IN THE SUPREME COURT OF THE STATE OF NEVADA

TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Appellant,

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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APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from the final order of the Fifth Judicial District Court granting Respondent Pahrump Fair Water, LLC, *et al.*'s (hereafter "PFW") Petition for Judicial Review. The final order was filed on December 6, 2018, with PFW serving the Notice of Entry of Order that same day. Joint Appendix ("JT APP") Vol. XIV at 5417–5441. Jurisdiction is proper pursuant to Nevada Rule of Appellate Procedure (NRAP) 3A(a), NRAP 3A(b)(1), and NRS 533.450(9). Appellant Tim Wilson, P.E., in his capacity as the Acting Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer") timely filed his Notice of Appeal with the district court on December 10, 2018. JT APP Vol. XIV at 5442–5460. Accordingly, the State Engineer's appeal is timely pursuant to NRAP 4(a)(1).

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(8) as this is an administrative agency case involving water and an order of the State Engineer.

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III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in holding that substantial evidence does not support Amended Order No. 1293A and that the State Engineer acted arbitrarily and capriciously in issuing Amended Order No. 1293A prohibiting the drilling of new domestic wells in the Pahrump Valley Hydrographic Basin without the relinquishment of 2.0 acre-feet of existing water rights in good standing?

B. Whether the district court erred in finding that Pahrump Fair Water, LLC, a limited-liability company consisting of three (3) different types of members, had the requisite standing to challenge Amended Order No. 1293A?

C. Whether the district court erred in admitting PFW's Supplemental Record on Appeal ("SROA") over the State Engineer's objections?

IV. STATEMENT OF THE CASE

This appeal arises from the district court's December 6, 2018, Order granting PFW's Petition for Judicial Review, whereby the district court found that the State Engineer exceeded his statutory authority in

issuing Amended Order No. 1293A, the State Engineer should have provided notice to property owners prior to issuing Amended Order No. 1293A, substantial evidence does not support Amended Order No. 1293A, and that Pahrump Fair Water, LLC, had the requisite standing to challenge Amended Order No. 1293A.[1] JT APP Vol. XIV at 5417–5426.

V. STATEMENT OF FACTS

The Pahrump Valley Hydrographic Basin (hereafter "Pahrump Basin"), straddles southern Nye and Clark counties and is one of 256 groundwater basins and sub-basins in Nevada. JT APP 1323, 3306. The Pahrump Basin is, historically, one of the most regulated groundwater basins within the state, as evidenced by the number of State Engineer Orders issues in the Pahrump Basin. *See* JT APP Vol. I at 50. The Pahrump Basin is over-appropriated, meaning that the existing committed water rights in the basin, in the form of permits and

[1] While PFW also raised the issue of whether Amended Order No. 1293A is an unconstitutional taking of private property without just compensation, the district court found it was unnecessary to make a determination with respect to the takings issue since it invalidated Amended Order No. 1293A. JT APP Vol. XIV at 5424.

certificates, exceeds the basin's perennial yield.[2] The perennial yield of the Pahrump Basin is 20,000 acre-feet annually ("afa"). JT APP Vol. I at 51, 86. However, due to many factors, the existing permitted and certificated rights total an annual water commitment of nearly 60,000 afa. *Id.*

While these numbers alone are problematic for the long-term health and management of the Pahrump Basin, the problem is exacerbated by the fact that the nearly 60,000 afa of existing rights **does not** include the quantity of water allowed to be withdrawn by existing domestic wells. Within the Pahrump Basin, there are approximately 11,280 existing domestic wells in the Pahrump Basin, which represents the greatest proliferation and density of domestic wells in any basin in the state by far. JT APP Vol. I at 51, Vol. I–III at 86–560, Vol. V at 1022–1157, Vol. VI–VIII at 1436–1652, Vol. IX–X at 1792–3495. By statute, each domestic well within the state may withdraw up to 2.0 afa of groundwater for culinary and household purposes in a single-family dwelling, including the watering of a

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

garden, lawn, and domestic animals, allowing for an additional withdrawal of approximately 22,560 afa from existing domestic wells in the Pahrump Basin. NRS 534.013; NRS 534.180. Calculating the total existing legally permissible withdrawals within the Pahrump Basin of nearly 60,000 afa of existing water rights, plus the legally allowed potential withdrawal of approximately 22,560 afa for existing domestic wells, amounts to more than 80,000 afa of existing commitments in a basin with 20,000 afa of water available to withdraw.

When taking into account the existing parcels in the Pahrump Basin for which no domestic wells currently exists, but which are not currently within the service area of an existing water utility, there is the potential for up to 8,000 new domestic wells to be drilled, or stated differently, an additional 16,000 afa of potential water commitments in the basin. JT APP Vol. I at 52, Vol. I–III at 86–560, Vol. V at 1022–1157, Vol. VI–VIII at 1436–1652, Vol. IX–X at 1792–3495. In other words, these potential new domestic wells (16,000 afa) together with the existing domestic wells (22,560 afa) would have, by statute, the ability to withdraw nearly twice the 20,000 afa perennial yield of the basin.

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Without further regulation in the Pahrump Basin, there stands the possibility of having nearly 100,000 afa[3] of groundwater withdrawn in the basin. Per NRS 534.080(4), the date of priority for the use of underground water from a well for domestic purposes where the draught does not exceed 2.0 acre-feet per year is the date of completion of the well. Given that Nevada is a prior appropriation state, and new domestic wells have the most junior priority, any new domestic wells will in turn be the first ones ordered to cease their use of water in the event of a curtailment. NRS 534.080(4); NRS 534.110(6). Despite the prior actions of the State Engineer to regulate the Pahrump Basin, water levels on the valley floor of the basin continue to decline steadily at unacceptable rates. JT APP Vol. VII at 1541–1550.

Based upon the undoubtedly troubling issues regarding water in Nye County, particularly the Pahrump Basin, the Nevada Legislature enacted the Nye County Water District Act in 2007, creating the Nye County Water District (hereafter "the District"). *See* Ch. 542, Nevada Statutes 2007, p. 3397 (S.B. 222 (2007)). Pursuant to

[3] Adding together the approximately 60,000 afa of existing permitted and certificated rights, 22,560 afa of potential withdrawals from existing domestic wells, and 16,000 afa of potential withdrawals from possible domestic wells equals approximately 98,560 afa.

NRS 534.030(5), the State Engineer has properly availed himself of the services of the District as a source of advice and assistance as necessary to conserve groundwater in the Pahrump Basin, a designated[4] basin.

On December 11, 2017, after voting to do so, the District sent a letter to the State Engineer requesting an order from the State Engineer that would require the relinquishment or dedication of water rights for new domestic wells, while expressly exempting existing domestic wells. JT APP Vol. VI at 1365–1384. Following receipt of the District's letter, the State Engineer issued Order No. 1293 on December 19, 2017, pursuant to his authority under NRS 534.110(8) and NRS 534.120(1), prohibiting the drilling of any new domestic well in the Pahrump Basin without obtaining and relinquishing 2.0 afa of water rights in good standing to account for the statutorily authorized withdrawal of the new domestic well. JT APP Vol. I at 50.

On April 17, 2018, the Nye County Board of Commissioners adopted a Groundwater Management Plan (hereafter "GMP") for the Pahrump Basin, thereby recognizing at the County level that Pahrump

[4] The State Engineer explains the significance of designating a groundwater basin, per NRS 534.030, in more detail below. In essence, designating a problematic groundwater basin allows the State Engineer to use additional statutory, discretionary tools to manage a basin.

has the highest density of domestic wells in Nevada, identifying and relying on Order No. 1293 as a key component of the GMP. JT APP Vol. X at 3496–3511. The GMP, with Order No. 1293, aims to bring water use within the basin to equilibrium with the groundwater withdrawals and ultimately bring stability and sustainability to the groundwater use within the Pahrump Basin. *See Id.* Specifically, the requirement for the impact of new domestic wells on the groundwater aquifer to be offset by water rights relinquished to the Pahrump Basin is vital to the County's GMP. Order No. 1293, and the County's GMP, represent an attempt by the County and the State Engineer to work cooperatively to address over-appropriation in the Pahrump Basin, which may prevent designation as a critical management area and ultimately prevent curtailment.

