 the stay, the appellant can then make the same request to the appellate court where the appeal is filed.

23 In reviewing a motion to stay a judgment pending appeal, a court must consider (1) whether the
24 object of the appeal will be frustrated if the stay is not granted, (2) whether the appellant [the State

25 ³ Motion at 8:6-7.

26 ⁴ Answering Brief at 13:13-19.

27 ⁵ Motion at 5:27-28.

28 ⁶ Motion Exhibit 1 at 2:6-9.

⁷ Order 1293A at 3 (§7).

⁸ In fact, this represents less than 2% of the parcels affected by Order 1293A.

⁹ *Clark Cty Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018).

¹⁰ *Id.*; NRAP 8(a)(1).

1 Engineer] will suffer irreparable harm if the stay is denied, (3) whether the respondent [PFW] will suffer
2 irreparable harm if the stay is granted, and (4) whether the appellant is likely to succeed on the merits
3 of the appeal.¹¹ These considerations establish an equitable balancing test. No consideration is more or
4 less important than any other consideration. However, the party requesting the stay has the burden of
5 “show[ing] that the balance of equities *weighs heavily* in favor of granting the stay.”¹²

6 In balancing the equities in this case, the Court should be particularly mindful of the fact that the
7 State Engineer is exempt from the requirement to post a supersedeas bond as a condition precedent to
8 issuing a stay.¹³ Accordingly, there is no relief available to offset any financial harm suffered by PFW
9 and its members resulting from the stay. By contrast, neither the State of Nevada nor the State Engineer
10 will suffer any risk of harm (financial or otherwise) if the stay is denied. The State Engineer will simply
11 be unable to continue to enforce an order that was issued: (1) in violation of constitutional due process
12 requirements, (2) without proper legislative authority, and (3) without substantial evidence to support it.

13 ARGUMENT

14 **I. Petitioners Have a High Likelihood of Success on the Merits.**

15 Importantly, the State Engineer fails in his motion to even claim that he has a likelihood of
16 success in his appeal. Instead he takes a single quote from the Court’s oral ruling out of context to make
17 the claim that “the likelihood of success on the merits should not weigh in either side’s favor.”¹⁴ A
18 review of the November 7, 2018, oral argument transcripts reveals that when the Court stated that this
19 was a “tight issue” it was referring to the overall conflicting interests of the parties (the State Engineer’s
20 need to manage water use in the basin versus the investment backed expectations of the property owners)
21 and not three specific issues raised by petitioners (legislative authority, due process, and substantial
22 evidence). Nowhere in the Court’s written ruling does it indicate that its determinations on these specific
23 issues was a close call.

24 The State Engineer completely fails to identify any specific errors in the Court’s reasoning that
25 would cause the Supreme Court to overturn the ruling on appeal. Instead, the State Engineer
26

27 ¹¹ NRAP 8(c).

28 ¹² *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th
Cir. 1981)) (emphasis added).

¹³ NRCP 62(e).

¹⁴ Motion at 8:7-8.

1 fundamentally misrepresents the Court’s ruling in an attempt to raise an issue on appeal that was never
2 argued or decided in these proceedings. Because the State Engineer is publicly misrepresenting this
3 Court’s ruling, and because Petitioners have a high likelihood of success on appeal, the motion should
4 be denied.

5 **A. The State Engineer is deliberately misrepresenting the legal effect of the Court’s**
6 **ruling.**

7 As noted above, in his motion, and in public statements made before the Court had even issued
8 its written order in this matter, the State Engineer is deliberately misrepresenting the Court’s ruling. In
9 his motion the State Engineer erroneously states that:

10 [T]here is now an outstanding question of whether domestic wells have a
11 “super” priority over all other rights, both appropriative and vested, such
12 that they are essentially exempt from the prior appropriation doctrine that
 has been Nevada’s water law since 1885.¹⁵

13 This statement is absolutely false and, tellingly, the State Engineer provides no direct citation to
14 anything in the Court’s ruling to support it. Petitioners never argued, and this Court never ruled, that
15 domestic wells have a super priority over other rights and are exempt from prior appropriations doctrine.

16 This case was about whether the State Engineer had the authority to restrict the *drilling* of new
17 domestic wells under a specific statute – NRS 534.110(8). There was never a claim or issue in this case
18 regarding the priority such wells would have *after* they were constructed. In fact, the Court
19 acknowledged in its written order that in instances where the State Engineer can point to a specific
20 statute that overrides the general regulatory exemption of NRS 534.030(4), the more specific statute will
21 control.¹⁶

22 With respect to establishing the priority of domestic wells, such a statute does, in fact, exist –
23 NRS 534.180(4)(d). Nothing in the Court’s decision overturns or invalidates this statute. Simply put,
24 the Court’s ruling does nothing to alter the Legislature’s assignment of a priority date for domestic wells
25 or affect the prior appropriations system in any manner. The ruling merely enforces the Legislature’s
26 clear directive that the State Engineer is without authority to establish a permitting system for domestic
27 wells or, conversely, restrict their drilling. Accordingly, the Court should reject the State Engineer’s

28 ¹⁵ Motion at 5:15-18.

¹⁶ Order at 6:6-8.

1 blatant attempt to misrepresent its ruling for the purpose of raising an issue on appeal that was never
2 argued or decided in these proceedings.

3 **B. The Court's ruling is highly likely to be upheld on appeal.**

4 As was discussed at the November 7, 2018, hearing, every regulatory action of the State Engineer
5 must meet three criteria – the State Engineer must have legislative authority to take the action, the State
6 Engineer must have substantial evidence to support the action, and affected property owners must have
7 been provided due process *before* the action is commenced. A failure to adhere to any one of these
8 requirements renders the State Engineer's action invalid.

9 Here, Petitioners argued, and the Court ruled, that Order 1293A failed all three tests.
10 Accordingly, the State Engineer has a high burden on appeal. He must convince the Supreme Court that
11 this Court was wrong on *all three issues*. Even if the Supreme Court finds that this Court erred on a
12 single particularly close issue, the result reached by this Court will still be affirmed based on the other
13 two findings. Given the State Engineer's high burden, and the facts that (1) the domestic well
14 exemptions in NRS 534.030(4) and 534.180(1) are clear and unambiguous, (2) the record is devoid of
15 substantial evidence supporting the State Engineer's action, and (3) the State Engineer admits that no
16 due process was provided to any of the property owners directly affected by Order 1293A, his likelihood
17 of success on appeal is extremely low.

18 The State Engineer should not be allowed to continue to enforce Order 1293A, and thereby
19 continue to deprive Petitioners of their constitutionally and statutorily protected property rights, while
20 he pursues a meritless appeal that has little chance of success. Accordingly, the State Engineer's Motion
21 should be denied.

22 **II. Property Owners In Pahrump Will Be Irreparably Harmed If The Stay Is Granted.**

23 The Nevada Supreme Court has recognized that because of the unique nature of property rights,
24 a "loss of real property rights generally results in irreparable harm."¹⁷ "Any act which destroys or results
25 in a substantial change in property, either physically or in the character in which it has been held or
26 enjoyed, does irreparable injury which justifies injunctive relief."¹⁸ "To destroy one's property is
27

28 ¹⁷ *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).

¹⁸ *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 125 (1972).

1 sometimes regarded as an irreparable injury and the particular value of a water supply in the desert is
2 not only unascertainable but its preservation is necessary to the general welfare.”¹⁹

3 The Court has determined that Order 1293A significantly impaired Petitioner’s property and due
4 process rights. They have been forced to suffer this trespass for an entire year without relief. The
5 issuance of a stay will only prolong their misfortune and continue to delay their efforts to construct their
6 homes.

