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OFFICE OF THE ATTORNEY GENERAL
CARSON CITY, NEVADA

FILED
FIFTH JUDICIAL DISTRICT

DEC 10 2018

Nye County Clerk

~~E. Westerlund~~ Deputy

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

Case No. CV 39524

Dept. No. 2

DEC 30 2018

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

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

Petitioners,

vs.

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

Respondent.

**EX PARTE MOTION FOR
ORDER SHORTENING TIME ON
MOTION FOR STAY OF ORDER
GRANTING PETITION FOR
JUDICIAL REVIEW AND
REVERSING STATE ENGINEER'S
AMENDED ORDER NO. 1293A
PENDING APPEAL**

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby moves this Honorable Court for an ex parte order shortening the time for Petitioners to respond to the State Engineer's Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal. This Motion is made in good faith and is based upon the attached Points and Authorities and the pleadings and papers on file herein.

///

1 **POINTS AND AUTHORITIES**

2 **I. NOTICE OF MOTION**

3 A hearing on this matter is not requested.

4 **II. BACKGROUND**


5 The State Engineer files this ex parte motion to ensure that his Motion for Stay of
6 Order Granting Petition for Judicial Review and Reversing State Engineer's Amended
7 Order No. 1293A Pending Appeal is heard prior to the expiration of the ten (10) day
8 period following service of written notice of entry of this Court's Order Granting
9 Petitioners' Petition for Judicial Review. Pursuant to NRCP 62(a), a party may seek
10 enforcement of a court order after the expiration of ten (10) days after service of written
11 notice of its entry. Thus, the State Engineer respectfully requests an order shortening
12 time for Petitioners to respond to the State Engineer's Motion for Stay to ensure the
13 resolution of the Motion for Stay prior to the expiration of this ten (10) day period, while
14 allowing sufficient time for the State Engineer to request the same relief from the Nevada
15 Supreme Court in the event this Court denies the requested stay. Otherwise, the purpose
16 of the State Engineer's Motion for Stay will be defeated. To accommodate this request,
17 the State Engineer proposes holding the hearing in Northern Nevada or telephonically, as
18 counsel for both parties reside in Northern Nevada.

19 Based on the foregoing, the State Engineer respectfully requests that the Court
20 order that Petitioners have two (2) days to respond to his Motion for Stay. The State
21 Engineer is prepared to file a reply brief, if at all, within one (1) day of the filing of any
22 response, and prior to any hearing on the Motion for Stay. The State Engineer further
23 requests that a hearing on the State Engineer's Motion for Stay be held within ten (10)
24 days of the service of the written notice of entry of the Order Granting Petitioners'
25 Petition for Judicial Review.

26 Although this Motion is filed ex parte, the undersigned counsel has provided a copy
27 of this Motion to counsel for Petitioners via email, and notified opposing counsel that the
28 State Engineer is seeking an order shortening time on his Motion for Stay.

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DATED this 7th day of December, 2018.

By:  (Bar No. 14156)
for JAMES N. BOLOTIN (Bar No. 13829)
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
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Attorney for Respondent,
State Engineer

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

Dorene A. Wright
Dorene A. Wright



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Petitioners,

vs.

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

Respondent.

[PROPOSED]
ORDER SHORTENING TIME ON
MOTION FOR STAY OF ORDER
GRANTING PETITION FOR
JUDICIAL REVIEW AND
REVERSING STATE ENGINEER'S
AMENDED ORDER
NO. 1293A PENDING APPEAL

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby submits the attached [Proposed] Order Shortening Time on Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal. The Proposed Order is attached hereto as Exhibit 1.

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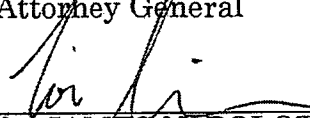
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AFFIRMATION

The undersigned does hereby affirm that the preceding [Proposed] Order Shortening Time on Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal does not contain the social security number of any person.

DATED this 7th day of December, 2018.

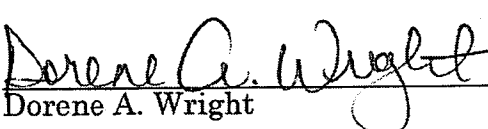
ADAM PAUL LAXALT
Attorney General

By:  (Bar No. 14156)
for JAMES N. BOLOTIN (Bar No. 13829)
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
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E: JBolotin@ag.nv.gov
*Attorney for Respondent,
State Engineer*

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 7th day of December, 2018, I served a true and correct copy of the foregoing [PROPOSED] ORDER SHORTENING TIME ON MOTION FOR STAY OF ORDER GRANTING PETITION FOR JUDICIAL REVIEW AND REVERSING STATE ENGINEER'S AMENDED ORDER NO. 1293A PENDING APPEAL, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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


Dorene A. Wright

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EXHIBIT 1

EXHIBIT 1

1 Case No. CV 39524

2 Dept. No. 2

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6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF NYE
8

9 PAHRUMP FAIR WATER, LLC.,
10 a Nevada limited-liability company;
11 STEVEN PETERSON, an individual;
12 MICHAEL LACH, an individual;
13 PAUL PECK, an individual;
14 BRUCE JABOUR, an individual; and
15 GERALD SCHULTE, an individual,

16 Petitioners,

17 vs.

18 JASON KING, P.E., Nevada State
19 Engineer, DIVISION OF WATER
20 RESOURCES, DEPARTMENT OF
21 CONSERVATION AND NATURAL
22 RESOURCES,

23 Respondent.

[PROPOSED]
ORDER SHORTENING TIME ON
MOTION FOR STAY OF ORDER
GRANTING PETITION FOR
JUDICIAL REVIEW AND
REVERSING STATE ENGINEER'S
AMENDED ORDER
NO. 1293A PENDING APPEAL

24 Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer,
25 Department of Conservation and Natural Resources, Division of Water Resources
26 (hereafter "State Engineer"), by and through counsel, Nevada Attorney General
27 Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, moved this Court for
28 an ex parte order shortening the time for Petitioners to respond to the State Engineer's
Motion for Stay of Order Granting Petition for Judicial Review and Reversing State
Engineer's Amended Order No. 1293A Pending Appeal. Having provided sufficient notice
to Petitioners, and the Court finding the State Engineer has established good cause and
adequate grounds for the requested relief,

///

1 IT IS HEREBY ORDERED that Respondent State Engineer's Motion for Stay of
2 Order Granting Petition for Judicial Review and Reversing State Engineer's Amended
3 Order No. 1293A Pending Appeal will be heard on _____ day of December, 2018, at the
4 hour of _____ at _____ (Court). Petitioners' Response shall be filed
5 on or before December _____, 2018, and the State Engineer's Reply shall be filed on or
6 before December _____, 2018, if at all.

7 IT IS SO ORDERED.

8 DATED this _____ day of December, 2018.

9
10 _____
11 DISTRICT JUDGE
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22 Submitted by:

23 ADAM PAUL LAXALT
Attorney General
24 JAMES N. BOLOTIN
Deputy Attorney General
25 State of Nevada
Office of the Attorney General
26 100 North Carson Street
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27 T: (775) 684-1231
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Case No. CV 39524

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IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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PAHRUMP FAIR WATER, LLC.,
a Nevada limited-liability company;
STEVEN PETERSON, an individual;
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GERALD SCHULTE, an individual,

Petitioners,

vs.

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

Respondent.

[PROPOSED]
ORDER GRANTING MOTION
FOR STAY OF ORDER GRANTING
PETITION FOR JUDICIAL REVIEW
AND REVERSING STATE
ENGINEER'S AMENDED ORDER
NO. 1293A PENDING APPEAL

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby submits the attached [Proposed] Order Granting Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal. The Proposed Order is attached hereto as Exhibit 1.

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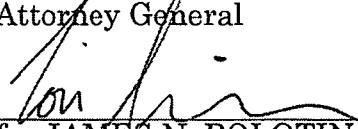
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AFFIRMATION

The undersigned does hereby affirm that the preceding [Proposed] Order Granting Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal does not contain the social security number of any person.

DATED this 7th day of December, 2018.


ADAM PAUL LAXALT
Attorney General

By:  (Bar No. 14156)
for JAMES N. BOLOTIN (Bar No. 13829)
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
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Carson City, Nevada 89701-4717
T: (775) 684-1231
E: JBolotin@ag.nv.gov
*Attorney for Respondent,
State Engineer*

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 7th day of December, 2018, I served a true and correct copy of the foregoing [PROPOSED] ORDER GRANTING MOTION FOR STAY OF ORDER GRANTING PETITION FOR JUDICIAL REVIEW AND REVERSING STATE ENGINEER'S AMENDED ORDER NO. 1293A PENDING APPEAL, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF NYE

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9 PAHRUMP FAIR WATER, LLC.,
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10 STEVEN PETERSON, an individual;
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11 PAUL PECK, an individual;
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12 GERALD SCHULTE, an individual,

13 Petitioners,

14 vs.

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

18 Respondent.

[PROPOSED]
ORDER GRANTING MOTION
FOR STAY OF ORDER GRANTING
PETITION FOR JUDICIAL REVIEW
AND REVERSING STATE
ENGINEER'S AMENDED ORDER
NO. 1293A PENDING APPEAL

19 THIS MATTER comes before this Court on a Motion for Stay of Order Granting
20 Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A
21 on Order Shortening Time filed by Respondent, Jason King, P.E., the State Engineer, in
22 his capacity as the Nevada State Engineer, Department of Conservation and Natural
23 Resources, Division of Water Resources (hereafter "State Engineer"). Having considered
24 the arguments presented by both parties, the Court hereby grants the State Engineer's
25 Motion. This Court's Order Granting Petition for Judicial Review is hereby STAYED
26 pending further order from the appellate court of competent jurisdiction, pursuant to
27 NRCP 62(c) and (e). Amended Order No. 1293A will remain in effect during this time.

28 ///

1 **I. BACKGROUND**

2 Petitioners Pahrump Fair Water, LLC, Steven Peterson, Michael Lach, Paul Peck,
3 Bruce Jabeour, and Gerald Schulte (collectively, "Petitioners"), filed their Petition for
4 Judicial Review, seeking the reversal of State Engineer's Amended Order No. 1293A, on
5 or about August 10, 2018. Following a complete briefing, the Court held oral arguments
6 on this matter on November 8, 2018, in Pahrump, Nevada. After taking oral argument
7 from both sides, this Court ordered that Petitioners' Petition for Judicial Review be
8 granted, and reversed Amended Order No. 1293A. Counsel for both parties submitted
9 proposed orders to the Court on or about November 20, 2018. The Court filed the written
10 order submitted by Petitioners on December 6, 2018, and the Notice of Entry of Order was
11 served on December 6, 2018.

12 The State Engineer is appealing this Court's ruling to the Nevada Supreme Court
13 and has filed his Notice of Appeal concurrently with the instant Motion. Due to serious
14 concerns about the effects of additional well drilling and pumping in the Pahrump Basin,
15 the State Engineer seeks a stay of this Court's Order, and for Amended Order No. 1293A
16 to remain in effect, during the pendency of this appeal. Based on the analysis below, this
17 Court grants the State Engineer's Motion and imposes the requested stay of the reversal
18 of Amended Order No. 1293A pending the outcome of the State Engineer's appeal.

19 **II. DISCUSSION**

20 **A. Standard for a Stay of a Judgment Granting, Dissolving, or Denying**
21 **an Injunction Pending Appeal**

22 The State of Nevada and its agencies are not entitled to a stay of a trial court's
23 judgment on mere filing of a notice of appeal; rather, the government must make a
24 separate and distinct application for a stay of judgment pending appeal. *Clark Cnty.*
25 *Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415
26 P.3d 16, 19 (2018) (*citing Nelson v. Heer*, 121 Nev. 832, 834 n.4, 122 P.3d 1252, 1253 n.4
27 (2005); *Public Serv. Comm'n v. First Jud. Dist. Ct.*, 94 Nev. 42, 45–46, 574 P.2d 272, 274
28 (1978)). Pursuant to NRCP 62(c), when an appeal is taken from a final judgment

1 granting, dissolving, or denying an injunction, the court in its discretion may suspend,
2 modify, restore, or grant an injunction during the pendency of the appeal upon such terms
3 as to bond or otherwise as it considers proper for the security of the rights of the adverse
4 party. Pursuant to NRCP 62(e), when an appeal is taken by the State or by any county,
5 city or town within the State, or an officer or agency thereof and the operation or
6 enforcement of the judgment is stayed, no bond, obligation, or other security shall be
7 required from the government appellant.

8 While not explicitly applicable to a requested stay pending appeal at the district
9 court, Nevada Rule of Appellate Procedure ("NRAP") 8(c) requires the Supreme Court or
10 Court of Appeals to consider the following factors in deciding whether to issue a stay or
11 injunction pending appeal:

- 12 (1) Whether the object of the appeal or writ petition will be
13 defeated if the stay or injunction is denied;
- 14 (2) Whether appellant/petitioner will suffer irreparable or
15 serious injury if the stay or injunction is denied;
- 16 (3) Whether respondent/real party in interest will suffer
17 irreparable or serious injury if the stay or injunction is
18 granted; and
- 19 (4) Whether appellant/petitioner is likely to prevail on the
20 merits in the appeal or writ petition.

21 While the Nevada Supreme Court generally does not hold that one factor carries
22 more weight than others, the Court has recognized that if one or two factors are
23 especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v.*
24 *McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citing *Hansen v. Eighth Jud. Dist. Ct.*
25 *ex rel. Cnty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000)). In other contexts,
26 specifically regarding an order refusing to compel arbitration, the Nevada Supreme Court
27 has articulated that the first stay factor takes on added significance and generally
28 warrants a stay pending resolution of the appeal. *Mikohn Gaming Corp.*, 120 Nev.
at 251, 89 P.3d at 38. The other stay factors remain relevant to the Court's analysis, but
"absent a strong showing that the appeal lacks merit or that irreparable harm will result
if a stay is granted, a stay should issue to avoid defeating the object of the appeal."
Id., 120 Nev. at 251–52, 89 P.3d at 38.

1 **B. This Court Hereby Stays the Reversal of the State Engineer's**
2 **Amended Order No. 1293A Pending Appeal**

3 Concurrently with the instant Motion, the State Engineer filed his Notice of Appeal
4 of this Court's Order Granting Petition for Judicial Review. The State Engineer seeks to
5 keep in place the prohibition on drilling new domestic wells in the Pahrump Basin
6 pursuant to Amended Order No. 1293A during the pendency of this appeal.

7 The practice in civil cases applies to the informal and summary character of
8 proceedings challenging decisions of the State Engineer. NRS 533.450(8). Pursuant to
9 NRCP 62(c), it is within this Court's discretion to stay a final judgment dissolving an
10 injunction and restore an injunction during the pendency of an appeal. This Court's
11 Order essentially dissolved an injunction prohibiting the drilling of new domestic wells in
12 the Pahrump Basin without relinquishment of 2 acre-feet of water rights. The State
13 Engineer now requests that this injunction be restored during the pendency of the appeal.
14 While NRCP 62(c) requires a bond or other security for such a request, as the
15 administrator of the Division of Water Resources, an agency of the State of Nevada, no
16 bond, obligation, or other security is required from the State Engineer. NRCP 62(e).

17 In this case, the first factor regarding the potential defeat of the object of the State
18 Engineer's appeal holds substantial weight. The State Engineer issued Amended Order
19 No. 1293A due to, in his view, the significant water issues facing the Pahrump Basin,
20 based on studies showing continuing water level declines on the valley floor of the
21 Pahrump Basin and projecting thousands of failures to existing wells under existing
22 conditions alone. *See* State Engineer's Answering Brief. It is the State Engineer's
23 position that he is statutorily authorized to issue Amended Order No. 1293A, and that it
24 is necessary to prevent the further proliferation of additional domestic wells that would
25 exacerbate and accelerate an already troubling situation with the groundwater levels in
26 Pahrump.

27 Additionally, it is appropriate to have the Nevada Supreme Court answer the
28 question of how domestic wells fit into the prior appropriation doctrine and whether they

1 are in fact subject to that doctrine. The Court recognizes that it is necessary for the State
2 Engineer to have this question answered, as it is critical for the management and
3 administration of groundwater rights throughout the state. This Court further
4 acknowledges that the purpose of the State Engineer's appeal is to have this question
5 decided before allowing additional domestic wells to be drilled without restriction;
6 without this stay, the goal of the State Engineer's appeal is defeated.

7 Since the oral argument on the merits of this case on November 8, 2018, in
8 Pahrump, Nevada, wherein this Court, from the bench, granted Petitioners' Petition for
9 Judicial Review, the State Engineer has received an onslaught of Notices of Intent to drill
10 new domestic wells in the Pahrump Basin. See Declaration of John Guillory, P.E.,
11 Nevada Division of Water Resources, Manager II, Las Vegas Branch Office. This
12 potential increase in domestic wells, along with the associated pumping of up to
13 2 acre-feet annually per domestic well, is exactly what the State Engineer sought to
14 prevent by issuing Amended Order No. 1293A. While this Court did ultimately reverse
15 the State Engineer's Amended Order No. 1293A, the Court finds that the object of the
16 State Engineer's appeal will be defeated in the absence of the requested stay should the
17 State Engineer be successful on appeal.

18 Similarly, the State Engineer, and the State of Nevada as a whole, will suffer
19 serious, potentially irreparable, harm, should this stay not issue. First, should the
20 Supreme Court ultimately reverse this Court's decision and reinstate Amended Order
21 No. 1293A, there will have been potentially hundreds, if not thousands, of new domestic
22 wells drilled in violation of Amended Order No. 1293A during the pendency of the appeal.
23 The Court acknowledges that such an outcome would result in significant procedural and
24 avoidable legal issues, including raising significant questions regarding plugging these
25 new wells and the payment to do so. This burden would fall on the State Engineer.
26 Second, the studies upon which the State Engineer based Amended Order No. 1293A
27 predict continued water level declines and well failures based on existing pumping. The
28 Court acknowledges that if the State Engineer is successful on appeal in his argument

1 that an increase in groundwater pumping by additional wells will accelerate the drop in
2 groundwater levels, based on historical pumping data at higher rates that did result in
3 groundwater declines, existing domestic well owners and water right owners in the
4 Pahrump Basin would be harmed. The water of all sources of water supply within the
5 boundaries of the State belongs to the public. NRS 533.025. It is the State Engineer's
6 duty to prevent the depletion of designated groundwater basins, like the Pahrump Basin.
7 See NRS 534.120. Therefore, this factor also weighs in favor of the State Engineer's
8 requested stay.

9 Conversely, Petitioners will not suffer serious or irreparable harm if this stay is
10 granted. While the stay would prevent the drilling of new domestic wells on parcels
11 owned by Petitioners without acquiring and relinquishing a 2 acre-foot water right, it is
12 in everyone's best interest to receive a final determination from the Nevada Supreme
13 Court on Amended Order No. 1293A. Additionally, requiring Petitioners to wait before
14 they drill these new wells (in the event the Nevada Supreme Court affirms this Court's
15 decision) is not irreparable harm, as the Supreme Court has held that increased costs and
16 delay do not constitute irreparable harm. See *Mikohn Gaming Corp.*, 120 Nev. at 253,
17 89 P.3d at 39. Nonetheless, this factor will generally not play a significant role in the
18 decision whether to issue a stay. *Id.*

19 Regarding the likelihood of success on the merits factor, the Supreme Court has
20 held that where the object of an appeal will be defeated if the stay is denied, a stay is
21 generally warranted; however, "the party opposing the stay motion can defeat the motion
22 by making a strong showing that appellate relief is unattainable" particularly where "the
23 appeal appears frivolous or if the appellant apparently filed the stay motion purely for
24 dilatory purposes." *Id.*, 120 Nev. at 253, 89 P.3d at 40. Here, the Court finds that the
25 State Engineer is appealing this Court's ruling in good faith, seeking to uphold his legal
26 duty to make such rules and regulations as necessary to prevent the depletion of the
27 Pahrump Basin via Amended Order No. 1293A. While this Court ultimately ruled
28 against the State Engineer, this Court recognizes that this case is a close call and a tight

1 issue. Therefore, the likelihood of success on the merits does not weigh in either side's
2 favor, and certainly does not work in Petitioners' favor to defeat the Motion for Stay.

3 As shown above, due in large part to the likelihood that the object of the State
4 Engineer's appeal will be defeated, either in totality or in part, if this stay does not issue,
5 and because of the potential harm to the State Engineer and the State of Nevada as a
6 whole, the State Engineer's Motion for Stay Pending Appeal is granted.

7 **III. CONCLUSION**

8 IT IS HEREBY ORDERED that the State Engineer's Motion for Stay of Order
9 Granting Petition for Judicial Review and Reversing State Engineer's Amended Order
10 No. 1293A is **GRANTED**.

11 IT IS HEREBY FURTHER ORDERED that this Court's Order Granting Petition
12 for Judicial Review, ultimately reversing Amended Order No. 1293A, is **STAYED** during
13 the pendency of the State Engineer's appeal, and the State Engineer need not post a
14 supersedeas bond or other security. The State Engineer's Amended Order No. 1293A will
15 remain in effect until and unless otherwise ordered by this Court or a Court of competent
16 jurisdiction following the conclusion of the appeal.

17 **IT IS SO ORDERED.**

18 DATED this _____ day of December, 2018.

19
20 DISTRICT JUDGE

21
22 Submitted by:

23 ADAM PAUL LAXALT
Attorney General
24 JAMES N. BOLOTIN
Deputy Attorney General
25 State of Nevada
Office of the Attorney General
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COPY

FILED
FIFTH JUDICIAL DISTRICT

Case No. CV 39524

OFFICE OF THE ATTORNEY GENERAL
CARSON CITY, NEVADA

DEC 12 2018

Dept. No. 2

DEC 17 2018

Nye County Clerk
Debra L. Melott
Deputy

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

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

Petitioners,

vs.

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

Respondent.

**REQUEST FOR SUBMISSION OF
EX PARTE MOTION FOR
ORDER SHORTENING TIME**

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby respectfully requests that the above-referenced matter be submitted to the Court for decision upon the State Engineer's Ex Parte Motion for Order Shortening Time on Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal. Given the *ex parte* nature of the underlying Motion, and its time sensitivity, the State Engineer requests that this matter be submitted upon the pleadings and other documents on file in this matter.

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DATED this 11th day of December, 2018.

By:

CERTIFICATE OF SERVICE

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

Dorene A. Wright
Dorene A. Wright

**OFFICE OF THE NYE COUNTY CLERK
SANDRA L. MERLINO**

Tonopah Office
Nye County Courthouse
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101 Radar Road
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Phone (775) 482-8127
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Pahrump Office
Government Complex
1520 East Basin Avenue
Pahrump, Nevada 89060
Phone (775) 751-7040
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December 18, 2018

SENT VIA E-FILE

Supreme Court Clerk
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

Re: CV39524
PAHRUMP FAIR WATER, LLC. Appellant, vs. JASON KING
P.E.Nevada State Engineer, Respondent. Et Al.

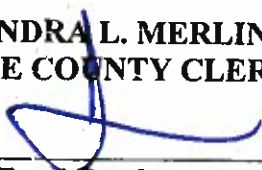
Dear Clerk of Court:

I am submitting an appeal packet for an appeal filed December 10, 2018 in the above referenced matter. As this was filed by the State of Nevada Attorney General's office no fees were collected.

Please feel free to contact me with any questions or concerns.

Sincerely,

**SANDRA L. MERLINO
NYE COUNTY CLERK**

By 
Terri Pemberton
Deputy Clerk, Pahrump

cc: Paul G Taggart (Attorney for Appellant)
James N. Bolotin Deputy Attorney General (Attorney for Respondent)
The Honorable Senior Judge Steven P Elliot



SUPREME COURT NEVADA

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DEC 18 2018

Nye County Clerk
Terri Pemberton Deputy

1 PAUL G. TAGGART, ESQ.
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8
9 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10 IN AND FOR THE COUNTY OF NYE

* * *

11 PAHRUMP FAIR WATER, LLC, a Nevada
12 limited-liability company; STEVEN PETERSON,
an individual; MICHAEL LACH, an individual;
13 PAUL PECK, an individual; BRUCE JABOUR, an individual;
14 and GERALD SCHULTE, an individual,

Case No. 39524

Dept. No. 2

15 Petitioners,

16 vs.

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

20 Respondent.

21 **OPPOSITION TO RESPONDENT'S**
22 **MOTION FOR STAY OF ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

23 COME NOW, Petitioners, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
24 company (hereinafter "PFW"); STEVEN PETERSON, an individual; MICHAEL LACH, an individual;
25 PAUL PECK, an individual; BRUCE JABOUR, an individual; and GERALD SCHULTE, an
26 individual, by and through their counsel, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ.,
27 of the law firm of TAGGART & TAGGART, LTD., to hereby file their Opposition to Respondent's
28 Motion requesting a stay of the Court's December 6, 2018, Order Granting Petition for Judicial Review.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
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1 This Opposition is based on the attached memorandum of points and authorities, all pleadings and papers
2 on file herein, and any oral argument the Court may allow.¹

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **INTRODUCTION**

5 A year ago, on December 19, 2017, the State Engineer, without warning, notice, or hearing,
6 arbitrarily issued Order 1293 and banned the drilling of new domestic wells in the Pahrump basin. The
7 issuance of Order 1293 upset a status quo that had existed for more than 150 years and created an
8 environment of economic uncertainty within the local community. The Order also disrupted the plans
9 of numerous individuals who had invested their life savings to purchase property in Pahrump with the
10 hope of building a home for themselves and their families. Now, after these property owners have finally
11 achieved the justice they sought, the State Engineer asks this Court to extend the economic uncertainty
12 and hardship by allowing him to continue to enforce an order that the Court has determined to be both
13 constitutionally and statutorily infirm. Justice demands that the State Engineer's request be denied, and
14 that the basin be allowed to return to the long-standing status quo that existed prior to his arbitrary and
15 capricious action.

16 In his request for a stay, and in public statements made before the Court had even issued its
17 written decision, the State Engineer has fundamentally misrepresented the effect of the Court's ruling.
18 In particular, the State Engineer claims that the Court's ruling grants domestic wells a "super priority"
19 status over all other water rights and users in the basin.² This is factually incorrect. Nowhere in the
20 hearing transcript or written order does the Court make any such pronouncement and the State Engineer
21 provides no citation to anything in the record that supports his contention. Instead, the central questions
22 in this case were whether the State Engineer has authority to ban the *drilling* of new domestic wells and,
23 if so, whether notice and a hearing are required before issuing such a regulation. The Petitioners never
24

25
26 ¹ Respondent has requested a hearing on the motion. Petitioners do not believe that a hearing is necessary or warranted in
27 this matter. However, if the Court believes that a hearing will assist it in deciding the issues raised, Petitioner is willing to
28 participate in such a hearing provided that it can be held at a place and time convenient to allow for Petitioner's full
participation.

² The State Engineer made this same erroneous claim during a presentation he gave at the Nevada Water Law Conference
held in Reno, Nevada, on November 28, 2018 – five days *before* the Court issued its written order. The State Engineer thus
misrepresented the effect of the Court's order before it was even issued.

1 argued, and the Court never ruled, that domestic wells are exempt from the prior appropriations system
2 after they are constructed.

3 In its Order, the Court held that the State Engineer's issuance of Order 1293A violated
4 Petitioner's constitutional due process and property rights. Contrary to Respondent's assertion, the
5 Court's ruling on this particular issue was not a "close call and tight issue."³ Rather, during the course
6 of these proceedings the State Engineer freely admitted that Orders 1293 and 1293A were issued without
7 any form of public notice or other due process. He also conceded in his answering brief that, if Order
8 1293A impairs an existing property right (which the Court determined it does), then the manner in which
9 the Orders were adopted violated constitutional due process protections.⁴ The likelihood of the Supreme
10 Court arriving at a different position on this issue is extremely minimal.

11 Finally, the State Engineer claims that since November 8, 2018, his office has received an
12 "onslaught" of property owners who have filed a Notice of Intent to drill domestic wells on their parcels.⁵
13 However, the affidavit supplied in support of this assertion indicates that only 154 such notices have
14 been filed.⁶ Given that Order 1293A stated that it would impact over 8,000 parcels of land within
15 Pahrump,⁷ describing the filing of 154 notices as an "onslaught" is pure hyperbole.⁸ In fact this relatively
16 small spike in the filing of notices reflects nothing more than a temporary release of pent-up demand
17 from property owners who were ready to build their homes but were held in limbo for the past year
18 while the State Engineer's orders were being litigated.

19 STANDARD OF REVIEW

20 A state agency is not entitled to a stay of a district court judgment.⁹ An initial request for a stay
21 of judgment pending appeal must be made to the court that entered the judgment.¹⁰ If the court denies
22 the stay, the appellant can then make the same request to the appellate court where the appeal is filed.

23 In reviewing a motion to stay a judgment pending appeal, a court must consider (1) whether the
24 object of the appeal will be frustrated if the stay is not granted, (2) whether the appellant [the State

25 ³ Motion at 8:6-7.

26 ⁴ Answering Brief at 13:13-19.

27 ⁵ Motion at 5:27-28.

28 ⁶ Motion Exhibit 1 at 2:6-9.

⁷ Order 1293A at 3 (§7).

⁸ In fact, this represents less than 2% of the parcels affected by Order 1293A.

⁹ *Clark Cty Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018).

¹⁰ *Id.*; NRAP 8(a)(1).

1 Engineer] will suffer irreparable harm if the stay is denied, (3) whether the respondent [PFW] will suffer
2 irreparable harm if the stay is granted, and (4) whether the appellant is likely to succeed on the merits
3 of the appeal.¹¹ These considerations establish an equitable balancing test. No consideration is more or
4 less important than any other consideration. However, the party requesting the stay has the burden of
5 “show[ing] that the balance of equities *weighs heavily* in favor of granting the stay.”¹²

6 In balancing the equities in this case, the Court should be particularly mindful of the fact that the
7 State Engineer is exempt from the requirement to post a supersedeas bond as a condition precedent to
8 issuing a stay.¹³ Accordingly, there is no relief available to offset any financial harm suffered by PFW
9 and its members resulting from the stay. By contrast, neither the State of Nevada nor the State Engineer
10 will suffer any risk of harm (financial or otherwise) if the stay is denied. The State Engineer will simply
11 be unable to continue to enforce an order that was issued: (1) in violation of constitutional due process
12 requirements, (2) without proper legislative authority, and (3) without substantial evidence to support it.

13 ARGUMENT

14 **I. Petitioners Have a High Likelihood of Success on the Merits.**

15 Importantly, the State Engineer fails in his motion to even claim that he has a likelihood of
16 success in his appeal. Instead he takes a single quote from the Court’s oral ruling out of context to make
17 the claim that “the likelihood of success on the merits should not weigh in either side’s favor.”¹⁴ A
18 review of the November 7, 2018, oral argument transcripts reveals that when the Court stated that this
19 was a “tight issue” it was referring to the overall conflicting interests of the parties (the State Engineer’s
20 need to manage water use in the basin versus the investment backed expectations of the property owners)
21 and not three specific issues raised by petitioners (legislative authority, due process, and substantial
22 evidence). Nowhere in the Court’s written ruling does it indicate that its determinations on these specific
23 issues was a close call.

24 The State Engineer completely fails to identify any specific errors in the Court’s reasoning that
25 would cause the Supreme Court to overturn the ruling on appeal. Instead, the State Engineer
26

27 ¹¹ NRAP 8(c).

28 ¹² *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th
Cir. 1981)) (emphasis added).

¹³ NRCP 62(e).

¹⁴ Motion at 8:7-8.

1 fundamentally misrepresents the Court’s ruling in an attempt to raise an issue on appeal that was never
2 argued or decided in these proceedings. Because the State Engineer is publicly misrepresenting this
3 Court’s ruling, and because Petitioners have a high likelihood of success on appeal, the motion should
4 be denied.

5 **A. The State Engineer is deliberately misrepresenting the legal effect of the Court’s**
6 **ruling.**

7 As noted above, in his motion, and in public statements made before the Court had even issued
8 its written order in this matter, the State Engineer is deliberately misrepresenting the Court’s ruling. In
9 his motion the State Engineer erroneously states that:

10 [T]here is now an outstanding question of whether domestic wells have a
11 “super” priority over all other rights, both appropriative and vested, such
12 that they are essentially exempt from the prior appropriation doctrine that
 has been Nevada’s water law since 1885.¹⁵

13 This statement is absolutely false and, tellingly, the State Engineer provides no direct citation to
14 anything in the Court’s ruling to support it. Petitioners never argued, and this Court never ruled, that
15 domestic wells have a super priority over other rights and are exempt from prior appropriations doctrine.

16 This case was about whether the State Engineer had the authority to restrict the *drilling* of new
17 domestic wells under a specific statute – NRS 534.110(8). There was never a claim or issue in this case
18 regarding the priority such wells would have *after* they were constructed. In fact, the Court
19 acknowledged in its written order that in instances where the State Engineer can point to a specific
20 statute that overrides the general regulatory exemption of NRS 534.030(4), the more specific statute will
21 control.¹⁶

22 With respect to establishing the priority of domestic wells, such a statute does, in fact, exist –
23 NRS 534.180(4)(d). Nothing in the Court’s decision overturns or invalidates this statute. Simply put,
24 the Court’s ruling does nothing to alter the Legislature’s assignment of a priority date for domestic wells
25 or affect the prior appropriations system in any manner. The ruling merely enforces the Legislature’s
26 clear directive that the State Engineer is without authority to establish a permitting system for domestic
27 wells or, conversely, restrict their drilling. Accordingly, the Court should reject the State Engineer’s

28 ¹⁵ Motion at 5:15-18.

¹⁶ Order at 6:6-8.

1 blatant attempt to misrepresent its ruling for the purpose of raising an issue on appeal that was never
2 argued or decided in these proceedings.

3 **B. The Court's ruling is highly likely to be upheld on appeal.**

4 As was discussed at the November 7, 2018, hearing, every regulatory action of the State Engineer
5 must meet three criteria – the State Engineer must have legislative authority to take the action, the State
6 Engineer must have substantial evidence to support the action, and affected property owners must have
7 been provided due process *before* the action is commenced. A failure to adhere to any one of these
8 requirements renders the State Engineer's action invalid.

9 Here, Petitioners argued, and the Court ruled, that Order 1293A failed all three tests.
10 Accordingly, the State Engineer has a high burden on appeal. He must convince the Supreme Court that
11 this Court was wrong on *all three issues*. Even if the Supreme Court finds that this Court erred on a
12 single particularly close issue, the result reached by this Court will still be affirmed based on the other
13 two findings. Given the State Engineer's high burden, and the facts that (1) the domestic well
14 exemptions in NRS 534.030(4) and 534.180(1) are clear and unambiguous, (2) the record is devoid of
15 substantial evidence supporting the State Engineer's action, and (3) the State Engineer admits that no
16 due process was provided to any of the property owners directly affected by Order 1293A, his likelihood
17 of success on appeal is extremely low.

18 The State Engineer should not be allowed to continue to enforce Order 1293A, and thereby
19 continue to deprive Petitioners of their constitutionally and statutorily protected property rights, while
20 he pursues a meritless appeal that has little chance of success. Accordingly, the State Engineer's Motion
21 should be denied.

22 **II. Property Owners In Pahrump Will Be Irreparably Harmed If The Stay Is Granted.**

23 The Nevada Supreme Court has recognized that because of the unique nature of property rights,
24 a "loss of real property rights generally results in irreparable harm."¹⁷ "Any act which destroys or results
25 in a substantial change in property, either physically or in the character in which it has been held or
26 enjoyed, does irreparable injury which justifies injunctive relief."¹⁸ "To destroy one's property is
27

28 ¹⁷ *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).

¹⁸ *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 125 (1972).

1 sometimes regarded as an irreparable injury and the particular value of a water supply in the desert is
2 not only unascertainable but its preservation is necessary to the general welfare.”¹⁹

3 The Court has determined that Order 1293A significantly impaired Petitioner’s property and due
4 process rights. They have been forced to suffer this trespass for an entire year without relief. The
5 issuance of a stay will only prolong their misfortune and continue to delay their efforts to construct their
6 homes.

7 For example, at a prior hearing in these proceedings Mr. Steven Peterson testified that he
8 purchased his parcel in Pahrump in 2017 with the intention of building a retirement home.²⁰ Prior to
9 purchasing his land, he checked with both the Nye County building department and the State Engineer’s
10 office to make sure he could use a domestic well to supply the home with water. After learning that he
11 could, Mr. Peterson purchased the parcel and proceeded to develop the plans for his retirement home.
12 Unfortunately, just a few weeks before he was able to pull a building permit, the State Engineer issued
13 Order 1293 and stopped him dead in his tracks. The delay has been particularly difficult because prior
14 to purchasing his lot Mr. Peterson sold his existing home and has been living in a fifth wheel RV ever
15 since. He originally planned to start building his new retirement home in October of this year. The
16 State Engineer’s order has prevented him from doing so.

17 Mr. Peterson is not the only person who finds himself stuck in a temporary living situation
18 because of the State Engineer’s arbitrary actions. Mrs. Melissa Campbell also testified that she and her
19 husband purchased a property in Pahrump with the hope of building a family home for them and their
20 two young sons.²¹ Like Mr. Peterson, the Campbells performed their due diligence before purchasing
21 their property and were told that they would have no problem drilling a domestic well. They closed on
22 their property just two months before the State Engineer issued Order 1293, and before they had time to
23 finalize their building plans and get a well drilled. Because of Order 1293 and 1293A, the Campbell
24 family was forced into living in a 30-foot trailer located on rented space on a commercial property. As
25 Mrs. Campbell tearfully noted, “[i]t’s hard to explain to a 6-year old that we no longer can move onto
26 the property that he’s been to and he’s helped us put poles in to put up a gate.”²²

27 ¹⁹ *Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971) (internal citations omitted).

28 ²⁰ Mr. Peterson’s full testimony can be found at SROA 920-25.

²¹ Mrs. Campbell’s full testimony can be found at SROA 934-938.

²² SROA 937:15-17.

1 Mrs. Campbell and Mr. Petersons are just two of many property owners whose lives have been
2 upended by the unlawful enforcement of the State Engineer's orders. Equity and justice demand that
3 the State Engineer's request for a stay be denied and that these families be allowed to immediately move
4 forward with their homebuilding plans.

5 **III. The Object Of The State Engineer's Appeal Will Not Be Frustrated By Denial Of The**
6 **Motion.**

7 The State Engineer claims that the object of his appeal will be frustrated if a stay is not issued.
8 However, the stated object of the State Engineer's appeal is to have the Supreme Court: (1) override the
9 Legislature's clear and unambiguous directive that domestic wells are generally exempt from his
10 regulatory authority, and (2) authorize him to issue such regulations without providing due process to
11 affected property owners as required by both the State and Federal Constitutions. The denial of the State
12 Engineer's request for a stay will do nothing to prevent the Supreme Court from considering these issues
13 or issuing an opinion on them. Stated simply, the State Engineer's appeal will not become moot if the
14 stay is denied, and the State Engineer makes no claim to the contrary in his Motion.

15 The *Mikhon Gaming*²³ case cited by the State Engineer is clearly distinguishable. In fact, the
16 two cases are so procedurally and factually different as to render any comparison meaningless. In the
17 *Mikhon Gaming* case, a district court made a determination that certain counter-claims brought by an
18 employee in a dispute against their employer were not subject to arbitration.²⁴ The district court then
19 refused to issue a stay while the employer pursued an interlocutory appeal on that issue.²⁵ If the Supreme
20 Court had not entered its own stay of the district court proceedings, the employer would have been
21 required to litigate rather than arbitrate the subject claims while the appeal was pending, thereby mooting
22 the whole purpose of the appeal (to require the claims be arbitrated not litigated).²⁶

23 Here, the State Engineer's appeal is not an interlocutory appeal designed to halt ongoing
24 proceedings at a district court. Rather, the Court has issued its final order in this matter and will not be
25 conducting any further proceedings (with the exception of deciding the instant motion for stay).
26

27 ²³ *Mikhon Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004).

28 ²⁴ *Id.* at 250-51, 89 P.3d at 38.

²⁵ *Id.*

²⁶ *Id.* at 252-53, 89 P.3d at 39.

1 Accordingly, there is no ongoing proceedings at the district court level that could, in any way, render
2 the State Engineer's appeal moot. The two cases are simply not comparable.

3 Because the State Engineer does not, and cannot, claim that denial of his motion will result in
4 his appeal becoming moot, the Court cannot make a finding that the object of the State Engineer's appeal
5 will be frustrated if his request for a stay is denied.

6 **IV. The State Engineer Will Not Suffer Any Harm If The Stay Is Denied.**

7 The Court's written order does not place any substantial burden (financial or otherwise) on the
8 State Engineer or his staff.²⁷ He and his staff will simply not be able to continue to enforce a
9 constitutionally and statutorily suspect regulation during the time that the appeal is pending. Because
10 the State Engineer cannot credibly make a claim that the order will cause him or his office any direct
11 harm, he instead attempts to exaggerate the effect that the drilling of a relatively minor number of wells
12 during the pendency of the appeal may have.

13 In Order 1293A the State Engineer indicates that there are as many as 8,000 undeveloped
14 residential parcels in Pahrump that are not served by a municipal water system.²⁸ According to the
15 affidavit accompanying the State Engineer's Motion, only 154 of these property owners have filed notice
16 of their intention to move forward and construct a well on their property since the Court issued its ruling.
17 The State Engineer conceded that in Pahrump the average domestic well uses only about ½ of an acre-
18 foot of water per year. The State Engineer also conceded that current pumping in the basin is
19 approximately 4,000 acre-feet *below* the basin's perennial yield. Accordingly, despite the State
20 Engineer's overwrought claims to the contrary, there is no danger that allowing these 154 property
21 owners to proceed with drilling their wells will cause any immediate harm to the basin.²⁹

22 Because the State Engineer has provided no evidence showing that any new wells drilled during
23 the pendency of these proceedings will cause any undue effects to existing wells, and because that State
24

25
26 ²⁷ The Court's order does require the State Engineer to publish notice that Order 1293A has been overturned; however, the
cost of drafting and publishing such a notice is de minimis and, in any event, this notice has already been issued.

27 ²⁸ Order 1293A at 3 (§7).

28 ²⁹ Importantly, like Order 1293A, the State Engineer's Motion is devoid of any scientific evidence showing that the drilling
of the 154 identified in Mr. Guillory's affidavit will unduly interfere with any existing wells in the basin. *See* NRS 534.110(8)
(requiring a showing that new wells will "cause an undue interference with existing wells" as a pre-condition to restricting
the drilling of new wells).

1 Engineer has not made any credible claim that he or his office will be harmed by the enforcement of the
2 Court's written order, the request for a stay should be denied.

3 **CONCLUSION**

4 For the foregoing reasons, PFW respectfully requests that the Court deny the State Engineer's
5 Motion.

6 **AFFIRMATION**
7 **Pursuant to NRS 239B.030(4)**

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

10 DATED this 17th day of December, 2018.

11 TAGGART & TAGGART, LTD.
12 108 North Minnesota Street
13 Carson City, Nevada 89703
14 (775) 882-9900 – Telephone
15 (775) 883-9900 – Facsimile

16 By: 

17 PAUL G. TAGGART, ESQ.
18 Nevada State Bar No. 6136
19 DAVID H. RIGDON, ESQ.
20 Nevada State Bar No. 13567
21 TIMOTHY D. O'CONNOR, ESQ.
22 Nevada State Bar No. 14098
23 Attorneys for Petitioners
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28

CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 17th day of December, 2018.



Employee of TAGGART & TAGGART, LTD.

Case No. CV 39524

DEC 24 2018

DEC 20 2018

Dept. No. 2

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

Nye County Clerk

Deputy

AMY DOWERS

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

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

Petitioners,

vs.

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

Respondent.

**REPLY IN SUPPORT OF
STATE ENGINEER'S MOTION FOR
STAY OF ORDER GRANTING
PETITION FOR JUDICIAL REVIEW
AND REVERSING STATE
ENGINEER'S AMENDED ORDER NO.
1293A PENDING APPEAL**

Respondent JASON KING, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General ADAM PAUL LAXALT and Deputy Attorney General JAMES N. BOLOTIN, hereby submits his Reply in support of his Motion for an order staying this Court's Order Granting Petition for Judicial Review pending appeal. This Reply is based upon the attached Points and Authorities and the pleadings and papers on file herein.

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POINTS AND AUTHORITIES

Given the time sensitive nature of the issues involved in the pending appeal at the Nevada Supreme Court, this matter is being addressed on an Order Shortening Time and therefore a reply may not be expected. However, Petitioners improperly raise a host of allegations, personal attacks against the State Engineer, and inadmissible evidence such that this Reply is necessary.

The State Engineer's Amended Order No. 1293A restricts the drilling of new domestic wells in the Pahrump Basin without relinquishment of 2 acre-feet of water rights to serve the new domestic well. SE ROA 3-9. The State Engineer issued Amended Order No. 1293A because he takes seriously the Legislature's declaration to consider the best available science in rendering decisions regarding the availability of water. See NRS 533.024(c). According to the best available science, as included in the Record on Appeal, the Pahrump Basin faces a dire situation.

Though not over-pumped (meaning that the annual pumping of groundwater is below the perennial yield), the water levels on the valley floor are declining. It is on the valley floor where the majority of current domestic wells in the Pahrump Basin exist. The State Engineer's evidence supporting Amended Order No. 1293A includes scientific models predicting thousands of well failures based on current pumping. Petitioners are correct that this Court held that this evidence was insufficient to support Amended Order No. 1293A without a specific model showing the precise effect of the potential 8,000 new domestic wells.

However, this does not change the fact that the State Engineer intends to argue in support of his evidence at the Nevada Supreme Court. Records of the State Engineer show a declining water table based on current pumping, and older records of the State Engineer (included in the Record on Appeal) show how severely the water table can drop when the Pahrump Basin is pumped at a higher rate – such that the State Engineer has determined that an increase in pumping will accelerate the water level declines and the associated well failures. The State Engineer's Office has inventoried groundwater

1 pumpage in Pahrump Valley since 1959, and the State Engineer has seen what happens
2 to the groundwater table and nearby springs when pumping exceeded the perennial yield
3 of 20,000 acre-feet annually in the past.

4 It is for these aforementioned reasons that the State Engineer is taking Amended
5 Order No. 1293A so seriously, such that he is appealing this Court's ruling and seeking a
6 stay of the Court's Order pending appeal. The State Engineer and the Nevada Division of
7 Water Resources, over which he is the administrator, work every day to uphold their
8 mission to conserve, protect, manage and enhance the State's water resources for
9 Nevada's citizens. The State Engineer believes that Amended Order No. 1293A is
10 necessary to protect the Pahrump Basin and its current domestic well and water right
11 owners, and to avoid moving towards curtailment by priority. He did not take lightly his
12 decision to issue Amended Order No. 1293A, and he did not do so with some kind of
13 vendetta or malice against the members of Pahrump Fair Water, LLC, or the individually
14 named Petitioners. Rather, the State Engineer has a duty to protect existing water users
15 in the Pahrump Basin, that being the more than 11,000 existing domestic well owners
16 and the holders of the more than 60,000 acre-feet of existing appropriative water rights.
17 In order to fulfill this duty, he deemed it necessary to require those seeking to drill new
18 domestic wells in the Pahrump Basin to acquire and relinquish water rights before doing
19 so in order to protect the Pahrump Basin via Amended Order No. 1293A.

20 The threat of the State Engineer's appeal becoming moot is a very real concern
21 weighing in favor of this requested stay. Petitioners seek to minimize the impact of the
22 number of Notices of Intent ("NOIs") to drill domestic wells since the November 8, 2018,
23 hearing. However, since the State Engineer filed his Motion for Stay, more NOIs
24 continue to be filed with the State Engineer. Additionally, Petitioners disregard the fact
25 that the appeal will likely take a minimum of 6 months to resolve. At a rate of 154 NOIs
26 per month, using the figure from the Motion for Stay, there could be approximately 1,000
27 new, unregulated domestic wells drilled during the pendency of a 6 month appeal, each
28 entitled to withdraw 2 acre-feet annually. *See* NRS 534.350(8)(a)(2).

1 Additionally, a query of the State Engineer's well log database, found on the
2 Nevada Division of Water Resources website, shows that approximately 370 domestic
3 wells have been drilled in the entire state of Nevada thus far this entire year. The
4 Pahrump Basin is one of 256 groundwater basins in Nevada. Therefore, just in the 29
5 days between the date of the oral argument in this case and the date that the State
6 Engineer served his Motion for Stay, the State Engineer received 154 NOIs for the
7 Pahrump Basin alone. This number is equivalent to approximately 42% of the amount of
8 all domestic wells drilled in Nevada this year. While Petitioners downplay the number of
9 NOIs, this does in fact strike at the heart of the State Engineer's appeal and the purpose
10 of Amended Order 1293A.

11 While Petitioners correctly note that the Court's Order did not specifically include
12 the term "super priority," this does not change the fact that the Court held that "domestic
13 wells are afforded an exemption from the State Engineer's regulatory purview." Order
14 Granting Petition for Judicial Review, p. 6. Such an exemption is, in effect, a finding that
15 domestic wells hold a superior priority to all other water rights. Taking this finding to its
16 logical extreme, the State Engineer is prohibited from making any order affecting
17 domestic wells, regardless of how grim the state of the basin and regardless of how
18 domestic wells are attributing to the poor health of the basin. Additionally, counsel for
19 Petitioners made arguments that appeared to advocate for this type of special treatment
20 for domestic wells during the oral argument.

21 Nonetheless, the State Engineer is relieved to read in Petitioners' Opposition that
22 they stand by NRS 534.180(4)(d), however the State Engineer considers this Court's
23 Order to be a very real threat to the prior appropriation system. If the State Engineer
24 misconstrued the Court's ruling, then he apologizes for doing so, but he is in no way
25 trying to "deliberately" or "blatant[ly]" misrepresent anything for the purpose of raising
26 an issue on appeal. Very simply, the State Engineer takes his duty to the State of
27 Nevada very seriously and has serious concerns regarding the repercussions of the
28 Court's Order.

1 Lastly, the State Engineer objects to the multiple inadmissible pieces of evidence
2 raised by Petitioners in their Opposition. In cases brought pursuant to NRS 533.450, the
3 court will not "substitute its judgment for that of the State Engineer" nor will the court
4 "pass upon the credibility of the witnesses nor reweigh evidence" but rather will be
5 limited to "a determination of whether substantial evidence in the record supports the
6 State Engineer's decision." *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205
7 (1991).

8 A statement made by the State Engineer, outside of the Court, without a transcript
9 of the statement, during the Nevada Water Law Conference, is inadmissible as irrelevant,
10 or at the very least unfairly prejudicial, and should not be part of the Court's calculus on
11 this Motion for Stay. See NRS 48.025; NRS 48.035(1). On November 28, 2018, the Court
12 had already ruled from the bench and the parties merely awaited the written order; the
13 State Engineer objects to the inclusion and consideration of this statement, found in
14 Petitioners' Opposition at page 2, footnote 2. Further, the State Engineer previously
15 objected to the inclusion of Petitioners' Supplemental Record on Appeal ("SROA"),
16 consisting of documents from a previous lawsuit in this Court, CV38972. See State
17 Engineer's Answering Brief, p. 7 FN 3. While the Court never formally ruled on this
18 objection, the Court did sign the proposed order submitted by Petitioners that included
19 cites to the SROA. The State Engineer respectfully restates his objection to the SROA,
20 and the references to the SROA contained in Petitioners' Opposition, as the State
21 Engineer did not consider these documents when deciding to issue Amended Order No.
22 1293A. These statements from the prior case, involving Order No. 1293, are irrelevant,
23 and even if the Court finds them relevant, the probative value is substantially outweighed
24 by the danger of unfair prejudice to the State Engineer. See NRS 48.025; NRS 48.035(1).

25 For the foregoing reasons, and those stated in his Motion, the State Engineer once
26 again respectfully requests that this Court grant his Motion for Stay Pending Appeal.

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DATED this 18th day of December, 2018.

By:

CERTIFICATE OF SERVICE

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David H. Rigdon, Esq.
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Sandra Geyer

DEC 27 2018

Nye County Clerk
Deputy

Veronica Aguilar

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3 TAGGART & TAGGART, LTD.
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(775) 883-9900 – Facsimile
6 Attorneys for Petitioners

7
8 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF NYE

* * *

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

Case No. 39524

Dept. No. 2

14 Petitioners,

15 vs.

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

19 Respondent.

20 **[PROPOSED] ORDER DENYING MOTION FOR STAY**

21 A proposed order is attached hereto as Exhibit 1.

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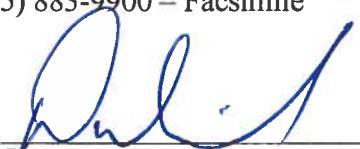
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AFFIRMATION
Pursuant to NRS 239B.030(4)

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

DATED this 17th day of December, 2018.

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 17th day of December, 2018.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

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<u>Exhibit</u>	<u>Document</u>	<u>Pages</u>
1.	[Proposed] Order Denying Motion for Stay	5

EXHIBIT 1

EXHIBIT 1

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2
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9 IN AND FOR THE COUNTY OF NYE
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* * *

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18 Engineer, DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

19 Respondent.
20

Case No. 39524

Dept. No. 2

21 **ORDER DENYING MOTION FOR STAY**

22 THIS MATTER comes before the Court on Respondent's Motion for Stay of Order Granting
23 Petition for Judicial Review and Reversing State Engineer's Amended Order 1293A Pending Appeal
24 (the "Motion") filed on December 7, 2018. At a status conference held on December 13, 2018, the Court
25 determined that a hearing on the Motion is not required and ordered Petitioners to electronically file
26 their opposition to the Motion no later than December 17, 2018. On December 17, 2018, Petitioners
27 timely filed their Opposition to Respondent's Motion for Stay. After careful consideration of the
28 arguments the parties raised in their respective briefs, the Court hereby denies Respondent's Motion.

BACKGROUND

On November 7, 2018, this Court held a hearing to consider Petitioners' Petition for Judicial Review. At the close of the hearing, the Court issued an oral ruling from the bench granting the Petition and directing Petitioners to prepare a written order. On November 21, 2018, Petitioners submitted their proposed order to the Court and, on that same day, Respondent submitted his own alternative proposed order. After careful consideration of both proposed orders, on December 3, 2018, this Court executed the proposed order submitted by Petitioners and issued its Order Granting Petition for Judicial Review (the "Order"). On that same day, Petitioners served Respondent with notice of entry of the Order.

The Court's Order reversed State Engineer Order 1293A on the basis that: (1) pursuant to NRS 534.030(4) the State Engineer does not possess legislative authority to issue an order restricting the drilling of new domestic wells in a basin, (2) the State Engineer violated Petitioners' constitutional due process rights when he issued Order 1293A without notice and without providing Petitioners an opportunity to be heard, and (3) there was insufficient evidence in the record to support the issuance of Order 1293A.

On December 8, 2018, the State Engineer filed a notice of his intent to appeal the Court's Order. On that same day, the State Engineer also filed the instant Motion and an ex parte request for an order shortening the time for Petitioners to file their Opposition to the Motion. On December 13, 2018, the Court held a telephonic status conference with the parties to consider Respondent's request for an order shortening time. During the telephonic status conference, the parties agreed that a hearing is not required and that the Court can decide Respondent's Motion based on the current record and the briefs filed by the parties. The Court directed Petitioners to electronically file any opposition on or before December 17, 2018. In accordance with the direction of the Court, on December 17, 2018, Petitioners timely filed their opposition brief.

STANDARD OF REVIEW

A state agency is not automatically entitled to a stay of a district court judgment.¹ An initial request for a stay of judgment pending appeal must be made to the court that entered the judgment.² If

¹ *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018).

² *Id.*; NRAP 8(a)(1).

1 the court denies the stay, the appellant can then make the same request to the appellate court where the
2 appeal is filed.

3 In reviewing a motion to stay a judgment pending appeal, a court must consider (1) whether the
4 object of the appeal will be frustrated if the stay is not granted, (2) whether the appellant [the State
5 Engineer] will suffer irreparable harm if the stay is denied, (3) whether the respondent [PFW, et al.] will
6 suffer irreparable harm if the stay is granted, and (4) whether the appellant is likely to succeed on the
7 merits of the appeal.³ These considerations establish an equitable balancing test. No consideration is
8 more or less important than any other consideration. However, the party requesting the stay has the
9 burden of “show[ing] that the balance of equities weighs heavily in favor of granting the stay.”⁴

10 In balancing the equities in this case, the Court is particularly mindful of the fact that the State
11 Engineer is exempt from the requirement to post a supersedeas bond as a condition precedent to issuing
12 a stay.⁵ Accordingly, there is no relief available to Petitioners to offset any financial harm resulting
13 from the stay. By contrast, the State Engineer will not suffer any risk of financial harm if the stay is
14 denied. The only consequence of a denial of the State Engineer’s Motion is that he will be unable to
15 continue to enforce Order 1293A during the pendency of the appeal.

16 ANALYSIS

17 As an initial matter, the Court is troubled by the State Engineer’s statement that as a result of the
18 Court’s Order:

19 [T]here is now an outstanding question of whether domestic wells have a
20 “super” priority over all other rights, both appropriative and vested, such
21 that they are essentially exempt from the prior appropriation doctrine that
has been Nevada’s water law since 1885.⁶

22 Neither the priority date assigned to domestic wells nor the issue of whether such wells are subject to
23 the prior appropriations doctrine was argued or decided in this case. Instead, this case was about whether
24 the State Engineer had the legal authority to restrict the drilling of new domestic wells in the Pahrump
25 basin. The Court determined that NRS 534.030(4) generally exempts such wells from regulation by the
26

27 ³ NRAP 8(c).

28 ⁴ *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)).

⁵ NRCP 62(e).

⁶ Motion at 5:15-18.

1 State Engineer *unless a specific statute states otherwise.*⁷ Because NRS 534.110(8) does not specifically
2 state that its provisions apply to domestic wells, the general exemption applied and this Court held that
3 the State Engineer was without authority to impose the subject drilling restriction.

4 By contrast, there is a specific statute that applies a priority date to domestic wells – NRS
5 534.180(4)(d). Nothing in this Court’s Order overrides or invalidates this statute. Order 1293A did not
6 relate to or rely on NRS 534.180(4)(d) in any manner. Accordingly, Petitioners never argued and this
7 Court never made any determination related to NRS 534.180(4)(d) or its applicability within the
8 Pahump basin. All this Court decided was that the State Engineer does not have authority to restrict
9 the drilling of new domestic wells, not what priority date should be applied to them after they are
10 constructed.

11 This Court has considered the merits of Respondent’s Motion in relation to NRAP 8(c)’s four
12 criteria and finds that, based on the pleadings submitted by the parties: (1) the object of the appeal will
13 not be frustrated if the stay is denied, (2) the State Engineer will not suffer irreparable harm if the stay
14 is denied, (3) Petitioners will continue to incur significant harm if the stay is not denied, and (4) that the
15 State Engineer does not have a high likelihood of success on the merits of his appeal. Accordingly, the
16 equities in this case weigh in favor of denying the Motion.

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28 ⁷ Order at 6:6-8.

1 Further, the Court finds that the status quo that should be maintained in this case is the situation
2 that existed during the more than 150 years prior to the State Engineer's surprise issuance of Orders
3 1293 and 1293A. If the State Engineer wants to upset 150 years of prior practice, he bears the heavy
4 burden of showing that such a change is legislatively authorized and that there is substantial evidence
5 supporting it. The Court has determined that the State Engineer failed to meet this burden. Accordingly,
6 the status quo that existed prior to the issuance of the Orders must be maintained.

7 **ORDER**

8 UPON CONSIDERATION, and good cause appearing therefore, the Court hereby denies
9 Respondent's Motion for Stay.

10 **IT IS SO ORDERED.**

11 DATED this _____ day of _____, 2018.

12
13
14 _____
DISTRICT COURT JUDGE

15 Respectfully submitted by:

16 TAGGART & TAGGART, LTD.
17 108 North Minnesota Street
18 Carson City, Nevada 89703
19 (775) 882-9900 – Telephone
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21 By: 

22 PAUL G. TAGGART, ESQ.
23 Nevada State Bar No. 6136
24 DAVID H. RIGDON, ESQ.
25 Nevada State Bar No. 13567
26 Attorneys for Petitioners
27
28

FILED
FIFTH JUDICIAL DISTRICT

DEC 27 2018
Nye County Clerk
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

PAHRUMP FAIR WATER, LLC, a Nevada
limited-liability company; STEVEN PETERSON,
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9 burden of "show[ing] that the balance of equities weighs heavily in favor of granting the stay."⁴

10 In balancing the equities in this case, the Court is particularly mindful of the fact that the State
11 Engineer is exempt from the requirement to post a supersedeas bond as a condition precedent to issuing
12 a stay.⁵ Accordingly, there is no relief available to Petitioners to offset any financial harm resulting
13 from the stay. By contrast, the State Engineer will not suffer any risk of financial harm if the stay is
14 denied. The only consequence of a denial of the State Engineer's Motion is that he will be unable to
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20 "super" priority over all other rights, both appropriative and vested, such
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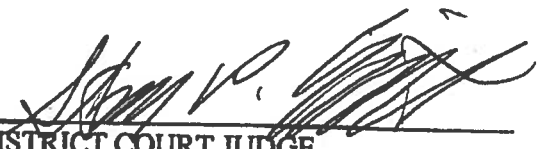
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3 1293 and 1293A. If the State Engineer wants to upset 150 years of prior practice, he bears the heavy
4 burden of showing that such a change is legislatively authorized and that there is substantial evidence
5 supporting it. The Court has determined that the State Engineer failed to meet this burden. Accordingly,
6 the status quo that existed prior to the issuance of the Orders must be maintained.

7 **ORDER**

8 UPON CONSIDERATION, and good cause appearing therefore, the Court hereby denies
9 Respondent's Motion for Stay.

10 **IT IS SO ORDERED.**

11 DATED this 20th day of December, 2018.

12
13
14 *Senior*  DISTRICT COURT JUDGE

15 Respectfully submitted by:

16 TAGGART & TAGGART, LTD.
17 108 North Minnesota Street
18 Carson City, Nevada 89703
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24 DAVID H. RIGDON, ESQ.
25 Nevada State Bar No. 13567
26 Attorneys for Petitioners
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28

FILED
FIFTH JUDICIAL DISTRICT

JAN 02 2019

Nye County Clerk
Terri Pemberton Deputy

1 PAUL G. TAGGART, ESQ.
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2 DAVID H. RIGDON, ESQ.
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7 Attorneys for Petitioners

8
9 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10 IN AND FOR THE COUNTY OF NYE

* * *

11 PAHRUMP FAIR WATER, LLC, a Nevada
12 limited-liability company; STEVEN PETERSON,
an individual; MICHAEL LACH, an individual;
13 PAUL PECK, an individual; BRUCE JABOUR,
an individual; and GERALD SCHULTE, an
14 individual,

Case No. 39524

Dept. No. 2

15 Petitioners,

16 vs.

17 JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
18 DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,
19

20 Respondent.

21 **NOTICE OF ENTRY OF ORDER**

22 PLEASE TAKE NOTICE that on December 27, 2018, the above-entitled Court entered its Order
23 Denying Motion for Stay in the above-captioned matter, a copy of which is attached hereto as Exhibit

24 1.

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AFFIRMATION
Pursuant to NRS 239B.030(4)

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

DATED this 31st day of December, 2018.

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By: 

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CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 31st day of December, 2018.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

<u>Exhibit</u>	<u>Document</u>	<u>Pages</u>
1.	Order <u>Denying Motion for Stay</u>	5

EXHIBIT 1

EXHIBIT 1

FILED
FIFTH JUDICIAL DISTRICT

DEC 27 2018
Nye County Clerk
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

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

Petitioners,

vs.

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

Respondent.

Case No. 39524

Dept. No. 2

ORDER DENYING MOTION FOR STAY

THIS MATTER comes before the Court on Respondent's Motion for Stay of Order Granting
Petition for Judicial Review and Reversing State Engineer's Amended Order 1293A Pending Appeal
(the "Motion") filed on December 7, 2018. At a status conference held on December 13, 2018, the Court
determined that a hearing on the Motion is not required and ordered Petitioners to electronically file
their opposition to the Motion no later than December 17, 2018. On December 17, 2018, Petitioners
timely filed their Opposition to Respondent's Motion for Stay. After careful consideration of the
arguments the parties raised in their respective briefs, the Court hereby denies Respondent's Motion.

BACKGROUND

On November 7, 2018, this Court held a hearing to consider Petitioners' Petition for Judicial Review. At the close of the hearing, the Court issued an oral ruling from the bench granting the Petition and directing Petitioners to prepare a written order. On November 21, 2018, Petitioners submitted their proposed order to the Court and, on that same day, Respondent submitted his own alternative proposed order. After careful consideration of both proposed orders, on December 3, 2018, this Court executed the proposed order submitted by Petitioners and issued its Order Granting Petition for Judicial Review (the "Order"). On that same day, Petitioners served Respondent with notice of entry of the Order.

The Court's Order reversed State Engineer Order 1293A on the basis that: (1) pursuant to NRS 534.030(4) the State Engineer does not possess legislative authority to issue an order restricting the drilling of new domestic wells in a basin, (2) the State Engineer violated Petitioners' constitutional due process rights when he issued Order 1293A without notice and without providing Petitioners an opportunity to be heard, and (3) there was insufficient evidence in the record to support the issuance of Order 1293A.

On December 8, 2018, the State Engineer filed a notice of his intent to appeal the Court's Order. On that same day, the State Engineer also filed the instant Motion and an ex parte request for an order shortening the time for Petitioners to file their Opposition to the Motion. On December 13, 2018, the Court held a telephonic status conference with the parties to consider Respondent's request for an order shortening time. During the telephonic status conference, the parties agreed that a hearing is not required and that the Court can decide Respondent's Motion based on the current record and the briefs filed by the parties. The Court directed Petitioners to electronically file any opposition on or before December 17, 2018. In accordance with the direction of the Court, on December 17, 2018, Petitioners timely filed their opposition brief.

STANDARD OF REVIEW

A state agency is not automatically entitled to a stay of a district court judgment.¹ An initial request for a stay of judgment pending appeal must be made to the court that entered the judgment.² If

¹ *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018).
² *Id.*; NRAP 8(a)(1).

1 the court denies the stay, the appellant can then make the same request to the appellate court where the
2 appeal is filed.

3 In reviewing a motion to stay a judgment pending appeal, a court must consider (1) whether the
4 object of the appeal will be frustrated if the stay is not granted, (2) whether the appellant [the State
5 Engineer] will suffer irreparable harm if the stay is denied, (3) whether the respondent [PFW, et al.] will
6 suffer irreparable harm if the stay is granted, and (4) whether the appellant is likely to succeed on the
7 merits of the appeal.³ These considerations establish an equitable balancing test. No consideration is
8 more or less important than any other consideration. However, the party requesting the stay has the
9 burden of "show[ing] that the balance of equities weighs heavily in favor of granting the stay."⁴

10 In balancing the equities in this case, the Court is particularly mindful of the fact that the State
11 Engineer is exempt from the requirement to post a supersedeas bond as a condition precedent to issuing
12 a stay.⁵ Accordingly, there is no relief available to Petitioners to offset any financial harm resulting
13 from the stay. By contrast, the State Engineer will not suffer any risk of financial harm if the stay is
14 denied. The only consequence of a denial of the State Engineer's Motion is that he will be unable to
15 continue to enforce Order 1293A during the pendency of the appeal.

16 ANALYSIS

17 As an initial matter, the Court is troubled by the State Engineer's statement that as a result of the
18 Court's Order:

19 [T]here is now an outstanding question of whether domestic wells have a
20 "super" priority over all other rights, both appropriative and vested, such
21 that they are essentially exempt from the prior appropriation doctrine that
has been Nevada's water law since 1885.⁶

22 Neither the priority date assigned to domestic wells nor the issue of whether such wells are subject to
23 the prior appropriations doctrine was argued or decided in this case. Instead, this case was about whether
24 the State Engineer had the legal authority to restrict the drilling of new domestic wells in the Pahrump
25 basin. The Court determined that NRS 534.030(4) generally exempts such wells from regulation by the
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27 ³ NRAP 8(c).

⁴ *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th
Cir. 1981)).

28 ⁵ NRCP 62(e).

⁶ Motion at 5:15-18.

1 State Engineer *unless a specific statute states otherwise.*⁷ Because NRS 534.110(8) does not specifically
2 state that its provisions apply to domestic wells, the general exemption applied and this Court held that
3 the State Engineer was without authority to impose the subject drilling restriction.

4 By contrast, there is a specific statute that applies a priority date to domestic wells – NRS
5 534.180(4)(d). Nothing in this Court's Order overrides or invalidates this statute. Order 1293A did not
6 relate to or rely on NRS 534.180(4)(d) in any manner. Accordingly, Petitioners never argued and this
7 Court never made any determination related to NRS 534.180(4)(d) or its applicability within the
8 Pahrump basin. All this Court decided was that the State Engineer does not have authority to restrict
9 the drilling of new domestic wells, not what priority date should be applied to them after they are
10 constructed.

11 This Court has considered the merits of Respondent's Motion in relation to NRAP 8(c)'s four
12 criteria and finds that, based on the pleadings submitted by the parties: (1) the object of the appeal will
13 not be frustrated if the stay is denied, (2) the State Engineer will not suffer irreparable harm if the stay
14 is denied, (3) Petitioners will continue to incur significant harm if the stay is not denied, and (4) that the
15 State Engineer does not have a high likelihood of success on the merits of his appeal. Accordingly, the
16 equities in this case weigh in favor of denying the Motion.

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⁷ Order at 6:6-8.

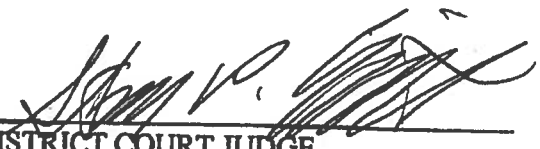
1 Further, the Court finds that the status quo that should be maintained in this case is the situation
2 that existed during the more than 150 years prior to the State Engineer's surprise issuance of Orders
3 1293 and 1293A. If the State Engineer wants to upset 150 years of prior practice, he bears the heavy
4 burden of showing that such a change is legislatively authorized and that there is substantial evidence
5 supporting it. The Court has determined that the State Engineer failed to meet this burden. Accordingly,
6 the status quo that existed prior to the issuance of the Orders must be maintained.

7 **ORDER**

8 UPON CONSIDERATION, and good cause appearing therefore, the Court hereby denies
9 Respondent's Motion for Stay.

10 **IT IS SO ORDERED.**

11 DATED this 20th day of December, 2018.

12
13
14 *Senior*  DISTRICT COURT JUDGE

15 Respectfully submitted by:

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21 By: 

22 PAUL G. TAGGART, ESQ.
23 Nevada State Bar No. 6136
24 DAVID H. RIGDON, ESQ.
25 Nevada State Bar No. 13567
26 Attorneys for Petitioners
27
28

of nonuse in which to use the water right beneficially and to provide proof of such use to the State Engineer or apply for relief pursuant to subsection 3 to avoid forfeiting the water right.

(b) If, after 1 year after the date of the notice of nonuse pursuant to paragraph (a), proof of resumption of beneficial use is not filed in the Office of the State Engineer, the State Engineer shall, unless the State Engineer has granted a request to extend the time necessary to work a forfeiture of the water right, send a final notice to the owner of the water right, as determined in the records of the Office of the State Engineer, by registered or certified mail, that the water right is held for forfeiture. If the owner of the water right, within 30 days after the date of such final notice, fails to file the required proof of resumption of beneficial use or an application for an extension of time to prevent forfeiture, the State Engineer shall declare the right, or the portion of the right not returned to beneficial use, forfeited. The State Engineer shall send notice of the declaration of forfeiture, by registered or certified mail, to the owner of record, as determined in the records of the Office of the State Engineer, of the water right that has been declared forfeited.

(c) If, after receipt of a notice of the declaration of forfeiture pursuant to paragraph (b), the owner of record of the water right fails to appeal the ruling in the manner provided for in [NRS 533.450](#), and within the time provided for therein, the forfeiture becomes final. Upon the forfeiture of the water right, the water reverts to the public and is available for further appropriation, subject to existing rights.

3. The State Engineer may, upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under subsection 2 if the request is made before the expiration of the time necessary to work a forfeiture. Except as otherwise provided in subsection 4, the State Engineer may grant, upon request and for good cause shown, any number of extensions, but a single extension must not exceed 1 year. In determining whether to grant or deny a request, the State Engineer shall, among other reasons, consider:

(a) Whether the holder has submitted proof and evidence that the holder is proceeding in good faith and with reasonable diligence to resume use of the water beneficially for the purpose for which the holder's right is acquired or claimed;

(b) The number of years during which the water has not been put to the beneficial use for which the right is acquired or claimed;

(c) Any economic conditions or natural disasters which made the holder unable to put the water to that use;

(d) Whether the water right is located in a basin within a county under a declaration of drought by the Governor, United States Secretary of Agriculture or the President of the United States;

(e) Whether the holder has demonstrated efforts to conserve water which have resulted in a reduction in water consumption;

(f) Whether the water right is located in a basin that has been designated as a critical management area by the State Engineer pursuant to subsection 7 of [NRS 534.110](#);

(g) The date of priority of the water right as it relates to the potential curtailment of water use in the basin;

(h) The availability of water in the basin, including, without limitation, whether withdrawals of water consistently exceed the perennial yield of the basin; and

(i) Any orders restricting use or appropriation of water in the basin.

➔ The State Engineer shall notify, by registered or certified mail, the owner of the water right, as determined in the records of the Office of the State Engineer, of whether the State Engineer has granted or denied the holder's request for an extension pursuant to this subsection. If the State Engineer grants an extension pursuant to this subsection and, before the expiration of that extension, proof of resumption of beneficial use or another request for an extension is not filed in the Office of the State Engineer, the State Engineer shall send a final notice to the owner of the water right, by registered or certified mail, that the water right will be declared forfeited if the owner of the water right fails to file the required proof of resumption of beneficial use or an application for an extension of time to prevent forfeiture within 30 days after the date of the final notice. If the owner of the water right fails to file the required proof of resumption of beneficial use or an application for an extension of time to prevent forfeiture within 30 days after the date of such final notice, the State Engineer shall declare the water right, or the portion of the right not returned to beneficial use, forfeited.

4. If the State Engineer grants an extension pursuant to subsection 1 in a basin:

(a) Where withdrawals of groundwater consistently exceed the perennial yield of the basin; or

(b) That has been designated as a critical management area by the State Engineer pursuant to subsection 7 of [NRS 534.110](#),

➔ a single extension must not exceed 3 years, but any number of extensions may be granted to the holder of such a right.

5. The failure to receive a notice pursuant to subsection 2 or 3 does not nullify the forfeiture or extend the time necessary to work the forfeiture of a water right.

6. A right to use underground water whether it is vested or otherwise may be lost by abandonment. If the State Engineer, in investigating a groundwater source, upon which there has been a prior right, for the purpose of acting upon an application to appropriate water from the same source, is of the belief from his or her examination that an abandonment has taken place, the State Engineer shall so state in the ruling approving the application. If, upon notice by registered or certified mail to the owner of record who had the prior right, the owner of record of the prior right fails to appeal the ruling in the manner provided for in NRS 533.450, and within the time provided for therein, the alleged abandonment declaration as set forth by the State Engineer becomes final.

[9a:178:1939; added 1947, 52; 1943 NCL § 7993.18a] — (NRS A 1967, 193, 1053; 1981, 1842; 1983, 1650; 1995, 1016; 2003, 651; 2007, 844; 2011, 504, 1384; 2017, 656, 3505)

...

NRS 534.110 Rules and regulations of State Engineer; statements and pumping tests; conditions of appropriation; designation of critical management areas; restrictions.

1. The State Engineer shall administer this chapter and shall prescribe all necessary regulations within the terms of this chapter for its administration.

2. The State Engineer may:

(a) Require periodical statements of water elevations, water used, and acreage on which water was used from all holders of permits and claimants of vested rights.

(b) Upon his or her own initiation, conduct pumping tests to determine if overpumping is indicated, to determine the specific yield of the aquifers and to determine permeability characteristics.

3. The State Engineer shall determine whether there is unappropriated water in the area affected and may issue permits only if the determination is affirmative. The State Engineer may require each applicant to whom a permit is issued for a well:

(a) For municipal, quasi-municipal or industrial use; and

(b) Whose reasonably expected rate of diversion is one-half cubic foot per second or more,

→ to report periodically to the State Engineer concerning the effect of that well on other previously existing wells that are located within 2,500 feet of the well.

4. It is a condition of each appropriation of groundwater acquired under this chapter that the right of the appropriator relates to a specific quantity of water and that the right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion. In determining a reasonable lowering of the static water level in a particular area, the State Engineer shall consider the economics of pumping water for the general type of crops growing and may also consider the effect of using water on the economy of the area in general.

5. This section does not prevent the granting of permits to applicants later in time on the ground that the diversions under the proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriator, so long as any protectable interests in existing domestic wells as set forth in NRS 533.024 and the rights of holders of existing appropriations can be satisfied under such express conditions. At the time a permit is granted for a well:

(a) For municipal, quasi-municipal or industrial use; and

(b) Whose reasonably expected rate of diversion is one-half cubic foot per second or more,

→ the State Engineer shall include as a condition of the permit that pumping water pursuant to the permit may be limited or prohibited to prevent any unreasonable adverse effects on an existing domestic well located within 2,500 feet of the well, unless the holder of the permit and the owner of the domestic well have agreed to alternative measures that mitigate those adverse effects.

6. Except as otherwise provided in subsection 7, the State Engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants, and if the findings of the State Engineer so indicate, the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.

7. The State Engineer:

(a) May designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.

