Case No. 77722

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

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

Respondents.

Electronically Filed
Mar 26 2019 02:27 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENTS' ANSWERING BRIEF

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) 882-9900 – Telephone
(775) 883-9900 – Facsimile
paul@legaltnt.com
david@legaltnt.com

Attorneys for Respondents

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certified that the following are persons and entities as described in Nevada Rules of Appellate Procedure ("NRAP") 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification and recusal. Pahrump Fair Water, LLC is a Nevada limited-liability company.

Pahrump Fair Water, LLC was represented in the district court by:

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
TAGGART & TAGGART, LTD.

DATED this 26th day of March, 2019.

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

By: /s/ Paul G. Taggart
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Other Authorities

ISSUES PRESENTED

1. Whether the right to a domestic water supply on parcels in Pahrump, Nevada, was impaired in violation of the due process clauses of the Nevada and United States Constitutions because Order 1293A was issued without notice or a hearing.

2. Whether the State Engineer lacks authority over the permitting of domestic wells and water supplies, and therefore did not have the authority to issue Order 1293A.

3. Whether the State Engineer's issued Order 1293A without substantial evidence to support his decision to prohibit the drilling of domestic wells in Pahrump, Nevada.

4. Whether the State Engineer violated the takings clauses of the Nevada and United States Constitutions when he issued Order 1293A.

STATEMENT OF THE CASE

Rural Nevadans rely on domestic wells to live. Since public water systems do not extend into rural areas, domestic wells are critical to the use of thousands of privately owned lots across Nevada.[1] The Legislature has repeatedly protected the right of rural landowners to their domestic water supply. First, when the Legislature

[1] Nevada Division of Water Planning, Nevada State Water Plan (1999) (on file at the State Engineer's office).

created the State Engineer's office, it prohibited the State Engineer from requiring a permit for domestic wells. Ever since, whenever domestic wells have been considered in new legislation, the Legislature has maintained that basic protection for the domestic water supplies.[2] The State Engineer has repeatedly agreed, and has repeatedly told the Legislature in testimony, that he "is not authorized to deny a person his *right to drill a domestic well.*"[3] Until now.

The State Engineer enacted Order 1293A to prohibit private property owners in Pahrump, Nevada, from drilling domestic wells for their water supplies. Nevada law only allows the State Engineer to prohibit the drilling of domestic well in places where water can be furnished by a water utility, but Order 1293A goes far beyond areas that are served by municipal purveyors.[4] And the State Engineer's newfound claim of power over domestic water supplies in Pahrump was enacted without *any* notice or a hearing.

The district court reversed Order 1293A because it was issued without notice and a hearing. The district court also found the State Engineer does not have the

---

[2] This regulatory scheme ensures that every Nevada property has access to a water supply that can support the needs of a household including drinking water, food preparation, bathing, and landscape irrigation. *See* Nevada State Water Plan at 3-17.

[3] *Minutes of the Meeting of the Subcomm. to Study Domestic and Mun. Water Wells*, July 14, 2000 (statement of State Engineer Michael Turnipseed in response to inquiry by Chairman Dean Rhoads).

[4] NRS 534.120(3).

authority to issue Order 1293A, and that substantial evidence did not support Order 1293A. The district court was correct, and should be affirmed.

STATEMENT OF FACTS

I. Issuance of Order 1293 Without Notice or a Hearing

On December 19, 2017, the State Engineer issued Order 1293 without any public notice or a hearing. In Order 1293, the State Engineer banned the drilling of new domestic wells on *all existing parcels* in the Pahrump basin, regardless of the proximity of the property to other wells or to areas of the basin where water levels might be declining.

Order 1293 was issued at the start of the Christmas and New Year's holiday break, and NRS 533.450(1) provides just 30 days for persons feeling aggrieved to appeal a State Engineer decision. Affected property owners in Pahrump had little time to notify others of Order 1293, organize themselves, and hire legal counsel.[5] A group of persons who felt aggrieved by Order 1293 determined the most efficient way to challenge Order 1293 was to form an association to collectively represent their interests. On January 9, 2018, Pahrump Fair Water, LLC ("PFW") was established for the express purpose of challenging Order 1293.[6]

[5] This process was complicated by the fact that for several months after Order 1293 was issued the State Engineer could not accurately answer questions from property owners about whether the new regulation applied to their particular properties. JT APP 4549:18-4550:8; JT APP 4563:8-4565:11.
[6] JT APP 4518:22-24.

II. PFW's Petition for Judicial Review of Order 1293

On January 18, 2018, PFW filed a petition for judicial review of Order 1293.[7] On February 1, 2018, PFW filed a motion for a stay.[8] Due to judicial recusals and scheduling issues, an evidentiary hearing on the motion for stay was not held until May 10, 2018. The State Engineer and members of his staff attended the district court hearing.[9]

Members of PFW testified regarding the harm that they suffering as a result of Order 1293. Property owners testified that they performed due diligence before purchasing their property and confirming that they could have a well.[10] Testimony also established that properties are valueless without a well.[11] Order 1293 also impacted the ability of property owners to obtain financing to construct a home.[12]

The district court heard PFW's testimony and raised concerns about the retroactive enforcement of the order, and asked counsel for the State Engineer if the order could be amended to address that concern.[13] During this discussion, the State Engineer acknowledged that the order could be amended, but did not indicate a