7 For example, at a prior hearing in these proceedings Mr. Steven Peterson testified that he
8 purchased his parcel in Pahrump in 2017 with the intention of building a retirement home.²⁰ Prior to
9 purchasing his land, he checked with both the Nye County building department and the State Engineer’s
10 office to make sure he could use a domestic well to supply the home with water. After learning that he
11 could, Mr. Peterson purchased the parcel and proceeded to develop the plans for his retirement home.
12 Unfortunately, just a few weeks before he was able to pull a building permit, the State Engineer issued
13 Order 1293 and stopped him dead in his tracks. The delay has been particularly difficult because prior
14 to purchasing his lot Mr. Peterson sold his existing home and has been living in a fifth wheel RV ever
15 since. He originally planned to start building his new retirement home in October of this year. The
16 State Engineer’s order has prevented him from doing so.

17 Mr. Peterson is not the only person who finds himself stuck in a temporary living situation
18 because of the State Engineer’s arbitrary actions. Mrs. Melissa Campbell also testified that she and her
19 husband purchased a property in Pahrump with the hope of building a family home for them and their
20 two young sons.²¹ Like Mr. Peterson, the Campbells performed their due diligence before purchasing
21 their property and were told that they would have no problem drilling a domestic well. They closed on
22 their property just two months before the State Engineer issued Order 1293, and before they had time to
23 finalize their building plans and get a well drilled. Because of Order 1293 and 1293A, the Campbell
24 family was forced into living in a 30-foot trailer located on rented space on a commercial property. As
25 Mrs. Campbell tearfully noted, “[i]t’s hard to explain to a 6-year old that we no longer can move onto
26 the property that he’s been to and he’s helped us put poles in to put up a gate.”²²

27 ¹⁹ *Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971) (internal citations omitted).

28 ²⁰ Mr. Peterson’s full testimony can be found at SROA 920-25.

²¹ Mrs. Campbell’s full testimony can be found at SROA 934-938.

²² SROA 937:15-17.

1 Mrs. Campbell and Mr. Petersons are just two of many property owners whose lives have been
2 upended by the unlawful enforcement of the State Engineer's orders. Equity and justice demand that
3 the State Engineer's request for a stay be denied and that these families be allowed to immediately move
4 forward with their homebuilding plans.

5 **III. The Object Of The State Engineer's Appeal Will Not Be Frustrated By Denial Of The**
6 **Motion.**

7 The State Engineer claims that the object of his appeal will be frustrated if a stay is not issued.
8 However, the stated object of the State Engineer's appeal is to have the Supreme Court: (1) override the
9 Legislature's clear and unambiguous directive that domestic wells are generally exempt from his
10 regulatory authority, and (2) authorize him to issue such regulations without providing due process to
11 affected property owners as required by both the State and Federal Constitutions. The denial of the State
12 Engineer's request for a stay will do nothing to prevent the Supreme Court from considering these issues
13 or issuing an opinion on them. Stated simply, the State Engineer's appeal will not become moot if the
14 stay is denied, and the State Engineer makes no claim to the contrary in his Motion.

15 The *Mikhon Gaming*²³ case cited by the State Engineer is clearly distinguishable. In fact, the
16 two cases are so procedurally and factually different as to render any comparison meaningless. In the
17 *Mikhon Gaming* case, a district court made a determination that certain counter-claims brought by an
18 employee in a dispute against their employer were not subject to arbitration.²⁴ The district court then
19 refused to issue a stay while the employer pursued an interlocutory appeal on that issue.²⁵ If the Supreme
20 Court had not entered its own stay of the district court proceedings, the employer would have been
21 required to litigate rather than arbitrate the subject claims while the appeal was pending, thereby mooting
22 the whole purpose of the appeal (to require the claims be arbitrated not litigated).²⁶

23 Here, the State Engineer's appeal is not an interlocutory appeal designed to halt ongoing
24 proceedings at a district court. Rather, the Court has issued its final order in this matter and will not be
25 conducting any further proceedings (with the exception of deciding the instant motion for stay).
26

27 ²³ *Mikhon Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004).

28 ²⁴ *Id.* at 250-51, 89 P.3d at 38.

²⁵ *Id.*

²⁶ *Id.* at 252-53, 89 P.3d at 39.

1 Accordingly, there is no ongoing proceedings at the district court level that could, in any way, render
2 the State Engineer's appeal moot. The two cases are simply not comparable.

3 Because the State Engineer does not, and cannot, claim that denial of his motion will result in
4 his appeal becoming moot, the Court cannot make a finding that the object of the State Engineer's appeal
5 will be frustrated if his request for a stay is denied.

6 **IV. The State Engineer Will Not Suffer Any Harm If The Stay Is Denied.**

7 The Court's written order does not place any substantial burden (financial or otherwise) on the
8 State Engineer or his staff.²⁷ He and his staff will simply not be able to continue to enforce a
9 constitutionally and statutorily suspect regulation during the time that the appeal is pending. Because
10 the State Engineer cannot credibly make a claim that the order will cause him or his office any direct
11 harm, he instead attempts to exaggerate the effect that the drilling of a relatively minor number of wells
12 during the pendency of the appeal may have.

13 In Order 1293A the State Engineer indicates that there are as many as 8,000 undeveloped
14 residential parcels in Pahrump that are not served by a municipal water system.²⁸ According to the
15 affidavit accompanying the State Engineer's Motion, only 154 of these property owners have filed notice
16 of their intention to move forward and construct a well on their property since the Court issued its ruling.
17 The State Engineer conceded that in Pahrump the average domestic well uses only about ½ of an acre-
18 foot of water per year. The State Engineer also conceded that current pumping in the basin is
19 approximately 4,000 acre-feet *below* the basin's perennial yield. Accordingly, despite the State
20 Engineer's overwrought claims to the contrary, there is no danger that allowing these 154 property
21 owners to proceed with drilling their wells will cause any immediate harm to the basin.²⁹

22 Because the State Engineer has provided no evidence showing that any new wells drilled during
23 the pendency of these proceedings will cause any undue effects to existing wells, and because that State
24

25
26 ²⁷ The Court's order does require the State Engineer to publish notice that Order 1293A has been overturned; however, the
cost of drafting and publishing such a notice is de minimis and, in any event, this notice has already been issued.

27 ²⁸ Order 1293A at 3 (§7).

28 ²⁹ Importantly, like Order 1293A, the State Engineer's Motion is devoid of any scientific evidence showing that the drilling
of the 154 identified in Mr. Guillory's affidavit will unduly interfere with any existing wells in the basin. *See* NRS 534.110(8)
(requiring a showing that new wells will "cause an undue interference with existing wells" as a pre-condition to restricting
the drilling of new wells).

1 Engineer has not made any credible claim that he or his office will be harmed by the enforcement of the
2 Court's written order, the request for a stay should be denied.

3 **CONCLUSION**

4 For the foregoing reasons, PFW respectfully requests that the Court deny the State Engineer's
5 Motion.

6 **AFFIRMATION**
7 **Pursuant to NRS 239B.030(4)**

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

10 DATED this 17th day of December, 2018.

11 TAGGART & TAGGART, LTD.
12 108 North Minnesota Street
13 Carson City, Nevada 89703
14 (775) 882-9900 – Telephone
15 (775) 883-9900 – Facsimile

16 By: 

17 PAUL G. TAGGART, ESQ.
18 Nevada State Bar No. 6136
19 DAVID H. RIGDON, ESQ.
20 Nevada State Bar No. 13567
21 TIMOTHY D. O'CONNOR, ESQ.
22 Nevada State Bar No. 14098
23 Attorneys for Petitioners
24
25
26
27
28

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 U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 17th day of December, 2018.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT 4

EXHIBIT 4

DEC 27 2018
Nye County Clerk
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 DENYING MOTION FOR STAY

THIS MATTER comes before the Court on Respondent's Motion for Stay of Order Granting
Petition for Judicial Review and Reversing State Engineer's Amended Order 1293A Pending Appeal
(the "Motion") filed on December 7, 2018. At a status conference held on December 13, 2018, the Court
determined that a hearing on the Motion is not required and ordered Petitioners to electronically file
their opposition to the Motion no later than December 17, 2018. On December 17, 2018, Petitioners
timely filed their Opposition to Respondent's Motion for Stay. After careful consideration of the
arguments the parties raised in their respective briefs, the Court hereby denies Respondent's Motion.