As a result of Order No. 1293, litigation ensued, with Pahrump Fair Water, LLC, filing a Petition for Judicial Review. Recognizing that certain individuals, who filed a Notice of Intent to Drill or applied for building permits prior to the issuance of Order No. 1293, may have been unintentionally impacted by the issuance of Order No. 1293, the State Engineer issued Amended Order No. 1293A on July 12, 2018. JT APP

Vol. I at 56. In issuing Amended Order No. 1293A, the State Engineer restated the prohibition on new domestic wells without the relinquishment of 2.0 afa of water rights, but created two exceptions:

(1) For those persons whom filed a Notice of Intent to Drill with the Nevada Division of Water Resources (hereafter "DWR") between December 15th and 19th, 2017, which were denied upon the issuance of Order No. 1293; or

(2) Persons whom could demonstrate that they filed an application for a zoning and/or building permit with the Nye County Departments of Planning or Building and Safety on or before December 19, 2017, for a parcel eligible for a domestic well. JT APP Vol. I at 56.

After the issuance of Amended Order No. 1293A, Pahrump Fair Water, LLC, and the State Engineer entered into a settlement agreement, whereby Pahrump Fair Water, LLC, voluntarily dismissed its appeal of Order No. 1293 and, in exchange, the State Engineer agreed to an expedited briefing and scheduling of a hearing on a new appeal of Amended Order No. 1293A.

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Following this settlement, Pahrump Fair Water, LLC, along with new petitioners Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte (collectively "PFW"), timely filed a new Petition for Judicial Review challenging Amended Order No. 1293A. JT APP Vol. I at 15–30. Following a complete briefing on this matter, and oral arguments on November 8, 2018, the district court ordered, from the bench, that PFW's Petition for Judicial Review be granted, reversing Amended Order No. 1293A. JT APP Vol. XIII–XIV at 5186–5377. The parties submitted competing Proposed Orders to that effect, as the State Engineer objected to the accuracy of the language of PFW's Proposed Order. JT APP Vol. XIV at 5378–5416. The written order granting the Petition for Judicial Review was filed on December 6, 2018, and the Notice of Entry of Order was served on December 6, 2018. JT APP Vol. XIV at 5417–5441.

The State Engineer timely filed his Notice of Appeal with the district court, as well as a Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal on Order Shortening Time. JT APP Vol. XIV at 5442–5476. Following a full briefing on this Motion for

Stay, the district court denied the Motion for Stay, with the Notice of Entry of Order received by the State Engineer on January 2, 2019. JT APP Vol. XIV at 5498–5539.

That same day, on January 2, 2019, the State Engineer requested the same relief from this Court, filing an 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 (hereafter "Emergency Motion for Stay Pending Appeal"), requesting immediate action. *See* State Engineer's Emergency Motion for Stay Pending Appeal. On January 3, 2019, this Court granted a temporary stay and directed an expedited response from PFW. *See* Order Granting Temporary Stay and Directing Expedited Response. Following a full briefing on the State Engineer's Emergency Motion for Stay Pending Appeal, this Court granted the State Engineer's requested stay pending appeal and expedited the appeal, requiring the State Engineer to file and serve his opening brief and appendix by February 15, 2019. *See* Order Granting Stay and Expediting Appeal. The State Engineer now timely submits his Opening Brief.

VI. SUMMARY OF THE ARGUMENT

The State Engineer respectfully requests that this Court reverse the district court's order in full, and find that Amended Order No. 1293A is supported by substantial evidence and that its issuance was a proper exercise of the State Engineer's statutory authority and discretion. Contained within the State Engineer's Record on Appeal is more than sufficient evidence supporting not only the detrimental impacts of adding more groundwater commitments, including localized effects of groundwater pumping based upon where pumping occurs, but also supporting the restriction on new, unaccounted for withdrawals of groundwater by domestic wells, as set forth in Amended Order No. 1293A.

The State Engineer has limited essentially every other type of new appropriation in the Pahrump Basin, made efforts to reduce the unused but authorized water right commitments, and heavily regulated the use of water within the basin; yet, water levels on the valley floor continue to fall. This continued decline will not only jeopardize and impair the legally protected interest in existing domestic wells, but also those existing permitted and certificated senior water rights.

Should domestic wells continue to proliferate without the ability of the State Engineer to regulate and manage all water uses and withdrawals in the Pahrump Basin, including exercising his legal authority to manage and regulate domestic wells, the detrimental effects of the plummeting water levels will be accelerated. Given the statutory language allowing a domestic well to withdraw up to 2.0 afa without a permit, existing uses alone will exceed the perennial yield without any authority or ability of the State Engineer to intervene and exercise his legal duty to manage the groundwater resource. Adopting PFW's arguments, this is the result.

Without Amended Order No. 1293A, the State Engineer's only option for addressing the groundwater problems in Pahrump will be to regulate, or curtail, by priority, whereby any new domestic wells would be the first water use restricted. *See* NRS 534.080(4); NRS 534.110(6). However, the district court's findings even call into question that legal directive and authority of the State Engineer. If this Court does not reverse the district court's findings, the statutory authority of the State Engineer to regulate domestic wells by priority is uncertain.

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The State Engineer properly acted within the authority and discretion provided to him by the Legislature. The Pahrump Basin is designated pursuant to NRS 534.030, thereby establishing that the basin is in need of further administration and enabling the State Engineer to utilize the tools contained in NRS 534.110(8) and NRS 534.120(1) in the enhanced management of the basin. The State Engineer determined that the drilling of additional wells that allow for additional, unaccounted for withdrawals from the groundwater supply in the Pahrump Basin will cause an undue interference with existing rights and the protectable interest in existing domestic wells. Therefore, Amended Order No. 1293A and its restriction on new domestic wells is essential. The State Engineer has already restricted every other new appropriation; there are no other withdrawals that he can restrict or limit without curtailment.

Further, the State Engineer has rightfully determined that the groundwater in the Pahrump Basin is being depleted. Therefore, Amended Order No. 1293A is essential to the welfare of the basin. The State Engineer has deemed it essential that he prohibit new domestic wells in the Pahrump Basin unless existing water rights are

relinquished in an amount to account for the withdrawals allowed by statute of that new domestic well. Special protections pertaining to domestic wells found elsewhere in NRS Chapters 533 and 534 are inapplicable to the State Engineer's authority to manage the state's water resources and do not limit the broad discretionary tools used to issue Amended Order No. 1293A.

Moreover, the State Engineer's issuance of Amended Order No. 1293A does not violate due process. Legislative history shows that the Legislature did not intend for a protectable interest to exist in a domestic well that did not yet exist. Further, the mere expectation that domestic wells would remain available without accounting for the impact to the aquifer in the Pahrump Basin is insufficient for due process protections to attach. Amended Order No. 1293A allows for the drilling of new domestic wells as long as there is an offset through the relinquishment of 2.0 acre-feet of water to the basin. Sufficient procedural protections exist through the judicial review process provided by NRS 533.450, as identified by the Legislature. *See* NRS 534.110(8).

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Finally, the district court erred in finding that Pahrump Fair Water, LLC, had the requisite standing to challenge Amended Order No. 1293A. Limited liability companies are independent entities separate and apart from their members and managers. There is no evidence that Pahrump Fair Water, LLC, at the time of the issuance of Amended Order No. 1293A, owned any property affected by the issuance of the order. Further, even if the Court considers the individual members, Pahrump Fair Water, LLC, is made up of undisclosed members who, based on their limited description as real-estate brokers doing business in Pahrump and owners of well drilling companies, would not have standing to sue in their own right. Lastly, the district court erred in admitting and considering PFW's Supplemental Record on Appeal in reaching its decision, over the objections of the State Engineer and contrary to case law and statute.

VII. ARGUMENT

A. Standard of Review

When reviewing a district court's order reversing an agency's decision, including a decision of the State Engineer, this Court applies the same standard of review as should be applied by the lower court,

determining "whether the agency's decision was arbitrary or capricious." *King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314, 316 (2018) (*citing Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996)).