[7] JT APP 3696-3708.
[8] JT APP 3711-3731.
[9] JT APP 4451:1-4.
[10] JT APP 4581:20-4582:17.
[11] JT APP 4523:11-4526:22; *see also* JT APP 4005, 4006, 4010, 4015, 4022, 4023, 4024.
[12] JT APP 4005.
[13] JT APP 4661:17-4663:19.

willingness to do so.[14] The district court also expressed serious concerns with the manner in which Order 1293 was issued:

> I'm extremely concerned about there not having been notice and the right to be heard. . . . And I can't off the top of my head think of any instance where the agencies weren't required to give notice and a right to be heard to people that were going to be affected.[15]

At the conclusion of the hearing on the motion for stay, the district court scheduled a hearing on the merits of PFW's petition. On July 6, 2018, PFW timely filed its opening brief on the merits.[16]

III. Issuance of Order 1293A, also Without Notice or a Hearing

On July 12, 2018, the State Engineer issued Order 1293A. Order 1293A was issued while Order 1293 was being reviewed by the district court, and the State Engineer did not seek leave to amend Order 1293. Order 1293A is an exact duplicate of Order 1293 with one exception. In Order 1293A, the State Engineer authorized an exemption for individuals who had either (1) submitted a notice of intent to drill a domestic well, or (2) filed for a building permit, before the issuance of Order 1293. The exemption addressed the retroactive enforcement issue that the district court raised at the previous hearing.

[14] *Id*.
[15] JT APP 4681:25-4683:6.
[16] JT APP 4729-4751.

Immediately after issuing Order 1293A, the State Engineer filed a motion requesting that PFW's appeal of Order 1293 be dismissed because the State Engineer argued the issuance of Order 1293A rendered that appeal moot.[17] On August 10, 2018, PFW and the State Engineer entered into a settlement agreement whereby PFW agreed to dismiss its appeal of Order 1293, and file a new appeal of Order 1293A. In return, the State Engineer agreed to expedite the briefing schedule and hearing for the new appeal.

IV. Respondents' Second Petition for Judicial Review

On August 10, 2018, PFW, along with five individuals who are members of PFW,[18] filed a new petition for judicial review of Order 1293A.[19] Despite the fact that the State Engineer was present and participated in the proceedings on Order 1293, the record submitted by the State Engineer in the appeal of Order 1293A did not include any of the evidence or testimony that was adduced in the Order 1293 action.[20] PFW submitted a supplemental record on appeal ("SROA") that included those missing records.[21] The State Engineer challenged the SROA claiming, without evidence, that "it consists of documents that the State Engineer did not consider in

[17] JT APP 4861-4873.
[18] From this point forward, Respondents will be collectively referred to as "PFW."
[19] JT APP 15-30 (the five individuals agreed to join the appeal separately in an attempt to quell the State Engineer's concerns regarding PFW's standing).
[20] *See* JT APP 36-3621.
[21] JT APP 3656-4905 (while both appeals were filed in the same district court, different judges presided over each of the appeals).

reaching his decision."[22] PFW responded by noting, among other things, that the district court should have the benefit of the prior court record, and NRS 47.150(2) requires a court to take judicial notice of the type of documents PFW submitted.[23]

A hearing on the merits of PFW's second appeal was held on November 8, 2018. The district court incorporated the documents from PFW's SROA into the record on appeal. At the conclusion of the hearing, the district court ruled against the State Engineer. The district court found the State Engineer violated due process by issuing the order without providing affected property owners with notice and an opportunity to be heard.[24] Also, the district court found the State Engineer exceeded his statutory authority when he issued Order 1293A.[25] Next, the district court found that substantial evidence did not exist to support Order 1293A.[26] Finally, the district court specifically rejected the State Engineer's claim that PFW lacked associational standing to file the appeal.[27] This appeal followed.

///

///

///

---

[22] JT APP 4922, fn.3 (this Court rejected a similar argument from the State Engineer in *King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314, 317-18 (2018)).
[23] JT APP 4985:9-4986:4.
[24] JT APP 5437:15-5438:2.
[25] JT APP 5436:15-5437:14.
[26] JT APP 5438:3-22.
[27] JT APP 5439:13-5440:13.

STANDARD OF REVIEW

All State Engineer decisions are subject to judicial review in district court under NRS 533.450. Judicial review is "in the nature of an appeal";[28] however, during the appeal the party challenging the decision must be provided a "full opportunity to be heard" before judgment is pronounced.[29] The district court's role below was to determine if the State Engineer's decision was arbitrary, capricious, or an abuse of discretion, or if it was otherwise affected by prejudicial legal error. If the State Engineer acts unlawfully by taking action without providing due process, or without authority, his action is arbitrary and capricious. In reviewing the district court's determination, this Court applies a similar abuse of discretion standard.[30]

SUMMARY OF ARGUMENT

The State Engineer has previously testified before the Legislature that he "is not authorized to deny a person his right to drill a domestic well."[31] This statement acknowledges that (1) the *right to drill a domestic well* is a separate and distinct property right, and (2) the State Engineer does not have legislative authorization to restrict domestic wells. The State Engineer's argument in this appeal contradicts the

[28] NRS 533.450(1).
[29] NRS 533.450(2).
[30] *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010).
[31] *Minutes of the Meeting of the Subcomm. to Study Domestic and Mun. Water Wells*, July 14, 2000 (statement of State Engineer Michael Turnipseed in response to inquiry by Chairman Rhoads).

plain language of relevant statutes, and the legislative history of Nevada's water laws, as well as repeated statements by State Engineers to the Legislature that his office cannot restrict domestic wells.