BACKGROUND

On November 7, 2018, this Court held a hearing to consider Petitioners' Petition for Judicial Review. At the close of the hearing, the Court issued an oral ruling from the bench granting the Petition and directing Petitioners to prepare a written order. On November 21, 2018, Petitioners submitted their proposed order to the Court and, on that same day, Respondent submitted his own alternative proposed order. After careful consideration of both proposed orders, on December 3, 2018, this Court executed the proposed order submitted by Petitioners and issued its Order Granting Petition for Judicial Review (the "Order"). On that same day, Petitioners served Respondent with notice of entry of the Order.

The Court's Order reversed State Engineer Order 1293A on the basis that: (1) pursuant to NRS 534.030(4) the State Engineer does not possess legislative authority to issue an order restricting the drilling of new domestic wells in a basin, (2) the State Engineer violated Petitioners' constitutional due process rights when he issued Order 1293A without notice and without providing Petitioners an opportunity to be heard, and (3) there was insufficient evidence in the record to support the issuance of Order 1293A.

On December 8, 2018, the State Engineer filed a notice of his intent to appeal the Court's Order. On that same day, the State Engineer also filed the instant Motion and an ex parte request for an order shortening the time for Petitioners to file their Opposition to the Motion. On December 13, 2018, the Court held a telephonic status conference with the parties to consider Respondent's request for an order shortening time. During the telephonic status conference, the parties agreed that a hearing is not required and that the Court can decide Respondent's Motion based on the current record and the briefs filed by the parties. The Court directed Petitioners to electronically file any opposition on or before December 17, 2018. In accordance with the direction of the Court, on December 17, 2018, Petitioners timely filed their opposition brief.

STANDARD OF REVIEW

A state agency is not automatically entitled to a stay of a district court judgment.¹ An initial request for a stay of judgment pending appeal must be made to the court that entered the judgment.² If

¹ *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018).

² *Id.*; NRAP 8(a)(1).

1 the court denies the stay, the appellant can then make the same request to the appellate court where the
2 appeal is filed.

3 In reviewing a motion to stay a judgment pending appeal, a court must consider (1) whether the
4 object of the appeal will be frustrated if the stay is not granted, (2) whether the appellant [the State
5 Engineer] will suffer irreparable harm if the stay is denied, (3) whether the respondent [PFW, et al.] will
6 suffer irreparable harm if the stay is granted, and (4) whether the appellant is likely to succeed on the
7 merits of the appeal.³ These considerations establish an equitable balancing test. No consideration is
8 more or less important than any other consideration. However, the party requesting the stay has the
9 burden of "show[ing] that the balance of equities weighs heavily in favor of granting the stay."⁴

10 In balancing the equities in this case, the Court is particularly mindful of the fact that the State
11 Engineer is exempt from the requirement to post a supersedeas bond as a condition precedent to issuing
12 a stay.⁵ Accordingly, there is no relief available to Petitioners to offset any financial harm resulting
13 from the stay. By contrast, the State Engineer will not suffer any risk of financial harm if the stay is
14 denied. The only consequence of a denial of the State Engineer's Motion is that he will be unable to
15 continue to enforce Order 1293A during the pendency of the appeal.

16 ANALYSIS

17 As an initial matter, the Court is troubled by the State Engineer's statement that as a result of the
18 Court's Order:

19 [T]here is now an outstanding question of whether domestic wells have a
20 "super" priority over all other rights, both appropriative and vested, such
21 that they are essentially exempt from the prior appropriation doctrine that
has been Nevada's water law since 1885.⁶

22 Neither the priority date assigned to domestic wells nor the issue of whether such wells are subject to
23 the prior appropriations doctrine was argued or decided in this case. Instead, this case was about whether
24 the State Engineer had the legal authority to restrict the drilling of new domestic wells in the Pahrump
25 basin. The Court determined that NRS 534.030(4) generally exempts such wells from regulation by the
26

27 ³ NRAP 8(c).

⁴ *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th
Cir. 1981)).

28 ⁵ NRCP 62(e).

⁶ Motion at 5:15-18.

1 State Engineer *unless a specific statute states otherwise.*⁷ Because NRS 534.110(8) does not specifically
2 state that its provisions apply to domestic wells, the general exemption applied and this Court held that
3 the State Engineer was without authority to impose the subject drilling restriction.

4 By contrast, there is a specific statute that applies a priority date to domestic wells – NRS
5 534.180(4)(d). Nothing in this Court’s Order overrides or invalidates this statute. Order 1293A did not
6 relate to or rely on NRS 534.180(4)(d) in any manner. Accordingly, Petitioners never argued and this
7 Court never made any determination related to NRS 534.180(4)(d) or its applicability within the
8 Pahump basin. All this Court decided was that the State Engineer does not have authority to restrict
9 the drilling of new domestic wells, not what priority date should be applied to them after they are
10 constructed.

11 This Court has considered the merits of Respondent’s Motion in relation to NRAP 8(c)’s four
12 criteria and finds that, based on the pleadings submitted by the parties: (1) the object of the appeal will
13 not be frustrated if the stay is denied, (2) the State Engineer will not suffer irreparable harm if the stay
14 is denied, (3) Petitioners will continue to incur significant harm if the stay is not denied, and (4) that the
15 State Engineer does not have a high likelihood of success on the merits of his appeal. Accordingly, the
16 equities in this case weigh in favor of denying the Motion.

17 ///

18 ///

19 ///

20 ///

21 ///

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24 ///

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27
28 ⁷ Order at 6:6-8.

1 Further, the Court finds that the status quo that should be maintained in this case is the situation
2 that existed during the more than 150 years prior to the State Engineer's surprise issuance of Orders
3 1293 and 1293A. If the State Engineer wants to upset 150 years of prior practice, he bears the heavy
4 burden of showing that such a change is legislatively authorized and that there is substantial evidence
5 supporting it. The Court has determined that the State Engineer failed to meet this burden. Accordingly,
6 the status quo that existed prior to the issuance of the Orders must be maintained.

7 **ORDER**

8 UPON CONSIDERATION, and good cause appearing therefore, the Court hereby denies
9 Respondent's Motion for Stay.

10 **IT IS SO ORDERED.**

11 DATED this 20th day of December, 2018.

12
13 
14 Senior DISTRICT COURT JUDGE

15 Respectfully submitted by:

16 TAGGART & TAGGART, LTD.
17 108 North Minnesota Street
18 Carson City, Nevada 89703
19 (775) 882-9900 – Telephone
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21 By: 

22 PAUL G. TAGGART, ESQ.
23 Nevada State Bar No. 6136
24 DAVID H. RIGDON, ESQ.
25 Nevada State Bar No. 13567
26 Attorneys for Petitioners
27
28

EXHIBIT 5

EXHIBIT 5

1 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE
2 STATE OF NEVADA

3 IN AND FOR THE COUNTY OF NYE

4 * * * * *

5 PAHRUMP FAIR WATER, LLC, a)
Nevada limited-liability company,)

CERTIFIED COPY

6 Petitioner,)
7)

8 vs.)

) Case No.
) CV 38972
)

9 Jason King, P.E., Nevada State)
Engineer, DIVISION OF WATER RESOURCES,)
10 DEPARTMENT OF CONSERVATION AND)
NATURAL RESOURCES,)

11 Respondent.)
12)

13 REPORTER'S TRANSCRIPT
14 OF
15 PROCEEDINGS

16 BEFORE THE HONORABLE WILLIAM MADDOX
THURSDAY, MAY 10, 2018
17 9:00 A.M.
18

19 APPEARANCES:

20 For the Petitioner: PAUL G. TAGGART, ESQ.
21 DAVID HOWARD RIGDON, ESQ.

22 For the Respondent: BRYAN STOCKTON, ESQ.
23 JAMES BOLOTIN, ESQ.
24

25 REPORTED BY: Janice David, CCR No. 405

W I T N E S S E S

PETITIONER Dr. Cr. Redr. Recr. VD.