"Water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). Pursuant to NRS 533.450(10), the decision of the State Engineer is prima facie correct, and the burden of proof is on the party attacking the same. *See also Office of State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) ("[D]ecisions of the State Engineer are presumed to be correct upon judicial review.").

The court's review of a decision of the State Engineer, under NRS 533.450, is limited to determining whether substantial evidence in the record supports the State Engineer's decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.* In reviewing a decision or order of the State Engineer,

the court will not "pass upon the credibility of the witnesses nor reweigh the evidence," as this is a limited review "in the nature of an appeal." *Id.* A party that feels aggrieved "is not entitled to a *de novo* hearing in the district court." *Id.* The court cannot substitute its judgment for that of the State Engineer. *Id.*

Further, a decision of an administrative agency, including the State Engineer, will not be disturbed unless it is arbitrary and capricious. *Pyramid Lake Paiute Tribe of Indians*, 112 Nev. at 751, 918 P.2d at 702. This Court has interpreted this to mean that the State Engineer must clearly resolve all the crucial issues presented and must prepare findings in sufficient detail to permit judicial review. *Revert*, 95 Nev. at 787, 603 P.2d at 264–65.

Where the State Engineer's action is discretionary in nature, "abuse of discretion provides the only grounds for reversal of the Engineer's decision." *Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982). In reviewing an order of the State Engineer for an abuse of discretion, the court's function is to "review the evidence upon which the Engineer based his decision and ascertain whether the evidence supports the

order." *Office of State Eng'r v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (*citing Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 283, 607 P.2d 581, 582 (1980)). If so, the court "is bound to sustain the Engineer's decision." *Id.*

Decisions of the State Engineer are entitled to deference with respect to their factual determinations and legal conclusions. Generally, the State Engineer's "factual determinations will not be disturbed" by the reviewing court as long as they are "supported by substantial evidence." *Pyramid Lake Paiute Tribe of Indians*, 112 Nev. at 751, 918 P.2d at 702. Further, "while it is true that [the court] is free to decide pure legal questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence." *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). This Court has explained that "an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action" and "great deference should be given to the agency's interpretation when it is within the

language of the statute." *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988); *See also U.S. v. State Eng'r*, 117 Nev. 585, 598, 27 P.3d 51, 53 (2001) (holding where the State Engineer is charged with administering a statute, "that office has the implied power to construe the statute.").

Accordingly, NRS 533.450 and the cases interpreting it provide the basis and the limit for challenging decisions of the State Engineer. Therefore, this Court's review is limited to whether substantial evidence in the State Engineer's record on appeal supports the State Engineer's decision, and whether the State Engineer abused his discretion in issuing Amended Order No. 1293A.

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B. Substantial Evidence in the State Engineer's Record on Appeal Supports Amended Order No. 1293A and the Issuance of Amended Order No. 1293A Was Not Arbitrary and Capricious

1. Amended Order No. 1293A Is Supported by Substantial Evidence in the State Engineer's Record on Appeal

As previously discussed, the Pahrump Basin is historically one of the most regulated basins in the State of Nevada. JT APP Vol. I at 50. In fact, prior to the issuance of Amended Order No. 1293A, nearly[5] every other type of new appropriation of groundwater had been curtailed. JT APP Vol. I at 67–79. Currently, there are existing rights in the form of permits and certificates totaling nearly 60,000 afa, as well as approximately 11,280 existing domestic wells each statutorily

[5] Per Order No. 1107, the State Engineer ordered that all applications to appropriate water from the groundwater source within the Pahrump Basin would be denied, with limited exceptions for certain commercial and industrial purposes, and environmental permits. JT APP Vol. I at 67–68. Similarly, per Order No. 1252, further ordered that any application to appropriate groundwater in the Pahrump Basin would be denied, with limited exceptions for environmental permits, temporary appropriations for stockwater during drought, temporary appropriations for establishing fire-resistant vegetative cover, and applications filed to increase diversion rate only. JT APP Vol. I at 72–79.

allowed to withdraw 2.0 afa, meaning that there are current existing rights totaling 82,560 afa in the Pahrump Basin. JT APP Vol. I at 51, Vol. I–III at 86–560, Vol. V at 1022–1157, Vol. VI–VIII at 1436–1652, Vol. IX–X at 1792–3495. Conversely, the perennial yield of the Pahrump Basin is 20,000 afa. JT APP Vol. I at 86. Thus, the Pahrump Basin is severely over-appropriated, and this does not even account for the approximately 8,000 existing parcels of land in the Pahrump Basin for which no domestic well currently exists but would have been eligible for a domestic well prior to the issuance of Amended Order No. 1293A. JT APP Vol. I at 52, Vol. I–III at 86–560, Vol. V at 1022–1157, Vol. VI–VIII at 1436–1652, Vol. IX–X at 1792–3495.

A 2017 report prepared for the Nye County Water District Governing Board entitled Nye County Water Resources Plan Update, determined that water levels on the valley floor of the basin have declined steadily throughout the period of development. JT APP Vol. VII at 1541–1550. Due to these declines, and based on **current** pumping rates (that actually fall below the perennial yield), 438 wells are predicted to fail by the year 2035, while 3,085 wells are predicted to fail by 2065. *Id.* Under NRS 534.030(5), the District appropriately

provided advice and assistance to the State Engineer, sending a letter[6] to the State Engineer on December 11, 2017, requesting that the State Engineer issue an order that would prohibit new domestic wells in the Pahrump Basin without relinquishment or dedication of water rights. JT APP Vol. VI at 1365–1366. This letter was based upon multiple reports, including the aforementioned Nye County Water Resources Plan Update, the report prepared by John Klenke in 2017 entitled "Estimated Effects of Water Level Declines in the Pahrump Valley on Water Well Longevity," and Nye County's own 2017 Staff Report. JT APP Vol. VI–VIII at 1368–1652. This component is key to Nye County's GMP, a plan voted on and approved by the Nye County Board of County Commissioners designed to address the depletion of the Pahrump Basin. JT APP Vol. X at 3496–3511.

This scientific data prepared for and provided to the State Engineer by the District, along with the State Engineer's own evidence and records of groundwater use and groundwater levels as maintained

[6] Due to a typographic error, the letter found at JT APP Vol. VI at 1365 is dated "Dec 11, 2016." This letter was sent on December 11, 2017, as correctly indicated on the page illustrating the votes of the Nye County Water District Governing Board members at JT APP Vol. VI at 1367.

by DWR, clearly shows troubling water trends in the basin in large part due to the proliferation of domestic wells. JT APP Vol. I–VIII at 86–1656, Vol. IX–X 1792–3511. These trends are well known and publicized in various newspaper articles dating back at least to 1974, and exist in spite of the many past orders from the State Engineer intended to address groundwater issues in the Pahrump Basin. JT APP Vol. I at 58–85, Vol. VIII–IX at 1657–1791.

Despite past actions by the State Engineer to regulate groundwater use in the Pahrump Basin, including designating[7] the Pahrump Basin for administration pursuant to NRS 534.030, water levels on the valley floor have been declining since the 1950s. JT APP Vol. I at 53, Vol. VI at 1301–1318, Vol. VI–VIII at 1385–1652. The water levels continue to drop, even though current pumping in the Pahrump Basin is at a 60-year low. JT APP Vol. VI at 1332. The well-documented drop in water levels has resulted in corresponding reduced flows from springs and land subsidence. JT APP Vol. I at 53,

[7] Designating a basin pursuant to NRS 534.030 allows the State Engineer to "[p]roceed with the administration of [NRS Chapter 534]," allowing him to utilize additional discretionary statutory tools reserved only for designated basins, including NRS 534.110(8) and NRS 534.120(1).

Vol. I–III at 86–560, Vol. IV at 689–748, Vol. V at 1022–1157, Vol. VI–VIII at 1412–1652, Vol. IX–X at 1792–3495. And, as stated above, it is predicted that 438 existing wells will fail by 2035. JT APP Vol. I at 54, Vol. VI–VIII at 1385–1652. Even more alarming is that, by 2065, the number of predicted well failures climbs to an astonishing 3,085. JT APP Vol. I at 54, Vol. VI–VIII at 1385–1652. These predictions, supported by the best available science, only include **existing** wells, not any new wells. It is important to emphasize that these predictions utilize and make a forecast based upon the **existing** demand; any increase in demand (such as additional domestic wells making additional withdrawals) will only exacerbate and accelerate the occurrence of well failures and other adverse effects of groundwater declines. *Id*.