(b) Shall designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin upon receipt of a petition for such a designation which is signed by a majority of the holders of certificates or permits to appropriate water in the basin that are on file in the Office of the State Engineer.

→ The designation of a basin as a critical management area pursuant to this subsection may be appealed pursuant to [NRS 533.450](#). If a basin has been designated as a critical management area for at least 10 consecutive years, the State Engineer shall order that withdrawals, **including, without limitation, withdrawals from domestic wells**, be restricted in that basin to conform to priority rights, unless a groundwater management plan has been approved for the basin pursuant to [NRS 534.037](#).

8. In 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. 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](#).

[10:178:1939; A [1947, 52](#); [1949, 128](#); [1955, 328](#)] — (NRS A [1993, 2641](#); [2001, 553](#); [2011, 1385](#))

NRS 534.120 State Engineer authorized to make rules, regulations and orders when groundwater is being depleted in designated area; preferred uses of water; temporary permits to appropriate water; revocation of temporary permits; restrictions placed on certain wells.

1. Within 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.

2. In the interest of public welfare, the State Engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by the State Engineer and from which the groundwater is being depleted, and in acting on applications to appropriate groundwater, the State Engineer may designate such preferred uses in different categories with respect to the particular areas involved within the following limits:

(a) Domestic, municipal, quasi-municipal, industrial, irrigation, mining and stock-watering uses; and

(b) Any uses for which a county, city, town, public water district or public water company furnishes the water.

3. Except as otherwise provided in subsection 5, the State Engineer may:

(a) Issue temporary permits to appropriate groundwater which can be limited as to time and which may, except as limited by subsection 4, be revoked if and when water can be furnished by an entity such as a water district or a municipality presently engaged in furnishing water to the inhabitants thereof.

(b) Deny applications to appropriate groundwater for any use in areas served by such an entity.

(c) Limit the depth of domestic wells.

(d) Prohibit the drilling of wells for domestic use, as defined in [NRS 534.013](#), in areas where water can be furnished by an entity such as a water district or a municipality presently engaged in furnishing water to the inhabitants thereof.

(e) In connection with the approval of a parcel map in which any parcel is proposed to be served by a domestic well, require the dedication to a city or county or a designee of a city or county, or require a relinquishment to the State Engineer, of any right to appropriate water required by the State Engineer to ensure a sufficient supply of water for each of those parcels, unless the dedication of the right to appropriate water is required by a local ordinance.

4. The State Engineer may revoke a temporary permit issued pursuant to subsection 3 for residential use, and require a person to whom groundwater was appropriated pursuant to the permit to obtain water from an entity such as a water district or a municipality engaged in furnishing water to the inhabitants of the designated area, only if:

(a) The distance from the property line of any parcel served by a well pursuant to a temporary permit to the pipes and other appurtenances of the proposed source of water to which the property will be connected is not more than 180 feet; and

(b) The well providing water pursuant to the temporary permit needs to be redrilled or have repairs made which require the use of a well-drilling rig.

5. The State Engineer may, in an area in which have been issued temporary permits pursuant to subsection 3, limit the depth of a domestic well pursuant to paragraph (c) of subsection 3 or prohibit repairs from being made to a well, and may require the person proposing to deepen or repair the well to obtain water from an entity such as a water district or a municipality engaged in furnishing water to the inhabitants of the designated area, only if:

(a) The distance from the property line of any parcel served by the well to the pipes and other appurtenances of the proposed source of water to which the property will be connected is not more than 180 feet; and

(b) The deepening or repair of the well would require the use of a well-drilling rig.

6. For good and sufficient reasons, the State Engineer may exempt the provisions of this section with respect to public housing authorities.

7. The provisions of this section do not prohibit the State Engineer from revoking a temporary permit issued pursuant to this section if any parcel served by a well pursuant to the temporary permit is currently obtaining water from an entity such as a water district or a municipality engaged in furnishing water to the inhabitants of the area.

[10.5:178:1939; added [1955, 328](#)] — (NRS A [1989, 1401](#); [1999, 3542](#); [2001, 555](#); [2003, 622, 624](#); [2007, 845](#))

NRS 534.125 State Engineer to file notice related to temporary permit. If the State Engineer issues a temporary permit pursuant to [NRS 534.120](#) or if a well for domestic use is drilled in an area in which the State Engineer has issued such a temporary permit, the State Engineer shall file a notice with the county recorder of the county in which the permit is issued or the well is drilled. The notice must include a statement indicating that, if and when water can be furnished by an entity such as a water district or a municipality engaged in furnishing water to the inhabitants of the designated area:

1. A temporary permit may be revoked;
2. The owner of a domestic well may be prohibited from deepening or repairing the well; and
3. The owner of the property served by the well may be required to connect to this water source at his or her own expense.

(Added to NRS by [1999, 3541](#))

NRS 534.130 State Engineer, assistants and Artesian Well Supervisor authorized to enter premises to investigate and carry out duties. The State Engineer, or the assistants or authorized agents of the State Engineer, and the Artesian Well Supervisor, or the assistants of the Artesian Well Supervisor, shall have the right to enter the premises of any owner or proprietor where any well mentioned in this chapter is situated at any reasonable hour of the day for the purpose of investigating and carrying out their duties in the administration of this chapter.

[11:178:1939; 1931 NCL § 7993.20]

NRS 534.140 Well drillers: Annual licenses; fees; continuing education; regulations for well drilling; licensing by State Contractors' Board.

1. Every well driller, before engaging in the physical drilling of a well in this State for development of water, must annually apply to the State Engineer for a license to drill.

2. The applications for those licenses and all licenses issued for the drilling of wells must be in the form prescribed by the State Engineer.

3. All well-drilling licenses expire on June 30 following their issuance and are not transferable.

4. A fee of \$100 must accompany each application for a license and a fee of \$50 must be paid each year for renewal of the license.

5. Those license fees must be accounted for in the State Engineer's Water License Account and used to pay costs pertaining to licensing, the adoption and enforcement of regulations for well drilling and the compensation of the members of the Well Drillers' Advisory Board and their expenses.

6. The State Engineer, after consulting with the Well Drillers' Advisory Board, shall adopt regulations relating to continuing education for well drillers.

7. The State Engineer shall prepare and keep on file in the Office of the State Engineer regulations for well drilling.

8. Before engaging in the physical drilling of a well in this State for the development of water, every well driller who is the owner of a well-drilling rig, or who has a well-drilling rig under lease or rental, or who has a contract to purchase a well-drilling rig, must obtain a license as a well driller from the State Contractors' Board.

[Part 7a:178:1939; added [1947, 52](#); A [1955, 328](#)] — (NRS A [1957, 719](#); [1963, 797](#); [1979, 115](#); [1983, 407](#); [1991, 63, 1785](#); [2005, 456](#))

...

NRS 534.160 License required to drill well; revocation of or refusal to reissue license; order to plug well; penalty for allowing unlicensed person to drill.

1. A person shall not drill a well for water in this State without having first obtained a well-drilling license.

2. Well drillers must comply with the regulations adopted by the State Engineer governing the drilling of water wells.

3. If the State Engineer determines, upon investigation and after hearing held upon at least 15 days' notice sent by registered or certified mail to the licensed well driller, that the well driller has failed to comply with the law or

the required regulations, the State Engineer may revoke the license. The State Engineer may refuse to reissue a license to a well driller if the well driller has violated the law or the regulations.

4. The order revoking or refusing to reissue a license is final unless an action for review by the district court is filed pursuant to [NRS 533.450](#).

5. The State Engineer shall order any person who drills a well without a license to plug that well. If the well is not plugged within 30 days after the order, the State Engineer shall plug the well at the expense of the person who owned or drilled the well.

6. If any licensed driller who owns, rents, leases or has a contract to purchase a well-drilling rig allows an unlicensed person to drill or perform any work in connection with well drilling, except under the supervision of the licensed driller, the license must be revoked or not reissued.

[Part 7a:178:1939; added [1947, 52](#); A [1955, 328](#)] — (NRS A [1957, 719](#); [1969, 95](#); [1981, 360](#))

NRS 534.170 Well driller to keep log and records; contents; information to be furnished to State Engineer; report of test.

1. The well driller shall keep:

(a) A log of the depth, thickness and character of the different strata penetrated and the location of water-bearing strata; and

(b) An accurate record of the work, including:

(1) A statement of the date of beginning work;

(2) The date of completion;

(3) The length, size and weight of the casing and how it is placed;

(4) The size of the drilled hole;

(5) Where sealed off and the type of seal;

(6) The name of the well driller and the type of drilling machine used;

(7) The number of cubic feet per second or gallons per minute of flow from such well when completed; and

(8) The pressure in pounds per square inch if it is a flowing well, and, if nonflowing, the static water level, and the water temperature.

2. The well driller shall furnish a copy of the log and the record of work for every well drilled to the State Engineer within 30 days after the well is completed.

3. If the well is to be tested by pumping by the holder of the permit, the report of the test must include the drawdown with respect to the amount of water pumped and any additional information requested by the State Engineer. This information must be reported and verified on forms prescribed by the State Engineer. The report must be returned:

(a) Immediately following the completion of the test; or

(b) Within 30 days following the completion of the well,

→ whichever occurs later.

4. The log, record of the work and report of the test are a permanent record in the Office of the State Engineer.

[Part 7a:178:1939; added [1947, 52](#); A [1955, 328](#)] — (NRS A [1981, 1842](#))

NRS 534.180 Applicability of chapter to wells used for domestic purposes; registration and plugging of wells used for domestic purposes; wells for accessory dwelling unit of single-family dwelling.

1. Except as otherwise provided in subsection 2 and as to the furnishing of any information required by the State Engineer, this chapter does not apply in the matter of obtaining permits for the development and use of underground water from a well for domestic purposes where the draught does not exceed 2 acre-feet per year.

2. The State Engineer may designate any groundwater basin or portion thereof as a basin in which the registration of a well is required if the well is drilled for the development and use of underground water for domestic purposes. A driller who drills such a well shall register the information required by the State Engineer within 10 days after the completion of the well. The State Engineer shall make available forms for the registration of such wells and shall maintain a register of those wells.

3. The State Engineer may require the plugging of such a well which is drilled on or after July 1, 1981, at any time not sooner than 1 year after water can be furnished to the site by:

(a) A political subdivision of this State; or

(b) A public utility whose rates and service are regulated by the Public Utilities Commission of Nevada,

→ but only if the charge for making the connection to the service is less than \$200.

4. If the development and use of underground water from a well for an accessory dwelling unit of a single-family dwelling, as defined in an applicable local ordinance, qualifies as a domestic use or domestic purpose:

- (a) The owner of the well shall:
 - (1) Obtain approval for that use or purpose from the local governing body or planning commission in whose jurisdiction the well is located;
 - (2) Install a water meter capable of measuring the total withdrawal of water from the well; and
 - (3) Ensure the total withdrawal of water from the well does not exceed 2 acre-feet per year;
 - (b) The local governing body or planning commission shall report the approval of the accessory dwelling unit on a form provided by the State Engineer;
 - (c) The State Engineer shall monitor the annual withdrawal of water from the well; and
 - (d) The date of priority for the use of the domestic well to supply water to the accessory dwelling unit is the date of approval of the accessory dwelling unit by the local governing body or planning commission.
- [3:178:1939; A 1947, 52; 1949, 128; 1955, 328] — (NRS A 1971, 868; 1977, 383; 1981, 1843; 1983, 2090; 1985, 1302; 1997, 2010; 2007, 846)

NRS 534.185 Waiver of certain requirements for domestic wells by State Engineer; exceptions.

1. The State Engineer shall, upon written request and receipt of a written agreement between the affected property owners, waive the requirements of this chapter regarding permits for the use and development of underground water from a well if:
 - (a) The well existed on July 1, 1983;
 - (b) It is used solely for domestic purposes by not more than three single-family dwellings; and
 - (c) Each of those dwellings does not draw more than 2 acre-feet of water per year.
 2. The State Engineer may require an owner who has been granted such a waiver to apply for a permit if one or more of the dwellings is drawing more than 2 acre-feet of water per year.
 3. This section does not apply to any groundwater basin for which the State Engineer has in effect on July 1, 1983, a procedure of issuing revocable permits.
- (Added to NRS by 1983, 1674; A 2007, 847)

...

NRS 534.350 Requirements for certain public water system to receive credits for addition of new customers to system.

1. A public water system may receive credits, as provided in this section, for the addition of new customers to the system. The granting of a credit pursuant to this section must be limited to public water systems in areas:
 - (a) Designated as groundwater basins by the State Engineer pursuant to the provisions of NRS 534.030; and
 - (b) For which the State Engineer has issued an order for granting a credit pursuant to this section.
2. A public water system which provides service in a groundwater basin is entitled to receive a credit for each customer who is added to the system and:
 - (a) Voluntarily ceases to draw water from a domestic well located within that basin; or
 - (b) Is the owner of a lot or other parcel of land, other than land used or intended solely for use as a location for a domestic well, which:
 - (1) Is located within that basin;
 - (2) Was established as a separate lot or parcel before July 1, 1993;
 - (3) Was approved by a local governing body or planning commission for service by an individual domestic well before July 1, 1993; and
 - (4) Is subject to a written agreement which was voluntarily entered into by the owner with the public water system pursuant to which the owner agrees not to drill a domestic well on the land and the public water system agrees that it will provide water service to the land. Any such agreement must be acknowledged and recorded in the same manner as conveyances affecting real property are required to be acknowledged and recorded pursuant to chapter 111 of NRS.
3. If a county requires, by ordinance, the dedication to the county of a right to appropriate water from a domestic well which is located on a lot or other parcel of land that was established as a separate lot or parcel on or after July 1, 1993, the county may, by relinquishment to the State Engineer, allow the right to appropriate water to revert to the source of the water. The State Engineer shall not accept a relinquishment of a right to appropriate water pursuant to this subsection unless the right is in good standing as determined by the State Engineer. A right to appropriate water that is dedicated and relinquished pursuant to this subsection:
 - (a) Remains appurtenant only to the parcel of land in which it is located as specified on the parcel map; and
 - (b) Maintains its date of priority established pursuant to NRS 534.080.

4. If an owner of a parcel of land specified in subsection 3 becomes a new customer of a public water system for that parcel of land, the public water system is entitled to receive a credit in the same manner as the addition of any other customer to the public water system pursuant to this section.

5. The State Engineer may require a new customer, who voluntarily ceases to draw water from a domestic well as provided in paragraph (a) of subsection 2 or whose right to appropriate water is dedicated pursuant to subsection 3, to plug that well.

6. A credit granted pursuant to this section:

(a) Must be sufficient to enable the public water system to add one service connection for a single-family dwelling to the system, except that the credit may not exceed the increase in water consumption attributable to the additional service connection or 2 acre-feet per year, whichever is less.

(b) May not be converted to an appropriative water right.

7. This section does not:

(a) Require a public water system to extend its service area.

(b) Authorize any increase in the total amount of groundwater pumped in a groundwater basin.

(c) Affect any rights of an owner of a domestic well who does not voluntarily comply with the provisions of this section.

8. As used in this section:

(a) "Domestic well" means a well used for culinary and household purposes in:

(1) A single-family dwelling; and

(2) An accessory dwelling unit for a single-family dwelling if provided for in an applicable local ordinance, including the watering of a garden, lawn and domestic animals and where the draught does not exceed 2 acre-feet per year.

(b) "Public water system" has the meaning ascribed to it in [NRS 445A.840](#).

1 CASE NO. CV 39524

2 DEPT NO. 2

3
4 IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT
5 COUNTY OF NYE, STATE OF NEVADA
6

7 PAHRUMP FAIR WATER, LLC.,)
a Nevada limited-liability company)
8 STEVEN PETERSON, an individual;)
MICHAEL LACH, an individual;)
9 PAUL PECK, an individual;)
BRUCE JABOUR, an individual and)
10 GERALD SCHULTE, an individual)

11 Petitioners,)

12 vs.)

13 JASON KING, P.E., Nevada State)
Engineer, DIVISION OF WATER)
14 RESOURCES, DEPARTMENT OF CONSERVATION)
AND NATURAL RESOURCES,)
15)

16 Respondent.)

CERTIFIED
TRANSCRIPT

17 BEFORE THE HONORABLE STEVEN P. ELLIOTT

18 DISTRICT COURT JUDGE

19 1520 EAST BASIN AVENUE

20 PAHRUMP, NEVADA 89060

21
22 ON THURSDAY, NOVEMBER 8, 2018

23 AT 10:07 A.M.

24
25 Reported by: Deborah Ann Hines, CCR #473, RPR

1 Appearances:

2 For the Petitioners:

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4 - and -
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E X H I B I T S

PLAINTIFF'S EXHIBIT

OFFERED

ADMITTED

(None)

DEFENDANT'S EXHIBIT

OFFERED

ADMITTED

(None)

1 THURSDAY, NOVEMBER 8, 2018

2 ---oOo---

3 THE COURT: Good morning. You may be
4 seated. Well, we're here in the case of Pahrump Fair
5 Water versus Jason King, the State Engineer. And I'm
6 judge -- I'm the Senior Judge Steve Elliott from
7 Reno, and I've served about 16 years on the bench
8 there in general jurisdiction, and now I have this
9 case. It's a real pleasure to have it.

10 And I believe we're hearing oral arguments,
11 not an evidentiary hearing as such, concerning the
12 petition by Pahrump Fair Water with regard to an
13 order from the State Engineer concerning domestic
14 wells in the Pahrump basin. That's what I understand
15 it to be, so hopefully we're all on the same page of
16 what we're going to do today. And perhaps the
17 lawyers for Pahrump Fair Water can introduce
18 themselves so I know who you are.

19 MR. RIGDON: Your Honor, Dave Rigdon from
20 Taggart & Taggart. I'm here with Paul Taggart from
21 Taggart & Taggart as well.

22 MR. TAGGART: Good morning, your Honor.

23 THE COURT: Good morning.

24 And then for the State, is it proper to call
25 it the State Engineer?

1 MR. BOLOTIN: Yes. Yes, your Honor. James
2 Bolotin, Deputy Attorney General, on behalf of the
3 State Engineer and the Division of Water Resources.
4 With me I have Micheline Fairbanks, deputy
5 administrator from the Division of Water Resources,
6 and Jason King, the State Engineer.

7 THE COURT: Okay. Great. Thank you. Well,
8 I think under the circumstances it's appropriate to
9 have Pahrump Fair Water make the first presentation,
10 since it's really your petition.

11 MR. RIGDON: Thank you, your Honor. And
12 before I start, I want to thank your Honor and thank
13 opposing counsel for scheduling this hearing in an
14 expedited manner. As you know, this has been a long
15 process that started almost a year ago and gone
16 through some machinations and we really do appreciate
17 the cooperation of opposing counsel and the court
18 getting this scheduled as early as it did, so we do
19 appreciate that.

20 Dave Rigdon on behalf of Pahrump Fair Water,
21 and other respondents who are members of Pahrump Fair
22 Water. And let me introduce my clients here. Seated
23 in the audience here, if Norma Jean and Lisa,
24 they're -- Norma Jean Opatik and Lisa Bond are the
25 managing members of Pahrump Fair Water. And behind

1 them, if everybody who's a member or supporter of
2 Pahrump Fair Water could stand up and be recognized
3 by the judge. These are all the various members and
4 supporters of the organization.

5 As you said -- as you noted, this is a case
6 about domestic wells, and the State Engineer has
7 issued an order in this case regarding domestic
8 wells. And with all orders of the State Engineer,
9 regardless of what they're about, there's three what
10 I call hurdles that have to be met or criteria that
11 have to be met for a State Engineer order to be
12 valid.

13 And the way I like to think of them is as
14 hurdles, if you go to a track meet and you go to an
15 event with hurdles there, if any one of these hurdles
16 is tripped over and is not met, then the order is
17 invalid. And those three hurdles are the State
18 Engineer has to have legislative, clear legislative
19 authority in order to do -- to issue the order. He
20 has no -- the State Engineer is not like your Honor
21 or like the legislature or like city council, the
22 State Engineer has no constitutional authority. He's
23 a creature of statute. The legislature created his
24 office and he can only do what the legislature
25 authorized him to do. So he has to meet that hurdle.

1 He has to have legislative authorization to do what
2 he needs to do.

3 The second hurdle he has to meet is if
4 whatever order he issues is going to impair or
5 infringe upon a property interest, then he has to
6 give the people who own that property interest due
7 process. So that's the second hurdle he has to
8 overcome.

9 And then the third hurdle of those orders is
10 whatever he does to avoid being arbitrary and
11 capricious or using his discretion, he has to have
12 substantial evidence in order to support the order.

13 And so we are here asking that Order 1293A,
14 which is an order issued by the State Engineer
15 regarding domestic wells, new domestic wells in the
16 Pahrump basin, be overturned. Now, we're asking it
17 to be overturned because it doesn't meet any of those
18 three criteria.

19 Domestic wells are exempt under the law from
20 State Engineer regulation. Property owners were not
21 given due process before the regulation was issued.
22 And Order 1293 isn't supported by substantial
23 evidence. So there's not -- it's not just that he
24 can't meet one of the hurdles, the State Engineer
25 can't meet any of the three hurdles that an

1 order needs, that a valid order needs to meet.

2 So to give you an idea, because you've only
3 recently become the judge in this case, I wanted to
4 give you an idea of some of the procedural
5 background.

6 Excuse me, your Honor. I apologize, your
7 Honor.

8 So I wanted to give you some of the
9 background on what's happening in this case and how
10 it originated. So almost a year -- and, your Honor,
11 may I approach? I have a copy of this PowerPoint
12 presentation in a binder, if you would like to see
13 it.

14 THE COURT: Any objection to that?

15 MR. BOLOTIN: No, your Honor. We have a
16 similar situation. We're going to give one when
17 we're going up too.

18 THE COURT: That's fine.

19 MR. RIGDON: Just in case the screen goes
20 out again.

21 THE COURT: I'll look at the screen for the
22 time being. I can see that pretty well here.

23 MR. RIGDON: All right. So as I said, about
24 a year ago, right before Christmas of 2017, the State
25 Engineer issued Order 1293. And he issued this order

1 kind of out of the blue. Caught everybody be
2 surprise. There was no notice. There's never been
3 posted notice that he was going to issue a regulation
4 of this type. There was no hearing ever held on it.
5 But he issued this order.

6 And under the statute, NRS 533.450, the
7 issuance of the order begins a 30-day period of which
8 people can appeal that order to -- and to file a
9 petition for judicial review for consideration by a
10 district court.

11 So the very next day, on December 20th --
12 now, one thing about Order 1293 was that it banned
13 the drilling of new domestic wells in the Pahrump
14 basin, just like Order 1293A does. But on the very
15 next day after he issued the order, there were
16 individuals who had filed what are called notices of
17 intent to drill a domestic well prior to the issuance
18 of the order that hadn't been acted upon yet.

19 And on December 20th, the State Engineer
20 sent the letter out to all the well drillers who had
21 submitted those notices on behalf of their clients
22 telling them that he was rejecting all of those
23 notices because he had issued this order and this
24 order banned the drilling of domestic wells. So
25 there was an issue with retroactive application. And

1 that's just going to be important in the procedural
2 history here, not currently an issue in front of us.

3 So the people in Pahrump here who are
4 affected by the order we're obviously taken by
5 surprise, and so they had to spend their Christmas
6 holiday and their New Year holiday last year trying
7 to organize and figure out, you know, what do we do
8 about this. There's a 30-day period to appeal, not
9 much time to get organized and decide how they want
10 to deal with this issue.

11 And so they approached our office, and we
12 gave them some advice on what they can do. And what
13 they decided to do -- the order itself says that it
14 affects about 8,000 parcels. Now, actually it
15 probably affects somewhere between 4,000 and 8,000
16 parcels, but that's a lot of parcels. And so rather
17 than have 4,000 or thousands of people each filing
18 individual petitions for judicial review, we
19 recommended that they form an association and that
20 way we could have everybody under one umbrella, do
21 one appeal and handle it that way.

22 And so that's what the group did, and they
23 formed in that period of time between the issuance of
24 the order and January 18th, they formed Pahrump Fair
25 Water, LLC to operate as that umbrella organization

1 to represent them in these proceedings. And so on
2 January 18th we filed on behalf of Pahrump Fair Water
3 a petition for judicial review of Order 1293.

4 We also filed, in accordance with the
5 statute, a motion to stay enforcement of the order
6 while the petition on the merits was pending, and we
7 did that on February 1st. Went through and briefed
8 the motion on the -- briefed the motion for stay, and
9 we finally got to a hearing on May 10th regarding the
10 motion for stay in front of Judge Maddox. And we
11 argued that. We put on witnesses talking about the
12 harm that this order was doing to people. And at end
13 of that hearing, Judge Maddox decided not to issue
14 the stay, he wanted to hear the petition on the
15 merits before he tried to stay the order.

16 But he did raise some concerns about the due
17 process issues and asked for an extra briefing on the
18 due process issue and the issue of whether the right
19 to drill a domestic well is a property right. And so
20 we began doing that briefing, and on July 6th we
21 filed our opening brief in the case.

22 We thought everything was moving along. We
23 had a hearing date set for September 6th. And then
24 on July 12th, 2018, the State Engineer, again out of
25 the blue, issues an amendment to Order 1293, and it's

1 called 1293A, which is the order we're here on right
2 now. He issued that order without notifying the
3 court, didn't ask for leave of the court to issue the
4 amended order. Didn't notify opposing counsel. We
5 found out about it because we have a paralegal in our
6 office who checks the State Engineer's website
7 periodically for new orders that are issued and
8 that's how we found out about it. It was the day
9 after it was filed, but we received no courtesy phone
10 call saying that we, you know, we've issued an
11 amended order.

12 The amended order fixed the retroactivity
13 problem. So under the amended order, the State
14 Engineer said, you know what, that retroactivity
15 issue is an issue and I'm going to go ahead and
16 create a new exception to the order to allow those
17 people who had filed those notices of intent to drill
18 that I had denied to go ahead and drill their
19 domestic wells.

20 And so it presented us with a real dilemma,
21 because while the court had exclusive jurisdiction
22 over the matter, and so the State Engineer is not
23 supposed to act on the matter while it's in front of
24 the court and try to do an amendment like that, they
25 violated that. There's a case called West Side

1 Charter that talks about the exclusive jurisdiction
2 of the court, and you're supposed to ask leave for
3 the court before you do anything along those lines,
4 and they didn't do that.

5 We were in a real catch 22 because we didn't
6 want to deny relief to the people that the amended
7 order gave relief to. We wanted to -- we didn't want
8 to take that relief away from them by getting Order
9 1293 declared invalid on procedural grounds like
10 that, but we also didn't want to delay the
11 proceedings that we had been in already, at that time
12 for almost seven months.

13 And so what we did, we worked with the State
14 Engineer's office and opposing counsel and we entered
15 into a settlement agreement. And what we agreed to
16 do was expedite these proceedings, expedite the
17 briefing and the scheduling of the hearing in these
18 proceedings, and they would agree that -- and then we
19 would dismiss our previous petition for judicial
20 review against Order 1293 and file a new petition for
21 judicial review against 1293A, and so that's what we
22 did.

23 And so on August 10th we filed the new
24 petition for judicial review of Order 1293A, which is
25 the order in front of you today. And then on

1 September 7th, we filed our opening brief. State
2 Engineer filed his answering brief on October 8th.
3 We filed our reply brief last week. And here we are
4 today at the hearing on the merits. So that's how we
5 got to where we are today, and that's why you got
6 assigned kind of halfway through a case that had
7 already been being argued for about seven, eight
8 months before that. So I just wanted to give you
9 that procedural background.

10 So there are -- this is an appeal of a State
11 Engineer determination via a petition for judicial
12 review. And so it's not really an evidentiary
13 hearing. We're not going to put any witnesses on
14 here today. There's no evidence that's going to be
15 entered into the record today, but there are some
16 undisputed facts in this case that are very important
17 for the court to understand with respect to -- to put
18 their order into context.

19 The Order 1293A, what does it do? It
20 restricts the drilling of new domestic wells on --
21 and this is very important -- on existing parcels.
22 Not on new parcels. On existing parcels in Pahrump,
23 unless the property owner first does one thing, and
24 that is go out and buy two acre feet of existing
25 state issued water right permits that are issued in

1 the basin, and then surrender those, give them up
2 forever to the State Engineer. So basically the
3 State Engineer's saying, "You can't drill a new
4 domestic well unless you go buy other property and
5 give that property to me, and then I'll let you go
6 ahead and drill a domestic well." And that's the
7 essence of what Order 1293A does.

8 Now, the order cites two primary pieces of
9 evidence in the order to justify that. One of them
10 is a 2017 update to the Nye County Water Resources
11 Plan, and that's in the record. It's a fairly
12 lengthy water resources plan update, about 150 or so
13 pages. And that plan describes all the different
14 basins in Nye County and talks about water issues
15 throughout the basins.

16 That plan cites to, and the State Engineer
17 also cited to in his order, a groundwater model
18 report that was prepared by a gentleman named Klenke.
19 And he's a ground water modeler, and he prepared this
20 groundwater model report that deals with the
21 groundwater model that was developed for the Pahrump
22 basin. So that's the other piece of evidence that
23 was cited in the order. And that's really what the
24 State Engineer, if you read the order, those are
25 really the two pieces of evidence the State Engineer

1 relies on.

2 But it's undisputed, and the State Engineer
3 says in the order that neither of these pieces of
4 evidence considered the affect of new domestic wells
5 on existing wells in the basin. What those two
6 pieces of evidence were is they were just pieces of
7 evidence about what was happening under current
8 pumping situations. It never -- they were never
9 designed to estimate what future impacts of
10 additional wells might be.

11 Other undisputed facts, and you'll find them
12 in the reports that are part of the record in this
13 case, this used to be an over-pumped basin. Back in
14 1969, there was numerous water right permits issued
15 for agricultural activity, and they were issued far
16 in excess of the perennial yield, and the basin was
17 over-pumped. But since 1969, most of that
18 agricultural activity has ceased, and pumping has
19 steadily declined since that time.

20 Currently today this basin is not being
21 over-pumped. That's the record of the State
22 Engineer's office. Perennial yield of this basin is
23 20,000 acre feet a year. That's what the State
24 Engineer estimates is the amount of water that can be
25 extracted every year without a problem. Current

1 pumping in the basin today is estimated by the State
2 Engineer's office to be 16,000 acre feet a year. So
3 it's not a -- well, it's an over-appropriated basin,
4 it's not an over-pumped basin.

5 The other thing is the State Engineer
6 estimates, by his own records, that the average
7 domestic well in this basin uses half an acre foot of
8 water a year. And that's important. If you drive
9 around town here, you'll see that the properties that
10 are on domestic wells, you're not seeing large, lush
11 lawns and massive amounts of landscaping that take up
12 a huge amount of water. This is water that's being
13 used to support the actual households, and they use
14 about half an acre foot a year on average in this
15 basin.

16 And then the last thing is Order 1293A is a
17 basin-wide order. It applies to all property in the
18 basin. And that's true even though the evidence in
19 these reports shows that the water level declines in
20 the basin that are occurring only occur in a portion
21 of the basin. There's other portions of the basin
22 where water levels are level or in a few instances
23 water levels are actually rising in some portions of
24 the basin, but the order applies to the entire basin.

25 So with these type of actions, and you've

1 been doing this a long time, your Honor, so you
2 probably know this, but I'm going to go through it
3 anyway. With NRS 533.450 action, the standard is
4 that any person who feels aggrieved by an order of
5 the State Engineer can seek judicial review. And
6 that's important. You don't have to actually show a
7 harm, you just have to feel aggrieved in order to
8 file a petition for judicial review of the State
9 Engineer order.

10 The review of a State Engineer order, under
11 the 533.450 standard, is, quote, in the nature of an
12 appeal. So it's like an appeal, because we're
13 appealing an agency decision, but it's not the
14 formalistic appeal that you see with like the supreme
15 court, that type of thing. So it's in the nature of
16 an appeal but the proceedings are supposed to be
17 informal, and everybody must be given an opportunity
18 to be heard in these proceedings.

19 So the other thing is, as I mentioned
20 before, the State Engineer must have substantial
21 evidence to support his decision. Without
22 substantial evidence, his decision would be arbitrary
23 and capricious or an abuse of his discretion, and
24 that's the standard by which State Engineer
25 determinations are judged. Are they arbitrary? Are

1 they capricious? Are they an abuse of discretion
2 where he's given discretion?

3 An order of arbitrary, if it's made, this is
4 Black's Law, if it's made without consideration for
5 facts, circumstances, fixed rules or procedures. So
6 if the State Engineer ignores facts in the record, if
7 he ignores fixed rules or procedures, then by
8 definition he is being arbitrary. It's capricious if
9 it's contrary to the evidence or established rules of
10 law, so, therefore, if he didn't follow the
11 established rules of law, or the evidence says
12 something different than what he says it says, then
13 it's automatically capricious.

14 So what level of deference should be
15 afforded to the State Engineer in a proceeding like
16 this? Well, we divide it into legal questions and we
17 divide it into evidentiary questions. On legal
18 questions it's clear from the case law from the
19 Nevada Supreme Court that no deference is given to
20 the State Engineer on his legal interpretations,
21 particularly legal interpretations of what his own
22 power is, okay. And why do we know that? We know
23 that because just this year in a case called Felton
24 versus Douglas County, the state supreme court said
25 that a reviewing court is required to decide purely

1 legal questions without deference to an agency
2 determination. No deference.

3 Now, the State Engineer, in his answering
4 brief, cites to a 1980s case that says you should
5 give him deference on legal questions. But this is
6 current law. This is 2018. This is this year. This
7 supreme court that we have sitting right now has said
8 that you're to decide this without deference to his
9 determinations of the law.

10 And, again, in 1992, which is again after
11 the case the State Engineer cites, Town of Eureka
12 versus State Engineer, which is a case directly
13 involving the State Engineer, a review of a State
14 Engineer decision, the court said that the district
15 court is free to decide the purely legal questions
16 without deference to the agency's decision. So
17 there's no deference on legal interpretations despite
18 what the State Engineer will represent to you today.

19 And why is that? It's really simple. It
20 gets back to Civics 101 from grammar school. We have
21 three branches of government. We have a judicial
22 branch, a legislative branch, and an executive
23 branch. And the job of the legislative branch is to
24 interpret the law. That goes all the way back to
25 Marbury versus Madison in 1803. It's emphatically

1 the providence and duty of the judicial department to
2 say what the law is, not the executive department
3 that the State Engineer operates under. Their job is
4 to carry out and enforce whatever the law is. But
5 it's the judicial department that is supposed to be
6 deciding -- interpreting what the law means.

7 Justice Gorsuch, who's our second most
8 recent United States Supreme Court appointment, has
9 lamented this. He's talked about this. He said
10 there's a problem -- he's talking about the federal
11 courts, he says there's a problem in the federal
12 courts. The courts aren't fulfilling their duty to
13 interpret the law, and then declared invalid agency
14 actions that are inconsistent with those
15 interpretations. He was -- again, he was speaking
16 about federal courts in that case.

17 And the nice thing is that in Nevada, our
18 state supreme court is not the problem that Justice
19 Gorsuch said because they've said in Felton no
20 deference. So our state courts are actually
21 following what the United States Supreme Court
22 Justice has said is the right way to do things. No
23 deference to State Engineer determinations.

24 Now normally, your Honor, I would tell you,
25 okay, there's no deference on the legal

1 determinations, but there is deference on evidentiary
2 determinations. After all, the State Engineer is an
3 engineer. He understands the evidence. And we would
4 normally defer to him on those evidentiary
5 determinations, but in this particular case that's
6 not the way it should be.

7 In this particular case no deference should
8 be given to his evidentiary findings. And why is
9 that? That's because the state supreme court, back
10 in 1979 in a case called Revert V Ray, which is one
11 of the seminal cases regarding procedure in water law
12 reviews, said that the deference afforded to the
13 State Engineer on evidentiary findings, on factual
14 findings has a condition attached to it. And that
15 condition is that his proceedings below must have
16 been full and fair. And if they weren't full and
17 fair, then you don't have to give him deference on
18 those evidentiary findings.

19 What does it mean to have a full and fair
20 proceeding below? Well, first of all, all parties
21 have to be noticed and be provided with an
22 opportunity to be heard at the State Engineer level.
23 And then once they're heard, and this is right out of
24 Revert V Ray, the State Engineer must fully resolve
25 each and every single objection or issue that was

1 raised at his level and provide a detailed order that
2 a court can then review as an appellate court would
3 normally review a record on appeal. And they said if
4 those procedure are not followed, the reviewing court
5 should not hesitate to intervene. That's what the
6 supreme court told us.

7 Now, why? Why is that the case? What is
8 the policy that's being served by forcing the State
9 Engineer to have full and fair proceedings below?
10 Well, it allows evidence that's used to be tested.
11 That's the key. And if there's no proceedings below,
12 there's no way to test the voracity, the
13 authenticity, the validity of the information that
14 he's relying on. None of it has been subjected to
15 cross-examination. None of it has been subjected to
16 alternative experts or alternative expert reports
17 haven't been prepared.

18 In short, your Honor, the record that's been
19 supplied to you as a, quote-unquote, record on
20 appeal, is just a stack of documents that the State
21 Engineer says, "I looked at these documents before I
22 issued this order." That's all there is. There's no
23 hearing transcripts, there was never -- Mr. Klenke,
24 that created that groundwater model, he never had to
25 testify. He never had to be subjected to examination

1 about what his groundwater model meant or how it was
2 built or what the parameters of it were.

3 And so because of that, there's never been
4 an opportunity that the petitioners have to challenge
5 any of this evidence. So you should take a really
6 skeptical look. And this is why there's no deference
7 to him on his evidentiary determinations in this
8 case, because it's never -- that evidence has never
9 been tested in an adversary proceeding, and that is
10 the key.

11 We all know that the whole point of an
12 adversary proceeding is to test evidence, is to make
13 sure that evidence we're using, whether it's a
14 criminal setting or civil setting, to make sure that
15 that evidence is valid, it's authenticated, and it's
16 relevant to the proceedings. And that has never been
17 done in this case, and so you need to take a look at
18 his record on appeal with a very, very skeptical eye.
19 And that's what we're asking you to do.

20 So our argument boils down to four main
21 points. Order 1293 should be overturned and
22 invalidated in this case, first of all, because, as I
23 said before, domestic wells are exempt from State
24 Engineer regulation. And in just a minute
25 Mr. Taggart, somebody's who's practiced in this area

1 for 20 years, is going to get up and talk to you
2 about what the water law statutes say and what State
3 Engineer -- they say the State Engineer's authority
4 is and what the legislative history behind those
5 statutes are. And once you hear that, you'll
6 understand why we say domestic wells are exempt from
7 the State Engineer regulation, even though that does
8 seem to be counterintuitive.

9 Second, property owners were not given due
10 process before Order 1293A was issued. That's just a
11 fact in the record, and it's a violation of
12 constitutional due process protections. And it's a
13 violation of constitutional due process because there
14 is a property interest at stake here.

15 Finally, or thirdly, Order 1293A is not
16 supported by substantial evidence. And we'll go
17 through that evidence -- I'll go through that
18 evidence with you. I'll show you some hydrographs
19 and some of the pages from the reports that the State
20 Engineer relied on. But I think what you'll find is
21 that there is not substantial evidence in this
22 record, even though this is a handpicked record that
23 the State Engineer, untested handpicked record,
24 there's not evidence in there to support the decision
25 that he made.

1 And then finally we argue that Order 1293A
2 resulted in unconstitutional taking of private
3 property without just compensation in violation of
4 the United States and the Nevada State Constitution.
5 And so that's the basics of the argument that we're
6 going to walk through with you here today. And so
7 I'll bring Mr. Taggart up. He's going to talk about
8 the first part of that, and then I'll be back up to
9 talk about other parts.

10 THE COURT: Thank you.

11 MR. TAGGART: Good morning, your Honor.

12 THE COURT: Good morning.

13 MR. TAGGART: When I went into private
14 practice after working at the attorney general's
15 office, I served as a city attorney in Fernley. And
16 we worked on a lot of land development applications,
17 a lot of parcel maps, subdivision maps. And we
18 learned, as city attorneys, very clearly what the
19 rules are for when parcels are created and when
20 subdivisions are created.

21 And one of the things I learned, one of the
22 main principles, and it's going to be really
23 important here today, is that once a parcel is
24 created, it is bound by the law in effect when that
25 parcel was created. And if you later adopt a law

1 that affects how a parcel can be approved in the
2 future, that new law cannot apply to an existing
3 parcel. And we understood that from the terms of
4 zoning and from special use permits and all of the
5 land development restrictions that our city council
6 might have wanted to place on something, they had to
7 do it before the parcel was created. They couldn't
8 come up with a new condition afterwards.

9 And that's an important principal of what
10 we're talking about here. We're talking about
11 thousands of parcels that exist in Pahrump that were
12 approved by Nye County that were signed off by all
13 the rules in place at the time, and those parcels
14 exist today. And now the State Engineer is trying to
15 place a new restriction on the ability to use those
16 parcels, something that is not authorized by law.

17 And as I walk through this, I'll show you
18 that the legislature, when it has dealt with domestic
19 wells, has always been careful to say that this new
20 restriction on domestic wells is for parcels created
21 after the date of this legislation. And that's
22 because the legislature also knows you cannot place a
23 new restriction on an existing parcel once it's
24 created.

25 Now, one of the things that Mr. Rigdon

1 talked about, and it's important here, is I'm going
2 to talk to you about what is the State Engineer
3 authorized to do by statute. And the question might
4 come up of do you need to defer to the State
5 Engineer's interpretation of his own powers or do you
6 have de novo power as a court to review the statutes
7 of the State of Nevada and determine what his powers
8 are. We say that your review is de novo, and that
9 you need to look at those Nevada statutes as they
10 were adopted by the legislature because that's what
11 courts do.

12 And that's what this tension that we've seen
13 recently in administrative law cases that Justice
14 Gorsuch was talking about, that Justice Hardesty
15 talks about in Felton that it's not proper to give
16 deference to state agencies when they're interpreting
17 their own powers, because that's what courts do, they
18 interpret statutes to define what those powers are.

19 So what I'd like to do now is go through
20 those statutes that Nevada has adopted with respect
21 to water law. Now, in the binder I provided to you,
22 there's a tab, and behind that tab is the water
23 statutes involving groundwater in Nevada, and it
24 looks like this (indicating).

25 THE COURT: Okay. I have that.

1 MR. TAGGART: All right. So I do not have
2 this on the screen, but we're going to walk through
3 these statutes and I'm going to point out to you,
4 because I think it's important to see the groundwater
5 law in context, because what we're saying is the
6 State Engineer, historically in his origin, never had
7 authority over domestic wells in the state of Nevada.

8 It's a principle that has been banged into
9 my head from day one, and it's stated to the
10 legislature over and over again. And that's a
11 principle that may seem counterintuitive because it's
12 a water well, and the State Engineer is the engineer
13 of water in the state of Nevada. But there's always
14 been a carve out for these small water requirements
15 at domestic wells on individual parcels.

16 So this Chapter 534 is what governs
17 groundwater in the state of Nevada. Now, this was
18 adopted in 1939. Prior to 1939, there was common law
19 that controlled the acquisition of water rights in
20 the state of Nevada for groundwater. There was prior
21 appropriation, we call it, which means if you own
22 land and you go drill a well, you could capture
23 water, put it to beneficial use, and if you do those
24 steps, if you follow those steps of putting it to
25 beneficial use, of proceeding with diligence, the

1 steps of prior appropriation, you get a water right.

2 And so then in 1939 the legislature said we
3 are going to give to the Nevada State Engineer
4 authority over appropriations of groundwater in the
5 state of Nevada. In 1905 through 1913, the
6 legislature created the State Engineer's office and
7 gave him authority over surface water. That's
8 Chapter 533.

9 In 1939 they added Chapter 534, and that
10 is -- and they added groundwater to the State
11 Engineer's authorities. But what they did when they
12 adopted this statute, this chapter, is they provided
13 the exemptions that we're going to talk about.

14 The first one is NRS 534.180(1), so if you
15 could turn to that. NRS 534.180(1), and I've
16 highlighted it here, it says -- well, the title of
17 this, applicability of chapter to wells used for
18 domestic purposes. And sub 1 says, except as
19 otherwise provided in subsection 2 as to the
20 furnishing of any information required by the State
21 Engineer, this chapter -- so the entire chapter
22 534 -- does not apply to the matter of obtaining
23 permits for the development and use of underground
24 water from a well for domestic purposes when the
25 draught does not exceed two acre feet.

1 So that language is saying that a parcel
2 owner can pump two acre feet of water for domestic
3 purposes and they do not need a permit from the State
4 Engineer. They have a right to two acre feet. That
5 is not subject to State Engineer permitting processes
6 or development processes.

7 Then if you go to NRS 534.030, so 534.030
8 which is on page four.

9 THE COURT: Okay. I have that.

10 MR. TAGGART: There I've highlighted also
11 where it says the State Engineer shall supervise all
12 wells tapping artesian water or water in definable
13 underground aquifers drilled after March 22nd, 1913
14 and all wells tapping percolating water drilled
15 subsequent to March 25th, 1939, except those wells
16 for domestic purposes for which a permit is not
17 required.

18 So this is saying that the State Engineer
19 shall supervise all wells except wells for domestic
20 purpose. In other words, the State Engineer shall
21 not supervise wells for domestic purposes. And so
22 these are the two exemptions that are clear in
23 statute and that exist and have existed since the
24 creation of the groundwater law.

25 And why that's important is when the

1 legislature adopted this law, it, if you will,
2 grandfathered in the idea of a right to two acre feet
3 if you own a parcel. Now, what also is very
4 important is whenever a parcel was created after this
5 exemption, it was created with this right. So every
6 parcel that came into being after this exemption has
7 the right -- every parcel owner has the right to rely
8 on that being the law when that parcel was created.

9 You can't come in now and change it, unless
10 you want to pay compensation, unless you want, you
11 know, I mean, you run into all the constitutional
12 problems you have. So that's why the legislature has
13 always been careful to only put new restrictions on
14 domestic wells to prospective parcels that are
15 created after the date of new legislation.

16 So what we'll now see is that despite the
17 general exemption, there have been times when the
18 legislature has said, "We are going to give the State
19 Engineer some power over domestic wells and we'll do
20 that in specific instance." And now we're going to
21 walk through those specific instances, because our
22 argument is that if you have these general
23 exemptions, then nothing in this chapter applies to
24 domestic wells unless it specifically says it does,
25 because otherwise the exemption means nothing.

1 So the exemption says all of the general
2 powers of the State Engineer do not apply to domestic
3 wells. You don't need to file an application for a
4 water right. You might remember the Dodge Flat case
5 that we had where I represented the City of Fernley
6 and there was the -- it was in front of your Honor.
7 It went up to the supreme court, involved Pyramid
8 Paiute Tribe. Applications had to be filed for that
9 groundwater before the State Engineer so folks could
10 have an opportunity to use that water. Domestic
11 wells you do not need to file an application before
12 the State Engineer in order to get access to two acre
13 feet.

14 Now, what I'd also like to point out though
15 is NRS 534.013. So if you can turn back a couple
16 pages there, or one page, and that's where the
17 legislature has defined domestic uses and domestic
18 purposes. So there the legislature has said, and so
19 whenever we see this domestic use exemption it says
20 that if the water is used for culinary or household
21 purposes directly related to a single family
22 dwelling, that's number one; and two, an accessory
23 dwelling unit for a single family dwelling if
24 provided for in the local ordinance, and the watering
25 of a family garden and lawn and the watering of

1 livestock and any other domestic or household
2 purposes if the amount of water does not exceed the
3 maximum amount set in NRS 534.180 from exemption from
4 the application of this chapter.

5 So, again, as long as you're using water for
6 a single family dwelling, an accessory dwelling to
7 that single family dwelling, if it's allowed by the
8 local ordinances, you have the right to use two acre
9 feet, it's exempted from that from the considerations
10 in this chapter as long as you're using it for
11 household purposes to water domestic animals,
12 household pets, and a family garden and a lawn. As
13 long as that's what you're using it for, you have the
14 right to do that without having the State Engineer
15 control it.

16 Now, it's important to note that the State
17 Engineer's office has always acknowledged that they
18 do not have regulatory power over domestic wells.
19 And, for instance, in 2015, and this is the common
20 practice that at the beginning of every legislative
21 session the State Engineer's office makes a
22 presentation to the legislature and advises the new
23 legislators and the ones who have been there for a
24 while on what water law is and what his office does.
25 And when they do that, it's very common for them to

1 say that -- well, what I have here is the Division of
2 Water Resources overview of water law to the
3 legislature on April 22nd, 2015.

4 And do you mind if I show this to the judge?

5 MR. BOLOTIN: Can you just explain the
6 foundation where you got it from?

7 MR. TAGGART: Well, yeah, this was on the
8 legislature's website in legislative history
9 regarding water laws that are offered from the
10 legislature each year. So if -- your Honor, may I
11 approach?

12 THE COURT: I'll allow it.

13 MR. TAGGART: So it's a simple idea. If you
14 turn to the second page, it says -- it says, the use
15 of water requires a permit from the State Engineer,
16 except for domestic wells. This was 2015. Then on
17 the next page it says domestic water wells: A water
18 right application and permit are not required in
19 order to drill a domestic well. Then it defines what
20 domestic purposes are. It's consistent with the
21 definition I read earlier under stature, and it says
22 the maximum amount of water that may be pumped from
23 domestic wells is limited to two acre feet per year.
24 So this has been -- so this is not a disputed
25 question. Individuals have a right to use two acre

1 feet of water on their property without filing an
2 application with the State Engineer.

3 Now, if this hasn't been made clear yet,
4 I'll clarify it here now, is what does the current
5 order of the State Engineer do? Order 1293A says
6 that if you want, from this day forward, from the
7 date of the order forward, if you want to drill a
8 domestic well in Pahrump on an existing parcel, you
9 have to acquire two acre feet and give it to the
10 State Engineer. You no longer have the right to two
11 acre feet of water in Nevada, like I've said is
12 exempt from the State Engineer's regulatory powers,
13 he's now saying, "You have to go get two acre feet of
14 water, give it to my office, relinquish it forever
15 and then I will authorize you to put a well in and
16 you can pump that water." So he's taken away the
17 right individuals have to two acre feet of water and
18 the right that they have to drill a domestic well to
19 get access to that water.

20 So there are no exceptions in the water law
21 to the general exemption that justify this regulation
22 being placed on domestic well owners. So the
23 principle that we argue today is that if the State
24 Engineer wants to regulate domestic wells, he has to
25 point to a specific mention of domestic wells in the

1 statute that gives him that power.

2 And I also want to point out that whenever
3 domestic wells are at issue in front of the
4 legislature, they don't have enough room in the
5 building for the people who come and talk about it.
6 This is fighting words in Nevada. "Don't take away
7 my domestic well. It's a God-given right that I
8 have." This is the idea that folks in Nevada have
9 about their domestic wells. "This is my God-given
10 right. I can't live on my parcel in the desert if I
11 don't have water to live there."

12 So when in 20 -- what year are we in now?
13 2018? In 2017, before the legislative session, there
14 was a hearing in Carson City on potential water
15 legislation coming into the 2017 session. I went to
16 the legislative building that day to hear the agenda
17 of issues. I don't know how many people there were
18 exactly, I'd say hundreds, two, three, 400 people in
19 overflow rooms. We were there all day talking about
20 the domestic well issue. It's not something taken
21 lightly whenever it goes before the legislature. So
22 the legislature is very careful when they carve out
23 powers of the State Engineer that are exceptions to
24 this general exemption.

25 And the last -- and the last idea, as we go

1 through this, I want to point out is that whenever a
2 power is given to the State Engineer, it's
3 prospective. It's not on existing parcels. It's on
4 whenever a new parcel is created.

5 So if we start in the front here and we look
6 at 534.020, which is on page three, 534.020 is a
7 legislative intent statement, and this is referred to
8 by the State Engineer in their argument. Legislative
9 intent is not power. Legislative intent, when it's
10 placed in statute, is a statement of aspiration.

11 It's not a power that's created to an agency. It
12 says the intent of the legislature by this chapter is
13 to prevent the waste of underground waters and
14 pollution and contamination thereof and provide for
15 the administration of the provisions thereof by the
16 State Engineer who is hereby empowered to make such
17 rules and regulations within the terms of this
18 chapter as may be necessary for proper execution of
19 the provisions of this chapter.

20 So what is that saying? It's saying that,
21 State Engineer, if you have a power that's expressed
22 in this statute, you can develop regulations to
23 articulate how to exercise that power in the statute.
24 It's not giving you a new power. So if the State
25 Engineer's attorney argues we disagree that this

1 particular provision can provide a separate power to
2 the State Engineer, it's only saying that the State
3 Engineer shall adopt rules and regulations to enforce
4 its powers.

5 Now, in 534.050(1) -- so 534.050 is saying
6 that a permit is required to appropriate water before
7 sinking a well in a designated basin. But the first
8 language of that provision number one, it says,
9 Except as otherwise provided in subsection 2 and NRS
10 534.180, so they're saying except when it's a
11 domestic well, all these things can happen. So,
12 again, the State Engineer is not authorized to apply
13 this particular rule to domestic wells. The
14 legislature was careful there.

15 In 534.080(1) -- so in 534.080 it says on
16 page six of the materials I handed out, it talks
17 about the appropriation of underground water for
18 beneficial use from artesian definable aquifers for
19 percolating water. And so this is where I want --
20 because ultimately what the State Engineer is saying
21 here today is he has a general power to protect the
22 aquifer. He does. He has general powers to protect
23 the aquifer, but he has a specific exclusion from
24 regulating domestic wells. He wants to take that
25 general power he has to protect the aquifer and use

1 that general power to also protect -- to regulate
2 domestic wells in contradiction of the exemption
3 we've talked about.

4 And so if that's true, then why wouldn't
5 every general power he has in the statute apply to
6 domestic wells? And so when I look at these
7 provisions, you know, there's a provision called
8 forfeiture and abandonment, it's the next provision,
9 534.090. I would normally think that domestic wells
10 are not subject to forfeiture and abandonment because
11 generally the chapter, this whole chapter is not
12 subject to domestic wells.

13 So if this whole chapter is not subject to
14 domestic wells, forfeiture and abandonment is not
15 subject to domestic wells. If the State Engineer's
16 argument is true, then all of a sudden all of these
17 general provisions now apply to domestic wells. He
18 can use all of these general provisions against
19 domestic wells. And that just isn't -- that just
20 can't be the case.

21 If you look at three and four of 534.080 up
22 there above, I mentioned that after the exemption was
23 created from this chapter for domestic wells, the
24 legislature has found it necessary at times to
25 address domestic wells and has done it specifically,

1 and here's an example. The legislature said, oh,
2 well, you know what, we are going say that the
3 priority date for domestic well is the date it's
4 drilled. And, again, they define it as no more than
5 two acre feet, but that's not giving the State
6 Engineer power. It's defining the characteristics of
7 the right.

8 Now let's go to 534.110(5). Now, the State
9 Engineer is arguing here that there's such a thing,
10 and 534.110(5), so we're on page eight of the
11 materials.

12 THE COURT: Yes, I have that.

13 MR. TAGGART: There's a sentence there.
14 This section is not for the granting of permits to
15 applicants later in time on the ground that the
16 diversions under the proposed later appropriations
17 may cause the water level to be lowered at the point
18 of diversion of a prior appropriation so long as any
19 protectable interest in existing domestic wells as
20 set forth in NRS 533.024 and the rights of holders of
21 existing appropriations can be satisfied.

22 So the legislature said to the State
23 Engineer, hey, you got to protect domestic wells just
24 like you're protecting every other water right in the
25 state of Nevada, so we're going to put those in here.

1 You have to protect domestic wells. It doesn't mean
2 you can regulate domestic wells, it means you have to
3 protect domestic wells. That's why they called it a
4 protectable interest in domestic wells. The State
5 Engineer has to protect that. It's not giving him an
6 addition power, it's putting additional duty on him
7 when he's regulating the groundwater rights that he
8 has jurisdiction over.

9 Then later on a similar provision is
10 provided in 5(b) where it talks about domestic wells.

11 The next provision, 534.110(6), is
12 significant because this provision was debated by the
13 legislature and gave the State Engineer an additional
14 power over domestic wells when he determines that
15 based on investigation that annual replenishment of
16 the groundwater supply may not be adequate to meet
17 existing rights. And these are for withdrawals from
18 domestic wells based on priority.

19 So if the State Engineer wanted to proceed
20 with a curtailment action, and our position is that
21 there is a way the State Engineer could manage the
22 basin in Pahrump, and it would be curtailment based
23 on priority, and I'll get to that in a minute, but
24 picking out domestic wells and limiting them without
25 addressing the other concerns with water rights in

1 Pahrum is not appropriate under the water law.

2 Now, if you turn to page nine of the
3 materials, there's two provisions that the State
4 Engineer relies upon in this case, two primary
5 provisions that he relies upon, and it's 534.110(8),
6 so the top of page nine, there is a reference to
7 subdivision 8 of 534.110. And it's a general
8 provision which says that in any basin or portion
9 thereof, if the state does -- in the state,
10 designated by the State Engineer, State Engineer may
11 restrict the drilling of wells. And the State
12 Engineer's saying if he may restrict the drilling of
13 wells, he may restrict the drilling of all wells.

14 This is the crux of our case here today, it
15 is the State Engineer may restrict the drilling of
16 wells. Does that mean the drilling of domestic
17 wells? He says yes, we say no. We say that you
18 don't have authority to supervise domestic wells
19 unless it specifically says that you do, and this
20 statute doesn't.

21 And throughout the statutes when it wants
22 him and the legislature wants to give the State
23 Engineer that, you know, very careful power over
24 domestic wells, they state that. And so this is one
25 of those general powers the State Engineer has which

1 does not apply to domestic wells because the chapter
2 does not apply to domestic wells. So that's key.
3 534.110(8). That's the main argument the State
4 Engineer makes in this case.

5 534.120(1) is another provision the State
6 Engineer relies upon, and it states, "Within an area
7 that has been designated by the State Engineer, as
8 provided for in this chapter, where, in the judgment
9 of the State Engineer the groundwater basin is being
10 depleted, the State Engineer in his or her
11 administrative capacity may make such rules,
12 regulations and orders as deemed essential to the
13 general welfare." Again, general power. Nowhere in
14 that provision does it say "including domestic
15 wells."

16 So in 534.110(8), in 534.120(1) there's no
17 specific mention of domestic wells. Whenever the
18 legislature wants him or gives him the power to deal
19 with domestic wells, they say it. They didn't say it
20 here. Now -- and so that's really the key. And I'll
21 show you where they've done that.

22 And, you know, what we just read before is
23 if he does a curtailment action, he can actually
24 curtail the pumping of domestic wells. That was a
25 significant decision the legislature made. They

1 added that into the provision.

2 In 534.110(2), it says, In the interest of
3 the public welfare the State Engineer is authorized
4 and directed to designate preferred uses of water
5 within the respective areas. So designated. And
6 then at the end it says, "within the following
7 limits," and it lists domestic as the first category
8 of preferred uses that can be established by the
9 State Engineer.

10 So what does this provision mean? Well, we
11 debated this provision in another case when the State
12 Engineer tried to curtail water rights in the
13 Yerington area. And in that case the State Engineer
14 argued that he could prefer one use over another in a
15 curtailment action. So if he said, I'm going -- you
16 know, there's 50,000 acre feet of water in this basin
17 being pumped, and there's only 20,000 acre feet of
18 water available, I have to do something. I'm going
19 to use -- and the law says the State Engineer's
20 office, the way you're supposed to do it is call
21 prior appropriation curtailment, curtailment by
22 priority. So if you're a junior, you get zero. And
23 you get zero until you get down to that amount of
24 water that's available. It's a rough cut. It's
25 very, very dramatic but it's our law.

1 And that -- but what the State Engineer
2 argued in Yerington, in which Judge Aberasturi agreed
3 with, was that if the State Engineer did a
4 curtailment, he could prefer uses in a curtailment
5 and he could say, you know what, I'm going to take
6 domestic out. I'm not going to curtail domestic.
7 I'm going to prefer that, among other uses -- above
8 other uses. And Judge Aberasturi actually said that.
9 He said, I'm never going -- I'm not going to make
10 everybody move to Reno in Yerington.

11 So the fear that, well, if we don't do
12 anything now in Pahrump, and all these domestic wells
13 go in, and then in 20 years we have to do a
14 curtailment action, all these domestic wells are
15 going to be the most junior wells because their
16 priority date is the date their well goes in, so
17 therefore we're going to have to come in in 20 years,
18 regulate by priority and wipe out all these domestic
19 wells if they go in and get drilled, so I've got to
20 come in and do something now. And that's -- I think
21 that's generally the position of the State Engineer
22 in this case.

23 Our position is, hey, when that time comes,
24 if it ever does, you can prefer domestic well uses
25 over other uses and not curtail them, if the argument

1 they made to Judge Aberasturi is truly the law. It
2 was never tested by the supreme court.

3 Now, here we come down to a couple really
4 critical provisions of 534.120. 534.120(c) says the
5 State Engineer can limit the depth of a domestic
6 well. If it didn't say that, he wouldn't be able to
7 do it. He wouldn't be able to limit the depth of a
8 domestic well because of the general exemption.

9 Then in D it says, "Prohibit the drilling of
10 wells for domestic use as defined in 534.013," we
11 looked at that, "in areas where water can be
12 furnished by an entity such as a water district or a
13 municipality presently engaged in furnishing water to
14 a house." The legislature said, you know what, we
15 are going to give you some power over domestic wells.
16 If a property could be served by a municipality with
17 a pipe in the street, and that pipe in the street can
18 be tapped into and that house can get city water,
19 we're going let the State Engineer say no domestic
20 well on that property. The legislature elected in
21 that instance to say, you know what, we'll give you
22 some power, because that makes sense, take water from
23 the municipality. They didn't say you could do it in
24 all instances. They said only prohibit the drilling
25 of wells for domestic use if there's water nearby.

1 Here he's done it in all instances.

2 Now, the next provision is even more
3 critical, sub E, because in 2007 the State Engineer
4 asked the legislature to give him this power. It
5 says that, "In connection with the approval of a
6 parcel map," so a new parcel, when it's created --
7 remember, you might recall the State Engineer's
8 office signs off on subdivision maps of divisions of
9 five or more, but not parcel maps generally.

10 Here it says, "In connection with approval
11 of a parcel map in which any parcel is proposed to be
12 served by a domestic well, require the dedication to
13 a city or county or a designee of the county or city,
14 or require a relinquishment to the State Engineer, of
15 any right to appropriate water required by the State
16 Engineer to ensure a sufficient supply of water and
17 for each of those wells, unless the dedication of the
18 right to appropriate water is required by the local
19 ordinance."

20 That's exactly what he did here, but he did
21 it to existing parcels. So this statute gives him
22 the specific authority to do that for future parcels,
23 but it doesn't give him the authority to do that for
24 prior parcels. Well, what's significant. The
25 legislature looked specifically at this question in

1 2007 and decided we'll give you the power going
2 forward but they did not provide the power for going
3 backwards.

4 Now, during that session this is the bill
5 that was authored to or -- this is the first reprint
6 of SB275. And if you turn to page six, you look
7 at -- so this is section 3.5 of the bill, and if you
8 look at section 3.5, and you go down to the bottom of
9 that page, there's that bolded italics subsection E.
10 And if you look at that, that's the language I just
11 read you that made its way into statute as
12 534.120(e). So this is the bill that requested that
13 that power be created in the legislature.

14 Now, there was a debate over the -- well,
15 not a debate, there was a discussion of the bill in
16 the legislature, and this is a copy of the minutes of
17 that discussion.

18 THE COURT: Thank you.

19 MR. TAGGART: So if you could turn to the
20 page there, your Honor, that I put a Post-It on.

21 THE COURT: Okay. Thank you.

22 MR. TAGGART: And at the top there it says
23 May 14, 2007, page 15, do you see that?

24 THE COURT: Yes.

25 MR. TAGGART: So this is a discussion

1 between Jason King, the State Engineer, and
2 Assemblyman Goicoecha, now Senator Pete Goicoecha,
3 who is by all accounts one of the primary individuals
4 in the legislature on water issues. And I think he's
5 the senator for this area.

6 So Jason King says to Senator -- Assemblyman
7 Goicoecha, "Section 3.5 allows the State Engineer to
8 require dedication or relinquishment of a water
9 right. This answers our question about Pahrump." I
10 just showed you section 3.5. "It is a tool we can
11 use to keep the basin balanced. In the past we
12 recommended that counties do this, but if the bill
13 passes it will be placed into statute." But we all
14 know that 3.5 was saying future parcels.

15 And then Assemblyman Goicoecha said, "If a
16 person has a number of small parcels, could the DWR
17 take water rights from those who are engaged in
18 agricultural activities?" Jason King says, "Are you
19 talking about parceling a large parcel?" Assemblyman
20 Goicoecha says, "No." But then he says this: "There
21 are scattered parcels around the state, and every
22 parcel owner has the right to drill a domestic well;
23 is that correct?" Jason King answers, "Correct."

24 So when debating whether or not a dedication
25 of water could be required for an existing -- for a

1 parcel in Nevada, and a bill about future parcels,
2 one of the primary authors of the bill was told that
3 people -- on existing parcels people have a right to
4 drill a domestic well. So we think that that
5 provision of law, 534.120(e), is paramount in this
6 case. It shows that the State Engineer was not given
7 the power to do what he did here in this case and
8 apply the power of 534.120(e) to existing parcels
9 because it only allows him to apply that power to
10 future parcels.

11 Now, there's a few other parts of this
12 chapter that I want to point out, because it's
13 abundantly clear that the legislature never gave the
14 State Engineer power over existing parcels, because,
15 as I go through these, you'll see that's what they
16 were careful to carve out and protect and to
17 grandfather. So sub 5, again this is allowing the
18 State Engineer to require a domestic well to be
19 plugged if it's within the area of a municipal water
20 supply and it fails.

21 Let me jump to page 12 of the material that
22 I provided, which is 534.350.

23 THE COURT: Page 12.

24 MR. TAGGART: Okay. Because I think this is
25 also very significant. As you look at 534.350(2),

1 now what are we talking about here? This is
2 requirements for certain public water system to
3 receive credits for additional new customers to
4 system. So I've got to set this up a little bit
5 because it is -- if a utility wants to provide water
6 service to a parcel, it needs water to do that,
7 right? So if I'm TMWA up in Reno, and I want to
8 provide water to a new house, I need water to do
9 that. I need a water right to do that.

10 And so if I'm TMWA, and I want to hook up a
11 parcel that used to have a domestic well, if that
12 well is plugged, this statute allows a credit to be
13 given to TMWA and hook that person up so I don't have
14 to go get another water right, because we know when
15 that well gets plugged, that two acre feet that used
16 to be available at that parcel is now going to be
17 credited to the municipality so that the municipality
18 can have the water on its water budget, on its
19 accounting system to serve that unit.

20 So this statute is talking about how do we
21 define what credits should be -- or how should these
22 credits be determined. It says, sub two, "A public
23 water system which provides service in a groundwater
24 basin is entitled to receive a credit for each
25 customer who is added to the system, and voluntarily

1 ceases to draw water from a domestic well located
2 within that basin."

3 So my example voluntarily ceases to draw
4 water from that domestic well, then -- or, so the
5 public water system can get a credit if it's from an
6 owner of a lot or other parcel of land other than
7 land used or intended solely for the use as a
8 location for domestic well which is located within
9 the basin, was established as a separate lot or
10 parcel before July 1st, 1999, and was approved by a
11 local governing body or planning commission for
12 service by an individual domestic well.

13 Why is this important? What the legislature
14 recognized is if there's a parcel in place on
15 July 1st, 1993, which was the date of this,
16 effectiveness of this statute, it had the right to
17 two acre feet. It didn't need to have a well in
18 place to have a right to two acre feet. The State
19 Engineer's position now is if you don't have a well
20 in, you don't have a right to a domestic well. You
21 have to have the well in. This statute's saying that
22 any parcel created before the date of the enactment
23 of that statute was entitled to have the two acre
24 feet. And so even if there was no well on that
25 parcel, if that person agreed to take city water, the

1 city got the credit.

2 So, again, the legislature recognized that a
3 parcel owner is entitled to receive two acre feet of
4 water on their parcel, period, end of story. It's
5 always been that way. It's our common understanding
6 of the water law. Right now the State Engineer is
7 saying, "I'm going to require you in Pahrump on
8 existing parcels, owners, you have to give me two
9 acre feet. You don't get your two acre foot
10 allowance anymore. I'm taking it away." There's no
11 statutory authority for that, and for that reason
12 this order should be overturned. And that's the end
13 of our argument with respect to the lack of
14 authority, your Honor.

15 THE COURT: Okay. Why don't we take, you
16 know, a brief break, at least five minutes or more.

17 MR. TAGGART: Okay.

18 THE COURT: All right.

19 (A recess was taken.)

20 THE COURT: I recognize that Mr. Rigdon,
21 you're going to then conclude the arguments on behalf
22 of the petitioners, right?

23 MR. RIGDON: I'm sorry?

24 THE COURT: You'll be concluding the
25 arguments on behalf of the petitioners?

1 MR. RIGDON: I will. I will.

2 THE COURT: And no time limit or anything,
3 but I was just kind of thinking that we should take
4 an hour lunch break and we'd take that break when
5 you're finished.

6 MR. RIGDON: Okay. Yeah, I think it will be
7 probably 12:15 or so, if that works.

8 THE COURT: Fine.

9 MR. RIGDON: I'll shoot for that, how's
10 that?

11 THE COURT: But I'm thinking, you know, to
12 take the larger break in between arguments makes more
13 sense than to break an argument up.

14 MR. RIGDON: Absolutely. I couldn't agree
15 more.

16 THE COURT: Or cut an argument off type of
17 thing.

18 MR. RIGDON: I agree a hundred percent, your
19 Honor.

20 So, your Honor, as Mr. Taggart just let you
21 know, the State Engineer doesn't have authority under
22 the law to regulate domestic wells. He has the
23 authority to -- he has the authority, if there's
24 another water source available to that, serves that
25 parcel, a municipal water source to say a new

1 domestic well can't be drilled, he has authority on
2 new parcels to require a dedication of water rights
3 to serve that new parcel.

4 But he doesn't have the authority to do what
5 he did in this case, which is say for parcels that
6 don't have -- these parcels don't have any other
7 source of water, that's important to understand, they
8 don't have any other source of water, so these
9 parcels that don't have any other source of water,
10 they can no longer have a domestic well, even though
11 those parcels already exist. And that's the real
12 issue here.

13 So we're going to get into the due process
14 issue now. And this is super, super important. And
15 I can't emphasize enough. I mean, just as a lawyer,
16 as somebody who's worked in and around government
17 activity most of my career, the due process issues
18 really just stand out to me as a problem in this
19 case.

20 And so right at the very beginning there's
21 an issue we need to discuss, and that is the State
22 Engineer concedes in his answering brief that if the
23 right to drill a domestic well on a parcel, on an
24 existing parcel is a property right, is an actual
25 property interest, that he's violated due process.

1 The due process was required and due process
2 was not given. So he's left -- because he had to
3 concede that point, because it's pretty obvious, he's
4 left arguing that the right to drill a domestic well
5 on an existing parcel is not a property interest,
6 it's not a protectable property right and, therefore,
7 no due process is required. That's basically what
8 the core of his argument boils down to.

9 In a supreme court brief that he filed with
10 the Nevada Supreme Court in Eureka County versus
11 District Court, the State Engineer said, "In order to
12 ensure that due recess has been afforded to all
13 interested and impacted parties, notice of an
14 opportunity to be heard must be afforded all
15 appropriators of the relevant source in the basin."
16 So he argued to the supreme court, now this was in a
17 case out in Eureka County, in Diamond Valley, and an
18 entity called Sadler Ranch who had their water, their
19 senior water rights dried up, was suing the State
20 Engineer asking a court to issue a writ ordering the
21 State Engineer to curtail the junior water right
22 holders in the basin.

23 And to set up that case for you a little
24 bit, so what happened was is the court issued a writ
25 and said -- or issued an order for the State Engineer

1 to come in and show cause why the writ shouldn't
2 issue. And a hearing was scheduled for that. And
3 the State Engineer and some of the junior water right
4 holders in the county came in and they argued to the
5 judge that you can't hold -- that you have to provide
6 notice of this hearing on the writ to show cause --
7 on the order to show cause. You have to provide
8 notice to everybody in the basin before you can hold
9 the hearing on that order. And the judge disagreed
10 and said, No, all I'm considering is whether I might
11 order the State Engineer to do these proceedings, and
12 when he does those proceedings, then notice will be
13 provided. And they took that to the supreme court.

14 And they argued to the supreme court that
15 just that, just the holding a hearing to maybe start
16 proceedings to maybe then curtail water in the basin,
17 that that was enough of an impairment of a right that
18 notice was required before the judicial proceeding.
19 And guess what? The supreme court agreed with them.
20 The supreme court issued an order and agreed with
21 this provision that in that particular case that
22 notice had to be provided before that judicial
23 hearing on that order to show cause. That's before
24 anything was taken away or any proceeding was even
25 initiated.

1 Here the State Engineer issued an order
2 without any notice, without any opportunity to be
3 heard, without anything. Even though -- and the
4 notice -- and it was not something that was
5 hypothetical that might occur in the future, it was
6 something that he was doing right now, and he didn't
7 issue the notice.

8 So he argues that the right to drill a
9 domestic well is not a valuable or protected property
10 right. Well, we beg to disagree. And the
11 authorities beg to disagree. In Nevada's climate,
12 and we've all lived here most of our lives, in this
13 climate the ability to have a water source is vital
14 to the ability to develop a household on a property.
15 If I go buy a vacant property and I want to build my
16 retirement home, which is what a lot of the people
17 have done here in Pahrump, they've bought property
18 with the idea that they're going to build a
19 retirement home and retire out here, if I don't have
20 a water source for that property, it's worthless to
21 me.

22 Assemblyman Goicoecha, going back to him, in
23 2011 when he was considering another water law bill,
24 this is different than the one in 2007, he said to
25 the legislature when that bill was being considered,

1 if you have a parcel created, you have a right, not a
2 privilege, not anything else, you have a right to
3 drill a domestic well.

4 Well, like Mr. Taggart showed you, where
5 would Assemblyman Goicoecha have gotten that idea in
6 2011 that that was the case and that that was the
7 general understanding of water law? Well, he got
8 that idea in 2007 when he asked that very question of
9 this State Engineer, and said, do these existing
10 parcels have a right to drill a domestic well, and
11 the State Engineer said, yes, they have that right.

12 So it was well-known. It's been well-known
13 to everybody that this is an actual right. It's one
14 of the sticks. When we go to law school and took
15 property law first year, we talked about the bundle
16 of sticks that come with the -- that a property right
17 is a bundle of sticks, and you have the stick in
18 there that's the right to exclude. If somebody
19 trespasses on my property, I can prosecute them for
20 that. I can exclude them. You have the right to the
21 quiet enjoyment. That's another stick in the bundle.

22 Well, in Nevada one of the sticks in our
23 bundle of sticks, if you have a property that cannot
24 be served by another water source, is the right to
25 drill a domestic well. It's one of those sticks in

1 that bundle. And that's what it is.

2 In testimony at the hearing on the motion to
3 stay in the previous proceeding, Miss Norma Jean
4 Opatik, who I introduced you to earlier, she's a real
5 estate expert, she's been in -- she served on the
6 state Real Estate Commission, and she testified that
7 a property's ability to have a domestic well is a
8 major factor that affects the property's value. It's
9 a very, very major factor that affects the property
10 value, probably one of the most valuable, one of the
11 biggest factors and, therefore, it's not -- it's a
12 valuable right, the right to drill a domestic well.

13 Now, Mr. Taggart read to you about the
14 setting up in NRS 533 of this protectable interest in
15 a domestic well. And that the State Engineer, in his
16 briefing, has been using as defining, as trying to
17 define what the right is and saying that you don't
18 have any rights until you actually drill the well,
19 because the protectable interest that the legislature
20 created doesn't arise until you actually have a well.
21 But that goes against all legislative history and
22 goes against what the legislature actually has said.

23 The protectable interest language that
24 Mr. Taggart referred to was added into the statute in
25 2001, and it was added in there for a very particular

1 reason, because prior to 2001 there were issues where
2 when somebody came in for a water right permit, like
3 a big agricultural user, a big municipal user, the
4 State Engineer said, well, I don't have any authority
5 over domestic wells so I don't have to consider them
6 when I do my conflicts analysis to determine whether
7 there's any conflicts if you put that big production
8 well in, how it will affect the domestic wells around
9 it. And the legislature said no, no, no, no, you
10 need to -- you need to take that into account when
11 you do this. And so they added this protectable
12 interest language in, and they said when you -- and
13 it's important where they put it in. They put it
14 into NRS 533, not NRS 534.

15 Well, why is that? NRS 533 covers all the
16 provisions about how you apply for a new water right
17 and all the conflicts analysis that you have to go
18 through and all the things you have to do to get a
19 new water right. 534 is the regulation of
20 groundwater in basins, okay. And so where did they
21 put the language? They didn't put it in the
22 regulation of groundwater, they put it in the part of
23 the statute that says this is what you need to look
24 out for when you're asking for a new water right or
25 when you want to change a water right and put a new

1 well in to serve that water right.

2 And so that was what the protectable
3 interest language did. It created a new protection,
4 in addition to the existing common law right to drill
5 a domestic well on an existing parcel, they created a
6 new protection for after you drill that well, now you
7 have this new protection that you're protected from
8 other people putting in large production wells that
9 could suck your well dry. And we've seen that in
10 certain places around the state. Personally I've
11 had -- my wife has a property that lost a domestic
12 well because a big municipal production well was put
13 in right next to it and sucked it dry. So that's
14 different. The protectable interest language does
15 not limit what the right to drill a domestic well is,
16 it offers added protections once that well is
17 drilled.