Order 1293A must be reversed because it cannot meet three fundamental requirements. First, Order 1293A was issued without the State Engineer affording due process, in the form of notice and an opportunity to he heard, to all parties affected by the order.[32] Second, the State Engineer does not have legislative authority to issue Order 1293A.[33] Third, Order 1293A is not supported by substantial evidence in the record.[34] Because the district court held that Order 1293A did not meet any of these requirements, the State Engineer must prove to this Court that the district court was wrong *on all three issues*. He cannot.

The State Engineer's remaining contentions regarding standing and the SROA are also without merit. This Court has held that citizens have a right to form associations to challenge administrative determinations and such associations possess both constitutional and statutory standing.[35] In addition, because the SROA

[32] *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979).
[33] *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001) (the Legislature must state an agency's authority to issue regulations in "sufficiently definite" terms for such regulations to be valid.).
[34] *Eureka Cty. v. State Eng'r*, 131 Nev. Adv. Op. 84 at 14, 359 P.3d 1114, 1120 (2015) (State Engineer decisions "must be made upon presently known substantial evidence.").
[35] *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009).

is relevant to the issuance of Order 1293A, and a district court was required by NRS 47.150(2) to take judicial notice of the public documents in the SROA, the district court properly considered PFW's SROA.

ARGUMENT

I. The Right To Drill A Domestic Well Is A Property Right That The State Engineer Impaired Without Due Process Because He Issued Order 1293A Without Notice Or A Hearing.

The State Engineer concedes that if the right to drill a domestic well is a vested property right, constitutional due process protections attach, and notice and a hearing were required.[36] The State Engineer also does not dispute that he did not provide notice and a hearing before enacting Orders 1293 and 1293A.[37] Accordingly, the State Engineer is left with only the argument that the right to drill a domestic well is *not* a property right and, therefore, "regular standards of procedural due process – notice and a hearing – do not apply."[38] This argument is without merit.

///

///

///

///

[36] Appellant's Opening Br. at 41-42.
[37] With the issuance of Order 1293A, Order 1293 was abrogated. Accordingly, this appeal only concerns Order 1293A. However, because Order 1293A was merely an amendment to Order 1293, the lack of due process afforded to PFW for both orders should be of concern to this Court.
[38] Appellant's Opening Br. at 42.

A. The right to water and a domestic well is a vested property right.

The right to water and a domestic well is a property right that vests when a parcel is created by the approval of a parcel or subdivision map.[39] Once a right vests, a government agency cannot take action to impair that right without proper notice and a hearing.[40]

Order 1293A applies to existing parcels, and the property rights held by the owners of those parcels most certainly *vested* in the constitutional sense. Those property rights include the right to build a home on that parcel. Each owner is also allowed to access a water supply to support that home. The right to water was recognized in Nevada's common law and was not abrogated by the adoption of the groundwater law or any amendment to that law. Since Order 1293A impaired vested rights without notice and a hearing, it must be overturned.

///

///

///

///

///

///

///

[39] *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (a property right vests when no further governmental discretionary action is required to exercise that right).

[40] *City of Reno v. Nev. First Thrift*, 100 Nev. 483, 686 P.2d 231 (1984).

B. Nevada has always recognized a parcel owner's right to domestic water from a well.

1. Nevada's pre-statutory common law

Under common law, prior to the adoption of Nevada's groundwater law, property owners were free to drill a well on their property and use the water thereby acquired for any beneficial use.[41] In 1881, the Court opined that:

> We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages.[42]

Accordingly, the common law recognized that each parcel owner had an absolute right to appropriate the water under their parcel, and that right was inextricably tethered to the ownership of the parcel.

2. Nevada's original groundwater law

The 1939 groundwater law placed groundwater appropriations under the same State Engineer permitting system that had previously been implemented for surface water. But the original groundwater law exempted domestic wells from State Engineer permitting requirements. Specifically, Section 3 of the 1939 statute stated that:

---

[41] *Mosier v. Caldwell*, 7 Nev. 363 (1872) (underground water "is not, and cannot be, distinguished from the estate itself, and of that the proprietor has the free and absolute use.").

[42] *Strait v. Brown*, 16 Nev. 317, 322 (1881).