NORMA JEAN OPATIK

By Mr. Rigdon 72 85

By Mr. Stockton 81

PAUL PECK

By Mr. Rigdon 86

By Mr. Stockton 88

DEBRA STRICKLAND

By Mr. Rigdon 94

By Mr. Stockton 105

MICHAEL LACH

By Mr. Rigdon 114 129

By Mr. Stockton 124 133

STEVEN PETERSON

By Mr. Rigdon 134

By Mr. Stockton 139

TED OFF

By Mr. Rigdon 140

By Mr. Stockton 143

JOYCE HARRIS

By Mr. Rigdon 145

MELISSA CAMPBELL

By Mr. Rigdon 148

E X H I B I T S

PETITIONER

Mrk'd

Idnt'd

Admt'd

Proposed Exhibit 1

63

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63

Proposed Exhibit 2

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Proposed Exhibit 3

154

RESPONDENT

Proposed Exhibit A

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63

63

1 THE COURT: Okay. They use JAVS. I've been
2 sitting in family court up there in Reno, and they use
3 JAVS up there. So, I keep looking for the light to
4 come on.

5 This is Case No. CV 38972, Pahrump Fair Water,
6 LLC versus Jason King, Division of Water, with the
7 State -- Nevada state engineer, Division of Water
8 Resources, Department of Conservation and Natural
9 Resources.

10 Can the parties identify themselves and who
11 they represent?

12 MR. RIGDON: Your Honor, we're here on behalf
13 of petitioner, Pahrump Fair Water. My name is Dave
14 Rigdon, and I'm with the law firm of Taggart &
15 Taggart.

16 MR. TAGGART: And good morning, your Honor.
17 I'm Paul Taggart, also here on behalf of Pahrump Fair
18 Water.

19 MR. STOCKTON: Good morning, your Honor. I'm
20 Bryan Stockton, deputy state engineer here
21 representing -- sorry. Deputy attorney general
22 representing the state engineer.

23 MR. BOLOTIN: Good morning, your Honor. James
24 Bolotin, also deputy attorney general representing the
25 state engineer.

1 MR. STOCKTON: And we have with us Jason King,
2 the state engineer; Micheline Fairbank, the deputy
3 state engineer; and John Guillory, another deputy
4 state engineer.

5 THE COURT: Okay. I suppose we have some
6 motions pending, mostly in regard to whether or not
7 we're going to have hearings -- witnesses at this
8 hearing today. I guess we have --

9 UNIDENTIFIED MAN: Your Honor, we can't hear
10 you. I don't think the microphone is on.

11 THE COURT: Okay. Can you hear me now?

12 (Response in the negative from the audience.)

13 THE COURT: You know, I think maybe I'm
14 getting allergies this time of year. So, I'm losing a
15 little bit of my voice.

16 Can you hear me now?

17 UNIDENTIFIED MAN: Nope.

18 THE COURT: You know, I think they have --
19 they probably have hearing devices for some of you. I
20 don't know if we have enough.

21 I will try to speak up. And, please, if you
22 can't hear me, raise your hand. And if I'm paying
23 attention, I'll speak up.

24 Can you hear me in the back?

25 (No audible response.)

1 THE COURT: Okay. You know -- yeah. I don't
2 know if I want to scream this whole hearing. I'll --
3 what is this thing here anyway? Is that --

4 THE CLERK: That's the mic. You can move it.
5 It's that microphone right there.

6 THE COURT: Looks like something -- I thought
7 it was a microphone.

8 So, I'll try to speak up as much as I can.
9 I'll try to speak up.

10 Mr. Rigdon?

11 MR. RIGDON: Yeah.

12 THE COURT: You have a motion to present
13 witnesses. Go ahead and argue that.

14 MR. RIGDON: Yes, your Honor. Thank you.
15 It's not actually a motion to present witnesses.
16 We -- we -- the state engineer has raised an objection
17 to us presenting witnesses at the hearing, and so
18 we've done some supplemental briefing on that for you.

19 With regards to whether or not we should be
20 able to present witnesses, there is a -- some
21 background that's very, very important to this.
22 And -- and that is that the state engineer keeps
23 referring to this -- the case Revert v. Ray, which
24 says that these proceedings, when we have an appeal
25 under NRS 533.450 -- that it's limited to the record

1 on appeal. But that presupposes that there was an
2 actual proceeding below.

3 An appeal, as you know -- when you usually
4 have an appeal, you have a proceeding below. There is
5 a record form. There is -- people are allowed to
6 provide testimony at that proceeding below. And then
7 that comes up. And so the Court has a full record
8 that it can review, and it can limit its review to
9 that record. Here we don't have any of that.

10 The state engineer issued this order. He
11 never provided any notice or a hearing to people.
12 They never had an opportunity to present evidence or
13 cross-examine his evidence, to -- to provide comments
14 as to whether or not this order should be presented.
15 They also never had the opportunity to discuss the
16 harms that this order is going to cause them. And so
17 there is no record below for you to review.

18 So, if the limited -- if the review is limited
19 to the record below, basically what we have is, we
20 have a government agency coming in and saying, "We can
21 issue an order. We don't have to provide anybody an
22 opportunity to -- to speak about that order that we're
23 going to issue. And -- and then we can say, 'This is
24 what we relied on, and we relied only on this, and
25 that's all you get to rely on, your Honor, is that.'"

1 And that's essentially what they're -- what their
2 argument is and what they're telling you.

3 Now, there is -- with regards to this
4 particular hearing, this is a motion for stay under
5 NRS 433 -- or 533.450, sub 5. And under that, it's
6 basically a preliminary-injunction standard. Is
7 there -- where the Court has to weigh the equities.
8 It's an equitable relief we're asking for, preliminary
9 injunction. And the Court has to weigh and balance
10 the harms of issuing the stay versus the harms of not
11 issuing the stay between the various parties. And
12 when the Court is exercising that type of equitable
13 jurisdiction, it has the inherent authority and power
14 to hear testimony related to those equities that it
15 has to balance. And that's what we're asking the
16 Court to hear today, is testimony on that basis.

17 The testimony that we're going to offer is
18 highly relevant. These are people who are being
19 actually affected and harmed by this order. So, it's
20 incredibly relevant. And then in addition, it's been
21 somewhat confusing to us, because the state engineer
22 keeps saying that the -- the hearing here is limited
23 to the record on appeal, only to what I put in my
24 order. And, in fact, on -- when the state engineer
25 filed his opposition to our motion to stay, he -- he

1 made that argument: You can't -- he filed with it a
2 motion to strike an exhibit that we filed, which was
3 letters from many of these same people who are going
4 to testify about the harms that this -- this order is
5 having on them. And he moved to strike that, because
6 it was extra-record evidence that shouldn't be brought
7 in. But in the same exact document he -- he submitted
8 his own exhibit of extra-record evidence, which was
9 minutes from a Nye County commission meeting that was
10 held after the order was issued.

11 So, it's very schizophrenic here for us.
12 We -- you know, are we allowed to submit extra-record
13 evidence, or are we not allowed to submit extra-record
14 evidence? We submit that we are. And we have no
15 objection to the exhibit that the state engineer
16 offered. We're just wondering why he was objecting to
17 our exhibits and our ability to provide you the
18 information that you need to balance the harms in this
19 case.

20 And so we -- we would appreciate if you would
21 allow us to present that testimony.

22 THE COURT: Okay. Mr. Stockton, do you have
23 any response you want to make to that?

24 MR. STOCKTON: I do, your Honor.

25 THE COURT: Before we go, my name is Bill

1 Maddox. I'm a senior district court judge from up in
2 Carson City. So...I didn't announce that before, and
3 I suppose the lawyers might know it, but for the
4 audience members.

5 Go ahead.

6 MR. STOCKTON: Thank you, your Honor. Just a
7 few points on this and -- and -- but the most crucial
8 one is, the reason you don't have a record on appeal
9 before you is, we're here on motion for stay. So, we
10 haven't been able to file the record yet. And I
11 brought some -- some documents with me that will be
12 part of the record once it's filed. And I just want
13 to show you a couple of those documents. And the
14 standard is not the documents that were in the state
15 engineer's order. The standard is the documents that
16 were before the state engineer order. And if I can
17 get these out here...