18 So, again, back in first year law school, if
19 you have a property right, the important thing,
20 determination you have to make is when did that
21 property right vest? When does it actually become a
22 protectable right? If we have a right to drill a
23 domestic well, when does that right become
24 protectable under due process standards? And we have
25 an answer for that.

1 And in American West Development versus City
2 of Henderson, the supreme court said that a
3 development right and the right to drill a domestic
4 well, that's similar to a development right. A
5 development right vests when there's no further
6 discretionary approval needed. So if I have -- if I
7 need to go get a zoning change from the city
8 government, I don't have a -- in order to do what I
9 want to do on my property, I don't have a vested
10 right at that point because the zoning change is a
11 discretionary act by a city council or county
12 commission to change the zoning on the property. So
13 I haven't created a vested right for that development
14 activity yet because I still have a discretionary
15 process I have to go through in order to get that
16 right.

17 So how does that apply to the right to drill
18 a domestic well? When does that vest? Well, it
19 vests when you don't need that discretionary approval
20 anymore. And as Mr. Taggart noted, what does NRS
21 534.180(1) say? It says that you don't need a permit
22 to drill a domestic well with less than two acre feet
23 of water. And so there is -- once a parcel is
24 created, and there's a statute that says you don't
25 need any discretionary permit in order to do it, the

1 right vests. The right vests when the parcel was
2 created, not when the well is drilled, not when the
3 right is exercised, it vested when the parcel was
4 created. And that's key in this case.

5 So we've established that this is one of the
6 rights, one of the sticks in the bundle of property
7 rights, and that -- and that that property right
8 vested when the parcel was created, not when the well
9 was drilled. And so on these existing parcels that
10 have already been created, they have a vested right.

11 So the only question is then what is the due
12 process required. And that's governed, as you know,
13 by the 5th and 14th Amendments to the United States
14 Constitution and by Article 1, Section 8, Subsection
15 5 of the Nevada Constitution, which all require due
16 process to be provided before -- if a regulation is
17 going to impair a property right, not take a property
18 right. And taking, we'll get into it later. This is
19 strictly if a regulation is going to impair a
20 property right, you have to give people notice and an
21 opportunity to be heard.

22 We know that. The supreme court has stated
23 in Bing Construction versus Douglas County in 1991,
24 they spelled it out, due process requires notice.
25 And what must the notice include? They said in Bing

1 Construction what the notice must include. It must
2 include the full content of the regulation and
3 provide a hearing that allows affected property
4 owners a full opportunity to provide testimony and
5 evidence about that regulation. That's what due
6 process requires.

7 And Revert V Ray, the decision we talked
8 about earlier, they applied this specifically to
9 State Engineer actions, and they said -- this was the
10 deference issue I brought up earlier. What did they
11 say was a full and fair opportunity to be heard, or a
12 full and fair proceeding for the State Engineer? It
13 was notice and a full and fair opportunity to be
14 heard, and they went further and said, and then the
15 State Engineer has to address every one of the
16 concerns it's brought up in that meeting, in that
17 hearing.

18 I have a little bit of a background in land
19 use planning. I've been on a planning commission,
20 I've served on city council. I know you've been a
21 city attorney. Mr. Taggart's been a city attorney.
22 We all know if a city wanted to pass a regulation
23 like this, what would they have to do? They would
24 have to pass it as an ordinance. And what does a
25 city have to go through if they want to create an

1 ordinance? They have to publish that ordinance and
2 then they have to have two readings of that
3 ordinance, one of them being a public hearing where
4 people get to come in and object to it.

5 City councils and county commissions who
6 have inherent powers that the State Engineer doesn't
7 have could not have passed this regulation. Neither
8 could the state legislature. If the state
9 legislature wanted to put this into law, what would
10 they have had to do? They would have had to
11 introduce it in one house, hold committee hearings on
12 it, allow people the opportunity to be heard, vote it
13 out of that house and then go do the very same thing
14 in the next house.

15 The state legislature couldn't issue a
16 statute like this without due process. Nobody in the
17 state could. Other state administrative agencies
18 that are subject to the Administrative Procedures Act
19 couldn't go through this processes. They would have
20 to go and notice and have a hearing before issuing an
21 order like this.

22 Only the State Engineer is claiming the
23 power to basically sit there and issue an edict
24 without any notice or hearing and impair somebody's
25 rights. He's the only person in the state who's

1 claiming this power. It's really confusing to me,
2 given my background in government, that somebody
3 thinks that that's okay.

4 So property owners weren't given due process
5 here. That's fundamental. The order -- the first
6 order was issued six days before the Christmas
7 holiday, and I don't think that that was a mistake.
8 It was ordered six days before the Christmas holiday,
9 and people only had a 30-day window in which to
10 appeal it. I honestly think that people thought that
11 it was issued with the hopes that nobody would meet
12 that 30-day window and it would just become de facto
13 law at that point.

14 But people did appeal it. And then when
15 they did, when they exercised their right to seek
16 judicial review, right in the middle of that, after
17 tremendous amounts of money were spent on briefing
18 and hearings in front of Judge Maddox in the previous
19 case, the State Engineer again, without any notice,
20 without courtesy phone call to opposing counsel,
21 without asking leave of the court or even notifying
22 the court -- we're the ones who notified the court
23 when we found out about it, State Engineer and his
24 counsel didn't notify the court, he issues this new
25 order and says -- and says at that time this stops --

1 everything you've done up to this point is wasted.
2 All this money that your clients have spent up to
3 this point is wasted and we need to start a whole new
4 proceeding.

5 We only agreed to that, like I said, because
6 we didn't want to hurt those people who were -- the
7 small group of people who were helped by the new
8 order, otherwise we would have fought it harder, but
9 we were really in a catch 22 at that point.

10 So now let's talk about substantial
11 evidence. Every order issued by the State Engineer
12 has to have substantial evidence to support it. And,
13 again, normally we would defer to the State Engineer
14 on substantial evidence, but here the evidence that
15 he's provided has never been tested in an adversary
16 proceeding.

17 What is the power he's claiming? He's
18 claiming the power under NRS 533.110(8) which says
19 that he can restrict new wells, but there's an
20 important caveat on that, an important condition on
21 that. He has to show that the new wells that he's
22 restricting will cause an undue interference with
23 existing wells. That's very important. The statute
24 says you can do it, but you have to meet this
25 condition.

1 So the question is is there substantial
2 evidence in the record to show that condition is
3 being met, that these new wells will cause undue
4 interference with existing wells. Not hunches, not
5 suppositions, actual evidence in the record. Well,
6 as I said before, the State Engineer relied
7 exclusively on a groundwater model that was never
8 designed to determine whether new wells would affect
9 existing wells. The model says that. It was only
10 looking at what are general groundwater declines and
11 projecting them forward based upon current pumping.
12 It never looked at what was -- whether a new well
13 would exacerbate that problem or not. It's not
14 there.

15 And Order 1293 acknowledges that. It says
16 it in the order that that evidence did not take into
17 account anticipated increases in future demands.
18 Now, what the State Engineer is telling you is, well,
19 it's obvious. It's obvious that if you have a
20 problem and you add new wells, you're going to make
21 the problem worse. But, like I said, hunches and
22 suppositions are not evidence.

23 And a key point here is the new wells must
24 cause an undue interference with existing wells. If
25 negative effects were to occur regardless of whether

1 the new wells were there, then the new wells are not
2 responsible for that negative effect. But there's no
3 analysis in the record. There's nothing that he can
4 pointed to in the record that says, I've looked at
5 this issue of what the specific effect of new wells
6 would be in this basin. It's just not there.

7 NRS 534.110(4), this is a really important
8 statute because every time you drill a new well,
9 regardless of what kind of well it is, when you drill
10 a new well and you start pumping, it creates what's
11 called a cone of depression, and so there's an
12 immediate lowering of the water table around that
13 well. It's going to happen no matter what well you
14 put in, unless there's enough artesian pressure you
15 can push it up. But if you're going to do a pumping
16 well, you're going to create a cone of depression and
17 you're going to -- you're going to create a lowering
18 of the water table around that well.

19 And so NRS 534.110(4) says that it allows
20 for that to happen. It allows for a reasonable
21 lowering of the static water level at the
22 appropriator's point of diversion. It recognizes the
23 reality and says we can allow reasonable lowering of
24 water levels.

25 NRS 534.110(8) says wells can only be

1 restricted if they cause undue interference, like I
2 just said. So here's the question: Where in Order
3 1293A, I would encourage everybody to look at it,
4 where in Order 1293A is there any determination of
5 what is an unreasonable lowering of the water table
6 in this basin, or what is considered to be an due
7 interference with existing wells? You won't find
8 that anywhere in the order. There's no analysis
9 there.

10 So the State Engineer didn't even set up the
11 objective analysis that the evidence then needs to
12 meet. He didn't say, hey, if water levels are
13 declining at half an acre foot a year long-term,
14 that's unreasonable, or if water levels are declining
15 at one foot, that's unreasonable. He didn't say if
16 this many wells fail, that's an undue interference.
17 Or if a well that's a certain depth, if wells of a
18 certain depth fail, that's an undue interference. He
19 didn't set any of that up. He just said, we have
20 this groundwater model that shows that there might be
21 some continuing water level declines in certain parts
22 of the basin, and because of that I think new wells
23 are going to exacerbate that problem and, therefore,
24 I'm going to issue this order. But there's no
25 analysis here. None.

1 More importantly, the order contradicts the
2 very evidence that he uses to support it. Section 18
3 of the order says, "Historical water level data
4 maintained by the State Engineer and other agencies
5 demonstrate that water levels on the valley floor
6 have steadily declined since the 1950s." He doesn't
7 provide any exceptions. He doesn't note that there's
8 areas in the valley floor where water levels have
9 stabilized or increased. He says, "Water levels
10 throughout the valley floor have been declining."

11 But the water resources plan update, that
12 2017 update that I told you about, that doesn't say
13 that. What that says, that says that water levels in
14 some portions of the basin have stabilized or
15 increased, in some areas by as much as 45 feet.

16 Now, here is a page from that water
17 resources plan. Now, the valley floor, I think most
18 people would define the valley floor as everything in
19 that really light tan, basically the playa of the
20 valley. And these are all measurements from wells in
21 that area. And you'll notice up in the top corner
22 those four -- there's areas in this basin where
23 you'll see that one kind of in the middle on the
24 right, that's one where water levels have
25 significantly rebounded on the east side of the

1 valley. Up in the northeast side of the valley,
2 water levels are pretty stable, according to these
3 hydrographs.

4 Now, there does appear to be some problems
5 in certain localized places in the valley with water
6 declines. You'll notice the one on the -- the second
7 one to the right on the bottom. That definitely
8 shows a water level decline in that one portion of
9 the basin, but this does not show general water level
10 declines throughout the entire valley floor that
11 would justify this order.

12 And this is why we say, and the State
13 Engineer in his briefing seemed to have been confused
14 by this, this is why we say the order is too broad.
15 If there's one thing that's been drilled into me
16 since I've been doing water law with Mr. Taggart here
17 for the last four years, one things that's been
18 drilled into me is that the hydrogeology of water
19 basins is complex. Large basins, it's very complex.
20 There is no one size fits all solutions.

21 Pumping in one part of a basin may have
22 some, may have a great, or may have no effect on
23 water levels in another part of a basin. There's all
24 kinds of underground geology that affects how waters
25 moves through it. It's not just the big bathtub

1 concept that people simplify it into. It's very,
2 very complex. And so it requires, when you're trying
3 to determine whether there will be an unduly
4 interference with existing wells, you need to analyze
5 that complex hydrogeology and say, will drilling in
6 this particular part of the basin, will that affect
7 wells in this part of the basin over here? It's not
8 clear cut. And it is very complex, and that's the
9 evidence that's missing from this record.

10 Back to 534.110(8), the statute that he's
11 using to justify what he's doing here. It
12 specifically requires the State Engineer to take into
13 account the complexity of the basin. It says he
14 can -- it gives him a choice. He can restrict the
15 drilling of new wells in a basin or a part of a basin
16 if the evidence shows that undue effects will occur
17 from the new wells. That's a discretionary
18 determination.

19 Order 1293A doesn't exercise that
20 discretion. It provides one size fits all approach,
21 despite the fact that the evidence doesn't support a
22 one size fits all approach. The evidence may support
23 going in and looking -- and we don't believe he has
24 the authority do this even in the areas where there
25 are water level declines. I refer back to what

1 Mr. Taggart said about he just doesn't have this
2 authority.

3 But if you did determine that he had this
4 authority, then this statute would require him to go
5 in and say this is where a problem is occurring and
6 identify those portions of the basin and determine,
7 whether in exercising that discretion whether to
8 issue a basin-wide order, a portion of the basin-wide
9 order, he would have to do an analysis to justify the
10 discretion that he's exercising, and he hasn't done
11 that analysis here. That by definition is an abuse
12 of discretion. By definition that's arbitrary and
13 capricious.

14 THE COURT: And I suppose your position is
15 that this is a very large basin, you know. This
16 isn't, you know, something that's small at all, and
17 in your previous slide showing some areas level or
18 actually maybe coming up a bit and others, you know,
19 places going down, is that what you're saying is
20 evidence that a blanket basin-wide approach is
21 inconsistent with this NRS 534.1108 because of, you
22 know, these other factors that you can't just do a
23 blanket statement for the whole Pahrump basin?

24 MR. RIGDON: That's absolutely right. So
25 let's go back to that map I showed you. So over on

1 the east side of the basin, water levels are
2 increasing. Nobody over there in that east side of
3 the basin can drill a new domestic well under this
4 order. Water levels are increasing in that portion
5 of the basin and nobody can drill a domestic well in
6 that.

7 Up in the northeast, water levels are fairly
8 stable. Nobody can drill a domestic well under this
9 order, even though water levels are stable in that
10 part of the basin.

11 He used a one size fits all approach without
12 taking into account -- and breaking the basin up into
13 individual sections where there's problems and not
14 problems. So, yeah, you have it absolutely correct.

15 THE COURT: All right. Thank you.

16 MR. RIGDON: So now we also think it's being
17 applied too narrowly. And so this may sound
18 confusing. Our argument is it's too broadly applied
19 and it's also too narrowly applied, but they're two
20 separate issues. The one issue is it's basin-wide
21 and, therefore, it doesn't take into account the
22 complex hydrogeology of the basin. The issue here is
23 why only domestic wells? Why is he only singling out
24 domestic wells? Why not -- domestic wells are the
25 smallest wells. They create the smallest cones of

1 depression. Large production wells create larger
2 cones of depression.

3 So why is he only singling out domestic
4 wells and not saying, "We're going to ban all new
5 wells in the basin," which is what his authority
6 under the statute is. Well, he says that's because
7 any of the larger wells, if they want to drill a new
8 larger well, like move a water right around and
9 create a new production well, they'll have to come
10 through my permitting process. And because when they
11 come through my permitting process, I'll be able to
12 do this individualized analysis, complex analysis to
13 determine whether that well should be allowed or not.

14 But I would argue that what's good for the
15 goose is good for the gander. If an individualized
16 conflict analysis is needed to move a larger
17 production well around, then certainly before he can
18 ban all domestic wells in the basin he needs to
19 perform that same conflicts analysis, that same
20 individualized conflicts analysis, and he hasn't done
21 that here. So he is treating domestic wells
22 differently than he treats every other well.

23 And this evidence is a bias, a general bias
24 of the State Engineer's office against domestic
25 wells. Why? Because, as Mr. Taggart said, domestic

1 wells are not something he can control, and he has
2 authority and control over other wells. So he'd
3 prefer if the wells that he has control and authority
4 over and not the ones that he doesn't.

5 Now we also argue, in addition to those
6 three things that we talked about that are the key
7 hurdles he has to overcome, we also argue that this
8 order is unlawfully taking private property without
9 just compensation. So Nevada law has been
10 interpreted to provide expansive, expansive
11 protections for private property.

12 In McCarran Airport versus Sisolak the
13 supreme court said that very thing. The Nevada
14 Constitution contemplates expansive property rights.
15 Remember, that was a question of whether a county
16 ordinance that limited building height near an
17 airport was a taking of private property. And the
18 supreme court found there was. It was an unexercised
19 right. Nobody had tried to build. It was an
20 unexercised right, the same way that the right to
21 drill a domestic well for these parcels is an
22 unexercised right. But the supreme court recognized
23 that that unexercised right can be protected under
24 taking law because the Nevada Constitution
25 contemplates expansive property rights.

1 In State versus Eighth Judicial District
2 Court, just recently in 2015 the state supreme court
3 went through some history, talked about how 800 years
4 ago the Magna Carta laid the foundation for
5 individual property rights, and that our state
6 constitution is part of this grand legal tradition,
7 Anglo American legal tradition that dates back 800
8 years of protecting property rights.

9 Blackstone, in his commentaries, way back in
10 the 1700s, said, "So great is the regard of the law
11 for private property that it won't authorize the
12 least violation of it," and this is the key, "not
13 even for the general good of the whole community."
14 We've recognized in this country that even if the
15 community will benefit, and that's what you're going
16 to hear arguments from the State Engineer, we need to
17 do this because it's for the good of the community.
18 We need to do this because it's needed to protect the
19 public. Great. You still have to provide just
20 compensation if you're going to put the burden on
21 private property owners. We protect that in this
22 country even if it's for the good of the whole
23 community.

24 Now, there's some question that the State
25 Engineer has raised over whether takings issue is

1 even ripe for adjudication. And I'll just let you
2 know, if you decide on the other grounds that we've
3 talked about that he hasn't met any of these three
4 hurdles that he has to jump over for his order to be
5 valid, we don't even need to get to the takings issue
6 in this case. But we're going to argue it because
7 just in case. But you don't even need to arrive at
8 this determination if you decide on the other
9 grounds.

10 But, as you know, having been a city
11 attorney, there's two types of takings. There's
12 what's called a per se taking and there's what's
13 called a regulatory taking. A per se taking is
14 exactly that. Government comes in and they take
15 property from you. A regulatory taking is where they
16 pass a regulation that so significantly impairs the
17 value of your property that they might as well have
18 come and just taken it from you. Those are the two
19 types of takings, and there's two different
20 standards. And we argue that order actually
21 represents both types of takings.

22 The first type of taking is this requirement
23 to go buy other water rights and give them to the
24 State Engineer. What is that if not you're going
25 to -- I'm seizing your property? You go buy

1 property, I'm going to seize it from you and then you
2 can go ahead and drill your domestic well. That's a
3 per se taking.

4 Also the ban on the drilling of new domestic
5 wells is a regulatory taking, because it's an -- it
6 basically takes all the value from the property, as
7 we've talked about.

8 So let's talk about per se takings. As I
9 said, the Nevada Supreme Court has defined a per se
10 taking as where government action requires a property
11 owner to suffer a permanent, physical invasion of his
12 property. Now, here it's not walking onto a piece of
13 real estate. The permanent physical invasion is,
14 "I'm taking this water right that you purchased and
15 you're giving it to me." That's the physical
16 invasion.

17 State issued water rights are real property.
18 That's a fundamental principle of state water law.
19 Water right is real property. And relinquishment,
20 that's how it describes it in the order, describes it
21 as a relinquishment. What's a relinquishment? It's
22 the abandonment of a right or thing. So what the
23 order requires is the person to abandon that thing
24 that they own. It's a separate property, piece of
25 property. And no consideration. So the question is

1 can you do that? Government can take private
2 property but have to provide just compensation.

3 Now, what I imagine the State Engineer is
4 going to argue is, well, the just compensation, what
5 you get is consideration for giving me this water
6 right is you get the right to drill a domestic well.
7 But as we all know from first year of contracts law
8 class, performing an act you're already obligated to
9 perform is not consideration. The State Engineer
10 already can't deny you the right to drill a domestic
11 well, so he can't give you -- give that up as
12 consideration for you giving him a new water right.
13 It's not consideration at all. It's not just
14 compensation.

15 Now, regulatory takings are a little more
16 complicated. Regulatory takings are governed by Penn
17 Central. And there's three considerations that the
18 court must consider, and that's the regulation's
19 impact on the property owner, whether the regulation
20 interfered with a reasonable investment back
21 expectation, and what the nature and the character of
22 the government action is.

23 In Dolan versus City of Tigard, which is a
24 land use case out of Oregon in 1994 that went up the
25 U.S. Supreme Court, they found a regulatory taking

1 occurred in that case. And they said it occurs when
2 a regulation is not roughly proportional to the
3 public impact of the activity. It requires an agency
4 to make an individualized determination that the
5 dedication is related both in nature and extent to
6 the impact of the proposed development.

7 Now, as we said here, the State Engineer's
8 own records show that the average domestic well in
9 Pahrump uses half an acre foot a water. Well, what
10 does his order require? His order requires two acre
11 feet of water. That's an improper exaction. There's
12 no linkage under Dolan versus City of Tigard between
13 the impact, half an acre foot of water that the
14 average domestic well uses, and the dedication
15 requirement which is two acre feet. And the
16 regulatory taking occurred where government action
17 deprives a property owner of their beneficial use of
18 the property.

19 So Order 1293 is a regulatory taking. It
20 has a major impact on property owners. I don't think
21 that can in any way be disputed. We've got testimony
22 in the record from the motion on stay hearing where
23 we have property owner after property owner take the
24 stand and talk about the impact that this is having
25 on them. There's a direct interference with

1 reasonable investment back expectation, so again
2 that's in the record from the hearing on the motion
3 for stay.

4 People testified that they did their due
5 diligence. They went out when they bought their
6 properties, people who bought properties just within
7 the last two years, they went out and they asked,
8 they asked county officials, they asked state
9 officials, "Hey, am I going to be able to have a
10 domestic well to serve a house," and they were told
11 yes when they bought their property.

12 MR. BOLOTIN: Your Honor, I'd like to make
13 an objection for the record. I made it in the briefs
14 too regarding the inclusion of the records below. I
15 just wanted to make an oral objection for the record
16 regarding those statements that were made in the
17 previous case. They were not part of what the State
18 Engineer relied on in creating his record or forming
19 his decision in this case.

20 THE COURT: Okay. I'll note your position
21 on that. I have to admit, Mr. Rigdon, I'm coming in
22 here prepared to address the issue, and I'm mentally,
23 you know, there to determine whether or not the
24 order, 1293A, is valid or not. You know, going a
25 step further to say, well, I think it's valid but

1 they owe you compensation, I don't know that I'm
2 prepared to make that leap. You know, that's a hard
3 one for me to -- probably won't be doing that today.

4 MR. RIGDON: I agree. We are not asking for
5 compensation. That is not a part of this proceeding.
6 That's not a part of the relief that's being sought.
7 We're not asking for compensation, and I want to make
8 that very, very clear because that's a really
9 important point, with the State Engineer saying that
10 you can't even reach the takings issue, okay.

11 All we're asking for is injunctive relief,
12 that this order cannot be enforced because it's --
13 one of the reasons it can't be enforced is because it
14 is an unconstitutional taking. That's all -- that's
15 the only determination we're asking that you make.
16 We're not asking you to make a determination about
17 value or anything else. And I want that clear for
18 the record.

19 So Order 1293, like I said, is not
20 proportional. We'll get into that right now. The
21 State Engineer's arguing that the takings issue is
22 not ripe for adjudication. They say that NRS chapter
23 37 is the only way you can get compensation for a
24 takings claim, and they're absolutely right. It's
25 the only way you can get compensation for a takings

1 claim. You have to bring an action under NRS 37, but
2 that action is not ripe yet because we haven't
3 finished our administration proceedings in this case.

4 And so it's not ripe for NRS 37
5 determination as to value that's been taken or
6 compensation, it is ripe for a determination as to
7 whether it is unconstitutional because it is a
8 taking, that the order shouldn't be enforced because
9 it is a taking. And that's the determination we're
10 asking you to make.

11 And there's no discovery. The State
12 Engineer says, well, you know, under 37 you have to
13 have discovery about value. And I think that's what
14 your concern that you just raised to me was about,
15 how do I determine? I can't -- we don't have
16 witnesses on the stand, we don't have appraisers, we
17 don't have experts to sit here and determine.
18 Absolutely, those procedures have to be done for
19 somebody to be compensated for a taking. You have to
20 perform that discovery.

21 But there's no discovery needed to make a
22 legal determination as to whether it's a regulatory
23 taking or a per se taking, and thereby -- and thereby
24 rendered unconstitutional and invalid on that basis.
25 And that's all we're asking you to do here.

1 Every order issued by the State Engineer --
2 now, what they're saying is -- one thing that they
3 said in their answering brief is that there's been no
4 discovery or evidence taken as to whether it
5 constitutes a taking or not. And they're right.
6 There hasn't been. Why? Because the State Engineer
7 didn't hold a hearing below. So the State Engineer
8 didn't hold a hearing where people could express this
9 concern and he could specifically address it, like
10 Revert V Ray requires him to do so somebody could
11 raise the objection and then he could specifically
12 address it and come to a determination.

13 But I would argue this: Every order issued
14 by the State Engineer carries with it a presumption
15 that he's considered its constitutionality, because
16 think about what the opposite would mean. The
17 opposite would mean if we didn't presume that he's at
18 least considered the constitutionality of the
19 actions, then that would be presuming that he can do
20 actions without consideration at all as to whether
21 it's constitutional, and that can't be. That would
22 be an absurd result.

23 So we have to assume, because there's no
24 record to look at, we have to assume that when he
25 issued this order he at least did some kind of

1 internal legal review and said, am I going to get hit
2 for a taking or is this constitutional? Do I have,
3 you know, this constitutional authority and determine
4 that he did. And that's a determination then that
5 you can rule on on a petition for judicial review and
6 says whether that determination is correct or
7 incorrect. And that's what we're asking you to do
8 here.

9 Try to -- just about wrapped up. I know I
10 said I'd be done by 12:15 but maybe another ten
11 minutes. I apologize.

12 The last issue, and it's just an issue we
13 have to address because the State Engineer brought it
14 up in his answering brief, he's been bringing it up
15 since the beginning of this case, and that's the
16 issue of whether the LLC that was created by these
17 people to address this issue as a collective rather
18 than as individuals has standing in this case. And
19 we argue that they do, and it's very, very clear in
20 the law that they do.

21 First they have standing under the United
22 States Constitution. Warth V Seldin says that if the
23 relief sought is injunctive and the benefit will
24 incur equally to all the members, then the
25 association has standing. So, again, we're not

1 seeking compensation here. We're not seeking
2 something that requires an individualized
3 determination of what happened to this member, what
4 happened to this member, what happened to this
5 member. What we're asking for is injunctive relief.
6 And if you issue that injunctive relief, all the
7 members will benefit equally. And because of that,
8 they have -- the association has standing.

9 Now, in Hunt versus Washington State Apple
10 Advertising Commission, this came two years later,
11 the court included that and then added two more parts
12 to the test. They said the members have to have had
13 standing themselves to file this action on their own.
14 Their interests have to be -- the interest asserted
15 by the association has to be germane to the
16 association's purpose. So I can't use a -- I can't
17 use a homeowners association to sue on something
18 that's totally unrelated to the purpose of a
19 homeowners association, okay. And then, like I said,
20 the relief doesn't require the participation of the
21 individual members.

22 Here PFW meets the requirements, all three
23 of those requirements. Each of these members, and
24 some of them we've listed individually as petitioners
25 in this case, we didn't list them all as petitioners

1 in this case, we listed some of them individually as
2 petitioners in this case, one of the reasons is, and
3 this is one of the reasons why it's important for
4 associations to have standing is that when we contact
5 some of the members, they said don't -- I don't want
6 my individual name put on there because I'm afraid of
7 retaliation. They're afraid of retaliation from the
8 State Engineer if they put their individual name on
9 there. That's one of the reasons why we allow people
10 to come in as associations so they don't face that
11 type of retaliation for exercising their right to
12 petition.

13 THE COURT: I'll grant you this: Given the
14 30-day window to respond, you weren't -- the
15 association wasn't going to be able to contact 4,000
16 people in order to, you know, get things going.

17 MR. RIGDON: That's true.

18 THE COURT: That's simply an impossibility.

19 MR. RIGDON: Absolutely. So we also have
20 standing under state law. Citizens for Cold Springs
21 is the case on point here. And that was -- that
22 dealt with an annexation issue up in Reno. And the
23 supreme court said that where the statute for review
24 of a city council decision said that any person who
25 had standing who claimed to be adversely affected,

1 that that allowed for an association to have standing
2 because they could fit under that definition of
3 claiming to be adversely affected.

4 Well, here what is the -- what does the
5 statute say? It grants standing to any person
6 feeling aggrieved. Any person feeling aggrieved.
7 That's actually broader than any person claiming to
8 be adversely affected because with a claim to be
9 adversely affected you had to show some adverse
10 affect. Here you only have to feel aggrieved by the
11 order. And given that it's broader, PFW does have
12 standing under 533.450 on that Cold Springs case.

13 And I want to make sure one thing is clear
14 for the record. When I was talking about whether the
15 association's purpose is germane to the interest, I
16 want to make sure the record reflects that this
17 association was created for one purpose and one
18 purpose only, and that was to oppose Order 1293 and
19 then the subsequent amendment of that order, Order
20 1293A. So I don't think there's any question that
21 this -- that the interest of the association are --
22 or the purpose of the association is germane to the
23 interest in this case.

24 So to wrap up and get us all to lunch here,
25 we believe that Order 1293 must be declared invalid.

1 It fails all three critical tests that we laid out.
2 There's a lack of statutory authority, as Mr. Taggart
3 showed you. There's a lack of due process. No, not
4 only a lack of due process, no due process. There's
5 a lack of substantial evidence to support the order.

6 In addition, as we said, you don't have to
7 reach this issue if you find on the other three
8 issues, but we believe it's an unconstitutional
9 taking. And so we believe that the order should be
10 declared invalid and we all go home, and you issue an
11 order to that effect.

12 However, and certainly if you find that
13 there's a lack of statutory authority, as Mr. Taggart
14 laid out, that would be the only result that could
15 result. Because if there's a lack of statutory
16 authority, he doesn't have this power under state
17 law, there's no reason to remand or do anything like
18 that, he just doesn't have the authority.

19 But if you find under the due process or the
20 substantial evidence, in the alternative, an
21 alternative to just rendering the order invalid would
22 be to stay the order, and then while the stay is in
23 effect, remand it for further proceedings at the
24 State Engineer's office to correct the due process
25 and substantial evidence issues.

1 We would ask, if that's the way you want to
2 go, if you want to say he does have the authority but
3 there was a lack of due process and so I'm going to
4 stay the order, it's important that the order be
5 stayed while this occurs and remand it back to the
6 State Engineer for more proceedings at his level, we
7 would ask that you establish clear guidelines for
8 those proceedings and specify the guidelines for the
9 hearing that the State Engineer will hold.

10 And here's the reason for that: I was at a
11 hearing that the State Engineer held last week in
12 Eureka County, and a statute -- he was considering a
13 groundwater management. The statute says he has to
14 hold a hearing, okay. So to check off that box on
15 the statute, he invited everybody out to Eureka
16 County, he sat there at a table, put two microphones
17 up and said, okay, just talk, and everybody just give
18 public comment, and at the end he said thank you and
19 walked out. Okay, that's not a hearing. That's not
20 a hearing that's needed to determine the validity of
21 evidence and those types of things.

22 What we would ask that you specify, if you
23 are going to send it back to him on a remand, is that
24 he hold a true adversarial proceeding type of hearing
25 where we are allowed to put witnesses on, we are

1 allowed -- where the proponents of whatever order or
2 he's trying to issue have to put their witnesses on
3 subject them to cross-examination. So we would just
4 want that clear in the record, if you're inclined to
5 do that. So with that, we rest our case. Thank you.

6 THE COURT: Okay. Thank you, Mr. Rigdon.
7 All right. We'll go ahead and take a one-hour lunch
8 break. So it's roughly 25 after, so we'll pick this
9 up at 1:25. We'll stand in recess.

10 (A lunch recess was taken.)

11 THE COURT: You may be seated. And now,
12 Mr. Bolotin, you may proceed.

13 MR. BOLOTIN: Perfect. Thank you, your
14 Honor. If you don't mind, here's a paper copy of our
15 presentation. I've already given a copy to opposing
16 counsel.

17 So, first and foremost, before I really dive
18 into the presentation, my name is James Bolotin. I'm
19 a deputy attorney general representing the State
20 Engineer in this matter. First and foremost, just in
21 response to certain arguments that opposing counsel
22 made this morning, I just want to point out that they
23 seem to argue a lot of the common law water rights
24 and common law bundle of sticks.

25 And the Nevada Supreme Court has expressly

1 rejected common law with respect to water rights in
2 Nevada. Back in 1885 in the case of Jones V Adams,
3 the Nevada Supreme Court explicitly overruled the
4 Vansickle V Haines case holding that the common law
5 doctrine of riparian right was not suited to the
6 local conditions of the state, as therefore the State
7 of Nevada has followed the prior appropriation
8 doctrine ever since. I just want to point that out
9 before I dive into the rest of this.

10 We're here today because the State
11 Engineer's amended Order 1293A should be affirmed.
12 The State Engineer acted within his statutory
13 authority pursuant to NRS 543.110(8) to issue amended
14 Order 1293A, and he did so based on substantial
15 evidence. This amended order prohibits the drilling
16 of new domestic wells in the Pahrump valley
17 hydrographic basin with certain exceptions, including
18 relinquishment of sufficient water rights to serve
19 any new domestic well.

20 This order was developed with the assistance
21 and desire of the Nye County Water District, pursuant
22 to NRS 543.030(5), and is necessary to protect the
23 more than 11,000 existing domestic wells in the
24 basin, as well as the closest 60,000 acre feet of
25 existing appropriated rights that currently exist in

1 the Pahrumpp basin.

2 So we're going to go through five major
3 points here. The State Engineer's amended order
4 should be affirmed because it is authorized by
5 statute, it is supported by substantial evidence, it
6 does not violate due process, it is not a taking.
7 And while this doesn't get rid of the entire case, we
8 feel strongly that Pahrumpp Fair Water, the entity,
9 the LLC does not have standing to bring this case.

10 So before I dive too much into the legal
11 argument, I want to give some background about how we
12 got here. The Pahrumpp basin, also known as Basin
13 162, straddles southern Nye and Clark Counties and
14 also extends into California, though that's not
15 depicted here because this is a Nevada centric map.
16 It's one of 256 groundwater basin and sub-basins in
17 Nevada, and is also historically one of the most
18 regulated basins in the entire state.

19 The State Engineer's been regulating this
20 basin since 1941 when he first designated and
21 described the basin pursuant to NRS 534.030. This
22 designated area was extended multiple times
23 throughout the year, including in Order 193 in 1948,
24 and Order Number 205 on January 23rd, 1953.

25 Might I ask what does a designation mean for

1 purposes of a groundwater basin? By being a
2 designated basin, the Pahrump basin is able to be
3 administered by the State Engineer pursuant to
4 certain statutory provisions reserved for designated
5 areas. As we see in the statute 534.030, upon
6 receipt of the State Engineer of a petition
7 requesting the State Engineer to administer the
8 provisions of this chapter as relating to designated
9 areas, signed by not less than 40 percent of
10 appropriators, that amount has changed throughout the
11 years, but once that's applied, certain other
12 provisions of the statute kick in.

13 So that brings us to what else the State
14 Engineer has done since 1941. As I said, the Pahrump
15 basin is historically one of the most heavily
16 regulated basins in the entire state as a result of
17 the concerns regarding availability of groundwater.

18 1953, Order Number 206 required the
19 installation of measuring devices at permitted points
20 of diversion.

21 1970, Order Number 381 declared irrigation
22 nonpreferred use of water in the basin, and ordered
23 the denial of all applications for permits to
24 appropriate groundwater for irrigation purposes.

25 1987, Order Number 955 denied all

1 applications on the Pahrump and Manse fans, which
2 we'll get back to, but those are -- those fans are
3 those areas that you saw on the map earlier where the
4 water is actually going -- the water levels are going
5 up. That's actually a result of the fact that at one
6 point the State Engineer restricted applications,
7 didn't let anybody move water right up onto that area
8 again, because that's actually where it's fed by the
9 springs, precipitation. That's actually where the
10 entire supply for the rest of the basin comes from.

11 1994, Order Number 1107 ordered that all
12 applications filed to appropriate groundwater in the
13 Pahrump basin be denied with the exceptions for small
14 commercial and industrial purposes and for
15 environmental purposes.

16 2007, Order Number 1183 established a
17 program for domestic well credits in the Pahrump
18 basin incentivizing public water systems to add new
19 customers who previously had used domestic wells or
20 were eligible for a domestic well.

21 2015, Order Number 1252 prohibited all new
22 appropriations, except for very limited exceptions
23 for environmental, temporary, or increased diversion
24 rate only but not actually increasing the annual
25 rate. I'll get to this again, but this goes to the

1 point of why only domestic wells in Order 1293A.
2 It's because any other application for any other type
3 of well would be denied. It wouldn't require a
4 scientific analysis. There's an order that says the
5 basin's over-appropriated, all these other
6 appropriations are going to be denied.

7 Then we get to Order Number 1293 which
8 prohibited the drilling of new domestic wells without
9 relinquishment of two acre feet annually to serve
10 that domestic well. And as you can see, the State
11 Engineer has been actively regulating the basin since
12 1941, almost 80 years, and the water levels in the
13 valley floor have continued to decline.

14 Just a little bit of background.
15 Over-appropriation is where the existing committed
16 rights in the basin in the form of permits,
17 certificates, domestic wells exceeds the perennial
18 yield. And perennial yield is the maximum amount of
19 groundwater that can be developed each year over the
20 long-term without depleting the groundwater
21 reservoir.

22 And the reason for many of these orders,
23 including Order 1293A, is that the Pahrump basin is
24 extremely over-appropriated. The Pahrump basin has a
25 perennial yield of 20,000 acre feet. Currently

1 existed permitted and certificated rights alone total
2 59,175 acre feet annually. Therefore, just based on
3 these permitted and certificated rights alone, the
4 Pahrump basin has serious problems, health problems,
5 as these existing rights are already three times the
6 perennial yield of the basin.

7 Notably these existing rights don't include
8 the amount of water that's allowed to be withdrawn
9 from existing domestic wells. Pursuant to statute,
10 NRS 534.350(8)(a), each domestic well in Nevada is
11 allowed to withdraw up to two acre feet annually for
12 culinary and household purposes in a single family
13 dwelling, including the watering of a garden, lawn,
14 and water needed for domestic animals. And this
15 number regarding how much water domestic wells are
16 allowed to take has actually fluctuated throughout
17 the legislative history of the statute.

18 THE COURT: I have a question, which may or
19 may not have relevance, but the petitioners asserted
20 that the actual pumping of water is about 16,000 acre
21 feet per year. Is that true or have you looked into
22 that?

23 MR. BOLOTIN: That is true, your Honor.
24 But, as you can see, the water levels are still
25 declining regardless of that. And the State Engineer

1 has to take into account what's possible. So, yeah,
2 pumping right now is currently less than the
3 perennial yield. But say more domestic wells
4 proliferate, or say these people that exercise the
5 rights that they have to pump, just as they used to
6 do back in decades ago, it was an over-pumped basin.

7 And the State Engineer, in order to properly
8 manage this type of a basin, he needs some certainty
9 regarding the maximum amount that can be pumped.

10 And, well, yeah, it's currently not over-pumped, the
11 water levels are still declining and there's still
12 enough rights that if everybody exercised their
13 rights, it would go way past what the perennial yield
14 is.

15 THE COURT: Well, is this, we don't have it
16 on that slide, but this nearly 60,000 acre feet of
17 water that's appropriated or permitted, is that
18 largely agricultural rights from historic, you know,
19 appropriation that really aren't being used anymore?

20 MR. BOLOTIN: I don't have the exact water
21 priority table in front of me, your Honor, so I don't
22 want to guess, but I know it is old irrigation
23 rights. Some of it is municipal rights that are
24 located on the fan that haven't been exercised yet,
25 but it's made up of a variety of different types of

1 water rights.

2 THE COURT: I think I have one more
3 question. Would it be assumed that the people that
4 are affected by this and have to go out and acquire
5 two acre feet of water, would they be getting that
6 most likely from unused agricultural appropriations?

7 MR. BOLOTIN: It wouldn't necessarily be
8 agricultural, but, yes, they would be getting it from
9 the existing permitted rights. And, well, yeah, you
10 might say that's -- these rights are still above the
11 perennial yield, et cetera, but Order 1293A, when
12 taken together with the Nye County Groundwater
13 Management Plan, which I'll get to, are designed to
14 prevent curtailment from ever happening.

15 So even though there are this many rights,
16 the whole purpose here is to put a cap so the State
17 Engineer has certainty regarding what kind of rights
18 are possible in the basin so that he can work towards
19 starting to hopefully make progress on the problem.

20 THE COURT: Okay. Thank you.

21 MR. BOLOTIN: Yep. As I said, the Pahrump
22 basin is over-appropriated. In the Pahrump basin
23 there are approximately 11,280 existing domestic
24 wells. Therefore, in addition to the almost 60,000
25 acre feet of existing rights, there are existing

1 domestic wells that are permitted to withdraw
2 approximately 22,560 additional acre feet of water in
3 the Pahrump basin, based on the statutory authority
4 to withdraw up to two acre feet per year. This
5 represents the greatest proliferation and density of
6 domestic wells in any basin in the entire state.

7 As you can see from this map from 2015 that
8 was put together using the Division of Water
9 Resources well log database, each red square
10 indicates a section or square mile where there are
11 more than a hundred domestic water wells. And the
12 different colors vary between how many domestic wells
13 are located in that section. As we can see, the
14 valley floor, which is where the water levels are
15 continuing to drop, it's red. It's full of domestic
16 wells in those areas. So this 22,560 acre feet that
17 existing domestic wells are statutorily permitted to
18 withdraw, it exceeds the perennial yield of the basin
19 on its own just on domestic wells.

20 And I think as opposing counsel spoke about
21 earlier, there was the potential for new domestic
22 wells. Prior to amended Order 1293A and Order 1293,
23 there were approximately 8,000 existing parcels of
24 land that would have been eligible for a domestic
25 well. Thus if we add it all up, the perennial yield

1 is 2,000 acre feet per year; existing rights, 59,175
2 acre feet; the current domestic wells, 22,560 acre
3 feet; and these potential domestic wells had been
4 drilled, that would add another 16,000 acre feet,
5 which is about what the pumping is right now. And
6 that would put potential rights without Amended Order
7 Number 1293A at 97,735 acre feet, or close to five
8 times the perennial yield of the basin.

9 Per NRS 534.080(4), domestic wells have a
10 date of priority of a date of the well's completion,
11 and, therefore, had these new wells been drilled,
12 they would be the first ones cut off in the event
13 that a curtailment happened in the basin.

14 And that's allowed by statute. NRS
15 534.110(6) says that domestic wells may be curtailed,
16 if necessary. "The State Engineer shall conduct
17 investigations in any basin or portion thereof where
18 it appears that the average annual replenishment to
19 the groundwater supply may not be adequate for the
20 needs of all permittees and all vested-right
21 claimants, and if the finding of the State Engineer
22 so indicate, the State Engineer may order that
23 withdrawals, including, without limitation,
24 withdrawals from domestic wells, be restricted to
25 conform to priority rights."

1 But even with the regulation that I talked
2 about in the past, the water levels on the valley
3 floor have been declining since the 1950s, which has
4 resulted in reduced spring flows and land subsidence.

5 So here's that map we saw earlier, and you
6 can see that on the valley floor the water levels
7 have continued to decrease despite it being
8 under-pumped and despite these other regulations by
9 the State Engineer. And there's no evidence that the
10 valley floor levels have increased. Only up towards
11 the fan in that upper corner have the water levels
12 gone up, and that's been the result of regulation by
13 the State Engineer and the fact that that area is fed
14 by springs, precipitation, and it actually -- the
15 water goes from the northern part, goes down gradient
16 and that actually provides the supply for all the
17 rest of the basin, which, as we can see, has still
18 continued to go down.

19 Here we have another snapshot of southern
20 Pahrump where a lot of the houses that use domestic
21 wells are. And we can see clearly water levels have
22 continued to decline in this area that has the
23 highest density of domestic wells.

24 And I think there was some mention earlier
25 about the size of the basin and why does it only

1 apply to domestic wells, why doesn't it apply to the
2 whole basin. For purposes of the State Engineer's
3 office, their office administers the Pahrump valley
4 as one common source of the groundwater. Even though
5 there are different types of saturated subsurface
6 materials, those different materials have a range of
7 storage capacity and permeability, they are still
8 hydraulically connected. It's one aquifer. There
9 are no independent aquifers in the Pahrump basin that
10 are hydraulically isolated from the rest of the
11 basin.

12 Evidence of subsidence from -- this is
13 evidence of subsidence from a field reconnaissance
14 survey in 2013. As you can see, there has been
15 evidence of subsidence and it corresponds with where
16 the water levels have been continuously declining.
17 So every time you see those circular marks, that's
18 where actual evidence of subsidence has been found,
19 and the other squares are where this is possible
20 evidence of subsidence.

21 So those are sinkholes, I think are the
22 yellow marks. And you can see it lines up perfectly
23 with the other map where the high density of domestic
24 wells and the water levels are dropping.

25 And here's just a field reconnaissance

1 survey from I think 2013 showing some of the evidence
2 of subsidence dating back to 2000. Here's some
3 evidence of what's happening in the basin.

4 And, your Honor, the problem's only
5 projected to get worse under the current conditions,
6 let alone if additional domestic wells were added to
7 the problem. As we can see here, this gives us a
8 look at what water levels are projected to look like
9 in 50 years. Well, yes, up on the fan where we've
10 seen the increase going, that's actually going to go
11 up. That doesn't matter with the pumping that's
12 happening down in the basin, it's projected to go --
13 the water levels are projected to drop by one foot a
14 year, or about 50 feet in the next 50 years.

15 Thus by 2035 it's projected that 438
16 existing wells are predicted to fail. And by 2065,
17 3,085 existing wells are predicted to fail, pursuant
18 to the reports that were requested by the Nye County
19 Water District.

20 And here we can see how many wells are
21 located in the different areas. So within that red
22 boundary, that's the area of appreciable decline.
23 That's where the water levels are dropping the
24 fastest. And that's how many wells are contained in
25 just that area alone.

1 And now we can see this is the 20 year
2 projection for how many wells per section are
3 predicted to fail. And by 2065, that's how many
4 wells per section are predicted to fail. You can see
5 in some cases there's close to 300 wells that in the
6 next 50 years are predicted to fail under current
7 pumping conditions.

8 Again, these predictions are based on
9 existing demand. Allowing more domestic wells will
10 only exacerbate the problem. As I stated previously,
11 the Pahrump basin has been heavily regulated by the
12 State Engineer, but despite these regulations, the
13 water levels continue to decline, and we can see the
14 problems that are going to be caused.

15 Petitioners made a big point about the lack
16 of evidence showing what additional pumping will do
17 to this area. With all due respect, your Honor, it
18 is evident from the record that the existing number
19 of wells and their pumping is leading to water level
20 declines and will lead to well failures. It does not
21 take much more than common sense to conclude that
22 more wells and more pumping will make the problem
23 only worse. Especially since the State Engineer's
24 historic records show the basin used to be
25 over-pumped and with that came dramatic water level

1 declines. Why would the State Engineer need to see
2 that again?

3 Due to the aforementioned issues with
4 groundwater in Nye County, especially Pahrump, the
5 Nevada legislature enacted the Nye County Water
6 District Act in 2007 creating the Nye County Water
7 District. This district's mission is to develop a
8 long-term sustainability plan of development for the
9 county's water resources, evaluate and mitigate the
10 environmental impacts associated with resource use,
11 better define the groundwater and surface water
12 resources conditions and to find alternative
13 approaches for the management of water resources of
14 the region.

15 And you might say what's the point of the
16 Nye County Water District? It has its mission, but
17 per statute in the designated basin the State
18 Engineer, in the administration of the groundwater
19 law, shall avail himself or herself of the services
20 of the governing body of the water district, and the
21 governing body or water board shall furnish such
22 advice assistance to the State Engineer as is
23 necessary for the purpose of conservation of
24 groundwater within the areas affected.

25 So based on that statutory authority, in

1 December of 2017 the Nye County Water District sent a
2 letter to the State Engineer requesting an order
3 requiring the relinquishment or dedication of water
4 rights for new domestic wells, while explicitly
5 exempting existing domestic wells, including those
6 that require rehabilitation, refurbishment, deepening
7 or replacing it. So any argument that we heard
8 earlier that the State Engineer's Order 1293 was
9 designed to ruin Christmas for Pahrump is seriously
10 preposterous as it corresponded quickly after the
11 State Engineer received this letter from the Nye
12 County Water District in December of 2017.

13 And thus afterwards, based on that letter
14 and based on the State Engineer's own evidence, he
15 issued Order Number 1293, which, as we said,
16 prohibited the drilling of new domestic wells within
17 the Pahrump basin except for those individuals who
18 obtain an existing water right in good standing
19 subject to the review of the State Engineer of not
20 less than two acre feet annually and relinquish the
21 water right to serve that domestic well. And this
22 was enacted pursuant to, as I said, NRS 534.110(8).

23 As we spoke a little bit earlier, after that
24 happened, litigation ensued with Pahrump Fair Water,
25 and that lawsuit was filed on or about January 18th

1 of 2018. While litigation was happening in the
2 background, on April 17th, 2018, the Nye County Board
3 of County Commissioners adopted a groundwater
4 management plan, also known as a GMP, for the Pahrump
5 basin. The GMP recognized at the county level that
6 Pahrump has the highest density of domestic wells in
7 the state, and relies on Order Number 1293 and its
8 prohibition on new domestic wells without
9 relinquishment of water rights as a key component to
10 manage the groundwater in the basin.

11 Then on July 12, 2018, the State Engineer
12 issued Amended Order 1293A creating additional
13 exceptions to Order Number 1293's prohibition on
14 domestic wells. This was because, as we talked about
15 earlier, there was retroactivity in the previous
16 order, and certain individuals had already filed
17 notices of intent to drill or pulled building permits
18 at the time Order Number 1293 was issued were
19 unintentionally caught in limbo by Order Number 1293.

20 And that brought us to, as I said, Amended
21 Order 1293A, which includes the same prohibition and
22 exceptions as the original but adds exceptions for
23 those individuals who had submitted notices of intent
24 to drill before the issuance of the original order
25 and those persons who could demonstrate that they

1 filed an application for a zoning or building permit
2 with Nye County on or before December 19th, 2017 for
3 a parcel that would have been eligible for a domestic
4 well.

5 Thus the amended order still addresses the
6 troubling groundwater trends in Pahrump and takes
7 action to avoid the curtailment protecting existing
8 wells that are threatened by the lowering of the
9 water table, as well as those predictions of future
10 well failures.

11 Following the issuance of the amended order,
12 the parties reached a settlement, as opposing counsel
13 discussed earlier, in exchange for the petitioners'
14 voluntary dismissal of the previous case, the State
15 Engineer agreed to an expedited briefing schedule and
16 scheduling of a hearing, which brought us to the
17 position we are today.

18 The amended order case was brought again by
19 the same petitioner, Pahrump Fair Water, as well as
20 some new petitioners, individual members of Pahrump
21 Fair Water. And that led us to today's hearing.

22 I want to discuss the standard of review for
23 challenging decisions of the State Engineer. Water
24 law disputes are unique. It is well settled in this
25 state that the water law in all proceedings

1 thereunder are special in character, and the
2 provisions of such law not only lay down a method of
3 procedure, but strictly limits it to that provided.
4 This is from the application of Filippini case. And
5 so specifically NRS 533.450 governs judicial review
6 of decisions of the State Engineer, and so does the
7 supreme court case law interpreting that statute.

8 Thus a lot was mentioned of the Felton case
9 and how that destroys the deference to the State
10 Engineer that was cited by petitioners would not
11 apply here because it's a workers' compensation case.
12 It's not a water case, flat out.

13 So again, NRS 533.450(1) says that these
14 proceedings, they may have any decision of the State
15 Engineer reviewed by a proceeding for that purpose
16 insofar as may be in the nature of an appeal.

17 533.450(10) says the decision of the State
18 Engineer is prima facie correct and the burden of
19 proof is upon the party attacking the same. Because
20 water law cases like this are special in character,
21 the provisions of NRS 533.450 establishes the
22 boundaries of the court's review and strictly limits
23 the review within the narrow confines established
24 under the statute and as interpreted by the supreme
25 court. And, again, this court is serving is an

1 appellate capacity pursuant to the statute.

2 The Revert V Ray case held that with respect
3 to the limited review and the nature of an appeal,
4 neither the district court nor the supreme court will
5 substitute its judgment for that of the State
6 Engineer. The court is not to pass upon the
7 credibility of the witnesses nor reweigh the evidence
8 but limit itself to the determination of whether
9 substantial evidence in the record supports the State
10 Engineer's decision.

11 And while there was some argument against
12 deference to the State Engineer, the State V State
13 Engineer case from 1988 held an agency charged with
14 the duty of administering an act is impliedly clothed
15 with the power to construe it as a necessary
16 precedent to administration action and, therefore,
17 great deference should be given to agency's
18 interpretation when it's within the language of the
19 statute.

20 While petitioners argue that the State
21 Engineer does not deserve deference, as recently as
22 yesterday in an oral argument involving the State
23 Engineer at the Nevada Supreme Court, Justice
24 Pickering indicated that the State Engineer should
25 receive deference, or that at the very least the

1 issue of deference is murky. This is because the
2 State V State Engineer case is still good law.

3 And thus the State Engineer's factual
4 determinations will not be disturbed by the reviewing
5 court so long as they are supported by substantial
6 evidence. Therefore, NRS 533.450 provide the basis
7 and the limit for challenging decisions of the State
8 Engineer, and this court's review is limited to
9 whether substantial evidence in the record on appeal
10 supports the State Engineer's decision.

11 This court should affirm the State
12 Engineer's Amended Order 1293A. As I stated
13 previously, it is authorized by statute, it is
14 supported by substantial evidence, it was requested
15 by the Nye County Water District, approved by the Nye
16 County Commissioners, it doesn't violate due process,
17 it's not a taking, and Pahrump Fair Water, LLC I
18 believe has a standing problem.

19 First and foremost, the State Engineer has
20 the legal authority to issue Amended Order 1293A, and
21 the State Engineer did so based on substantial
22 evidence in the record. NRS 533.024(1)(b) states
23 that it is the policy of the State of Nevada to
24 recognize the importance of domestic wells as
25 appurtenances to private homes to creat a protectable

1 interest in such wells and to protect their supply of
2 water from unreasonable adverse affects which are
3 caused by municipal, quasi-municipal or industrial
4 uses and which cannot be reasonably mitigated.

5 Thus, the State Engineer actually agrees
6 with petitioners that domestic wells are unique under
7 Nevada pursuant to this statute; however, only
8 existing domestic wells can be considered
9 appurtenances to existing private homes for purposes
10 of the state policy.

11 In order to meet his other duties, the State
12 Engineer can and must regulate future potential,
13 currently nonexistent domestic wells so that he can
14 protect the existing domestic wells, as that is his
15 duty under state law. Especially if you look further
16 at NRS 533.0124(1)(c), it's a policy to consider the
17 best available science in rendering decisions
18 concerning the availability of surface and
19 underground sources of water. And 533, that same
20 section, sub 1(e), holds it's the policy to manage
21 conjunctively the appropriation used in
22 administration of all waters in the state, regardless
23 of the source of water. That means regardless of
24 whether it's groundwater or surface water.

25 Pursuant to NRS 534.110(8), in any basin or

1 portion thereof in the state designated by the State
2 Engineer, which is the case of this basin, the State
3 Engineer may restrict drilling of wells in any
4 portion thereof if the State Engineer determines that
5 additional wells would cause undue interference with
6 existing wells.

7 As I stated, the Pahrump basin's been
8 designated and has been designated since 1941. Had
9 the legislature intended to create a total exemption
10 for domestic wells, as petitioners argue, they would
11 have expressly said so and taken it -- and if you
12 take that argument to its logical conclusion,
13 domestic wells would have a superpriority, senior to
14 all other rights, including those original irrigation
15 rights that were municipal rights that have been here
16 for years. They've done it before.

17 Specifically in 533.085 they create a
18 superpriority basically for vested rights stating,
19 "Nothing contained in this chapter shall impair the
20 vested right of any person to use the water, nor
21 shall the right of any person to take and use water
22 be impaired or affected by any of the provisions of
23 this chapter where appropriations have been initiated
24 in accordance with law prior to March 22nd, 1913."
25 That's when the water law went into effect.

1 So with all due respect, your Honor, I'd
2 like to just ask, are we a prior appropriation state,
3 as the case law and the statute says, or are we a
4 domestic well state where domestic wells hold
5 priority to everything else and every other type of
6 water in the state?

7 THE COURT: I'm afraid I'm still trying to
8 understand what a designated area means.

9 MR. BOLOTIN: If you go back to --

10 THE COURT: Designated basin. I do see this
11 designated area, particular basin designated area.
12 It says NRS 543.030.

13 MR. BOLOTIN: So if you go to slide eight.

14 THE COURT: I was just looking there. It
15 says the Pahrum basin designated and described
16 pursuant to NRS 534.030, and I was looking at that
17 statute, and it talks about designated areas, but I
18 don't -- I still don't understand how that, you know,
19 pulls out I guess domestic wells to treat them
20 differently than if they weren't in a designated
21 basin or area.

22 MR. BOLOTIN: Well, your Honor, the --

23 THE COURT: Maybe you can help me on this.

24 MR. BOLOTIN: Yeah. The designation of the
25 basin just kicks in other statutory -- other

1 statutes. And those statutes don't take effect
2 unless the basin is designated. So if you look at
3 slide 63, one slide earlier, that statute provides
4 that it only applies to those basins that have been
5 designated.

6 So just -- it's kind of a statutory
7 mechanism that once a basin becomes designated, the
8 State Engineer has extra authority to manage it. And
9 pursuant to the NRS 534.110(8), if the basin has been
10 designated, the State Engineer may restrict drilling
11 of wells in any portion thereof if the State Engineer
12 determines that additional wells would cause undue
13 interference with existing wells. Does that help,
14 your Honor?

15 THE COURT: Well, I'm just taking a little
16 time to try to read it so I can understand. I mean,
17 I'm looking at the 110, and I'm supposed to look at
18 8. Okay, I've read, reread 8, Section 8 that is.

19 MR. BOLOTIN: So basically subsection 8
20 would not apply to a basin that hasn't been
21 designated.

22 THE COURT: I believe that the assertion
23 that probably I think of Mr. Taggart was that these
24 drilling of new wells are not domestic wells, he
25 asserted that this chapter does not apply to domestic

1 wells.

2 MR. BOLOTIN: Well, if you -- I don't have
3 in front of me, but NAC, Nevada Administration Code
4 534.220 defines a well to include a water well. So
5 the State Engineer took that since nothing in
6 534.110(8) said it doesn't apply to domestic wells,
7 it says it applies to wells. A well is a well is a
8 well. And the State Engineer believes he has the
9 authority to manage wells in a designated basin
10 pursuant to that statute.

11 THE COURT: Okay. Thank you.

12 MR. BOLOTIN: So the State Engineer has
13 determined, based on substantial evidence, that
14 additional wells would unduly interfere with existing
15 wells, which is required for drilling restrictions in
16 a designated basin under NRS 534.110(8). And to the
17 extent petitioners argue that there wasn't
18 substantial evidence and there was only two pieces of
19 evidence, the record is roughly 3,000 plus pages
20 long, your Honor. And with all due respect, there's
21 a lot more than two pieces of evidence in that
22 record.

23 As we saw previously, water levels on the
24 valley floor of the basin have declined steadily
25 throughout the period of development. Dating back to

1 the 1950s, water levels on the valley floor have
2 declined, and even though it's not being over-pumped,
3 and even though the State Engineer has regulated the
4 basin strongly, those water levels have continued to
5 decline. And again, based on the current pumping
6 rates, we're looking at future well failures just
7 based on the current pumping rates.

8 And, like I said, additional wells would
9 clearly exacerbate the problem, such that the State
10 Engineer -- and would interfere with these existing
11 wells such the State Engineer acted within his duties
12 to prohibit new domestic wells for the purpose of
13 protecting the existing domestic wells and the
14 existing permitted rights.

15 The district's letter, based on the Nye
16 County Water Resources Plan update, supporting an
17 order to the affect of Amended Order 1293A's
18 prohibition on new domestic wells without
19 relinquishment of a water right to serve it. These
20 outside studies and documents properly provided the
21 State Engineer as advice and assistance under NRS
22 534.030(5) all show that the water levels are
23 declining in large part due to proliferation of
24 domestic wells such that existing wells are
25 threatened.

1 This is seen throughout the record,
2 including the Nye County Water District water
3 resources plan update and the record at 1389 to 1605,
4 the Nye County Water District letter itself to the
5 State Engineer, and the records from 1318 to 1337,
6 and the Klenke report seen in the record from 1338 to
7 1388.

8 And these conclusions are supported by the
9 State Engineer's own data and evidence maintained at
10 the Nevada Division of Water Resources, which, as you
11 can see at the bottom of the slide, is contained in
12 the record as well. All of this confirms the Pahrump
13 basin is suffering from troubling water trends, with
14 valley floor water levels declining and declining at
15 an accelerated rate as withdrawals are projected to
16 increase, ultimately interfering with and leading to
17 failures of existing wells.

18 And to the extent that petitioners argue
19 that they had no idea this was coming or they were
20 without notice that there was issues, the problems in
21 the Pahrump are not new, your Honor. And any
22 allegations by petitioners that they had no notice or
23 idea is disingenuous. These trends have been in the
24 news for decades.

25 Dating back to 1974, the L.A. Times had an

1 article talking about the fragile nature of this area
2 and the issues related to water. 1974, in Nevada, in
3 a local newspaper at the time, talks about the
4 problem. Again, L.A. Times, to the '80s, the Reno
5 Gazette Journal addressed -- had notice of the
6 problem in Pahrump. This continued throughout that
7 year. They were doing stories on it.

8 Or even more recently, 2013, Pahrump Valley
9 Times, the local newspaper knew that there was a
10 problem. 2014, the local newspaper was talking about
11 the problem and how people from the State Engineer's
12 office were coming up and trying to work with the
13 community and address the issues.

14 2015, newspaper articles about the dropping
15 levels of the aquifer. And with my client, the State
16 Engineer, Jason King, up here working with, trying to
17 work with the county and the citizens to address this
18 problem.

19 2016, as I said, more solutions arise during
20 second well owner meeting. This is not a surprise
21 issue, your Honor. All these newspaper articles from
22 the Pahrump Valley Times since at 2013 demonstrate
23 that the community was on notice of not only the
24 water issues but more specifically the concern
25 regarding allowing new domestic wells in the Pahrump

1 basin.

2 What these articles also reflect are the
3 countless meetings between representatives of the
4 State Engineer and Division of Water Resources, the
5 County Commissioners, the Nye County Water District
6 and other community groups. Any assertion that there
7 was no notice is actually disingenuous and belied by
8 the local newspaper.

9 So given the evidence, the request from the
10 Nye County Water District and the well-publicized
11 historical trends, the State Engineer acted within
12 his authority to issue Amended Order 1293A. As we
13 talked about the statute earlier, it checks off the
14 boxes. Pahrum basin is a designated basin, so the
15 statute applies to it, and the State Engineer
16 determined that additional domestic wells will lead
17 to failure of existing wells, so he issued this order
18 with the purpose of protecting those existing wells
19 pursuant to a statutory duty.

20 What was his other option? Curtailment by
21 priority. As petitioners discussed, what are the
22 consequences of this? Current owners of domestic
23 wells and permitted and certificated water rights
24 would be losing full or in some cases all use of
25 their water. And as I stated earlier, the new

1 domestic wells that would be allowed to proliferate
2 would be the first ones cut off pursuant to statute.

3 But Amended Order 1293A, along with the Nye
4 County Groundwater Management Plan, is designed to
5 protect existing water users and prevent curtailment
6 from happening. While special provisions exist under
7 Nevada water law for existing domestic wells, the
8 State Engineer can regulate drilling of new,
9 currently nonexistent domestic wells under the
10 statute we just mentioned, 534.110(8) and 534.120.

11 As pointed out by petitioners, the State
12 Engineer agrees. Under NRS 534.030(4) domestic wells
13 are exempt from the permitting process. Amended
14 Order 1293A complies with this statute. It does not
15 affect existing domestic wells. It just doesn't.
16 However, the statute does not prohibit the State
17 Engineer from controlling the ability to drill new
18 domestic wells under the previously mentioned
19 statutes. The statutes upon which the State Engineer
20 based his decision in the amended order, NRS
21 534.110(8) and 534.120(1), do not cite 534.030(4),
22 nor do they include a limitation against its
23 application to domestic wells.

24 Now we're going look at the language of that
25 second statute I mentioned, 534.120(1). Again, this

1 is a statute that kicks in when a basin is
2 designated. Within an area that has been designated
3 by the State Engineer, as provided for in this
4 chapter, where in the judgment of the State Engineer
5 the groundwater basin is being depleted, the State
6 Engineer, in his or her administrative capacity, may
7 make such rules, regulations and orders as are deemed
8 essential for the welfare of the area involved.

9 That's what Amended Order 1293A is, your
10 Honor. The State Engineer, in his judgment, has
11 determined that the groundwater basin is being
12 depleted, regardless of it being over-pumped at the
13 perennial yield, the water levels are dropping, and
14 thus he had issued this order as he has deemed it
15 essential to the welfare of the Pahrump basin.

16 Thus, based on this statute alone, the
17 legislature has provide the State Engineer with broad
18 authority to take the necessary steps to protect
19 vulnerable groundwater basins. Under this statute
20 Amended Order 1293A checks all the boxes again. The
21 Pahrump basin is designated, in the judgment of the
22 State Engineer, the basin is being depleted and he's
23 deemed the prohibition of future domestic wells
24 essential to the welfare of the Pahrump basin.

25 And we were discussing earlier, this order

1 is necessary to give some element of certainty to the
2 State Engineer and Division of Water Resources as to
3 the withdrawals from this basin moving forward.
4 There's nothing else in the remainder of NRS 534.120
5 that usurps the State Engineer's broad authority
6 granted in subsection 1 or says that it isn't
7 applicable to domestic wells.

8 Similarly, as we discussed -- as seen
9 previously, predicted well failures. Under
10 534.110(8) if the State Engineer determines in a
11 designated basin that it would cause -- that
12 future -- that additional wells would cause undue
13 interference with existing wells, he can issue an
14 order like 1293A.

15 Also, Order 1293A is not overbroad, despite
16 petitioners argument otherwise. NRS 534.030(4)
17 exempts domestic wells from the permitting process.
18 This is exactly why Amended Order 1293A only applies
19 to future domestic wells. Other wells would be --
20 only applies to domestic wells. Other wells would be
21 required to go through the application and permitting
22 process where they would be denied pursuant to Order
23 Number 1252. There wouldn't be any analysis, there
24 wouldn't be any scientific look at any well
25 application. Any other water right application would

1 be denied pursuant to Order Number 1252 which ordered
2 that subject to limited exceptions any application to
3 appropriate groundwater with the designated, in this
4 case Pahump basin, will be denied.

5 Therefore, the State Engineer has regulated
6 every single other form of groundwater withdrawal,
7 and water levels have continued to decline in the
8 basin. Prohibition on new domestic wells is the last
9 option before curtailment, and the State Engineer has
10 the authority to institute this prohibition with the
11 purpose, along with the Nye County Groundwater
12 Management Plan, to avoid curtailment from ever
13 happening.

14 Next I want to talk about due process.
15 1293A does not violate petitioners' due process
16 rights as protectable interests in domestic wells
17 only attach to existing domestic wells. Again we
18 agree with petitioners to this extent. Both the
19 United State Constitution and the Nevada Constitution
20 protect against the deprivation of private property
21 without due process of law.

22 Additionally, in 2001 the Nevada legislature
23 enacted NRS 533.024(1)(b) statewide creating a
24 protectable interest in domestic wells. And as I
25 stated previously, it's the policy of Nevada per

1 statute to recognize the importance of domestic wells
2 as appurtenances to private homes. However, from
3 legislative history it is clear that the legislature
4 intended this protectable interest to apply only to
5 existing domestic wells.

6 If we look at before that statute was
7 enacted, legislative history from February 26, 2001,
8 then State Engineer Turnipseed was in front of the
9 legislature and he was asked by Senator Carlton if
10 the protectable interest only occurred after there
11 has been an improvement on the property and a well
12 has been drilled and if citizens cannot claim
13 protectable interest without anything on the
14 property. Mr. Turnipseed answered yes.

15 Mr. Ricci added one of the problems they
16 faced is the drilling of a well prior to a house
17 being built. Protectable interests become difficult
18 because the bill states existing domestic wells. He
19 said it is difficult to determine if one of these
20 wells meets the criteria simply because it was
21 drilled years in advance of building a house. This
22 is clearly in the legislative history. With these
23 statements the legislature still enacted that statute
24 making it clear the protectable interest in a
25 domestic well does not kick in until it is drilled

1 and there's something on the property.

2 And thus petitioners lack any protectable
3 interest as well as any due process protections for
4 the mere expectation that they might drill a domestic
5 well at some point in the future.

6 In Nevada there are two steps for a due
7 process claim, pursuant to the Malfitano case from
8 2017. Number one, where there exists a liberty or
9 property interest which has been interfered with by
10 the state, and whether the procedures attendant upon
11 the deprivation were constitutionally sufficient.
12 Here the petitioners lacked protected property
13 interest in these future domestic wells, and,
14 therefore, it is not necessary to even reach the
15 second element.

16 I just want to go to one thing real quick
17 that petitioners brought up in their argument
18 regarding the American West case. This talks about
19 how as long as there is no other permit required to
20 be asked for, I think they said, then they have a
21 protectable interest at that point. However, in
22 getting a domestic well you still need to file the
23 notice of intent to drill. There are other steps
24 that are still required. It's not -- parceling alone
25 is not sufficient.

1 I want to move to one other thing that's
2 also taught early on in law school. Property
3 interest is more than an abstract need or desire for
4 it, and more than a unilateral expectation of it.
5 Rather, you must instead have a legitimate claim of
6 entitlement to it.

7 Here petitioners lack a protected property
8 interest in these future domestic wells deprived as a
9 result of Amended Order 1293A and, therefore, it is
10 not necessary to reach that second element that we
11 discussed earlier.

12 This legitimate claim of entitlement to a
13 property interest cannot be created as if by estoppel
14 merely because a wholly and expressly discretionary
15 state privilege has been granted generously in the
16 past. That's also from the Malfitano case. And a
17 government body's past practice of granting a
18 government benefit is insufficient to establish a
19 legal entitlement to the benefit, and protections of
20 due process attach only to deprivations of property.

21 Amended Order 1293A does not violate due
22 process. Petitioners self-identify as parcel owners
23 in the basin, real estate brokers doing business in
24 Pahrump, and owners of well drilling companies.
25 Amended Order 1293A does not deprive petitioners of a

1 property interest to which they have a legal
2 entitlement. Rather, petitioners have only a mere
3 expectation that domestic wells would be able to be
4 drilled in the Pahrump basin. The protectable
5 interest in domestic wells created by the legislature
6 only applies to existing domestic wells. Petitioners
7 do not have a legal entitlement to the ability to
8 drill domestic wells simply because the law has
9 historically been lenient in allowing the drilling of
10 domestic wells in the basin.

11 To the extent that petitioners cite the
12 Eureka County case, it's a very different case, your
13 Honor. That case dealt with appropriators: People
14 and entities who already had existing water rights,
15 hence the need for due process. This is a very
16 different situation.

17 Furthermore, Amended Order 1293A does not
18 result in a deprivation of property as Amended Order
19 Number 1293A does not revoke or interfere with
20 existing domestic wells. In fact, its purpose is to
21 protect the existing wells and rights in the basin.
22 This is in line with the legal doctrine of
23 appurtenance stated in the case of Zolezzi V Jackson,
24 72 Nev. 150 from 1956. As no existing domestic well
25 has ever existed on these parcels, and there is no

1 dependence created between the water and the land,
2 therefore no protectable interest in a nonexistent
3 domestic wells was conveyed as a result of the land
4 being purchased.

5 The amended order, as I stated, does not
6 interfere with existing domestic wells, and there has
7 been no deprivation of property to which petitioners
8 have a legal claim of entitlement, thus the
9 protections of procedural due process do not apply in
10 this situation. And this is especially true
11 regarding the subset of petitioners identified as
12 real estate brokers and owners of well drilling
13 companies.

14 Their allegations are a perfect example of
15 the unilateral expectation that the court in
16 Malfitano found to be insufficient to warrant due
17 process protections. The unilateral expectation that
18 they would be hired to drill future domestic wells,
19 which they can still do if the property owner
20 relinquishes water rights, or be hired to buy or sell
21 real estate is the definition of a unilateral
22 expectation.

23 Petitioners during their argument sort of
24 conceded that the taking claim is not ripe at this
25 point, so I'm not going to spend a lot of time going

1 through this, but we would just say that we agree.
2 And to the extent petitioners would request just
3 compensation, it's improper to bring that type of a
4 taking claim in this matter without discovery,
5 especially when the court is acting in its appellate
6 capacity pursuant to statute.

7 But regardless, Amended Order 1293A does not
8 result in a taking. State Engineer agrees that both
9 the U.S. and Nevada Constitution prohibit
10 governmental takings of private property without just
11 compensation. However, here no taking occurred,
12 including no per se or regulatory taking as alleged
13 by petitioners.

14 Pursuant to the Sisolak case, per se
15 regulatory taking occurs when a government regulation
16 requires an owner to suffer a permanent, physical
17 invasion of the owner's property or when a government
18 regulation completely deprives an owner of all
19 economic beneficial use of the owner's property. The
20 allegation that a regulation has diminished the
21 property's value or destroyed the potential for its
22 highest and best use does not without more constitute
23 a taking. Regulations have been upheld and deemed
24 not a taking even where property value is
25 significantly reduced as a result. This is also in

1 the Sisolak case, 122 Nev. at 663.

2 Regarding domestic wells themselves, Amended
3 Order Number 1293A does not interfere with existing
4 domestic wells, and even permits new domestic wells
5 if certain conditions are met. As petitioners lack a
6 protected property interest in their expectations of
7 future domestic wells, no taking occurred as to these
8 potential domestic wells.

9 To the extent they argue that a taking
10 occurred as to the currently owned parcels, this
11 taking argument also fails. It's not a per se
12 regulatory taking, your Honor. It doesn't impose any
13 physical invasion of property, none, let alone a
14 permanent invasion required to meet the taking test
15 laid out in Sisolak.

16 And it doesn't meet the second test either.
17 It doesn't deprive parcels owners of all economic
18 beneficial use of the property. These property
19 owners can still build homes on the property and can
20 either hook up to a utility service, acquire
21 sufficient water rights, get a cistern on their
22 property. Simply because the value of the property
23 is affected or because building a home will be a
24 little bit more expensive, it does not result in a
25 taking. And we've cited case law at pages 20 and 21

1 of our answering brief holding that a reduction in
2 value is not enough to meet this element, even
3 extreme reductions in the value of the property.

4 In the brief -- in their opening brief,
5 petitioners argue that the State Engineer is forcibly
6 taking their water. This is completely inaccurate.
7 By law, domestic well is defined by statute as
8 permitting a draught of up to two acre feet per year.
9 Thus, the actual pumping figures here are irrelevant.
10 Domestic wells, by statute, equal two acre feet per
11 year. That's what a domestic well is.

12 THE COURT: Isn't that just the maximum
13 amount that they're allowed to pump?

14 MR. BOLOTIN: Exactly, your Honor. So
15 that's the maximum amount that they're allowed to
16 pump, but that's why in order to drill a new domestic
17 well, by statute if it's going to be a domestic well,
18 it needs to be allowed to pump up to two acre feet.
19 That's what the definition of domestic well is.

20 And in order to provide certainty to the
21 basin and provide the State Engineer with the
22 knowledge of the maximum amount of pumpable rights,
23 it is necessary to require this two acre feet to be
24 relinquishment as this is the amount that domestic
25 well, as I said, are permitted to draught by law.

1 THE COURT: So it doesn't matter if, you
2 know, plaintiffs are correct here that the average,
3 you know, well in a basin is just a half an acre feet
4 per year, still your position would be, well, we need
5 the two acre feet because that's what they could
6 pump, and we have to assume that they would do that?

7 MR. BOLOTIN: Exactly. We have to assume
8 just -- if it's going to be a domestic well you're
9 going to drill, by law if it's a domestic well, it's
10 allowed to withdraw two acre feet. So the actual
11 pumping is kind of irrelevant for these purposes.

12 And, again, individuals can still drill new
13 domestic wells, as I said, if sufficient water rights
14 are relinquished. Only to the extent that
15 individuals desire to drill a domestic well on their
16 property is relinquishment required. The State
17 Engineer is not unilaterally, let alone forcibly,
18 taking any existing property by virtue of amended
19 Order 1293A. And, again, the State Engineer isn't
20 forever taking these rights. He's not personally
21 taking the water rights and taking them home.
22 They're going back into the basin for the purpose of
23 protecting those senior rights and existing domestic
24 wells.

25 And, lastly, Pahrump Fair Water, LLC lacks

1 legal standing to bring this action. 533.450(1)
2 provides that any person aggrieved by any order or
3 decision of the State Engineer affecting the person's
4 interest may have the same reviewed by a proceeding
5 for that purpose. And as you're aware, your Honor,
6 the threshold requirement to bring a lawsuit is the
7 existence of a genuine controversy involving a
8 litigant.