PFW challenged this evidence as being insufficient to support Amended Order No. 1293A at the district court, and the district court agreed, citing the absence of a specific finding regarding the effects of additional domestic well pumping. JT APP Vol. XI at 3634–3655, Vol. XIV at 4955–4987, 5417–5426.

This finding was an error.

Historical records within the Pahrump Basin, as maintained and included in the evidence relied upon by the State Engineer, reflect the fact that in the past, groundwater pumping regularly exceeded the perennial yield[8] on an annual basis. JT APP Vol. VI at 1334. Looking at the historic groundwater levels confirms that increased rates of groundwater pumping correlates with dramatic drops in groundwater levels. JT APP Vol. VI at 1338–1345. It should go without saying that actual records and evidence reflecting the impact of groundwater pumping higher than the present rates is a reliable basis to predict future effects if groundwater withdrawals returned to those historic levels.

The State Engineer's historic actions made in an effort to intervene and to reduce pumping in the Pahrump Basin have resulted in some positive effects. JT APP Vol. I at 50, Vol. VI at 1338–1345. However, the decrease in groundwater declines and recovery in some areas are limited and localized to the areas closer to the alluvial fans on

[8] The line used at JT APP Vol. VI at 1334 to illustrate perennial yield does not use the current perennial yield of 20,000 afa; however, it remains clear that pumping exceeded 20,000 afa regularly until recent years.

the northeastern part of the Pahrump Basin where a substantial part of the groundwater recharge occurs. *Id.*

Despite essentially prohibiting every other type of new appropriation, groundwater levels on the valley floor currently continue to decline. JT APP Vol. VI at 1394–1396, Vol. VII at 1545–1548. The recovery experienced on the alluvial fan is not expanding; rather, the evidence demonstrates that groundwater levels on the valley floor continue to decline. *Id.* Thus, Amended Order No. 1293A represents the State Engineer's attempt to limit the last widely available form of new appropriation in the Pahrump Basin, new domestic wells. The State Engineer makes this effort to fulfill his statutory duty to protect existing domestic wells and the existing senior water rights that are being threatened by continuing declines in groundwater levels on the valley floor.

The only remaining alternative is to curtail by priority, based upon a finding that the average annual replenishment is inadequate for the needs of all permittees and vested-right claimants. NRS 534.110(6). This undesirable outcome neither serves to benefit the community as a whole nor honors the efforts of Nye County through its GMP. The State

Engineer should utilize every available alternative before resorting to such draconian measures. As stated previously, if the State Engineer curtails the basin by priority, any new domestic wells would have the junior-most priority and, therefore, be the first wells turned off.[9] NRS 534.080(4) and NRS 534.110(6). Amended Order No. 1293A allows for the drilling of new domestic wells as long as there is an offset through the relinquishment of 2.0 acre-feet of water to the basin thus providing a path forward for property owners wishing to develop their properties for domestic use in the future.

Moreover, while the district court's decision effectively strips any regulatory authority over domestic wells from the State Engineer, such is wholly inconsistent with Nevada law. The Legislature clearly intended for the State Engineer to be authorized to regulate domestic wells, otherwise NRS 534.080(4) (setting a date of priority for domestic wells), NRS 534.110(6) (authorizing regulation by priority including

[9] Despite this clear statutory provision, PFW argued before the district court that the State Engineer is prohibited from regulating domestic wells at all, and the district court ultimately ruled in PFW's favor. JT APP Vol. XIV at 4986, 5219, 5422 (the district court finding that "domestic wells are afforded an exemption from the State Engineer's regulatory purview."). The State Engineer raised his concern about this issue in his Motion for Stay before the district court and his Emergency Motion for Stay before this Court, and highlights it once again here.

domestic wells), NRS 534.110(7) (mandating regulation by priority, including domestic wells, under certain conditions in a basin designated as a critical management area), and NRS 534.180(2) (requiring registration of a domestic well drilled in designated basin) are superfluous. Ultimately, the purpose of Amended Order No. 1293A is to assure that any new draught of water from the Pahrump Basin does not increase the total water commitments in existence at the time of its issuance. Stated more simply, the purpose of Amended Order No. 1293A is to allow the State Engineer to account for the 2.0 acre-feet of groundwater a new domestic well is statutorily authorized to withdraw in the overall water "budget" so that future management decisions may be made.

The district court erred in finding that substantial evidence does not support Amended Order No. 1293A. JT APP Vol. XIV at 5423. Specifically, the district court erred by deeming it necessary for the State Engineer to conduct a full conflicts analysis and erred by finding that it was a pre-requisite that the State Engineer "set an objective standard for determining whether predicted declines in the water table are reasonable." JT APP Vol. XIV at 5423. While a conflict analysis of

potential future pumping may be important in a basin where there is insufficient historical data, this is not the case with the Pahrump Basin. In the Pahrump Basin, the State Engineer has the benefit of decades of historical data, showing the actual effects of groundwater pumping that is below, near, at, or in excess of the perennial yield of the basin. JT APP Vol. VI at 1301–1345, Vol. VII at 1545, 1547.

The State Engineer has worked diligently through previous administrative actions and management efforts to bring the pumping to where it is now, below the perennial yield. Those efforts are being rewarded to some degree, as groundwater levels are beginning to recover along the toe of the alluvial fan in the eastern part of the Pahrump Basin. JT APP Vol. I at 58–85, Vol. VII at 1544–1545. Yet, despite these efforts and despite pumping below the perennial yield, there has been **no** recovery in the lowland portions of the valley floor. JT APP Vol. VII at 1545–1550. At this rate, "thousands of primarily domestic wells will have to be deepened or replaced in some sections of southern Pahrump." *Id.* Further, there are other consequences in addition to effects on existing domestic well owners, including water quality degradation and land subsidence. JT APP Vol. VII at 1549.

Looking at past data for the Pahrump Basin, as well as population forecasts for Pahrump, the State Engineer has properly determined, based upon his experience and expertise, that an increase in the number of domestic wells and withdrawals from domestic wells will only accelerate water level declines and the associated consequences. JT APP Vol. VII at 1549 Unless a total limit on water use can be established and accounted for in the basin budget, which in part is occurring through relinquishment of existing water rights, history is destined to repeat itself. *Id*.

Substantial evidence supports Amended Order No. 1293A, and the district court erred in finding otherwise.

2. The State Engineer Is Statutorily Authorized to Issue Amended Order No. 1293A

The State Engineer does not dispute that existing domestic wells hold a protectable interest in Nevada water law. Amended Order No. 1293A itself makes this acknowledgement, as do the statutes addressing existing domestic wells and wells used for domestic purposes in NRS Chapters 533 and 534. JT APP Vol. I at 50–56. One such acknowledgement includes the legislative declaration found at

NRS 533.024(1)(b), establishing Nevada policy to "recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot be reasonably mitigated."

In fact, it is this declaration to protect those interests in existing domestic wells that is the catalyst behind Amended Order No. 1293A. The State Engineer **can** and **must** regulate future domestic wells to meet his obligations under this legislative declaration, as well as the other legislative declarations to "consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada" and to "manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of water." NRS 533.024(1)(c); (e).

NRS 534.110(8) specifically provides that "[i]n any basin or portion thereof in the State designated by the State Engineer, the State Engineer **may** restrict drilling of wells in any portion thereof if the State Engineer determines that additional wells would cause an

undue interference with existing wells." (Emphasis added). Further, NRS 534.120(1) provides that "[w]ithin an area that has been designated by the State Engineer, as provided for in this chapter, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved."