> This act [the groundwater law] shall not apply to the *developing and use* of underground water for domestic purposes where the draught does not exceed two gallons per minute and where the water developed is not from an artesian well.[43]

Separately, Section 4 the 1939 law also exempted domestic wells from the State Engineer's general administrative powers:

> [The State Engineer] shall designate such area by basin or sub-basin, or by townships, *and proceed with the administration of this act* on all wells . . . save and excepting [domestic wells].[44]

In 1947, the groundwater law was significantly amended. However, both of the provisions noted above remained the same. And section 3 of the 1947 law (which later became codified as NRS 534.180(1)), was amended to read:

> This act shall not apply to the *developing and use* of underground water for domestic purposes where the draught does not exceed two gallons per minute.[45]

Section 4 of the 1947 law (which was later codified as NRS 534.030) was amended to read:

> Upon receipt by the state engineer of a petition requesting him to administer the provisions of this act . . . he shall designate such area by basin, or by subbasin, or by township and proceed with the administration of this act as provided for herein. *Such supervision to be exercised on all wells . . . save and excepting* [*domestic wells*].[46]

---

[43] 1939 Nev. Stat. 274-75 (emphasis added).
[44] 1939 Nev. Stat. 275 (emphasis added).
[45] 1947 Nev. Stat. 52-53 (emphasis added).
[46] 1947 Nev. Stat. 53 (emphasis added).

Both the 1939 and 1947 acts clearly authorized the State Engineer to "supervise" or "administer" groundwater withdrawals in certain designated basins except those from domestic wells. Additionally, the acts expressly prohibited the State Engineer from placing any restriction on the development of new domestic wells.

3. The State Engineer's recognition that property owners have a right to domestic water from a domestic well.

In 1999, State Engineer Michael Turnipseed testified before a legislative subcommittee that, because of these exemptions, he "is not authorized to deny a person his *right to drill a domestic well.*"[47] This was further affirmed by State Engineer Jason King who, while testifying before the Legislature in 2007, had the following exchange with Assemblyman (now Senator) Goicoechea:

> Assemblyman Goicoechea: There are scattered parcels around the State, and every parcel owner has the *right to drill a domestic well*, correct?
>
> State Engineer Jason King: Correct.[48]

In 2011, Assemblyman Goicoechea again reiterated his understanding of the law when he stated during a legislative hearing that "with domestic wells in the state, if you have a parcel created, you have a *right to drill a domestic well* and I do not think

[47] *Minutes of the Meeting of the Subcomm. to Study Domestic and Mun. Water Wells*, July 14, 2000 (emphasis added).
[48] *Minutes of the Assembly Comm. on Nat. Res., Agric., and Mining*, May 14, 2007, at p. 15 (emphasis added).

anyone argues that."[49] State Engineer King was present at that hearing and did not object to this statement.[50]

These statements reflected the conventional understanding regarding domestic wells – that the right to drill a domestic well, if no other source of water is available, is one of the fundamental sticks in the bundle of rights that comes with ownership of property.[51] Without this right, in an arid climate like Nevada's, a parcel of land becomes effectively unusable and valueless.[52]

4. <u>Nevada's water statutes recognize right to domestic water from a domestic well.</u>

The rule that existing parcels included a vested right to some form of water to support a home is also reflected in subsequent amendments to the groundwater law.

---

[49] *Minutes of the Assembly Comm. on Gov. Affairs*, March 30, 2011, at p. 72 (discussion of Assemb. B. 419) (emphasis added).

[50] *Id*. This interpretation of the law has also been reiterated in various legal treatises. *See* JAMES H. DAVENPORT, NEVADA WATER LAW 151 (Colorado River Commission, 2003) ("Domestic wells that draw no more than 1,800 gallons per day do not require pre-authorization from the State Engineer."); *see also* ROSS E. DE LIPKAU & EARL M. HILL, THE NEVADA LAW OF WATER RIGHTS 8-5, 8-6 (Rocky Mountain Mineral Law Foundation, 2010) (Nevada operates on a "one-house, one-well concept.").

[51] *See generally* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 45-72 (Harvard 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.").

[52] *Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971) ("the particular value of a water supply in the desert is not only unascertainable but its preservation is necessary to the general welfare.").

In 1955, the Legislature gave the State Engineer the power to restrict new domestic wells "in areas where water can be furnished by an entity such as a water district or municipality."[53] But this provision only applied to parcels that can be served by a utility. The Legislature continued its policy of restricting the State Engineer's authority to prohibit domestic wells on parcels not served by such a utility.

Likewise, the domestic well credit program established by NRS 534.350(2)(b) shows that the Legislature considered the right to drill a domestic well is an important property right. Under this statute, a property owner whose parcel previously was eligible for a domestic well is provided a domestic well credit that can be used when they hook up to a utility's water system.[54] Such credits are granted both to parcels with an existing domestic well that will be plugged *and* those that are eligible for such a well but have not yet drilled one.[55] The credit offsets the requirement to dedicate water to the utility before receiving service. Accordingly, even if a parcel owner has not yet exercised his right to drill a well, he still receives

[53] 1955 Nev. Stat. 332. (this provision later was codified as NRS 534.120(3)(d)).
[54] In most cases, a water utility will require a property owner to dedicate water rights prior to connecting to the water system. These dedicated water rights ensure that the utility will have adequate water resources to serve the property. Domestic well credits relieve a property owner of the dedication requirement since the 2.02 afa of water that allocated for a domestic well on the property (regardless of whether one has already been drilled) becomes a resource that can be used by the water utility.
[55] NRS 534.350(2)(b) (domestic well credits are available to owners of lots created before July 1, 1993 who agree "not to drill a domestic well on the land.")

the credit. This is an explicit recognition that the right to drill a domestic well is one of the sticks in the bundle of rights that come with ownership of property in Nevada.