9 Thus, here pursuant to the Citizens of Cold
10 Springs case, which involves a statute that also
11 provided standing in excess of constitutional
12 standing, there's a two-part inquiry. Who is granted
13 standing under 533.450 to challenge decisions of the
14 State Engineer, and is Pahrump Fair Water a person
15 whose interests have been adversely impacted by
16 Amended Order Number 1293A?

17 Like in Citizens of Cold Springs, as I said,
18 533.450 provides broader standing than that afforded
19 by a constitution. Thus, Pahrump Fair Water likely
20 meets the first prong due to NRS 533.450's language
21 that any person aggrieved, just as the plaintiffs did
22 in the Cold Springs case.

23 However, Pahrump Fair Water cannot meet the
24 second prong, as they are not a person whose
25 interests have been adversely affected by Amended

1 Order Number 1293A. Pahrump Fair Water is a limited
2 liability company and is, therefore, its own legal
3 person under Nevada law. If you look at NRS
4 86.201(3), a limited liability company is an entity
5 distinct from its managers and members.

6 NRS 86.381 states that a member of a limited
7 liability company is not a proper party to
8 proceedings by or against the company, except where
9 the object is to enforce the members' rights against
10 or liability to the company itself. Under the Beazer
11 Homes case, a party generally has standing to assert
12 only its own rights and cannot raise the claims of a
13 third party not before the court.

14 In the Deal case, 94 Nev. at 304 from 1978,
15 the defendant argued that a condominium association
16 lacks standing to bring construction defect suit on
17 behalf of the condominium owners. The supreme court
18 held that in absence of any express statutory grant
19 to bring suit on behalf of the owners or a direct
20 ownership interest by the association in a
21 condominium within the development, the condominium
22 management association does not have standing to sue
23 as a real party in interest.

24 Here Pahrump Fair Water is not a real party
25 in interest and, therefore, also lacks standing to

1 participate in the action. They cannot bring a
2 petition on judicial review based solely on the
3 interests of its members. Under Nevada law, Pahrump
4 Fair Water is an independent legal person and is not
5 adversely affected for purposes of standing absent
6 its own interests affected by Amended Order Number
7 1293A independent of its own members. This is
8 especially true considering that a portion of Pahrump
9 Fair Water's members, namely real estate brokers and
10 well drillers, likely would lack standing on their
11 own to bring this case.

12 And this case is distinguishable from Hunt V
13 Washington State Apple Advertising. In Hunt the U.S.
14 Supreme Court felt that a state agency had standing
15 to sue on behalf of its members where the following
16 elements were met. Its members would otherwise have
17 standing to sue in their own right, the interests it
18 seeks to protect are germane to the organization's
19 purpose, and neither the claim asserted nor the
20 relief requested requires the participation of
21 individual members of the lawsuit.

22 Pahrump Fair Water cannot meet the first
23 element of this test. Pahrump Fair Water, LLC's
24 members have not shown that they have standing to sue
25 in their own right. In the Hunt case, the commission

1 had a membership made up entirely of similarly
2 situated individuals: Apple growers and dealers.
3 Here Pahrump Fair Water is composed of three
4 admittedly very different types of individuals:
5 Parcel owners, real estate brokers, and owners of
6 well drilling companies. These otherwise
7 unidentified parcels owners, real estate brokers and
8 owners of well drilling companies only have a
9 speculative injury.

10 In Hunt the U.S. Supreme Court found that
11 the apple growers and dealers suffered an injury in
12 fact as a result of a North Carolina statute. This
13 is especially the case in the case of the latter two
14 categories of people: The real estate brokers and
15 the owners of well drilling companies.

16 In the reply brief petitioners also cite to
17 the case of Farmers Against Curtailment Order, also
18 known as the FACO case. Again in that case the
19 petition was brought by an organization made entirely
20 of similarly situated individuals -- farmers -- and
21 they were challenging the curtailment of groundwater
22 rights which they currently owned. This differs
23 greatly from Pahrump Fair Water made up of
24 differently situated individuals challenging an order
25 that does not negatively affect existing water

1 rights.

2 These real estate brokers and owners of well
3 drilling companies allege that they might be
4 negatively affected as a result of Amended Order
5 Number 1293A. This is the epitome of a speculative
6 injury, your Honor, and insufficient for standing.
7 Similarly, also required to standing, it is
8 speculative to assume that a decision in favor of
9 Pahrump Fair Water would redress their theoretical
10 injury. It's just as arguable, especially in the
11 case of the real estate brokers, that they could
12 actually benefit from this order in that the property
13 with existing domestic wells would increase in value,
14 thus increasing their commission. It's just as
15 speculative and just as possible, your Honor.

16 And any argument that we heard earlier that
17 Jason King, the State Engineer, would retaliate or
18 has some personal vendetta against people who use
19 domestic wells is preposterous that he would go after
20 them if their names were on the lawsuit.

21 And lastly, if Pahrump Fair Water, LLC
22 itself was dismissed from the case, no tangible
23 prejudice would occur to the remaining individual
24 petitioners.

25 So in -- one second, your Honor.

1 Petitioners' petition for judicial review
2 should be denied and Amended Order Number 1293A
3 should be affirmed. I would ask your Honor before I
4 give the floor back to petitioners, could I have a
5 brief recess before I wrap it up and hand the floor
6 back over to petitioners?

7 THE COURT: Fine. Sure. Court will stand
8 in recess.

9 (A recess was taken.)

10 THE COURT: You may be seated. And,
11 Mr. Bolotin, would you like to say anything else?

12 MR. BOLOTIN: Yes, I'm just going to wrap up
13 really quickly, your Honor.

14 THE COURT: Okay.

15 MR. BOLOTIN: In conclusion, your Honor,
16 petitioners' petition for judicial review should be
17 denied and Order Number 1293A should be affirmed, as
18 I stated previously, as the law in the state of
19 Nevada pursuant to Jones V Adams in 1885 that we are
20 a prior appropriation state. Had the legislature
21 wanted to create a superpriority where domestic wells
22 trump everything else, they would have done it. They
23 did it with vested rights and they could have done it
24 but they haven't. Instead they've given the State
25 Engineer broad authority to manage problematic basins

1 to ensure the supply of water to existing permits,
2 certificates, and domestic wells.

3 I just want to get back to one question you
4 asked really quick after I conferred with my client.
5 Those existing 59,175 acre feet is mostly old
6 agricultural rights that have been converted to
7 municipal rights, and thus they're currently serving
8 current municipal users and are designed to supply
9 future users and supply future sustainable
10 development.

11 If we were to accept petitioners' argument
12 regarding domestic wells, we would say that domestic
13 wells hold priority over everything, and what should
14 be the first cut off are these people that are
15 currently using municipal water and those water
16 rights for potential future development. And that
17 would create a situation where rather than having the
18 certainty that the State Engineer's trying to create
19 here, we'd have a situation where there would be
20 proliferation of domestic wells and it would be the
21 most uncertain situation we can imagine.

22 And we've seen -- I can't state this enough
23 to the argument petitioners make that we didn't
24 provide any analysis of what future pumping will do
25 to these forecasts of well failures coming down the

1 line. All I can say, your Honor, is we've seen
2 over-pumping. We've seen it happen in the past here.
3 And I believe it is a good way to govern to be
4 proactive and try and prevent those problems before
5 we get to them rather than letting them happen and
6 clean up the mess.

7 So in conclusion, I just want to say it
8 again, that the State Engineer's order should be
9 affirmed. He's authorized to do it by statute. It's
10 supported by substantial evidence. Not only that,
11 it's been requested by the local municipality, by the
12 Nye County Water District, and it's been approved by
13 the Nye County Commissioners. Doesn't violate due
14 process. It's not a taking without just
15 compensation. And though it doesn't get rid of the
16 entire petition, Pahrump Fair Water, LLC lacks
17 standing as a petitioner in this matter, and,
18 therefore, the State Engineer respectfully requests
19 that this court deny the petition for judicial review
20 and affirm the State Engineer's decision. And unless
21 you have no other questions, I'll cede the time to...

22 THE COURT: Well, I do see this issue about,
23 you know, the ability to cut off domestic wells from
24 parcels which are approved and, you know, on the
25 ground and they don't have access to municipal or

1 other, you know, public system, you know, and they,
2 you know, can't really have a home on the property
3 without water, so they're going to have to have a
4 well or they wouldn't be able to use the property.

5 You know, I think that, you know, the
6 attorneys for Pahrump Fair Water made a pretty strong
7 case going over all these statutes and pointing out
8 that there isn't a permit system for domestic wells
9 and they're really excluded from this chapter. But
10 your position is, well, you know, there are
11 designated basins, designated areas where that isn't
12 true, that they, you know, don't have any special
13 privileges in those areas.

14 And, you know, I need to make the correct
15 decision on this, and, you know, that's a real tough
16 issue for me, you know, where you're saying it's not
17 the same. And I'm kind of thinking that, you know, I
18 guess it's Senator Goicoechea -- anyway, my guess is
19 that all the significant, you know, populated basins
20 in Nevada are already designated, you know, that
21 you're talking about, you know, most every place that
22 is of any consequence surely it's already a
23 designated basin. So that, you know, there's hardly
24 anything that would be outside that, you know, only
25 really remote areas of the state where there's very

1 little population where nobody was very concerned
2 about it because, you know, there's not the
3 population pressure that there would be, you know,
4 in, you know, many areas, put it that way.

5 Many areas of the state where, you know, you
6 have Cold Springs, for instance, north of Reno, they
7 have a similar issue where there's a lot of
8 population pressure and there's no, you know, Truckee
9 River going through it. They have to rely on
10 groundwater and, you know, it's depleting, you know,
11 the resources, at least so we understand. And it's
12 probably true of every major population area in
13 Nevada because it's a dry state.

14 You know, it just seems like the Senator was
15 under the, you know, from reading that, it sounds
16 like he's under the impression that there is some
17 real substance to domestic wells being outside the
18 scope of ordinary regulation and permitting, and yet
19 he wouldn't be talking about very many places, you
20 know, because these would be in basins that aren't
21 designated and have hardly any, you know, population
22 pressure. So I'm struggling with that, you know,
23 that's what I'm saying.

24 And this is probably the issue upon which
25 the whole case hinges. I don't know. Is there

1 anything else you can tell me that, you know, talks
2 about, you know, what the other side says, which is
3 that this chapter doesn't really talk about and
4 regulate domestic wells which are excluded?

5 MR. BOLOTIN: Well, your Honor -- well,
6 there are -- Pahrump is not the only designated basin
7 in the state. It is a unique situation given the
8 proliferation of domestic wells and how that affects
9 things here. In those other big populations centers,
10 such as Las Vegas or Reno, they have municipal water.
11 It's a different type of a situation.

12 And given the problems in Pahrump and the
13 use of domestic wells, pursuant to 534.110(8), this
14 type of basin is designated and its continuing to be
15 depleted such that there's interference with existing
16 wells, and we've seen that. The forecast shows many,
17 many wells are going to have to be deepened or are
18 going to fail completely, and State Engineer has to
19 protect those existing rights and has to protect
20 those wells, so we read the statute, it doesn't --
21 that statute isn't qualified. It says wells. A well
22 is a well. And by administrative code a well is
23 defined as a water well.

24 And while there are certain other statutes
25 that apply specifically to domestic wells,

1 specifically exempt domestic wells, such as the
2 permitting process, the State Engineer's power to
3 ensure the health of the basin hinges on this ability
4 to stop proliferation of future domestic wells.

5 And the designation, yes, you're right, your
6 Honor, there are other basins that are designated,
7 and I think you can look it up on -- it's on the
8 Division of Water Resources website. There's a map
9 that shows the basins, but in this particular
10 instance that doesn't mean that those other statutes
11 that kick in when a basin is designated or being
12 used.

13 This is the last chance, the last step the
14 State Engineer has to try to figure out the problem
15 here before going to curtailment and before knocking
16 people who are currently using the water or have
17 current water rights for municipal companies who are
18 planning to use this water for when Pahrump continues
19 to develop. It's the last step before reaching that
20 step, your Honor. And with that, I'll cede it over
21 to the petitioners' side.

22 THE COURT: All right. Thank you very much,
23 Mr. Bolotin.

24 MR. TAGGART: Why is it okay for the State
25 Engineer to protect water for municipalities for

1 their future growth and not protect domestic wells
2 for their future growth? If the State Engineer -- I
3 mean, I worked for Cliff Young. He was the judge I
4 clerked for. He told me a long time ago the State
5 Engineer is not the czar of the universe. He does
6 not get to make these kind of decisions. If he wants
7 this power, he should go to the legislature and ask
8 for it, and they won't give it to him. This is not a
9 hard case. This power was never given to the State
10 Engineer. When they went there and asked for the
11 power, it was for parcels in the future.

12 These people have a right to two acre feet
13 of water per parcel. They have a right to two acre
14 feet of water. This order takes it away. It's that
15 simple. Under what authority? The only authority
16 they can point you to is the general powers in 533
17 and 534.110(8) and 534.120(1).

18 And just because they designate a basin
19 doesn't mean they get powers that aren't in the
20 statute. They're still restricted to the powers in
21 the statute. And, remember, I pointed you to the
22 statute that says they cannot supervise domestic
23 wells. It uses the word "supervise." It says the
24 State Engineer shall supervise wells but except
25 domestic wells. Are they saying that if they

1 designate a basin they can all of a sudden supervise
2 domestic wells? Well, that would be in contradiction
3 to the statute. The statute doesn't say that.

4 So is there a problem in Pahrump with water
5 over-appropriation? I mean, look at the paper they
6 showed you. They showed you. They added it up to
7 whatever their number was, 100,000 acre feet.

8 There's only 16,000 acre feet of pumping. There was
9 a tremendous amount of pumping years ago: Cotton,
10 agriculture, tons of water use that is not happening
11 today, and all those water rights are not being used.
12 50,000 acre feet of water, or whatever the number,
13 it's something large, 45,000 acre feet, whatever the
14 number of unused State Engineer permits.

15 The State Engineer issued those permits.
16 Why not cut those back? Why is it on the back of
17 domestic well owners that this problem is going to be
18 saved? Why is it that you say, okay, domestic well
19 owner, you, under statute, get two acre feet of
20 water, but now the State Engineer, without authority,
21 I'm going to take away your two acre feet of water
22 and I'm going to make you go buy two acre feet of
23 water. And where are you going to buy that two acre
24 feet of water? From the people who aren't using
25 their water, the 50,000 acre feet of water that he

1 issued, his office issued, that's higher than should
2 have been issued.

3 This is why the legislature should be making
4 this decision, not the State Engineer. The
5 legislature gave the State Engineer specific powers.
6 When asked whether he could do this, and they looked
7 at it in 2007, they said, If you want to do something
8 like this, do it on new parcels. Senator Goicoecha
9 did not think this was what was coming, based upon
10 that testimony that I read into the record.

11 So for that reason we think it's clear that
12 there's no authority for this rule. If there's a way
13 to correct over-appropriation, it's through the tools
14 the State Engineer was given. And I characterize
15 this statement about curtailment, and if we let all
16 these wells go in, then they're going to be the first
17 one cut is disingenuous because we argued a case in
18 Yerington where they argued that they could prefer
19 domestic uses over others, that they could prefer
20 irrigation uses over others. They have it within
21 their discretion, if they wanted to, to prefer
22 domestic uses over other uses in a basin during
23 curtailment. They prevailed on that issue. They
24 have that power under stature.

25 So this notion that if you don't do

1 something now, the train's going to leave the station
2 and we can't fix it. There's 16,000 acre feet
3 pumping, 20,000 acre feet of perennial yield. We
4 aren't in a crisis mode right now in terms of
5 pumpage. Do something about the 50,000 acre feet of
6 appropriative permits that the State Engineer has
7 complete control over, the legislature's given him
8 complete control over those. How long do those get
9 to hang out there and not be used? And instead he's
10 going after the domestic wells. So we think it's an
11 easy case. There are no powers that give the State
12 Engineer the right to do this.

13 Now, with respect to notice, the idea that
14 legally sufficient notice for constitutional purposes
15 can be provided by newspaper articles that talk
16 generally about a problem with water is preposterous.
17 If you want to take -- if you want to impair
18 somebody's property rights, you have to provide legal
19 notice, and that individual has to have an
20 opportunity to participate in a process to have
21 consideration of their concerns heard by the
22 government before they can do that. So that notice
23 was provided through newspaper articles we think is
24 improper.

25 Whether there's substantial evidence that

1 the State Engineer needs to do something, because I
2 think that's what they've established, there's
3 substantial evidence that there's a water problem in
4 Pahrump. There's substantial evidence that there's
5 more water on paper than there is available in the
6 resource. Absolutely. I concede that. Is there
7 substantial evidence that the only way to solve it,
8 which you've heard today, the only way to solve it is
9 to take away domestic well owners' two acre feet per
10 parcel? That's the only way to solve this problem?
11 With all the other tools that the State Engineer has
12 and the 50,000 acre feet of unused permits that he
13 has? That doesn't make any sense.

14 So our position about substantial evidence
15 is that's not reasonable. Substantial evidence has
16 to be what a reasonable mind would accept as true.
17 That's not reasonable that there's enough evidence
18 that the only solution is cutting back the domestic
19 wells.

20 Now, on standing, I mean clearly the
21 standard for water cases is low. Feeling aggrieved
22 is all that's necessary for standing. Real estate
23 agents, well drillers, these people are obviously
24 impacted by the decision that you can't have domestic
25 wells in this area. I mean, and they testified to

1 that in this courtroom, and that transcript is in the
2 record. So certainly there's standing.

3 And so unless you have any further
4 questions, we think that this order should be
5 overturned and that it should simply -- the State
6 Engineer should do this differently using the powers
7 that he's clearly given by the legislature.

8 THE COURT: Okay. Thank you. Anything else
9 from the other side or are we done?

10 MR. BOLOTIN: Just one last point, your
11 Honor. Just to return to where I started my
12 argument, we're not saving the municipal water uses
13 on the back of domestic wells. This order is
14 designed to protect existing domestic wells and
15 existing water rights by limiting or requiring water
16 rights to be relinquished for new domestic wells.
17 And this is in line with the right -- with the law of
18 prior appropriation, which is in this -- which is the
19 law of the State of Nevada.

20 The State Engineer has to protect those
21 water rights that have the oldest priority. He's not
22 doing it to purposely protect municipal water on the
23 backs of domestic wells. The priority is what it is.
24 First in time, first in right, and that's the
25 overarching theme that I think needs to be read into

1 this entire order, and the State Engineer has tried
2 every other thing, other than curtailment, up to this
3 point.

4 And the law doesn't require substantial
5 evidence for this to be the only solution. But if
6 the State Engineer's decision is supported by
7 substantial evidence, which we believe there is
8 substantial evidence in the record supporting the
9 State Engineer's decision, then it should be upheld
10 by this court. Thank you, your Honor.

11 THE COURT: You know, although my career
12 hasn't really been, you know, as an environmental law
13 lawyer, I did take water law in college in Colorado
14 and, I think I do understand that, you know, the
15 western states are appropriation states, the eastern
16 states are riparian or, you know, you get to take,
17 you know, water out of the streams that are plentiful
18 in the east. Not so here. Because of mining, we
19 needed to take water from parcels that had water,
20 move it over to where the mines were at, and, you
21 know, that became, you know, the way the west was
22 won. You appropriated water that could be moved.

23 And I do, you know, certainly think that the
24 State Engineer is doing his job and trying to get a
25 handle on, you know, a situation of

1 over-appropriation perhaps in the Pahrump basin.
2 And, you know, I can't fault that. I don't think
3 none of us can fault that. But, you know, trying to
4 get a handle on this issue of the, you know, sort of
5 rights of parcel owners who have a parcel, paid some
6 money for it somewhere down the line, and have
7 expectation of being able to put in a domestic well
8 and not have a permitting process to do so and have
9 the right to pump up to two acre feet. Maybe it's
10 less in reality, but that's what the law allows.

11 I'm, you know, struggling with this one. I
12 think it's a tight issue, you know. It would
13 probably be nice if the State Engineer had, you know,
14 broad powers to, you know, get a handle on, you know,
15 the desert basin water use, but I can see from, you
16 know, the history of this statute that there seems to
17 be special deference given to domestic wells. And I
18 can see the expectation of these people to, you know,
19 be able to drill a well, and each little house isn't
20 really taking up a whole lot of water.

21 And I guess I'm going to give the benefit of
22 the doubt to the petitioners here that the State
23 Engineer is exceeding authority to convert these
24 parcels that don't even have to get a permit to drill
25 a well and to, having to go through and, you know, a

1 new process of acquiring, you know, groundwater
2 rights, you know, at the level of two acre feet per
3 well and donating that water to the State Engineer so
4 that they can sort of get back some of these
5 appropriated water rights and, you know, not expand
6 the amount of pumping, you might say, or
7 appropriation of water rights in the basin. But it
8 doesn't look to me like overall in the statutory
9 scheme that it's allowed. So I would go with the
10 petitioners on that.

11 And then as to the issue of the notice and a
12 hearing, regardless of whether the State Engineer, by
13 reason of having a designated basin, has, you know,
14 some special rights to curtail domestic well
15 drilling, I think where you are doing a substantial
16 change to the property interest, the property rights
17 of somebody with a parcel who expects to be able to
18 develop the parcel and needs to have a well to do it,
19 and when they acquired that property they could do it
20 without a permit.

21 And in the overall statutory scheme it still
22 seems to be that they can do this without a permit
23 and change it around to require the two acre feet
24 have to be purchased and, you know, make it
25 definitely, in essence, a permitted process that I

1 don't think is really contemplated here. I think,
2 you know, it is rising up to the level of taking away
3 a valuable paid-for interest on the part of these
4 property owners.

5 And you'd have to give notice and an
6 opportunity to be heard before adopting this, you
7 know, in any event, you know, because this is such a
8 big change and an expensive, additional cost to these
9 parcel owners that you'd have to give that. You'd
10 have to afford due process. It's not something that
11 can just be legislated and you don't worry about it.

12 As to the issue of the authority of the
13 Pahrump Fair Water, LLC, or however it's designated,
14 the LLC, a Nevada limited liability company, it's
15 clear to me that most of those people are property
16 owners who have certain rights in this ability to
17 drill a well and develop their dwelling. And that's
18 the reason for the existence of this.

19 And I think the, you know, it's not
20 different than the Cold Springs case. And you can,
21 you know, instead of trying to have, you know, 4,000
22 or more individuals, you know, we don't know how many
23 people, they're saying, you know, it could be 8,000,
24 but it's at least 4,000, try to come up individually
25 and, you know, raise the money for attorneys and, you

1 know, getting things going within the 30 days, you
2 know, doesn't make sense to me.

3 I think, you know, Pahrump Fair Water is an
4 appropriate legal entity to represent the interests
5 of, you know, its members who are feeling aggrieved
6 by this new order. And, you know, while I think
7 there's, you know, ample evidence showing that the
8 overall trend of the valley is that the groundwater
9 is being over-pumped or not recharged enough, but
10 it's going down, some areas might be going up, but
11 the overall trend is down for the total basin.

12 There wasn't, in fact, a study that was
13 dealing with, you know, how the continuation of, you
14 know, wells, domestic wells on these parcels that
15 need to have the wells in order to get water, that
16 really isn't there. So I think there is some
17 deficiency in the State Engineer's studies in order
18 to come up with this result.

19 So for that reason I am going to grant the
20 relief requested by the petitioners and direct their
21 counsel to prepare the appropriate order.

22 MR. RIGDON: Thank you.

23 MR. TAGGART: Thank you, your Honor.

24 MR. RIGDON: Thank you, your Honor. And
25 would that be effective today?

1 THE COURT: Well, I guess it's effective
2 today, but, you know, I guess, you know, nobody
3 actually sees it until it's signed, but I guess it's
4 effective today.

5 MR. RIGDON: Okay.

6 THE COURT: But, I don't know. Does that
7 make any sense, Mr. Bolotin, in terms of the
8 effective date?

9 MR. BOLOTIN: I don't think it's in your
10 power, your Honor, to make it effective whenever it
11 is.

12 MR. RIGDON: We'll get you an order within a
13 week.

14 THE COURT: Well, you know, I hate to be
15 telling war stories, but I do have an extraordinary
16 story. I had a child custody case, and on a
17 Wednesday night, around 5:00 o'clock, I finally --
18 you know, we had a three-day trial, Monday, Tuesday
19 Wednesday. I ordered that the child, who had been
20 living with one parent in Washington state, right on
21 the Canadian border, she had the child come back here
22 to have this hearing, and I awarded it to other
23 parent for, you know, the next two years, because the
24 other parent had two years already where that parent
25 had taken the child away.

1 Anyway, I made that ruling, and they agreed
2 they would actually transfer the child on a Friday,
3 the Friday after that Wednesday. And so, of course,
4 the parent with the child went to the Las Vegas
5 airport to fly back to Seattle, probably was going to
6 take the child to Canada. But even without a written
7 order, the airport police were willing to stop, you
8 know, find and stop the woman and get the child back.
9 I was astounded that that actually happened with no
10 written order. So anyway, sometimes miracles happen,
11 I guess.

12 So anyway, is there some issue about when
13 the effective date is?

14 MR. BOLOTIN: The only issue, your Honor,
15 that I could see is that the people back at the
16 Division of Water Resource would have to go, they
17 could probably do it quickly, but I don't know if it
18 would happen today, even though for all intents and
19 purposes it's legally effective, but they have to go
20 in and note that the order has been overturned or
21 something like that.

22 THE COURT: Well, it might not -- you know,
23 it might have to wait until there's a written order.
24 That might make more sense that they do something
25 with a written order instead of, well, yeah, the

1 judge ruled this way. I understand that that's
2 stretching it.

3 Okay, if there's nothing else, let's stand
4 in recess.

5 (Thereupon the proceedings
6 were concluded at 3:20 p.m.)

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CERTIFICATE OF REPORTER

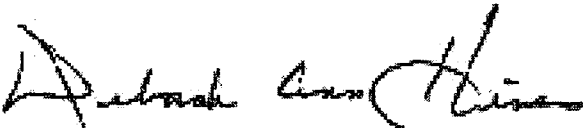
STATE OF NEVADA)

SS:

COUNTY OF CLARK)

I, Deborah Ann Hines, certified court reporter, do hereby certify that I took down in shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 25th day of January, 2019.


Deborah Ann Hines, CCR #473, RPR

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FILED

FIFTH JUDICIAL DISTRICT

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Nye County Clerk

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Case No. CV 39524

Dept. No. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

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

Petitioners,

vs.

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

Respondent.

**PROPOSED ORDER GRANTING
PETITION FOR JUDICIAL REVIEW**

Respondent, Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department Of Conservation And Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby submits the attached Proposed Order Granting Petition for Judicial Review. The Proposed Order is attached hereto as Exhibit 1. Following receipt of Petitioners' Proposed Order, and discussions with opposing counsel, the parties were unable to agree on the terms of the Proposed Order. Therefore, the State Engineer hereby submits this Proposed Order that he believes is more accurate than that of opposing counsel based on the partial transcript. The partial transcript is attached hereto as Exhibit 2.

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DATED this 20th day of November, 2018.

By:

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

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 20th day of November, 2018, I served a true and correct copy of the foregoing PROPOSED ORDER GRANTING PETITION FOR JUDICIAL REVIEW, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Dorene A. Wright

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EXHIBIT 1

EXHIBIT 1

1 Case No. CV 39524

2 Dept. No. 2

3
4
5
6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF NYE
8

9 PAHRUMP FAIR WATER, LLC.,
10 a Nevada limited-liability company;
11 STEVEN PETERSON, an individual;
12 MICHAEL LACH, an individual;
13 PAUL PECK, an individual;
14 BRUCE JABOUR, an individual; and
15 GERALD SCHULTE, an individual,

16 Petitioners,

17 vs.

18 JASON KING, P.E., Nevada State
19 Engineer, DIVISION OF WATER
20 RESOURCES, DEPARTMENT OF
21 CONSERVATION AND NATURAL
22 RESOURCES,

23 Respondent.

24 [PROPOSED]
25 ORDER GRANTING PETITION
26 FOR JUDICIAL REVIEW

27 THIS MATTER comes before this Court on a Petition for Judicial Review of State
28 Engineer's Amended Order 1293A ("Petition") filed by Petitioners PAHRUMP FAIR
29 WATER, LLC ("PFW"), STEVEN PETERSON, MICHAEL LACH, PAUL PECK,
30 BRUCE JABOUR, and GERALD SCHULTE ("Petitioners"). Petitioners filed their
31 Opening Brief on September 11, 2018. Respondent, JASON KING, P.E., the State
32 Engineer, in his capacity as the Nevada State Engineer, DEPARTMENT OF
33 CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES
34 (hereafter "State Engineer"), filed his Answering Brief on or about October 8, 2018.
35 Petitioners filed their Reply Brief on November 1, 2018. The Court heard oral argument
36 on November 8, 2018, in Pahrump Nevada. Petitioners are represented by Paul G.

1 Taggart, Esq., and David H. Rigdon, Esq., of Taggart & Taggart, Ltd. The State Engineer
2 is represented by Nevada Attorney General Adam Paul Laxalt and Deputy Attorney
3 General James N. Bolotin.

4 Having considered the arguments contained in the papers and presented at oral
5 argument, the Court hereby **GRANTS** Petitioners' Petition for Judicial Review, and
6 reverses the State Engineer's Amended Order 1293A.

7 **DISCUSSION AND BACKGROUND**

8 After voting to do so, the Nye County Water District sent a letter to the State
9 Engineer in December 2017 supporting an order from the State Engineer that would
10 require the relinquishment or dedication of water rights for new domestic wells.
11 Following receipt of the Nye County Water District's December 2017 letter, the State
12 Engineer issued Order No. 1293 on December 19, 2017, pursuant to NRS 534.110(8),
13 prohibiting the drilling of new domestic wells without the acquisition and relinquishment
14 of 2.0 acre-feet annually ("afa") of water rights to serve the new domestic well.

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

27 After the issuance of Amended Order No. 1293A, PFW and the State Engineer
28 entered into a settlement agreement on August 8, 2018, whereby PFW voluntarily

1 dismissed the appeal of Order No. 1293, in exchange for the State Engineer agreeing to
2 an expedited briefing schedule and an expedited scheduling of a hearing of a new appeal
3 of Amended Order No. 1293A. Following this settlement, PFW, along with new
4 Petitioners Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte
5 (collectively "Petitioners"), timely filed a new Petition for Judicial Review challenging
6 Amended Order No. 1293A. During briefing and oral argument, Petitioners argued that
7 the State Engineer lacked the legal authority to restrict the drilling of domestic wells,
8 that Amended Order No. 1293A violated constitutional procedural due process, that
9 Amended Order No. 1293A was not support by substantial evidence, and that Amended
10 Order 1293A amounts to an unconstitutional taking of private property without just
11 compensation. The State Engineer argued that he does have the legal authority to issue
12 Amended Order No. 1293A pursuant to NRS 534.110(8) and 534.120, that Amended
13 Order No. 1293A is supported by substantial evidence, that Amended Order No. 1293A
14 does not violate due process, that Petitioners' taking claim is improperly raised in this
15 proceeding and that no taking occurred, and that PFW lacked standing to bring this
16 action. Petitioners' Reply Brief reasserted their previous arguments, while also arguing
17 that PFW does have standing.

18 I. Standard of Review

19 Water law and all proceedings under it are special in character and its provisions
20 not only prescribe the method of procedure, but strictly limit procedure to that method.
21 *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949). Pursuant to
22 NRS 533.450(1), where the State Engineer's decision is appealed, the decision is
23 prima facie correct and the burden of proof is on the party challenging the Engineer's
24 decision. *Office of State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991)
25 ("[D]ecisions of the State Engineer are presumed to be correct upon judicial review.").
26 Decisions of the State Engineer are entitled to deference both as to their factual basis and
27 their legal conclusions. NRS 533.450(1); *See Bacher v. State Eng'r*, 12 Nev. 1110, 1118,
28 146 P.3d 793, 798 (2006) ("While the State Engineer's interpretations of a statute is not

1 controlling, it is persuasive.”). A decision of the State Engineer will not be disturbed on
2 appeal if the decision is supported by substantial evidence and the decision was not an
3 abuse of discretion, not contrary to law. *U.S. v. Alpine Land & Reservoir Co.*,
4 919 F. Supp. 1470, 1474 (D. Nev. 1996). The determination of whether to disturb a
5 decision of the State Engineer comes down to whether the Court determines that decision
6 to be arbitrary and capricious. *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*,
7 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Shetakis Dist. v. State, Dep’t Taxation*,
8 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).

9 With respect to questions of fact, a court must limit itself to a determination of
10 whether substantial evidence in the record supports the State Engineer’s decision.
11 *Town of Eureka v. Office of State Eng’r of State of Nev., Div. of Water Res.*, 108 Nev. 163,
12 165, 826 P.2d 948, 949 (1992) (citing *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264
13 (1979)). Substantial evidence is that which a “reasonable mind might accept as adequate
14 to support a conclusion.” *Bacher*, 12 Nev. at 1121, 146 P.3d at 800 (citation omitted). A
15 court will not substitute its judgment for that of the State Engineer, pass on the
16 credibility of witnesses, or reweigh the evidence. *Revert*, 95 Nev. at 786, 603 P.2d at 264.

17 As to legal conclusions, such as questions of statutory interpretation, a court
18 reviews questions of law de novo. *In re Nev. State Eng’r Ruling No. 5823*, 128 Nev. 232,
19 238, 277 P.3d 449, 453 (2012). However, the State Engineer has the implied power to
20 construe the state’s water law, thus, great deference should be given to those
21 interpretations when they are within the language of the statutes. *U.S. v. State Eng’r*,
22 117 Nev. 585, 598, 27 P.3d 51, 53 (2001); *Pyramid Lake Paiute Tribe of Indians*, 112 Nev.
23 at 747-48, 918 P.2d at 700; *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).
24 Although the State Engineer’s interpretation of a statute is not controlling, the court
25 “recognizes the State Engineer’s expertise and looks to his interpretation of a Nevada
26 water law statute as persuasive, if not mandatory, authority.” *In re Ruling No. 5823*,
27 128 Nev. at 239, 277 P.3d at 453 (2012) (citing *Town of Eureka*, 108 Nev. at 155-56,
28 826 P.2d at 950).

1 **II. Analysis**

2 The Court finds that the State Engineer is trying to do his job and trying to get a
3 handle on the over-appropriation in the Pahrump Basin, and does not fault him for doing
4 so. However, these parcel owners also have rights at issue here, and they have paid some
5 money for these parcels at some point in time, and have had the expectation of being able
6 to drill a domestic well, with the ability to withdraw up to 2.0 afa, without going through
7 the permitting process to do so. Therefore, the Court finds that this is a tight issue and a
8 close call. However, after hearing the arguments from both parties, the Court now
9 **GRANTS** the Petition for Judicial Review and **REVERSES** Amended Order No. 1293A
10 for the following reasons:

11 **A. The State Engineer Exceeded his Statutory Authority**

12 In looking at the legislative history of NRS 533 and NRS 534, it can be seen that
13 there seems to be special deference given to domestic wells. The Court gives the benefit of
14 the doubt to Petitioners here, that the State Engineer exceeded his statutory authority by
15 issuing Amended Order No. 1293A. These existing parcels, prior to Amended Order
16 No. 1293A, were eligible to drill a domestic well without a water right permit and
17 withdraw up to 2.0 afa. Amended Order No. 1293A converts these existing parcels into
18 parcels that, in order to utilize groundwater for domestic purposes, now require parcel
19 owners to acquire groundwater rights at the level of 2.0 afa and donate the water to the
20 State Engineer so that some of these water rights can be returned to the basin and to
21 prevent the increase in the amount of pumping or appropriation of water rights in the
22 Pahrump Basin. Overall, it does not appear that the statutory scheme allows this, and
23 therefore the Court rules in favor of Petitioners in that the State Engineer exceeded his
24 statutory authority by issuing Amended Order No. 1293A.

25 **B. Notwithstanding the State Engineer's Statutory Authority, Notice**
26 **and a Hearing Should Have Been Provided**

27 Regardless of whether the State Engineer, by reason of designating the Pahrump
28 Basin, had the statutory authority to issue Amended Order No. 1293A and curtail

1 domestic well drilling, Amended Order No. 1293A results in a substantial change to the
2 property interest of these existing parcels. These parcel owners had an expectation to be
3 able to develop these parcels, and they need a well to do it. When the parcel owners
4 acquired this property, they could drill a domestic well without acquiring a water right
5 permit to do so. In essence, the State Engineer is taking domestic wells, something that
6 did not require a water right permit by statute, and is making it a permitted process that
7 the Court finds was not contemplated by the relevant statutes.

8 The Court finds that regardless of the statutory authority, the effect of Amended
9 Order No. 1293A rises to the level of taking away a valuable paid-for interest on the part
10 of these parcel owners. Therefore, notice and an opportunity to be heard was necessary
11 before adopting Amended Order No. 1293A, as this is a big change and an expensive
12 additional cost to these parcel owners. These parcel owners needed to be afforded due
13 process.

14 **C. PFW Has Standing as a Petitioner to Challenge Amended Order**
15 **No. 1293A**

16 It is clear to the Court that Pahrump Fair Water, the Limited Liability Company,
17 is made up mostly of those people that are property owners who have certain rights in
18 this ability to drill a well and develop their dwelling. That is the reason that PFW, LLC
19 exists. The Court finds that this case is not different from *Citizens for Cold Springs v.*
20 *City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009), where the Supreme Court
21 found that a group of adjacent neighbors to voluntarily annexed land had standing to sue
22 as "any person" under NRS 268.668. The Court finds that it would not make sense to
23 require 4,000 or more individuals to try and to come up individually with money for
24 attorneys and get things going to file a Petition for Judicial Review within the 30-day
25 time period. PFW is an appropriate legal entity to represent the interests of its members
26 who are feeling aggrieved by Amended Order No. 1293A.

27 ///

28 ///

1 **D. The State Engineer's Record on Appeal is Deficient**

2 There is ample evidence showing that the overall trend of the valley is that the
3 groundwater is being over-pumped or not recharged enough. The water levels in the
4 basin are going down; while some areas near the alluvial fan might be going up, the
5 overall trend is down for the total basin. However, there was not, in fact, a study in the
6 State Engineer's Record on Appeal dealing with how new domestic wells on these parcels
7 will effect water levels and existing wells. Therefore, the Court also finds that there is
8 some deficiencies in the State Engineer's studies and Record on Appeal in order to come
9 up with Amended Order No. 1293A.

10 **E. The Court Makes No Determination as to Petitioner's Taking Claim**

11 The Court has already determined that in issuing Amended Order No. 1293A, the
12 State Engineer (1) exceeded his statutory authority, (2) did not provide notice and a
13 hearing, as required by due process, and (3) had deficiencies in his Record on Appeal.
14 Because of this, Amended Order No. 1293A is invalid. Accordingly, the Court finds that
15 there is no need at this time to make a determination with respect to whether Amended
16 Order No. 1293A is an unconstitutional taking of private property without just
17 compensation.

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1 **III. Order**

2 After consideration of the arguments presented by both parties, and good cause
3 appearing therefore, the Court hereby finds that Amended Order No. 1293A was
4 arbitrary and capricious, and therefore Amended Order No. 1293A is reversed.

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

7 IT IS HEREBY FURTHER ORDERED that the State Engineer's Amended Order
8 No. 1293A is **REVERSED.**

9 **IT IS SO ORDERED.**

10 DATED this _____ day of _____, 2018.

11
12 DISTRICT JUDGE
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20

21 Submitted by:

22 ADAM PAUL LAXALT

Attorney General

23 JAMES N. BOLOTIN

Deputy Attorney General

24 Nevada Bar No. 13829

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Attorney for Respondent, State Engineer
28

EXHIBIT 2

EXHIBIT 2

1 CASE NO. CV 39524

2 DEPT NO. 2

3
4 IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT
5 COUNTY OF NYE, STATE OF NEVADA
6

7 PAHRUMP FAIR WATER, LLC.,)
a Nevada limited-liability company)
8 STEVEN PETERSON, an individual;)
MICHAEL LACH, an individual;)
9 PAUL PECK, an individual;)
BRUCE JABOUR, an individual and)
10 GERALD SCHULTE, an individual)

11 Petitioners,)

12 vs.)

13 JASON KING, P.E., Nevada State)
Engineer, DIVISION OF WATER)
14 RESOURCES, DEPARTMENT OF CONSERVATION)
AND NATURAL RESOURCES,)
15)

16 Respondent.)

CERTIFIED COPY

EXCERPT

17 BEFORE THE HONORABLE STEVEN P. ELLIOT

18 DISTRICT COURT JUDGE

19 1520 EAST BASIN AVENUE

20 PAHRUMP, NEVADA 89060

21
22 ON THURSDAY, NOVEMBER 8, 2018

23 AT 10:07 A.M.

24
25 Reported by: Deborah Ann Hines, CCR #473, RPR

1 Appearances:

2 For the Petitioners:

3 PAUL G. TAGGART, ESQ.
4 - and -
5 DAVID H. RIGDON, ESQ.
6 Taggart & Taggart
7 108 N. Minnesota Street
8 Carson City, NV 89703
9 (775) 882-9900
10 paul@legaltnt.com

11 For the respondents:

12 JAMES N. BOLOTIN, ESQ.
13 Deputy Attorney General
14 100 N. Carson Street
15 Carson City, NV 89701
16 (775) 684-1231
17 jbolotin@ag.nv.gov

E X H I B I T S

PLAINTIFF'S EXHIBIT

OFFERED

ADMITTED

(None)

DEFENDANT'S EXHIBIT

OFFERED

ADMITTED

(None)

EXCERPT

THURSDAY, NOVEMBER 8, 2018

---oOo---

THE COURT: You know, although my career hasn't really been, you know, as an environmental law lawyer, I did take water law in college in Colorado and, I think I do understand that, you know, the western states are appropriation states, the eastern states are riparian or, you know, you get to take, you know, water out of the streams that are plentiful in the east. Not so here. Because of mining, we needed to take water from parcels that had water, move it over to where the mines were at, and, you know, that became, you know, the way the west was won. You appropriated water that could be moved.

And I do, you know, certainly think that the state engineer is doing his job and trying to get a handle on, you know, a situation of over-appropriation perhaps in the Pahrump basin. And, you know, I can't fault that. I don't think none of us can fault that. But, you know, trying to get a handle on this issue the, you know, sort of rights of parcel owners who have a parcel, paid some money for it somewhere down the line, and have expectation of being able to put in a domestic well

1 and not have a permitting process to do so and have
2 the right to pump up to two acre feet. Maybe it's
3 less in reality, but that's what the law allows.

4 I'm, you know, struggling with this one. I
5 think it's a tight issue, you know. It would
6 probably be nice if the state engineer had, you know,
7 broad powers to, you know, get a handle on, you know,
8 the desert basin water use, but I can see from, you
9 know, the history of this statute that there seems to
10 be special deference given to domestic wells. And I
11 can see the expectation of these people to, you know,
12 be able to drill a well, and each little house isn't
13 really taking up a whole lot of water.

14 And I guess I'm going to give the benefit of
15 the doubt to the petitioners here that the state
16 engineer is exceeding authority to convert these
17 parcels that don't even have to get a permit to drill
18 a well and to, having to go through and, you know, a
19 new process of acquiring, you know, groundwater
20 rights, you know, at the level of two acre feet per
21 well and donating that water to the state engineer so
22 that they can sort of get back some of these
23 appropriated water rights and, you know, not expand
24 the amount of pumping, you might say, or
25 appropriation of water rights in the basin. But it

1 doesn't look to me like overall in the statutory
2 scheme that it's allowed. So I would go with the
3 petitioners on that.

4 And then as to the issue of the notice and a
5 hearing, regardless of whether the state engineer, by
6 reason of having a designated basin, has, you know,
7 some special rights to curtail domestic well
8 drilling, I think where you are doing a substantial
9 change to the property interest, the property rights
10 of somebody with a parcel who expects to be able to
11 develop the parcel and needs to have a well to do it,
12 and when they acquired that property they could do it
13 without a permit.

14 And in the overall statutory scheme it still
15 seems to be that they can do this without a permit
16 and change it around to require the two acre feet
17 have to be purchased and, you know, make it
18 definitely, in essence, a permitted process that I
19 don't think is really contemplated here. I think,
20 you know, it is rising up to the level of taking away
21 a valuable paid-for interest on the part of these
22 property owners.

23 And you'd have to give notice and an
24 opportunity to be heard before adopting this, you
25 know, in any event, you know, because this is such a

1 big change and an expensive additional cost to these
2 parcel owners that you'd have to give that. You'd
3 have to afford due process. It's not something that
4 can just be legislated and you don't worry about it.

5 As to the issue of the authority of the
6 Pahrump Fair Water LLC, or however it's designated,
7 the LLC, a Nevada limited liability company, it's
8 clear to me that most of those people are property
9 owners who have certain rights in this ability to
10 drill a well and develop their dwelling. And that's
11 the reason for the existence of this.

12 And I think the, you know, it's not
13 different than the Cold Springs case. And you can,
14 you know, instead of trying to have, you know, 4,000
15 or more individuals, you know, we don't know how many
16 people, they're saying, you know, it could be 8,000,
17 but it's at least 4,000, try to come up individually
18 and, you know, raise the money for attorneys and, you
19 know, getting things going within the 30 days, you
20 know, doesn't make sense to me.

21 I think, you know, Pahrump Fair Water is an
22 appropriate legal entity to represent the interests
23 of, you know, its members who are feeling aggrieved
24 by this new order. And, you know, while I think
25 there's, you know, ample evidence showing that the

1 overall trend of the valley is that the groundwater
2 is being over-pumped or not recharged enough, but
3 it's going down, some areas might be going up, but
4 the overall trend is down for the total basin.

5 There wasn't, in fact, a study that was
6 dealing with, you know, how the continuation of, you
7 know, wells, domestic wells on these parcels that
8 need to have the wells in order to get water, that
9 really isn't there. So I think there is some
10 deficiency in the state engineer's studies in order
11 to come up with this result.

12 So for that reason I am going to grant the
13 relief requested by the petitioners and direct their
14 counsel to prepare the appropriate order.

15 MR. RIGDON: Thank you.

16 MR. TAGGART: Thank you, your Honor.

17 MR. RIGDON: Thank you, your Honor. And
18 would that be effective today?

19 THE COURT: Well, I guess it's effective
20 today, but, you know, I guess, you know, nobody
21 actually sees it until it's signed, but I guess it's
22 effective today.

23 MR. RIGDON: Okay.

24 THE COURT: But, I don't know. Does that
25 make any sense, Mr. Bolotin, in terms of the

1 effective date?

2 MR. BOLOTIN: I don't think it's in your
3 power, your Honor, to make it effective whenever it
4 is.

5 MR. RIGDON: We'll get you an order within a
6 week.

7 THE COURT: Well, you know, I hate to be
8 telling war stories, but I do have an extraordinary
9 story. I had a child custody case, and on a
10 Wednesday night, around 5:00 o'clock, I finally --
11 you know, we had a three-day trial, Monday, Tuesday
12 Wednesday. I ordered that the child who had been
13 living with one parent in Washington state, right on
14 the Canadian border, she had the child come back here
15 to have this hearing, and I awarded it to other
16 parent for, you know, the next two years, because the
17 other parent had two years already where that parent
18 had taken the child away.

19 Anyway, I made that ruling, and they agreed
20 they would actually transfer the child on a Friday,
21 the Friday after that Wednesday. And so, of course,
22 the parent with the child went to the Las Vegas
23 airport to fly back to Seattle, probably was going to
24 take the child to Canada. But even without a written
25 order, the airport police were willing to stop, you

1 know, find and stop the woman and get the child back.
2 I was astounded that that actually happened with no
3 written order. So anyway, sometimes miracles happen,
4 I guess.

5 So anyway, is there some issue about when
6 the effective date is?

7 MR. BOLOTIN: The only issue, your Honor,
8 that I could see is that the people back at the
9 Division of Water Resource would have to go, they
10 could probably do it quickly, but I don't know if it
11 would happen today, even though for all intents and
12 purposes it's locally effective, but they have to go
13 in and note that the order has been overturned or
14 something like that.

15 THE COURT: Well, it might not -- you know,
16 it might have to wait until there's a written order.
17 That might make more sense that they do something
18 with a written order instead of, well, yeah, the
19 judge ruled this way. I understand that that's
20 stretching it.

21 Okay, if there's nothing else, let's stand
22 in recess.

23 (Thereupon the proceedings
24 were concluded at 3:20 p.m.)

25 * * * * *

CERTIFICATE OF REPORTER

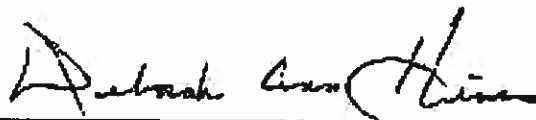
STATE OF NEVADA)

SS:

COUNTY OF CLARK)

I, Deborah Ann Hines, certified court reporter, do hereby certify that I took down in shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 8th day of November, 2018.



Deborah Ann Hines, CCR #473, RPR

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
2 DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
3 TAGGART & TAGGART, LTD.
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4 Carson City, Nevada 89703
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6 Attorneys for Petitioners

FILED

2018 NOV 26 P 2:44

NYE COUNTY CLERK
BY Bennett
DEPUTY

7
8 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF NYE

10 * * *

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

Case No. 39524

Dept. No. 2

14 Petitioners,

15 vs.

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

19 Respondent.

20 **[PROPOSED] ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

21 A proposed order is attached hereto as Exhibit 1.

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Carson City, Nevada 89703
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AFFIRMATION
Pursuant to NRS 239B.030(4)

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

DATED this 21st day of November, 2018.

TAGGART & TAGGART, LTD.
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By: 

PAUL G. TAGGART, ESQ.
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Attorneys for Petitioners

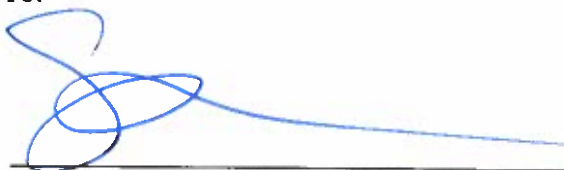
CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 21st day of November, 2018.



Employee of TAGGART & TAGGART, LTD.

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

<u>Exhibit</u>	<u>Document</u>	<u>Pages</u>
1.	[Proposed] Order Granting Petition for Judicial Review	10

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EXHIBIT 1

EXHIBIT 1

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8 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
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24 **ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

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

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

5 **I. Facts and Procedural History**

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

15 Petitioner, PFW timely filed a Petition for Judicial Review of Order 1293. PFW filed its Opening
16 Brief in that appeal on July 6, 2018. On July 12, 2018, without providing any notice to the Court or
17 opposing counsel, the State Engineer issued Order 1293A (the "Amended Order"). On July 18, 2018,
18 the State Engineer filed a motion to dismiss PFW's appeal of Order 1293, claiming that the issuance of
19 Order 1293A rendered the appeal moot. The State Engineer stated in the motion to dismiss that "Order
20 1293A supersedes any legal force and effect of Order 1293" and therefore "Order 1293 is no longer
21 legally valid or enforceable." Like Order 1293, Order 1293A was issued without providing any notice
22 to affected property and without providing an opportunity for affected persons to provide comments or
23 challenge the evidence the State Engineer relied upon. In substance and effect, Order 1293A is nearly
24 identical to Order 1293. The only difference is that Order 1293A provides two additional exemptions
25 to the drilling restriction. Of these exemptions, one allows individuals who filed a notice of intent to
26 drill a domestic well before the issuance of Order 1293, and who had those notices subsequently rejected
27 by the State Engineer, to refile the notices and drill their wells.
28

1 On August 8, 2018, the parties entered into a settlement agreement whereby PFW agreed to
2 voluntarily dismiss the appeal of Order 1293 and file a new petition for judicial review of Order 1293A.
3 In exchange, the State Engineer agreed to an expedited briefing schedule and to expedite the scheduling
4 of a hearing on the new appeal. On August 10, 2018, the parties filed a stipulation requesting dismissal
5 of the previous appeal. On that same day, PFW submitted a new petition for judicial review of Order
6 1293A to the Court and served the same on the State Engineer.

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

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

25 **II. Standard of Review**

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

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

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

13 Here, the State Engineer provided no notice that he was intending to issue the Amended Order,
14 nor did he hold any hearing or seek any comments from affected property owners. Accordingly, unlike
15 with other appellate-type proceedings, there is little to no record below for the Court to review. While
16 the State Engineer has provided an ostensible “record on appeal” for the Court’s consideration, this
17 record consists of only the documents the State Engineer claims he relied on in making his decision.
18 None of the documents have been authenticated or validated, nor have the authors of the documents
19 been required to testify in a formal hearing or been subjected to cross-examination. In addition, no one
20 from the State Engineer’s office has provided any testimony or evidence supporting his claim of reliance
21 on these documents. Accordingly, none of the processes and procedures which are designed to ensure
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24 ¹ *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Shetakis Dist.*
v. State, Dep’t of Taxation, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).

25 ² BLACK’S LAW DICTIONARY 125 (10th ed. 2014) (definition of “arbitrary”).

26 ³ BLACK’S LAW DICTIONARY 254 (10th ed. 2014) (definition of “capricious”).

27 ⁴ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

28 ⁵ *Bacher v. State Eng’r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Emp. Sec. Dep’t v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

⁶ *Revert*, 95 Nev. 782, 603 P.2d 262.

⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

⁸ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

⁹ *Id.*

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

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

15 **III. The State Engineer Exceeded His Statutory Authority.**

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

22 Two separate and distinct protections for domestic wells are provided in NRS 534.180(1) and
23 NRS 534.030(4) which are exemptions from the State Engineer’s general regulatory control. Under
24 NRS 534.180(1), domestic wells are exempt from the State Engineer’s permitting process while NRS
25

26 ¹⁰ Answering Brief at 8:20-21 (citing *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

27 ¹¹ *Town of Eureka v. Office of State Eng’r, State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992).

28 ¹² *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

¹³ See *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a deferential standard of review for federal courts reviewing legal determinations of federal agencies).

¹⁴ *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)) (emphasis added).

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

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

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

16 The State Engineer issued Order 1293 on December 19, 2017, without any prior notice or
17 publication and without holding a hearing. Order 1293A was issued while the appeal over Order 1293
18 was pending. The State Engineer issued Order 1293A without any prior notice or publication. These
19 facts are a matter of public record and are undisputed. The Nevada Supreme Court has ruled that prior
20 to issuing a regulation affecting an interest in real property a regulatory body must provide personal
21 notice to each affected property owner.¹⁷ Said notice must include the content of the regulation so that
22 affected parties can adequately prepare to oppose it.¹⁸ Finally, the regulatory body must hold a hearing
23 and allow affected property owners the opportunity to provide testimony and evidence related to the
24 regulation.¹⁹ A failure to follow these steps is a constitutional due process violation that renders the
25 regulation invalid. Because the Orders impair a vested property right, and because the State Engineer
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27 ¹⁵ Answering Brief at 12:21-22.

¹⁶ *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

28 ¹⁷ *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

¹⁸ *Id.*

¹⁹ *Id.*

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

3 **V. Substantial Evidence Does Not Support Order 1293A.**

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

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

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

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27 ²⁰ Answering Brief at 10:27-11:2.

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

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

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

8 The Court has already determined that the Respondent (1) did not have legislative authority to
9 issue Order 1293A, (2) violated due process in the issuance of Order 1293A, and (3) issued Order 1293A
10 without substantial evidence to support it. Because of this Oder 1293A is invalid. Accordingly, the
11 Court finds that there is no need at this time to make a determination with respect to whether Order
12 1293A is an unconstitutional taking of private property without just compensation.

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

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

18 In *Citizens for Cold Springs v. City of Reno*,²⁴ the Court reviewed the grant of statutory standing
19 contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an
20 association of property owners that would be affected by an annexation decision had standing to
21 challenge that decision.²⁵ The Court interpreted the language of NRS 268.668 which grants standing to
22 "any person or city claiming to be adversely affected by such proceeding."²⁶ Since the statute says that
23 any person claiming to be adversely affected may bring an action, in the "tradition of [its] long-standing
24 jurisprudence," the Court found that standing rights under NRS 268.668 are broader that what
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27 ²² Answering Brief at 29:8-12.

²³ SROA 858:22-859:1.

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

²⁵ *Id.*, 125 Nev. at 634, 218 P.3d at 853.

²⁶ *Id.*, 125 Nev. at 629, 218 P.3d at 850.

1 constitutional standing allows.²⁷ The Court specifically focused on the NRS 268.668 grant of standing
2 to any person claiming to be aggrieved.²⁸ Based on that language the Court held that even property
3 owners who do not have constitutional standing because they did not own property in the area of
4 annexation at issue do have standing under NRS 268.668.²⁹

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

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27 ²⁷ *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

28 ²⁸ *Id.*

29 ²⁹ *Id.*, 125 Nev. at 631, 218 P.3d at 851.

30 ³⁰ *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

31 ³¹ SROA 858:22-859:1.

ORDER

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

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

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

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

IT IS SO ORDERED.

DATED this _____ day of _____, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

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

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

FILED

2018 DEC -6 P 2:34

NYE COUNTY CLERK

BY

TD
DEPUTY

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IN AND FOR THE COUNTY OF NYE

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26 drill a domestic well before the issuance of Order 1293, and who had those notices subsequently rejected
27 by the State Engineer, to refile the notices and drill their wells.
28

1 On August 8, 2018, the parties entered into a settlement agreement whereby PFW agreed to
2 voluntarily dismiss the appeal of Order 1293 and file a new petition for judicial review of Order 1293A.
3 In exchange, the State Engineer agreed to an expedited briefing schedule and to expedite the scheduling
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6 1293A to the Court and served the same on the State Engineer.

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

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

25 **II. Standard of Review**

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

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

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

13 Here, the State Engineer provided no notice that he was intending to issue the Amended Order,
14 nor did he hold any hearing or seek any comments from affected property owners. Accordingly, unlike
15 with other appellate-type proceedings, there is little to no record below for the Court to review. While
16 the State Engineer has provided an ostensible “record on appeal” for the Court’s consideration, this
17 record consists of only the documents the State Engineer claims he relied on in making his decision.
18 None of the documents have been authenticated or validated, nor have the authors of the documents
19 been required to testify in a formal hearing or been subjected to cross-examination. In addition, no one
20 from the State Engineer’s office has provided any testimony or evidence supporting his claim of reliance
21 on these documents. Accordingly, none of the processes and procedures which are designed to ensure
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24 ¹ *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Shetakis Dist.*
25 *v. State, Dep’t of Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).

26 ² BLACK’S LAW DICTIONARY 125 (10th ed. 2014) (definition of “arbitrary”).

27 ³ BLACK’S LAW DICTIONARY 254 (10th ed. 2014) (definition of “capricious”).

28 ⁴ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

⁵ *Bacher v. State Eng’r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Emp. Sec. Dep’t v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

⁶ *Revert*, 95 Nev. 782, 603 P.2d 262.

⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

⁸ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

⁹ *Id.*

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

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

15 **III. The State Engineer Exceeded His Statutory Authority.**

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

22 Two separate and distinct protections for domestic wells are provided in NRS 534.180(1) and
23 NRS 534.030(4) which are exemptions from the State Engineer’s general regulatory control. Under
24 NRS 534.180(1), domestic wells are exempt from the State Engineer’s permitting process while NRS
25

26 ¹⁰ Answering Brief at 8:20-21 (citing *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

27 ¹¹ *Town of Eureka v. Office of State Eng’r, State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992).

28 ¹² *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

¹³ See *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a
deferential standard of review for federal courts reviewing legal determinations of federal agencies).

¹⁴ *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986))
(emphasis added).

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

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

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

16 The State Engineer issued Order 1293 on December 19, 2017, without any prior notice or
17 publication and without holding a hearing. Order 1293A was issued while the appeal over Order 1293
18 was pending. The State Engineer issued Order 1293A without any prior notice or publication. These
19 facts are a matter of public record and are undisputed. The Nevada Supreme Court has ruled that prior
20 to issuing a regulation affecting an interest in real property a regulatory body must provide personal
21 notice to each affected property owner.¹⁷ Said notice must include the content of the regulation so that
22 affected parties can adequately prepare to oppose it.¹⁸ Finally, the regulatory body must hold a hearing
23 and allow affected property owners the opportunity to provide testimony and evidence related to the
24 regulation.¹⁹ A failure to follow these steps is a constitutional due process violation that renders the
25 regulation invalid. Because the Orders impair a vested property right, and because the State Engineer
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27 ¹⁵ Answering Brief at 12:21-22.

28 ¹⁶ *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

¹⁷ *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

¹⁸ *Id.*

¹⁹ *Id.*

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

3 **V. Substantial Evidence Does Not Support Order 1293A.**

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

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

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

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26 _____
27 ²⁰ Answering Brief at 10:27-11:2.

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

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

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

8 The Court has already determined that the Respondent (1) did not have legislative authority to
9 issue Order 1293A, (2) violated due process in the issuance of Order 1293A, and (3) issued Order 1293A
10 without substantial evidence to support it. Because of this Order 1293A is invalid. Accordingly, the
11 Court finds that there is no need at this time to make a determination with respect to whether Order
12 1293A is an unconstitutional taking of private property without just compensation.

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

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

18 In *Citizens for Cold Springs v. City of Reno*,²⁴ the Court reviewed the grant of statutory standing
19 contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an
20 association of property owners that would be affected by an annexation decision had standing to
21 challenge that decision.²⁵ The Court interpreted the language of NRS 268.668 which grants standing to
22 "any person or city claiming to be adversely affected by such proceeding."²⁶ Since the statute says that
23 any person claiming to be adversely affected may bring an action, in the "tradition of [its] long-standing
24 jurisprudence," the Court found that standing rights under NRS 268.668 are broader than what
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26
27 ²² Answering Brief at 29:8-12.

28 ²³ SROA 858:22-859:1.

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

²⁵ *Id.*, 125 Nev. at 634, 218 P.3d at 853.

²⁶ *Id.*, 125 Nev. at 629, 218 P.3d at 850.

1 constitutional standing allows.²⁷ The Court specifically focused on the NRS 268.668 grant of standing
2 to any person claiming to be aggrieved.²⁸ Based on that language the Court held that even property
3 owners who do not have constitutional standing because they did not own property in the area of
4 annexation at issue do have standing under NRS 268.668.²⁹

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

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27 ²⁷ *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

28 ²⁸ *Id.*

29 ²⁹ *Id.*, 125 Nev. at 631, 218 P.3d at 851.

30 ³⁰ *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

31 ³¹ SROA 858:22-859:1.

ORDER

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

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

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

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

IT IS SO ORDERED.

DATED this 3 day of December, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

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

By: 

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7 Attorneys for Petitioners

FILED
FIFTH JUDICIAL DISTRICT COURT

DEC 07 2018

NYE COUNTY DEPUTY CLERK
DEPUTY

Marianne Yoffee

8
9 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF NYE

11 * * *

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

Case No. 39524

Dept. No. 2

15 Petitioners,

16 vs.

17 JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
18 DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,
19

20 Respondent.

21 **NOTICE OF ENTRY OF ORDER**

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

25 ///

26 ///

27 ///


28 ///

AFFIRMATION
Pursuant to NRS 239B.030(4)

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

DATED this 6 day of December, 2018.

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

By: 
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CERTIFICATE OF SERVICE

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

☒ **BY HAND-DELIVERY:**

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

DATED this 6th day of December, 2018.



Employee of TAGGART & TAGGART, LTD.

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

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<u>Exhibit</u>	<u>Document</u>	<u>Pages</u>
1.	Order Granting Petition for Judicial Review	10

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 - Telephone
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EXHIBIT 1

EXHIBIT 1

FILE

2018 DEC -6 P 2:34

NYE COUNTY CLERK

BY TD
DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

PAHRUMP FAIR WATER, LLC, a Nevada
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Engineer, DIVISION OF WATER RESOURCES,
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Respondent.

Case No. 39524

Dept. No. 2

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

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

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

5 **I. Facts and Procedural History**

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

15 Petitioner, PFW timely filed a Petition for Judicial Review of Order 1293. PFW filed its Opening
16 Brief in that appeal on July 6, 2018. On July 12, 2018, without providing any notice to the Court or
17 opposing counsel, the State Engineer issued Order 1293A (the "Amended Order"). On July 18, 2018,
18 the State Engineer filed a motion to dismiss PFW's appeal of Order 1293, claiming that the issuance of
19 Order 1293A rendered the appeal moot. The State Engineer stated in the motion to dismiss that "Order
20 1293A supersedes any legal force and effect of Order 1293" and therefore "Order 1293 is no longer
21 legally valid or enforceable." Like Order 1293, Order 1293A was issued without providing any notice
22 to affected property and without providing an opportunity for affected persons to provide comments or
23 challenge the evidence the State Engineer relied upon. In substance and effect, Order 1293A is nearly
24 identical to Order 1293. The only difference is that Order 1293A provides two additional exemptions
25 to the drilling restriction. Of these exemptions, one allows individuals who filed a notice of intent to
26 drill a domestic well before the issuance of Order 1293, and who had those notices subsequently rejected
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13 Here, the State Engineer provided no notice that he was intending to issue the Amended Order,
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24 ¹ *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Shetakis Dist.*
25 *v. State, Dep't of Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).

26 ² BLACK'S LAW DICTIONARY 125 (10th ed. 2014) (definition of "arbitrary").

27 ³ BLACK'S LAW DICTIONARY 254 (10th ed. 2014) (definition of "capricious").

28 ⁴ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

⁵ *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Emp. Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

⁶ *Revert*, 95 Nev. 782, 603 P.2d 262.

⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

⁸ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

⁹ *Id.*

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

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

15 **III. The State Engineer Exceeded His Statutory Authority.**

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

22 Two separate and distinct protections for domestic wells are provided in NRS 534.180(1) and
23 NRS 534.030(4) which are exemptions from the State Engineer’s general regulatory control. Under
24 NRS 534.180(1), domestic wells are exempt from the State Engineer’s permitting process while NRS
25

26 ¹⁰ Answering Brief at 8:20-21 (citing *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

27 ¹¹ *Town of Eureka v. Office of State Eng’r, State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992).

28 ¹² *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

¹³ See *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a
deferential standard of review for federal courts reviewing legal determinations of federal agencies).

¹⁴ *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986))
(emphasis added).

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

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

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

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

26 ¹⁵ Answering Brief at 12:21-22.

27 ¹⁶ *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

28 ¹⁷ *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

¹⁸ *Id.*

¹⁹ *Id.*

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

3 **V. Substantial Evidence Does Not Support Order 1293A.**

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

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

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

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26 _____
27 ²⁰ Answering Brief at 10:27-11:2.

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

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

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

8 The Court has already determined that the Respondent (1) did not have legislative authority to
9 issue Order 1293A, (2) violated due process in the issuance of Order 1293A, and (3) issued Order 1293A
10 without substantial evidence to support it. Because of this Order 1293A is invalid. Accordingly, the
11 Court finds that there is no need at this time to make a determination with respect to whether Order
12 1293A is an unconstitutional taking of private property without just compensation.

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

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

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

26
27 ²² Answering Brief at 29:8-12.

²³ SROA 858:22-859:1.

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

²⁵ *Id.*, 125 Nev. at 634, 218 P.3d at 853.

²⁶ *Id.*, 125 Nev. at 629, 218 P.3d at 850.

1 constitutional standing allows.²⁷ The Court specifically focused on the NRS 268.668 grant of standing
2 to any person claiming to be aggrieved.²⁸ Based on that language the Court held that even property
3 owners who do not have constitutional standing because they did not own property in the area of
4 annexation at issue do have standing under NRS 268.668.²⁹

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

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27 *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

28 *Id.*

29 *Id.*, 125 Nev. at 631, 218 P.3d at 851.

30 *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

31 SROA 858:22-859:1.

ORDER

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

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

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

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

IT IS SO ORDERED.

DATED this 3 day of December, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

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

By: 

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



COPY

FILED
FIFTH JUDICIAL DISTRICT

DEC 10 2018

Nye County Clerk
E. Westerlund Deputy

DEC 30 2018

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

Case No. CV 39524 OFFICE OF THE ATTORNEY GENERAL
CARSON CITY, NEVADA

Dept. No. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

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

Petitioners,

vs.

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

Respondent.

NOTICE OF APPEAL


Notice is hereby given that Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby appeals to the Nevada Supreme Court from this Court's Order Granting Petition for Judicial Review, filed by this Court on December 6, 2018. Notice of Entry of Order was served on December 6, 2018. A copy of said Notice of Entry of Order is attached hereto as Exhibit 1.

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DATED this 7th day of December, 2018.

By:  (Bar No. 14156)
for JAMES N. BOLOTIN (Bar No. 13829)
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1231
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Attorney for Respondent,
State Engineer

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Paul G. Taggart, Esq.
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Dorene A. Wright
Dorene A. Wright

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INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Notice of Entry of Order	15

EXHIBIT 1

EXHIBIT 1

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
2 DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
3 TIMOTHY D. O'CONNOR, ESQ.
Nevada State Bar No. 14098
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OFFICE OF THE ATTORNEY GENERAL
CARSON CITY, NEVADA

DEC 06 2018

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

8
9 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF NYE

11 * * *

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

Case No. 39524

Dept. No. 2

15 Petitioners,

16 vs.

17 JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
18 DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,
19

20 Respondent.

21 **NOTICE OF ENTRY OF ORDER**

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

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AFFIRMATION
Pursuant to NRS 239B.030(4)

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

DATED this 11 day of December, 2018.

TAGGART & TAGGART, LTD.
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Carson City, Nevada 89703
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By: 

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CERTIFICATE OF SERVICE

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

☒ BY HAND-DELIVERY:

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

DATED this 6th day of December, 2018.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

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<u>Exhibit</u>	<u>Document</u>	<u>Pages</u>
1.	Order Granting Petition for Judicial Review	10

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

EXHIBIT 1

EXHIBIT 1

FILED

2018 DEC -6 P 2:34

NYE COUNTY CLERK

BY TD
DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

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

Petitioners,

vs.

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

Respondent.

Case No. 39524

Dept. No. 2

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

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

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

5 I. **Facts and Procedural History**

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

15 Petitioner, PFW timely filed a Petition for Judicial Review of Order 1293. PFW filed its Opening
16 Brief in that appeal on July 6, 2018. On July 12, 2018, without providing any notice to the Court or
17 opposing counsel, the State Engineer issued Order 1293A (the "Amended Order"). On July 18, 2018,
18 the State Engineer filed a motion to dismiss PFW's appeal of Order 1293, claiming that the issuance of
19 Order 1293A rendered the appeal moot. The State Engineer stated in the motion to dismiss that "Order
20 1293A supersedes any legal force and effect of Order 1293" and therefore "Order 1293 is no longer
21 legally valid or enforceable." Like Order 1293, Order 1293A was issued without providing any notice
22 to affected property and without providing an opportunity for affected persons to provide comments or
23 challenge the evidence the State Engineer relied upon. In substance and effect, Order 1293A is nearly
24 identical to Order 1293. The only difference is that Order 1293A provides two additional exemptions
25 to the drilling restriction. Of these exemptions, one allows individuals who filed a notice of intent to
26 drill a domestic well before the issuance of Order 1293, and who had those notices subsequently rejected
27 by the State Engineer, to refile the notices and drill their wells.

1 On August 8, 2018, the parties entered into a settlement agreement whereby PFW agreed to
2 voluntarily dismiss the appeal of Order 1293 and file a new petition for judicial review of Order 1293A.
3 In exchange, the State Engineer agreed to an expedited briefing schedule and to expedite the scheduling
4 of a hearing on the new appeal. On August 10, 2018, the parties filed a stipulation requesting dismissal
5 of the previous appeal. On that same day, PFW submitted a new petition for judicial review of Order
6 1293A to the Court and served the same on the State Engineer.

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

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

25 **II. Standard of Review**

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

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

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

13 Here, the State Engineer provided no notice that he was intending to issue the Amended Order,
14 nor did he hold any hearing or seek any comments from affected property owners. Accordingly, unlike
15 with other appellate-type proceedings, there is little to no record below for the Court to review. While
16 the State Engineer has provided an ostensible "record on appeal" for the Court's consideration, this
17 record consists of only the documents the State Engineer claims he relied on in making his decision.
18 None of the documents have been authenticated or validated, nor have the authors of the documents
19 been required to testify in a formal hearing or been subjected to cross-examination. In addition, no one
20 from the State Engineer's office has provided any testimony or evidence supporting his claim of reliance
21 on these documents. Accordingly, none of the processes and procedures which are designed to ensure
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24 ¹ *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Sherakis Dist.*
v. State, Dep't of Taxation, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).

25 ² BLACK'S LAW DICTIONARY 125 (10th ed. 2014) (definition of "arbitrary").

26 ³ BLACK'S LAW DICTIONARY 254 (10th ed. 2014) (definition of "capricious").

27 ⁴ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

28 ⁵ *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Emp. Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

⁶ *Revert*, 95 Nev. 782, 603 P.2d 262.

⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

⁸ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

⁹ *Id.*

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

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

15 **III. The State Engineer Exceeded His Statutory Authority.**

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

22 Two separate and distinct protections for domestic wells are provided in NRS 534.180(1) and
23 NRS 534.030(4) which are exemptions from the State Engineer’s general regulatory control. Under
24 NRS 534.180(1), domestic wells are exempt from the State Engineer’s permitting process while NRS
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26 ¹⁰ Answering Brief at 8:20-21 (citing *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

27 ¹¹ *Town of Eureka v. Office of State Eng’r, State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992).

28 ¹² *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

¹³ See *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a
deferential standard of review for federal courts reviewing legal determinations of federal agencies).

¹⁴ *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986))
(emphasis added).

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

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

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

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

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27 ¹⁵ Answering Brief at 12:21-22.

¹⁶ *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

¹⁷ *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

¹⁸ *Id.*

¹⁹ *Id.*

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

3 **V. Substantial Evidence Does Not Support Order 1293A.**

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

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

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

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27 ²⁰ Answering Brief at 10:27-11:2.

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

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

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

8 The Court has already determined that the Respondent (1) did not have legislative authority to
9 issue Order 1293A, (2) violated due process in the issuance of Order 1293A, and (3) issued Order 1293A
10 without substantial evidence to support it. Because of this Oder 1293A is invalid. Accordingly, the
11 Court finds that there is no need at this time to make a determination with respect to whether Order
12 1293A is an unconstitutional taking of private property without just compensation.

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

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

18 In *Citizens for Cold Springs v. City of Reno*,²⁴ the Court reviewed the grant of statutory standing
19 contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an
20 association of property owners that would be affected by an annexation decision had standing to
21 challenge that decision.²⁵ The Court interpreted the language of NRS 268.668 which grants standing to
22 "any person or city claiming to be adversely affected by such proceeding."²⁶ Since the statute says that
23 any person claiming to be adversely affected may bring an action, in the "tradition of [its] long-standing
24 jurisprudence," the Court found that standing rights under NRS 268.668 are broader that what
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27 ²² Answering Brief at 29:8-12.

²³ SROA 858:22-859:1.

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

²⁵ *Id.*, 125 Nev. at 634, 218 P.3d at 853.

²⁶ *Id.*, 125 Nev. at 629, 218 P.3d at 850.

1 constitutional standing allows.²⁷ The Court specifically focused on the NRS 268.668 grant of standing
2 to any person claiming to be aggrieved.²⁸ Based on that language the Court held that even property
3 owners who do not have constitutional standing because they did not own property in the area of
4 annexation at issue do have standing under NRS 268.668.²⁹

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

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27 ²⁷ *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

28 ²⁸ *Id.*

29 ²⁹ *Id.*, 125 Nev. at 631, 218 P.3d at 851.

30 ³⁰ *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

31 ³¹ SROA 858:22-859:1.

ORDER

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

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

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

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

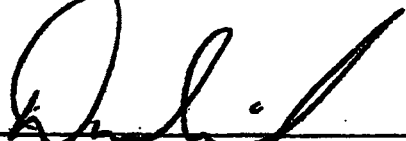
IT IS SO ORDERED.

DATED this 3 day of December, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

TAGGART & TAGGART, LTD.
108 North Minnesota Street
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By: 
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COPY

FILED
FIFTH JUDICIAL DISTRICT

DEC 10 2018

Nye County Clerk
E. Westerlund Deputy

DEC 30 2018

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

Case No. CV 39524

Dept. No. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

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

Petitioners,

vs.

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

Respondent.

**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**

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby moves this Honorable Court, pursuant to NRCP 62(c), for an order staying this Court's Order Granting Petition for Judicial Review, and its reversal of Amended Order No. 1293A, pending appeal of that reversal to the Nevada Supreme Court, on an order shortening time. This Motion is based upon the attached Points and Authorities and the pleadings and papers on file herein.

///

1 **POINTS AND AUTHORITIES**

2 **I. NOTICE OF MOTION**

3 A hearing on this matter is respectfully requested prior to the expiration of the
4 10-day period following service of written notice of entry of this Court's Order Granting
5 Petitioners' Petition for Judicial Review. Pursuant to NRCP 62(a), a party may seek
6 enforcement of a court order after the expiration of 10 days after service of written notice
7 of its entry. Therefore, it is imperative that this matter be heard as soon as possible.

8 **II. BACKGROUND**

9 Petitioners Pahrump Fair Water, LLC, Steven Peterson, Michael Lach, Paul Peck,
10 Bruce Jabeour, and Gerald Schulte (collectively, "Petitioners"), filed their Petition for
11 Judicial Review, seeking the reversal of State Engineer's Amended Order No. 1293A, on
12 or about August 10, 2018. Following a complete briefing on this matter, the Court held
13 oral arguments on this matter on November 8, 2018, in Pahrump, Nevada. After taking
14 oral argument from both sides, this Court ordered that Petitioners' Petition for Judicial
15 Review be granted, and reversed Amended Order No. 1293A. Counsel for both parties
16 submitted proposed orders to the Court on or about November 20, 2018. The written
17 order was filed on December 6, 2018, and the Notice of Entry of Order was served on
18 December 6, 2018.