The Pahrump Basin at issue in Amended Order No. 1293A is a designated basin pursuant to NRS 534.030, a fact that no one disputes. JT APP Vol. I at 50, 58–60. Both NRS 534.110(8) and NRS 534.120(1) provide the State Engineer with broad authority to take the necessary steps to protect designated groundwater basins, like the Pahrump Basin, when there is evidence that the basin is being depleted. As previously discussed, the evidence of groundwater levels within the Pahrump Basin valley floor demonstrates a depletion of the groundwater. This is occurring despite the fact that actual pumping is less than the perennial yield of the basin. This evidence of depletion, even at reduced pumping rates, warrants further intervention by the State Engineer as authorized by NRS 534.110(8) and NRS 534.120(1).

The district court erred in finding that NRS 534.030(4) and NRS 534.180(1) prohibit Amended Order No. 1293A. JT APP Vol. XIV at 5421–5422. While existing domestic wells are exempted from the State Engineer's regulatory supervising and permitting process, as set forth in NRS 534.030(4) and NRS 534.180(1), the district court erroneously applied these limitations to the broad provisions of NRS 534.110(8) and NRS 534.120(1) upon which the State Engineer properly enacted Amended Order No. 1293A.

NRS 534.110(8) and NRS 534.120(1) **do not** include a limitation as to their applicability to domestic wells, and are indeed not so limited. In fact, in order for the State Engineer to meet the Legislature's directive to protect the supply of water to **existing** domestic wells, it is necessary for the State Engineer to apply these statutes as he did in Amended Order No. 1293A. *See* NRS 533.024(b). The State Engineer acted within his statutory authority in enacting the restrictions on new domestic wells contained in Amended Order No. 1293A, and he is entitled to deference as to his interpretation of the applicable statutes. Although NRS 534.110(6) authorizes the State Engineer to restrict withdrawals to conform to priority rights, thereby authorizing the State

Engineer to prohibit the drilling of new domestic wells in the basin, Amended Order No. 1293A stops short of an outright prohibition. Amended Order No. 1293A allows for the drilling of new domestic wells as long as the impact of the domestic well is offset by the relinquishment of 2.0 afa of water to the basin.

While portions of NRS 534.120 lay out specific actions that the State Engineer can take regarding temporary permits and preferred uses of water, nothing in these latter provisions cites to subsection 1 of the statute or usurps the power provided to the State Engineer therein. *See* NRS 534.120(2)–(7). NRS 534.120(1) plainly provides the State Engineer the broad discretion to issue orders, such as Amended Order No. 1293A, that are essential for the welfare of a designated groundwater basin. It was in the State Engineer's discretion, and based on the aforementioned substantial evidence, that the State Engineer deemed Amended Order No. 1293A essential for the welfare of the Pahrump Basin as the next appropriate measure toward stopping the depletion of the aquifer.

Similarly, NRS 534.110(8) allows the State Engineer to restrict drilling of **wells** in designated basins where he determines that

additional **wells** would cause an undue interference with existing **wells**. This statute is neither limited to a particular type of **well** the State Engineer may restrict, nor is it limited in the type of **well** that the State Engineer may seek to protect from interference. In this situation, prior to issuing Amended Order No. 1293A, the State Engineer already prohibited every other type of well that may withdraw water from the aquifer besides domestic wells, and yet the evidence clearly shows continually declining water levels on the valley floor and looming well failures—many of which are domestic wells. The State Engineer has determined that additional pumping from domestic wells will accelerate this problem or, more plainly stated, will interfere with existing wells.

Therefore, it was proper for the State Engineer to issue Amended Order No. 1293A, prohibiting the drilling of new domestic wells (that would accelerate this interference) unless 2.0 afa of water is relinquished to the basin to account for the withdrawals of that new domestic well. This is squarely within the State Engineer's discretionary authority pursuant to both NRS 534.110(8) and NRS 534.120(1): the Pahrump Basin is designated, and the State

Engineer has determined that additional domestic wells will contribute to increasing groundwater declines and accelerate the failure of existing wells that are already threatened under current pumping conditions. If existing pumping rates will lead to well failures, a potential 8,000 additional wells with a potential associated increase in pumping of 16,000 afa[10] will accelerate the problem (as exhibited by the past history of the Pahrump Basin)—undoubtedly causing an undue interference with existing wells. *See* NRS 534.110(8).

Without these discretionary tools, the State Engineer's only alternatives are limited, and the potential for curtailment by priority in the Pahrump Basin, per NRS 534.110(6), becomes more likely. Such draconian measures would result in many existing domestic wells and water right holders losing the use of their water. In the event that

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[10] While PFW argued at the district court that there will not be an additional 16,000 afa of additional groundwater withdrawals, such argument is only speculation. First, as previously discussed, existing domestic wells are authorized to withdraw up to 2.0 afa under Nevada law. Second, even if the assumed rate of groundwater use by existing domestic wells, one-half afa, is presumed to be withdrawn, that still results in an additional 4,000 afa of groundwater withdrawals. Based upon the current rate of groundwater pumping, an additional 4,000 of groundwater pumping by domestic wells will bring the total groundwater pumping to more than 20,000 afa, exceeding the perennial yield of the basin. This does not factor in any additional development of existing, senior, groundwater rights within the basin.

domestic wells were allowed to continue to proliferate, the newest domestic wells would have the junior-most priority date and would therefore be the first to have the use of water restricted in a curtailment. *See* NRS 534.080(4). Amended Order No. 1293A, in conjunction with the Nye County GMP, seeks to protect existing domestic well owners and other water users, while working towards the goal of avoiding the extreme step of curtailment by priority.

Further, and in spite of the plain language contained within NRS 534.110(6), the district court's order appears to question whether the State Engineer can even regulate domestic wells at all, broadly and incorrectly finding that "domestic wells are afforded an exemption from the State Engineer's regulatory purview." JT APP Vol. XIV at 5422. If that is the case, regardless of the clear language in statute otherwise, the State Engineer is precluded from intervening in any manner to protect the state's water resources, which belong to the public, where a basin, like Pahrump, is facing depletion attributable to domestic wells. It is unlikely that this was the intent of the Legislature in enacting

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NRS 534.110(6), NRS 534.110(8), and NRS 534.120(1) and clearly belied by the plain statutory language.[11]

PFW incorrectly argued that because special provisions exist for domestic wells in NRS Chapter 534, and because the term "domestic well" does not specifically exist in NRS 534.110(8) or NRS 534.120(1), that the State Engineer therefore lacked authority to issue Amended Order No. 1293A. *See* JT APP Vol. XI at 3646–3647. This selective interpretation flies in the face of the plain reading of NRS 534.110(8) and NRS 534.120(1). PFW, in effect, argues that because NRS 534.030(4) explicitly exempts domestic wells from the permitting process, domestic wells are therefore exempted from all other portions of NRS Chapter 534. *See* JT APP Vol. XI at 3646–3647. This is despite the fact than neither NRS 534.110(8) nor NRS 534.120(1) cite to NRS 534.030(4) or include limitations on their application to domestic wells.

While NRS 534.030(4) specifically exempts domestic wells from the permitting process, and the State Engineer does not dispute this

[11] While there is no available legislative history regarding the adoption of NRS 534.110(8) and NRS 534.120(1), a plain reading of the statutes infers such a presumption.

interpretation, this is the exact reason why Amended Order No. 1293A applies only to domestic wells. Other wells would be required to go through the application and permitting process, where the State Engineer would almost surely deny the application as he has already issued an order prohibiting new groundwater appropriations within the Pahrump Basin. Specifically, in Order No. 1252, issued on April 29, 2015, the State Engineer stated that, subject to certain exceptions,[12] "any application to appropriate groundwater . . . within the designated [Pahrump Basin] will be denied." JT APP Vol. I at 78. Therefore, the State Engineer has applied similar restrictions on all other prospective new uses of groundwater as there is no water available from the proposed source of supply. *See* NRS 533.370(2). Water levels continue to drop, and, prior to Amended Order No. 1293A, new domestic wells were the last unrestricted use in the Pahrump Basin. The State Engineer has properly acted within his discretion to now restrict the free proliferation of new domestic wells without accounting for the

[12] Those exceptions include temporary appropriations of groundwater for stockwater purposes during drought declarations, temporary appropriations of groundwater for establishing fire-resistant vegetative cover, and applications to increase diversion rates with no corresponding increase in the duty of the water right(s). JT APP Vol. I at 79.

withdrawal of water as the final mechanism available to constrain future expansion of new withdrawals from the aquifer to address the groundwater depletion within the Pahrump Basin.