18 So, this -- this is what will be in the
19 record. This is the amount of wells that exist in the
20 Pahrump Valley Artesian Basin right now. That's four
21 hundred and some-odd pages that are listed single
22 spaced with all these wells. And this is the list of
23 the wells that were plugged in the last -- in the
24 past. And so those are the kind of things that will
25 be in the record once we get there.

1 This is a motion for stay. And despite
2 their -- their plea for equity, they didn't file for
3 an injunction. What they filed is a motion for stay
4 under NRS 533.450, which is a statutory remedy. So,
5 saying that they can -- they can bootstrap equity into
6 a statutory remedy is inappropriate.

7 So, there is a -- complaints that there was no
8 hearing. Well, there is no hearing required. Under
9 NRS 534.120, when the state engineer sees that he
10 needs to issue an order to protect the general health
11 and welfare of a basin, then he can issue those
12 orders. There is no requirement for a hearing. The
13 due process comes right here in this courtroom, and
14 the due process will come over the course of the
15 appeal. And so -- so, this is the due process they're
16 entitled to. Due process is notice and opportunity to
17 be heard.

18 So -- but to step back a little bit, though,
19 do you have a case in front of you? Because we have
20 the case that was cited by the -- the appellants in
21 this Hunt versus Washington.

22 Can you see that up there?

23 THE COURT: I don't.

24 MR. STOCKTON: Okay. Do you mind if I turn
25 this that way or -- all right.

1 THE COURT: Should it be showing up on this
2 screen up here? I guess this is just a video.

3 MR. STOCKTON: So, let me give you -- can I
4 give -- or may I approach the bench?

5 THE COURT: It's probably -- I mean, can the
6 people in the audience see it now?

7 (Response in the negative from the audience.)

8 THE COURT: I don't need more paper. I got
9 all the paper I need. Turn it so they can see it. I
10 can listen.

11 MR. STOCKTON: All right. So, this is the
12 Hunt versus Washington State Apple Advertising that
13 the appellants are relying on. And the third element
14 of whether an organization has standing without the
15 participation of the individual members is that, so
16 long as the nature of the claim and the relief sought
17 does not make the individual participation of each
18 injured party indispensable to proper resolution of
19 the claim.

20 And so if the organization is saying that you
21 need to hear from these people in order to decide this
22 case, then they don't have standing to bring this
23 claim. They have to have those individually-named
24 members appear before this Court before they have
25 standing to bring this claim.

1 THE COURT: Would I be able to allow them to
2 amend to add parties that...

3 MR. STOCKTON: I mean, obviously that would be
4 an issue for another day that we would have to address
5 at the time, but yes. But they haven't amended yet.
6 They have been on notice that the state engineer
7 objects to them representing the individual parties
8 without naming the individual parties. And,
9 therefore, they have notice of this. And we've
10 objected to this.

11 They lack standing to be here today and -- and
12 the individual parties, because they're represented by
13 an organization, lack standing to testify in this
14 case.

15 So -- so, now I would also like to talk
16 about -- and I'll get more into this later -- is -- is
17 the due-process argument. And the argument is that
18 the state engineer has taken away some due-process
19 right from the people who want to testify.

20 The problem is, you got United States Supreme
21 Court precedent under Board of Regents versus Ross,
22 which says that -- let me just flash it up so people
23 can read it. All right.

24 To have a property interest, you have to have
25 more than a need or a desire for that property. You

1 have to have more than an expectation. You have to
2 have a present right for that property. And in this
3 case you have people that -- that want to drill
4 this -- these domestic wells on these lots.

5 The problem is, the water is totally over
6 appropriated. There is no water left. We're going to
7 show you -- I mean, the -- the petitioners have made a
8 big deal about the fact that, well, the basin is
9 recovering in some areas. It is but not in the area
10 where these lots are. And we're going to show you
11 some slides later that depict how bad the water
12 situation is. And that's the harm that you have to
13 consider.

14 But getting back to the witnesses -- I think
15 I'd better stop there.

16 Any questions?

17 THE COURT: No.

18 MR. RIGDON: If I might respond to the
19 standing argument: I thought we were just arguing
20 about the -- whether we were going to be allowed to
21 have witnesses or not. But -- but let's get to the
22 standing argument for just a second here.

23 Again, let's remember what happened in this
24 situation. On December 19th, three days before the
25 Christmas and -- and New Year holiday period, the

1 state engineer lays down this order without any notice
2 to anybody or any warning. Okay?

3 THE COURT: Is there a statute anywhere that
4 requires him to give notice to people?

5 MR. RIGDON: We believe that the principles of
6 due process required him to give notice because --

7 THE COURT: That wasn't the question. Is
8 there a statute that requires him to give notice?

9 MR. RIGDON: No.

10 THE COURT: Okay.

11 MR. RIGDON: No. So, that -- that's what
12 happened. Now, that started a clock, a thirty-day
13 clock. And it's a jurisdictional clock. If you don't
14 file your appeal within that thirty-day period, you're
15 forever barred from filing the appeal of that order.

16 Now, here's the problem that was faced:
17 During that thirty-day period, individuals --

18 THE COURT: Could I allow -- is there any
19 problem with me allowing you to amend your petition to
20 add real people instead of proceeding as a -- this
21 LLC?

22 MR. RIGDON: We could, but there is no need
23 to. This is -- this is -- it's been very --

24 THE COURT: Is there a case in the state of
25 Nevada that has a LLC proceeding in this? Because I

1 read through this, and I don't know if I saw that.

2 MR. RIGDON: There was a couple. We -- we --
3 there is one that's closed now. It was called FACO
4 versus state engineer. It was a water case in
5 Yerington. It never got to the Supreme Court. It was
6 decided at the district court. And the state engineer
7 never appealed the overturning of his order in that
8 case.

9 But in that case it was the same situation.
10 You had a group of farmers. There was more than
11 thirty of them who were all affected by the state
12 engineer containment order. They -- not one of them
13 put their individual name on the complaint. They
14 created an LLC called Farmers Against Containment
15 Order. And they argued that case in front of that
16 court.

17 And at that time the state engineer
18 challenged -- when the briefing was done on that case,
19 the state engineer challenged the standing of those
20 parties. And the parties fought back against that
21 challenge. And -- and at the hearing the state
22 engineer stood up and -- and -- and acquiesced and
23 said, "No. We -- I will concede that -- that this LLC
24 can represent these people." And so -- and that's
25 right in the order that the judge issued that we put

1 in in one of our exhibits, is the judge acknowledged
2 that they --

3 THE COURT: The problem, as I sit here and
4 think about it, I have is -- is, you say you represent
5 people that are aggrieved by this order by the state
6 engineer. And I can think of a number of different
7 people potentially that might be aggrieved, some of
8 which probably don't have standing, some of which may.

9 An example would be, say you have a retired
10 person who lives somewhere else and they have family
11 and people in this valley and they have been thinking
12 about coming here and buying a lot. And obviously if
13 they bought a lot, they would have to -- if they were
14 going to build a house, that person probably wouldn't
15 have standing.

16 On the other hand, I read somewhere where
17 someone has gone as far as to pay -- make a down
18 payment to -- to a well driller. So, they're a long
19 ways down. And I assume what stopped that was if
20 the -- was, notice to the drill was filed and turned
21 down by the state engineer.

22 MR. STOCKTON: Correct, your Honor.

23 THE COURT: Okay. So, you got this convening
24 of potentially aggrieved people, some of which don't
25 have standing, some of which might. And you've lumped

1 them all into this LLC, I...