19 Based on the arguments made to the District Court, the State Engineer is
20 appealing this Court's ruling to the Nevada Supreme Court and he files his Notice of
21 Appeal concurrently with this Motion. Due to serious concerns about the adverse effects
22 of additional well drilling and groundwater pumping in the Pahrump Basin on existing
23 senior water rights holders and existing domestic wells, the State Engineer seeks a stay
24 of this Court's Order, and for Amended Order No. 1293A to remain in effect, during the
25 pendency of this appeal.

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1 **III. DISCUSSION**

2 **A. Standard for a Stay of a Judgment Granting, Dissolving, or Denying**
3 **an Injunction Pending Appeal**

4 The State of Nevada and its agencies are not entitled to a stay of a trial court's
5 judgment on mere filing of a notice of appeal; rather, the government must make a
6 separate and distinct application for a stay of judgment pending appeal. *Clark Cnty.*
7 *Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415
8 P.3d 16, 19 (2018) (citing *Nelson v. Heer*, 121 Nev. 832, 834 n.4, 122 P.3d 1252, 1253 n.4
9 (2005); *Public Serv. Comm'n v. First Jud. Dist. Ct.*, 94 Nev. 42, 45–46, 574 P.2d 272, 274
10 (1978)). Pursuant to NRCP 62(c), when an appeal is taken from a final judgment
11 granting, dissolving, or denying an injunction, the court in its discretion may suspend,
12 modify, restore, or grant an injunction during the pendency of the appeal upon such terms
13 as to bond or otherwise as it considers proper for the security of the rights of the adverse
14 party. Pursuant to NRCP 62(e), when an appeal is taken by the State or by any county,
15 city or town within the State, or an officer or agency thereof and the operation or
16 enforcement of the judgment is stayed, no bond, obligation, or other security shall be
17 required from the government appellant.

18 While not explicitly applicable to a requested stay pending appeal at the district
19 court, Nevada Rule of Appellate Procedure ("NRAP") 8(c) requires the Supreme Court or
20 Court of Appeals to consider the following factors in deciding whether to issue a stay or
21 injunction pending appeal:

- 22 (1) Whether the object of the appeal or writ petition will be
23 defeated if the stay or injunction is denied;
24 (2) Whether appellant/petitioner will suffer irreparable or
25 serious injury if the stay or injunction is denied;
26 (3) Whether respondent/real party in interest will suffer
27 irreparable or serious injury if the stay or injunction is
28 granted; and
(4) Whether appellant/petitioner is likely to prevail on the
merits in the appeal or writ petition.

27 While the Nevada Supreme Court generally does not hold that one factor carries
28 more weight than others, the Court has recognized that if one or two factors are

1 especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v.*
2 *McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (*citing Hansen v. Eighth Jud. Dist. Ct.*
3 *ex rel. Cnty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000)). In other contexts,
4 specifically regarding an order refusing to compel arbitration, the Nevada Supreme Court
5 has articulated that the first stay factor takes on added significance and generally
6 warrants a stay pending resolution of the appeal. *Mikohn Gaming Corp.*, 120 Nev.
7 at 251, 89 P.3d at 38. The other stay factors remain relevant to the Court's analysis, but
8 "absent a strong showing that the appeal lacks merit or that irreparable harm will result
9 if a stay is granted, a stay should issue to avoid defeating the object of the appeal."
10 *Id.*, 120 Nev. at 251–52, 89 P.3d at 38.

11 **B. This Court's Reversal of the State Engineer's Amended Order**
12 **No. 1293A Should be Stayed Pending Appeal**

13 The State Engineer respectfully seeks a stay of this Court's Order Granting
14 Petitioner's Petition for Judicial Review, reversing Amended Order No. 1293A, pending
15 appeal. The State Engineer filed his Notice of Appeal of this Court's Order concurrently
16 with the filing of this Motion, and seeks to preserve the status quo during the pendency of
17 this appeal, *i.e.*, continue the prohibition on drilling new domestic wells in the Pahrump
18 Basin without the relinquishment of 2 acre-feet of water rights, pursuant to Amended
19 Order No. 1293A.

20 The practice in civil cases applies to the informal and summary character of
21 proceedings challenging decisions of the State Engineer. NRS 533.450(8). Pursuant to
22 NRCP 62(c), it is within this Court's discretion to stay a final judgment dissolving an
23 injunction and restore an injunction during the pendency of an appeal. This Court's
24 Order essentially dissolved an injunction prohibiting the drilling of new domestic wells in
25 the Pahrump Basin without relinquishment of 2 acre-feet of water rights, and the State
26 Engineer respectfully requests that this injunction be restored during the pendency of the
27 appeal. While NRCP 62(c) requires a bond or other security for such a request, as the

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1 head of the Division of Water Resources, an agency of the State of Nevada, no bond,
2 obligation, or other security is required from the State Engineer. NRCP 62(e).

3 In this case, the first factor regarding the potential defeat of the object of the State
4 Engineer's appeal should hold substantial weight. The State Engineer issued Amended
5 Order No. 1293A due to the significant water issues facing the Pahrump Basin, based on
6 studies showing continuing water level declines on the valley floor of the Pahrump Basin
7 and projecting the failure of thousands of existing wells under existing pumping
8 conditions alone. See State Engineer's Answering Brief. These existing conditions are in
9 significant part the result of the Pahrump Basin containing the highest density and
10 proliferation of domestic wells in the State of Nevada. *Id.* It is the State Engineer's
11 position that he is statutorily authorized to issue Amended Order No. 1293A, and that it
12 is necessary to prevent the further proliferation of additional domestic wells that would
13 exacerbate and accelerate an already troubling situation with the groundwater levels in
14 Pahrump.

15 Further, based on this Court's ruling, there is now an outstanding question of
16 whether domestic wells have a "super" priority over all other rights, both appropriative
17 and vested, such that they are essentially exempt from the prior appropriation doctrine
18 that has been Nevada's water law since 1885. In other words, if domestic wells are
19 determined to be exempt from the prior appropriation doctrine, previously held senior-in-
20 time rights are now subordinate to all domestic well owners, and would be the first cut off
21 in the event of curtailment. The State Engineer's appeal will argue that domestic wells
22 are, in fact, subject to the prior appropriation doctrine and subject to regulation and
23 management by the State Engineer. Allowing additional domestic wells to be drilled,
24 without restriction, during the pendency of the appeal will only compound this issue such
25 that a primary goal of the State Engineer's appeal will be defeated if a stay is not issued.

26 Since the oral argument on the merits of this case on November 8, 2018, in
27 Pahrump, Nevada, wherein this Court, from the bench, granted Petitioners' Petition for
28 Judicial Review, the State Engineer has received an onslaught of Notices of Intent to drill

1 new domestic wells in the Pahrump Basin. See Declaration of John Guillory, P.E.,
2 Nevada Division of Water Resources, Manager II, Las Vegas Branch Office, attached
3 hereto as Exhibit 1. Should this proliferation of new domestic wells be allowed to
4 proceed, the purpose of the State Engineer's appeal to uphold Amended Order No. 1293A
5 will be defeated. This potential increase in domestic wells, along with the legal
6 entitlement to pump up to 2 acre-feet annually per each domestic well, will only further
7 compound the extraordinary groundwater declines and threats to existing domestic wells
8 and holders of groundwater rights. This result is exactly what the State Engineer sought
9 to prevent when issuing Amended Order No. 1293A under his legal duty to manage
10 Nevada's limited water resources for the benefit of the public. While this Court did
11 ultimately reverse the State Engineer's Amended Order No. 1293A, the State Engineer
12 respectfully requests that this Court restore Amended Order No. 1293A's injunctive
13 properties during the pendency of the appeal; otherwise, the object of the appeal will be
14 defeated.

15 Additionally, the State Engineer, and the State of Nevada as a whole, will suffer
16 serious, potentially irreparable, harm should this stay not issue. The issue is twofold.
17 First, should the Supreme Court ultimately reverse this Court's decision and reinstate
18 Amended Order No. 1293A, as noted above, there will have been potentially hundreds, if
19 not thousands, of new domestic wells drilled in violation of Amended Order No. 1293A
20 during the pendency of the appeal. This would create a procedural nightmare, raising
21 significant questions regarding plugging these new wells and the payment to do so. This
22 burden would fall on the State Engineer. Second, the studies upon which the State
23 Engineer based Amended Order No. 1293A predict continued water level declines and
24 well failures based on existing pumping. Should pumping increase, there is a distinct
25 likelihood that water levels will drop at an increased rate such that it is possible that the
26 Pahrump Basin may drop to an irrecoverable level. The water of all sources of water
27 supply within the boundaries of the State belongs to the public. NRS 533.025. It is the
28 State Engineer's duty to prevent the depletion of designated groundwater basins, like the

1 Pahrump Basin. See NRS 534.120. Therefore, it is important that Amended Order
2 No. 1293A remain in effect until the Nevada Supreme Court reaches a final decision in
3 order to avoid serious, irreparable harm to the State Engineer and the State of Nevada.

4 Conversely, Petitioners will not suffer serious or irreparable harm if this stay is
5 granted. While the stay would prevent the drilling of new domestic wells on parcels
6 purportedly owned by Petitioners without the relinquishment of 2 acre-feet of water
7 rights, it is in everyone's best interest to receive a final determination from the Nevada
8 Supreme Court on Amended Order No. 1293A. As stated above, without this stay, a
9 procedural mess would be left in the wake if the Nevada Supreme Court ultimately
10 overturned this Court's decision, including either requiring the State Engineer to order
11 those individuals who drilled domestic wells on their property during the pendency of the
12 appeal, without relinquishment of 2 acre-feet of water, to purchase such a water right and
13 relinquish it before continuing to use their well or, if a water right is not acquired, order
14 the plugging of the well. Additionally, requiring Petitioners to wait before they drill these
15 new wells (in the event the Nevada Supreme Court affirms this Court's decision) is not
16 irreparable harm, as the Supreme Court has held that increased costs and delay do not
17 constitute irreparable harm. See *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39.
18 Nonetheless, this factor will generally not play a significant role in the decision whether
19 to issue a stay. *Id.*

20 Regarding the likelihood of success on the merits factor, the Supreme Court has
21 held that where the object of an appeal will be defeated if the stay is denied, a stay is
22 generally warranted; however, "the party opposing the stay motion can defeat the motion
23 by making a strong showing that appellate relief is unattainable" particularly where "the
24 appeal appears frivolous or if the appellant apparently filed the stay motion purely for
25 dilatory purposes." *Id.*, 120 Nev. at 253, 89 P.3d at 40. Here, the State Engineer is
26 appealing this Court's ruling in good faith, seeking to uphold his legal duty to make such
27 rules and regulations as necessary to prevent the depletion of the Pahrump Basin via
28 Amended Order No. 1293A, allowing the State Engineer to work towards halting water

1 level declines and limiting well failures without the need to curtail existing water users.
2 Additionally, despite this Court's finding to the contrary, the State Engineer will argue
3 that he did in fact have authority to issue Amended Order No. 1293A to prohibit the
4 drilling of new domestic wells without the relinquishment of a 2 acre-foot water right,
5 that it was supported by substantial evidence, and that he did not violate due process in
6 issuing the Amended Order. As this Court held during the oral argument, this case is a
7 close call and a tight issue. Therefore, the likelihood of success on the merits should not
8 weigh in either side's favor, and should certainly not work in Petitioners' favor to defeat
9 this Motion for Stay.

10 As shown above, due in large part to the likelihood that the purpose of the State
11 Engineer's appeal will be defeated, either in totality or in part, if this stay does not issue,
12 and because the potential harm to the State Engineer and the State of Nevada as a
13 whole, the State Engineer's Motion for Stay Pending Appeal should be granted.

14 IV. CONCLUSION

15 It is within this Court's discretion to restore or grant an injunction during the
16 pendency of an appeal, without the need for a bond or security due to the State Engineer's
17 status as the head of a State agency. Here, the State Engineer is appealing this Court's
18 decision overturning Amended Order No. 1293A. However, the purpose of this appeal
19 will be defeated if Amended Order No. 1293A's prohibition on new domestic wells is lifted
20 during the pendency of the appeal. It is also likely that the State Engineer, and the State
21 of Nevada as a whole, will suffer serious injury due to the proliferation of new domestic
22 wells and increased groundwater pumping in the Pahrump Basin. Therefore, and based
23 on the foregoing, the State Engineer respectfully requests that this Court grant this
24 Motion for Stay of Order Granting Petition for Judicial Review and Reversing State
25 Engineer's Amended Order No. 1293A Pending Appeal on Order Shortening Time.

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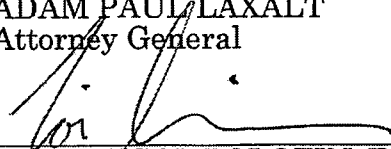
1 **AFFIRMATION**

2 The undersigned does hereby affirm that the preceding Motion for Stay of Order
3 Granting Petition for Judicial Review and Reversing State Engineer's Amended Order
4 No. 1293A Pending Appeal on Order Shortening Time does not contain the social security
5 number of any person.

6 DATED this 7th day of December, 2018.

7 ADAM PAUL LAXALT
8 Attorney General

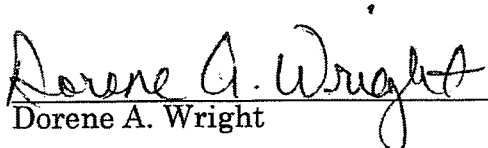
9 By:

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Attorney for Respondent,
State Engineer

16
17 **CERTIFICATE OF SERVICE**

18 I certify that I am an employee of the State of Nevada, Office of the Attorney
19 General, and that on this 7th day of December, 2018, I served a true and correct copy of
20 the foregoing MOTION FOR STAY OF ORDER GRANTING PETITION FOR JUDICIAL
21 REVIEW AND REVERSING STATE ENGINEER'S AMENDED ORDER NO. 1293A
22 PENDING APPEAL ON ORDER SHORTENING TIME, by placing said document in the
23 U.S. Mail, postage prepaid, addressed to:

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

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28 Dorene A. Wright

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INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Declaration of John Guillory, P.E., Nevada Division of Water Resources, Manager II, Las Vegas Branch Office dated December 3, 2018	2

EXHIBIT 1

EXHIBIT 1

1 Case No. CV 39524

2 Dept. No. 2

3
4
5
6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF NYE
8

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

13 Petitioners,

14 vs.

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

18 Respondent.

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

19 I, JOHN GUILLORY, declare:

20 1. I have personal knowledge of the matters asserted herein and am competent
21 to testify thereto, save for those matters asserted on information and belief, and for those
22 matters, I am informed and believe them to be true.

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

26 3. In connection with the case of *Pahrump Fair Water, LLC., et al. v. Jason*
27 *King, P.E., Nevada State Engineer, Division of Water Resources, Department of*
28 *Conservation and Natural Resources*, CV 39524, filed in the Fifth Judicial District Court

1 of the State of Nevada, in and for the County of Nye, the Office of the Nevada Attorney
2 General contacted me and requested that I, as a Manager II with DWR experienced with
3 the Pahrump Basin, provide truthful and accurate information relevant to legal briefs
4 that they intend to file with the Court on behalf of DWR and the State Engineer, and for
5 other proper purposes.

6 4. Since the oral argument before this Court, held on November 8, 2018,
7 wherein this Court, from the bench, granted the Petition for Judicial Review, effectively
8 reversing Amended Order No. 1293A, DWR has received 154 Notices of Intent to Drill
9 new domestic wells in the Pahrump Basin.

10 5. Furthermore, since the November 8th oral argument, DWR has received
11 approximately 10 inquiries, telephonic or otherwise, regarding the ability to drill new
12 domestic wells in the Pahrump Basin.

13
14 FURTHER I declare under penalty of perjury, pursuant to NRS 53.045, that the
15 foregoing is true and correct.

16
17 EXECUTED on this 3rd day of December, 2018.

18
19
20  P.E.
JOHN GUILLORY, P.E.

1 these steps is a constitutional due process violation that renders the regulation invalid. Because the
2 Orders impair a vested property right, and because the State Engineer failed to provide notice or hold a
3 hearing before issuing the Orders, the Orders are invalid and must be overturned.

4 **III. The Orders Are Arbitrary, Capricious, And An Abuse Of The State Engineer's Discretion**
5 **Because They Are Not Supported By Substantial Evidence In The Record.**

6 **A. The Court cannot defer to the State Engineer's factual findings because the**
7 **proceedings below were not conducted in a full and fair manner that afforded all**
8 **parties the opportunity to be heard.**

9 To be valid, an Order the State Engineer issues must be supported by substantial evidence
10 existing in the record at the time of issuance.⁵⁵ Substantial evidence is evidence "which a 'reasonable
11 mind might accept as adequate to support a conclusion.'"⁵⁶ Normally, when the State Engineer holds a
12 hearing on a water related matter, interested parties are given an opportunity to view and challenge the
13 evidence the State Engineer will be relying on to make his decision. This evidence is then included in
14 the record on appeal submitted to the district court. Here, none of these procedures were followed and,
15 therefore, the ROA submitted by the State Engineer should be viewed skeptically.

16 When proper evidentiary procedures are followed, the State Engineer's factual findings are
17 accorded deference and the burden is on the party attacking them. However, the Nevada Supreme Court
18 has made clear that this deference is pre-conditioned on the "fullness and fairness of the administrative
19 proceedings" below.⁵⁷ Accordingly, a reviewing court can only defer to the State Engineer's factual
20 findings if: (1) opposing parties were given a "full opportunity to be heard," (2) the State Engineer fully
21 resolved all issues raised by the parties, and (3) the State Engineer prepare written findings "in sufficient
22 detail to permit judicial review."⁵⁸ The Supreme Court's holding that deference will not be granted if
23 certain procedural and evidentiary safeguards are not followed is a recognition of the reality that under
24 such circumstances there is no way to determine the authenticity, relevance, or veracity of the "evidence"
25 the State Engineer relied on.

26 ///

27 ⁵⁵ *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 ⁵⁶ *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

⁵⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264.

⁵⁸ *Id.*, 95 Nev. at 787, 603 P.2d at 264-65.

1 **B. There is no evidence in the record that the Pahrump Basin is being over-pumped or**
2 **that additional domestic wells will unduly interfere with existing wells.**

3 The State Engineer does not contest certain key factual contentions raised by PFW in its Opening
4 Brief. First, the State Engineer's own records show that the Pahrump Basin is not currently over-pumped
5 (i.e., pumping does not exceed the established perennial yield). Second, pumping rates in the basin have
6 steadily declined since 1969 and as a result of this decline water levels in some portions of the basin
7 have leveled-off or risen (in some cases by as much as 45 feet). Third, the ROA does not contain any
8 scientific study or other evidence showing that allowing additional domestic wells will unduly impact
9 existing wells in the basin.

10 Even if the State Engineer had the authority to apply NRS 534.110(8) to domestic wells, which
11 he does not, before he can do so he must demonstrate that additional wells will unduly interfere with
12 wells that already exist. In his Answering Brief, the State Engineer makes the conclusory statement that
13 "[i]t is clear that if existing pumping rates will lead to well failures, an increase in the number of wells
14 and therefore an increase in pumping will accelerate the problem – undoubtedly causing an undue
15 interference with existing wells."⁵⁹ However, there is a major problem with this statement – it is not
16 backed by any evidence or facts in the record and the State Engineer provides no citation to any evidence
17 supporting it.

18 As the State Engineer well knows, the hydrology and hydrogeology of any given groundwater
19 basin is complex. Pumping in one part of a basin may have a variable effect on water levels in another
20 part of a basin. This is why tools like monitoring wells and groundwater models are used to determine
21 the likelihood of conflicts arising from pumping at any specific location. Here, the State Engineer did
22 not perform a full conflicts analysis but instead relied exclusively on a groundwater model,
23 commissioned by an interested and biased party, that was never designed to determine whether new
24 wells would cause undue interference with existing wells.⁶⁰ Instead, the model was designed to
25 determine the likelihood of well failures resulting from the pumping of existing wells in the basin.

26
27 ⁵⁹ Answering Brief at 10:27-11:2.

28 ⁶⁰ Notably the State Engineer fails in his Answering Brief to address any of the criticisms of the groundwater study raised by
 Petitioners' in their Opening Brief. Such failure should be deemed an admission that Petitioners' arguments are meritorious
 and that the groundwater study is fundamentally flawed and, therefore, cannot be considered substantial evidence supporting
 the issuance of the Orders.

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

8 The State Engineer makes much of the fact that water levels in some portions of the basin are
9 continuing to decline while ignoring the fact that water levels in other portions of the basin are static or
10 rising. This variability in basin conditions is precisely why a full conflicts analysis should have been
11 performed. As it stands, there is no evidence in the record to support the idea that the drilling of domestic
12 wells anywhere in the basin will cause undue interference with existing wells. Accordingly, the Orders
13 are invalid and must be overturned.

14 **C. The Orders are both overbroad and being applied too narrowly.**

15 As noted above, the hydrology and hydrogeology of groundwater basins is complex. What little
16 evidence exists in the record shows that water levels in the basin are declining in some areas, remaining
17 static in others, and even rising in some places. Despite this, the Orders impose a basin-wide ban on the
18 drilling of new domestic wells.

19 The State Engineer is specifically authorized under NRS 534.110(8) to limit a ban on the drilling
20 of new wells to only the portions of a basin where evidence shows such wells may unduly interfere with
21 existing wells. Because the evidence in the record indicates that in some areas of the basin water levels
22 are static or rising, and therefore would not be impacted by the drilling of new domestic wells, it was an
23 abuse of the State Engineer’s discretion to impose a basin-wide ban.

24 In addition, the State Engineer’s Orders impose a ban on only domestic wells, not other types of
25 wells. Individual domestic wells are limited to a draught of two acre-feet/year. They are typically the
26 smallest wells in a basin and generally have much smaller cones of depression than the larger municipal
27 or agricultural wells. Accordingly, the potential impacts from drilling a domestic well are usually much
28 smaller than the impacts associated with large production wells. Despite this the Orders continue to

1 allow for the drilling of the much larger wells with potentially greater impacts on existing wells while
2 banning the smaller ones.

3 The State Engineer argues that the larger production wells are exempt from the Orders because
4 they are required to undergo a permitting process that includes a conflicts analysis. This ignores the fact
5 that the State Engineer was required to perform a conflicts analysis before restricting the drilling of wells
6 under NRS 534.110(8) and completely failed to do so. Instead he relied solely on his unsupported hunch
7 that because some existing wells may be causing a problem in some parts of the basin, allowing any new
8 wells (regardless of location) will exacerbate the problem.

9 If the State Engineer truly believes that no conflicts analysis is needed to determine whether new
10 domestic wells will exacerbate certain localized water level issues, then he should apply that same
11 standard and ban all new wells in the basin. Likewise, if the State Engineer believes that a conflicts
12 analysis could show that a large production well could be safely located in certain areas within the basin,
13 he should perform an in-depth conflicts analysis to determine locations where new domestic wells can
14 also be safely allowed.

15 Because the record in this case is unreliable and does not provide substantial evidence supporting
16 the issuance of the Orders, the Orders are invalid and should be overturned.

17 **IV. The Orders Are Unconstitutional Because They Authorize Private Property To Be Taken**
18 **For Public Use Without Compensation.**

19 **A. The Court has the authority to determine the takings issues raised by Petitioners.**

20 The State Engineer claims that because PFW has not brought an action for inverse condemnation
21 under NRS Chapter 37, the Court cannot consider PFW's claims that the Orders are an unconstitutional
22 taking of private property.⁶¹ The State Engineer is correct that any action seeking compensatory
23 damages for an unconstitutional taking must be brought under NRS Chapter 37. However, this is not
24 the relief that PFW is seeking at this time. What PFW is seeking is to have the Orders overturned and
25 declared invalid under the administrative review process of NRS 533.450. If this occurs, there will be
26 no permanent taking of PFW's property rights and thus no need to bring an inverse condemnation action
27 against the State.

28

⁶¹ Answering Brief at 17-20.

1 In the present action, Petitioners seek only declarative and injunctive relief, not compensatory
2 damages.⁶² Accordingly, there is no need for discovery or fact-finding to determine the extent of the
3 losses suffered by individual property owners. The only question before the Court is a purely legal one
4 – whether the Orders, as written, constitute an unlawful taking of private property for public use. The
5 parties have fully briefed this issue and it is ripe for adjudication.

6 The State Engineer also argues that the Court cannot make this determination on the takings
7 issue because it is operating in an appellate capacity and no judicial determination has been made on
8 this issue in the proceedings below. This ignores the fact that when the State Engineer issues regulatory
9 edicts he is operating in a quasi-judicial capacity. Prior to issuing an order it is incumbent on the State
10 Engineer to perform a review of the legal authority underlying the proposed order and determine whether
11 its issuance will violate the constitutional or statutory provisions. Accordingly, every order issued by
12 the State Engineer carries with it the presumption that the State Engineer has determined that the order
13 is constitutional. To presume otherwise would lead to the absurd conclusion that the State Engineer is
14 not required to consider the constitutionality of his actions.

15 The State Engineer asserts that to properly defend against PFW's takings claim would require
16 discovery as to the basis of the claim. This is absurd. The basis of the claim is fully articulated in
17 Petitioners' Opening Brief wherein Petitioners assert that the Orders are both a per se taking and a
18 regulatory taking. In addition, the only reason the State Engineer was unable to hold his own
19 proceedings to conduct discovery on these claims is that he chose not to do so. Had the State Engineer
20 followed proper procedure and held a hearing before issuing the Orders, he could have considered
21 testimony and evidence regarding the impacts of the proposed Order on private property owners and
22 whether such impacts would constitute an unlawful taking. Simply put, the State Engineer cannot refuse
23 to hold an evidentiary hearing and then, when his order is appealed, claim that the reviewing Court has
24 no jurisdiction to hear the appeal because of a lack of evidentiary proceedings below.

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28 ⁶² Petitioners reserve the right to file a motion for recovery of attorney's fees and costs incurred in pursuing this action pursuant to NRS 18.010(2)(b).

1 Because the State Engineer can be presumed to have determined that the Orders in question are
2 constitutional before issuing them, the Court has both the authority and duty to consider arguments on
3 appeal challenging the Orders' constitutionality.

4 **B. Requiring a property owner to acquire other valuable property and surrender it to**
5 **the State is a per se taking of private property.**

6 "The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to
7 states through the Fourteenth Amendment, prohibits the government from taking private property for
8 public use without just compensation."⁶³ Likewise, Article 1, Section 8(6) of the Nevada Constitution
9 states "[p]rivate property shall not be taken for public use without just compensation having first been
10 made, or secured." Two types of government actions constitute a per se taking: (1) where the action
11 requires a property owner to suffer a permanent physical invasion of the property, or (2) where the action
12 "completely deprives an owner of all economical beneficial use" of the property.⁶⁴

13 State-issued water right permits are considered real property in Nevada.⁶⁵ In the Orders the State
14 Engineer requires a property owner who desires to drill a new domestic well to first acquire two acre-
15 feet of existing water rights and then forever "relinquish" those water rights to the State Engineer.
16 Relinquishment is defined as "[t]he abandonment of a right or thing."⁶⁶ Accordingly, the Orders require
17 a property owner to forever abandon the acquired water rights to the state. By definition, this is a per se
18 taking of private property – as a result of the relinquishment, the owner of the water right is completely
19 deprived of all beneficial use of it.

20 Since there is no doubt that the acquired water right is being confiscated by the State Engineer,
21 the only question remaining is whether the regulation provides the property owner with just
22 compensation (i.e., whether the government is providing any consideration for the property). In this
23 case, the only thing the State Engineer is giving in exchange for the water right is his permission to drill
24 a domestic well. However, pursuant to NRS 534.180(1), a person seeking to drill a domestic well on
25 their parcel is not required to seek the State Engineer's permission before doing so. Because a property
26

27 ⁶³ *McCarran Int'l. Airport*, 122 Nev. at 661-62, 137 P.3d at 1121.

28 ⁶⁴ *Id.*, 122 Nev. at 662, 137 P.3d at 1122.

⁶⁵ *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949).

⁶⁶ BLACK'S LAW DICTIONARY 1482 (10th ed. 2014) (definition of "relinquishment").

1 owner has an absolute common law right to drill a well without permission from the State Engineer, the
2 granting of such permission cannot be deemed to be adequate consideration.⁶⁷ Accordingly, nothing in
3 the Orders provides just compensation for the State Engineer's confiscation of the two acre-feet of water
4 rights.

5 Because the Orders require a property owner to acquire and forever relinquish to the State
6 Engineer valuable property, and provide no adequate compensation for the property seizure, the Orders
7 are an unconstitutional taking of private property for public use and must be overturned.

8 **C. Requiring the relinquishment of four-times the water needed to serve a domestic**
9 **well is an unconstitutional regulatory taking.**

10 In addition to being a per se regulatory taking, the Orders are also an unconstitutional regulatory
11 taking. A regulatory taking occurs when a government regulation requires individual property owners
12 to "bear a burden that should be borne by the public as a whole."⁶⁸ In determining whether a regulation
13 constitutes a taking a court must consider: (1) the regulation's economic impact on the property owner,
14 (2) whether the regulation interferes with reasonable investment-backed expectations, and (3) the nature
15 and the character of the government action.⁶⁹ In examining whether a regulatory taking has occurred,
16 the reviewing court "must consider the property as a whole" and "the purpose of the regulation."⁷⁰

17 Here, the State Engineer is requiring that property owners surrender 2 acre-feet of water rights
18 despite clear evidence showing that the average domestic well in Pahrump uses only ½ acre-foot of
19 water per year. The purpose for this over-dedication requirement is made clear in the Nye County Water
20 Resource Plan 2017 Update (the "Plan") the State Engineer cites in the Orders.⁷¹ The Plan explicitly
21 states that "[t]he relinquished water rights that are in excess of the actual usage will never be beneficially
22 used and in fact return to the [public] basin."⁷² The Plan even includes a proposed water basin budget
23 spreadsheet that includes a row titled "OVER DEDICATION POTENTIAL – DOMESTIC WELLS"
24

25 ⁶⁷ *Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650-51, 615 P.2d 939, 944 (1980) ("Consideration is not adequate when it is
26 a mere promise to perform that which the promisor is already bound to do.").

⁶⁸ *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522-23, 122 S. Ct. 1522, 1524 (1992).

⁶⁹ *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978); *see also McCarran Int'l. Airport*, 122 Nev. at 663, 137 P.3d at 1122.

⁷⁰ *Id.*

⁷¹ ROA 7, n.12.

⁷² ROA 1511.

1 where the excess water rights forcibly taken from property owners who seek to drill a domestic well can
2 be used to offset the quantity of water the State Engineer has over-allocated in the basin.⁷³

3 The clear purpose of requiring a property owner to relinquish more water than he will actually
4 use is to assist the State Engineer with solving the public problem of over-allocation of water in the
5 basin. The State Engineer acknowledges this when he states that “[r]elinquishment is a key component
6 of the Amended Order No. 1293A and the Nye County GMP.”⁷⁴ If the owners of the existing 8,000
7 parcels that do not currently have a domestic well each relinquish two acre-feet of water, 16,000 acre-
8 feet of existing permits will be surrendered. However, those parcels will likely only use a combined
9 4,000 acre-feet of water. Accordingly, the net benefit to the public will be 12,000 acre-feet of water, or
10 more than 30% of the total over-appropriated permits. While this may be a good outcome for the public
11 as a whole, it is unconstitutional to require individual property owners to bear the cost of solving public
12 problems.

13 In addition, no reasonable person can dispute that the Orders significantly impair property rights
14 and interfere with the reasonable investment-backed expectations of the owners. Property owners have
15 testified under oath (and subject to the State Engineer’s cross-examination) that when purchasing their
16 property, they performed due diligence to determine whether they would be able to drill a domestic
17 well.⁷⁵ Testimony also established that not being able to drill such a well, or having to purchase other
18 water rights as a prerequisite to being able to drill such a well, significantly reduces the value of the
19 property.⁷⁶ The State Engineer cites no evidence to refute these claims.

20 Because the Orders (1) have a significant economic impact on affected property owners, (2)
21 interfere with the reasonable investment backed expectations of those owners, and (3) require a property
22 owner to dedicate more water than he will use for the explicit purpose of forcing property owners to
23 bear the costs of solving a public problem, the Orders are an unconstitutional regulatory taking and must
24 be overturned.

25 ///

27 ⁷³ ROA 1512.

28 ⁷⁴ Answering Brief at 22, n.8.

⁷⁵ SROA 921:20-922:17.

⁷⁶ SROA 863:11-863:20.

1 **V. Petitioner Pahrump Fair Water, LLC Has Both Statutory And Constitutional Standing To**
2 **Bring This Action.**

3 The State Engineer argues that Petitioner PFW has no standing to file or participate in this
4 action.⁷⁷ The State Engineer's argument is without merit. PFW has both statutory and constitutional
5 standing to assert the interests of its members because it is an association that was formed for the express
6 purpose of doing so.⁷⁸

7 PFW has standing under the United States Constitution. The U.S. Supreme Court has stated that
8 an association can have standing to assert the interests of its members if the association has been injured
9 or one or more of its members are injured.⁷⁹ "[W]hether an association has standing to invoke the court's
10 remedial powers on behalf of its members depends in substantial measure on the nature of the relief
11 sought."⁸⁰ If the relief sought by an association is for prospective injunctive relief, courts reasonably
12 presume that remedy, "if granted, will inure to the benefit of those members of the association actually
13 injured."⁸¹ In fact, in most cases involving associations, like the instant case, "the relief sought has been
14 of this kind."⁸²

15 Further, an association has standing to bring suit on behalf of its members when (1) its members
16 would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane
17 to their organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the
18 participation of individual members in the lawsuit.⁸³ Here, PFW has members that would otherwise
19 have the right to bring this action on their own. Also, because PFW was formed for the express purpose
20 of fighting the Orders,⁸⁴ this challenge is germane to its purpose, and it is not necessary to have
21 individual members participate in the lawsuit. Finally, the participation of the individual members of
22 PFW is not required in order to resolve the issues raised in PFW's Petition because only declarative and
23 injunctive relief is being sought.

24
25 ⁷⁷ Answering Brief at 29:8-12.

26 ⁷⁸ SROA 858:22-859:1.

27 ⁷⁹ *Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 2213 (1975).

28 ⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

⁸⁴ SROA 858:22-859:1.

1 PFW also has standing under state law. When the Legislature enacted NRS 533.450, it continued
2 its longstanding practice of providing standing rights under statute that are even broader than those
3 provided by the Constitution. Standing under NRS 533.450 is provided to “any person feeling aggrieved
4 by any order or decision of the State Engineer.” The Nevada Supreme Court has consistently interpreted
5 similar language in other statutes to broadly grant standing to Nevada’s citizens to challenge decisions
6 by their government.

7 In *Citizens for Cold Springs v. City of Reno*,⁸⁵ the Court reviewed the grant of statutory standing
8 contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an
9 association of property owners that would be affected by an annexation decision had standing to
10 challenge that decision.⁸⁶ The Court interpreted the language of NRS 268.668 which grants standing to
11 “any person or city claiming to be adversely affected by such proceeding.”⁸⁷ Since the statute says that
12 any person claiming to be adversely affected may bring an action, in the “tradition of [its] long-standing
13 jurisprudence,” the Court found that standing rights under NRS 268.668 are broader than what
14 constitutional standing allows.⁸⁸ The Court specifically focused on the NRS 268.668 grant of standing
15 to any person claiming to be aggrieved.⁸⁹ Based on that language the Court held that even property
16 owners who do not have constitutional standing because they did not own property in the area of
17 annexation at issue do have standing under NRS 268.668.⁹⁰

18 The language of NRS 533.450 is even broader than NRS 268.668 because it grants standing to
19 any person feeling aggrieved.⁹¹ Accordingly, just as *Citizens for Cold Springs* was granted standing to
20 assert the rights of its members under NRS 268.668, PFW has standing to do the same under NRS
21 533.450.

22 Forming a limited-liability company for the purpose of challenging a State Engineer
23 determination is not new. In *Farmers Against Curtailment Order, LLC v. State Engineer*,⁹² farmers in
24

25 ⁸⁵ *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009).

26 ⁸⁶ *Id.*, 125 Nev. at 634, 218 P.3d at 853.

27 ⁸⁷ *Id.*, 125 Nev. at 629, 218 P.3d at 850.

28 ⁸⁸ *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

⁸⁹ *Id.*

⁹⁰ *Id.*, 125 Nev. at 631, 218 P.3d at 851.

⁹¹ NRS 533.450.

⁹² *Farmers Against Curtailment Order, LLC v. State Engineer*, Case No. 15-CV-00227 (Third Jud. Dist. Ct. of Nevada, May 4, 2015).

1 the Smith and Mason Valleys created a limited-liability company to fight a State Engineer order
2 requiring a curtailment of pumping. While the State Engineer initially raised questions regarding the
3 company's standing to bring an action on behalf of its members, "the State Engineer acknowledged at
4 the hearing that FACO has standing to bring this action."⁹³ Because the State Engineer has formally
5 acknowledged in other cases that limited-liability companies can have standing to assert the interests of
6 their members, the State Engineer's argument in this case is without merit.

7 Because PFW was expressly formed to fight the Orders, and because judicial efficiency will be
8 served by allowing PFW to represent the interests of its members, PFW has standing to do so.

9 **VI. The State Engineer's Request To Strike PFW's Supplemental Record On Appeal Is**
10 **Without Merit.**

11 In a footnote the State Engineer requests the Court strike PFW's Supplemental Record on Appeal
12 because "... it consists of documents that the State Engineer did not consider in reaching his decision .
13 . . ."⁹⁴ Of course, this begs the question of how to verify the State Engineer's claims regarding what
14 documents he relied on when there were no proceedings below during which such documents could be
15 introduced, challenged, and/or authenticated. Despite this, the documents included in PFW's
16 Supplemental Record on Appeal all consist of official court records filed in this jurisdiction.

17 Pursuant to NRS 47.150(2), a court is required to take judicial notice of matter of fact when
18 requested to do by a party. Under NRS 47.130, matters of fact include materials that are (a) generally
19 known within the territorial jurisdiction of the trial court, or (b) capable of accurate and ready
20 determination by resort to sources whose accuracy cannot be questioned. Because the documents in the
21 Supplemental Record on Appeal are all public documents that were filed with this Court in a past
22 proceeding, they are both generally known within the jurisdiction of the Court and capable of easy
23 authentication. Accordingly, the Court is required to take judicial notice of them.

24 The State Engineer argues that the Court can only review documents that the State Engineer
25 claims he relied on in issuing the Orders. However, this statement is correct only with respect to a
26 determination by the Court of whether substantial evidence exists in the record to support the State
27

28 ⁹³ Reply to the State Engineer's Opposition to Pahrump Fair Water, LLC's Motion for Stay of Nevada State Engineer Order No. 1293, Exhibit 3, CV38972.

⁹⁴ Answering Brief at 7 n.3.

1 Engineer's decision. With respect to other matters, like whether the State Engineer failed to adhere to
2 proper procedural process or violated Petitioners' due process and property rights, the Court is free to
3 consider such information. Accordingly, the State Engineer's objection to Petitioners' Supplemental
4 Record on Appeal should be denied.

5 **CONCLUSION**

6 Because (1) the Legislature specifically exempted domestic wells from the State Engineer's
7 regulatory authority, (2) the State Engineer issued the Orders without providing notice or hearing to
8 affected parties, and (3) the State Engineer did not have substantial evidence supporting the issuance of
9 the Orders, Petitioners respectfully request that this Court overturn the State Engineer's Orders. In the
10 alternative, Petitioners respectfully request that enforcement of the Orders be stayed and this case
11 remanded to the State Engineer with instructions to hold a properly noticed evidentiary hearing on the
12 matter.

13 **AFFIRMATION**

14 **Pursuant to NRS 239B.030(4)**

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

17 DATED this 31st day of October, 2018.

18 TAGGART & TAGGART, LTD.
19 108 North Minnesota Street
20 Carson City, Nevada 89703
21 (775) 882-9900 – Telephone
22 (775) 883-9900 – Facsimile

23 By: 

24 PAUL G. TAGGART, ESQ.
25 Nevada State Bar No. 6136
26 DAVID H. RIGDON, ESQ.
27 Nevada State Bar No. 13567
28 Attorneys for Petitioners

CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 31st day of October, 2018.



Employee of TAGGART & TAGGART, LTD.

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

Petitioners,

vs.

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

Respondent.

Oral Argument on Petition for Judicial Review

J James N. Bolotin, Deputy Attorney General, on behalf of the State Engineer

APP 4988

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF NYE
Case Number CV 39524



November 8, 2018 – Pahrump, Nevada

State Engineer's Amended Order No. 1293A Should be Affirmed

The State Engineer acted within his statutory authority, pursuant to NRS 534.110(8), to issue Amended Order 1293A, based upon substantial evidence.

This Amended Order prohibits the drilling of new domestic wells in the Pahrump Valley Hydrographic Basin (“Pahrump Basin”), with certain exceptions including relinquishment of sufficient water rights to serve any new domestic well.

State Engineer's Amended Order No. 1293A Should be Affirmed

Amended Order 1293A was developed with the assistance and desire of the Nye County Water District (per NRS 534.030(5)), and is necessary to protect the more than 11,000 existing domestic wells and 59,175 afa of existing appropriative water rights in the Pahrump Basin

State Engineer's Amended Order No. 1293A Should be Affirmed

- Authorized by Statute
- Supported by Substantial Evidence
- Does not violate due process
- Not a taking
- Pahrump Fair Water, LLC (“PFW”) lacks standing

JT APP 4991



BACKGROUND

JT APP 4992



Background

The Pahrump Basin, Basin 162 (SE ROA at 3390)

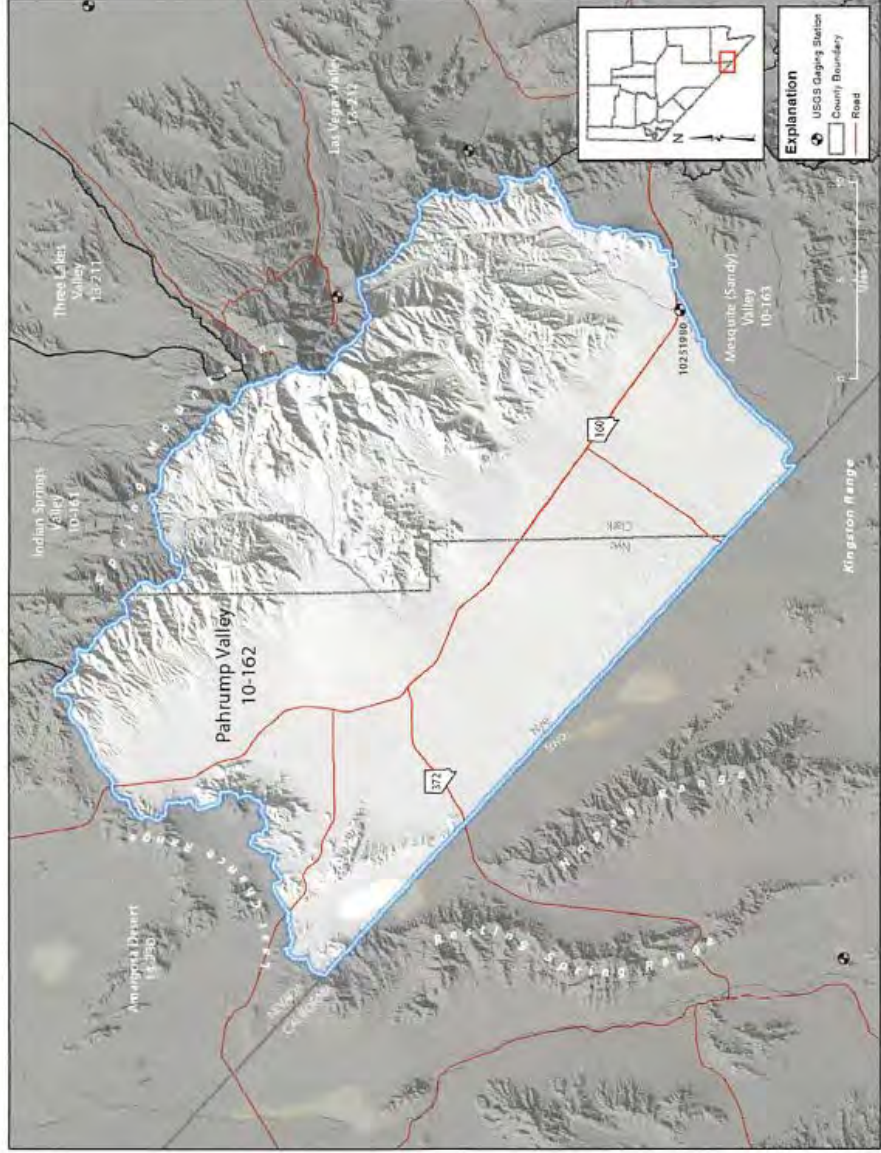


Figure 1. Pahrump Valley (Hydrographic Basin 10-162) physiographic map.

Pahrump Basin is a Designated Basin

Order No. 176 – March 11, 1941
Pahrump Basin designated and described
pursuant to NRS 534.030

Order No. 193 – January 15, 1948
Extended designated area
Order No. 205 – January 23, 1953
Further extended designated area

SE ROA at 11 – 13



Pahrump Basin is a Designated Basin

NRS 534.030

1. Upon receipt by the State Engineer of a petition requesting the State Engineer to administer the provisions of this chapter as relating to designated areas, signed by not less than 40 percent of the appropriators of record in the Office of the State Engineer, in any particular basin or portion therein, the State Engineer shall:
 - (a) Cause to be made the necessary investigations to determine if such administration would be justified.
 - (b) If the findings of the State Engineer are affirmative, designate the area by basin, or portion therein, and make an official order describing the boundaries by legal subdivision as nearly as possible.
 - (c) Proceed with the administration of this chapter.

Prior Orders of the State Engineer

May 4, 1953 – Order No. 206

Required the installation of measuring devices at permitted points of diversion

June 1, 1970 – Order No. 381

Declared irrigation a non-preferred use of water in the Pahrump Basin and ordered the denial of all applications for permits to appropriate ground water for irrigation purposes

SE ROA at 14 – 17



Prior Orders of the State Engineer

October 26, 1987 – Order No. 955 (amending Order No. 381)

Denied all applications on the Pahrump and Manse fans, restricted viable applications to small commercial uses on the valley floor, and amended Order No. 381 to allow reinstatement applications for irrigation purposes where a certificated water right was forfeited prior to January 1, 1988.

November 8, 1994 – Order No. 1107

Ordered that all applications filed to appropriate groundwater in the Pahrump Basin be denied, with exceptions for small commercial and industrial purposes and environmental permits



Prior Orders of the State Engineer

April 19, 2007 – Order No. 1183

Established a program for domestic well credits in the Pahrump Basin, incentivizing public water systems to add new customers who previously used domestic wells or owned a lot eligible for a domestic well

April 29, 2015 – Order No. 1252

Further extended the designated area, lifted Order No. 955's prohibition on moving existing water rights from “off-the-fan” to the Pahrump and Manse fans, and **prohibited all new**

appropriations except for very limited exceptions for environmental, temporary, and increased diversion rate only applications.

SE ROA at 22 – 32



Prior Orders of the State Engineer

December 19, 2017 – Order No. 1293

Prohibited the drilling of new domestic wells without relinquishment of 2.0 acre-feet annually (“afa”) of water rights to serve the domestic well.

SE ROA at 33 – 38



The Pahrump Basin is Over-Appropriated

Over-Appropriation –

where the existing committed water rights in the basin, in the form of permits, certificates, and domestic wells, exceeds the perennial yield

Perennial Yield –

the maximum amount of groundwater that can be developed each year over the long term without depleting the groundwater reservoir

The Pahrump Basin is Over-Appropriated

The Pahrump Basin has a perennial yield of **20,000 afa**

Existing permitted and certificated rights total **59,175 afa**

SE ROA at 4, 39

The Pahrump Basin is Over-Appropriated

Existing permitted and certificated rights
total 59,175 afa

DOES NOT INCLUDE

water allowed to be withdrawn from
existing domestic wells

NRS 534.350(8)(a)

In Nevada, each domestic well is permitted to withdraw up to 2.0 afa for culinary and household purposes in a single-family dwelling, including the watering of a garden, lawn, and domestic animals

The Pahrump Basin is Over-Appropriated

In the Pahrump Basin, there are approximately 11,280 existing domestic wells

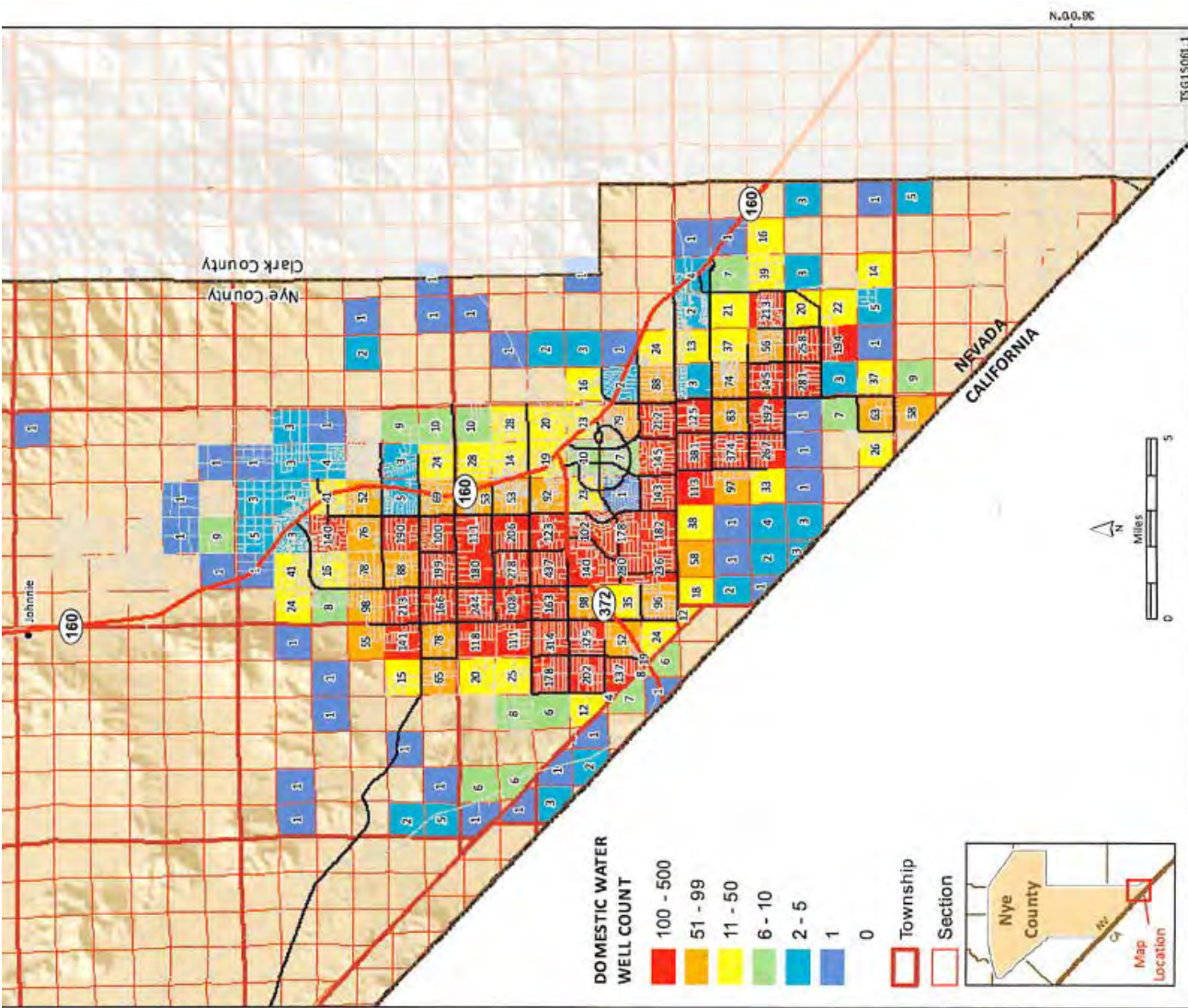
Therefore, in addition to the 59,175 afa of existing rights, there are existing domestic wells statutorily permitted to withdraw approximately 22,560 additional afa of water from the Pahrump Basin

SE ROA at 4, 40 – 513, 975 – 1110, 1389 – 1605, 1745 – 3448



Figure 6-2. Count and distribution of domestic water wells in Pahrump Valley from NDWR Well Log Database as of April 2015.

SE ROA at 1551



The Pahrump Basin is Over-Appropriated

This 22,560 afa of water that *existing* domestic wells are statutorily permitted to withdraw

Exceeds the perennial yield of the basin on its own

Potential for New Domestic Wells

Prior to Amended Order No. 1293A (and Order No. 1293), there were approximately 8,000 existing parcels of land eligible for a domestic well

Potential for New Domestic Wells

These potential domestic wells would have been able to withdraw approximately 16,000 additional afa of groundwater

Perennial Yield	20,000 afa
Existing Permitted/Certificated Rights	59,175 afa
Withdrawals from existing domestic wells	22,560 afa
Withdrawals from potential new domestic wells	16,000 afa
Potential rights without Amended Order No. 1293A	97,735 afa



Potential for New Domestic Wells

Per NRS 534.080(4), domestic wells have a date of priority of the date of the well's completion

Therefore, had these new wells been drilled, they would be the first cut off in the event of a curtailment in the Pahrump Basin under Nevada's law of prior appropriation

Potential for New Domestic Wells

Per NRS 534.110(6), domestic wells may be curtailed if necessary:

“...the State Engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants, and if the findings of the State Engineer so indicate, the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.”

Declining Water Levels and Potential Well Failures

Even with regulation, water levels on the valley floor have been declining since the 1950s, resulting in reduced spring flows and land subsidence



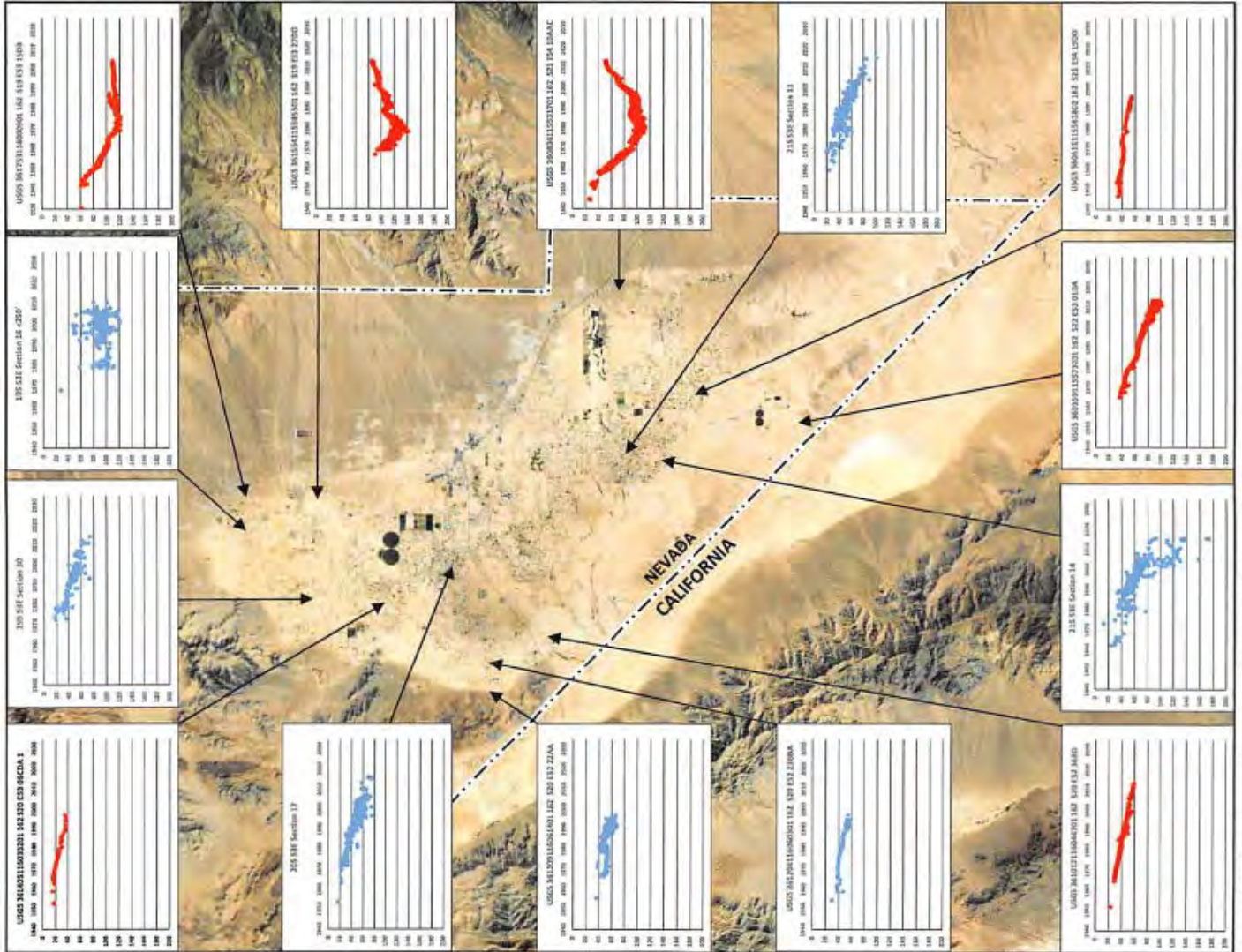


Figure 5-1. Long-term Water Level Trends in Pahrump Valley.

SE ROA at 1500

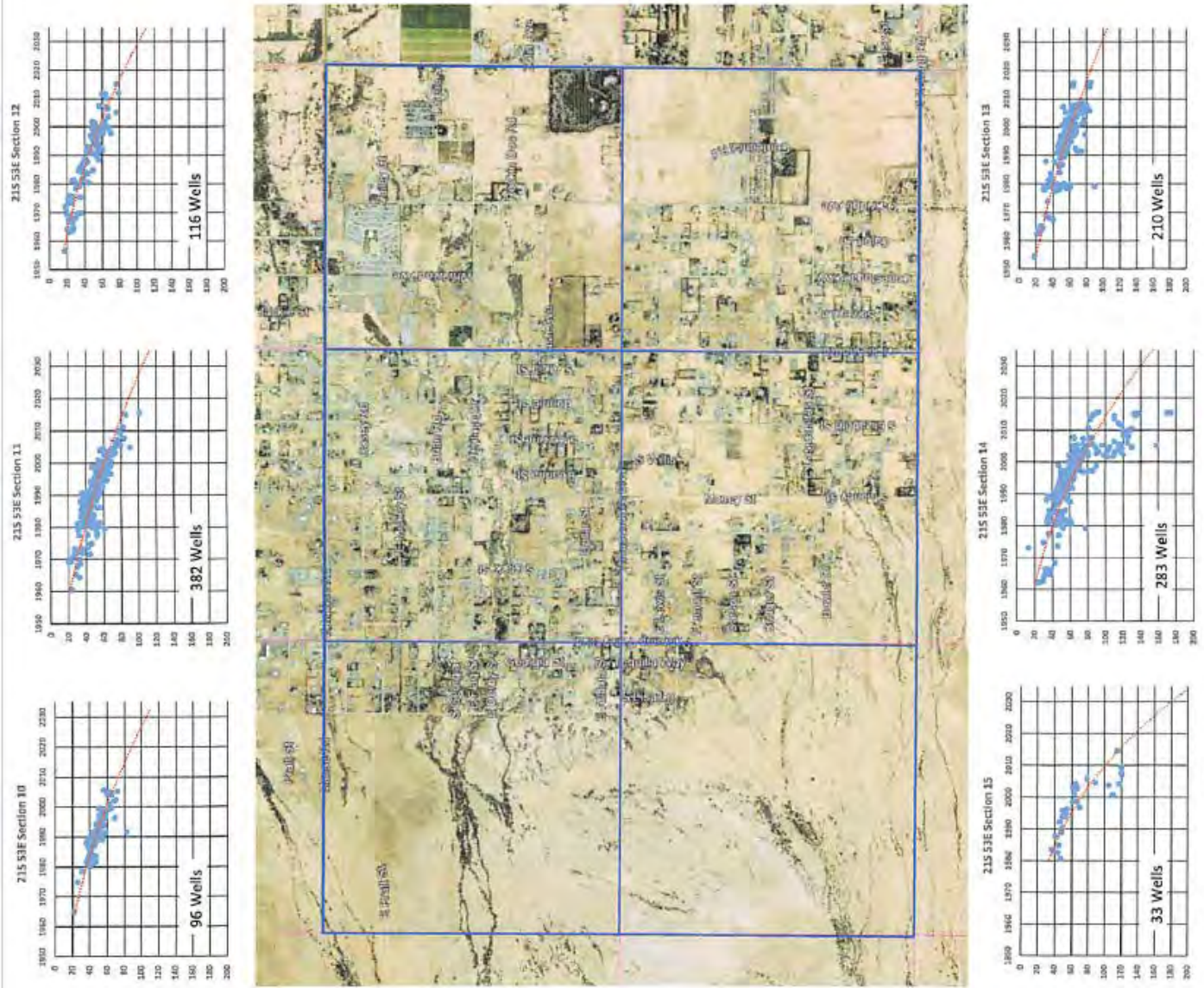


Figure 5-2. Long-term Water Levels for 1,120 Water Wells in six sections in Southern Pahrump.



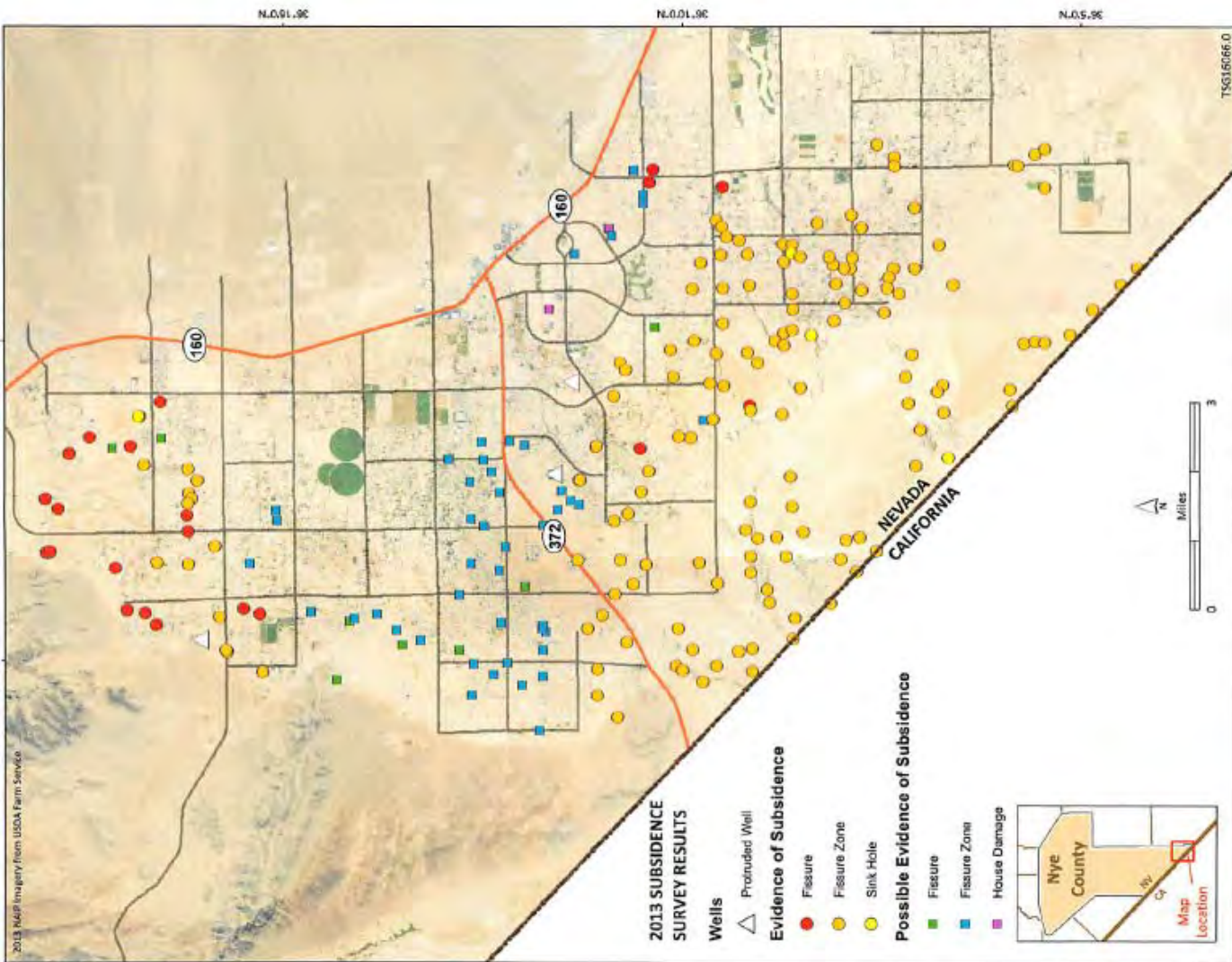


Figure 5-11. Evidence of subsidence from a field reconnaissance survey conducted in 2013 by the Nye County.

SE ROA
at 1507



Mapped Geologic Deposits		Subsidence Significance
Qbg eolian and alluvial silt and mud		Direct evidence of subsidence includes fissuring, and potholes. Thin-bedded to massive with no soil development
Qbf sandy silt, clayey silt, and clay		Extensive areas of subsidence and damaged structures. Irrigation/ponded water can result in severe fissuring and piping and, in some cases, catastrophic collapse
Qbe Unit F sandy silt, clayey silt, and clay		Direct evidence not observed but soils are collapsible. As water table declined, evaporites were dewatered. Subsequent dissolution by recharge may cause collapse.

Mapped geologic deposits and the significance of observed
subsidence and soil collapse features observed during
2005 Nye County Subsidence Field Study. From Buqo
(2005a).

Figure 5-10: Classification of mapped geologic deposits and subsidence features from 2005 Nye County Study
(Buqo, 2005a).

SE ROA
at 1506

Land Subsidence



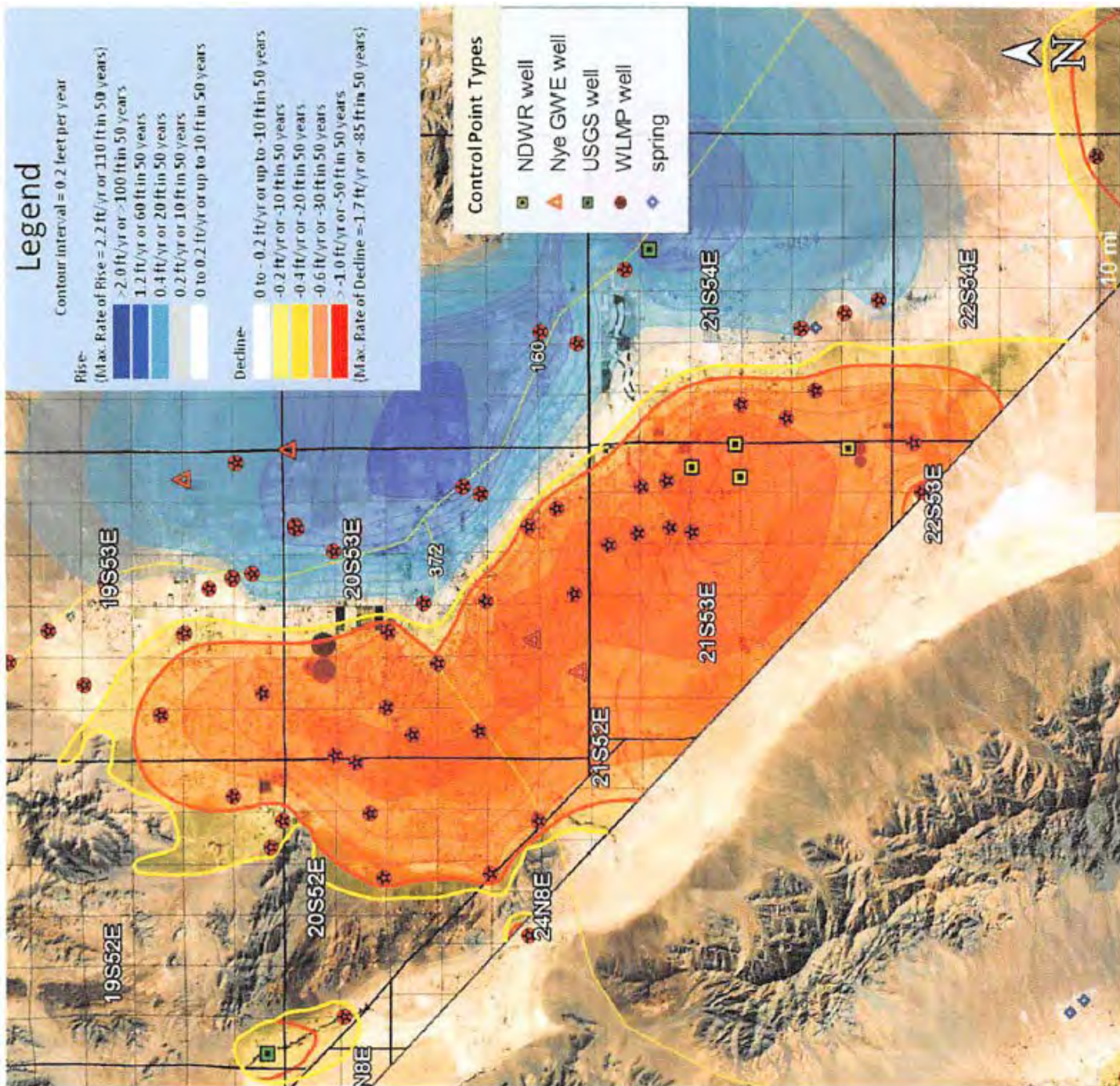
Pahrump - October 2000

**SE ROA
at 1178**

Declining Water Levels and Potential Well Failures

The problem is only projected to get worse
under current conditions –
Let alone if additional domestic wells were
added to the problem





SE ROA
at 1347

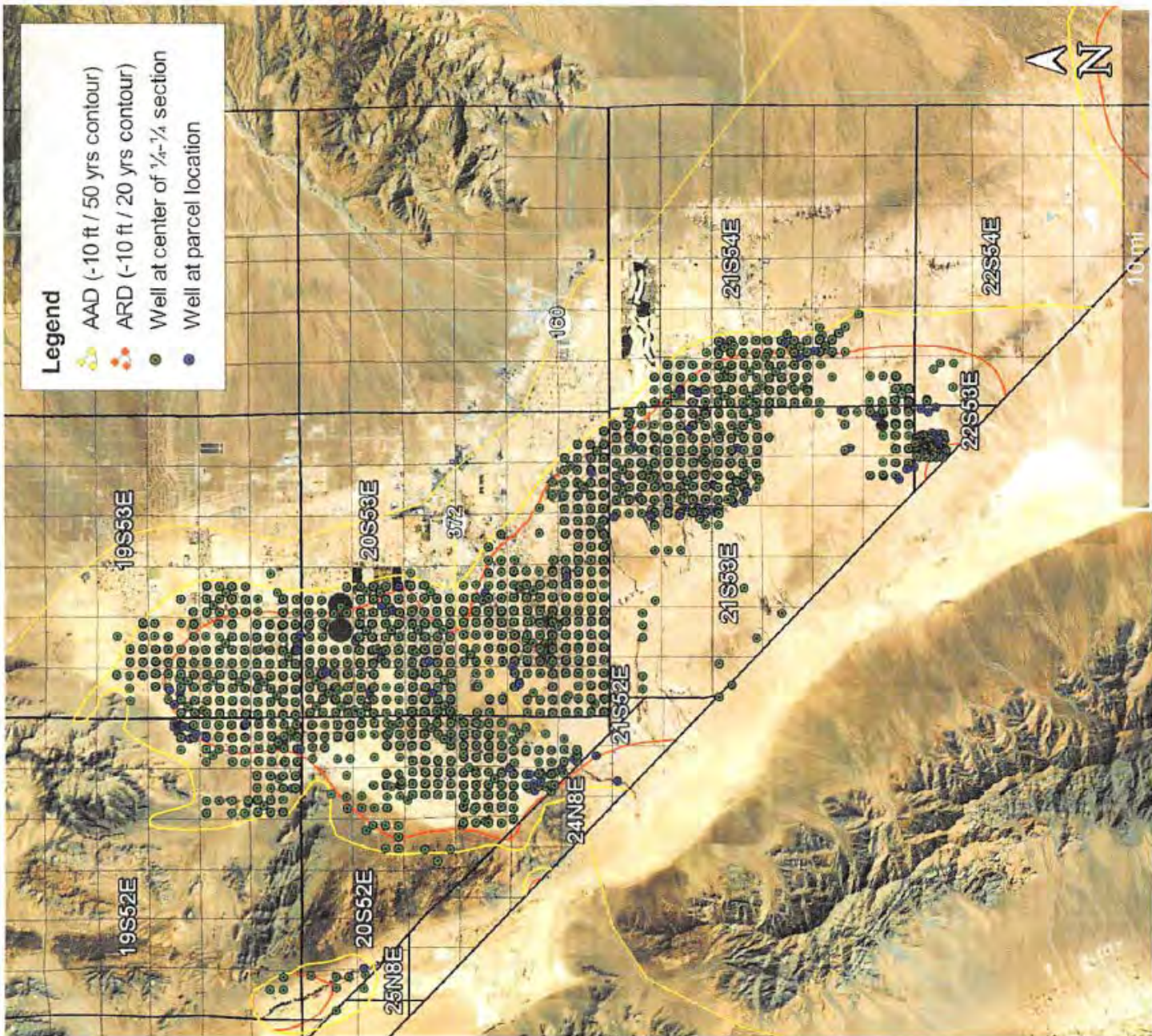


Declining Water Levels and Potential Well Failures

By 2035 – 438 existing wells are predicted
to fail

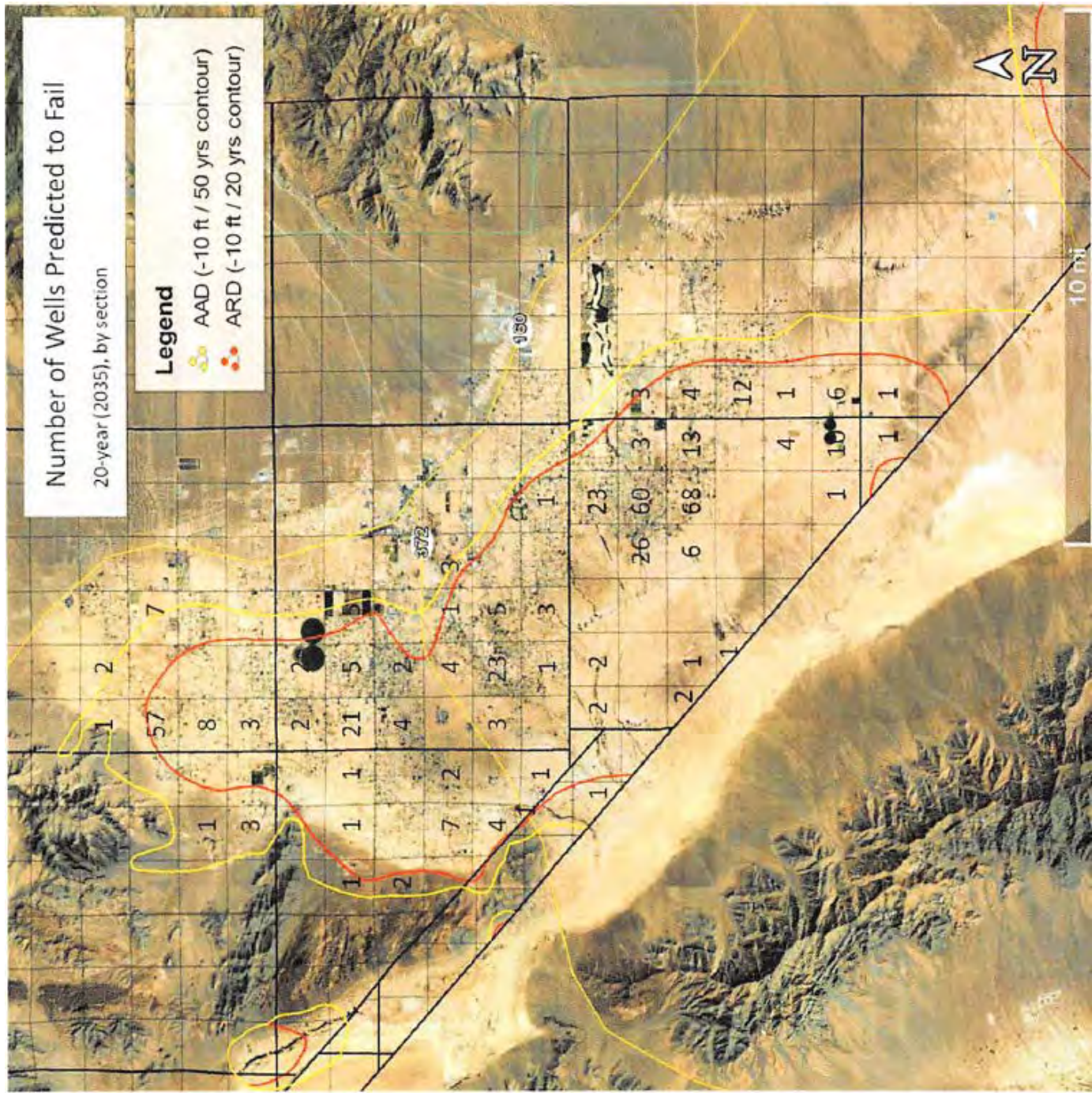
By 2065 – 3,085 existing wells are
predicted to fail





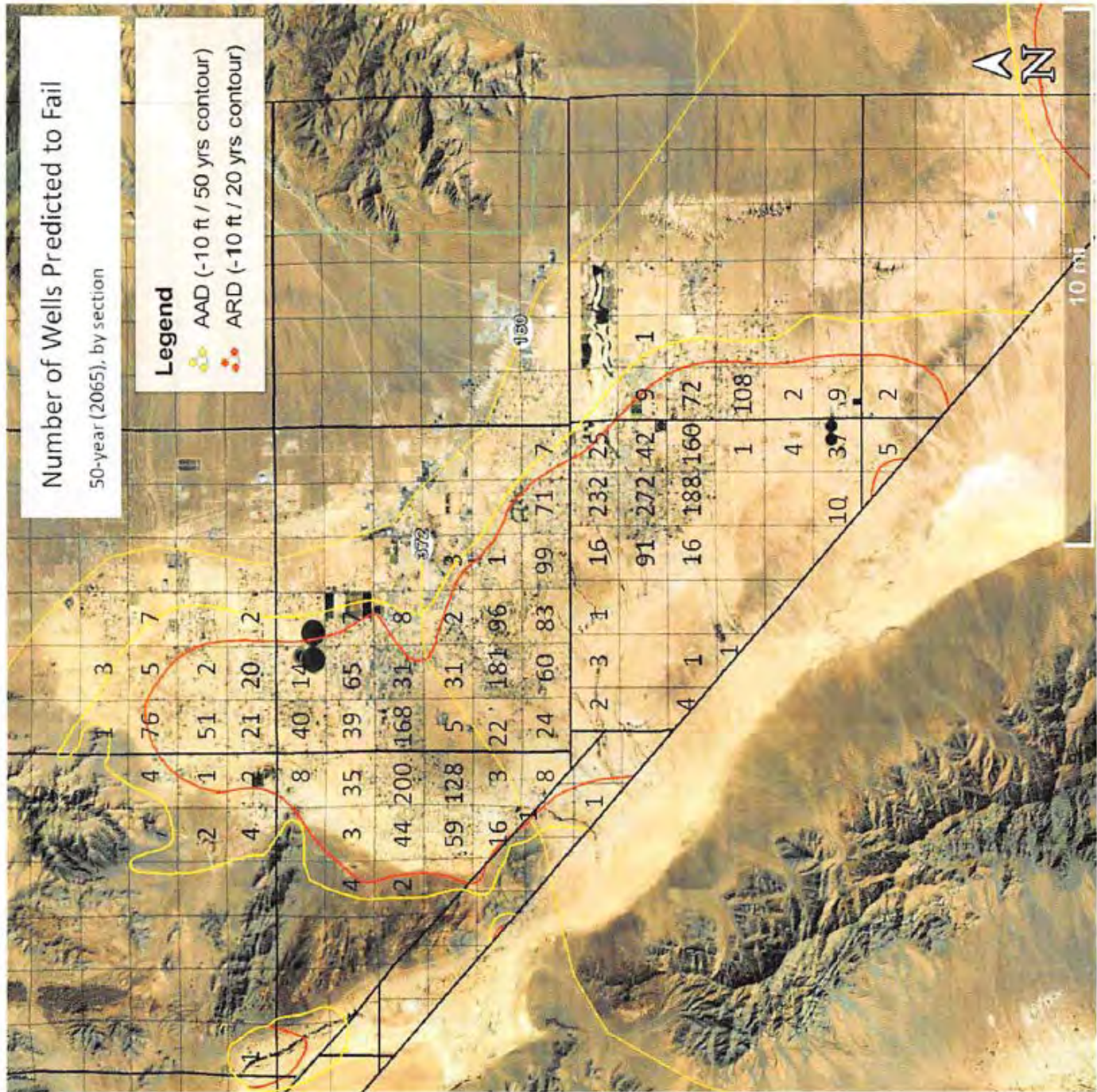
SE ROA
at 1348





SE ROA
at 1356





SE ROA
at 1357



Declining Water Levels and Potential Well Failures

Again, these predictions are based on
existing demand –

Allowing more domestic wells will only
exacerbate the problem

Nye County Water District

NYE COUNTY WATER DISTRICT ACT

CHAPTER 542, STATUTES OF NEVADA 2007

AN ACT relating to water; creating the Nye County Water District; providing for the acquisition, storage, sale and distribution of water by the District; conferring other powers on the District; providing for the membership of the Governing Board of the District; setting forth the duties of the Board; authorizing the Board to levy and collect certain taxes; exempting the District from regulation by the Public Utilities Commission of Nevada; and providing other matters properly relating thereto.