C. Nevada's Recognition of Right to Domestic Water is Consistent with Nevada's Real Property Jurisprudence.

The Nevada Constitution guarantees every person's right to acquire, possess, and protect their property.[56] "The Nevada Constitution contemplates expansive property rights" and "our State enjoys a rich history of protecting private property owners against government takings."[57] In this sense, the property protections of the Nevada Constitution are broader than those of the United States Constitution.[58]

1. Nevada's Expansive Protection of Property Rights

Whenever the Court is faced with a choice between competing doctrines of law regarding the protection of property rights, it has consistently adopted doctrines of law that afford *greater* protections to property rights. For example, in *Wal-Mart Stores, Inc. v. Cty. of Clark*, the federal district court reviewed this Court's adoption

---

[56] *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41, 9, 351 P.3d 736, 741 (2015).

[57] *McCarran Int'l Airport*, 122 Nev. at 670, 137 P.3d at 1127. The fact that the Nevada Constitution provides property protections greater than those of the United States Constitution is consistent with long-standing principles of federalism. *See generally* JEFFERY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (Oxford University Press 2018); William J. Brenan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Har. L. Rev. 489 (1977).

[58] *McCarran Int'l Airport*, 122 Nev. at 669-70, 137 P.3d at 1126-27.

of the "no further discretionary act" test to determine when property rights vest.[59] The district court found that this Court specifically adopted this test over a less protective "building permit" test.[60] Likewise, in *McCarran Int'l Airport v. Sisolak*, this Court held that a property owner had a vested and protectable property interest in the useable airspace above their property, even though the owner had not yet exercised his right to build in that airspace.[61]

All that is required for a property interest to be protected is that it exists "in the bundle of property rights" that an owner acquires when she purchases property.[62] This bundle includes "all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the property."[63]

2. Right to drill a domestic well vests when parcel is created.

The Court's decisions regarding the vesting of property rights hold that vesting occurs at the point in time at which no further *discretionary* government approval is required to exercise the right.[64] Under this standard, the right to drill a domestic well vests at the time when the property owner can commence drilling the well without the need to seek further discretionary approval from the government.

---

[59] *Wal-Mart Stores, Inc. v. Cty. of Clark*, 125 F.Supp.2d 420, 425-26 (D. Nev. 1999).
[60] *Id*.
[61] *McCarran Int'l Airport*, 122 Nev. at 658, 137 P.3d at 1127.
[62] *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007).
[63] *Id*.
[64] *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112; *see also Wal-Mart Stores, Inc.*, 125 F.Supp.2d at 426.

Under NRS 534.180(1), domestic wells are expressly exempted from the State Engineer's discretionary permitting requirements. Although a property owner still must file a notice of intent to drill a well, this is merely a registration requirement and not a discretionary decision.[65] Like the issuance of a building permit, this is a ministerial act not a discretionary one.[66]

Because after a parcel is created, the owner is not required to seek any additional discretionary approval to drill a domestic well on their property, the right to water from a domestic well vests when a parcel is created. At that point, a property owner is also entitled to a building permit to establish a house, which is also a ministerial act. Therefore, the right to water from a domestic well is protected just like a developer's right to build a project, or utilize airspace, because no further discretionary approvals are needed after a parcel is created.

The State Engineer cites to *Malfitano* to support his claim that the right to drill a domestic well is merely an expectation interest and not a vested right.[67] However, *Malfitano* is inapposite. In *Malfitano*, the property owner was seeking a

---

[65] Under NRS 534.180(2) the State Engineer can require that domestic wells be registered. Approving a notice of intent to drill is a ministerial act not a discretionary one. *See Wal-Mart Stores, Inc.*, 125 F.Supp.2d at 427 ("A ministerial act is defined as 'an act performed by an individual in a prescribed legal manner in accordance with law, without regard to, or the exercise of, the judgment of an individual.").

[66] *Wal-Mart Stores, Inc.*, 125 F.Supp.2d at 427 ("A ministerial act is defined as an act performed by an individual in a prescribed legal manner in accordance with law, without regard to, or the exercise of, the judgment of an individual.").

[67] Appellant's Opening Br. at 43-45.

discretionary approval – the issuance of a liquor license. The Court correctly found the grant of a temporary liquor license did not created a vested right to a permanent one, because further discretionary action was still required.[68] Accordingly, *Malfitano* is inapplicable to the present case precisely because the grant of a permanent liquor license required a further discretionary act by a government agency while the drilling of a domestic well on an existing parcel does not.[69]

The State Engineer is also incorrect when he states that the conveyance of a parcel does not convey with it the right to drill a domestic well on that parcel.[70] Under NRS 111.010(2) an estate in land includes "every estate and interest, present and future, vested and contingent" in those lands. The right to water from a domestic well is interrelated and interdependent with the property itself and, unlike a permitted water right, cannot be separately conveyed. Accordingly, a conveyance of a parcel of land conveys all the grantor's right, title, and interests in that property,[71] including the water from a domestic well.