The State Engineer has the legal authority supporting his ability to issue Amended Order No. 1293A. Thus, Amended Order No. 1293A is not arbitrary and capricious and this Court should reverse the district court's order and affirm and fully reinstate Amended Order No. 1293A.

3. The State Engineer's Issuance of Amended Order No. 1293A Did Not Violate Due Process

The State Engineer's issuance of Amended Order No. 1293A does not amount to a constitutional due process violation. The district court erred by deeming Amended Order No. 1293A invalid on that basis. *See* JT APP Vol. XIV at 5422–5423. Both the Nevada Constitution and the United States Constitution protect against the deprivation of private property without due process of law. Nev. Const. art. 1, § 8 (5); U.S. Const. amend. V; U.S. Const. amend. XIV, § 1. However, PFW does not have a protectable property interest affected by Amended

Order No. 1293A, and therefore the regular standards of procedural due process—notice and a hearing—do not apply in this case.

The Nevada Legislature has declared it the policy of Nevada "[t]o recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated." NRS 533.024(1)(b). However, during the 2001 legislative session, adopting the "protectable interest" language of NRS 533.024(1)(b), it was made clear that "protectable interests"[13] only occur "after there has been an improvement on the property and a well has been drilled" and that citizens cannot claim a "protectable interest" without anything on the property. JT APP Vol. V at 959. The district court erred by finding the opposite in this case—essentially holding that PFW has a protectable interest in **potential** domestic wells based upon a mere **expectation** that eventually, at some theoretical time in the future, it intends to drill a domestic well to serve the parcel of land.

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[13] Throughout the legislative history, the language of S.B. 159 is identified as including a provision about a "protectible [sic] interest." *See, e.g.*, JT APP Vol. V at 959, 964. This brief utilizes the language of the actual statute, "protectable interest." NRS 533.024(1)(b).

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

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

practice of granting a government benefit is insufficient to establish a legal entitlement to the benefit. *See Gerhart v. Lake Cty.*, 637 F.3d 1013, 1021 (9th Cir. 2011). "The protections of due process attach only to **deprivations** of property." *Malfitano*, 396 P.3d at 820 (*quoting Burgess v. Storey Cty. Bd. of Comm'rs*, 116 Nev. 121, 124, 992 P.2d 856, 857–58 (2000)) (emphasis added).

In *Malfitano*, the Nevada Supreme Court found that the appellant's due process rights were not violated when a county Liquor Board denied his applications for liquor licenses where he previously held temporary licenses, finding that "even assuming the Liquor Board has leniently issued liquor licenses in the past, this does not entitle [appellant] to a permanent liquor license" and the "Liquor Board did not revoke **existing** licenses." 396 P.3d at 820–21 (emphasis added). Just as the appellant in *Malfitano* unsuccessfully argued that he had a legal entitlement to a liquor license because the Liquor Board previously leniently issued such licenses, here PFW is not entitled to drill domestic wells just because the law has historically been lenient in providing for domestic wells. Similarly, just as the Supreme Court found that the appellant in *Malfitano* failed to show a deprivation of property as the

Liquor Board did not revoke an **existing** license, here Amended Order No. 1293A does not revoke (or in any way interfere with) **existing** domestic wells. All water within the boundaries of the State belongs to the public, and the State Engineer is simply trying to protect the supply to existing users. NRS 533.025.

PFW, identified simply as parcel owners in the basin, real-estate brokers doing business in Pahrump, and owners of well drilling companies, **do not** have a legal claim of entitlement to the ability to drill a domestic well in the Pahrump Basin. JT APP Vol. I at 16. Rather, PFW only has a mere expectation that such wells would be able to be drilled.[14] This is not enough to create a legal entitlement to this property interest, and PFW's entire argument sounds of principles of estoppel—an argument that the Supreme Court specifically denounced in *Malfitano*. In enacting NRS 533.024(1)(b), the Legislature recognized that a "protectable interest" in domestic wells only applies to existing domestic wells. JT APP Vol. V at 959.

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

This is in line with the doctrine of appurtenance. Where land is conveyed with an **existing** domestic well that has historically been used to serve the land, the domestic well (and its accompanying statutory, usufructuary right to pump 2.0 afa pursuant to NRS 534.350(8)(a)) is conveyed by deed with the land to which it is applied, by virtue of a deed's appurtenance clause, because the two "become so interrelated and dependent on each other in order to constitute a valid appropriation that the [water] becomes **by reason of necessity** appurtenant to the [land]." *See Zolezzi v. Jackson*, 72 Nev. 150, 153–54, 297 P.2d 1081, 1082–83 (1956) (*quoting Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 164, 140 P. 720, 723 (1914)).

Here, where there is no existing domestic well on an undeveloped parcel of land, a conveyance of a deed to the land (even if it included an appurtenance clause) does not convey any such right to a domestic well. Since the domestic well had never been drilled, and the accompanying statutory, usufructuary 2.0 afa of water have never been pumped, there is no interrelation or dependence created between water and land, and thus no protectable interest in the non-existent domestic well is conveyed when the land is purchased.

Since PFW does not have a legal entitlement to the ability to drill a new domestic well, and does not allege any interference with existing domestic wells,[15] PFW lacks a legitimate claim of entitlement to a property interest insofar as Amended Order No. 1293A is concerned. Therefore, there has been no deprivation of a property interest, and the protections of procedural due process do not apply.

The district court's finding of a due process violation is even more tenuous as it concerns those individuals making up PFW identified as real-estate brokers and owners of well drilling companies. These unidentified individuals are not alleging that they have property that would previously have been eligible for a domestic well—rather, they are essentially alleging a due process violation based upon a mere expectation that individuals buying property and/or intending to drill a domestic well in the Pahrump Basin would be utilizing their services. This is a prime example of a "unilateral expectation" that is insufficient to warrant due process protections. *See Malfitano*, 396 P.3d at 819–20.

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[15] Note, not only does Amended Order No. 1293A not interfere with existing domestic wells, but seeks to protect existing domestic wells while allowing a path forward for new domestic wells with the relinquishment of 2.0 afa of water to the basin to offset the potential impact to the aquifer of the new domestic well.

At the district court, PFW argued that *Eureka Cty. v. Seventh Jud. Dist. Ct. ex rel. Cty. of Eureka* (hereafter "*Eureka County*") supports their position, such that they were entitled to notice and a hearing prior to the issuance of Amended Order No. 1293A. JT APP Vol. XI at 3644–3645 (*citing* 134 Nev. Adv. Op. 37 at 8, 417 P.3d 1121, 1124 (2018)). This argument is refuted by PFW's aforementioned lack of a legitimate claim of entitlement to a property interest in this matter. PFW incorrectly argued that the unilateral expectation of being able to drill a domestic well is a stronger property right than a previously permitted or certificated water right affected by a curtailment order. *Id.* This proposition is contradicted by the applicable due process precedent cited above. In line with the holding in *Eureka County*, the State Engineer does not dispute the need for notice and a hearing prior to issuing orders affecting a property interest in water to which individuals are legally entitled—such as the water rights that were at issue in *Eureka County*. However, in this case, PFW holds only a mere expectation as to the future ability to drill domestic wells in the Pahrump Basin. Under *Malfitano*, such an expectation is insufficient to trigger due process protections.

Lastly, the district court's reliance on *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 810 P.2d 768 (1991), was also erroneous as Amended Order No. 1293A is distinguishable from the special use permit impaired by Douglas County in that case. In *Bing Const. Co. of Nev.*, Douglas County granted a construction company a special use permit allowing the company to use county roads to ingress and egress its gravel pit. 107 Nev. at 263, 810 P.2d at 768. However, some 18 years after issuance of the special use permit, Douglas County adopted a resolution limiting the use of previously utilized county roads, allegedly impairing the efficiency of the business and adding hours to transportation time. *Id.*, 107 Nev. at 263–64, 810 P.2d at 768–69. This Court held that the county violated due process by not providing personal notice prior to the public hearing where the construction company had been using the county roads pursuant to the special use permit for 18 years prior to Douglas County's decision to make a zoning change. *Id.*, 107 Nev. at 266, 810 P.2d at 770.