[Approved: June 18, 2007]

(Leadlines for sections have been supplied by the Legislative Counsel of the State of Nevada)

WHEREAS, Adequate and efficient water service is vital to the economic development and well-being of the residents of Nye County; and

WHEREAS, The well-being of the residents of Nye County, the long-term economic development of Nye County and the protection of the environment of Nye County could best be served by the creation of a single governmental entity, the purpose of which is to secure and develop sustainable sources of water; and

WHEREAS, The provisions of this act do not express any preference for whether water service is provided to the residents of Nye County by a governmental entity or by a private utility regulated by the Public Utilities Commission of Nevada; now, therefore,

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:



Nye County Water District

NRS 534.030(5)

...the State Engineer, in the administration of the groundwater law, shall avail himself or herself of the services of the governing body of the water district or the water conservation board, or both of them, in an advisory capacity. The governing body or water board shall furnish such advice and assistance to the State Engineer as is necessary for the purpose of the conservation of groundwater within the areas affected. The services of the governing body or water conservation board must be without compensation from the State, and the services so rendered must be upon reasonable agreements effected with and by the State Engineer.



December 2017 Letter to the State Engineer



Nye County Water District
2101 E. CALYPSO BLVD., STE. 100 • PRATER, NEVADA 89048
(775) 727-7727 • FAX (775) 727-7010

Disc 11, 2006

Jason King, State Engineer
Division of Water Resources
9011 South Stewart Street, Suite 200
Carson City, Nevada 89701

Ref: *Import of critical concern for achieving a better balance in Human 462.*

1 Year Timeline

A significant portion of our ability to balance the amount of water rights on the books versus available water resources centers on the discretion of the fellow user team.

- 2) Over dedication of water rights in support of development projects.
- 3) Fortification and immobilization (artificial)
- 4) Limiting the propagation of domestic wells in perpetuity in favor of public water-pulling from the lake.

Attribution: After review of the records for cancellations and forfeitures, we have determined that over 16,000 acre feet of water rights have been canceled or forfeited in the past 30 years. We request that your offices continue to provide critical review of water rights for nonuse and extensions of time. We are aware that this trend will slow as water rights become more valuable. On the last retention that this effort has made it significant progress to cover appropriations in the future.

[illegible]

SE ROA 1318

Water Conservation: A Water Conservation Plan for new construction has been adopted by the Nye County Board of Commissioners and is attached to this correspondence for your consideration. The staff report attached to this correspondence provides an estimate of a 15% water efficiency gain by the year 2063. This equates to an estimate of 2700 acre foot reduction in potential pumpage as a result of adoption of this plan. Nye County and Nye County Water District are currently working on practical methods for enforcement.

Domestic Wells: Domestic wells total more than 11,000 drilled to date in Basin 162. Using an assumed average of 40.5 gpm test cell accounts for approximately 28% of the pumping in the basin to date. Adding 300 test cell estimates for the 20 years 1980-2000 increases potential pumping to 490, or 1.4% of the basin's potential. The 1980-2000 period is the most likely pumping period of interest. The 1950-1980 period is less likely, and the 1900-1950 period is the least likely. Should the State ever allow domestic wells to be drilled without a minimum depth of 100 feet, the State would have some balance control to be drilled without a minimum depth of 100 feet. (In comparison, a similar balance control was used for the basin's waterfloods.) When considering that Nevada is a priority potential state and water together with the implications of NRS 534.000 and (under a potential statehood limit), propagation of domestic wells in priority places (your office in the position to limit withdrawals of new only new domestic wells but the majority of those currently in line).

NB: \$34 000.4'. The date of priority for the use of underground water from a well for domestic purposes where the draught does not exceed 2 m is the date of completion of the

- (a) Recorded by the well driller on the log this well driller files with the State Engineer pursuant to NRS 334.170; or
- (b) Documented through any other documentation or evidence specified by the State

As such, the Nye County Water District is requesting that you issue an Order requiring relinquishment or dedication of water rights for new domestic wells. In addition, we are requesting that existing domestic wells are expressly exempt from the Order. This exemption should include existing domestic wells that require any type of siting, retrofitting, deepening

i

Dan H. W.

1. List of attachments:
Staff report with tables
Nye County Bill 2017-06

SEE ROA 1319



Order No. 1293

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

#1293

ORDER

PROHIBITING THE DRILLING OF NEW DOMESTIC WELLS
IN THE PAHRUMP ARTESIAN BASIN (40-162), NYE COUNTY, NEVADA.

WHEREAS, the State Engineer has designated the Pahrump Artesian Basin as provided under NRS § 534.120 by the following orders:

1. Order No. 176 dated March 11, 1941, designating and describing the basin pursuant to NRS § 534.120 upon the petition of ten percent of the legal appropriators of underground water;
2. Order No. 193 dated January 15, 1948, extending the designated area;
3. Order No. 205 dated January 23, 1953, further extending the designated area.

WHEREAS, the State Engineer has issued the following orders concerning the regulation and management of groundwater in the basin:

1. Order No. 206 dated May 4, 1953, requiring the installation of measuring devices;
2. Order No. 381 dated June 1, 1970, declaring irrigation a non-preferred use, ordering that new applications for irrigation be denied;
3. Order No. 955 dated October 26, 1987, amending Order No. 381, denying applications on the Pahrump and Manse fans, restricting applications to small commercial uses and forfeiture re-filing provisions;
4. Order No. 1107 dated November 8, 1994, denying all new applications to appropriate except small commercial, small industrial and environmental uses;
5. Order No. 1183 dated April 19, 2007, establishing a program for domestic well credits in the basin;
6. Order No. 1252 dated April 29, 2015, further extending the designated area, lifting the prohibition of moving existing water rights to the Pahrump and Manse fans and curtailing all new appropriations except for very limited exceptions.

SE ROA 33

SE ROA at 33 – 38

JT APP 5027



Order No. 1293

Prohibited the drilling of any new domestic well within the Pahrump Basin, except:

1. Any person proposing to drill a new domestic well must obtain an existing water right in good standing, subject to review of the State Engineer, of not less than 2.0 acre-feet annually and relinquish the water right to serve the domestic well.
2. Any entity that has already relinquished sufficient water rights to serve a new domestic well is excepted from this order.
3. A domestic well requiring rehabilitation as defined by NAC § 534.189 is hereby excepted.
4. The reconditioning of a domestic well as defined by NAC § 534.188, or replacement of an existing domestic well is excepted from this Order, unless the well is located in an area where water can be furnished by an entity such as a water district or a municipality presently engaged in furnishing water to the inhabitants thereof.

Order No. 1293

Litigation ensued:

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p>PAUL G. TAGGART, ESQ. Nevada State Bar No. 6136 DAVID H. RIGDON, ESQ. Nevada State Bar No. 13567 TAGGART & TAGGART, LTD. 108 North Minnesota Street Carson City, Nevada 89703 (775) 883-5900 — Telephone (775) 883-5900 — Facsimile Attorneys for Petitioner</p> <p>OFFICE OF THE ATTORNEY GENERAL CARSON CITY, NEVADA</p> <p>JAN 18 2008</p> <p>BUREAU OF ENGINEERING & SURVEY UNRECORDED</p> <p>IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF NYE</p> <p>PAHRUMP FAIR WATER, LLC, a Nevada limited-liability company, Petitioner, vs. JASON KING, JR., NAGAHAMA ENGINEERING, INC., a Nevada limited liability company, Respondent, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.</p> <p>CASE NO.: _____ DEPT. NO.: _____</p> <p>PETITION FOR JUDICIAL REVIEW</p> <p>COMES NOW, Petitioner, PAHRUMP FAIR WATER, LLC, a Nevada limited liability company, hereinafter "petitioner" or "PFW", by and through its attorneys of record, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby petitions the Court to reverse or remand Order 1293 issued by Respondent, JASON KING, P.E., Nevada State Engineer, on December 19, 2017, and attached hereto as Exhibit 1.</p> <p>This Petition for Judicial Review, as well as Notice of Appeal, is filed pursuant to NRS 533.450. PFW is a Nevada limited-liability company whose members include owners of parcels in the Pahrump basin who are directly affected by Order 1293, real-estate brokers doing business in the Pahrump area, and owners of well drilling companies. The members of PFW are, therefore, "person[s]" feeling aggrieved by the State Engineer's issuance of Order 1293 as defined in NRS 533.450.</p>
---	--



Nye County Groundwater Management Plan

Pahrump Basin 162

Groundwater Management Plan

Version February, 2018

Prepared for:

Nye County Water District Governing Board

Prepared by:

Nye County Water District

1 | Page

SE ROA 3451

SE ROA at 3449 – 3464

JT APP 5030



Amended Order No. 1293A

On July 12, 2018, the State Engineer issued Amended Order No. 1293A, creating additional exceptions to Order No. 1293's prohibition on domestic wells



Amended Order No. 1293A

This Amended Order includes the same prohibition and exceptions as Order No. 1293, however it added exceptions for:

- (1) Persons whom filed a Notice of Intent to Drill with the Nevada Division of Water Resources between December 15th and December 19th, 2017, that were denied upon the issuance of Order No. 1293; and
- (2) Persons whom could demonstrate that they filed an application for a zoning and/or building permit with Nye County on or before December 19, 2017, for a parcel eligible for a domestic well.



Amended Order No. 1293A

Following the issuance of Amended Order No. 1293A, the parties reached a settlement regarding the appeal of Order No. 1293.

In exchange for Petitioner's voluntary dismissal of the previous case, the State Engineer agreed to an expedited briefing and hearing schedule for a new appeal of Amended Order No. 1293A.

JT APP 5033



Amended Order No. 1293A

Pahrump Fair Water, LLC (“PFW”), the Petitioner in the previous suit, as well as new Petitioners, Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and

Gerald Schulte filed a new suit, challenging Amended Order No. 1293A



Standard of Review

JT APP 5035



Water Law Disputes are Unique Proceedings

It is also settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided.



Judicial Review of Decisions of the State Engineer

NRS 533.450(1)

... may have the same reviewed by a proceeding for that purpose, *insofar as may be in the nature of an appeal*

Judicial Review of Decisions of the State Engineer

NRS 533.450(10)

The decision of the State Engineer
is **prima facie correct**, and the
burden of proof is upon the
party attacking the same.



Water Law Disputes are Unique Proceedings

Because water law cases, like this, are **special in character**, the provisions of NRS 533.450 establish the boundaries of the court's review and **strictly limits** the review within the narrow confines established under the statute and as interpreted by the Supreme Court.

This Court is serving in an appellate capacity

NRS 533.450(1)

... may have the same reviewed by a
proceeding for that purpose, *insofar as
may be in the nature of an appeal*



Whether substantial evidence in the record supports the State Engineer's Decision?

With respect to a limited review “in the nature of an appeal,” neither the district court nor this court will substitute its judgment for that of the State Engineer: **we will not pass upon the credibility of the witnesses nor reweigh the evidence**, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision.

Revert v. Ray, 95 Nev. 782, 786 (1979)

Deference to the State Engineer

An agency charged with the duty of administering an act is *impliedly clothed with power* to construe it as a necessary precedent to administrative action, and therefore *great deference should be given to the agency's interpretation when it is within the language of the statute.*

State v. State Engineer, 104 Nev. 709, 713 (1988) (internal citations omitted).



Deference to the State Engineer

The State Engineer’s “factual determinations **will not be disturbed**” by the reviewing court so long as they are “supported by substantial evidence.”

Pyramid Lake Paiute Tribe v. Washoe Cnty., 112 Nev. 743, 751(1996).



Standard of Review

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

This Court should affirm the State Engineer's Amended Order No. 1293A

JT APP 5045



State Engineer's Amended Order No. 1293A Should be Affirmed

- Authorized by Statute
- Supported by Substantial Evidence
- Does not violate due process
- Not a taking
- Pahrump Fair Water, LLC (“PFW”) lacks standing



The State Engineer has the Legal Authority to Issue Amended Order No. 1293A and the State Engineer Did So Based on Substantial Evidence in the Record



NRS 533.024(1)(b)

It is the policy of the State of Nevada “to recognize the importance of domestic wells as appurtenance 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.”

NRS 533.024(1)(b)

However, only *existing* domestic wells can be considered appurtenances to *existing* private homes for purposes of this State policy.

In order to meet his other duties, the State Engineer **can** and **must** regulate *future, potential, non-existent* domestic wells

NRS 534.110(8)

In 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 undue interference with existing wells

The Pahrump Basin is a Designated Basin, as required for application of NRS 534.110(8)

Order No. 176 – March 11, 1941
Pahrump Basin designated and described
pursuant to NRS 534.030

Order No. 193 – January 15, 1948

Extended designated area

Order No. 205 – January 23, 1953

Further extended designated area

**The State Engineer has
determined, based on substantial
evidence, that additional wells
would unduly interfere with
existing wells, as required for
drilling restrictions under NRS
534.110(8)**

Declining Water Levels on the Valley Floor

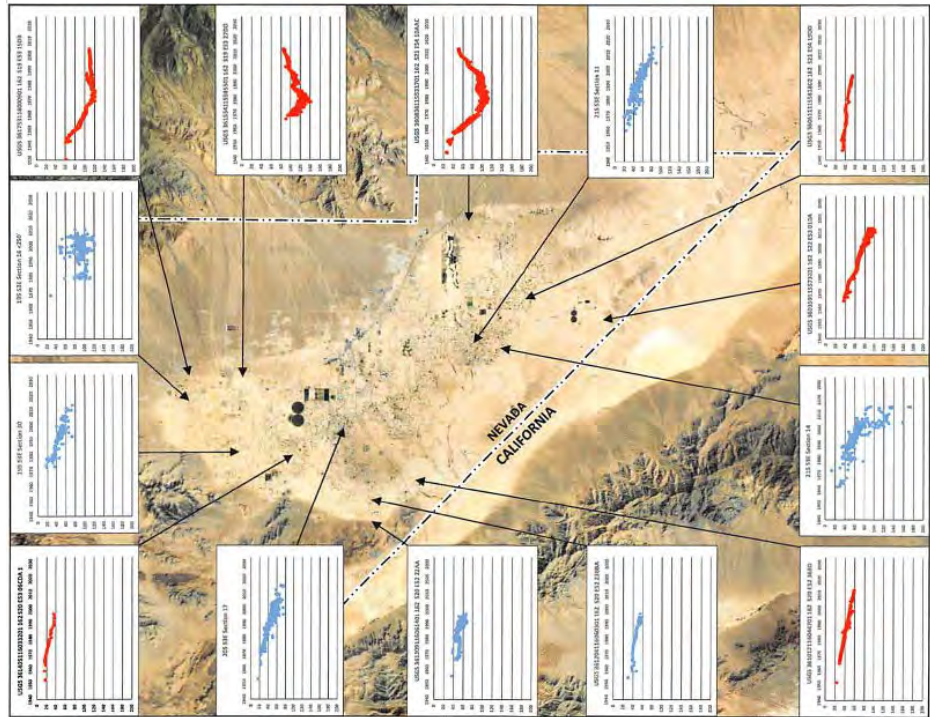


Figure 5-1. Long-term Water Level Trends in Pahrump Valley.

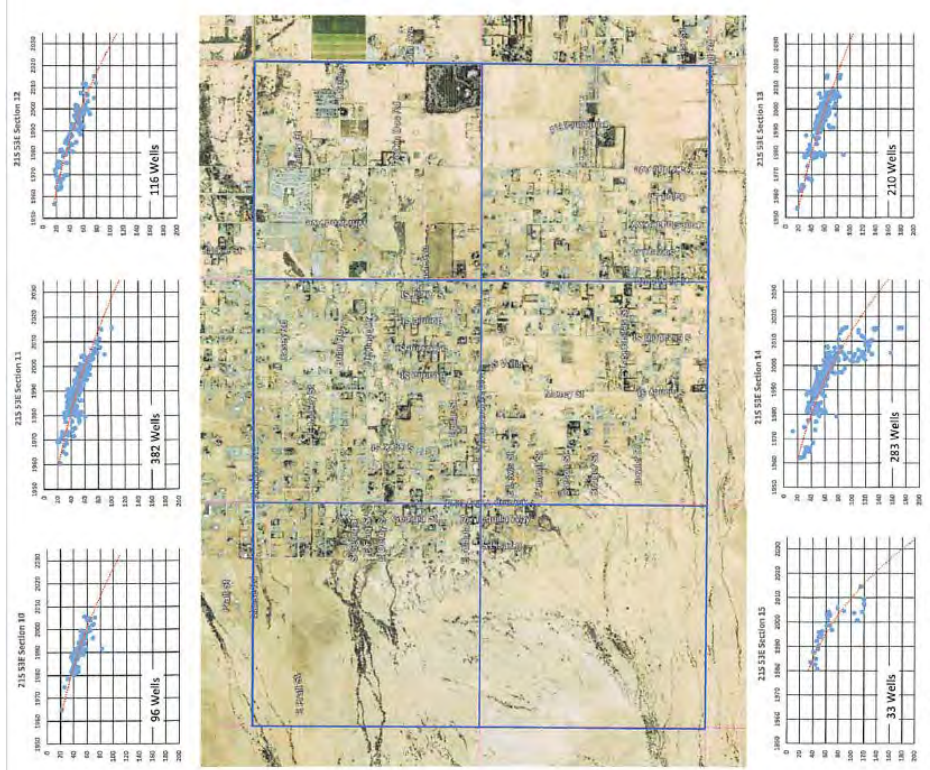
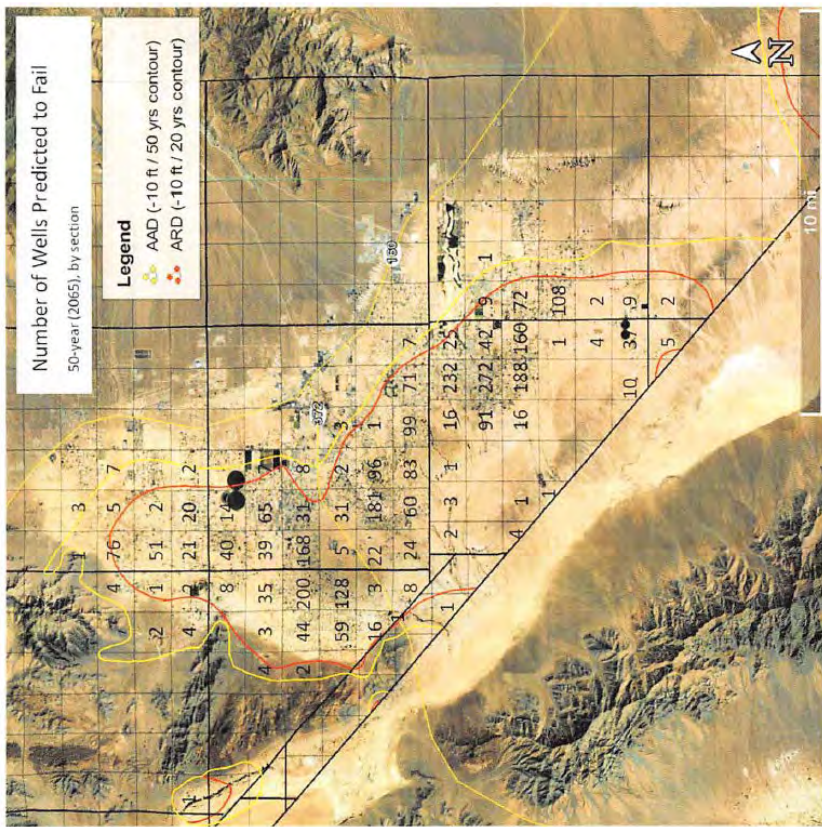
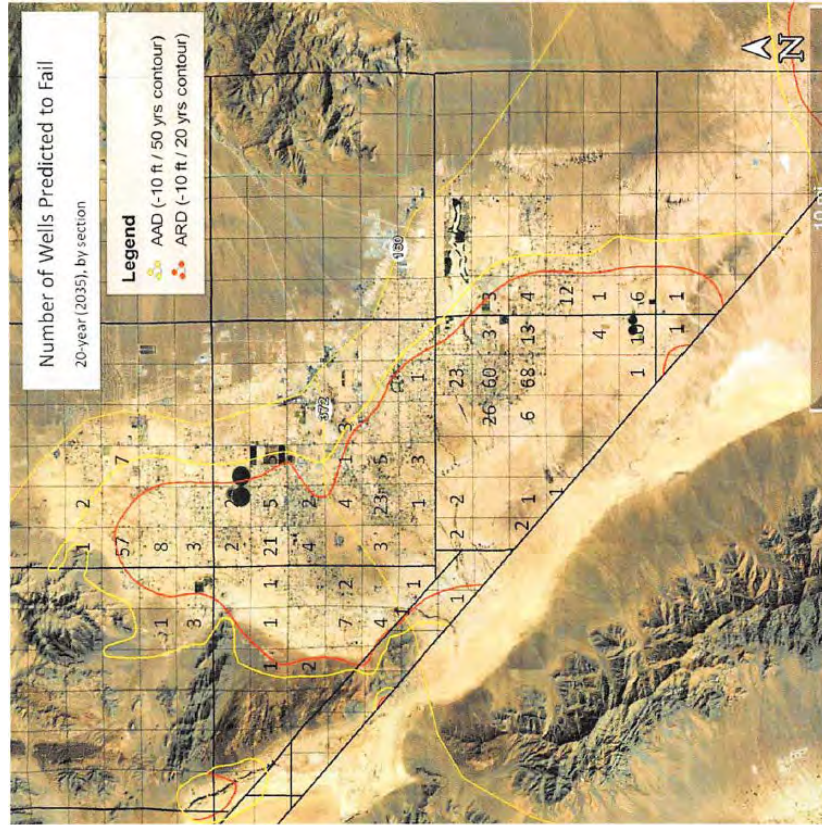


Figure 5-2. Long-term Water Levels for 1,120 Water Wells in six sections in Southern Pahrump.

Predicted Well Failures



The State Engineer Acted Within his Authority, based on Substantial Evidence in the Record

- “Nye County Water District Water Resources Plan Update,” prepared by MaryEllen C. Giampaoli, 2017
 - SE ROA at 1389 – 1605
- Nye County Water District Letter, including its own 2017 Staff Report
 - SE ROA at 1318 – 1337
- “Estimated Effects of Water Level Declines in the Pahrump Valley on Water Well Longevity,” prepared by John Klenke, 2017
 - SE ROA at 1338 – 1388

The State Engineer Acted Within his Authority, based on Substantial Evidence in the Record

These conclusions are further supported by the
State Engineer's own data and evidence,
maintained by the Nevada Division of Water
Resources

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

LA Times - 1974



JT APP 5057



SE ROA at 11 – 38, 1610 – 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

The Nevadan - 1974

Sunday, June 9, 1974—THE NEVADAN—3

Pahrump, meaning big water in Paiute, may be headed for bad water and big trouble

by Larry Pryor
Los Angeles Times
Environmental Writer

A fragile desert valley that straddles the California-Nevada border has become a battlefield in the war between the economy and the environment.

The combatants here drive bulldozers, tractors and government pickup trucks instead of tanks and Jeeps. The spoils of war fill up the desert floor—an estimated 6.5 billion in the past year.

The water is dwindling, since more of it is used each year than flows into the enclosed basin. But this fact has done nothing to change the strategies of developers and farmers.

One developer has already sold enough lots on the edge of the Pahrump Valley to house 30,000 residents and expects to sell another 100,000 more to make this development, Calvada Valley, the third largest city in Nevada.

The pressures of population and competing economic interests here are considered by some the worst of what will eventually happen throughout the West.

"This water problem is a heck of a lot bigger than anyone realizes," said an aide to the federal interstate sales administrator.

"A lot of areas could run out of water if people decide to build on their lots."

But developers are not stopping. Except a \$1,000 investment in a long-septic tank.

The size of Pahrump Valley's underground reservoir is immense. But because of the delicate, closed ecosystem of the high desert, there is little possibility that the water can be altered.

If the farmers pump it at the rate they are now, artesian springs will dry up, a rare desert fish will go extinct and residential wells will have to go lower each year.

If the developers draw water for municipal use, the farmers' wells will eventually turn dry, too.

At some point, according to the California Regional Water Quality Control Board, the water will decline in quantity and quality until it is unfit for any use at all.



This bubbling fountain greets prospective land buyers at the entrance to the Calvada Valley development in Pahrump where the name of the game is water and it is played without rules or regard for the future.

As of now, the underground basin is being managed through applications of raw economic and political power, with little thought given to planning the long-term fate of the valley.

State and federal agencies, although concerned, are disorganized and impotent.

Local officials on both sides of the border are willingly promoting growth. With the state and federal controls, private interests have a free rein.

The most conspicuous interest is Preferred Equities Corp., which is building Calvada Valley, a "new town" it says will rival Reno and Las Vegas.

The company is 80 per cent owned by a trust controlled by Los Angeles businessman of Gulf American Land Corp., which was suspended from operation in 1967 by the state of Florida for fraudulent and misleading sales

practices.

Rosen merged Gulf American with GAC Corp., which two months ago entered into an agreement with the state of Nevada. The Commission that called for \$10 million in bonds to resolve disputes over the Florida developments.

In 1970, the Rosen family bought large holdings in Pahrump Valley, a vast bowl 60 miles west of Las Vegas rimmed by snow-capped mountains and roused with massive other rock outcrops.

At that time, the valley's floor was green with cotton and alfalfa fields. The town of Pahrump had 800 residents, mostly commuters from Atomic Energy Commission facilities. The area has since become the Las Vegas.

"We decided that the area would be subject to the influence of Las Vegas' growth," said

Frank M. Gentry, the former Nevada state



Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

LA Times - 1974

State Sues to Block Subdivision in Desert

Seeks to Have Pahrump Valley Rezoning
Held Up Until Ecology Conditions Are Met

BY LARRY PRYOR

Times Environment Writer

Atty. Gen. Evelle J. Younger filed suit against Inyo County Tuesday to block the subdivision of about 8,400 acres of desert land until procedures required by the California Environmental Quality Act have been complied with.

Younger's suit charges the Inyo County Board of Supervisors abused its discretion by accepting tentative tract maps and approving a zone change without evidence that development would not harm the environment.

The approved tentative tract maps are in the Pahrump Valley portion of Inyo County, a high-desert valley that straddles the California-Nevada border.

Atty. Gen. Evelle J. Younger's office said the attorney general had anticipated that final maps would not be filed for more than a year.

The board's action Monday, the spokesman said, seems to indicate that they feel the present environmental impact report is adequate and they believe the land should be developed.

"We will probably have to ask for a more accelerated timetable by the

JT APP 5059



SE ROA at 11 - 38, 1610 - 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

Reno Gazette-Journal
1986

20A—Reno Gazette-Journal
Sunday, March 2, 1986

Quiet Nevada valley hit by land sales fever

From page 1A
Yreka, Calif. — According to the Nye County Assessor's office, only 37 Preferred Equities lots have been sold up to the subdivision water system, Central Nevada Utilities Co., according to the utility's own reports to the Public Service Commission. 22,000 — are useless without water, sewer and electricity.

Under these conditions, the desert town is in a bind. The town is not only squabbling over its future as the opposing forces of self-to-the-hill and government regulation square off in a classic power struggle, but it is also in a bind over the future social and economic well-being of a small Nevada town.

The town continues to subdivide. A few agencies are starting to demand answers to a critical question: "Where is all this going?"

The town is not only selling that money or bonds to guarantee that water and sewer systems will be built over the years, but it is also in a bind over the future of the town.

A three-year standoff between the rural county and subdivision may be heading for a resolution.

The town is not only selling that money or bonds to guarantee that water and sewer systems will be built over the years, but it is also in a bind over the future of the town.

A three-year standoff between the rural county and subdivision may be heading for a resolution.

THESE EVENTS COULD reverse a history of governmental neglect and special interest influence that has nurtured the town's lot sales operation in a variety of ways.

□ Nye County operates with virtually no land use or subdivision controls. The town's lot sales operation, when Nye County started to impose limited planning controls, authorized a special bill

CARSON CITY — At the same time a federal grand jury indicted Rosen for violating real estate regulations, top state officials were purchasing his former board chair's shares in Nevada's largest real estate company.

In 1977, a federal grand jury accused Rosen of diverting \$53 million of the company's funds to himself and his family in income taxes on several real estate deals. The falsified return occurred in 1977, a federal grand jury said.

Rosen of diverting \$53 million of the company's funds to himself and his family in income taxes on several real estate deals. The falsified return occurred in 1977, a federal grand jury said.

Just before his trial was to start, Rosen pleaded no contest. Las Vegas state court judge Robert F. Johnson sentenced Rosen to three years' probation and ordered him to pay a \$5,000 fine.

The light sentence was part of a plea bargain between Rosen and the state. Rosen's federal agents how he moved the \$3.6 million into a Bahamas Bank so they could learn how to nab other Nevada residents who had stolen money from the state.

But federal officials later admitted he didn't give them any useful information.

Nevada absolves land dealer of tax crimes

With Gov. Richard Bryan chairing the Oct. 7 Nevada Board hearing and State Sen. Jim Bibb representing Rosen, it took the state's top law officials only a matter of minutes to absolve the land sales baron in Nevada.

All seven Pardons Board members — the governor, five Supreme Court justices and one state legislator — voted to pardon Rosen.

McKay voted to wipe Rosen's record clean in Nevada.

Rosen's appearance was waived due to his illness. Rosen's record was wiped clean. Rosen's record was wiped clean.

Rosen's appearance was waived due to his illness. Rosen's record was wiped clean. Rosen's record was wiped clean.

Rosen's appearance was waived due to his illness. Rosen's record was wiped clean. Rosen's record was wiped clean.



Rosen

Although it was for a federal offense, Bibb said officials in Las Vegas decided not to pursue his pardon on the grounds that he was a "good citizen" and "a good person" before applying for a pardon from President Reagan.

"I think he wants to make peace not only with God, but with the world," Bibb said, "and to put it bluntly, he wants to go out with a clean slate."

However, Bibb said his client has decided not to pursue his pardon on the grounds that he was a "good citizen" and "a good person" before applying for a pardon from President Reagan.

Bryan characterized the board's action as "pro forma." A pardon "is not a reward for good behavior," he said, "but a recognition of the fact that the person has been out in the community for a number of years" and "if the applicant has not been in trouble with the law" again.



previously approved the subdivision map for the town. The town is not only squabbling over its future as the opposing forces of self-to-the-hill and government regulation square off in a classic power struggle, but it is also in a bind over the future social and economic well-being of a small Nevada town.

The town continues to subdivide. A few agencies are starting to demand answers to a critical question: "Where is all this going?"

The town is not only selling that money or bonds to guarantee that water and sewer systems will be built over the years, but it is also in a bind over the future of the town.

A three-year standoff between the rural county and subdivision may be heading for a resolution.

IN THE MEANTIME, it takes no sense to install enormous water and sewer systems when there are not enough people to use them, he said. The expansion of the town's lot sales operation as the expansion of the subdivision takes place. If we're right, the area is going to grow so fast, the problem actually occurs.

Church said Preferred Equities officials are working on a compromise that will satisfy both the company and county. Church met with Bradhurst, Nevert and Neighbors. Bradhurst said it was at the request of state Sen. Bibb, attorney for the county, that the company agreed to the new bonding requirements for the yet another subdivision, Calvada Unit 12.

The company sought to relax the bonding requirements for the yet another subdivision, Calvada Unit 12. The company sought to relax the bonding requirements for the yet another subdivision, Calvada Unit 12.

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Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

Reno Gazette-Journal
1986

By Graham Hand
Wednesday, March 2, 1986

Population hike, like agriculture, drains Pahrump's water

PAHRUMP—It may be a fact of life that Nevada's growing population is draining the water, as the Pahrump Valley was drained for almost 100 years.

Twenty years of agricultural and residential development have drained the Pahrump Valley of its water, leaving it dry and barren. The valley is now a vast, flat, arid landscape, with no water left to grow crops or sustain a population.



PAHRUMP VALLEY: Children take time out to play in a creek. Pahrump valley, which is extremely arid, is a dry lake bed.

Stories by Doug McMillan

The 1930s were the heyday of water in the Pahrump Valley. The moderate rates of decline and the steady flow of water from the Colorado River and the Truckee River were enough to sustain the valley's agriculture and population. But by the 1950s, the water was running low, and the valley's water supply was being drained by the increasing population and the growing demand for water in the surrounding areas.

By the 1980s, the water was almost gone, and the valley was a dry lake bed. The population had grown to over 100,000, and the demand for water was insatiable. The valley's water supply was being drained by the increasing population and the growing demand for water in the surrounding areas.

Years ago, the Pahrump and other valleys in Nevada were known for their abundant water supply. The water was used for agriculture, and the population was growing. But by the 1950s, the water was running low, and the valley's water supply was being drained by the increasing population and the growing demand for water in the surrounding areas.

By the 1980s, the water was almost gone, and the valley was a dry lake bed. The population had grown to over 100,00, and the demand for water was insatiable. The valley's water supply was being drained by the increasing population and the growing demand for water in the surrounding areas.

Although Nevada has abundant water rights, the Pahrump Valley is one of the most arid regions in the state. The water is being drained by the increasing population and the growing demand for water in the surrounding areas. The valley's water supply is being drained by the increasing population and the growing demand for water in the surrounding areas.

By the 1980s, the water was almost gone, and the valley was a dry lake bed. The population had grown to over 100,00, and the demand for water was insatiable. The valley's water supply was being drained by the increasing population and the growing demand for water in the surrounding areas.



Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

Pahrump Valley Times-
2013

**Water board feels heat over
proposed restrictions**



JT APP 5063



By Mark Waite Pahrump Valley Times mwaite@pvtimes.com
October 4, 2013 - 6:00 am



SE ROA at 11 – 38, 1610 – 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

Pahrump Valley Times-
2013

Water board approves land parceling restrictions

By Mark Waite Pahrump Valley Times mwaite@pvtimes.com
November 6, 2013 - 7:45 am



Planning restrictions designed to reduce future water usage, like increasing the number of water rights that must be retired when creating parcels and increasing minimum parcel sizes, were passed by the Nye County Water District Board last week.

JT APP 5064



SE ROA at 11 – 38, 1610 – 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

**Well owners, utilities quarrel
over water plans**

Pahrump Valley Times-
2014



By Mark Waite Pahrump Valley Times mwaites@pvtimes.com
June 6, 2014 - 6:02 am



JT APP 5065

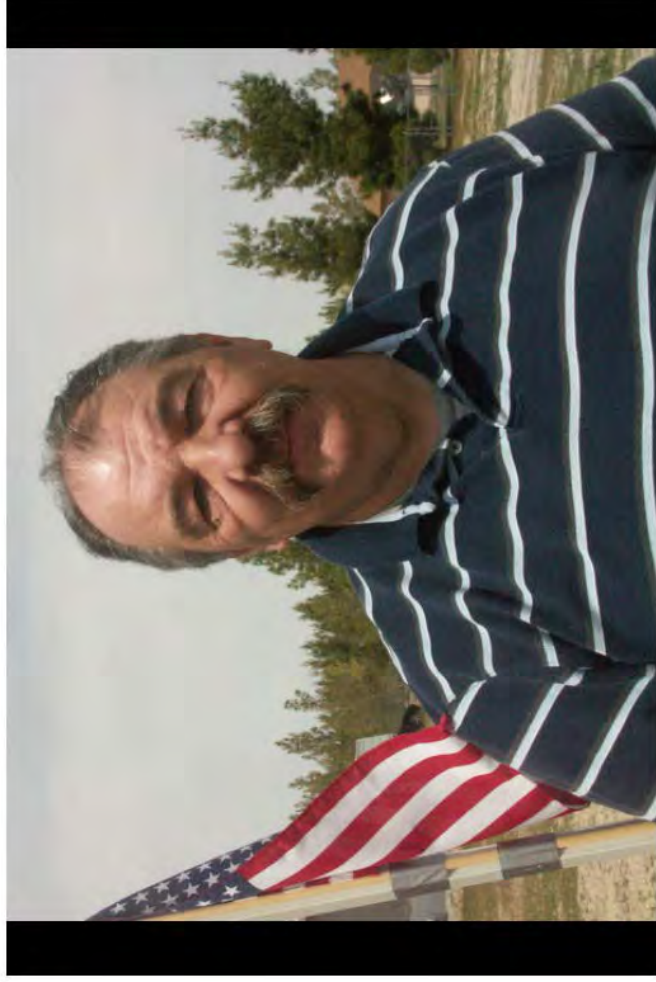


SE ROA at 11 – 38, 1610 – 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

Pahrump Valley Times-
2014

**State engineer to well owners:
Be part of solution**



By Mark Waite Pahrump Valley Times mwaite@pvtimes.com
July 11, 2014 - 6:26 am



JT APP 5066



SE ROA at 11 – 38, 1610 – 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

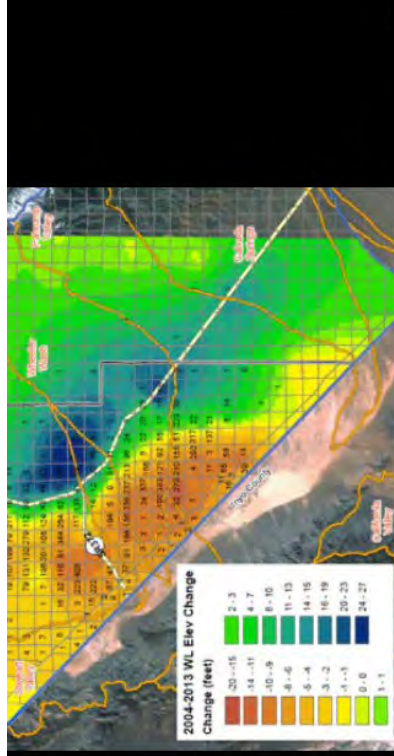
Pahrump Valley Times-
2015

Report: Pahrump aquifer trends 10-year decline

By Lillian Browne Pahrump Valley Times lbrowne@pvtimes.com
February 27, 2015 - 7:40 am



Aquifer levels are decreasing in areas where domestic wells are clustered, according to a report.



By Lillian Browne Pahrump Valley Times lbrowne@pvtimes.com
February 27, 2015 - 7:40 am



JT APP 5067



SE ROA at 11 – 38, 1610 – 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

Pahrump Valley Times-
2015

**Legislature to attempt to fix
Pahrump water concerns**



By Lillian Browne Pahrump Valley Times lbrowne@pvtimes.com
February 4, 2015 - 7:02 am



JT APP 5068



SE ROA at 11 – 38, 1610 – 1744

Troubling Trends Are Well-Known and Publicized, Despite Past State Engineer Orders

Pahrump Valley Times-
2016

**More solutions arise during
second well owner meeting**



JT APP 5069

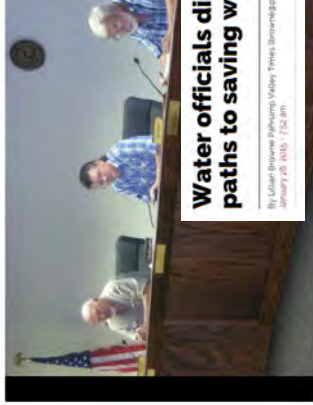
By Daria Sokolova Pahrump Valley Times
January 13, 2016 - 3:33 pm



SE ROA at 11 – 38, 1610 – 1744

Pahrump Valley Times News Articles

**Water board priorities:
Importation, revenue increases**



By Lillian Browne Pahrump Valley Times lrbrowne@pvtimes.com
February 25, 2015 - 7:00 am

**Proposal to meter new domestic
wells gains traction**



**State water boss updates on
bills**

**Water officials discuss many
paths to saving water**

By Lillian Browne Pahrump Valley Times lrbrowne@pvtimes.com
January 28, 2015 - 7:52 am

**Could relinquished rights
conserve water?**

By Mary Wake Pahrump
July 23, 2014 - 9:53 am

**Meters for new domestic wells
on commission agenda for
Tuesday**

By Lillian Browne Pahrump Valley Times lrbrowne@pvtimes.com
March 12, 2015 - 11:13 am

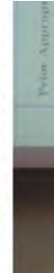


**County commissioners to discuss
water conservation**

By Dana Solodova Pahrump Valley Times
December 11, 2015 - 9:22 am

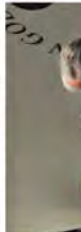
By Lillian Browne Pahrump Valley Times lrbrowne@pvtimes.com
January 24, 2015 - 1:00 am

**Legislative committee to
examine water bills this week**

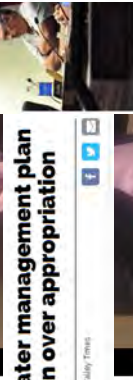


**Groundwater management plan
tabled until January**

**Water governing board to look
into overdedicated water rights**



**Goicoechea returns to hear from
well owners**



**Ground Water Management Plan
continues to receive scrutiny**

By Lillian Browne Pahrump Valley Times lrbrowne@pvtimes.com
March 25, 2015 - 7:23 am



**'Water grab' feared at Nevada
Legislature**



By Dana Solodova Pahrump Valley Times
April 4, 2015 - 10:00 am

By Dana Solodova Pahrump Valley Times
April 13, 2015 - 10:00 am

Amended Order No. 1293A

Given the evidence, request from Nye County Water District, and well-publicized historical trends, the State Engineer acted within his authority to issue Amended

Order No. 1293A



Amended Order No. 1293A

NRS 534.110(8)

- The Pahrump Basin is Designated
- The State Engineer determined that additional domestic wells will lead to failure of existing wells

JT APP 5072



Other Option?

CURTAILMENT

Consequences?

- Current owners of domestic wells and permitted/certificated water rights losing full/all use of water
- Newest domestic wells would be the first ones cut off (NRS 534.080(4))

Amended Order No. 1293A

Amended Order No. 1293A, along with the Nye County GMP, is designed to protect existing water users and prevent curtailment

Potential Future Domestic Wells are NOT exempt from State Engineer Regulation

While special provisions exist under Nevada water law for *existing* domestic wells, the State Engineer can regulate the drilling of *new, currently non-existent* domestic wells under NRS 534.110(8) and NRS 534.120.

Potential Future Domestic Wells are NOT exempt from State Engineer Regulation

NRS 534.030(4)

The State Engineer shall supervise all wells tapping artesian water or water in definable underground aquifers drilled after March 22, 1913, and all wells tapping percolating water drilled subsequent to March 25, 1939, except those wells for a domestic purpose for which a permit is not required

Potential Future Domestic Wells are NOT exempt from State Engineer Regulation

However, NRS 534.030(4) does not
prohibit the State Engineer from
controlling the ability to drill *new*
domestic wells under NRS 534.110(8)
and NRS 534.120(1)

Potential Future Domestic Wells are NOT exempt from State Engineer Regulation

NRS 534.120(1)

Within 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 order as are **deemed essential for the welfare of the area** involved.

JT APP 5078



Potential Future Domestic Wells are NOT exempt from State Engineer Regulation

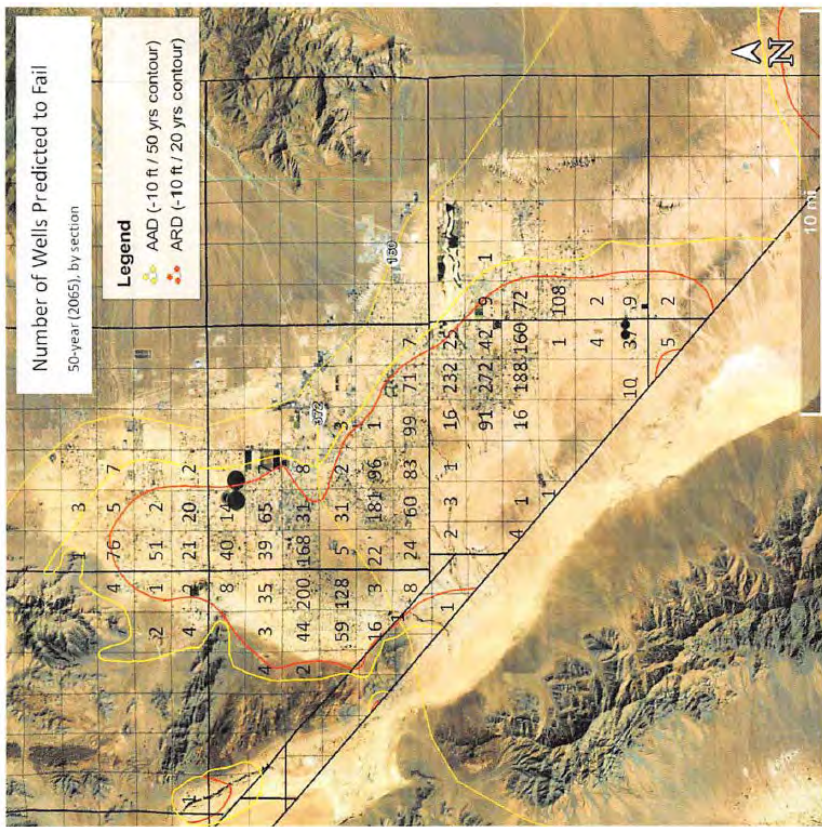
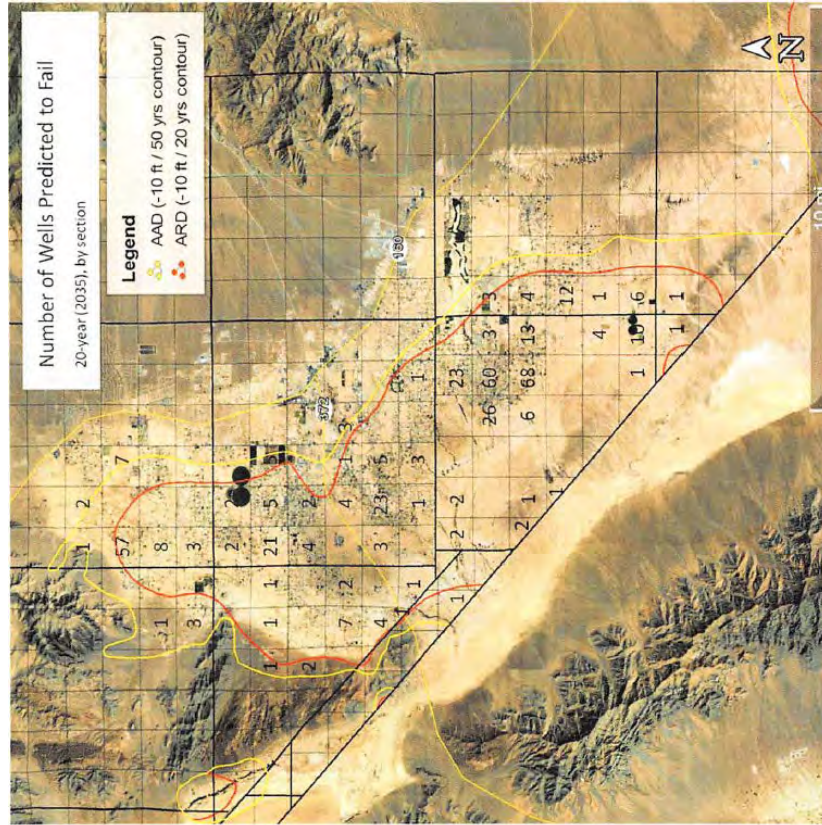
Under NRS 534.120(1), Amended Order No.
1293A is proper:

- The Pahrump Basin is designated
- In the judgment of the State Engineer, the Pahrump Basin is being depleted
- The State Engineer has deemed the prohibition on future domestic wells essential to the welfare of the Pahrump Basin

Potential Future Domestic Wells are NOT exempt from State Engineer Regulation

Similarly, Under NRS 534.110(8),
Amended Order No. 1293A is proper,
as the State Engineer determined
that additional wells would cause
undue interference with existing
wells

Predicted Well Failures



Amended Order No. 1293A is NOT Overbroad

NRS 534.030(4) exempts domestic
wells from the permitting process



Amended Order No. 1293A is NOT Overbroad

This is why Amended Order No.
1293A only applies to future domestic
wells –

Other wells would be required to go
through the application and
permitting process, where they would
be **denied** pursuant to Order No. 1252

Amended Order No. 1293A is NOT Overbroad

Order No. 1252

Subject to limited exceptions, “any application to appropriate groundwater...within the designated [Pahrump Basin] will be denied.”



Amended Order No. 1293A is NOT Overbroad

Thus, the State Engineer has regulated every other form of groundwater withdrawal and water levels continue to decline –

Prohibition on new domestic wells is the last option before curtailment, and the State Engineer has the authority to institute this prohibition.

Amended Order No. 1293A Does
Not Violate Petitioners' Due
Process Rights as Protectable
Interests in Domestic Wells Only
Attach to **EXISTING** Domestic
Wells

JT APP 5086



Due Process

Both the Nevada Constitution
and the United States
Constitution protect against the
deprivation of private property
without due process of law.

Due Process

Additionally, in 2001, the Nevada
Legislature enacted NRS
533.024(1)(b) statewide, creating
a “protectable interest” in
domestic wells

Due Process

However, from the legislative history, it is clear that the legislature intended this “protectable interest” to apply ONLY to **EXISTING** domestic wells

also applies to wells created under NRS 534.120. Assembly Bill 408 of the Seventieth Session was mentioned in conjunction with NRS 534.120.

ASSEMBLY BILL 408 OF THE SEVENTIETH SESSION: Revises provisions relating to appropriation of water and revises method for calculating certain charge for water. (BDR 48-1541)

Mr. Turnipseed responded that domestic wells defined in statute, and serving a single family or domestic home, have been exempt from permitting since the beginning of the groundwater law in 1939. One of the problems in protecting domestic wells is that some of their whereabouts were and still are unknown. Well drillers now must file a log with the State Department of Conservation and Natural Resources. The approval criteria in NRS 533.70 have three parts: Is there unappropriated water in the source, is it going to interfere with existing rights, and is it going to protect the existing rights in part to

"protectible interest" is covered in the specifics of NR

Senator Carlton asked Mr. T after there has been an im drilled, and if citizens cannot the property. Mr. Turnipseed

Mr. Ricci added one of the pr house being built. "Protect states "existing domestic we these wells meets the criteria building a house.

Senator James argued the notification requirements, wh being turned over to the judiciary the courts will decide it is a policy statement that has no "protectible interests." Mr. Turnipseed replied that the "protectible interest" is not only a policy under NRS 533.024, but comes in under the approval criteria. Senator James countered that the state engineer must be empowered to adopt regulations to implement this policy statement into a statute. The criteria need to be developed through the state engineer through rulemaking. He said the courts

Senator Carlton asked Mr. Turnipseed if the "protectible interests" only occur after there has been an improvement on the property and a well has been drilled, and if citizens cannot claim "protectible interests" without anything on the property. Mr. Turnipseed answered, "Yes."

Mr. Ricci added one of the problems they face is the drilling of a well prior to a house being built. "Protectible interests" become difficult because the bill states "existing domestic wells." He said it is difficult to determine if one of these wells meets the criteria simply because it was drilled years in advance of building a house.

SE ROA 912



Due Process

Thus, Petitioners lack any protectable interest, as well as any due process protections, for the *mere expectation* that they could *potentially* drill a domestic well at some point in the future

Due Process

Two (2) Steps for a Due Process Claim:

1. Whether there exists a liberty or property interest which has been interfered with by the State?
2. Whether the procedures attendant upon the deprivation were constitutionally sufficient?

Malfitano v. Cnty. of Storey by & through Storey Cnty. Bd. of Cnty. Comm'rs, ___ Nev. ___, 396 P.3d 815, 819 (2017) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).



Due Process

Property Interest:

“more than an abstract need or desire for it” and “more than a unilateral expectation of it”

Rather, “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 (1972)).



Due Process

This legitimate claim of 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.”

JT APP 5094

Malfitano, 396 P.3d at 820 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981)).



Due Process

A government body's past practice of granting a government benefit is insufficient to establish a legal entitlement to the benefit.

See Gerhart v. Lake Cnty., 637 F.3d 1013, 1021 (9th Cir. 2011)



Due Process

Protections of due process attach only to **deprivations** of property



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

Amended Order No. 1293A Does Not Violate Due Process

Petitioners self-identify as parcel owners in the basin, real-estate brokers doing business in Pahrump, and owners of well drilling companies.

Amended Order No. 1293A Does Not Violate Due Process

Amended Order 1293A does not deprive
Petitioners of a property interest to
which they have a legal entitlement –
rather Petitioners have only a *mere*
expectation that domestic wells would be
able to be drilled in the Pahrump Basin

Amended Order No. 1293A Does Not Violate Due Process

The “Protectable Interest” in
domestic wells, created by the
legislature, only applies to *existing*
domestic wells

Amended Order No. 1293A Does Not Violate Due Process

Petitioners do not have a legal entitlement to the ability to drill domestic wells simply because the law has historically been lenient in allowing the drilling of domestic wells in the Pahrump Basin

Amended Order No. 1293A Does Not Violate Due Process

Further, Amended Order No. 1293A does not result in a deprivation of property, as Amended Order No. 1293A does not revoke or interfere with *existing* domestic wells

In fact, its purpose is to

PROTECT EXISTING WELLS

Amended Order No. 1293A Does Not Violate Due Process

Doctrine of Appurtenance

As no existing domestic well has ever existed on these parcels, there is no dependence created between the water and the land, and therefore no protectable interest in **non-existent** domestic wells was conveyed when this land was purchased.

Amended Order No. 1293A Does Not Violate Due Process

The Amended Order does not interfere with *existing* domestic wells, and there has been no deprivation of any property to which Petitioners have a legal claim of entitlement –

Thus, the protections of procedural
due process do not apply

Amended Order No. 1293A Does Not Violate Due Process

This is especially true regarding those
Petitioners identified as real-estate
brokers and owners of well drilling
companies –

Their allegations are a perfect example
of the “unilateral expectation” that
Malfitano found to be insufficient to
warrant due process protections

Petitioners' Taking Claim is Improperly Raised for the first time in the Petition for Judicial Review



Improper Taking Claim

Taking claims must be brought via a verified complaint pursuant to NRS Chapter 37, and must permit discovery

This Court, acting in its appellate capacity per 533.450, cannot render such a finding

Improper Taking Claim

Further, no taking claim would even be ripe at this point unless and until Amended Order No. 1293A is upheld.

Amended Order No. 1293A

Does NOT Result in a Taking

JT APP 5108



No Taking Occurred

State Engineer agrees that both the U.S. and Nevada Constitutions prohibit governmental takings of private property without just compensation –

Here, **no taking occurred**,
including *no per se* regulatory taking
as alleged by Petitioners

No Taking Occurred

Per Se Regulatory Taking

1. When a government regulation requires an owner to suffer a permanent physical invasion of the owner's property; or
2. When a government regulation completely deprives an owner of all economical beneficial use of the owner's property

McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 662 (2006)



No Taking Occurred

Allegation that a regulation has diminished the property's value, or destroyed the potential for its highest and best use, does not, without more, constitute a taking.

Regulations have been upheld, and deemed not a taking, even where property value is significantly reduced as a result.

Sisolak, 122 Nev. at 663

No Taking Occurred

Regarding domestic wells themselves,
Amended Order No. 1293A does not
interfere with *existing* domestic wells,
and even permits new domestic wells if
certain conditions are met –

As Petitioners lack a protected property
interest in their expectations of *future*
domestic wells, no taking occurred as to
these *potential* domestic wells

No Taking Occurred

As to the currently owned parcels (which is only alleged by a portion of Petitioners), this taking argument also fails.

No Taking Occurred

Not a *per se* regulatory taking of existing parcels:

1. Does not impose *any* physical invasion of property, let alone a permanent invasion required for a *per se* regulatory taking;

No Taking Occurred

- Not a *per se* regulatory taking of existing parcels:
2. Does not deprive parcel owners of all economical beneficial use of the property

Allegation of “Forcibly Taking” Water is Completely Inaccurate

By law, a “domestic well” is defined
by statute as permitting a draught of
up to 2.0 acre-feet per year

Allegation of “Forcibly Taking” Water is Completely Inaccurate

Actual pumping figures are
irrelevant:

Domestic Wells = 2.0 afa

JT APP 5117

NRS 534.350(8)(a); NRS 534.080(4); NRS
534.180(1)



Allegation of “Forcibly Taking” Water is Completely Inaccurate

Individuals can STILL drill *new* domestic wells
if sufficient water rights are relinquished!

Only to the extent that individuals desire to drill
a domestic well on their property is
relinquishment required...

the State Engineer is not unilaterally, let alone
“forcibly,” taking any existing property by virtue
of Amended Order No. 1293A

Pahrump Fair Water, LLC, Lacks Legal Standing to Bring this Action

JT APP 5119



PFW Lacks Standing

NRS 533.450(1)

“any person aggrieved by any order or decision of the State Engineer ... affecting the person’s interests ... may have the same reviewed by a proceeding for that purpose ...”

PFW Lacks Standing

Two-Part Inquiry:

1. Who is granted standing under NRS 533.450 to challenge decisions of the State Engineer?
2. Is PFW a person whose interests have been adversely impacted by Amended Order No. 1293A?

Citizens for Cold Springs v. City of Reno, 125 Nev. 625, 629 (2009).



PFW Lacks Standing

Like in *Citizens for Cold Springs*, NRS 533.450 provides broader standing than that afforded by the Constitution.

Thus, PFW likely meets the first prong due to NRS 533.450's "any person aggrieved language", just as the plaintiffs in *Cold Springs* met NRS 268.668's "any person affected" language

PFW Lacks Standing

However, PFW cannot meet the second prong as they are **not** a person whose interests have been adversely affected by Amended Order No. 1293A

PFW Lacks Standing

PFW is a Limited-Liability Company, and is therefore its own legal “person” under Nevada law

NRS 86.201(3)

A limited-liability company is an entity distinct from its managers and members

PFW Lacks Standing

NRS 86.381

A member of a limited-liability company is not a proper party to proceedings by or against the company, except where the object is to enforce the member's right against or liability to the company.

PFW Lacks Standing

“[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, 730 – 31 (2012) (citing *Deal v. 999 Lakeshore Ass’n*, 94 Nev. 301, 303 (1978)).

PFW Lacks Standing

In *Deal*, the defendant argued that a condominium association lacked standing to bring a construction defect suit on behalf of the condominium owners.

The Supreme Court 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 (1978).

PFW Lacks Standing

Here, PFW is not a real party in interest, and therefore also lacks standing to participate in this action.

PFW cannot bring a Petition for Judicial Review based solely on the interest(s) of its members.

PFW is an independent legal person under Nevada law, and is not “adversely affected” for purposes of standing, absent its own interest affected by Amended Order No. 1293A, independent of its members.

PFW Lacks Standing

This case is distinguishable from *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977)

In *Hunt*, the U.S. Supreme Court held that a state agency had standing to sue on behalf of its members where the following elements were met:

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



PFW Lacks Standing

PFW's members have not shown that they have standing to sue in their own right

In *Hunt*, the Commission had a membership made up entirely of similarly situated individuals:
apple growers and dealers

Here, PFW is composed of three (3) very different types of individuals:

Parcel owners, real-estate brokers, and owners of well-drilling companies

PFW Lacks Standing

These otherwise unidentified parcel owners, real-estate brokers, and owners of well-drilling companies have only a **speculative injury**

In *Hunt*, the U.S. Supreme Court found that the apple growers/dealers suffered an injury in fact as a result of a North Carolina statute.

PFW Lacks Standing

These real-estate brokers and owners of well-drilling companies allege that they *might* be negatively affected as a result of Amended Order No. 1293A.

This is the epitome of a speculative injury,
insufficient for standing

Similarly, it is also speculative to assume that a
decision in favor of PFW would redress its
theoretical injury

PFW Lacks Standing

Dismissing PFW would result in no
tangible prejudice to the remaining
petitioners



CONCLUSION

Petitioners' Petition for Judicial Review should be denied, and Amended Order No. 1293A should be affirmed



State Engineer's Amended Order No. 1293A Should be Affirmed

- Authorized by Statute
- Supported by Substantial Evidence
- Requested by the Nye County Water District, and approved by the Nye County Commissioners
- Does not violate due process
- Not a taking
- Pahrump Fair Water, LLC (“PFW”) lacks standing

JT APP 5135



CONCLUSION

The State Engineer respectfully requests
that this Court deny the Petition for
Judicial Review and affirm Amended
Order No. 1293A

**IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE**

PAHRUMP FAIR WATER, LLC., Et al., Petitioner,

VS.

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

**CASE NO.: CV39524
DEPT. NO.: II**



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Order 1293A Should be Overturned Because:

- Domestic Wells are Exempt from State Engineer regulation.
- Property Owners Were Not Given Due Process *before* Order 1293A was issued.
- Order 1293A is not supported by substantial evidence.



I. Procedural Background

- December 19, 2017 – State Engineer issues Order 1293.
 - No prior notice or hearing.
 - Begins NRS 533.450 30-day appeal period.
- December 20, 2017 – State Engineer sends letters to well drillers rejecting Notices of Intent to Drill filed before December 19.
- January 18, 2018 – PFW files Petition for Judicial Review.
- February 1, 2018 – PFW files Motion for Stay.



I. Procedural Background

- May 10, 2018 – Hearing on Motion for Stay.
- July 6, 2018 – PFW files opening brief.
- July 12, 2018 – State Engineer issues Order 1293A.
 - Issued without notice to public, court, or opposing counsel.
 - Rescinds retroactive application of Order 1293, but leaves all other provisions in place.
- August 10, 2018 – PFW and State Engineer enter settlement agreement.



I. Procedural Background

- August 10, 2018 – PFW files new Petition for Judicial Review of Order 1293A.
- September 7, 2018 – PFW files opening brief.
- October 8, 2018 – State Engineer files answering brief.
- November 1, 2018 – PFW files reply brief.
- November 8, 2018 – Hearing on merits.



II. Undisputed Facts

- Order 1293A restricts drilling of new domestic wells on existing parcels in Pahrump *unless* property owner first:
 - Purchases 2af of existing groundwater rights, and;
 - Forever relinquishes those rights to the State Engineer.
- Two primary pieces of evidence cited in Order 1293A:
 - Nye County Water Resources Plan Update (2017).
 - Klenke groundwater model report.
 - State Engineer admits that neither piece of evidence considered the effect of future domestic wells on groundwater levels in the basin (Order 1293, Section 19 at p.4).



II. Undisputed Facts

- Pumping has steadily declined since 1969.
- Basin is not currently over-pumped.
 - Perennial Yield = 20,000 afa.
 - Current pumping = 16,000 afa (apx.).
- Average domestic well in basin uses 0.5 afa.
- Order 1293A is basin-wide, even though water levels in some portions of basin have leveled off and/or significantly increased.



III. Standard of Review

- **NRS 533.450**
 - Any person “feeling aggrieved” by order of State Engineer can seek judicial review.
 - Review is “in the nature of an appeal”, but proceedings are “informal” and must give everyone an opportunity to be heard.
- **State Engineer must have substantial evidence supporting decision.**
 - SE Order is arbitrary if made without consideration for “facts, circumstances, fixed rules, or procedures.”
 - SE Order is capricious if “contrary to the evidence or established rules of law.”



III. Court Must Conduct De Novo Review

- No deference to State Engineer on legal interpretations
 - *Felton v. Douglas County* (2018) – A reviewing court is required to “decide purely legal questions *without deference* to an agency determination.”
 - *Town of Eureka v. State Engineer* (1992) – A “district court is free to decide purely legal questions . . . *without deference* to the agency’s decision.”
 - *Marbury v. Madison* (1803) – “It is emphatically the province and duty of the judicial department to say what the law is.”
 - Justice Gorsuch – “the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations.” (*Gutierrez-Brizuela v. Lynch* (2016) concurring opinion)



III. Court Must Conduct De Novo Review

- No deference to State Engineer's factual findings
 - *Revert v. Ray* (1979) deference to State Engineer on factual findings is conditioned on “fullness and fairness of the administrative proceedings.”
 - Proceedings must provide parties with “full opportunity to be heard” and State Engineer must fully resolve all issues raised by opposing parties.
 - If these procedures are not followed, reviewing court should not hesitate to intervene.
 - No proceedings below means evidence has not been tested for relevance, authenticity, or veracity.
 - Petitioners have never had an opportunity to challenge reports and evidence that State Engineer relied on.



IV. Argument

Order 1293A Should be Overturned Because:

- A. Domestic Wells are Exempt from State Engineer regulation.
- B. Property Owners Were Not Given Due Process *before* Order 1293A was issued.
- C. Order 1293A is not supported by substantial evidence.
- D. Order 1293A results in an unconstitutional taking of private property.



IV (A) - State Engineer Has No Authority to Restrict Drilling of Domestic Wells

- NRS 534.180(1) – No permit required for domestic wells.
 - Part of original 1939 groundwater law that established permitting system.
 - Because of exemption, domestic wells remained under common law.
- NRS 534.030(4) – The State Engineer shall supervise all wells “*except those wells for domestic purposes for which a permit is not required.*”
 - Part of 1947 amendment to groundwater law that expanded regulation beyond simple permitting.
 - Supervision = regulation. (Black’s Law Dictionary)

These are two different and distinct exceptions.



IV (A) - State Engineer Has No Authority to Restrict Drilling of Domestic Wells

- NRS 534.030(4) and 534.180(1) establish general rule that State Engineer does not have authority to regulate domestic wells.
- Legislature has provided specific exceptions to general rule:
 - NRS 534.120(3)(d) – SE can prohibit new domestic wells *if other water service is available*.
 - NRS 534.120(3)(e) – SE can require dedication of water rights for domestic well *when a new parcel is created*.
 - If SE has general power to ban new domestic wells on *all parcels* (both new and existing) or require dedication of water rights regardless of whether *other water service is available*, these statutes are completely unnecessary.
- A statute cannot be interpreted in way that renders other parts of the statute “mere surplusage.” *Paramount Ins., Inc. v. Rayson & Smitley* (1970).



IV (A) - State Engineer Has No Authority to Restrict Drilling of Domestic Wells

- State Engineer claims authority under NRS 534.110(8).
 - “In 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.”
 - No language specifically stating that Legislature intended to include domestic wells.
- Contrast with NRS 534.110(6)
 - “the State Engineer may order that withdrawals, *including, without limitation, withdrawals from domestic wells*, be restricted to conform to priority rights.
 - Statute was passed in 1955, italicized language added in 2011.
 - 2011 amendment indicates that Legislature believes that it must expressly include domestic wells if it wants a statute to apply to them.



IV (A) - State Engineer Has No Authority to Restrict Drilling of Domestic Wells

- Domestic wells are allowed under common law.
 - Property owner has absolute right to drill well on property.
 - If well interferes with prior well, the owner of the prior well may bring trespass action to enforce rights.
- Without express language to the contrary, statute does not change common law.
 - *Orr Ditch & Water Co. v. Justice Court* (1947) – Statutes do not change common law unless they effect that change with clarity.
 - Conn. Nat'l Bank v. Germain (U.S. 1992) – Legislature must be presumed to mean what it says and *say what it means*.



IV(B) – Property Owners Were Not Given Due Process

- The State Engineer concedes that if the right to drill a domestic well is a property right, Order 1293A violated due process.
 - SE Answering Brief – “the Nevada Constitution protects against the deprivation of private property without due process of law.”
 - SE Brief filed with Nevada Supreme Court in *Eureka Cnty. v. Dist. Ct.* – “In order to ensure that due process has been afforded to all interested and impacted parties . . . notice and the opportunity to be heard must be afforded to all appropriators of the relevant water source in a basin.”



IV(B) – Property Owners Were Not Given Due Process

- The right to drill a domestic well is a valuable property right.
 - In Nevada’s climate, ability to drill domestic well is essential to establishment of household.
 - Assemblyman Goicoechea (2011) – “if you have a parcel created, you have a right to drill a domestic well.”
 - Opatik testimony – a property’s ability to have a domestic well is major factor affecting property’s value in Pahrump. (p.77 hearing transcript)

Right to drill a domestic well one stick in the “bundle of sticks” that make up property right.



IV(B) – Property Owners Were Not Given Due Process

- The statutorily established “protectable interest in a domestic well” is not the same as the common law “right to drill a domestic well.”
 - Protectable interest language added to statute in 2001 to force State Engineer to consider effects on domestic wells from pumping from non-domestic wells.
 - Intended to increase, not limit, protections for domestic wells.
 - 2001 Testimony of LCB analyst – “‘protectable interest’ means protections of the domestic well’s *water supply* from unreasonable impacts.”
 - 2001 legislation amended NRS 533.370(2) to prohibit State Engineer from approving applications for new non-domestic wells if pumping would interfere with “protectable interest” in existing domestic well.



IV(B) – Property Owners Were Not Given Due Process

- The right to drill a domestic well vests when the parcel is created.
 - *Am. W. Development v. City of Henderson* (1995) – a development right vests when no further discretionary approval is needed.
 - Once parcel is created, NRS 534.180(1) states that no further discretionary approval is needed to drill domestic well.
 - Therefore, right to drill a domestic well vests when parcel is created.



IV(B) – Property Owners Were Not Given Due Process

- State and Federal Constitutions require due process before vested right is impaired.
 - 5th and 14th Amendments to United States Constitution.
 - Article 1, Section 8(5) of the Nevada State Constitution.
- *Bing Const. v. Douglas Cnty.* (1991) – due process requires notice that includes content of regulation and hearing that allows affected property owners full opportunity to provide testimony and evidence.
- *Revert v. Ray* (1979) – State Engineer proceedings must include notice, provide property owners “full opportunity to be heard” and must “clearly resolve all the crucial issues presented.”



IV(B) – Property Owners Were Not Given Due Process

- Here, the State Engineer issued both Orders without notice or a hearing.
 - Order 1293 issued six days before Christmas holiday with no warning or notice
 - Petitioners had only 30-days to organize opposition and appeal. (NRS 533.450)
 - Order 1293A issued during pending appeal of Order 1293 without notice to public, district court, or opposing counsel.
 - *Westside Charter v. Gray Line Tours* (1983) – Appeal of agency decision vests reviewing court with exclusive jurisdiction over matter that restricts agency from taking further action until appeal is resolved.



IV(C) - Order 1293A Is Not Supported By Substantial Evidence

- No evidence that new domestic wells will interfere with existing wells.
 - NRS 534.110(8) – State Engineer must demonstrate that new wells will “*cause an undue interference with existing wells.*”
 - The State Engineer relied exclusively on GW model that was never designed to determine whether new wells would affect existing wells.
 - Order 1293A acknowledges that no conflict analysis was performed and the evidence relied on “did not take into account anticipated increases in future demand.”



IV(C) - Order 1293A Is Not Supported By Substantial Evidence

- NRS 534.110(4) allows for “reasonable lowering of the static water level at the appropriator’s point of diversion.”
- NRS 534.110(8) says wells can only be restricted if evidence shows they will cause “undue interference.”
- Order 1293A contains no analysis about what constitutes a reasonable lowering of the water table vs. an undue interference with existing wells in the basin.
 - No determinations about what magnitude of decline constitutes undue interference.



IV(C) - Order 1293A Is Not Supported By Substantial Evidence

- Order 1293A contradicts the evidence used to support it.
 - Sec. 18 – “Historical water level data maintained by the State Engineer and other agencies demonstrates that water levels on the valley floor have steadily declined since the 1950s.”
 - Nye County Water Plan – Water levels in some portions of the basin have stabilized or increased, in some areas by as much as 45-feet. (SE ROA 1497)



IV(C) - Order 1293A Is Not Supported By Substantial Evidence

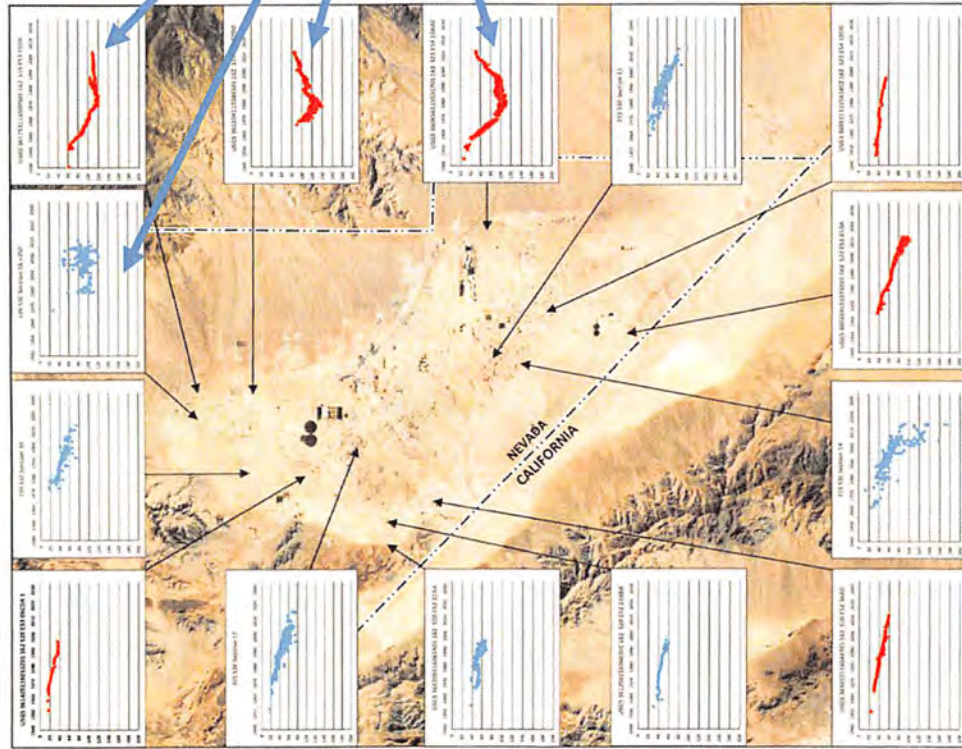


Figure 5-1. Long-term Water Level Trends in Pahrump Valley.

