

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

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Case No. 77722

**REPLY IN SUPPORT OF STATE ENGINEER'S 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**

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Aaron D. Ford and Deputy Attorney General James N. Bolotin, hereby submits this Reply in support of his Emergency Motion Under Nevada Rule of

Appellate Procedure (“NRAP”) 27(e) for Stay of the District Court’s Order Granting Petition for Judicial Review Pending Appeal Pursuant to NRAP 8(a)(2).

### **MEMORANDUM OF POINTS AND AUTHORITIES**

Petitioners Pahrump Fair Water, LLC, Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte (collectively “Pahrump Fair Water” or “PFW”), argue at the forefront of their Opposition that the State Engineer’s appeal is dead in the water, concluding that “[t]he State Engineer will not prevail in this appeal” before the briefing on the merits of the appeal has even started. Opposition, p. 1. While likelihood of success on the merits is a factor to be weighed in this Court’s determination, per NRAP 8(c)(4), the State Engineer’s Motion focused primarily on the first factor, NRAP 8(c)(1), due to the very real threat that the object of the State Engineer’s appeal will be defeated if the stay is denied. In cases where the first factor is found to be most significant, this Court has held that “the final factor will counterbalance the first factor only when the appeal appears to be frivolous or the stay sought purely for dilatory purposes.” *State v. Robles-Nieves*, 129 Nev. 537, 546, 306 P.3d 399, 406 (2013) (citing *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004)).

PFW argues that the object of the State Engineer’s appeal will not be frustrated by denial of the State Engineer’s Motion for stay. Opposition, pp. 3–6. In doing so, PFW mischaracterizes the purpose of the State Engineer’s appeal as

“whether the State Engineer can issue regulations that impair property rights without providing 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.” Opposition, p. 3. While questions regarding due process and the State Engineer’s statutory authority are undeniably present in the instant appeal, and the State Engineer believes that the district court erred with respect to these questions, the *object* of the State Engineer’s appeal is to uphold Amended Order No. 1293A in an effort to manage the groundwater resource in the Pahrump Valley Basin in order to protect the owners of existing water rights and existing domestic wells. In other words, the State Engineer, through Amended Order No. 1293A, is actually trying to prevent the impairment of existing property rights.

As exhibited in the State Engineer’s Motion, hundreds of Notices of Intent (“NOIs”) to drill new domestic wells were filed in the less than two months between the November 8, 2018, hearing at the district court and the filing of the State Engineer’s January 2, 2019, Emergency Motion. Motion, p. 5 n.1. At the end of the day, PFW may be correct that thousands of wells do not end up being drilled during the pendency of this appeal. *See* Opposition, p. 3. However, at this point, at least 232 NOIs have been submitted to the State Engineer—meaning that there is an immediate intent to drill at least 232 new domestic wells. Should the NOIs continue

to flow in at a rate of 232 NOIs every two (2) months, the State Engineer will have received over 800 NOIs by the time his Reply Brief is due on June 24, 2019. This does not even take into account potential extensions of time, oral argument, and the time it will take for the Court to issue an opinion. Based on the numbers that are currently in front of the State Engineer, it is reasonable to believe that there is the intent to drill more than 1,000 new domestic wells during this appeal.

Additionally, PFW repeats one of its primary arguments from the district court: “on average, each domestic well in the basin only uses a half of an acre-foot per year.” Opposition, p. 4. The State Engineer is responsible for preventing the depletion of the Pahrump Valley Basin, a designated groundwater basin. *See* NRS 534.030(1); NRS 534.110(8). The vast majority of domestic wells in the Pahrump Valley Basin do not have a meter, and therefore there is no real way for the State Engineer to accurately gauge the amount of groundwater withdrawals from domestic wells. Therefore, in managing the basin and potential withdrawals, the State Engineer has to take into account that each domestic well is entitled to (and therefore *could*) pump up to 2 acre-feet annually. NRS 534.350(8)(a)(2). This would mean, based on the rate that NOIs have been submitted up to this point, over 1,000 domestic wells could be drilled during the pendency of this appeal, with a total entitlement to withdraw more than 2,000 additional acre-feet of water per year (as opposed to the 120 acre-feet per year identified by PFW). *See* Opposition, p. 4.

The State Engineer restates his arguments concerning the harm factors, in that there is a threat of irreparable harm to the State Engineer, and the State of Nevada as a whole, given his responsibility to prevent the depletion of groundwater as all water within the boundaries of the State belongs to the public. NRS 533.025; NRS 534.120. There is also the significant procedural harm (and associated economic harm) to the State Engineer and the Nevada Division of Water Resources if this Court upholds Amended Order No. 1293A but allows the drilling of domestic wells during the course of this appeal. Conversely, the delay associated with this stay, should PFW ultimately succeed in this appeal, does not constitute irreparable harm.

Based on the foregoing, as well as the underlying Emergency Motion for Stay Pending Appeal, the State Engineer again respectfully requests that this Court issue a stay of the district court's order pending this appeal.

RESPECTFULLY SUBMITTED this 10th day of January, 2019.

AARON D. FORD  
Attorney General

By: /s/ James N. Bolotin  
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## **CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 10th day of January, 2019, I served a copy of the foregoing REPLY IN SUPPORT OF STATE ENGINEER'S 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), by electronic service to:

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/s/ Dorene A. Wright