Here, PFW is not challenging the revocation of **existing** domestic wells, and could not do so as Amended Order No. 1293A limits only **new** domestic wells with the intent of protecting existing water users,

including domestic well owners. Rather, PFW challenges the State Engineer's decision to limit new, non-existent domestic wells that PFW expected to be able to drill but in which PFW has no current protectable interest. As stated above, PFW lacks a protectable property interest in these future domestic wells, and therefore it is not necessary to reach the question of the sufficiency of the notice and hearing, as the Court did in *Bing Const. Co. of Nev.*, as no notice or hearing was required.

Given the special character of water law, "the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." *Application of Filippini*, 66 Nev. at 27, 202 P.2d at 540. The specific statutes depended on by the State Engineer in issuing Amended Order No. 1293A, NRS 534.110(8) and NRS 534.120(1), do not require the State Engineer to provide notice and a hearing, but rather provide for adequate protections through NRS 533.450. NRS 534.110(8) ("Any order or decision of the State Engineer so restricting drilling of such wells may be reviewed by the district court of the county pursuant to NRS 533.450.").

PFW lacks a legal claim of entitlement to the ability to drill domestic wells in the Pahrump Basin and, as Amended Order

No. 1293A does not affect existing domestic wells, it does not cause a deprivation of property. Therefore, procedural due process protections are not triggered as a result of Amended Order No. 1293A. This Court should reverse the district court's order and uphold the State Engineer's Amended Order.

C. Pahrump Fair Water, LLC, Lacked Standing to Challenge Amended Order No. 1293A

Though not a determinative factor in the outcome of the case, the district court erred in finding that Pahrump Fair Water, LLC, as an individual petitioner, had the requisite standing to challenge Amended Order No. 1293A. The threshold requirement when bringing an action is the existence of a genuine controversy. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670 (2008) ("This court has a 'long history of requiring an actual justiciable controversy as a predicate to judicial relief.'"); *see also Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009). The Nevada Legislature has established that "any person feeling aggrieved by any order or decision of the State Engineer . . . affecting

the person's interests, when the order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, or NRS 533.481, 534.193, 535.200 or 536.200, may have the same reviewed by a proceeding for that purpose . . . ." NRS 533.450(1).

Under this statutory structure, the question of whether Pahrump Fair Water, LLC, has standing to challenge Amended Order No. 1293A requires a twofold analysis: (1) Who is granted standing under NRS 533.450 to challenge an order or decision of the State Engineer?; and (2) Is Pahrump Fair Water, LLC, a person who feels aggrieved and whose interests have been adversely affected by the issuance of the State Engineer's Amended Order No. 1293A? NRS 533.450(1); *see also, e.g.*, *Citizens for Cold Springs*, 125 Nev. at 629, 218 P.3d at 850. Here, NRS 533.450(1) grants an arguably broader standing than provided by constitutional standing. However, Pahrump Fair Water, LLC, as an individual petitioner, still lacked standing to challenge Amended Order No. 1293A under NRS 533.450(1).

Under the first inquiry, NRS 533.450 affords standing to challenge a decision of the State Engineer to any person who has an

interest that is affected by a decision or order of the State Engineer, and who feels aggrieved by said decision or order. NRS 533.450(1). This interpretation of the statute is supported by the plain reading of NRS 533.450 and Nevada Supreme Court precedence.

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

Corr., 122 Nev. 385, 393, 135 P.3d 220, 226 (2006), *abrogated by Buzz Stew*, 124 Nev. 224, 181 P.3d 670).

In examining the statute, the *Cold Springs* Court looked to *Hantges v. City of Henderson*, 212 Nev. 319, 113 P.3d 848 (2005), for direction in applying statutory standing in excess of constitutional standing. 125 Nev. at 630–31, 281 P.3d at 851. Constitutional standing requires, at a minimum, that the plaintiff suffered a concrete and particularized and actual 'injury in fact,' an underlying connection between the alleged injury and the conduct alleged to cause the injury, and there must be a reasonable likelihood that the alleged injury may be rectified by a decision in the plaintiff's favor. *See U.S. v. Alpine Land & Reservoir Co.*, 788 F. Supp. 2d 1209, 1211 (D. Nev. 2011) (citations omitted). Thus, in *Cold Springs*, the Court found that the plain language of the statute provided broader standing than that afforded strictly under the Constitution because NRS 268.668 states that "any person or city claiming to be adversely affected." 125 Nev. at 631, 218 P.3d at 851. Thus, the Court found that the plaintiff landowners and residents whom were living adjacent to or near the annexation were within the scope of NRS 268.668 as "any person . . .

claiming to be adversely affected" and had standing to challenge the annexation. *Id.*

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

Unlike here with NRS 533.450, where the controlling statutory language was enacted before the retention of a legislative history, in *Cold Springs*, the Court had the benefit of an Attorney General Opinion as well as precedence to rely upon. *Id.*, 125 Nev. at 631–32, 218 P.3d

at 851. However, the Court's findings are illustrative and applicable to the interpretation of NRS 533.450. Specifically, the Court held that even though the plaintiff did not own property that was subject to the annexation, plaintiff had adequately pled a personal and adverse injury as a result of the annexation. *Id.*, 125 Nev. at 632–33, 218 P.3d at 852. The language contained in NRS 533.450(1) is reasonably similar such that the analysis used by the Court in *Cold Springs* is persuasive here.

First, so long as a person can adequately plead a concrete and particularized actual or imminent adverse effect as a result of a decision of the State Engineer and has a reasonable likelihood of relief from the action, NRS 533.450 conveys standing. Thus, just like the property owners and residents in *Cold Springs*, the scope of those considered to be any person affected may be quite broad. However, once the analysis moves to the second prong, it becomes clear that Pahrump Fair Water, LLC, lacks standing even under the broader standing conveyed by NRS 533.450(1).

Quite simply, Pahrump Fair Water, LLC, is not a person whose interests have been adversely affected by Amended Order No. 1293A. First, Pahrump Fair Water, LLC, is organized as a limited liability

company under Chapter 86 of the NRS. "A limited-liability company is an entity distinct from its managers and members." NRS 86.201(3). Accordingly, a limited-liability company, such as Pahrump Fair Water, LLC, is a legal "person" in the eyes of Nevada law. Further, a limited-liability company only represents the legal interests of the company itself, and the members of a limited-liability company are not proper parties to proceedings by or against the company, except to "enforce the member's rights against or liability to the company." NRS 86.381. Thus, "a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court." *Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 731, 291 P.3d 128, 133 (2012) (*citing Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 303, 579 P.2d 775, 777 (1978)); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

In *Deal* following a trial, the defendant raised a defense that the plaintiffs lacked standing as a condominium association to bring a construction defect suit on behalf of the condominium owners. The *Deal* Court, in evaluating standing, held that "in the absence of any express statutory grant to bring suit on behalf of the owners, or a direct ownership interest by the association in a condominium within the

development, a condominium management association does not have standing to sue as a real party in interest." *Deal*, 94 Nev. at 304, 579 P.2d at 777. Thus, the Court found that the condominium association was not a real party in interest and lacked standing. *Id.*, 94 Nev. at 304–05, 579 P.2d at 777–78.

Here, Pahrump Fair Water, LLC, is not a real party in interest under NRS 533.450 and lacks standing. At the time this action was proceeding in the district court, a review of the Nye County property records and the records of the Nevada State Engineer showed that Pahrump Fair Water, LLC, owns no real property in the Pahrump Basin nor any water rights. Moreover, there is no record of Pahrump Fair Water, LLC, submitting any Notice of Intent to Drill card or other document pertaining to the drilling of a domestic well prior to December 19, 2017 (the operative date for the exceptions provided under Amended Order No. 1293A).