2 MR. RIGDON: Well, your Honor, what the
3 testimony will establish -- one of the first things it
4 will establish would be, so the witnesses can testify,
5 is that we don't have anybody lumped in who doesn't
6 have standing -- wouldn't have standing on their own,
7 as you refer to, somebody just thinking about buying
8 property. Everybody that's going to be -- that's a
9 part of the LLC has been directly harmed by the order,
10 either because they're a property owner right now who
11 cannot drill a well or because they're a -- a business
12 that has had contracts interfered with, like the
13 well-drilling business that has contracts interfered
14 with. And this is hurting their business or their
15 real estate type of organization that has had escrows
16 canceled and -- and had lost -- have contracts blown
17 apart because of this order.

18 So, everybody here, everybody that's a part of
19 Pahrump Fair Water -- and the testimony will establish
20 that -- is somebody who has been directly affected by
21 the order. And the standard is -- is whether they
22 feel aggrieved by the order.

23 THE COURT: I just have -- you know, let me
24 tell you my concern. We're going to spend a whole
25 bunch of time in this case litigating it, I assume. A

1 whole bunch of briefing is going to get done. And
2 then I know the Supreme Court -- if it gets up there
3 and they decide all of a sudden that this LLC thing
4 doesn't fly, then everything we've done is to no
5 avail.

6 And that's why I'm asking if -- if I -- seems
7 to me you could find a representative of each group
8 which you represent that's a part of this LLC and put
9 their name individually in. And that way I avoid
10 wasting all this time to have the Supreme Court say,
11 No, you didn't have standing. Because this is an
12 important issue, and I -- I -- it needs to be decided.
13 I'm sure the state engineer wants confirmation of
14 whether or not he can do what he's done. And I'm just
15 troubled by that.

16 See what I'm saying?

17 MR. RIGDON: I understand, your Honor. And --
18 and could I offer the following solution, is that --

19 THE COURT: Okay.

20 MR. RIGDON: The standing issue doesn't need
21 to be decided right now this minute.

22 THE COURT: No. I hadn't planned on doing
23 that either.

24 MR. RIGDON: And so if we can put the
25 testimony on today that we were planning to put on,

1 later on today when we get down to the closing
2 arguments, we can talk more about the standing issue
3 and -- and -- yeah. We -- if you would grant us leave
4 at that time to amend to include a couple of the
5 people who testify here today, we would -- if -- if
6 that's -- if that's what you're looking for, we will
7 be happy to do that.

8 THE COURT: Mr. Stockton, what's your response
9 to that?

10 MR. STOCKTON: A couple of things. And I
11 wasn't heavily involved in the FACO case. In fact, I
12 was barely involved at all. But in this case they
13 were challenging the order, and the witnesses that
14 testified were not individual farmers. They had an
15 engineer testify and then -- and then I'm not sure who
16 else. So, they were testifying on behalf of this FACO
17 organization and not creating a series of mini trials
18 over each individual's right with this order.

19 And I -- in order to -- in order to go
20 forward, I -- I would strenuously object to having all
21 these witnesses today. At this stage in this
22 proceeding there has to be a motion to amend the
23 pleading to add these individual plaintiffs, and we
24 have to have a chance to respond.

25 So, we object to hearing all the witnesses

1 today and turning this into a series of mini trials,
2 which -- you know, for which we don't have notice of
3 what the claims are other than what's in the exhibit
4 we moved to strike. So -- so, it's -- it's -- it's
5 like ambush and surprise, is what they're trying to
6 do. They want to put on twenty-six mini trials in
7 front of you today.

8 THE COURT: Well, I'm not going to hear -- I
9 mean, there has got to be -- I can't imagine
10 twenty-six different situations.

11 MR. STOCKTON: So, it's our position that no
12 witnesses should be heard today. This is a motion for
13 stay. It's a statutory remedy. NRS 533.450 says it's
14 got to be in the nature of an appeal. And in an
15 appeal you don't hear witnesses.

16 THE COURT: I agree.

17 MR. STOCKTON: And so that's -- that's our
18 objection. And we think the FACO case -- it's a
19 district court case. So, there is not -- it doesn't
20 have the precedential value that a Supreme Court case
21 would. We've got the hunt -- or the apple grower case
22 that says clearly if these individuals are
23 indispensable, they can't put on this case. They have
24 to name the individuals. So -- so, that's our
25 position.

1 MR. RIGDON: And, your Honor, for an accurate
2 response, just to correct one thing, a couple of
3 things: First of all, there has been Supreme Court
4 precedent in the Cold Springs case, which hasn't been
5 mentioned here yet, where the Cold Springs
6 Association -- it wasn't an LLC. It was a
7 association, but it was still a corporate entity that
8 was allowed -- that the Supreme Court said they have
9 standing to -- to block the annexation or attempt to
10 block the annexation in the Cold Springs area that the
11 city of Reno was proposing. So, there is that Supreme
12 Court precedent there.

13 As far as the FACO case, just to correct one
14 thing -- and -- and I know Mr. Stockton wasn't
15 directly involved in that. I was.

16 There was two actual different actions. When
17 a first order was issued, there was a motion for
18 preliminary injunction, stay, just like we're doing
19 here today. And at that hearing the -- the -- the --
20 the -- FACO was allowed to put on witnesses,
21 individual farmer witnesses, to testify about the
22 makeup of FACO, why it had standing, all those types
23 of things. And that's all we're asking you to do
24 today.

25 THE COURT: I'm going to allow the witnesses,

1 but I'm not going to allow twenty-six witnesses. I
2 don't want --

3 MR. RIGDON: We don't have twenty-six
4 witnesses, your Honor.

5 THE COURT: Okay. And we're going to get it
6 done today. So -- and -- and I may or may not
7 consider their testimony. I agree with Mr. Stockton
8 that normally in these kinds of cases -- and I
9 misspoke myself when we were talking on the phone,
10 that this is a 233B case, but the standards are the
11 same in this case, I imagine, as they are in 233B
12 cases.

13 But I'll allow you to put witnesses on.
14 Again, I don't want to hear a repeat of -- of
15 grievances. So -- and I don't know if you need time
16 to decide who you're going to call, but we're going to
17 be done today.

18 So, go ahead, Mr. Stockton. Call witnesses.

19 MR. RIGDON: Your Honor, we were going to do
20 an opening statement and then call the witnesses and
21 then do closing.

22 THE COURT: Why do I need an opening
23 statement?

24 MR. RIGDON: We only have a limited time for
25 the witnesses. We know that. We're only planning on

1 calling eight. We expect that many of them will only
2 be on the stand for less than fifteen minutes. So...

3 THE COURT: Okay.

4 MR. RIGDON: If that's okay.

5 THE COURT: Well, I'm retired. I have all day
6 long. At least theoretically I'm retired.

7 MR. RIGDON: All right. Your Honor, we were
8 going to do a presentation on the board, but if you
9 want to follow along, I...

10 THE COURT: That's fine.

11 MR. RIGDON: I've got a printout for you.

12 THE COURT: I just -- I already got one big
13 box of documents in the mail. And the truth is that
14 I was too lazy to carry some of them over here this
15 morning. So, they're still in my hotel room.

16 So, anyway go ahead.

17 MR. RIGDON: All right, your Honor.

18 We're not here to argue whether the basin is
19 over pumped, whether it's a good -- this order
20 represents good public policy, those types of things.

21 Regardless of whatever order the state
22 engineer issues or any regulation he issues, he has to
23 pass three key tests. Every -- every order has to
24 pass three key tests, regardless of whether its good
25 public policy or bad public policy.

1 And the first test is that due process has to
2 be afforded to any people who are affected by the
3 order, who have a property interest at stake by the
4 order. The second is that the state engineer must
5 have clear statutory authority to issue the order.
6 The state engineer is a creature of statute.

7 THE COURT: I'm going to stop you for a
8 minute.

9 How -- assuming for a moment that people were
10 entitled to notice before this action was taken by the
11 state engineer, how would he know who was affected by
12 this?

13 MR. RIGDON: He's identified that there is
14 eight thousand parcels that are -- he identified in
15 his briefing that there is eight thousand parcels that
16 would be affected by the order, that -- that are
17 parcels that are created that are not within a certain
18 distance to a community water system, and that
19 therefore would be eligible to drill a domestic well.