Notes: Charts shown for specific locations for USGS long-term water level monitoring wells (red). Depth to water in feet shown on Y axis on all graphs. X axis varies depending on period of record. Y axis varies depending on water level variation. Data from U.S. Geological Survey and Nevada Division of Water Resources.



IV(C) - Order 1293A Is Not Supported By Substantial Evidence

- Order 1293A is too broad.
 - Hydrogeology of large basins is complex. Pumping in one part of basin may have little effect on water levels in another part of the basin.
 - NRS 534.110(8) specifically requires the State Engineer to take into account the complexity of the basin and ban new wells only in portions of the basin where evidence shows that a conflict with existing wells will occur.
 - Order 1293A is one-size-fits-all approach. Bans new domestic wells in entire basin, even where water levels are not declining.
 - The State Engineer's failure to perform a conflicts analysis and limit regulation to only portions of basin where problem exists is an arbitrary and capricious abuse of discretion.



IV(C) - Order 1293A Is Not Supported By Substantial Evidence

- Order 1293A is being applied too narrowly.
 - Only domestic wells are singled out for ban. The State Engineer will still allow new large production wells to be located in basin.
 - Domestic wells generally have small cones of depression, while production wells create larger cones that take longer to reach equilibrium.
 - Because of this domestic wells are less likely to interfere with existing wells.
 - State Engineer argues that conflict analysis will be done for larger wells.
 - However, the State Engineer was required to perform a conflicts analysis before issuing Order 1293A and failed to do so.
 - Evidences a bias against domestic wells.



IV(D) - Order 1293A Unlawfully Takes Private Property Without Just Compensation

- Nevada law provide expansive protections for private property.
 - *McCarran Int'l Airport v. Sisolak* (2006) – “the Nevada Constitution contemplates *expansive property rights*.”
 - *State v. Eighth Jud. Dist. Ct.* (2015) – “eight hundred years ago, the Magna Carta laid a foundation for individual property rights . . . Our State Constitution also guarantees every individual's right to acquire, possess, and protect property.”
 - Blackstone's Commentaries – “So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no *not even for the general good of the whole community*.”



IV(D) - Order 1293A Unlawfully Takes Private Property Without Just Compensation

- Takings issue need not be decided if Order 1293A is overturned on other grounds.
- Two types of takings
 - Per se taking
 - Regulatory taking
- Order 1293A falls under both categories.
 - Requirement to relinquish other water rights is per se taking.
 - Ban on drilling of new domestic wells is regulatory taking.



IV(D) - Order 1293A Unlawfully Takes Private Property Without Just Compensation

- Order 1293A constitutes a per se taking.
 - *McCarran Int'l Airport v. Sisolak* (2006) – Per se taking = where a government action requires a property owner to suffer a permanent physical invasion of his property.
 - State issued water rights permits are real property.
 - Relinquishment = “The abandonment of a right or thing.”
 - Order 1293A requirement to buy and relinquish an existing water right is a physical taking of that water right.
 - No consideration is provided for relinquishment.
 - *Cnty. of Clark v. Bonanza No. 1* (1980) - Performing an act one is already required to do is not adequate consideration.



IV(D) - Order 1293A Unlawfully Takes Private Property Without Just Compensation

- Regulatory takings.
 - *Penn Cent. Transp. Co. v. New York* (U.S. 1978) – Three considerations:
 - Regulations impact on the property owner
 - Whether regulation interferes with reasonable investment-backed expectations.
 - The nature and character of the government action.
 - *Dolan v. City of Tigard* (U.S. 1994) – Regulatory taking occurs where regulation is not roughly proportional to public impact of activity.
 - Requires agency to make “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”
 - *McCarran Int’l Airport v. Sisolak* (2006) – Regulatory taking = where a government action deprives a property owner of beneficial use of property.



IV(D) - Order 1293A Unlawfully Takes Private Property Without Just Compensation

- Order 1293A is a regulatory taking.
 - Has major impact on property owners.
 - Direct interference with reasonable investment-backed expectations.
 - Deprives owners of beneficial use of there property – In Nevada, no water = no house.
 - Not proportional
 - Requires dedication of 2af of water rights even though State Engineer admits average domestic well in basin only uses 1/2 af of water.



IV(D) - Order 1293A Unlawfully Takes Private Property Without Just Compensation

- Takings issue is ripe for adjudication.
 - NRS Chapter 37 inapplicable because this action does not seek compensation for taking.
 - At this time, Petitioners are seeking only declaratory and injunctive relief.
- Discovery is not needed to determine whether Order constitutes a taking.
 - This is a purely legal not factual determination.
 - SE had opportunity to conduct evidentiary hearing and chose not to.
- Every order issued by the State Engineer carries with it the presumption that he has considered constitutionality of the order.
 - Therefore, SE has implicitly determined that Order 1293A is not a taking and Court has jurisdiction to review that determination.



V. PFW Has Standing

- State Engineer only challenges PFW's standing, not the standing of individual petitioners.
- U.S. Constitution standing.
 - *Warth v. Seldin* (U.S. 1975) – If relief sought is injunctive, benefit will inure equally to members of association and association has standing.
 - *Hunt v. Wash. State Apple Advert. Comm'n* (U.S. 1977) – three part test:
 - Members would have standing themselves.
 - Interests are germane to association's purpose.
 - Relief does not require participation of individual members (injunctive v. compensatory).
 - PFW meets the requirements for standing under U.S. Constitution.



V. PFW Has Standing

- State law standing.
 - Standing under state law is broader.
 - *Citizens for Cold Springs v. City of Reno* (2009) – Where state statute granted standing to any person “claiming to be adversely affected” association had standing to sue on behalf of members.
 - NRS 533.450 grants standing to “any person feeling aggrieved”
 - This is broader than person “claiming to be adversely affected.”
 - PFW has standing under NRS 533.450.



Order 1293A Must Be Declared Invalid

- Order 1293A fails all three critical tests
 - Lack of statutory authority.
 - Lack of due process.
 - Lack of substantial evidence.
- Order 1293A is an unconstitutional taking
- In alternative, enforcement should be stayed and Order 1293A remanded to State Engineer.
 - Require SE to hold hearing
 - Establish clear guidelines for hearing notice and procedures.



CHAPTER 534 - UNDERGROUND WATER AND WELLS

<u>NRS 534.010</u>	Definitions.
<u>NRS 534.0105</u>	"Aquifer" defined.
<u>NRS 534.011</u>	"Area of active management" defined.
<u>NRS 534.0115</u>	"Area of hydrologic effect" defined.
<u>NRS 534.012</u>	"Artesian well" defined.
<u>NRS 534.0125</u>	"Augmentation" defined.
<u>NRS 534.013</u>	"Domestic use" and "domestic purposes" defined.
<u>NRS 534.0135</u>	"Percolating waters" defined.
<u>NRS 534.014</u>	"Person" defined.
<u>NRS 534.0145</u>	"Project" defined.
<u>NRS 534.015</u>	"Recharged water" defined.
<u>NRS 534.0155</u>	"Storage account" defined.
<u>NRS 534.016</u>	"Stored water" defined.
<u>NRS 534.0165</u>	"Waste" defined.
<u>NRS 534.017</u>	"Well driller" defined.
<u>NRS 534.0175</u>	"Well drilling" and "drilling a well" defined.
<u>NRS 534.020</u>	Underground waters belong to public and are subject to appropriation for beneficial use; declaration of legislative intent.
<u>NRS 534.025</u>	Removal of underground waters to alleviate hazards caused by secondary recharge is beneficial use.
<u>NRS 534.030</u>	Administration by State Engineer: Petition by appropriators in basin; hearing in absence of petition; certain artesian water, underground aquifers and percolating water; advisory services of governing bodies of water districts and water conservation boards.
<u>NRS 534.035</u>	Groundwater boards: Establishment; number, appointment, terms and expenses of members; officers; meetings and quorum; duties; dissolution.
<u>NRS 534.037</u>	Groundwater management plan for basin designated as critical management area: Petition; hearing; approval or disapproval; judicial review; amendment.
<u>NRS 534.040</u>	Employment and compensation of well supervisor and assistants; levy, collection and distribution of special assessment.
<u>NRS 534.050</u>	Permit to appropriate water required before sinking well in designated groundwater basin; requirements in undesignated areas; waivers; penalties.
<u>NRS 534.060</u>	Conditions for sinking wells; casings and appliances; repair of defective wells; liens; sealing of wells; use of abandoned wells to monitor groundwater.
<u>NRS 534.070</u>	Waste of water from artesian well unlawful.
<u>NRS 534.080</u>	Appropriation of underground water for beneficial use from artesian, definable aquifer or percolating water: Acquisition of rights under chapter 533 of NRS; orders to desist; dates of priority.
<u>NRS 534.090</u>	Forfeiture and abandonment of rights.
<u>NRS 534.100</u>	Recognition of existing water rights; classification of water in definable aquifer or percolating water by State Engineer; adjudication of vested underground water rights.
<u>NRS 534.110</u>	Rules and regulations of State Engineer; statements and pumping tests; conditions of appropriation; designation of critical management areas; restrictions.
<u>NRS 534.120</u>	State Engineer authorized to make rules, regulations and orders when groundwater is being depleted in designated area; preferred uses of water; temporary permits to appropriate water; revocation of temporary permits; restrictions placed on certain wells.
<u>NRS 534.125</u>	State Engineer to file notice related to temporary permit.
<u>NRS 534.130</u>	State Engineer, assistants and Artesian Well Supervisor authorized to enter premises to investigate and carry out duties.
<u>NRS 534.140</u>	Well drillers: Annual licenses; fees; continuing education; regulations for well drilling; licensing by State Contractors' Board.
<u>NRS 534.141</u>	Application for renewal of license must include certain information regarding state business license; grounds for denial of renewal.
<u>NRS 534.142</u>	Payment of child support: Statement by applicant for license to drill; grounds for denial of license; duty of State Engineer. [Effective until the date of the repeal of 42 U.S.C. § 666, the federal law requiring each state to establish procedures for withholding, suspending and restricting the professional, occupational and recreational licenses for child support arrearages and for noncompliance with certain processes relating to paternity or child support proceedings.]

<u>NRS 534.144</u>	Suspension of license for failure to pay child support or comply with certain subpoenas or warrants; reinstatement of license. [Effective until the date of the repeal of 42 U.S.C. § 666, the federal law requiring each state to establish procedures for withholding, suspending and restricting the professional, occupational and recreational licenses for child support arrearages and for noncompliance with certain processes relating to paternity or child support proceedings.]
<u>NRS 534.146</u>	Application for license to include social security number of applicant. [Effective until the date of the repeal of 42 U.S.C. § 666, the federal law requiring each state to establish procedures for withholding, suspending and restricting the professional, occupational and recreational licenses for child support arrearages and for noncompliance with certain processes relating to paternity or child support proceedings.]
<u>NRS 534.150</u>	Well Drillers' Advisory Board: Appointment; terms of members; vacancies; compensation; duties.
<u>NRS 534.160</u>	License required to drill well; revocation of or refusal to reissue license; order to plug well; penalty for allowing unlicensed person to drill.
<u>NRS 534.170</u>	Well driller to keep log and records; contents; information to be furnished to State Engineer; report of test.
<u>NRS 534.180</u>	Applicability of chapter to wells used for domestic purposes; registration and plugging of wells used for domestic purposes; wells for accessory dwelling unit of single-family dwelling.
<u>NRS 534.185</u>	Waiver of certain requirements for domestic wells by State Engineer; exceptions.
<u>NRS 534.190</u>	Penalties.
<u>NRS 534.193</u>	Additional penalties.
<u>NRS 534.195</u>	Injunctive and other relief.
<u>NRS 534.250</u>	Project for recharge, storage and recovery of water: Permit required; issuance, contents, modification and assignment of permit; monitoring requirements.
<u>NRS 534.260</u>	Project for recharge, storage and recovery of water: Contents of application for permit.
<u>NRS 534.270</u>	Project for recharge, storage and recovery of water: Review of application for permit; notice of application; protests; hearing; determination; judicial review.
<u>NRS 534.280</u>	Project for recharge, storage and recovery of water: Annual report to State Engineer.
<u>NRS 534.290</u>	Project for recharge, storage and recovery of water: Permit for recovery well; recovery limited to designated wells; designation of person entitled to recover water; use or exchange of recovered water.
<u>NRS 534.300</u>	Project for recharge, storage and recovery of water: Storage account to be established; limit on amount of water recovered.
<u>NRS 534.310</u>	Project for recharge, storage and recovery of water: Annual fee for permit; disposition of money received by State Engineer; employment of consultants by State Engineer.
<u>NRS 534.320</u>	Project for recharge, storage and recovery of water: Revocation or suspension of permit; orders to cease and desist; injunction.
<u>NRS 534.330</u>	Project for recharge, storage and recovery of water: Penalties.
<u>NRS 534.340</u>	Project for recharge, storage and recovery of water: Designation of areas of active management.
<u>NRS 534.350</u>	Requirements for certain public water system to receive credits for addition of new customers to system.
<u>NRS 534.360</u>	Water Rights Technical Support Account: Creation; administration; uses.

NRS 534.010 Definitions.

1. As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 534.0105 to 534.0175, inclusive, have the meanings ascribed to them in those sections.

2. As used in this chapter, the terms "underground water" and "groundwater" are synonymous.

[Part 2:178:1939; A 1947, 52; 1949, 128; 1955, 328] — (NRS A 1957, 714; 1971, 867; 1981, 658; 1985, 522, 1302; 1987, 1776)

NRS 534.0105 "Aquifer" defined. "Aquifer" means a geological formation or structure that stores or transmits water, or both.

(Added to NRS by 1987, 1770)

NRS 534.011 "Area of active management" defined. "Area of active management" means an area:

1. In which the State Engineer is conducting particularly close monitoring and regulation of the water supply because of heavy use of that supply; and

2. Which has received that designation by the State Engineer pursuant to [NRS 534.030](#).
(Added to NRS by [1987, 1770](#); A [1989, 598](#))

NRS 534.0115 “Area of hydrologic effect” defined. “Area of hydrologic effect” means the surface area of land covering the extent of hydrologic response of water recharged pursuant to a project to recharge.
(Added to NRS by [1987, 1770](#))

NRS 534.012 “Artesian well” defined. “Artesian well” means a well tapping an aquifer underlying an impervious material in which the static water level in the well stands above where it is first encountered in the aquifer.
(Added to NRS by [1987, 1770](#))

NRS 534.0125 “Augmentation” defined. “Augmentation” means to increase the volume of stored water in a system of aquifers by artificially introducing water into that system.
(Added to NRS by [1987, 1770](#))

NRS 534.013 “Domestic use” and “domestic purposes” defined. “Domestic use” or “domestic purposes” extends to culinary and household purposes directly related to:

1. A single-family dwelling; and
2. An accessory dwelling unit for a single-family dwelling if provided for in an applicable local ordinance, including, without limitation, the watering of a family garden and lawn and the watering of livestock and any other domestic animals or household pets, if the amount of water drawn does not exceed the maximum amount set forth in [NRS 534.180](#) for exemption from the application of this chapter.

(Added to NRS by [1987, 1770](#); A [1999, 1184](#); [2007, 842](#))

NRS 534.0135 “Percolating waters” defined. “Percolating waters” are underground waters, the course and boundaries of which are incapable of determination.

(Added to NRS by [1987, 1770](#))

NRS 534.014 “Person” defined. “Person” includes any municipal corporation, power district, political subdivision of this or any state, or an agency of the United States Government.

(Added to NRS by [1987, 1770](#))

NRS 534.0145 “Project” defined. “Project” means a facility designed and constructed to add water to a system of aquifers, store water underground and recover that water pursuant to a permit issued pursuant to [NRS 534.250](#).

(Added to NRS by [1987, 1770](#))

NRS 534.015 “Recharged water” defined. “Recharged water” means water that reaches or percolates into an aquifer or system of aquifers:

1. Through natural processes;
2. By secondary recharge as a result of beneficial uses; or
3. Artificially through facilities specifically constructed for that purpose.

(Added to NRS by [1987, 1770](#))

NRS 534.0155 “Storage account” defined. “Storage account” means an account established pursuant to [NRS 534.300](#) for a project for underground storage and recovery.

(Added to NRS by [1987, 1770](#))

NRS 534.016 “Stored water” defined. “Stored water” means water which has been stored underground for the purpose of recovery pursuant to a permit issued pursuant to [NRS 534.250](#).

(Added to NRS by [1987, 1770](#))

NRS 534.0165 “Waste” defined. “Waste” means causing, suffering or permitting any artesian well to discharge water unnecessarily above or below the surface of the ground so that the waters thereof are lost for beneficial use or in any canal or ditch conveying water from a well where the loss of water in transit is more than 20 percent of the amount of the water discharged from the well.

(Added to NRS by 1987, 1770)

NRS 534.017 “Well driller” defined. “Well driller” means any person who drills a well or wells, for compensation or otherwise.

(Added to NRS by 1987, 1770)

NRS 534.0175 “Well drilling” and “drilling a well” defined. “Well drilling” or “drilling a well” are synonymous, and mean drilling or boring new wells, placing casing in wells, cleaning and repairing existing wells, cementing wells and doing all other things normally associated with the construction or rehabilitation of wells.

(Added to NRS by 1987, 1770)

NRS 534.020 Underground waters belong to public and are subject to appropriation for beneficial use; declaration of legislative intent.

1. All underground waters within the boundaries of the State belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this State relating to the appropriation and use of water and not otherwise.

2. It is the intention of the Legislature, by this chapter, to prevent the waste of underground waters and pollution and contamination thereof and provide for the administration of the provisions thereof by the State Engineer, who is hereby empowered to make such rules and regulations within the terms of this chapter as may be necessary for the proper execution of the provisions of this chapter.

[1:178:1939; 1931 NCL § 7993.10]

....

NRS 534.030 Administration by State Engineer: Petition by appropriators in basin; hearing in absence of petition; certain artesian water, underground aquifers and percolating water; advisory services of governing bodies of water districts and water conservation boards.

1. Upon receipt by the State Engineer of a petition requesting the State Engineer to administer the provisions of this chapter as relating to designated areas, signed by not less than 40 percent of the appropriators of record in the Office of the State Engineer, in any particular basin or portion therein, the State Engineer shall:

(a) Cause to be made the necessary investigations to determine if such administration would be justified.

(b) If the findings of the State Engineer are affirmative, designate the area by basin, or portion therein, and make an official order describing the boundaries by legal subdivision as nearly as possible.

(c) Proceed with the administration of this chapter.

2. In the absence of such a petition from the owners of wells in a groundwater basin which the State Engineer considers to be in need of administration, the State Engineer shall hold a public hearing:

(a) If adequate facilities to hold a hearing are available within the basin; or

(b) If such facilities are unavailable, hold the hearing within the county where the basin lies or within the county, where the major portion of the basin lies,

→ to take testimony from those owners to determine whether administration of that basin is justified. If the basin is found, after due investigation, to be in need of administration the State Engineer may enter an order in the same manner as if a petition, as described in subsection 1, had been received.

3. The order of the State Engineer may be reviewed by the district court of the county pursuant to NRS 533.450.

4. The State Engineer shall supervise all wells tapping artesian water or water in definable underground aquifers drilled after March 22, 1913, and all wells tapping percolating water drilled subsequent to March 25, 1939, except those wells for domestic purposes for which a permit is not required.

5. Within any groundwater basin which has been designated or which may hereafter be so designated by the State Engineer, except groundwater basins subject to the provisions of NRS 534.035, and wherein a water conservation board has been created and established or wherein a water district has been created and established by law to furnish water to an area or areas within the basin or for groundwater conservation purposes, the State Engineer, in the administration of the groundwater law, shall avail himself or herself of the services of the governing body of the water district or the water conservation board, or both of them, in an advisory capacity. The governing body or water board shall furnish such advice and assistance to the State Engineer as is necessary for the purpose of the conservation of groundwater within the areas affected. The services of the governing body or water conservation

board must be without compensation from the State, and the services so rendered must be upon reasonable agreements effected with and by the State Engineer.

[4:178:1939; A 1947, 52; 1949, 128; 1953, 188] — (NRS A 1957, 715; 1961, 489; 1967, 1052; 1981, 916, 1841; 1983, 534)

....

NRS 534.050 Permit to appropriate water required before sinking well in designated groundwater basin; requirements in undesignated areas; waivers; penalties.

1. Except as otherwise provided in subsection 2 and NRS 534.180, every person desiring to sink or bore a well in any basin or portion therein in the State designated by the State Engineer, as provided for in this chapter, must first make application to and obtain from the State Engineer a permit to appropriate the water, pursuant to the provisions of chapter 533 of NRS relating to the appropriation of the public waters, before performing any work in connection with the boring or sinking of the well.

2. Upon written application and a showing of good cause, the State Engineer may issue a written waiver of the requirements of subsection 1:

(a) For exploratory wells to be drilled to determine the availability of water or the quality of available water;

(b) To allow temporary use of the water in constructing a highway or exploring for water, oil, gas, minerals or geothermal resources; or

(c) For wells to be drilled in shallow groundwater systems and pumped to alleviate potential hazards to persons and property resulting from the rise of groundwater caused by secondary recharge. If practical, approved by the State Engineer and consistent with this chapter and chapter 533 of NRS, the withdrawn water must be used for some other beneficial use.

3. In other basins or portions of basins which have not been designated by the State Engineer no application or permit to appropriate water is necessary until after the well is sunk or bored and water developed. Before any diversion of water may be made from the well, the appropriator must make application to and obtain from the State Engineer, pursuant to the provisions of chapter 533 of NRS, a permit to appropriate the water.

4. Upon written application and a showing of good cause, the State Engineer may issue a written waiver of the requirements of subsection 3, to allow temporary use of water in constructing a highway or exploring for water, oil, gas, minerals or geothermal resources.

5. Any person using water after a permit has been withdrawn, denied, cancelled, revoked or forfeited is guilty of a misdemeanor. Each day of violation of this subsection constitutes a separate offense and is separately punishable.

[6:178:1939; A 1943, 139; 1947, 52; 1949, 128; 1953, 190] — (NRS A 1957, 716; 1967, 1053; 1979, 183, 242; 1981, 659; 1983, 2090; 1985, 490; 1987, 1776; 1997, 1621; 2007, 842)

NRS 534.060 Conditions for sinking wells; casings and appliances; repair of defective wells; liens; sealing of wells; use of abandoned wells to monitor groundwater.

1. During the sinking or boring of a well the permittee shall cause to be placed in the well a proper and sufficient casing approved by the State Engineer, so arranged as to prevent the caving in of the well and to prevent the escape of water therefrom through any intervening sand or gravel stratum, which casing must be of sufficient length to reach the deepest aquifer encountered during the sinking or boring of the well.

2. The number, size, type and distribution of perforations is optional with the permittee, except that no perforations may be made in a pipe tapping confined (artesian) water above the confining impervious materials.

3. The permittee shall provide the necessary valves, plugs or other appliances to prevent or control the flow of water from the well and prevent the loss of underground water above or below the ground surface.

4. If in the judgment of the State Engineer a well is in any manner defective the State Engineer may order the owner to repair the well or, in the discretion of the State Engineer, may cause the well to be repaired or sealed. If the State Engineer elects to repair or seal the well, the cost of repairing or sealing the well must be paid from the water distribution account and must not be charged to the owner of the well or be a lien on the land upon which the well is located or on other land of the owner to which water from the well is appurtenant.

5. If the State Engineer orders the owner to repair the well and if upon 15 days' written notice by registered or certified mail, return receipt requested, the owner fails to repair the well, the State Engineer or the assistants or authorized agents of the State Engineer may, without further notice, take such steps as may be necessary to effect

such repairs. The cost thereof, including the labor and material, may in the first instance be paid by the State Engineer from the Water Distribution Revolving Account, but any such cost in any event is a lien on the land on which the well is located and, also, any other land possessed by the well owner to which the water from the well is appurtenant.

6. The State Engineer, or the assistants or authorized agents of the State Engineer, as the case may be, shall file an itemized and sworn statement, setting forth the date when the work was done and the nature of the labor so performed, with the board of county commissioners of the county wherein the charge and expense were incurred. The board of county commissioners shall thereupon present a bill for the expense to the person liable therefor under this section, and if that person neglects for 30 days thereafter to pay it, the bill and costs become a lien upon the lands and property of the person so liable for the payment of the bill, and must be collected as delinquent taxes against the lands and property are collected.

7. When a well is abandoned or about to be abandoned, the owner, in lieu of plugging the well, may advise the State Engineer and other interested hydrologic entities that the well is available to monitor the groundwater. If, in the opinion of the State Engineer, the well would be useful as a site for monitoring, the State Engineer may grant the owner a waiver of the requirement that the well be plugged.

8. The State Engineer may grant the owner of a well a waiver of the requirement that the well be plugged under circumstances other than those set forth in subsection 7. The State Engineer shall adopt regulations that provide a procedure by which the State Engineer may approve a waiver from the requirement of plugging an abandoned well pursuant to this subsection.

[7:178:1939; A [1947, 52](#); 1943 NCL § 7993.16] — (NRS A [1957, 717](#); [1961, 448](#); [1967, 192](#); [1979, 669](#); [1987, 1777](#); [2005, 455](#))

...

NRS 534.080 Appropriation of underground water for beneficial use from artesian, definable aquifer or percolating water: Acquisition of rights under [chapter 533](#) of NRS; orders to desist; dates of priority.

1. A legal right to appropriate underground water for beneficial use from an artesian or definable aquifer subsequent to March 22, 1913, or from percolating water, the course and boundaries of which are incapable of determination, subsequent to March 25, 1939, can only be acquired by complying with the provisions of [chapter 533](#) of NRS pertaining to the appropriation of water.

2. The State Engineer may, upon written notice sent by registered or certified mail, return receipt requested, advise the owner of a well who is using water therefrom without a permit to appropriate the water to cease using the water until the owner has complied with the laws pertaining to the appropriation of water. If the owner fails to initiate proceedings to secure such a permit within 30 days after the date of the notice, the owner is guilty of a misdemeanor.

3. Except as otherwise provided in subsection 4 and [NRS 534.180](#), the date of priority of all appropriations of water from an underground source mentioned in this section is the date when application is made in proper form and filed in the Office of the State Engineer pursuant to the provisions of [chapter 533](#) of NRS.

4. The date of priority for the use of underground water from a well for domestic purposes where the draught does not exceed 2 acre-feet per year is the date of completion of the well as:

(a) Recorded by the well driller on the log the well driller files with the State Engineer pursuant to [NRS 534.170](#); or

(b) Demonstrated through any other documentation or evidence specified by the State Engineer.

[9:178:1939; A [1947, 52](#); 1943 NCL § 7993.18] — (NRS A [1957, 718](#); [1967, 195](#); [2007, 843](#))

NRS 534.090 Forfeiture and abandonment of rights.

1. Except as otherwise provided in this section, failure for 5 successive years after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right or a right for which a certificate has been issued pursuant to [NRS 533.425](#), and further whether the right is initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse.

2. If the records of the State Engineer or any other documents obtained by or provided to the State Engineer indicate 4 or more consecutive years of nonuse of all or any part of a water right which is governed by this chapter:

(a) The State Engineer shall notify the owner of the water right, as determined in the records of the Office of the State Engineer, by registered or certified mail of the nonuse and that the owner has 1 year after the date of the notice

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 JABOUR,
an individual; and GERALD
SCHULTE, an individual,

Respondents.

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JOINT APPENDIX

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10/12/18	Answering Brief filed by State Engineer	XIV	4910–4945
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09/05/18	Letter from Court & Memorandum of Temporary Assignment (Steven Kosach)	XI	3628–3629
12/18/18	Letter from Nye County Clerk to Nevada Supreme Court re: submittal of appeal packet	XIV	5496–5497
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12/10/18	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	XIV	5461–5473
12/10/18	Notice of Appeal filed by State Engineer	XIV	5442–5460
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01/02/19	Notice of Entry of Order (Denying Motion for Stay)	XIV	5530–5539
12/07/18	Notice of Entry of Order (Granting Petition for Judicial Review)	XIV	5427–5441

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12/10/18	[Proposed] Order Granting Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal filed by State Engineer	XIV	5483–5493
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11/26/18	[Proposed] Order Granting Petition for Judicial Review filed by State Engineer	XIV	5378–5401
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11/01/18	Reply Brief filed by PFW	XIV	4955–4987
12/20/18	Reply in Support of State Engineer's Motion for Stay of Order Granting Petition for Judicial Review and Reversing State Engineer's Amended Order No. 1293A Pending Appeal	XIV	5509–5514
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08/30/18	Summary of Record on Appeal and Bates-stamped pages SE ROA 1–3574	I–XI	36–3621
09/11/18	Supplemental Record on Appeal and Bates-stamped pages SROA 1–1245 filed by PFW	XI–XIV	3656–4905
11/08/18	Transcript (re: Oral Arguments on Petition for Judicial Review)	XIV	5186–5377

RESPECTFULLY SUBMITTED this 15th day of February, 2019.

AARON D. FORD
Attorney General

By: /s/ James N. Bolotin
JAMES N. BOLOTIN
Deputy Attorney General
Attorney for Appellant,
State Engineer

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 JOINT APPENDIX, by electronic service to:

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PAHRUMP FAIR WATER vs JASON KING
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Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

1 Case No. CV38972A

2 Dept. No. 1

3
4
5
6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF NYE
8

9 PAHRUMP FAIR WATER, LLC.,
a Nevada limited-liability company,

10 Petitioner,

11 vs.

12 JASON KING, P.E., Nevada State
13 Engineer, DIVISION OF WATER
14 RESOURCES, DEPARTMENT OF
15 CONSERVATION AND NATURAL
16 RESOURCES,

Respondent.

NOTICE OF ENTRY OF ORDER
DENYING PETITIONER'S MOTION
TO STAY STATE ENGINEER'S
ORDER 1293

17 TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

18 YOU, AND EACH OF YOU, please take notice that an Order Denying Petitioner's
19 Motion to Stay State Engineer's Order 1293 was entered in the above-entitled matter on the
20 25th day of June, 2018. A copy of said Order is attached hereto as Exhibit 1.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///


AFFIRMATION

The undersigned does hereby affirm that the preceding Notice of Entry of Order Denying Petitioner's Motion to Stay State Engineer's Order 1293 does not contain the social security number of any person.

DATED this 9th day of July, 2018.

ADAM PAUL LAXALT
Attorney General

By:


JAMES N. BOLOTIN
Deputy Attorney General
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Email: JBolotin@ag.nv.gov
*Attorney for Respondent,
State Engineer*

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 10th day of July, 2018, I served a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER DENYING PETITIONER'S MOTION TO STAY STATE ENGINEER'S ORDER 1293, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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


Dorene A. Wright

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Order Denying Petitioner's Motion to Stay State Engineer's Order 1293 filed June 25, 2018	10

EXHIBIT 1

EXHIBIT 1

FILED
OFFICE OF THE ATTORNEY GENERAL FIFTH JUDICIAL DISTRICT
CARSON CITY, NEVADA

JUN 25 2018

1 Case No. CV38972A

JUN 28 2018

2 Dept. No. 1

Nye County Clerk

Terri Pemberton Deputy

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

3
4
5
6 **IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF NYE**
8

9 PAHRUMP FAIR WATER, LLC.,
10 a Nevada limited-liability company,

11 Petitioner;

12 vs.

13 JASON KING, P.E., Nevada State
14 Engineer, DIVISION OF WATER
15 RESOURCES, DEPARTMENT OF
16 CONSERVATION AND NATURAL
17 RESOURCES,

18 Respondent.

19 **ORDER DENYING**
20 **PETITIONER'S MOTION TO STAY**
21 **STATE ENGINEER'S ORDER 1293**

22 Pahrump Fair Water, LLC (hereafter "PFW") filed a Motion to Stay State
23 Engineer's Order 1293 ("Motion"); on February 1, 2018. Jason King, P.E., the State
24 Engineer, Department of Conservation and Natural Resources, Division of Water
25 Resources (hereafter "State Engineer") filed an Opposition to Petitioner's Motion, on
26 February 28, 2018. A hearing was held on May 10, 2018, to consider PFW's Motion.
27 Paul C. Taggart, Esq. and David H. Rigdon, Esq. of Taggart & Taggart, Ltd., appeared
28 on behalf of PFW. Senior Deputy Attorney General Bryan L. Stockton and Deputy
Attorney General James N. Bolotin appeared on behalf of the State Engineer.

For purposes of ruling on the Motion for Stay only, the Court makes the following
findings of fact and conclusions of law in this order, denying PFW's Motion.

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1 witnesses at the May 10th hearing and the State Engineer was permitted to cross
2 examine those witnesses.

3 FINDINGS OF FACT

4 1. On December 19, 2017, the State Engineer issued Order 1293 which
5 prohibited the drilling of a new domestic well without obtaining and relinquishing an
6 existing water right in good standing, of not less than 2.0 acre-feet to serve that domestic
7 well.

8 2. The Pahrump Valley Artesian Basin ("Basin") is one of 256 groundwater
9 basins within the State of Nevada, which straddles Nye and Clark counties.

10 3. The Basin is over appropriated.

11 4. The Basin is historically one of the highest regulated groundwater basins
12 by the State Engineer with the first order increasing scrutiny and management of the
13 basin being issued in 1941.

14 5. The State Engineer estimates the perennial yield of the Basin to be 20,000
15 acre-feet annually ("afa"); which is generally considered to be the amount of usable water
16 of the groundwater reservoir that can be withdrawn and consumed economically each
17 year for an indefinite period, without causing depletion of the groundwater reservoir.

18 6. Within the Basin, the State Engineer has issued water rights in the form of
19 certificates and permits that allow up to 59,175 acre-feet of water to be withdrawn from
20 the Basin per year.

21 7. The community of Pahrump and the Basin has the largest number and
22 density of domestic wells in the State of Nevada, comprising 22-percent of all domestic
23 wells in the state.

24 8. There are currently 11,280 domestic wells in the Basin which pursuant to
25 NRS 534.180(1) are entitled to withdraw up to two (2) acre-feet.

26 9. The total estimated quantity of water committed in the Basin for the 11,280
27 domestic wells is 22,560 afa, which exceeds the perennial yield of the Basin alone.

28 ///

1 10. Within the Basin, there exist approximately 8,000 parcels of land, which
2 prior to the issuance of Order 1293, could potentially drill a domestic well, which
3 represents an additional potential demand of 16,000 afa of water in the Basin, which has
4 an estimated perennial yield of 20,000 afa.

5 11. Historic water level data maintained by the State Engineer and other
6 agencies demonstrates that the groundwater levels on the valley floor, where most
7 domestic wells are concentrated, have been in a steady state of decline for several
8 decades.

9 12. The State Engineer has already prohibited the issuance of any new
10 permitted water rights in the Basin, and domestic wells are the sole water use not
11 previously regulated by prior State Engineer Orders to prevent further compounding of
12 the over-appropriation, and was the only remaining source of new water withdrawals.

13 13. Based upon the demonstration of the concentration of domestic wells within
14 the Basin and the continued groundwater declines, despite prior efforts of the State
15 Engineer to manage the groundwater resource, additional withdrawals will harm the
16 public.

17 14. The State Engineer demonstrated that there was a significant risk of harm
18 to itself, the non-moving party, in managing the public's interest in the groundwater
19 supply, based upon the demonstration of continued groundwater depletion in the Basin
20 floor aquifer.

21 15. Based upon the testimony of PFW's witnesses, these individuals alleged
22 harm resulting from the issuance of Order 1293.

23 16. Specifically, PFW's witnesses testified as to their concerns of being unable
24 to pursue their plans due to the issuance of Order 1293.

25 a. Norma Jean Opatik testified that she is a realtor in the valley and
26 that customers had cancelled plans to relocate to Pahrump based on
27 the perception that water could be a problem.

28. ///

1 **A. Any Harm or Hardship to the Nonmoving Party and Harm to**
2 **Members of the Public**

3 The Nevada Legislature has granted the State Engineer power to regulate water,
4 both above and below ground. See NRS 533.030 and 534.020. With respect to
5 groundwater, the Nevada Legislature has expressly granted the State Engineer power to
6 regulate the appropriation of water from both percolating and artesian sources. NRS
7 534.080. The Nevada Legislature has enacted requirements that the State Engineer
8 protect "existing rights or with protectable interests in existing domestic wells" from
9 conflict. NRS 533.024. The Legislature has also recognized "the importance of domestic
10 wells as appurtenances to private homes, to create a protectable interest in such wells
11 and to protect their supply of water from unreasonable adverse effects which are caused
12 by municipal, quasi-municipal or industrial uses and which cannot reasonably be
13 mitigated." NRS 534.024(b).

14 Pursuant to NRS 534.020(2), the State Engineer is charged with the duty of
15 managing the groundwater resources, including the Basin, of the State of Nevada. See
16 also NRS 533.370(2) ("... where there is no unappropriated water in the proposed source
17 of supply, or where its proposed use or change conflicts with existing rights or with
18 protectable interests in existing domestic wells . . . , or threatens to prove detrimental to
19 the public interest, the State Engineer shall reject the application and refuse to issue the
20 requested permit.") Here, the State Engineer has taken an active role in the
21 administration of the Basin, and historically, the Basin had been severely over-pumped
22 causing extraordinary aquifer depletion. The existing 59,175 acre-feet of senior existing
23 water rights coupled with the entitlement of an additional 22,560 acre-feet of potential
24 groundwater use by the existing domestic wells in the Basin are senior to any not-yet-
25 drilled domestic wells. Nevada law is clear that the State Engineer has a duty to protect
26 existing rights and existing domestic wells that have a protectable interest in their
27 source of supply. The State Engineer has a duty to manage the basin in a manner that
28 does not expedite the anticipated failure of 438 existing domestic wells by 2035 based on

1 simulations of current groundwater use within the Basin. These predictions logically
2 would only be exasperated with additional wells, especially an additional 8,000
3 additional domestic wells.

4 Actions, such as over pumping, which will damage the State's groundwater
5 resources will cause harm to the State Engineer by preventing him from fulfilling his
6 duty to protect existing rights through the management of the State's water resources.
7 The Court therefore finds that a stay would cause harm or hardship to the State
8 Engineer and consequently, the public through further depletion of the groundwater
9 resource.

10 **B. Irreparable Harm to the Moving Party**

11 PFW asserts that its members will suffer irreparable harm if the stay is not
12 granted in that they will not be able to sell property, drill wells or create dwelling places.
13 The State Engineer argues that waiting for the litigation to take its course is not
14 irreparable harm relying upon *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89
15 P.3d 36, 39 (2004). The Court finds that the individuals who testified before the Court
16 demonstrated that Order 1293 resulted in harm.

17 **C. Likelihood of Success**

18 While the Court reviews questions of law de novo, deference is given to the State
19 Engineer's interpretation of Nevada water law. It is uncontested that the basin is over
20 appropriated, and therefore, the State Engineer asserts that there is no more water that
21 is not subject to existing rights. NRS 533.450(10) states that "[t]he decision of the State
22 Engineer is prima facie correct, and the burden of proof is upon the party attacking the
23 same." Thus, PFW bears the heavy burden to disprove the State Engineer's factual
24 finding that further unrestricted drilling of domestic wells will conflict with existing
25 rights. Contrary to PFW's argument that the State Engineer is prohibited from
26 regulating the drilling of domestic wells, Nevada law only exempts domestic wells from
27 the requirement that before a person diverts any water, a permit to appropriate that
28 water be obtained. NRS 534.180(1) ("Except as otherwise provided in subsection 2 and

1 as to the furnishing of any information required by the State Engineer, this chapter does
2 not apply in the manner of obtaining permits for the development and use of
3 underground water from a well for domestic purposes where draught does not exceed 2
4 acre-feet per year."(Emphasis added)). "All underground waters within the boundaries of
5 the State" are "subject to all existing rights to the use thereof," as set forth in NRS
6 534.020, is a clear legislative declaration that includes water for domestic wells. The
7 Court finds that the State Engineer does have authority to prohibit the drilling of new
8 domestic wells without the property owner acquiring and relinquishing an existing water
9 right in good standing of not less than 2.0 acre-feet for the purpose of serving the
10 domestic well, and that Order 1293 is a valid exercise of the State Engineer's authority
11 and PFW has not demonstrated, at this time, a likelihood of success on the merits.

12 2. DUE PROCESS

13 As acknowledged by counsel for PFW, there is no statutory requirement that the
14 State Engineer hold a hearing or otherwise provide notice prior to the issuance of Order
15 1293. The State Engineer is statutorily entitled to "make such rules, regulations and
16 orders as are deemed essential for the welfare of the area involved." NRS 534.120(1).
17 Additionally, the State Engineer "may restrict drilling of wells in any portion thereof if
18 the State Engineer determines that additional wells would cause an undue interference
19 with existing wells." NRS 534.110(8).

20 The Court finds that Nevada law does not require notice prior to the issuance of
21 Order 1293, and that a stay is not warranted. However, despite the absence of a
22 statutory mandate, the Court is troubled by this issue and directs the parties to address
23 the question of when a property right in a domestic well is created and the extent upon
24 which notice required to satisfy due process in the parties briefs on the merits.

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CONCLUSION AND ORDER

The Motion for Stay is **DENIED**.

The Court notes that a briefing schedule is in place and a hearing on the merits was scheduled for Thursday, September 6, 2018 at 9:00 a.m. at the Fifth Judicial District Court in Pahrump, Nevada.

IT IS SO ORDERED.

Dated this _____ day of _____ 2018.

DISTRICT COURT JUDGE

Submitted by:

ADAM PAUL LAXALT
Attorney General

By:

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CONCLUSION AND ORDER

The Motion for Stay is DENIED.

The Court notes that a briefing schedule is in place and a hearing on the merits was scheduled for Thursday, September 6, 2018 at 9:00 a.m. at the Fifth Judicial District Court in Pahrump, Nevada.

IT IS SO ORDERED.

Dated this 21st day of June 2018.

William G. Mahoney
DISTRICT COURT JUDGE

Submitted by:

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Attorney General.

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1 Case No. CV38972

2 Dept. No. 2

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6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF NYE
8

9 PAHRUMP FAIR WATER, LLC.,
a Nevada limited-liability company,

10 Petitioner,

11 vs.

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

15 Respondent.
16

NOTICE OF MOTION AND MOTION
TO DISMISS PETITION FOR
JUDICIAL REVIEW

17 Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer,
18 Department of Conservation and Natural Resources, Division of Water Resources
19 (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam
20 Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby moves this honorable
21 Court for an order dismissing Petitioner Pahrump Fair Water, LLC's Petition for Judicial
22 Review as moot. This Motion is brought pursuant to NRCP 12(b)(5)¹ and D.C.R. 13 and is
23 supported by the attached Memorandum of Points and Authorities and the pleadings and
24 papers on file herein.
25

26 ¹ The State Engineer submits and references documents outside of the pleadings in this matter. The Court's
27 consideration of such matters "incorporated by reference or integral to the claim" should not convert this motion to a motion
28 for summary judgment. *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015). However, should the
Court find that disposition of this motion under NRCP 56 be appropriate, the State Engineer brings this motion in the
alternative. See NRCP 12(b).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Decisions and Orders of the State Engineer are subject to judicial review governed by NRS 533.450. However, a fundamental element of any legal action is that it is justiciable, presenting an actual controversy that a court is capable of resolving. This Court's duty is to "decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). It is common practice for courts to refuse to determine questions presented in purely moot cases, and cases presenting real controversies at the time they are filed may become moot by the occurrence of subsequent events. *NCAA*, 97 Nev. at 58, 624 P.2d at 11.

Notwithstanding and without waiving the issue of Petitioner's standing, which remains an outstanding issue and was previously the subject of supplemental briefing at the direction of this Court, Petitioner Pahrump Fair Water LLC's Petition for Judicial Review (hereafter "Petition") is now moot by virtue of the issuance of State Engineer's Amended Order 1293A. See State Engineer's Amended Order No. 1293A, accessible at <http://images.water.nv.gov/images/Orders/1293Ao.pdf>, last accessed July 12, 2018. Petitioner Pahrump Fair Water LLC (hereafter "Petitioner"), a Nevada limited-liability company created for the purpose of challenging the State Engineer's Order No. 1293, served its Petition on or about January 18, 2018, arguing that its members were "person[s] feeling aggrieved" by the State Engineer's Order No. 1293 pursuant to NRS 533.450. See Petition, pp. 1 – 2. Among the grounds on which Petitioner based its Petition was that Order No. 1293 affected individuals who made up the membership of Petitioner without notice and "applied retroactively to individuals who had already filed a Notice of Intent to Drill prior to the issuance of the order," some of whom, prior to the issuance of Order No. 1293, allegedly placed deposits with well drillers. See Petition, pp. 3 – 4.

1 Through Amended Order No. 1293A, the State Engineer has excepted certain
2 persons purportedly affected by Order No. 1293, many of whom likely make up the
3 membership of Petitioner.² Specifically, Amended Order No. 1293A creates an exception
4 for those persons who filed a Notice of Intent to Drill with the Division of Water
5 Resources (hereafter “DWR”) between December 15 and 19, 2017, which were denied
6 upon the issuance of Order 1293. See Amended Order No. 1293A, p. 7. Amended Order
7 No. 1293A allows these persons to re-file a Notice of Intent to Drill for full consideration
8 by DWR, without being subject to provisions of Order No. 1293. *Id.* Furthermore,
9 Amended Order No. 1293A creates an additional exception for any person able to
10 “demonstrate that they filed an application for a zoning and/or building permit with the
11 Nye County Departments of Planning or Building and Safety on or before December 19,
12 2017, for a parcel eligible for a domestic well.” *Id.*

13 Amended Order No. 1293A creates exceptions for those specific persons who had
14 already taken steps to either drill a domestic well or whom had initiated the process to
15 construct a home on their property. Therefore, the Amended Order directly resolves
16 grievances raised by Petitioner, on behalf of its members upon whom Petitioner bases its
17 standing, namely “owners of parcels in the Pahrump basin who are directly affected by
18 [Order No. 1293]” and “owners of well drilling companies.”

19 However, Petitioner’s standing aside, these individuals are no longer aggrieved by
20 the State Engineer’s Order No. 1293 as it has been replaced by Amended Order No.
21 1293A. As a result, Petitioner’s claims relating to Order No. 1293 are moot and this
22 Court can no longer decide an actual controversy in regard to these persons making up
23 Petitioner. Because Petitioner’s Petition is moot, it should be dismissed.

24 II. RELEVANT FACTUAL BACKGROUND

25 On December 19, 2017, State Engineer issued Order No. 1293 Prohibiting the
26 Drilling of New Domestic Wells in the Pahrump Artesian Basin (10-162), Nye County,

27 ² Petitioner has never disclosed the identities or interests of its membership, only generally described its members.
28 Thus, neither this Court nor the State Engineer has any substantive information about the complete composition of the
entity’s membership.

1 Nevada. See State Engineer Order No. 1293, accessible at
2 <http://images.water.nv.gov/images/Orders/1293o.pdf>, last accessed July 11, 2018. Order
3 No. 1293 prohibited the drilling of any new domestic wells within the Pahrump Artesian
4 Basin³, with certain exceptions for those persons who: obtain an existing water right and
5 relinquish it to the State Engineer, have already relinquished sufficient water rights to
6 serve a domestic well, are rehabilitating an existing domestic well pursuant to NAC
7 534.189, and/or are reconditioning a domestic well as defined by NAC 534.188, or
8 replacing an existing domestic well “unless the well is located in an area where water can
9 [be] furnished by an entity such as a water district or a municipality presently engaged in
10 furnishing water to the inhabitants thereof.” *Id.*

11 On January 18, 2018, Petitioner filed their Petition, along with their Notice of
12 Appeal of State Engineer’s Order #1293. See Petition; see also Notice of Appeal of State
13 Engineer’s Order #1293. Therein, Petitioner asserts that it is “a Nevada limited-liability
14 company whose members include owners of parcels in the Pahrump basin who are
15 directly affected by Order 1293, real-estate brokers doing business in the Pahrump area,
16 and owners of well drilling companies.” Petition, p. 1. Petitioner further asserts that it
17 has standing to sue on behalf of its members as “Petitioner has members that would
18 otherwise have standing to file this action in their own right and Petitioner was
19 specifically formed by these members for the purpose of opposing Order 1293.” Petition,
20 p. 2. Petitioner bases its Petition on allegations that Order No. 1293:

21 (1) was issued without prior notice to those individuals who
22 would be affected by the order and without providing such
23 individuals an opportunity to present evidence in opposition
24 thereto; (2) was not supported by substantial evidence; (3)
25 violates the provisions of NRS 534.180(1); (4) requires a property
owner to relinquish to the State Engineer four times the
quantity of water typically used by domestic wells in the
Pahrump Basin; and (5) was improperly applied retroactively to
individuals who had already filed a Notice of Intent to Drill prior
to issuance of the order.

26
27 ³ As provided by NRS 534.120, the Pahrump Artesian Basin is a groundwater basin within the State of Nevada that,
28 in the State Engineer’s judgment, is being depleted and therefore the State Engineer is authorized to “designate preferred
uses of water within the respective areas so designated by the State Engineer and from which the groundwater is being
depleted.”

1 Petition, p. 3 – 4.

2 Shortly after filing its Petition, on February 1, 2018, Petitioner filed a Motion for
3 Stay of Nevada State Engineer Order No. 1293 (hereafter “Motion for Stay”), seeking “an
4 order staying the enforcement of Nevada State Engineer Order No. 1293 during the
5 pendency of these proceedings.” Motion for Stay, p. 19. The State Engineer, following
6 extensions of time, filed his Opposition to the Motion for Stay on February 28, 2018, and
7 Petitioner submitted its Reply on March 5, 2018. The parties also engaged in
8 supplemental briefing on the issues of Petitioner’s standing and Petitioner’s request to
9 call witnesses at the hearing on Petitioner’s Motion for Stay.

10 The Court held a hearing on Petitioner’s Motion for Stay on May 10, 2018. Over
11 the objection of the State Engineer that the proceedings were to be conducted in the
12 nature of an appeal pursuant to NRS 533.450, the Court permitted Petitioner to call eight
13 (8) witnesses and the State Engineer was permitted to cross-examine those witnesses.
14 Following argument of the parties, and testimony by Petitioner’s member-witnesses, the
15 Court ultimately denied Petitioner’s requested stay, finding that only one of the required
16 elements for a stay, pursuant to NRS 533.450(5), weighed in favor of Petitioner. Namely,
17 the Court found that “the individuals who testified before the Court demonstrated that
18 Order 1293 resulted in harm.” See Order Denying Petitioner’s Motion to Stay State
19 Engineer’s Order 1293, p. 7. The Court signed the Order Denying Petitioner’s Motion to
20 Stay State Engineer’s Order 1293 on June 21, 2018. Following a Stipulation Extending
21 Briefing Schedule, Petitioner served its Opening Brief on July 5, 2018.

22 The State Engineer issued Amended Order No. 1293A on July 12, 2018,
23 superseding any legal effect of Order No. 1293. As Amended Order No. 1293A replaces
24 and supplants Order No. 1293, Order No. 1293 is no longer legally enforceable.⁴ As
25

26 ⁴ Additionally, the exceptions in Amended Order No. 1293A eliminate much of the harm asserted
27 by Petitioner, on behalf of its members, further enforcing the State Engineer’s prior argument that
28 Petitioner lacks the standing to bring its Petition, as many of its members would now lack standing to
challenge Order No. 1293 in their own right.

Petitioner's Petition is based upon the now-obsolete Order No. 1293, this Court can no longer affect the matter at issue before it and dismissal based on mootness is proper.

III. ARGUMENT

A. Standard of Review of a Motion Made Pursuant to NRCP 12(b)(5)

Pursuant to Nevada Rule of Civil Procedure (NRCP) 12(b)(5), a responding party may move to dismiss a case based upon the petitioner's failure to state a claim upon which relief may be granted. A motion to dismiss is to be reviewed rigorously. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is proper "if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle him to relief." *Schmidt v. Washoe Cnty.*, 2009 WL 3191487, 2 (2009), citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

"Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party." *Smith v. Eighth Jud. Dist. Ct. in and for Cnty. of Clark*, 113 Nev. 1343, 1348, 950 P.2d 280, 283 (1997), quoting *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). "The test for determining whether the allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of the claim and the relief requested." *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407-08 (1984). However, in order to state a claim upon which relief can be granted, a plaintiff must allege a cognizable claim. *Id.*

As will be articulated below, it is proper for this Court to dismiss Petitioner's Petition as the issues raised therein are moot by virtue of Amended Order No. 1293A. As Petitioner's Petition no longer presents a justiciable controversy, the mootness doctrine requires dismissal of Petitioner's Petition as it fails to state a claim upon which relief may be granted.

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1 **B. Mootness Doctrine**

2 This Court has a duty to “decide actual controversies by a judgment which can be
3 carried into effect, and not give opinions upon moot questions or abstract propositions, or
4 to declare principles of law which cannot affect the matter in issue before it.” *NCAA*, 97
5 Nev. at 57, 624 P.2d at 10; *see also Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for*
6 *Sound Gov’t*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004). The Nevada Supreme Court
7 has defined a case as being moot where “it seeks to determine an abstract question which
8 does not rest upon existing facts or rights.” *Cashman Equip. Co. v. W. Edna Assoc., Ltd.*,
9 132 Nev. Adv. Op. 69, 380 P.3d 844, 853 (2016) (internal citations omitted). The question
10 of mootness is one of justiciability; a controversy must be present through all stages of the
11 proceeding and “even though a case may present a live controversy at its beginning,
12 subsequent events may render the case moot.” *Personhood Nevada v. Bristol*, 126 Nev.
13 599, 602, 245 P.3d 572, 574 (2010) (citations omitted). The Nevada Supreme Court has
14 frequently refused to determine questions presented in purely moot cases. *NCAA*, 97
15 Nev. at 58, 624 P.2d at 11.

16 While issues qualifying as “matters of widespread importance” and “capable of
17 repetition, yet evading review” may warrant judicial review, such is not the case here.
18 However, in order to demonstrate that a case consists of “matters of widespread
19 importance” and “capable of repetition yet evading review” the opposing party “must
20 prove that (1) the duration of the challenged action is relatively short, (2) there is a
21 likelihood that a similar issue will arise in the future, and (3) the matter is important.”
22 *Cashman*, 123 Nev. Adv. Op. 69, 380 P.3d at 853. The facts and circumstances in this
23 case support this Court’s finding that Petitioner’s Petition has been rendered moot by the
24 issuance of Amended Order No. 1293A, and that the *Cashman* exception does not apply.

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1 C. There is no justiciable controversy in the underlying Petition for
2 Judicial Review following the issuance of Amended Order No.
3 1293A.

4 As of July 12, 2018, Amended Order No. 1293A supersedes any legal force and
5 effect of Order No. 1293. As of the filing of this Motion, the final decision of the State
6 Engineer expressed in Order No. 1293 is no longer legally valid or enforceable. Rather,
7 only Amended Order No. 1293A is legally enforceable.

8 Through the State Engineer's issuance of Amended Order No. 1293A, the
9 membership of Petitioner are no longer aggrieved by the State Engineer's decision set
10 forth in Order No. 1293. While Amended Order No. 1293A supersedes Order No. 1293, it
11 maintains the overall goal and reasoning of the original Order No. 1293, namely that it
12 prohibits the drilling of new domestic wells within the Pahrump Artesian Basin due to
13 the State Engineer's determination that the groundwater basin is being depleted, and the
14 risk presented by the possibility of up to 8,000 new domestic wells⁵ in the Pahrump
15 Artesian Basin. *Compare* Order No. 1293, p. 5, *with* Amended Order No. 1293A, p. 6.
16 Also consistent with the original Order No. 1293, Amended Order No. 1293A includes
17 certain exceptions from this prohibition on new wells, including the same exceptions
18 regarding relinquishment, rehabilitation, and reconditioning. *Compare* Order No. 1293,
19 pp. 5 – 6, *with* Amended Order No. 1293A, pp. 6 – 7.

20 However, Amended Order No. 1293A now includes two (2) additional exceptions to
21 the prohibition against drilling new domestic wells within the Pahrump Artesian Basin.
22 Specifically, the State Engineer provided an accommodation for:

- 23 5. Persons that filed a Notice of Intent to Drill with the
24 Division of Water Resources between December 15 and
25 19, 2017, as identified in Exhibit "A," which Notice(s)
26 were denied upon the issuance of Order 1293, may re-file
27 a Notice of Intent to be reconsidered under this exception
28 to the Order.

⁵ The State Engineer acknowledges that the number of possible new domestic wells affected by Order No. 1293 has been reduced as a result of the exceptions in Amended Order No. 1293A.

6. Any person that can 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, is excepted from this Order.

Amended Order 1293A.

A specific ground alleged in Petitioner's Petition was that Order No. 1293 was "improperly applied retroactively to individuals who had already filed a Notice of Intent to Drill prior to the issuance of the order." Petition, p. 4. Without waiving the State Engineer's argument that there was no improper retroactive denial of Notices of Intent to Drill as a result of Order No. 1293, there is now nevertheless an exception for individuals who submitted Notices of Intent to Drill prior to the issuance of Order No. 1293 that were denied upon the issuance of Order No. 1293. Amended Order 1293A, p. 7. Now, under Amended Order No. 1293A, individuals who submitted a Notice of Intent to Drill between December 15 and 19, 2017, that was denied based on the issuance of Order No. 1293, may resubmit their Notices for full reconsideration. Furthermore, anyone who filed a building and/or zoning permit with Nye County, for a parcel eligible for a domestic well, prior to the issuance of Order No. 1293 is also excepted from the prohibition. This Amended Order therefore eliminates the purported negative effects asserted by Petitioner on behalf of its members, mooted the basis upon which these members would have "file[d] this action in their own right."

Further, based on the Court's Order Denying Petitioner's Motion to Stay State Engineer's Order 1293, and contrary to Petitioner's allegation that Order No. 1293 violated NRS 534.180(1), the Court has already ruled that the State Engineer has "authority to prohibit the drilling of new domestic wells without the property owner acquiring and relinquishing an existing water right in good standing of not less than 2.0 acre-feet for the purpose of serving the domestic well, and the Order 1293 is a valid exercise of the State Engineer's authority." See Order Denying Petitioner's Motion to Stay State Engineer's Order 1293, p. 8. While the State Engineer remains steadfast in his assertion that Order No. 1293 was based on substantial evidence, it is clear that

1 Amended Order No. 1293A now supersedes the prior order and renders any challenge to
2 Order No. 1293 in this matter moot.

3 Quite simply, the concerns raised in the Petition are eradicated by virtue of the
4 issuance of Amended Order 1293A, and therefore the Petition is moot. *See Kremens v.*
5 *Bartley*, 431 U.S. 119, 128 – 29 (1977). There is no longer an actual justiciable
6 controversy regarding Order No. 1293 such that this Court's judgment can affect the
7 matter in issue before it. Accordingly, Petitioner's Petition no longer presents a
8 justiciable controversy. Petitioner's Petition is moot and should therefore be dismissed as
9 it fails to state a claim upon which relief may be granted.

10 **D. Dismissal as being moot is proper, as there is no likelihood that this**
11 **particular dispute is capable of repetition while evading review.**

12 To avoid the fact that the issuance of Amended Order No. 1293A renders this case
13 moot, it is anticipated that Petitioner will argue that this somehow falls within and
14 exception to the mootness doctrine – which it does not. Petitioner cannot demonstrate
15 that this is a case that consists of “matters of widespread importance” that are “capable of
16 repetition yet evading review.” *See, e.g., Cashman*, 123 Nev. Adv. Op. 69, 380 P.3d at 853.
17 In order to establish a basis for an exception, Petitioner “must prove that (1) the duration
18 of the challenged action is relatively short, (2) there is a likelihood that a similar issue
19 will arise in the future, and (3) the matter is important.” *Id.* (emphasis added).

20 Amended Order No. 1293A is an order, which has been established for perpetuity.
21 The State Engineer recognizes the fact that there is a finite period of time within which a
22 party may seek to challenge the issuance of the Amended Order pursuant to NRS
23 533.450. Hence, should there be any member of Petitioner whom feels “aggrieved” by that
24 Amended Order, he or she is certainly lawfully entitled to seek a judicial review based
25 upon the individual claim. Thus, the opportunity to seek review is not such that an
26 individual whom believes he or she has a lawful basis to challenge the decision will be
27 deprived of their right due to the dismissal of the Petition.

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1 Second, the substance of Amended Order No. 1293A is not the type of matter that
2 is likely to arise again in the future. The State Engineer's decision addresses an entire
3 class of wells in a specified area, and there is no potential for the State Engineer to issue
4 a separate order prohibiting new domestic wells in the Pahrump Artesian Basin. Finally,
5 while the State Engineer acknowledges that the particular issue is of importance, such
6 does not warrant abandonment of the mootness doctrine, as any challenge to the legal
7 foundation of the order may be brought under a separate action. The *Cashman* exception
8 requires that Petitioner prove all three (3) elements; Petitioner is not capable of doing so.
9 Accordingly, there is no basis to find that this matter falls within the exception to the
10 mootness doctrine.

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1 IV. CONCLUSION

2 Petitioner's Petition for Judicial Review should be dismissed, as it cannot state a
3 claim upon which relief may be granted under NRS 533.450. While the State Engineer's
4 prior arguments disputing Petitioner's standing to bring its Petition remain and
5 independently justify dismissal, the issuance of Amended Order No. 1293A by the State
6 Engineer relieves many individuals from any alleged harm incurred as a result of Order
7 No. 1293, mooted Petitioner's Petition. Therefore, Petitioner's Petition is moot because
8 there no longer remains a justiciable controversy. Because Petitioner's Petition is moot,
9 the State Engineer respectfully requests that this Court dismiss the Petition for Judicial
10 Review.

11
12 AFFIRMATION

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

15 DATED this 18th day of July, 2018.

16 ADAM PAUL LAXALT
17 Attorney General

18 By:


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20 Deputy Attorney General
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27 Attorney for Respondent,
28 State Engineer

Office of the Attorney General
100 North Carson Street
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 18th day of July, 2018, I served a true and correct copy of the foregoing **NOTICE OF MOTION AND MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
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Mackenzie Hodges

1 Case No. CV38972

2 Dept. No. 1

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6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF NYE
8

9 PAHRUMP FAIR WATER, LLC.,
a Nevada limited-liability company,

10 Petitioner,

11 vs.

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

15 Respondent.
16

**NOTICE OF MOTION AND MOTION
FOR STAY OF BRIEFING PENDING
THE COURT'S DECISION ON THE
STATE ENGINEER'S MOTION TO
DISMISS**

17 Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer,
18 Department of Conservation and Natural Resources, Division of Water Resources
19 (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam
20 Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby moves this honorable
21 Court for an order staying further briefing on Petitioner Pahrump Fair Water, LLC's
22 Petition for Judicial Review pending the Court's decision on the State Engineer's Motion
23 to Dismiss. This Motion is brought pursuant to D.C.R. 13 and is supported by the
24 attached Memorandum of Points and Authorities and the pleadings and papers on file
25 herein.

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POINTS AND AUTHORITIES

I. INTRODUCTION

Concurrent with the filing of this Motion, the State Engineer files his Motion to Dismiss Petition for Judicial Review (hereafter "Motion to Dismiss"), seeking dismissal of the Petition for Judicial Review ("Petition") filed by Pahrump Fair Water LLC (hereafter "Petitioner") as raising issues that are now moot and no longer justiciable pursuant to State Engineer's Amended Order No. 1293A. The State Engineer's Motion to Dismiss is potentially dispositive of this entire case. Therefore, if this Court grants the State Engineer's Motion to Dismiss, there would no longer be any need for further briefing on Petitioner's Petition. Therefore, there is good cause, based on judicial economy and the public interest, for this Court to stay any further briefing on Petitioner's Petition until after this Court reaches a decision on the State Engineer's Motion to Dismiss.

II. ARGUMENT

The practice in civil cases applies to the judicial review process for decisions of the State Engineer. NRS 533.450(8). The first rule in the Nevada Rules of Civil Procedure ("NRCP") requires the rules to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." NRCP 1. A judicial determination on a motion for stay is reviewed for an abuse of discretion. *See Aspen Fin. Serv. v. Dist. Ct.*, 128 Nev. 635, 640, 289 P.3d 201, 205 (2012). Furthermore, pursuant to NRS 533.450(11), the Attorney General represents the interests of the State Engineer.

In this case, both judicial economy and the public interest support staying any briefing or further decisions on Petitioner's Petition pending the outcome of the State Engineer's Motion to Dismiss. Doing so will allow the Court to decide the threshold question of justiciability, without requiring the Court to address other matters which would be mooted by the Court granting the State Engineer's Motion to Dismiss. This prevents the waste of judicial resources, as well as those resources of the parties involved, while the Court addresses a Motion that is potentially dispositive of this entire dispute.

1 Furthermore, it is in the public interest to potentially relieve the taxpaying public of the
2 State of Nevada from the expense of having a public attorney brief and argue issues
3 which could be rendered moot.

4 **III. CONCLUSION**

5 Accordingly, the State Engineer respectfully requests that the Court stay briefing
6 and further action on Petitioner's Petition until this Court reaches a decision on the State
7 Engineer's concurrently filed Motion to Dismiss. As discussed above, there are legitimate
8 concerns of judicial economy and the public interest supporting the issuance of this stay.
9 Alternatively, should the Court deny this Motion, the State Engineer respectfully
10 requests an extension of time to respond to Petitioner's Opening Brief.

11
12 **AFFIRMATION**

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

15 DATED this 18th day of July, 2018.

16 ADAM PAUL LAXALT
17 Attorney General

18 By:

19 
20 JAMES N. BOLOTIN
21 Deputy Attorney General
22 Nevada Bar No. 13829
23 Government and Natural Resources
24 100 North Carson Street
25 Carson City, Nevada 89701-4717
26 Tel: (775) 684-1231
27 Fax: (775) 684-1108
28 Email: JBolotin@ag.nv.gov
Attorney for Respondent,
State Engineer

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 18th day of July, 2018, I served a true and correct copy of the foregoing NOTICE OF MOTION AND MOTION FOR STAY OF BRIEFING PENDING THE COURT'S DECISION ON THE STATE ENGINEER'S MOTION TO DISMISS, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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


Mackenzie Hodges

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
2 DAVID H. RIGDON, ESQ.
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3 TAGGART & TAGGART, LTD.
108 North Minnesota Street
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5 (775) 882-9900 – Telephone
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Attorneys for Petitioner

FILED
FIFTH JUDICIAL DISTRICT

AUG - 6 2018

Nye County Clerk
DEBRA BENNETT Deputy

7 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8
9 IN AND FOR THE COUNTY OF NYE

* * *

10 PAHRUMP FAIR WATER, LLC, a Nevada
11 limited-liability company,

12 Petitioner,

13 vs.

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

16 Respondent.
17

CASE NO.: CV38972

DEPT. NO.: 2

18 **OPPOSITION TO RESPONDENT'S MOTION**
19 **TO DISMISS PETITION FOR JUDICIAL REVIEW**

20 COMES NOW, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability company
21 (hereinafter "PFW"), by and through its counsel of record, PAUL G. TAGGART, ESQ. and DAVID H.
22 RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby opposes the State
23 Engineer's Motion to Dismiss Petition for Judicial Review ("Motion to Dismiss") filed on July 18, 2018.
24 This Opposition is based on the attached Memorandum of Points and Authorities, the pleadings and
25 papers currently on file in this matter, and any oral argument or testimony the Court may allow.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The State Engineer's actions in this case violate basic and long-standing principles of due process, jurisdiction, and administrative law. The State Engineer waited until after extensive proceedings in this matter had occurred, and PFW had expended significant time and expense to file its opening brief on the merits, to interfere with the Court's exclusive jurisdiction by issuing an amended order. The State Engineer also makes the untrue claim that the amended order "directly resolves grievances raised by Petitioner."¹

Judicial review of administrative orders "serves as an important check on the legality of the actions that agencies may undertake."² As Justice Marshall noted in *Marbury v. Madison* – "It is emphatically the province and duty of the judiciary to say what the law is."³ "By training and professional experience, judges are particularly adept at interpreting legal texts and resolving constitutional and statutory issues."⁴ Accordingly, while a court is undertaking a constitutional and statutory review of an administrative agency order, that agency is procedurally barred from taking any action that would conflict with, or negate, the Court's ability to rule on the issues presented.⁵

PFW raised five primary legal arguments in its opening brief including, without limitation: (1) the State Engineer violated constitutional due process protections when he issued Order 1293 without notice and a hearing, (2) the State Engineer lacks legislative authority to restrict the drilling of domestic wells, (3) Order 1293 is not supported by substantial evidence in the record, (4) Order 1293 is an unconstitutional taking of private property without just compensation, and (5) the State Engineer improperly applied Order 1293 in a retroactive manner. The State Engineer's amended order corrects just one of these deficiencies – the retroactive application of Order 1293.

¹ Motion to Dismiss at 3:15-16.

² ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* §13.1 (3rd ed. 2014).

³ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁴ AMAN & MAYTON, *supra* note 2.

⁵ 73A C.J.S. *Public Administrative Law and Procedure* §194 (1983) ("the continuing power of a board to modify or change its orders is suspended during the pendency of an appeal as to questions raised by such appeal.").

1 Because the amended order was improperly issued and does not resolve the issues PFW raised
2 in its opening brief, dismissal is unwarranted. In addition, the State Engineer's argument that PFW lacks
3 standing is unsupported by both the relevant caselaw and by the testimony of PFW's members at the
4 May 10, 2018, hearing on PFW's motion for stay. Accordingly, the State Engineer's Motion to Dismiss
5 should be denied.

6 **PROCEDURAL BACKGROUND**

7 On December 19, 2017, the State Engineer issued Order 1293. The order was issued without
8 any prior public notice and without providing affected property owners any opportunity to provide
9 comment or examine the sufficiency of the evidence the State Engineer relied on when formulating the
10 order.⁶ In addition, despite the fact that the Legislature specifically exempted domestic wells from the
11 State Engineer's general supervisory authority,⁷ in the order, the State Engineer restricts the drilling of
12 new domestic wells on over 4,000 privately owned parcels in the Pahrump groundwater basin unless the
13 property owners first acquires two acre-feet of existing water rights and forever relinquishes those rights
14 to the State Engineer.

15 On January 18, 2018, PFW timely noticed and filed its petition for judicial review of Order 1293
16 in accordance with NRS 533.450. The State Engineer did not immediately file his record on appeal with
17 the Court.⁸

18 On January 31, 2018, PFW timely filed a motion requesting the Court stay Order 1293 while the
19 appeal is proceeding. The parties completed briefing on the motion for stay on March 6, 2018. The
20 briefing on the motion could have been completed sooner. The State Engineer initially requested that
21 PFW stipulate to a three-week delay in filing his opposition to the motion. PFW agreed to a one-week
22 delay. Even so, the State Engineer failed to meet this stipulated deadline.

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25 ⁶ Opening Brief Exhibit 1 at 78:1-2, 87:19-88:3; 115:6-12; 137:9-12; 143:2-13; 147:13-19.

26 ⁷ NRS 534.030(4) (The State Engineer shall supervise all wells . . . except those wells for domestic purposes for which a
27 permit is not required.”).

28 ⁸ While the State Engineer is required to file a record on appeal, because there were no official proceedings below, the
“record” in this case consists solely of documents and other materials cherry-picked by the State Engineer which have not
been authenticated, verified, or otherwise validated under the Nevada Rules of Evidence.

1 Due to the recusal of both of the regular judges of the Fifth Judicial District Court, and the
2 subsequent need to appoint a senior judge to hear this matter, a hearing on the motion for stay was
3 delayed until May 10, 2018.

4 On May 10, 2018, the Court held a hearing on PFW's motion for stay. At the conclusion of the
5 hearing the Court denied the motion and instructed the State Engineer to prepare a written order. The
6 Court made clear to the parties that its decision on the matter was preliminary and requested the parties
7 further address issues raised in the hearing in their briefs on the merits of the case. The Court also
8 indicated its desire to hear the merits of the case in a timely manner and scheduled a hearing on the
9 merits to take place on September 6, 2018.

10 The State Engineer waited until June 14, 2018, more than a month after the conclusion of the
11 hearing on the motion for stay, to file the proposed order the Court requested. On June 26, 2018, more
12 than six months after PFW filed its appeal, the State Engineer finally filed his record on appeal with the
13 Court. On July 6, 2018, PFW timely filed its opening brief.

14 On July 12, 2018, without providing any notice to the Court or opposing counsel, the State
15 Engineer issued Order 1293A. The State Engineer purports to amend Order 1293 by including special
16 exemptions from Order 1293 for roughly two dozen persons who filed a notice of intent to drill a
17 domestic well prior to December 19, 2017 (Order 1293's date of the issuance) and property owners who
18 can demonstrate that they applied for a building permit on their property prior to that date. After issuing
19 the amended order, neither the State Engineer nor his counsel notified the Court or PFW's counsel of
20 the amended order.

21 On July 13, 2018, a legal assistant working for PFW's counsel found Order 1293A while doing
22 a routine check of the State Engineer's website. Counsel for PFW immediately notified the Court that
23 Order 1293A had been issued and requested a status conference on the matter.

24 On July 18, 2018, the State Engineer filed the instant motion to dismiss. Through his arguments
25 and language in the Motion to Dismiss, the State Engineer makes clear that his office is improperly
26 using the issuance of Order 1293A as a procedural device to evade effective judicial review of his
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1 arbitrary, capricious, and unlawful actions in this case. In addition, the State Engineer makes legal and
2 factual claims that are demonstrably untrue.

3 STANDARD OF REVIEW

4 Motions to dismiss are subject to a “rigorous standard of review.”⁹ Under this rigorous standard,
5 a petition for judicial review can only be dismissed if it appears beyond a doubt that the non-moving
6 party (in this case, PFW) could prove no set of facts that that would entitle it to relief.¹⁰ The Court must
7 recognize all factual allegations contained in the pleadings of the non-moving party as true and draw all
8 inferences in that party’s favor.¹¹ The sole issue to be decided in a motion to dismiss is “whether a
9 complaint [or petition] states a claim for relief.”¹² Here, PFW’s petition for judicial review was filed in
10 accordance with the procedures of NRS 533.450 and in the petition, PFW clearly states multiple claims
11 on which the requested relief can be granted. Accordingly, the State Engineer’s Motion to Dismiss must
12 be denied.

13 ARGUMENT

14 I. Order 1293A Does Not Resolve The Issues Raised In PFW’s Petition.

15 The State Engineer claims that the “Amended Order therefore eliminates the purported negative
16 effects asserted by Petitioner on behalf of its members.”¹³ This statement is untrue. As noted above,
17 PFW raised five primary arguments in its opening brief. Order 1293A only addresses a single one of
18 these arguments – the retroactive enforcement of the order. Like Order 1293, Order 1293A was issued
19 without providing affected property owners their constitutionally mandated due process rights of notice
20 and a hearing. Like Order 1293, Order 1293A was issued without legislative authority. Like Order
21 1293, Order 1293A is not supported by substantial evidence in the record. And, like Order 1293, Order
22 1293A is an unconstitutional taking of private property for public benefit without just compensation.

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25 ⁹ *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227, 181 P.3d 670, 672 (2008).

26 ¹⁰ *Id.* 124 Nev. at 228, P.3d at 672.

27 ¹¹ *Id.*

¹² *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993).

¹³ Motion to Dismiss at 9:16-18.

1 The State Engineer is correct that the Court has a duty to “decide actual controversies by a
2 judgment which can be carried into effect.”¹⁴ That is precisely what PFW is asking the Court to do here
3 – decide an actual controversy between PFW and the State Engineer regarding whether the State
4 Engineer (1) violated the due process rights of PFW’s members, (2) issued Order 1293 without
5 legislative authority, (3) issued Order 1293 absent substantial evidence supporting it, and (4)
6 unconstitutionally took private property for public use without just compensation. These are real
7 controversies that existed before the issuance of the amended order and that continue to remain after the
8 issuance of the amended order. Accordingly, the mootness doctrine is not applicable.

9 The State Engineer also claims that, if the mootness doctrine did apply (which it does not), this
10 is not a matter that is capable of repetition evading review.¹⁵ Specifically the State Engineer notes that
11 “Amended Order No. 1293A is an order, which has been established in perpetuity”¹⁶ while also alleging
12 that Order 1293 (an order also presumably established in perpetuity) is now null and void as a result of
13 the issuance of Order 1293A.¹⁷ If Order 1293 can be made null and void, and thereby escape judicial
14 review, by the State Engineer’s unilateral act of issuing an amended order, then the exact same thing
15 can also happen with Order 1293A. Simply put, there is no assurance that if the Court grants the State
16 Engineer’s Motion to Dismiss and forces PFW to litigate Order 1293A anew, that the State Engineer
17 will not repeat his current performance and issue another amended order after briefing is underway in
18 the new appeal and then claim that that appeal is moot as well. Under this strategy, the State Engineer
19 would effectively evade any meaningful judicial review of his unlawful actions. Regardless, PFW’s
20 appeal is not moot because there remains an actual controversy between the parties that the Court is
21 capable of resolving.

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23 ///

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25 ¹⁴ *Nat. Collegiate Athletic Association v. Univ. of Nev., Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

26 ¹⁵ *Univ. and Community College System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004) (“Even when an appeal is moot, however, this court may consider it when the matter is capable of repetition, yet evading review.”).