3. Order 1293A Impairs the Right to Water From Domestic Well

The State Engineer clearly placed an impermissible permit condition on the drilling of a domestic well for water. Order 1293A prohibits domestic wells unless

---

[68] *Malfitano v. Cty. of Storey*, 133 Nev. Adv. Op. 40 at 12, 396 P.3d 815, 820 (2017).
[69] *See* NRS 534.180(1) (no discretionary permit is required to drill a domestic well).
[70] Appellant's Opening Br. at 46.
[71] NRS 111.170.

a property owner acquires two (2) acre feet of existing water rights permits and then relinquishes those rights to the State Engineer.

This two (2) acre foot relinquishment requirement ignores the fact that only 0.5 acre feet is pumped from the average domestic well in Pahrump per year.[72] The real purpose for requiring more water to be given to the State Engineer than will actually be used is described in the Nye County Water Resource Plan 2017 Update (the "Plan").[73] The Plan states that "[t]he relinquished water rights that are in excess of the actual usage will never be beneficially used and in fact return to the [public] basin."[74] That information indicates the over-dedication is really intended to offset the over-allocation of the basin that the State Engineer's office created by granting too many water rights.[75]

The State Engineer acknowledges that "[r]elinquishment is a key component of the Amended Order No. 1293A and the Nye County GMP."[76] If the owners of the existing 8,000 parcels, that do not currently have a domestic well, each relinquish two acre-feet of water, 16,000 acre-feet of existing permits will be surrendered. However, those parcels will only use a combined 4,000 acre-feet of water providing

[72] JT APP 1558; JT APP 3652:21-22; JT APP 3430-3495.
[73] JT APP 54, n.12; JT APP 1558.
[74] JT APP 1558. The Plan quantifies the over-dedication in a proposed water basin budget spreadsheet that includes a row titled "OVER DEDICATION POTENTIAL – DOMESTIC WELLS." JT APP 1559.
[75] JT APP 1559.
[76] JT APP 4937, n.8.

a net reduction of 12,000 acre-feet of water, or more than 30% of amount of water over-appropriated.

The State Engineer is prohibited from exacting water rights from domestic well owners to correct an over-appropriation problem that his office created. Just like his prohibition on domestic wells is an impairment of vested property rights, the two (2) acre foot relinquishment requirement is also an impairment.

D. The "Protectable Interest" Language in Recent Statutory Amendments Was Enacted to Protect, not Impair The Right to Water from a Domestic well.

Despite prior statements from State Engineer's that existing parcel owners have a right to water from a domestic well, the State Engineer now argues that the "protectable interest" language in NRS 533.024(1)(b) fundamentally altered Nevada's statutory scheme, and gave the State Engineer the authority to prohibit domestic wells. This argument is without merit.

The State Engineer ignores the legislative history of the "protectable interest" language. This language was placed in the water law to provide *additional* protections for domestic wells, not to remove existing protections.

1. Legislative history of NRS 533.024

The Legislature adopted NRS 533.024(1)(b) in 1993. Nevada law has always required the State Engineer to reject water rights permit applications that conflict

with existing rights.[77] However, in 1993, the State Engineer did not consider a domestic well as an existing right and would not protect them from conflicts with new water rights he permitted.[78]

The Legislature enacted the original version of NRS 533.024(1)(b) to require the State Engineer to respect the "protectible interest" in existing domestic wells when he permitted new water rights.[79] In 2001, the Legislative Counsel Bureau defined the term "protectable interest" as the "protection of the *domestic well's water supply* from unreasonable impacts [from other wells]."[80] Nevada State Engineer Michael Turnipseed confirmed the bill was needed because "a municipal well's cone of depression could impact domestic wells" in a basin.[81] Finally, the new provision was placed in NRS Chapter 533, which governs the application and permitting process, and not in NRS Chapter 534, which governs the management of groundwater resources.

///

---

[77] NRS 533.370(2).
[78] *Minutes of the Assembly Comm. on Gov. Affairs*, April 27, 1993, at p. 2 (testimony of Assemblyman Gibbons, sponsor of AB 461).
[79] While Assemb. B. 461 was not approved in its original form, the language from the bill that would become NRS 533.024(1)(b) was incorporated into S.B. 19 which was approved by the Legislature and signed by the Governor. JOURNAL OF THE SENATE, SIXTY-SEVENTH SESSION OF THE NEVADA LEGISLATURE 1897 (July 2, 1993) (reports of conference committees).
[80] JT APP 957 (emphasis added).
[81] JT APP 958. This was the same concern raised by Assemblyman Gibbons in 1993. *See* n.78, *supra*.

2. Other Statutes With "Protectable Interest" Language

The "protectable interest" language is used in other parts of the water code to further protect existing domestic wells, but not to give the State Engineer power to restrict new wells. Under NRS 533.370(2), the State Engineer is forbidden from approving an application that "conflicts with existing rights *or with protectable interests in existing domestic wells*."[82] This statute, and others that include this language, are intended to protect domestic wells, not restrict them. Certainly, this language was not enacted to alter rights to water from domestic wells. If it were, substantial legislative testimony would exist to reflect such a dramatic shift in legislative policy. Hence, NRS 533.024(1)(b) was never intended to delimit or restrict a property owner's right to drill a *new* domestic well. Rather, the intent was to require the State Engineer to provide protection to wells that are operational from subsequent appropriations.