The interests of the members of Pahrump Fair Water, LLC, are immaterial to standing in this matter. Just as a homeowner's association or condominium association lacked standing to sue on behalf of its members, Pahrump Fair Water, LLC, cannot, as a matter of law,

bring a petition for judicial review based solely on the interest(s) of its members. *See Deal*, 94 Nev. at 304–05, 579 P.2d at 777–78; *Beazer*, 128 Nev. at 730–31, 291 P.3d at 133–34 ("[W]ithout statutory authorization, a homeowners' association does not have standing to bring suit on behalf of its members."). *See also* NRS 86.381, NRCP 17(a). Pahrump Fair Water, LLC, is an independent legal person under Nevada law, and without having itself an interest affected by Amended Order No. 1293A, it cannot be adversely "affected" in the manner necessary to convey standing under NRS 533.450(1).

To the extent the interests of Pahrump Fair Water, LLC,'s members are considered by the Court, this is still insufficient for Pahrump Fair Water, LLC, to have standing as a petitioner before the district court. The district court cited *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977), for the proposition that an association, including an LLC under Nevada law, has standing to sue on behalf of its members when:

> (1) its members would otherwise have standing to sue in their own right,
> (2) the interests it seeks to protect are germane to their organization's purpose, and

> (3) neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit.

See JT APP Vol. XIV at 5425. While the U.S. Supreme Court found associational standing in the *Hunt* case, a case that notably **did not** involve an LLC organized under Nevada law, the situation of Pahrump Fair Water, LLC, is distinguishable.

Pahrump Fair Water, LLC, fails to meet the first element of the *Hunt* test, and therefore lacks associational standing even under the *Hunt* standard. The Commission in *Hunt* had a membership made up entirely of similarly situated individuals, specifically apple growers and dealers in Washington State. *Id.*, 432 U.S. at 343–45, 97 S. Ct. at 2441–42. Here, Pahrump Fair Water, LLC (by its own admission), is composed of three (3) very different types of otherwise undisclosed members: "parcel owners in the Pahrump basin who are directly affected by Amended Order 1293A, real-estate brokers doing business in the Pahrump area, and owners of well drilling companies." JT APP Vol. I at 16.

Despite PFW's blanket assertion to the contrary, it is not clear that the unidentified members of Pahrump Fair Water, LLC, have

standing to sue in their own right. In fact, it would seem that these individuals lack standing to sue on their own based on the limited description of these individuals. In *Hunt*, the district court found as a fact that a North Carolina statute caused harm to Washington apple growers and dealers, and therefore they would have had standing to sue in their own right. *Hunt*, 432 U.S. at 343–45, 97 S. Ct. at 2441–42. Here, and in specific regard to those unknown members of Pahrump Fair Water, LLC, identified merely as "real-estate brokers" and "owners of well drilling companies," any effect on these individuals is purely speculative. The district court erroneously assumed that these individual members of Pahrump Fair Water, LLC, would have standing to sue in their own right based on an inference that Amended Order No. 1293A **might** affect their businesses. This is epitome of a speculative injury, and is neither concrete nor particularized as required for constitutional standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992). Similarly, this speculative effect on the interests of the certain members of Pahrump Fair Water, LLC, is insufficient to convey standing under NRS 533.450(1).

Following that same logic, it is speculative, that a favorable decision in this matter would redress the theoretical injury alleged by the members of Pahrump Fair Water, LLC. *See Lujan*, 504 U.S. at 560–61, 112 S. Ct. at 2136. Thus, Pahrump Fair Water, LLC, failed to meet a necessary requirement for associational standing under U.S. Supreme Court precedents, should this Court find that they apply to the standing conveyed by NRS 533.450(1).

Lastly, there would have been no tangible prejudice to the remaining petitioners at the district court had Pahrump Fair Water, LLC, been dismissed, as the individual petitioners (Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte) would have been able to continue the lawsuit as property owners allegedly affected by Amended Order No. 1293A.

Pahrump Fair Water, LLC, lacked standing as an individual petitioner to raise a challenge to Amended Order No. 1293A. The district court erred in finding otherwise.

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D. The District Court Erred in Admitting PFW's Supplemental Record on Appeal

Pursuant to NRS 533.450(1), decisions or orders of the State Engineer may be reviewed in a proceeding for that purpose "insofar as may be in the nature of an appeal." The court may not "substitute its judgment for that of the State Engineer" nor may the court "pass upon the credibility of the witnesses nor reweigh the evidence" but rather will be limited "to a determination of whether substantial evidence in the record supports the State Engineer's decision." *Morris*, 107 Nev. at 701, 819 P.2d at 205. The district court erred in admitting PFW's Supplemental Record on Appeal ("SROA"), and did so without addressing the State Engineer's objections. *See* JT APP Vol. XIV at 4922; *see generally* JT APP Vol. XIV at 5417–5426.

The district court may not consider items that were not a part of the administrative record. *Revert*, 95 Nev. at 787, 603 P.2d at 265 (*citing State ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973), and *City of Reno v. Folsom*, 86 Nev. 39, 464 P.2d 454 (1970)). Where the district court properly determines that there are missing findings in the State Engineer's record, it is an error for the district to consider

extra-record evidence; rather, the proper procedure is for the district court to remand the case to the State Engineer for proper determination of the issue. *Revert*, 95 Nev. at 787, 603 P.2d at 265. Failure to do so compounds the State Engineer's error. *Id.*

As shown above, the State Engineer's Record was not deficient in the matter and Amended Order No. 1293A is supported by substantial evidence. The SROA consists of the case file of the related previous district court action between Pahrump Fair Water, LLC, and the State Engineer. *See* JT APP Vol. XI–XIV at 3656–4905. The State Engineer issued Amended Order No. 1293A on July 12, 2018, and yet the SROA contains documents created **after** that date. Clearly, these later-in-time documents did not play a role in the State Engineer's decision to issue Amended Order No. 1293A. Further, the State Engineer did not consider **any** of the documents in the SROA in reaching his decision in Amended Order No. 1293A. The State Engineer properly addressed all critical issues of Amended Order No. 1293A in the order itself, as supported by the State Engineer's Record on Appeal, and substantial evidence supports Amended Order No. 1293A. It was an error for the

district court to admit the SROA over the State Engineer's objections, in contravention of NRS 533.450(1), *Revert*, and *Morris*.

Alternatively, if the district court determined that State Engineer's Order (or the Record on Appeal in support thereof) failed to make a proper finding on a particular issue, then the correct course of action would have been to remand Amended Order No. 1293A with instructions for the State Engineer to make additional findings, rather than supplementing the State Engineer's record via PFW's SROA. Simply put, the State Engineer's decisions must be based solely on the Record on Appeal relied upon in rendering the decision. If the State Engineer fails to provide a record sufficient to justify the decision, the State Engineer is bound to suffer the consequence; it is improper for a court to supplement the Record on Appeal after the fact.

VIII. CONCLUSION

Amended Order No. 1293A is based on substantial evidence in the State Engineer's Record on Appeal, and its issuance was not arbitrary or capricious. Specifically, the State Engineer acted within his statutory authority, per NRS 534.110(8) and NRS 534.120(1), to address the grim situation facing the Pahrump Basin, and he was not arbitrary

or capricious in doing so. Lastly, the district court erred in finding that Pahrump Fair Water, LLC, had adequate standing based on its own representations to challenge Amended Order No. 1293A, and further erred by admitting and considering PFW's SROA.

Prior to the issuance of Amended Order No. 1293A, domestic wells represented the last unaccounted groundwater use in the Pahrump Basin, and yet water levels continued to drop, threatening thousands of existing wells. Amended Order No. 1293A is necessary to protect the existing water users in the Pahrump Basin, and is a necessary component to the overall long-term management of the groundwater basin. Absent authority to intervene and manage the water resources, the State Engineer may be required to curtail by priority, resulting in all new domestic wells being the junior most rights and the first to be curtailed. Allowing the unrestricted proliferation of new domestic wells in this context represents poor management of the groundwater resource, and would have dire consequences.

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Based on the foregoing, the State Engineer respectfully requests that this Court reverse the district court's order, and fully reinstate the State Engineer's Amended Order No. 1293A.

RESPECTFULLY SUBMITTED this 15th day of February, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 pitch Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,431 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 15th day of February, 2019.

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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 15th day of February, 2019, I served a copy of the foregoing APPELLANT'S OPENING BRIEF, by electronic service to:

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