20 THE COURT: So, he would have to give all
21 eight thousand notice of this?

22 MR. RIGDON: Yeah. Throw a card in the mail.
23 It's done all the time. When zoning decisions are
24 made, when cities want to rezone property, they notice
25 affected property owners around that. They send out

1 little cards in the mail. I get them all the time in
2 my neighborhood.

3 THE COURT: So, you say that -- that anybody
4 that owns one of these eight thousand lots is
5 aggrieved by this decision?

6 MR. RIGDON: Yes. Because they have a -- they
7 have a property right, the right to drill a domestic
8 well. That's a property right. It's one of the
9 bundles of sticks that they were -- they were conveyed
10 when they got their property. And that bundle of --
11 that -- that stick is now being impaired by this
12 order. And that requires, therefore, notice and an
13 opportunity to be heard.

14 THE COURT: Okay. Go ahead.

15 MR. RIGDON: So, the state engineer has to
16 have clear statutory authority to do what he's doing.
17 The state engineer is a creature of statute. He has
18 no inherent powers, no constitutional powers. He's
19 a -- a administrative authority who is created by
20 statute and is limited by statute. So, without
21 express authority, he doesn't have the power to do
22 what he did in this case.

23 And third, the order has to be supported by
24 substantial evidence. Every order that he issues has
25 to be supported by substantial evidence.

1 All three of these things, on any order he
2 issues, must be true. If any one of these things
3 fails, then the order is invalid. In this case all
4 three are -- are -- he fails all three tests.

5 Now, we got on the subject of the procedural
6 background. He issued this order on December 19th
7 with no notice, no hearing, not even -- not even a
8 notice that "hey, submit me your comments if you want
9 any comments on this or if you have any comments,"
10 nothing, no public meetings, nothing. This came as a
11 complete surprise and both out of the blue to a lot of
12 property owners which are here today. And that began
13 a thirty-day appeal period.

14 The day after he issued the order, he turned
15 around -- and he had been holding back on -- on giving
16 his stamp of approval on what are called notices of
17 intent to drill, which is, people who had already --
18 were eligible to have a domestic well, they had put
19 their deposit with a well driller, and they were
20 simply providing the state engineer with notice that
21 they were going to drill the well. He held back on
22 those, waited until after he issued the order, and
23 then denied all those. So, he applied it
24 retroactively.

25 And then so we -- on January 18th we filed our

1 petition for judicial review, and then we filed our
2 motion for stay. And the motion for stay is a
3 preliminary injunction. Yes, it's provided for in
4 statute, but it is a preliminary injunction. That's
5 what it is.

6 So, what does order 1293 do? And this is
7 really important. Order 1293 restricts the drilling
8 of any new domestic wells in Pahrump unless the
9 property owner first goes out on the open market,
10 purchases 2 acre-feet of existing groundwater rights
11 from a permanent right holder, and then gives those
12 water rights to the state engineer and forever
13 relinquish any property interest in them. Then they
14 get to have their -- their -- their domestic well.
15 So, they have to buy property, forfeit it, and then
16 he'll allow them to drill a domestic well.

17 The order -- there was two primary pieces of
18 evidence cited to in the order. And that was the Nye
19 County Water Resources Plan Update and this
20 groundwater report done by a gentleman named
21 Mr. Klenke. The state engineer in the order admits
22 that neither of those pieces of evidence -- and this
23 is a key consideration in this case -- neither of
24 those pieces of evidence considered the effect that
25 future domestic wells might have on existing wells,

1 that while there is no scientific evidence in there,
2 in either of these -- in either of these pieces of
3 evidence or in the order itself, there is no
4 scientific analysis as to whether these new wells will
5 actually affect existing wells.

6 So, we filed our motion for stay. Under
7 533.455, before ruling on that motion the court must
8 consider four things. And you know what? Those four
9 things are the same four things that the court must
10 consider when it's -- when it's doing a preliminary
11 injunction. That's why I say this is the same as a
12 preliminary injunction. If you look up the standards
13 in the law for preliminary injunction, these four
14 things are in there.

15 And so what are those four things? One of
16 them is whether any non-moving party will be harmed if
17 the stay is granted. Now, a lot of times the state
18 engineer cases, there is actually more parties than
19 the state engineer and the other person. There is --
20 you'll have a fighting -- competing water-rights
21 interests. And so some people might be having an
22 application. Some people might be protesting that
23 application. So, this is put in there to look at the
24 harm to those non-moving parties in the case.

25 In this case we don't have any other

1 non-moving party other than the state engineer. So,
2 it's a little awkward there.

3 But the second thing is whether the moving
4 party, whether Pahrump Fair Water and its members,
5 will be harmed if the stay is denied. And -- and
6 that's pretty straightforward on its face.

7 The third one is whether there is potential
8 harm to members of the public. And that's the key
9 here: members of the public, not whether it's in the
10 public interest to do this but whether there is actual
11 individual members of the public that -- that will be
12 harmed if the stay is -- if the -- if the stay is
13 granted or denied.

14 Now, we would assert two things here. Number
15 one, the members of PFW can assert their harm through
16 PFW. The state engineer has objected to that. But
17 even if they can't, which we believe they can -- but
18 even if they can't, they can assert their harm as harm
19 to members of the public. Every member of PFW is a
20 member of the public. And so they fall under both
21 those categories.

22 And then the final thing you're supposed to
23 look at is the likelihood of success on the merits.
24 And that is, based on the merits of the case, from
25 what we have so far, is there a chance, is there a

1 likelihood that we might succeed when we come in and
2 argue that.

3 So, here's the undisputed facts that are
4 before you. Pumping in this basin has steadily
5 declined since 1969. The state engineer doesn't
6 contest that fact. The state engineer does not
7 contest -- in fact, he said it here today -- that the
8 basin is not currently being over pumped. And this is
9 a key distinction when we deal with water law in
10 Nevada. We have basins that are over appropriated,
11 meaning that there has been rights issued greater than
12 the water that's available. But it's a separate
13 consideration as to whether a basin is actually being
14 over pumped. There is lots of times where water
15 rights are held and not actually used. And that's the
16 case here in Pahrump.

17 So, pumping currently is 15,000 acre-feet a
18 year. The perennial yield of water that's available
19 to pump is 20,000 acre-feet a year. So, right now
20 there is no shortage of water in Pahrump.

21 The average domestic well -- this is also a --
22 a fact that's uncontested. They're asking for
23 2 acre-feet of water. But the state engineer's own
24 records show that the average domestic well in Pahrump
25 only uses half an acre-foot of water. So, they're

1 asking for four times that amount.

2 The other thing that they don't dispute is,
3 they issued the order without providing notice or a
4 hearing to affected property owners. And -- and --
5 and one of the other undisputed facts -- and you heard
6 it here today -- is that water levels in some portions
7 of the basin -- and this is key, because even if you
8 decide he has the authority, the statute he's claiming
9 authority over requires him to show he -- he can issue
10 the order in the basin or in portions of the basin.

11 So, it's an abusive discretion if he does a
12 basin-wide order when all he needs to do is a portion
13 of the basin order. And here he did a basin-wide
14 order even though water levels in some portions of the
15 basin have leveled off or significantly increased.
16 And -- and his own evidence, that Nye County Water
17 Plan Update or -- or -- I forget the exact name of
18 it -- but that he cited to shows that in some areas of
19 the basin water levels have increased by as much as
20 45 feet. That's a significant increase in water
21 level. But people who are around of where that
22 45-foot increase is, they're just as affected by this
23 water as anybody else.

24 So, we're here to talk about the relative
25 harms that -- that -- that the Court needs to balance.

1 And again this is an equitable balancing test. No, we
2 didn't bring an action in equity. We brought an
3 action for preliminary injunction, which is an action
4 in equity. Okay? We didn't specify it was, but it
5 is. That's the nature of it. And under that the
6 Court has independent authority to weigh the evidence
7 related to the relative harms.

8 The issue here is not whether it's good public
9 policy. It's whether individuals are being
10 irreparably harmed by the order. And when balancing
11 the harms, harm to individual members of PFW is harm
12 to the public, as I mentioned before.