E. The State Engineer failed to provide notice and a hearing before issuing Order 1293A.

This Court has held that a governmental entity must provide personal notice to each affected property owner before it can take an action that impairs a private property right.[83] Notice must include the content of the action, so affected parties

[82] Emphasis added. The highlighted language was added to the statute in 2001. *See* 2001 Stat. Nev. 552.
[83] *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

can adequately prepare to oppose it.[84] Finally, the governmental entity must hold a hearing and allow affected property owners the opportunity to provide testimony and evidence related to the government action.[85] A failure to follow these steps constitutes a due process violation rendering the governmental action invalid.

The State Engineer does not dispute that Order 1293A impairs a property owner's right to drill a domestic well. The plain language of the order explicitly prevents a property owner from drilling such a well unless they qualify for one of the exceptions.[86] The State Engineer has also never disputed that he issued Order 1293A without any prior notice and without holding a hearing. He did so even though a lack of notice was one of the primary claims advanced by PFW in the appeal of Order 1293 and despite the fact that the district court had expressed specific concern about this lack of notice.[87] Because Order 1293A materially impairs a vested property right, and because the State Engineer failed to provide notice or hold a hearing before issuing Order 1293A, the order is invalid and must be overturned.

///

///

[84] *Id*.
[85] *Id*.
[86] JT APP 12-13.
[87] JT APP 4681:25-4683:6.

II. The State Engineer Does Not Have Authority to Restrict Drilling of Domestic Wells.

The language of NRS 534.030(4) is plain and unambiguous. The statute grants the State Engineer general supervisory power over all groundwater wells in a designated basin *except* domestic wells. This law has been in place since 1939, when the Legislature first enacted the groundwater law. Likewise, NRS 534.180(1) specifically exempts domestic wells from "the development and use" permits the State Engineer is authorized to issue. The history of these provisions, and of the groundwater law in general, clearly demonstrates that the Legislature purposely intended to exempt both the establishment and use of domestic wells from the State Engineer's regulatory authority except in certain limited circumstances that do not apply to the present case.

A. Domestic wells are exempt from the State Engineer's supervisory control under NRS 534.030(4) and 534.180(1).

The State Engineer only has "those powers which the legislature expressly or implicitly delegates."[88] Accordingly, the State Engineer is "without discretion to violate express statutory language *even where the equities lie in favor of doing so*."[89]

[88] *Clark Cty. v. State, Equal Right Comm'n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991).
[89] *State Eng'r v. Am. Nat'l Ins. Co.*, 88 Nev. 424, 426-27, 498 P.2d 1329, 1330-31 (1972) (emphasis added).

Regardless of the State Engineer's hyperbolic claims that Order 1293A is desperately needed, he does not have the power to issue such an order.

The only determination that the Court must make in this case is whether the Legislature has expressly or implicitly given the State Engineer the power to restrict the drilling of domestic wells. Not only has the Legislature *not* provided such an authorization, it has expressly stated the opposite.

1. 1939 and 1947 groundwater law expressly exempted right to water from domestic well from State Engineer authority.

Both the 1939 and 1947 groundwater laws clearly authorized the State Engineer to "supervise" or "administer" all groundwater withdrawals in certain designated basins *except* domestic wells. These provisions have been only minimally amended since 1947, and current statutes contain essentially the same language, indicating that the Legislature continues to support the domestic well exemption.[90]

2. Domestic well exemptions are not limited to existing wells.

In the proceedings below, the State Engineer claimed the domestic water exemptions are essentially redundant, and both provisions only exempt domestic wells from the permitting requirement.[91] Here, the State Engineer abandons that

[90] *Compare* 1947 Nev. Stat. 52-53 *with* NRS 534.030(4) and NRS 534.180(1).
[91] JT APP 4927:21-22.

claim. Now he argues that the statutory exemptions for domestic water only apply to domestic wells that already exist.[92] This argument is also without merit.

The State Engineer is clearly prohibited from interfering with the "development" as well as the "use" of a domestic well under NRS 534.180(1). Likewise, NRS 534.030(4) clearly restricts the State Engineer from applying the general basin management provisions of NRS 534.110(8) and NRS 534.120(1) to domestic wells altogether.[93]

The State Engineer's reliance on a legislative declaration (NRS 533.024(1)(b)) is equally unavailing. Legislative declarations are mere statements of purpose and do not overturn specific statutory provisions.[94] As two preeminent legal scholars have noted, "a [legislative] expression of purpose has as much real-world effect as a congressional expression of apology."[95] Accordingly, the State Engineer cannot use NRS 533.024(1)(b)'s declaration of purpose to overcome the

---

[92] Appellant's Opening Br. at 34.

[93] Reference to areas "designated by the State Engineer" in NRS 534.110(8) and NRS 534.120 are those basins designated under NRS 534.030.

[94] *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) ("it is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous."); *see also* NORMAN J. SINGER & J.D. SHAMBIE SIGNER, STATUTES AND STATUTORY CONSTRUCTION § 47.4 292 (7th ed. 2007) ("the preamble cannot control the enacting part of the statute where the enacting part is expressed in clear, unambiguous terms.").

[95] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 217 (2012).

express and unambiguous provisions of NRS 534.030(4) and NRS 534.180(1). In addition, the legislative history of NRS 533.024(1)(b) indicates the opposite.