27 ¹⁶ Motion to Dismiss at 10:20.

28 ¹⁷ *Id.* at 5:23-24 (alleging that because Order 1293A replaces Order 1293, Order 1293 is no longer in effect).

II. Order 1293A Was Improperly Issued.

A well-established principle of administrative law is that once an appeal of an administrative order has been filed, the administrative agency is suspended from withdrawing or modifying that order during the pendency of the appeal.¹⁸ This rule has been adopted and repeatedly reinforced in multiple jurisdictions throughout the United States including Alaska, Arizona, Colorado, Washington, and Utah.¹⁹ As the Alaska Supreme Court noted:

The rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court's jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.²⁰

The only exception to the general rule is where there would be no conflict between the agency's subsequent action and the Court's jurisdiction. "If there would be no conflict, then there would be no obstacle to the administrative agency exercising a continuing jurisdiction."²¹

The Nevada Supreme Court explicitly adopted the general rule in *Westside Charter* – "where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved."²² The language the Nevada Supreme Court

¹⁸ 73A C.J.S. *Public Administrative Law and Procedure* §194 (1983) ("the continuing power of a board to modify or change its orders is suspended during the pendency of an appeal as to questions raised by such appeal.").

¹⁹ *Whitfield Transp., Inc. v. Brooks*, 302 P.2d 526, 529 (Ariz. 1956) ("We have repeatedly held that when, as here, an appeal to this court has been perfected the inferior tribunal loses all jurisdiction of each and every matter connected with the case.") (emphasis added); *Colorado Anti-Discrimination Comm. v. Continental Air Lines, Inc.*, 355 P.2d 83, 86 (Colo. 1960) ("this court has repeatedly held that an administrative agency is without authority to change, alter or vacate an order while review proceedings are pending in the district court") (emphasis added); *Career Service Review Bd. v. Utah Dep't of Corrections*, 942 P.2d 933, 943 (Utah 1997) ("When a party institutes proceedings to review a decision or an order of an administrative agency, the agency is deprived of its jurisdiction over the matter during the pendency of the appeal."); *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965) ("It is the general rule that when an order of an administrative agency is appealed to a court, the agency's power and authority in relation to the matter is suspended as to questions raised by the appeal."); *Martin v. Dayton School Dist. No. 2*, 536 P.2d 169, 170 (Wash. 1975) ("It is the general rule that the jurisdiction of an administrative agency over a particular matter ends when its decision is appealed to the court.").

²⁰ *Fischback & Moore of Alaska, Inc.*, 407 P.2d at 176.

²¹ *Id.*

²² *Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada*, 99 Nev. 456, 459, 664 P.2d 351, 353 (1983).

1 used is important and deprives the administrative agency from acting until *all* of the questions raised in
2 the appeal are litigated to *finality*.

3 Here, PFW raised five primary arguments against Order 1293. None of those issues has been
4 resolved to finality. The State Engineer argues that the Court's order denying PFW's motion for stay
5 constitutes a final ruling on the legal issues PFW raised.²³ The State Engineer is wrong. An order
6 deciding a motion for a preliminary injunction is just that – preliminary. The Court was not deciding
7 the case on the merits and specifically asked the parties to include in their briefs on the merits additional
8 information regarding certain points raised in the preliminary hearing. The Court made clear that its
9 order was preliminary and that all issues PFW raised would be covered at the hearing on the merits of
10 the case.

11 Because all the issues PFW raised in its opening brief remain active and unresolved, the State
12 Engineer was without authority to issue Order 1293A. This is especially true where, as here, the timing
13 of the issuance of the amended order and the State Engineer immediate request for dismissal of the
14 appeal evidence a clear intent to prevent the Court from hearing PFW's appeal in a timely manner.

15 Because the State Engineer was without authority to issue Order 1293A, the amended order
16 cannot be used to support dismissal of PFW's appeal of Order 1293. Accordingly, the State Engineer's
17 Motion to Dismiss should be denied.

18 **III. The Record In This Case Clearly Demonstrates That PFW Has Standing.**

19 In his Motion to Dismiss, the State Engineer revives his argument that because PFW is a limited-
20 liability company, it is not allowed to assert the interests of its individual members. As has been
21 demonstrated in prior briefing in this matter, the State Engineer's argument has no basis in law or fact.
22 In fact, PFW has standing under well-established United State Supreme Court and Nevada Supreme
23 Court binding precedent.

24 **A. PFW Has Standing under the United States Constitution.**

25 First, PFW has standing under the United States Constitution. The U.S. Supreme Court has
26 stated that an association can have standing to assert the interests of its members if the association has

27 ²³ Motion to Dismiss at 9:22-26.
28

1 been injured or one or more of its members are injured.²⁴ “[W]hether an association has standing to
2 invoke the court's remedial powers on behalf of its members depends in substantial measure on the
3 nature of the relief sought.”²⁵ If the relief sought by an association is for prospective injunctive relief,
4 courts reasonably presume that remedy, “if granted, will inure to the benefit of those members of the
5 association actually injured.”²⁶ In fact, in most cases involving associations, like the instant case, “the
6 relief sought has been of this kind.”²⁷

7 Further, an association has standing to bring suit on behalf of its members when (1) its members
8 would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane
9 to their organization’s purpose, and (3) neither the claim asserted, nor the relief requested, requires the
10 participation of individual members in the lawsuit.²⁸ Here, PFW has members that would otherwise
11 have the right to bring this action on their own. Also, because PFW was formed for the express purpose
12 of fighting Order 1293, this challenge is germane to its purpose, and it is not necessary to have individual
13 members participate in the lawsuit. Finally, the participation of the individual members of PFW is not
14 required in order to resolve the issues raised in PFW’s Petition.

15 **B. PFW has standing pursuant to binding Nevada Supreme Court precedent.**

16 PFW also has standing under state law. When the Legislature enacted NRS 533.450, it continued
17 its longstanding practice of providing standing rights under statute that are even broader than those
18 provided by the Constitution. Standing under NRS 533.450 is provided to “any person *feeling aggrieved*
19 by any order or decision of the State Engineer.”²⁹ This does not require the person filing the appeal to
20 demonstrate individual harm from the order, it only requires that they *feel* aggrieved by it. The Nevada
21 Supreme Court has consistently interpreted similar language in other statutes to broadly grant standing
22 to Nevada’s citizens to challenge decisions by their government.

24 *Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 2213 (1975).

25 *Id.*

26 *Id.*

27 *Id.*

28 *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

29 Emphasis added.

1 In *Citizens for Cold Springs v. City of Reno*,³⁰ the Court reviewed the grant of statutory standing
2 contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an
3 association of property owners that would be affected by an annexation decision had standing to
4 challenge that decision.³¹ The Court interpreted the language of NRS 268.668 which grants standing to
5 “any person or city *claiming* to be adversely affected by such proceeding.”³² Since the statute says that
6 any person claiming to be adversely affected may bring an action, in the “tradition of [its] long-standing
7 jurisprudence,” the Court found that standing rights under NRS 268.668 are broader than what
8 constitutional standing allows.³³ The Court specifically focused on the NRS 266.668 grant of standing
9 to any person *claiming* to be aggrieved.³⁴ Based on that language the Court held that even property
10 owners who do not have constitutional standing because they did not own property in the area of
11 annexation at issue, do have standing under NRS 268.668.³⁵

12 The language of NRS 533.450 is even broader than NRS 533.668 because it grants standing to
13 any person *feeling* aggrieved.³⁶ Accordingly, just as *Citizens for Cold Springs* was granted standing to
14 assert the rights of its members under NRS 268.668, PFW has standing to do the same under NRS
15 533.450.

16 **C. Testimony at the prior hearing clearly demonstrates that PFW has standing.**

17 Testimony at the May 10, 2018, motion for stay hearing clearly established that PFW’s members
18 are actually being harmed by Order 1293. Norma Jean Opatik, managing member of PFW, testified that
19 all the of PFW’s members are either property owners affected by Order 1293 or businesses that are being
20 affected.³⁷ PFW had eight witnesses testify under oath that they are members of PFW. Each of these
21 witnesses testified regarding the harm they are incurring as a result of the enforcement of Order 1293.
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24 ³⁰ *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009).

25 ³¹ *Id.* 125 Nev. at 634, P.3d at 853.

26 ³² *Id.* 125 Nev. at 629, P.3d at 850 (emphasis added).

27 ³³ *Id.* 125 Nev. at 630-31, P.3d at 851.

28 ³⁴ *Id.*

³⁵ *Id.* at 631, P.3d at 851.

³⁶ NRS 533.450.

³⁷ Opening Brief Exhibit 1 at 73:24-74:4.

1 The State Engineer complains that PFW has not disclosed its full membership to the State
2 Engineer.³⁸ Importantly, the State Engineer cites no legal authority which mandates such disclosure. In
3 fact, based on the contempt that the State Engineer has shown towards affected property owners in this
4 case,³⁹ many PFW members are fearful of retaliation should their identities be disclosed. This is one of
5 the primary reasons why courts allow concerned citizens to bring actions as anonymous members of an
6 association rather than in their own names.

7 **CONCLUSION**

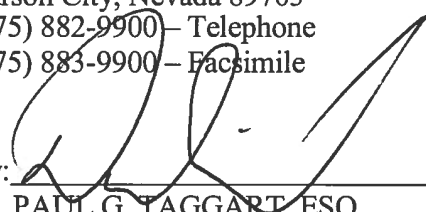
8 For the foregoing reasons, PFW respectfully requests that the Court: (1) deny the State
9 Engineer's Motion to Dismiss, and (2) order the State Engineer to pay PFW's legal costs incurred in
10 responding to Order 1293A and this Motion to Dismiss as a sanction for his improper invasion of the
11 Court's exclusive jurisdiction.

12 **AFFIRMATION**
13 **Pursuant to NRS 239B.030**

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

16 DATED this 3rd day of August, 2018.

17 TAGGART & TAGGART, LTD.
18 108 North Minnesota Street
19 Carson City, Nevada 89703
20 (775) 882-9900 – Telephone
21 (775) 883-9900 – Facsimile

22 By: 
23 PAUL G. TAGGART, ESQ.
24 Nevada State Bar No. 6136
25 DAVID H. RIGDON, ESQ.
26 Nevada State Bar No. 13567
27 Attorneys for Petitioner
28

38 Motion to Dismiss at 3, fn.2.

39 The State Engineer has characterized PFW members as "impertinent" for exercising their constitutional right to raise objection to Order 1293 and refused offers to meet with affected residents to discuss their concerns. Motion to Strike at 2:3-4.

CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 3rd day of August, 2018.



Employee of TAGGART & TAGGART, LTD.

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2 DAVID H. RIGDON, ESQ.
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6 Attorneys for Petitioner

7 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF NYE

9 * * *

10 PAHRUMP FAIR WATER, LLC, a Nevada
limited-liability company,

11 Petitioner,

12 vs.

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

16 Respondent.
17

CASE NO.: CV38972

DEPT. NO.: 2

18 **STIPULATION AND ORDER FOR VOLUNTARY DISMISSAL WITH PREJUDICE**

19 COMES NOW, Petitioner, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
20 company (hereinafter “PFW”), by and through its counsel of record, PAUL G. TAGGART, ESQ. and
21 DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and Respondent,
22 JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT
23 OF CONSERVATION AND NATURAL RESOURCES, by and through his counsel of record, Deputy
24 Attorney General JAMES N. BOLOTIN, ESQ., and hereby agree and stipulate that this action, including
25 all claims, counterclaims, and third-party claims, shall be dismissed with prejudice with each party to
26 bear his own fees and costs. A proposed order is attached hereto as Exhibit 1.

AFFIRMATION
Pursuant to NRS 239B.030

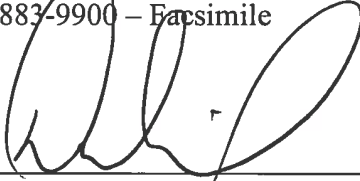
The undersigned do hereby affirm that the preceding document does not contain the social security number of any persons.

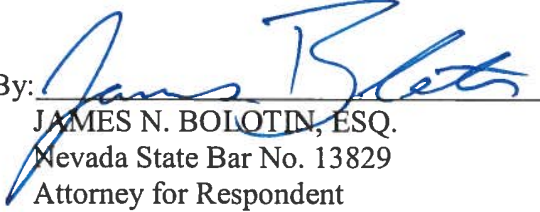
DATED this 10th day of August, 2018.

DATED this 10th day of August, 2018.

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Attorneys for Petitioner

By: 
JAMES N. BOLOTIN, ESQ.
Nevada State Bar No. 13829
Attorney for Respondent

Taggart & Taggart, Ltd.
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CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 10th day of August, 2018.



Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
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<u>Exhibit Number</u>	<u>Description</u>	<u>Page Count</u>
1.	[Proposed] Order Granting Stipulation and Order for Voluntary Dismissal with Prejudice	2

EXHIBIT 1

EXHIBIT 1

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IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

PAHRUMP FAIR WATER, LLC, a Nevada
limited-liability company,

Petitioner,

vs.

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

Respondent.

CASE NO.: CV38972

DEPT. NO.: 2

**ORDER GRANTING STIPULATION AND ORDER FOR
VOLUNTARY DISMISSAL WITH PREJUDICE**

UPON CONSIDERATION, and good cause appearing therefore, this Court hereby **GRANTS**
the parties' Stipulation and Order for Voluntary Dismissal with Prejudice.

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This matter is hereby **DISMISSED** with prejudice.

IT IS SO ORDERED.

DATED this _____ day of _____, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

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

By: _____

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
Attorneys for Petitioner

FILED
FIFTH JUDICIAL DISTRICT

AUG 27 2018

Nye County Clerk
AMY DOWERS Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

PAHRUMP FAIR WATER, LLC, a Nevada
limited-liability company,

Petitioner,

vs.

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

CASE NO.: CV38972

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UPON CONSIDERATION, and good cause appearing therefore, this Court hereby **GRANTS**
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This matter is hereby **DISMISSED** with prejudice.

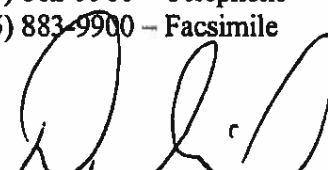
IT IS SO ORDERED.

DATED this 13th day of August, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

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Attorneys for Petitioner

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7 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF NYE

9 * * *

10 PAHRUMP FAIR WATER, LLC, a Nevada
limited-liability company,

11 Petitioner,

12 vs.

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

16 Respondent.
17

CASE NO.: CV38972A

DEPT. NO.: 2

18 **NOTICE OF ENTRY OF ORDER**

19 PLEASE TAKE NOTICE that on August 27, 2018, this Court entered its Order Granting
20 Stipulation and Order for Voluntary Dismissal with Prejudice, a copy of which is attached hereto as
21 Exhibit 1.

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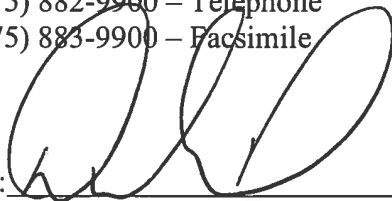
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AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 29th day of August, 2018.

TAGGART & TAGGART, LTD.
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By: 
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
Attorneys for Petitioner

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CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 29th day of August, 2018.



Employee of TAGGART & TAGGART, LTD.

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<u>Exhibit Number</u>	<u>Description</u>	<u>Page Count</u>
1.	Order Granting Stipulation and Order for Voluntary Dismissal with Prejudice	2

EXHIBIT 1

EXHIBIT 1

FILED
FIFTH JUDICIAL DISTRICT

AUG 27 2018

Nye County Clerk
AMY DOWERS Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

PAHRUMP FAIR WATER, LLC, a Nevada
limited-liability company,

Petitioner,

vs.

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

Respondent.

CASE NO.: CV38972

DEPT. NO.: 2

ORDER GRANTING STIPULATION AND ORDER FOR
VOLUNTARY DISMISSAL WITH PREJUDICE

UPON CONSIDERATION, and good cause appearing therefore, this Court hereby **GRANTS**
the parties' Stipulation and Order for Voluntary Dismissal with Prejudice.

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This matter is hereby **DISMISSED** with prejudice.

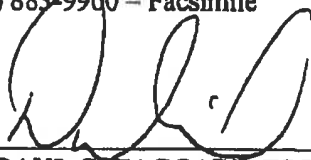
IT IS SO ORDERED.

DATED this 13th day of August, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

TAGGART & TAGGART, LTD.
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By: 
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Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
Attorneys for Petitioner

--FILED--
Administrative Office of the Courts
Date: 09/18/18

By: Deborah C. [Signature]

**SUPREME COURT OF THE STATE OF NEVADA
ADMINISTRATIVE OFFICE OF THE COURTS**

IN THE MATTER OF THE ASSIGNMENT OF
A SENIOR JUDGE

Order No. 19-00232

MEMORANDUM OF TEMPORARY ASSIGNMENT

WHEREAS all district judges in the Fifth Judicial District have recused themselves from hearing any and all matters in *Pahrump Fair Water v. Jason King*, Case Number CV 39524, now therefore,

IT IS HEREBY ORDERED that the Honorable Steven Elliott, Senior Judge, is assigned to hear any and all matters in *Pahrump Fair Water v. Jason King*, Case Number CV 39524, and he shall have authority to sign any orders arising out of this assignment. The Court shall notify the parties of the assignment and provide Steven Elliott, Senior Judge with any assistance as requested.

Entered this 18 day of September 2018.

NEVADA SUPREME COURT

By: [Signature], Justice

Copy: The Honorable Steven Elliott, Senior Judge
The Honorable Robert W. Lane, District Judge, Fifth Judicial District Court
The Honorable Kimberly A. Wanker, District Judge, Fifth Judicial District Court

SEP 21 2018

NYE COUNTY DEPUTY CLERK
DEPUTY

Marianne Yoffee

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
TAGGART & TAGGART, LTD.
108 North Minnesota Street
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(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile
Attorneys for Petitioners

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

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

Case No. 39524

Dept. No. 2

Petitioners,

vs.

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

Respondent.

REQUEST TO SET HEARING DATE

COME NOW, Petitioners, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
company (hereinafter “PFW”), STEVEN PETERSON, an individual, MICHAEL LACH, an individual,
PAUL PECK, an individual, BRUCE JABOUR, an individual, and GERALD SCHULTE, an
individual (collectively “Petitioners”), by and through their counsel, PAUL G. TAGGART, ESQ. and
DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby file this
Request to Set Hearing Date in the above-entitled action.

Pursuant to a Settlement Agreement previously entered into by the parties, on August 31, 2018,
the Court issued an Order Granting Stipulation and Order Regarding Briefing Schedule which granted

1 an expedited briefing schedule for this case. On September 8, 2018, Petitioner filed its Opening Brief
2 and, pursuant to the expedited briefing schedule, briefing will be completed in this matter no later than
3 October 29, 2018. The Settlement Agreement provides that "[t]he parties agree to expedite the
4 scheduling of a hearing on the new petition for judicial review after briefing is completed and subject to
5 court availability." Accordingly, to expedite the hearing in this matter, Petitioners respectfully request
6 the Court convene a phone conference with the parties to set a hearing date in this matter.

7 **AFFIRMATION**

8 **Pursuant to NRS 239B.030(4)**

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

11 DATED this 19th day of September, 2018.

12 TAGGART & TAGGART, LTD.
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15 By: 

16 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
17 DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
18 Attorneys for Petitioners
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CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 19th day of September, 2018.



Employee of TAGGART & TAGGART, LTD.

 **COPY**

OFFICE OF THE ATTORNEY GENERAL
CARSON CITY, NEVADA

FILED
FIFTH JUDICIAL DISTRICT

OCT 12 2018

OCT 18 2018

Nye County Clerk

AMY DOWERS Deputy

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

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

Petitioners,

vs.

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

Respondent.

**RESPONDENT STATE ENGINEER'S
ANSWERING BRIEF**

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CERTIFICATE OF SERVICE 30

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NRS 534.350(8)(a) 16, 22

NRS 542..... 5

Rules

NRCP 12(b)(5) 19

NRCP 17(a)..... 26, 27

Constitutional Provisions

Nev. Const. art. 1, § 8 (5) 13

U.S. Const. amend. V 13

U.S. Const. amend. XIV, § 1 13

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

7 POINTS AND AUTHORITIES

8 I. INTRODUCTION

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

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

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

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

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

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

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

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

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

24 II. FACTUAL SUMMARY

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

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

6 While these numbers alone are problematic for the health of the Pahrump Basin,
7 the problem is exacerbated by the fact that the 59,175 afa of existing rights *does not*
8 include the quantity of water allowed to be withdrawn by existing domestic wells. By
9 statute, each domestic well within the State of Nevada is permitted to withdraw up to
10 2.0 afa for culinary and household purposes in a single-family dwelling, including the
11 watering of a garden, lawn, and domestic animals. NRS 534.350(8)(a). There are
12 approximately 11,280 existing domestic wells in the Pahrump Basin, the greatest
13 proliferation and density of domestic wells in any basin in the State of Nevada by far.
14 SE ROA at 4, 40-513, 975-1110, 1389-1605, 1745-3448. Thus, in addition to the
15 59,175 afa of existing rights in the Pahrump Basin, there are existing domestic wells
16 which are statutorily permitted to draw approximately 22,560 afa of water—an amount
17 that in and of itself exceeds the perennial yield of the basin.

18 Taking into account the existing parcels in the Pahrump Basin for which no
19 domestic wells currently exists, there is the potential for up to 8,000 new domestic wells
20 to be drilled in the basin. SE ROA at 5, 40-513, 975-1110, 1389-1605, 1745-3448. Should
21 these domestic wells be drilled, a legal right to an additional 16,000 afa of groundwater
22 would be created. In other words, these potential new domestic wells, together with the
23 existing domestic wells, would have a legal right to withdraw nearly twice the perennial
24 yield of the basin. Without further regulation in the Pahrump Basin, there stands the
25 possibility of having nearly 100,000 afa² of legal rights to withdraw groundwater in a
26

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

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

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

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

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

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

1 2018, the Nye County Board of Commissioners adopted a Groundwater Management Plan
2 (hereafter "GMP") for the Pahrump Basin, thereby recognizing at the County level that
3 Pahrump has the highest density of domestic wells in Nevada and identifying and relying
4 on Order No. 1293 as a key component of the GMP. SE ROA at 3449-3464. Specifically,
5 the requirement for new domestic wells to be served by water rights relinquished to the
6 State Engineer is vital to the County's GMP, and vital to the desire of both the County
7 and the State Engineer to avoid curtailment in the Pahrump Basin.

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

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

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

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

3 **III. STANDARD OF REVIEW**

4 Water law proceedings, like this, are special in character and the provisions of
5 NRS 533.450 establish the boundaries of the court's review and strictly limits the review
6 to the narrow confines established under the statute and as interpreted by the Nevada
7 Supreme Court. *See Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949)
8 ("It is also well settled in this state that the water law and all proceedings thereunder are
9 special in character, and the provisions of such law not only lay down the method of
10 procedure but strictly limits it to that provided." (emphasis added)). All proceedings to
11 review a decision of the State Engineer are subject to the provisions of NRS 533.450,
12 which explicitly provides in part that such proceedings are "in the nature of an appeal"
13 and are "informal and summary."

14 The court's review of a decision brought under NRS 533.450 is limited to deciding
15 whether the State Engineer's decision is supported by substantial evidence. *See Revert v.*
16 *Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence is "that which a
17 reasonable mind might accept as adequate to support a conclusion." *Id.* When reviewing
18 a decision or order of the State Engineer, the court may not "pass upon the credibility of
19 the witness nor reweigh the evidence." *Id.*; *see also Bacher v. State Eng'r*, 122 Nev. 1110,
20 1121, 146 P.3d 793, 800 (2006).

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

1 The Legislature has specified that “[t]he decision of the State Engineer shall be
2 prima facie correct, and the burden of proof shall be upon the party attacking the same.”
3 NRS 533.450(10); *see also Revert*, 95 Nev. at 786, 603 P.2d at 264. A decision of the State
4 Engineer is entitled to deference both as to its factual basis and its legal conclusions. *See*
5 *U.S. v. State Eng’r*, 117 Nev. 585, 598, 27 P.3d 51, 53 (2001) (The State Engineer’s office
6 “has the implied power to construe the statute.”); *see also Pyramid Lake Paiute Tribe v.*
7 *Washoe Cnty.*,
8 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996). Generally, the State Engineer’s “factual
9 determinations will not be disturbed” by the reviewing court on a Petition for Judicial
10 Review pursuant to NRS 533.450 so long as they are “supported by substantial evidence”;
11 however, if the court determines that the State Engineer’s decision was “arbitrary and
12 capricious,” and therefore an abuse of discretion, the court may then overrule the State
13 Engineer’s conclusions. *Pyramid Lake Paiute Tribe*, 112 Nev. at 751, 918 P.2d at 702
14 (citations omitted).

15 Decisions of the State Engineer are entitled not only to deference with respect to
16 factual determinations, but also with respect to legal conclusions. The Nevada Supreme
17 Court has explained that “an agency charged with the duty of administering an act is
18 impliedly clothed with power to construe it as a necessary precedent to administrative
19 action,” and therefore “great deference should be given to the agency’s interpretation
20 when it is within the language of the statute.” *State v. State Eng’r*, 104 Nev. 709, 713,
21 766 P.2d 263, 266 (1988).

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

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1 IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 As stated above, the Nevada Legislature has declared it the policy of Nevada “[t]o
21 recognize the importance of domestic wells as appurtenances to private homes, to create a
22 protectable interest in such wells and to protect their supply from unreasonable adverse
23 effects which are caused by municipal, quasi-municipal or industrial uses and which
24 cannot reasonably be mitigated.” NRS 533.024(1)(b). However, during the 2001
25 legislative session, where S.B. 159 was passed such that the “protectable interest”
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27 ⁴ Those exceptions include temporary appropriations of groundwater for stockwater purposes during
28 drought declarations, temporary appropriations of groundwater for establishing fire-resistant vegetative
cover, and applications to increase diversion rates with no corresponding increase in the duty of the water
right(s). SE ROA at 32.

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

9 Such a proposition is not supported by law. A due process claim has two (2) steps:
10 first, the Court must determine “whether there exists a liberty or property interest which
11 has been interfered with by the State” and second, the Court must determine “whether
12 the procedures attendant upon that deprivation were constitutionally sufficient.”
13 *Malfitano v. Cnty. of Storey by & through Storey Cnty. Bd. of Cnty. Comm’rs*, ___ Nev. ___,
14 396 P.3d 815, 819 (2017) (*citing Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460,
15 109 S. Ct. 1904 (1989)). The Petitioners fail to meet this first step, and therefore the
16 analysis stops there.

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

27
28 ⁵ Throughout the legislative history, the language of S.B. 159 is identified as including a provision
about a “protectible [sic] interest.” *See, e.g.*, SE ROA at 912, 917. This brief utilizes the language of the
actual statute, “protectable interest.” NRS 533.024(1)(b).

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

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

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

27
28 ⁶ Plus, domestic wells can still be drilled in the Pahrump Basin on eligible parcels following
relinquishment of an adequate water right to serve the proposed domestic well, per Amended Order
No. 1293A.

1 This is in line with the doctrine of appurtenance. Where land is conveyed with an
2 *existing* domestic well that has historically been used to serve the land, the domestic well
3 (and its accompanying statutory, usufructuary right to pump 2.0 afa pursuant to
4 NRS 534.350(8)(a)) is conveyed by deed with the land to which it is applied, by virtue of a
5 deed's appurtenance clause, because the two "become so interrelated and dependent on
6 each other in order to constitute a valid appropriation that the [water] becomes *by reason*
7 *of necessity* appurtenant to the [land]." See *Zolezzi v. Jackson*, 72 Nev. 150, 153-54,
8 297 P.2d 1081, 1082-83 (1956) (*quoting Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 164,
9 140 P. 720, 723 (1914)). Here, where there is no existing domestic well on an undeveloped
10 parcel of land, a conveyance of a deed to the land (even if it included an appurtenance
11 clause) does not convey any such right to a domestic well. Since the domestic well had
12 never been drilled, and the accompanying statutory, usufructuary 2.0 afa of water have
13 never been pumped, there is no interrelation or dependence created between water and
14 land, and thus no protectable interest in the non-existent domestic well is conveyed when
15 the land is purchased.

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

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

28 ///

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

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

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

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

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

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

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

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

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

1 Order No. 1293A is supported by substantial evidence. If the Court upholds the State
2 Engineer's decision, then Petitioners *may* be able to assert a taking claim. However, if
3 the State Engineer's decision is not upheld, then Petitioners have no basis to allege a
4 taking based upon Amended Order No. 1293A. *See, e.g., Doe v. Bryan*, 102 Nev. 523, 525,
5 728 P.2d 443, 444 (1986) ("Nevada has a long history of requiring an actual justiciable
6 controversy as a predicate to judicial relief. Moreover, litigated matters must present an
7 existing controversy, *not merely the prospect of a future problem.*" (emphasis added)).

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

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

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

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

5 Assuming, *arguendo*, that this Court does take into account Petitioners' argument
6 that Amended Order No. 1293A constitutes a taking, such an allegation is refuted by
7 applying the applicable case law. The State Engineer does not dispute that both the
8 United States Constitution and the Nevada Constitution prohibit governmental takings
9 of private property for public use without just compensation; such propositions have been
10 upheld by the Supreme Court of Nevada. See *McCarran Int'l Airport v. Sisolak*, 122 Nev.
11 645, 661-662, 137 P.3d 1110, 1121 (2006). However, the State Engineer adamantly
12 disputes Petitioners' assertion that Amended Order No. 1293A is a *per se* regulatory
13 taking.

14 There are two categories of regulatory action that generally will be deemed *per se*
15 takings: (1) when a government regulation requires an owner to suffer a permanent
16 physical invasion of the owner's property; or (2) when a government regulation completely
17 deprives an owner of all economical beneficial use of the owner's property. *Sisolak*,
18 122 Nev. at 662, 137 P.3d at 1122 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538,
19 125 S. Ct. 2074 (2005)). Outside of the situations that constitute a *per se* regulatory
20 taking, to determine whether a government regulation nonetheless effects a compensable
21 regulatory taking, a court should consider "(1) the regulation's economic impact on the
22 property owner, (2) the regulation's interference with investment-back expectations, and
23 (3) the character of the government action." *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122
24 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978)).
25 An allegation that a regulation has diminished the property's value, or destroyed the
26 potential for its highest and best use, does not, without more, constitute a taking.
27 *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122. Regulations have been upheld as valid, and
28 therefore not a taking, even where the property value was significantly reduced as a

1 result of the regulation. *See Sisolak*, 122 Nev. at 663 n.47, 137 P.3d at 1122 n.47 (*citing*
2 *Euclid v. Ambler Co.*, 272 U.S. 365, 397, 47 S. Ct. 114 (1926) (regulations valid although
3 they effected a 75 percent diminution in value of property); *Hadacheck v. Los Angeles*,
4 239 U.S. 394, 414, 36 S. Ct. 143, 60 L. Ed. 348 (1915) (ordinance prohibiting highest and
5 best use of land as a brickworks was valid, although it reduced the value of property from
6 \$800,000 to \$60,000); *William C. Haas v. City & Cnty. of San Francisco*, 605 F.2d 1117,
7 1121 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the
8 value of property from \$2,000,000 to \$100,000)).

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

16 To the extent Petitioners argue that Amended Order No. 1293A effects a regulatory
17 taking as to their currently owned⁷ parcels of land, this argument also fails. Amended
18 Order No. 1293A is not a *per se* taking: it does not impose any physical invasion of
19 property on property owners in the Pahrump Basin (let alone a permanent invasion), nor
20 does it deprive parcel owners of all economical beneficial use of their property.
21 Petitioners’ arguments that they have had their “dreams extinguished” is pure hyperbole.
22 Individuals who purchased parcels of land in the Pahrump Basin intending to build
23 homes on the property can still do so, and they can even still do so with a domestic well so
24 long as they acquire a water right of at least 2.0 afa and relinquish the right to serve the
25 domestic well. Simply because the value of the property is affected or, conversely,

26
27 ⁷ To the extent that those Petitioners identified as real-estate brokers doing business in Pahrump
28 and owners of well drilling companies argue Amended Order No. 1293A results in a taking against them,
such a proposition defies all logic considering they do not allege to own a parcel of land in the Pahrump
Basin eligible for a domestic well. *See* Petition, p. 2.

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

4 Lastly, Petitioners' argument that Amended Order No. 1293A "forcibly take[s]"
5 more water than an average domestic well uses is a red herring and, frankly,
6 mischaracterizes the effects of the Order. See Petitioners' Opening Brief, pp. 15-17.
7 The State Engineer does not dispute that the average domestic well in the Pahrump
8 Basin pumps less than 2.0 afa—such is seen clearly from the State Engineer's ROA.
9 SE ROA at 3383-3448. However, this does not change that fact that domestic wells are
10 defined by statute as having a draught that "does not exceed 2 acre-feet per year."
11 NRS 534.350(8)(a); *see also* NRS 534.080(4) and NRS 534.180(1). Therefore, actual
12 pumping figures do not matter for purposes of Amended Order No. 1293A; in order for a
13 well to be considered a domestic well it must, by law, be able to withdraw up to, and
14 including, 2.0 afa. This alone justifies the amount of water the State Engineer requires to
15 be relinquished⁸ for a new domestic well. See SE ROA at 8.

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

25
26 ⁸ Relinquishment is a key component of the Amended Order No. 1293A and the Nye County GMP.
27 By requiring relinquishment of an EXISTING water right of at least 2.0 afa before drilling a new domestic
28 well, that acquired water will no longer be used for its original permitted/certificated use. Therefore, the
overall allowed use of water in the Pahrump Basin will not increase. However, if relinquishment was not
required, any new domestic well would add 2.0 afa of potential use to the basin, while the water that would
have been acquired and relinquished (as required by Amended Order No. 1293A) will instead continue to be
used under its permit/certificate.

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

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

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

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

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

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

6 In *Citizens for Cold Springs*, property owners adjacent to undeveloped land in the
7 City of Reno filed a complaint for declaratory relief challenging the annexation of said
8 land. 125 Nev. at 628, 218 P.3d at 849. In that action, the complaint was challenged on
9 the basis that the plaintiff lacked standing as it had not shown that “it had been
10 personally, substantially, and adversely . . . affected by the annexation.” *Id.* The district
11 court dismissed the case for failure to state a claim. *Id.* On appeal, the Nevada Supreme
12 Court considered the scope of NRS 268.668, which affords standing to “any person . . .
13 claiming to be adversely affected” by an annexation.” 125 Nev. at 629, 218 P.3d at 850
14 (emphasis supplied). In examining whether the statute afforded the plaintiff standing,
15 the *Cold Springs* Court conducted an examination of the statute to “. . . ‘determine
16 whether the plaintiff had standing to sue.’” 125 Nev. at 630 (citing *Stockmeier v.*
17 *Nev. Dept. of Corr.*, 122 Nev. 385, 393, 135 P.3d 220, 226 (2006), *abrogated by Buzz Stew*,
18 124 Nev. 224, 181 P.3d 670).

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

1 states that “any person or city claiming to be adversely affected.” 125 Nev. at 631,
2 218 P.3d at 851. Thus, the Court found that the plaintiff landowners and residents whom
3 were living adjacent to or near the annexation were within the scope of NRS 268.668 as
4 “any person . . . claiming to be adversely affected” and had standing to challenge the
5 annexation. *Id.*

6 However, that finding only addressed the first prong of the Court’s analysis in
7 *Cold Springs*. The Court went on to determine whether the plaintiffs were actually
8 “adversely affected.” *Id.* Again, the Court looked to the plain language of the statute for
9 guidance. However, the plain language of the statute did not offer any guidance or
10 definition, thus the Court looked to the rules of statutory construction. *Id.* In
11 interpreting a statute, the Court looks “at the ‘context’ or ‘spirit’ in which it was enacted
12 to effect a construction that best represents the legislative intent in enacting the statute.”
13 *Id.* (citing *Boucher v. Shaw*, 124 Nev. 1164, 1167, 196 P.3d 959, 961 (2008)). The intent is
14 “to read ‘statutes with a statutory scheme harmoniously with one another to avoid an
15 unreasonable or absurd result.” *Id.* (citing *Allstate Ins. Co. v. Fackette*, 125 Nev. 132, 138,
16 206 P.3d 572, 576 (2009)).

17 Unlike here with NRS 533.450, where the controlling statutory language was
18 enacted before the retention of a legislative history, in *Cold Springs*, the Court had the
19 benefit of an Attorney General Opinion as well as precedence to rely upon. *Id.*, 125 Nev.
20 at 631-32, 218 P.3d at 851. However, the Court’s findings are illustrative and applicable
21 to the interpretation of NRS 533.450. Specifically, the Court held that even though the
22 plaintiff did not own property that was *subject to the annexation*, plaintiff had adequately
23 pled a personal and adverse injury as a result of the annexation. *Id.*, 125 Nev. at 632-33,
24 218 P.3d at 852. The language contained in NRS 533.450(1) is reasonably similar such
25 that the analysis used by the Court in *Cold Springs* is persuasive here.

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

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

4 Quite simply, PFW is not a person whose interests have been adversely impacted
5 by Amended Order No. 1293A. As a preliminary step in reaching this conclusion, one
6 must look to the fact that PFW has been organized as a limited liability company under
7 Chapter 86 of the NRS. "A limited-liability company is an entity distinct from its
8 managers and members." NRS 86.201(3). Accordingly, a limited-liability company, such
9 as PFW, is a legal "person" in the eyes of Nevada law. Further, a limited-liability
10 company only represents the legal interests of the company itself, it cannot, independent
11 of its own legal interests, enforce the interests of rights of its members, except to "enforce
12 the member's rights against or liability to the company." NRS 86.381. An action may
13 only be initiated "by the real party in interest—one who possesses the right to enforce the
14 claim and has a significant interest in the litigation." *Beazer Homes Holding Corp. v.*
15 *Dist. Ct.*, 128 Nev. 723, 730-31, 291 P.3d 128, 133 (2012) (citing *Szilagvi v. Testa*, 99 Nev.
16 834, 838, 673 P.2d 495, 498 (1983)). See also NRCP 17(a). Thus, "a party generally has
17 standing to assert only its own rights and cannot raise the claims of a third party not
18 before the court." *Beazer*, 128 Nev. at 731, 291 P.3d at 133 (citing *Deal v. 999 Lakeshore*
19 *Ass'n*, 94 Nev. 301, 303, 579 P.2d 775, 777 (1978); see also *Warth v. Seldin*, 422 U.S. 490,
20 499 (1975)).

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

28 ///

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

3 Here, PFW is not a real party in interest under NRS 533.450 and lacks standing.
4 Based upon a review of the Nye County property records and the records of the Nevada
5 State Engineer, PFW neither owns any real property in the Pahrump Basin nor any
6 water rights. Moreover, there is no record of PFW submitting any Notice of Intent to
7 Drill card or other document pertaining to the drilling of a domestic well prior to
8 December 19, 2017 (the operative date for the exceptions provided under Amended Order
9 No. 1293A). The interests of PFW's members are immaterial to standing in this matter.
10 Just as a homeowner's association or condominium association lacked standing to bring
11 suit on behalf of its members, Petitioner cannot, as a matter of law, bring a petition for
12 judicial review based solely on the interest(s) of its members. *See Deal*, 94 Nev. at 304-05,
13 579 P.2d at 777-78; *Beazer*, 128 Nev. at 730-31, 291 P.3d at 133-34 ("[W]ithout statutory
14 authorization, a homeowners' association does not have standing to bring suit on behalf of
15 its members."). *See also* NRS 86.381, NRCP 17(a). PFW is an independent legal person
16 under Nevada law, and without having itself an interest affected by Amended Order
17 No. 1293A, it cannot be "adversely affected" in the manner necessary to convey standing
18 under NRS 533.450(1).

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

28 ///

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

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

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

13 Despite Petitioners' blanket assertion to the contrary, it is not clear that the
14 unidentified members of PFW have standing to sue in their own right. In fact, it would
15 seem that these individuals lack standing to sue on their own based on the limited
16 description of these individuals provided by Petitioners. In *Hunt*, the district court found
17 as a fact that a North Carolina statute caused harm to Washington apple growers
18 and dealers, and therefore they would have had standing to sue in their own right.
19 *Hunt*, 432 U.S. at 343-45, 97 S. Ct. at 2441-42. Here, and in specific regard to those
20 unknown members of PFW who are identified merely as "real-estate brokers" and
21 "owners of well drilling companies," any harm to these individuals' businesses is purely
22 speculative. The Petition does not provide any other grounds for how these unidentified
23 individuals are harmed by Amended Order No. 1293A, but rather asks this Court to
24 assume these individuals would have standing to sue in their own right based on an
25 inference that their businesses *might* be affected by Amended Order No. 1293A. This is
26 epitome of a speculative injury, and is neither concrete nor particularized as required
27 for constitutional standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61,
28 112 S. Ct. 2130, 2136 (1992).

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

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

13 V. CONCLUSION

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

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

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DATED this 8th day of October, 2018.

By:

CERTIFICATE OF SERVICE

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

-30-



FILED
FIFTH JUDICIAL DISTRICT

OCT 29 2018

Nye County Clerk

AMY DOWERS Deputy

Case No. CV39524
Dept 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

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

Petitioners,

ORDER SETTING HEARING

v

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

Respondent.

This Court has set this matter for hearing on November 8, 2018 at 10:00 in the Pahrump
District Court at 1520 E. Basin Ave. in Pahrump, Nevada.

DATED this 29 day of October 2018.

DISTRICT JUDGE

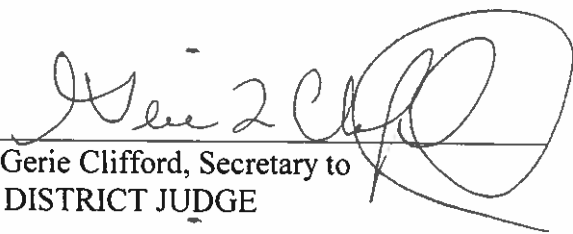


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The undersigned hereby certifies that on the 29 day of October 2018, she mailed
(or hand delivered) copies of the foregoing ORDER to the following:

Taggart & Taggart, LTD
108 N. Minnesota Street
Carson City, Nv. 8970

James N. Bolotin, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701


Gerie Clifford, Secretary to
DISTRICT JUDGE

FILED
FIFTH JUDICIAL DISTRICT

OCT 31 2018

Nye County Clerk
Terri Pemberton Deputy

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
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6 Attorneys for Petitioners

7
8 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF NYE

10 * * *

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

Case No. CV 39524

Dept. No. 2

14 Petitioners,

15 vs.

16 JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
17 DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,
18

19 Respondent.

20 **STIPULATION AND ORDER FOR EXTENSION OF TIME**

21 COMES NOW, Petitioners, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
22 company (hereinafter "PFW"), STEVEN PETERSON, an individual, MICHAEL LACH, an individual,
23 PAUL PECK, an individual, BRUCE JABOUR, an individual, and GERALD SCHULTE, an
24 individual (collectively "Petitioners"), by and through their counsel, PAUL G. TAGGART, ESQ. and
25 DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and Respondent,
26 JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT
27 OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State Engineer"), by and through
28

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1 his counsel, Deputy Attorney General JAMES N. BOLOTIN, ESQ., and hereby agree and stipulate as
2 follows:

3 That Petitioners shall have a three-day extension of time in which to file their Reply Brief.
4 Petitioners' Reply Brief is due on or before November 1, 2018.

5 A proposed order is attached hereto as Exhibit 1.

6 **AFFIRMATION**
Pursuant to NRS 239B.030

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

9 DATED this 25th day of October, 2018.

DATED this 25 day of October, 2018.

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15 By: 

16 PAUL G. TAGGART, ESQ.
17 Nevada State Bar No. 6136
18 DAVID H. RIGDON, ESQ.
19 Nevada State Bar No. 13567
20 Attorneys for Petitioner

21 By: 

22 JAMES N. BOLOTIN, ESQ.
23 Deputy Attorney General
24 Nevada State Bar No. 13829
25 Attorney for Respondent

CERTIFICATE OF SERVICE

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

[X] BY U.S. POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

DATED this 25th day of October, 2018.



Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>	<u>Page Count</u>
1.	[Proposed] Order Granting Stipulation and Order for Extension of Time	2

EXHIBIT 1

EXHIBIT 1

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IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

* * *

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

Petitioners,

vs.

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

Respondent.

Case No. 39524

Dept. No. 2

ORDER GRANTING STIPULATION AND ORDER FOR EXTENSION OF TIME

GOOD CAUSE APPEARING, this Court hereby **GRANTS** the Stipulation and Order for
Extension of Time.

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FILED
FIFTH JUDICIAL DISTRICT

NOV - 1 2018

Nye County Clerk
Sarah Westfall Deputy

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8 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF NYE

* * *

10 PAHRUMP FAIR WATER, LLC, a Nevada
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12 PAUL PECK, an individual; BRUCE JABEOUR,
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14 Petitioners,

15 vs.

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

19 Respondent.

CV
Case No. 39524

Dept. No. 2

20 **PETITIONERS' REPLY BRIEF**

21 COME NOW, Petitioners, PAHRUMP FAIR WATER, LLC, a Nevada limited-liability
22 company (hereinafter "PFW"); STEVEN PETERSON, an individual; MICHAEL LACH, an individual;
23 PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an
24 individual, by and through their counsel, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ.,
25 of the law firm of TAGGART & TAGGART, LTD., to hereby file their reply brief. This opening brief
26 is based on the attached memorandum of points and authorities, all pleadings and papers on file herein,
27 and any argument the Court may allow.

28 ///

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JT APP 4955

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Prior to the issuance of Order 1293 and Order 1293A, the common understanding in Nevada was that the State Engineer cannot and does not regulate domestic wells. Property owners have always been able to drill domestic wells on their property without a water right from the State Engineer. In this sense, domestic wells have always been *exempt* from the State Engineer's regulatory powers. This common and unremarkable understanding of Nevada water law dates back to the statutory adoption of Nevada's water law, and whenever a change has been made to the original water law, special care has been taken to protect the domestic well exemption from the State Engineer's control. Each and every amendment to the water law that addresses domestic wells has been adopted after significant debate that centered on the protection of the right of property owners to drill and use domestic wells. If the Legislature had ever considered the removal of the domestic well exemption that is required to authorize the State Engineer to issue Order 1293A, a large legislative record would exist to reflect such a dramatic change in the water law. No such record exists because the Legislature never considered such a shift in power.

The State Engineer rests his claim of authority in this case on the general regulatory powers contained in NRS 534.120(1) and NRS 534.110(8). Yet, neither of these statutes applies to domestic wells because, indisputably, neither statute mentions domestic wells. Accordingly, the State Engineer is not authorized by the general language in NRS 534.120(1) to place the restrictions contained in NRS 534.110(8) on domestic wells, and Orders 1293A should be overturned.

Instead of relying on an express power, as a state officer is required to do in Nevada, the State Engineer relies on a legislative declaration and general policy arguments to support his claim that Order 1293A is good. Legislative declarations are clearly not provisions of power for a state agency. And no matter how "good" the State Engineer may think a policy is, without an express statutory power, his office is not empowered to adopt legislative policy. Yet, that is exactly what Order 1293A is, and it should be overturned.

Not only is the State Engineer without statutory power to enact Order 1293A, the adoption of Order 1293A is unconstitutional. The right to drill a well *vests* for a property owner when their parcel is created. That right cannot be taken away without due process. Yet, the State Engineer, without notice

1 or due process of any kind, significantly impaired a fundamental property right. As the Nevada Supreme
2 Court has noted “[e]ight hundred years ago, the Magna Carta laid a foundation for individual property
3 rights, including the protection of private property from unlawful government takings.”¹ The high
4 regard for private property in our Anglo-American legal tradition is reflected in Blackstone’s
5 Commentaries as follows: “[s]o great moreover is the regard of the law for private property, that it will
6 not authorize the least violation of it; no, *not even for the general good of the whole community.*”²
7 Nevada closely adheres to this grand legal tradition and “enjoys a rich history of protecting private
8 property owners against government takings” in part because “the Nevada Constitution contemplates
9 *expansive* property rights.”³ Order 1293A clearly violates this tradition. Since the State Engineer
10 impaired significant property rights, Order 1293A is contrary to the Legislature’s express directive that
11 such wells are exempt from the State Engineer’s supervisory control, and for the other reasons raised
12 below, Order 1293A is unlawful.

13 STANDARD OF REVIEW

14 I. A Record Must Be Properly Developed By The State Engineer For Consideration In This 15 Petitions for Judicial Review.

16 “Any person feeling aggrieved by an order or decision of the State Engineer” may seek judicial
17 review of that order or decision.⁴ Judicial review is “in the nature of an appeal.”⁵ The role of the
18 reviewing court is to determine if the State Engineer’s decision was arbitrary, capricious, or an abuse of
19 discretion, or if it was otherwise affected by prejudicial legal error.⁶ A decision is arbitrary if it was
20 made “without consideration of or regard for facts, circumstances, fixed rules, or procedures.”⁷ A
21 decision is capricious if it is “contrary to the evidence or established rules on law.”⁸

22 In *Revert v. Ray*, the Nevada Supreme Court articulated the procedural safeguards the State
23 Engineer must employ prior to issuing an order or decision.⁹ First, the State Engineer must provide

24 ¹ *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41 at 9, 351 P.3d 736, 741 (2015).

25 ² 1 WILLIAM BLACKSTONE, COMMENTARIES 135 (emphasis added).

26 ³ *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41 at 9, 351 P.3d at 741 (emphasis added).

27 ⁴ NRS 533.450(1).

28 ⁵ NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

⁶ *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Shetakis Dist. v. State, Dep’t of Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).

⁷ BLACK’S LAW DICTIONARY 125 (10th ed. 2014) (definition of “arbitrary”).

⁸ BLACK’S LAW DICTIONARY 254 (10th ed. 2014) (definition of “capricious”).

⁹ *Revert*, 95 Nev. 782, 603 P.2d 262.

1 affected parties with a “full opportunity to be heard” and “must clearly resolve all the crucial issues
2 presented.”¹⁰ Next, the State Engineer’s order or decision must include “findings in sufficient detail to
3 permit judicial review.”¹¹ Finally, if such procedures are not followed and “the resulting administrative
4 decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion,” a court should not
5 hesitate to intervene and block the enforcement of the order or decision.¹²

6 Here, the State Engineer provided no notice that he was intending to issue the Orders, nor did he
7 hold any hearing or seek any comments from affected property owners. Accordingly, unlike with other
8 appellate-type proceedings, there is little to no record below for the Court to review. While the State
9 Engineer has provided an ostensible “record on appeal” for the Court’s consideration, this record
10 consists of nothing more than hand-picked documents that the State Engineer claims he relied on in
11 making his decision. None of the documents have been authenticated or validated, nor have the authors
12 of the documents been required to testify in a formal hearing or been subjected to cross-examination. In
13 addition, no one from the State Engineer’s office has provided any testimony or evidence supporting his
14 claim of reliance on these documents. Accordingly, none of the processes and procedures which are
15 designed to ensure a full and fair opportunity to challenge evidence before a decision, or to verify that
16 evidence submitted to the Court is relevant and accurate have been followed. Accordingly, the Court
17 should review such materials with a skeptical eye, and, at a minimum, remand this matter for a hearing
18 that properly allows the petitioners with a full opportunity to challenge the evidence the State Engineer
19 now uses to justify his order.

20 **II. The Court Is Required To Conduct A De Novo Review Of The State Engineer’s Erroneous**
21 **Interpretations Of Nevada Water Law.**

22 The State Engineer claims “[d]ecisions of the State Engineer are entitled not only to deference
23 with respect to factual determinations, but also with respect to legal conclusions.”¹³ The only citation
24 provided in support of this claim is to a thirty-year old case. Meanwhile the State Engineer ignores more
25 recent precedent rolling back such deference as well as *Revert v. Ray*’s admonition that any deference
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27 ¹⁰ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

28 ¹¹ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

¹² *Id.*

¹³ Answering Brief at 8:20-21 (citing *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

1 afforded to the State Engineer is pre-conditioned on his adherence to certain procedural safeguards that
2 were not followed in this case.

3 The Nevada Supreme Court has clearly and unambiguously held that “[w]hile the State
4 Engineer’s interpretation of a statute is persuasive, it is not controlling”¹⁴ and that a reviewing court is
5 required to “decide pure legal questions *without deference* to an agency determination.”¹⁵ The latter of
6 these holdings was issued this year and reflects the Nevada Supreme Court’s current thinking. This
7 more recent precedent effectively overturns the thirty-year old case the State Engineer cited.

8 The State Engineer asserts that this Court should adopt a *Chevron*-like standard of review to the
9 State Engineer’s legal conclusions.¹⁶ The State Engineer’s argument is without merit and fails to
10 consider these recent Nevada Supreme Court cases. The State Engineer initially cites NRS 533.450 as
11 the basis for his assertion. However, NRS 533.450 establishes no such standard, either expressly or by
12 implication, and the Nevada Supreme Court has never adopted the *Chevron* standard for purely legal
13 questions. In fact, in *Town of Eureka*, the Supreme Court held just the opposite – that a “district court
14 is free to decide purely legal questions . . . *without deference* to the agency’s decision.”¹⁷

15 In *Town of Eureka*, the Court specifically reviewed the standard of review that was articulated
16 in *State v. State Engineer*¹⁸ – the standard the State Engineer relied on in his Opposition.¹⁹ Contrary to
17 the State Engineer’s assertion that *State v. State Engineer* established a deferential standard of review
18 for legal questions, the Nevada Supreme Court interpreted the holding of *State v. State Engineer* as
19 follows: “[w]hile the State Engineer’s interpretation of a statute is persuasive, *it is not controlling*.”²⁰
20 This is significantly different than the State Engineer’s assertion that a court should give great deference
21 to the State Engineer’s legal conclusions. Because *Town of Eureka* was decided after *State v. State*
22 *Engineer*, and specifically limited the scope of the standard of review articulated in *State v. State*
23 *Engineer*, *Town of Eureka* controls the review of this case.

24 ¹⁴ *Town of Eureka v. Office of State Eng’r, State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992).

25 ¹⁵ *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

26 ¹⁶ See *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a
27 deferential standard of review for federal courts reviewing legal determinations of federal agencies).

28 ¹⁷ *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986))
(emphasis added).

¹⁸ 104 Nev. 709, 766 P.2d 263.

¹⁹ Opposition at 13:14-19.

²⁰ *Town of Eureka*, 108 Nev. at 165-66, 826 P.2d at 950 (citing *State v. State Eng’r*, 104 Nev. at 713, 766 P.2d at 266)
(emphasis added).

1 Importantly, the non-deferential standard of review enunciated in *Town of Eureka* was
2 reaffirmed by the Nevada Supreme Court as recently as February 15, 2018. In *Felton v. Douglas County*,
3 the Supreme Court noted that the “standard for reviewing petitions for judicial review of administrative
4 decisions is to “decide pure legal questions *without deference* to an agency determination.”²¹ The
5 Supreme Court stated that in such cases, a court should apply “a de novo standard of review to questions
6 of law, which includes the administrative construction of statutes.”²²

7 The Nevada Supreme Court’s recent holding in *Felton* is consistent with the evolving rollback
8 of judicial deference to legal interpretations made by administrative agencies. Several legal scholars
9 and judges have criticized *Chevron*-like standards of review²³ because they create within the judiciary
10 an “institutional bias in favor of the most powerful parties (the [] bureaucracy), which violates parties’
11 due process rights when their life, liberty, or property is at issue.”²⁴ Several prominent legal scholars
12 and judges have criticized deferential standards of review because they create within the judiciary an
13 “institutional bias in favor of the most powerful parties [the administrative bureaucracy] which violates
14 parties’ due process rights when their life, liberty, or property is at issue.”²⁵ Another prominent legal
15 scholar has noted that “when a judge ‘respects,’ ‘defers,’ or otherwise relies on an agency’s judgment
16 about the law . . . she needs to worry not about an agency’s authority, but more centrally about whether
17 she candidly is abandoning her very office as a judge and denying due process of law.”²⁶ Justice Gorsuch
18 has lamented that “under *Chevron*, the problem remains that courts are not fulfilling their duty to
19 interpret the law and declare invalid agency actions inconsistent with those interpretations.”²⁷

21 ²¹ *Felton v. Douglas County*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d at 994 (emphasis added).

22 ²² *Id.*

23 ²³ See e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Jeffery A.
24 Pojanowski, *Without Deference*, 81 Missouri Law Review 1075 (2016); Christopher J. Walker, *Attacking Auer and Chevron*
25 *Deference: A Literature Review*, 15 Georgetown Journal of Law and Public Policy ____ (forthcoming 2018) (published by
The Ohio State University Moritz College of Law, Public Law and Legal Working Paper Series No. 408, September 4, 2017,
revised October 3, 2017); John C. Eastman, *The President’s Pen and the Bureaucrat’s Fiefdom*, 40 Harvard Journal of Law
and Public Policy 639 (June 2017).

26 ²⁴ Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 Georgetown Journal of Law and
Public Policy ____ (forthcoming 2018) (published by The Ohio State University Moritz College of Law, Public Law and
Legal Working Paper Series No. 408, September 4, 2017, revised October 3, 2017).

27 ²⁵ Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 Georgetown Journal of Law and
Public Policy ____ (forthcoming 2018) (published by The Ohio State University Moritz College of Law, Public Law and
Legal Working Paper Series No. 408, September 4, 2017, revised October 3, 2017).

28 ²⁶ Phillip Hamburger, *Chevron Bias*, 84 George Washington Law Review 1192 (2016).

²⁷ *Gutierrez-Brizuela*, 834 F.3d at 1153.

1 As was stated more than 200 years ago “[i]t is emphatically the province and duty of the judicial
2 department to say what the law is.”²⁸ As his title suggests, the State Engineer is a professional engineer
3 by background and training. There is nothing in his educational background that provides him with any
4 special expertise regarding the common law rules of statutory construction or legal interpretation.
5 Rather, it is the courts which possess the greatest expertise in these areas. Accordingly, the Court should
6 not give any deference to the State Engineer’s legal determinations. This is especially true with respect
7 to determinations regarding the scope and limit of his own authority.

8 ARGUMENT

9 **I. The State Engineer Does Not Have Legal Authority To Issue Amended Order 1293A** 10 **Because Domestic Wells Are Exempt From The State Engineer’s Regulatory Powers.**

11 The language of NRS 534.030(4) is plain and unambiguous. The statute grants the State
12 Engineer general supervisory power over all groundwater wells in Nevada *except* domestic wells. The
13 history of this particular provision, and of the groundwater law in general, clearly demonstrate that the
14 Legislature purposely intended to exempt domestic wells from the State Engineer’s regulatory authority
15 except in certain limited circumstances that do not apply to the present case. Accordingly, the Orders
16 are an invalid exercise of authority that the State Engineer does not possess and should be overturned.

17 Also, the State Engineer has no implied powers. The State Engineer is a creature of statute and
18 has only those powers expressly granted to him by the Legislature. Water law is “special in character”
19 and its provisions “not only lay down the method of procedure but strictly limit the method to that
20 provided” in the statutes.²⁹ The State Engineer simply has no inherent equitable powers and is wholly
21 “without discretion to violate express statutory language *even where the equities lie in favor of doing*
22 *so.*”³⁰ Accordingly, the State Engineer’s protestations that the Orders are desperately needed to help
23 him manage groundwater in the basin are wholly irrelevant to a determination of whether he has the
24 power to issue them. The only determination that the Court must make is whether the Legislature has
25 expressly authorized the State Engineer to issue the Orders. In this case, not only has the Legislature
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27

28 ²⁸ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²⁹ *Preferred Equities Corp. v. State Eng’r, State of Nev.*, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003).

³⁰ *State Eng’r v. Am. Nat’l Ins. Co.*, 88 Nev. 424, 426-27, 498 P.2d 1329, 1330-31 (1972) (emphasis added).

1 not provided such an authorization, it has expressly stated the opposite – that domestic wells are exempt
2 from the State Engineer’s supervisory power.

3 A. Nevada’s groundwater law, NRS 534.030(4), exempt’s domestic wells from the State
4 Engineer’s control.

5 Nevada’s first groundwater law was passed in 1939. The 1939 statute brought groundwater
6 appropriations under the same permitting system that had previously been implemented for surface
7 water. Notably, however, the statute exempted domestic wells from the requirements of its provisions.
8 Specifically, the 1939 statute stated that:

9 This act [the groundwater law] shall not apply to the developing and use
10 of underground water for domestic purposes where the draught does not
11 exceed two gallons per minute and where the water developed is not from
an artesian well.³¹

12 This exemption meant that the drilling of domestic wells would continue to be governed by the common
13 law in effect at the time.³² Under the common law, a person could drill a domestic well on their parcel
14 without seeking prior permission from the State Engineer or any other government official. If such a
15 well interfered with the wells of a more senior appropriator of groundwater, that senior appropriator
16 could seek an appropriate remedy in a court proceeding. Because under the common law property
17 owners had an absolute right to drill a domestic well to support the development of a household on their
18 property, any provisions of the groundwater law restricting that right must be strictly construed.³³

19 In 1947 the groundwater law was significantly amended. In addition to the provision noted
20 above (which later became codified as NRS 534.180(1)), the 1947 law also included a section providing
21 that that:

22 Upon receipt by the state engineer of a petition requesting him to
23 administer the provisions of this act, as relating to designated areas . . . he
24 shall designate such area by basin, or by subbasin, or by township and
25 proceed with the administration of this act as provided for herein. *Such*
supervision to be exercised on all wells tapping artesian water or water

26 ³¹ 1939 STATUTES OF NEVADA 274-75.

27 ³² ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) (“statutes will
not be interpreted as changing the common law unless they effect that change with clarity.”).

28 ³³ *Orr Ditch & Water Co. v. Justice Court of Reno Tp., Washoe Cty.*, 64 Nev. 138, 164, 178 P.2d 558, 570 (1947) (“Another
important rule of statutory construction, very generally applied, is the rule which provides that statutes in derogation of the
common law shall be strictly construed, in the absence of any statute changing the rule.”) (quoting Crawford on Statutory
Construction, § 228, pp. 422, 423).

1 *in definable underground aquifers drilled subsequent to March 22, 1913,*
2 *and on all wells tapping percolating water, the course and boundaries of*
3 *which are incapable of determination, drilled subsequent to March 25,*
 1939; save and excepting those wells coming under the provisions of
 *section 3 of this act.*³⁴

4 With minor amendments, the italicized portion of this provision later became codified as NRS
5 534.030(4).

6 The new section included in the 1947 act authorized the State Engineer to move beyond mere
7 permitting of groundwater wells and instead “supervise” all wells and groundwater withdrawals in
8 certain designated basins. Supervision includes all “acts involved in managing, directing, or overseeing
9 persons or projects.”³⁵ Therefore, this section of the groundwater law expressly authorized the State
10 Engineer to generally manage, direct, and oversee groundwater withdrawals in designated basins (like
11 Pahrump) and is the basis for his authority to do so. However, the statute expressly excluded domestic
12 wells from the State Engineer’s regulatory powers by stating “excepting those wells coming under the
13 provisions of section 3 of this act” (i.e., domestic wells).³⁶

14 Two separate and distinct protections for domestic wells are provided under NRS 534.180(1)
15 and NRS 534.030(4) in the form of further exemptions from the State Engineer’s regulatory control.
16 Under NRS 534.180(1), such wells are exempt from the State Engineer’s permitting process while NRS
17 534.030(4) separately exempts them from the State Engineer’s general supervisory control.
18 Accordingly, the State Engineer is wrong when he claims that “NRS 534.030(4) specifically exempts
19 domestic wells from the permitting process.”³⁷ Instead, as shown above, it is NRS 534.180(1) that
20 exempts domestic wells from the permitting process while NRS 534.030(4) provides an additional
21 exemption that removes domestic wells from the State Engineer’s general supervisory control.

22 Because domestic wells are afforded an exemption from the State Engineer’s regulatory purview,
23 the only way he can issue a regulation governing them is if he can point to a specific statute that
24 authorizes him to do so. With respect to the Orders in question, he has not and cannot do this because
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27 ³⁴ 1939 STATUTES OF NEVADA 53 (emphasis added).

28 ³⁵ BLACK’S LAW DICTIONARY 1667 (10th ed. 2014).

³⁶ 1947 STATUTES OF NEVADA 53.

³⁷ Answering Brief at 12:21-22.

1 no such statute exists. Accordingly, the State Engineer is without authority to issue Order 1293A and it
2 must be overturned.

3 **B. Specific exceptions to the general rule do not grant the State Engineer broad**
4 **regulatory power over domestic wells.**

5 Very limited exceptions have been adopted by the Legislature from the general exemption of
6 domestic wells from the State Engineer's regulatory powers. None of these limited exceptions authorize
7 Order 1293A because none of them allow the State Engineer to ban the drilling of new domestic wells
8 on *existing* parcels.

9 For example, NRS 534.120(3)(d) authorizes the State Engineer to prohibit the drilling of new
10 domestic wells in "areas where water can be furnished by an entity such as a water district or
11 municipality" (i.e., where the property owner can reasonably get water from other sources). Likewise,
12 NRS 534.120(3)(e) allows the State Engineer to require a dedication of water rights when a *new* parcel
13 is created (but not for existing parcels). Clearly, neither of these provisions authorize Order 1293A
14 because Order 1293A prohibits new domestic wells in areas where water cannot be furnished by a water
15 purveyor, and on existing parcels.

16 Further, the enactment of NRS 534.120(3)(d) and (e) demonstrates that an express provision of
17 statute is needed to give the State Engineer the power over domestic wells that is needed to justify Order
18 1293A, and since no such statute exists, Order 1293A is not valid. First, neither of these provisions
19 would be needed if the State Engineer had the implied power he claims. The State Engineer claims that
20 NRS 534.110(8) applies *generally* to domestic wells, and justifies Order 1293A. But if that were true,
21 the language of NRS 534.120(3)(d) would be unnecessary and rendered nugatory. That result is contrary
22 to the foundational principle of statutory interpretation that every provision of a statute is to be given
23 effect and no provision should be given an interpretation that causes it to duplicate another provision or
24 cause another provision to have no consequence.³⁸

25 As noted above, NRS 534.120(3)(d) provides a specific condition under which the State
26 Engineer is authorized to restrict the drilling of new domestic wells – if the property on which the well
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28 ³⁸ *Paramount Ins., Inc. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) ("No part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can be properly avoided.")

1 is proposed to be located can reasonably be served by a municipal utility. The obvious corollary to this
2 rule is that if the condition does not exist (i.e., if no other water source is available to serve the property),
3 the State Engineer is not authorized to restrict the property owner from installing a domestic well.
4 However, if the State Engineer could order, as he claims, a general ban on new domestic wells under
5 NRS 534.110(8) (regardless of whether an alternative source of water is available) then the conditional
6 language of NRS 534.120(3)(d) has no practical effect.

7 The simple question that the State Engineer has never provided a satisfactory answer to is – if,
8 as he claims, NRS 534.030(4) does not exempt domestic wells from his general supervisory powers,
9 why did the Legislature find it necessary to adopt special statutes granting him limited authority over
10 such wells in specific circumstances? For example, NRS 534.110(6) allows the State Engineer to order
11 a curtailment of pumping in a basin in certain limited circumstances. This provision was first enacted
12 in 1955.³⁹ From the time it was enacted until 2011 the statute did not contain language making it
13 applicable to domestic wells. In 2011, the Legislature specifically added the language “including,
14 without limitation, withdrawals from domestic wells”⁴⁰ indicating a specific desire to bring domestic
15 wells within the statute’s reach. This language would be wholly superfluous if the State Engineer has
16 the general regulatory power he claims.

17 By contrast, no express language has ever been included in NRS 534.110(8) or NRS 534.120(1).
18 Just as including such language in NRS 534.110(6) demonstrates legislative intent to have its provisions
19 apply to domestic wells, excluding similar language in NRS 534.110(8) or NRS 534.120 demonstrates
20 a legislative intent not to have the statute apply to such wells. Neither a legislative declaration, nor the
21 policy reasons the State Engineer relies on, can provide that power either.⁴¹ The Legislature must be
22 presumed to mean what it says, and say what it means.⁴² When the Legislature has seen fit to apply
23 specific provisions of the water law to domestic wells, it has done so with unambiguous language and
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25 ³⁹ 1955 STATUTES OF NEVADA 331.

26 ⁴⁰ 2011 Assembly Bill 419.

27 ⁴¹ *Price Dev. Co., L.P. v. Orem City*, 995 P.2d 1237, 1246 (Utah 2000) (“a preamble is nothing more than a statement of policy
28 which confers no substantive rights.”); *see River Dev. Corp. v. Liberty Corp.*, 133 A.2d 373, 383 (N.J. Ch. 1957) (preamble
of a statute is not appropriate too for construing statute, unless the statute itself is ambiguous); *State v. Ohio Oil Co.*, 49 N.E.
809, 813 (Ind. 1898) (“as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of
the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and
meaning of the legislature, is, in itself, fatal to the claim set up.”).

⁴² *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

1 clear intent. Where, as here, the Legislature has not clearly expressed such intent in a statute, it cannot
2 be presumed to intend that outcome. Accordingly, the State Engineer is not authorized by the general
3 language in NRS 534.120(1) to place the restrictions contained in NRS 534.110(8) on domestic wells,
4 and Orders 1293A should be overturned.

5 **II. The State Engineer Violated Basic Constitutional Due Process Safeguards When He Issued**
6 **The Orders Without Providing Notice Or A Hearing.**

7 The State Engineer concedes that if the right to drill a domestic well is a vested property right,
8 constitutional due process protections attach, and notice and hearing are required.⁴³ Accordingly, the
9 State Engineer is left making the rather strained argument that notice was not required because the right
10 to drill a domestic well is not a vested property right. The State Engineer is wrong. His argument is
11 based solely on language in NRS 533.024(1)(b) which establishes a “protectable interest” in already-
12 drilled domestic wells that was intended to protect such wells from unreasonable adverse effects caused
13 by other wells. In making this argument, the State Engineer conflates two separate and distinct property
14 interests and ignores Nevada’s history of interpreting property rights expansively.

15 **A. The right to drill a domestic well is a fundamental property right in Nevada.**

16 Order 1293A applies to existing parcels, and the property interests on those parcels has most
17 certainly *vested* in the constitutional sense. For instance, each parcel owner is entitled to build a home.
18 Each owner is also allowed to a water supply, and that right has been recognized since statehood, in the
19 adoption of the water code, and every amendment to the water code. That right to build a home and
20 have a water supply vested when each parcel was created. After the right to build a house vests, a local
21 government cannot take action to impair that vested right without proper notice and a hearing.⁴⁴
22 Likewise, the State Engineer cannot take an action that impairs the vested right to build a home or build
23 a water supply. Yet, Order 1293A does exactly that, and was adopted without notice and a hearing.
24 Therefore, Order 1293A must be overturned.

25 In 2011, Assemblyman (now Senator) Goicoechea testified during a Legislative hearing that
26 “with domestic wells in the state, if you have a parcel created, you have a right to drill a domestic well
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28 ⁴³ Answering Brief at 13:13-16.

⁴⁴ *City of Reno v. Nev. First Thrift*, 100 Nev. 483, 686 P.2d 231 (1984).

1 and I do not think anyone argues that.”⁴⁵ At the time he uttered this statement, it was uncontroversial
2 and reflected the conventional understanding regarding domestic wells – that the right to drill a domestic
3 well, if no other source of water is available, is one of the fundamental sticks in the bundle of rights that
4 comes with ownership of property.⁴⁶ In an arid climate such as ours, without this right a parcel of land
5 becomes effectively unusable and valueless. Importantly, Assemblyman Goicoechea’s statement was
6 made almost 20 years after the Legislature passed NRS 533.024(1)(b) giving domestic wells statutory
7 protection from adverse effects caused by other wells.

8 Now the State Engineer argues that the “protectable interest” language in NRS 533.024(1)(b)
9 fundamentally altered prior legislation, and gave the State Engineer the right to prohibit domestic wells.
10 But, in fact, this “protectable interest” language was intended for a whole different purpose.

11 1. **A “protectable interest in a domestic well” is not the same thing as a right to**
12 **drill a domestic well.**

13 The Legislature enacted NRS 533.024(1)(b) for the sole purpose of ensuring that the existing
14 domestic wells would be considered when the State Engineer was reviewing permit applications for
15 other uses of water. This is why it is included in NRS Chapter 533, which governs the application and
16 permitting process, and not in NRS Chapter 534, which governs the management of groundwater
17 resources. This provision was never intended to delimit or restrict a property owner’s right to drill a
18 domestic well. Rather, the intent was clearly to provide extra protection for such a well once it was
19 operational.

20 In presenting an amendment to NRS 533.024(1)(b) in the 2001 Legislature, Ms. Eissmann, a
21 senior research analyst with the Legislative Counsel Bureau, defined the term “protectable interest” as
22 follows – “‘protectible interest’ means protection of the *domestic well’s water supply* from unreasonable
23 impacts [from other wells].”⁴⁷ This was confirmed by Nevada State Engineer Michael Turnipseed who
24 opined that the bill was needed because “a municipal well’s cone of depression could impact domestic
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26 ⁴⁵ March 30, 2011, Assembly Committee on Government Affairs p. 72.

27 ⁴⁶ See generally STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 45-72 (Harvard
28 University Press, 2011) (discussing the origins and history of the “bundle of rights” theory of property ownership). See also
McCarran Int’l Airport v. Sisolak, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006) (“The term ‘property’ includes all rights
inherent in ownership, including the right to possess, use, and enjoy the property.”).

⁴⁷ ROA 910.

1 wells” in a basin.⁴⁸ These statements clearly indicate that the “protectable interest” created by NRS
2 534.024(1)(b) is a right to protect the water supply of an existing domestic well from harm caused by
3 large productions wells.

4 This conclusion is reinforced when one considers how the “protectable interest” language is used
5 in the rest of the water law statute. For example, the provisions of NRS 533.370 set the standards for
6 approvals of permit applications. Under NRS 533.370(2) the State Engineer is forbidden from
7 approving an application that “conflicts with existing rights or with protectable interests in existing
8 domestic wells.” Clearly, this statute is intended to enforce NRS 533.024(1)(b)’s legislative declaration
9 that domestic wells be protected from harm caused by other water users and provides further evidence
10 that in establishing such an interest, the Legislature was not acting in a manner to restrict property
11 owners’ existing common law right to drill a domestic well on their property. This definition did not
12 alter, nor could it alter, the meaning of the right to drill a domestic well in Nevada.

13 **2. Nevada defines property rights expansively.**

14 The Nevada Constitution guarantees every person’s right to acquire, possess, and protect their
15 property.⁴⁹ The Nevada Supreme Court has held that “the Nevada Constitution contemplates expansive
16 property rights” and noted that “our State enjoys a rich history of protecting private property owners
17 against government takings.”⁵⁰ As noted above, the right of a property owner to drill a well on their
18 property to support the development of a household has been a key stick in the bundle of rights that
19 comes with ownership of property in Nevada. This right has existed since before statehood, has been
20 recognized by legislators, judges, lawyers, and ordinary citizens, and has never been abrogated by either
21 a legislative act or judicial determination.

22 **3. The right to drill a domestic well vests when a parcel is created.**

23 As noted above, the right to protect an existing well from adverse effects of other wells naturally
24 arises only after such a well is established. However, the right to drill a well arises when a parcel is
25 created. Nevada Supreme Court decisions regarding the vesting of development rights hold that “[i]n
26 order for rights in a proposed development project to vest, zoning or use approvals must not be subject
27

28 ⁴⁸ *Id.*

⁴⁹ *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41 at 9, 351 P.3d at 741.

⁵⁰ *McCarran Int’l Airport*, 122 Nev. at 670, 137 P.3d at 1127.

1 to further governmental discretionary action affecting project commencement.”⁵¹ Under this standard,
2 the right to drill a domestic well becomes vested at the time when the property owner can commence
3 drilling the well without the need to seek further discretionary approval from a governmental entity.

4 Domestic wells are specifically exempt from the discretionary permitting requirements of the
5 statutory water law under NRS 534.180(1). Therefore, once a parcel is created, there are no additional
6 discretionary approvals that are required before the property owner can drill a domestic well on the
7 property. Accordingly, pursuant to the logic of *American West*, the right to drill a domestic well
8 naturally vests once the parcel in question has been created. This is eminently logical, since that is the
9 point in time at which the property owner can also proceed with establishing a household on the property.

10 Because Nevada defines property rights expansively, and because the right to drill a domestic
11 well becomes vested once the parcel is created, the State Engineer is without power to issue a regulation
12 impairing that right unless he first, at a minimum, provides individual notice to affected property owners
13 and allows them the opportunity to be heard. Accordingly, the Order 1293A is invalid and must be
14 overturned.

15 **B. The State Engineer failed to provide notice and a hearing before impairing**
16 **Petitioner’s fundamental property rights.**

17 The State Engineer issued Order 1293 on December 19, 2017, without any prior notice or
18 publication and without holding a hearing. Order 1293A was issued while the appeal over Order 1293
19 was pending. The State Engineer issued Order 1293A without any prior notice or publication (and
20 without notifying either the Court or opposing counsel). These facts are a matter of public record and
21 are undisputed. The Nevada Supreme Court has ruled that prior to issuing a regulation affecting an
22 interest in real property a regulatory body must provide personal notice to each affected property
23 owner.⁵² Said notice must include the content of the regulation so that affected parties can adequately
24 prepare to oppose it.⁵³ Finally, the regulatory body must hold a hearing and allow affected property
25 owners the opportunity to provide testimony and evidence related to the regulation.⁵⁴ A failure to follow
26

27 ⁵¹ *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (hereinafter “*American West*”).

28 ⁵² *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

⁵³ *Id.*

⁵⁴ *Id.*