13 And finally, a loss of a property right by
14 itself, per se -- a loss of a property right or
15 impairment of a property right is considered per se
16 irreparable harm. We list the three cases here. We
17 cited to them on our brief where the Supreme Court has
18 said, by itself an impairment of a property right,
19 because property is unique, is a de facto -- is a
20 de facto irreparable injury. Okay.

21 So, our testimony that we will present here
22 today will show that members of PFW will be harmed by
23 the order, that members of the public are being harmed
24 by the order, and that harm -- there is five types of
25 harms that we're going to be talking about today:

1 infringement of a significant property right,
2 reductions in property values, effective loss of an
3 ability to build on the property that was purchased
4 with the investment-backed expectation that that's
5 what they could do, interference with existing
6 contracts, and the canceling of property escrows.

7 Well, the state engineer, as it says, is the
8 only non-moving party. He's failed to allege any harm
9 to him or his office from -- resulting from the
10 issuance of the stay. He's going to tell you all
11 about why this is good public policy. But again
12 that's not why we're here. We're here because he
13 needs to show that he has -- his -- his office will
14 suffer harm.

15 He's also provided no evidence -- he's asked
16 for a \$1 million bond. And he asked for that in his
17 brief, as one sentence summarily at the end of his
18 brief, without providing any evidence -- any
19 accounting or any evidence showing that -- that such a
20 bond is required or that he's going to incur any kind
21 of harm -- any kind of economic harm from a stay.

22 And then -- and then finally, the state
23 engineer has been going around -- has said in his
24 brief and has been telling people who call his office
25 that if the stay is granted and then later, when we

1 argue the merits, you decide to reinstate the order,
2 your Honor, that all those people, anybody who drilled
3 a domestic well during that time, will have to plug
4 the well. We would assert that that's a legal
5 question for this Court to decide. This Court has
6 inherent authority, when it's tailoring equitable
7 remedies, to tailor such remedies to prevent
8 injustice. We believe that that's an issue that would
9 be decided by the Court at that time; there is not an
10 automatic operation of law that would require that
11 result.

12 So, we believe that we're likely to succeed on
13 the merits. The state engineer failed to follow basic
14 principles of due process which require notice and a
15 hearing before issuing an order affecting property
16 right.

17 And then on the other two points for
18 likelihood of success on the merits, Mr. Taggart is
19 going to tell you a little bit about statutory
20 authority and the substantial evidence.

21 MR. TAGGART: Your Honor, for the record, my
22 name is Paul Taggart. And I'll -- I'll get through
23 this briefly, but Mr. Rigdon laid out three ideas for
24 us to focus on today. One is the due-process issue
25 and the lack of notice. Two is whether the state

1 engineer has statutory authority. And three is
2 whether or not the state engineer's decision is
3 supported by substantial evidence.

4 And -- and I think it's really important to
5 understand that domestic wells and the right to drill
6 a domestic well are outside the state engineer's
7 regulatory authority. And I think coming to this case
8 as you are and seeing the state engineer in the
9 courtroom, you would assume it's a water issue and the
10 state engineer, the state engineer's office is the --
11 is the administrator of water in the state of Nevada.
12 But it's a fact that statutorily, since the beginning
13 of the state engineer's office, when it was created,
14 domestic wells are outside the purview of the state
15 engineer's office. They are excepted from the permit
16 requirement.

17 So, NRS 534.030, sub 4 outlines that the state
18 engineer shall supervise all wells that go into the
19 artesian water or water defined in -- in definable
20 underground aquifers but except those wells for
21 domestic purposes for which a permit is not required.
22 So, a permit from the state engineer is not required
23 to have a domestic well in the state of Nevada.

24 So, prior to the state -- creation of the
25 state engineer's office there was an understanding

1 that individuals were entitled to put domestic wells
2 in to have water for their house. And when the
3 legislature created the state engineer's office in
4 1913, it specifically said the state engineer is not
5 in the role of permitting those types of domestic
6 wells.

7 And at NRS 534.08 -- I'm sorry, 534.180, sub 1
8 it states, "This chapter" -- so, when it says this
9 chapter, it means chapter 534, which is the chapter
10 governing underground water and providing the state
11 engineer with authorities over underground water
12 resources in the state of Nevada. It says, "This
13 chapter does not apply in the matter of obtaining
14 permits for the development and use of underground
15 water from a well for domestic purposes where the
16 draught does not exceed 2 acre-feet per year." So,
17 when a individual has a parcel, that parcel is
18 entitled to a domestic well. And that individual who
19 owns that parcel does not need a permit from the state
20 engineer to get that domestic well.

21 Now, that's -- that's the general rule that's
22 established by statute. In specific instances the
23 legislature has given the state engineer some role
24 over domestic wells. And I want to be clear here,
25 because whenever this issue comes up in front of the

1 legislature about domestic wells, there are hundreds
2 of individuals who show up at the legislature, and
3 it's hotly contested how domestic wells in the state
4 of Nevada can be controlled by the state. And the
5 legislature has consistently upheld the exemption of
6 the permit requirement.

7 What the legislature has provided, these
8 limited -- these limited roles for the state engineer.
9 For instance, he may require the registration of
10 domestic wells. That means there has to be a list of
11 domestic wells, and you have to put your name on that
12 list with the state. He -- he can require a domestic
13 well to be plugged if municipal water service is near
14 that parcel. So, that's an additional statute that
15 came into being later in time, that if the parcel can
16 get water from another source, like a municipal
17 system, then the state engineer can say, you have to
18 get water from that municipal system.

19 A -- a significant change is in NRS 534.110,
20 sub 6. In a curtailment -- so, when the state
21 engineer determines that there is more water being
22 pumped or being -- being appropriated than is
23 available in a basin, he may initiate curtailment.
24 The legislature provided the state engineer with the
25 authority to subject domestic wells to curtailment

1 when he follows the process of the curtailment order.
2 So, that's -- that's a specific location of something
3 the state engineer can do.

4 The state engineer can also limit the depth of
5 domestic wells. And -- and so those are some of the
6 specific places where the legislature has given the
7 state engineer some role, despite the general
8 exclusion of his role over domestic wells.

9 Well, today the state engineer is relying on
10 NRS 534.110, sub 8 to take the position that he can
11 require an individual -- he can prohibit an individual
12 from drilling a domestic well, which seems to be
13 contrary to the -- to the exclusion of his ability to
14 require a permit. He's saying, you cannot drill a
15 domestic well unless you acquire 2 acre-feet and
16 relinquish it. Then he will give you the ability to
17 drill a domestic well. He's relying on this provision
18 which says, "In any basin or portion thereof in the
19 state designated by the state engineer, the state
20 engineer may restrict drilling of wells in any portion
21 thereof if the state engineer determines that
22 additional wells would cause an undue interference
23 with existing wells." This is key. This is the
24 provision of law that the state engineer relied upon
25 when he adopted the order that you're reviewing.

1 Our position is, that statute does not say he
2 can include domestic wells in that exclusion. The
3 only time he can take any regulatory action with
4 respect to a domestic well, he has to have specific
5 authority under statute. And that's been provided to
6 him in the limited instances I -- I just described.
7 It is not provided in this provision that is being
8 relied upon. So, common law in the history of
9 statutory water law in Nevada indicates that 534 --
10 NRS 534.110, sub 8 does not apply to domestic wells.

11 I -- I explained the general presumption
12 stated in the original groundwater law, that -- that
13 the act does not apply to developing and use of
14 underground water for domestic purposes. What can be
15 more a part of developing and using an underground
16 water well for domestic purposes than the ability to
17 drill that well? This -- this original provision of
18 law recognized that -- that there existed a common
19 law, a right to drill a well to support development of
20 a household. And why is that? Why -- when -- when --
21 because you're going to hear that there is no property
22 right involved here.

23 The right to drill a domestic well is not a
24 property right. If you own a parcel in the state of
25 Nevada and you can't -- and the state of Nevada -- and