B. No Express Power Exists to Overcome the Exemption Domestic Wells Have from State Engineer Authority.

Because domestic wells are afforded specific and general exemptions from the State Engineer's purview, the State Engineer must find a specific statute that authorizes his action to overcome the exemptions. He cannot.

The State Engineer has it exactly backwards when he states that "NRS 534.110(8) and NRS 534.120(1) do not include a limitation as to their applicability to domestic wells, and are indeed not so limited."[96] Because NRS 534.030(4) and NRS 534.180(1) specifically exempt domestic wells from the State Engineer's general regulatory authority, all provisions of the groundwater law that do not specifically state that they apply to domestic wells, cannot be used to regulate them. Therefore, because NRS 534.110(8) and NRS 534.120(1) do not mention domestic wells, the State Engineer was without authority to rely on these statutes to issue Order 1293A.

When it has chosen to do so, the Legislature has provided certain limited exceptions from the general domestic well exemption. None of these limited

[96] Appellant's Opening Br. at 34.

exceptions authorize Order 1293A because none of them allow the State Engineer to ban the drilling of new domestic wells on *existing* parcels.

1. NRS 534.120(3)(d) & (e)

Under NRS 534.120(3)(d) the State Engineer is authorized to prohibit the drilling of new domestic wells in "areas where water can be furnished by an entity such as a water district or municipality" (i.e., where the property owner can reasonably get water from other sources). Likewise, NRS 534.120(3)(e) allows the State Engineer to require a dedication of water rights when a *new* parcel is created (but not for existing parcels). Clearly, neither of these provisions authorize Order 1293A because Order 1293A prohibits new domestic wells on existing parcels in areas where water cannot be furnished by a water purveyor. Further, the enactment of NRS 534.120(3)(d) and NRS 534.120(3)(e) demonstrates the need to include an express provision in a statute to make that statute apply to domestic wells.

Further, neither NRS 534.120(3)(d) nor NRS 534.120(3)(e) would be needed if the State Engineer has the implied power he claims. One of the foundational principles of statutory interpretation is that every provision of a statute is to be given effect and no provision should be given an interpretation that causes it to be of no consequence.[97]

[97] *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.").

As noted above, NRS 534.120(3)(d) provides a specific condition under which the State Engineer is authorized to restrict the drilling of new domestic wells – if the property on which the well is proposed to be located can reasonably be served by a municipal utility. The obvious corollary to this rule is that if the condition does not exist (i.e., if no other water source is available to serve the property), the State Engineer is not authorized to restrict the property owner from constructing a domestic well. If the State Engineer could order, as he claims, a general ban on new domestic wells under NRS 534.110(8) (regardless of whether an alternative source of water is available) then the conditional language of NRS 534.120(3)(d) has no effect.

2. NRS 534.110(6)

If NRS 534.030(4) gave the State Engineer general powers over domestic wells as he claims, enactment of NRS 534.110(6) also would not have been necessary. Under NRS 534.110(6) the State Engineer is allowed to order a curtailment of pumping in a basin under certain conditions. This provision was first enacted in 1955.[98] From the time it was enacted until 2011 the statute did not apply to domestic wells. Then, in 2011, the Legislature specifically appended the phrase "including, without limitation, withdrawals from domestic wells" to the end of the

[98] 1955 Nev. Stat. 331.

statute.[99] This indicated a specific desire to bring domestic wells within the statute's reach.[100] This language would be wholly superfluous if the State Engineer already had the general regulatory power over domestic wells that he claims.

No such language has ever been included in NRS 534.110(8) or NRS 534.120(1), the statutes that the State Engineer is claiming as the basis of his authority for Order 1293A. Just as including specific language in NRS 534.110(6) demonstrates a legislative intent to have its provisions apply to domestic wells, leaving out similar language in NRS 534.110(8) or NRS 534.120 demonstrates a legislative intent not to have the statute apply to such wells.[101] Neither a legislative declaration, nor the policy reasons the State Engineer puts forward, can provide that power either.[102]

---

[99] Assemb. B. 419, 76th Leg Sess. (Nev. 2011).

[100] However, because statutes are presumed to apply prospectively, only domestic wells on parcels created after 2011 are subject to curtailment under NRS 534.110(8). *See Sandpointe Apts. v. Dist. Court*, 129 Nev. 813, 820, 313 P.3d 849, 853 (2013) ("Substantive statutes are presumed to only operate prospectively.").

[101] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012) (the cannon of presumption of consistent usage provides that "a material variation in terms [within a statute] suggests a variation in meaning.").

[102] *Price Dev. Co., v. Orem City*, 995 P.2d 1237, 1246 (Utah 2000) ("a preamble is nothing more than a statement of policy which confers no substantive rights."); *see River Dev. Corp. v. Liberty Corp*., 133 A.2d 373, 383 (N.J. 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

The Legislature must be presumed to mean what it says, and say what it means.[103] Where the Legislature has seen fit to apply specific provisions of the water law to domestic wells, it has done so with unambiguous language and clear intent. Where, as here, the Legislature has not clearly expressed such intent in a statute, it cannot be presumed to intend that outcome. Accordingly, the State Engineer is not authorized by the general language in NRS 534.120(1) to apply the restrictions contained in NRS 534.110(8) to domestic wells.

C. Other states have domestic well exemptions.

Nevada is not alone. Almost all prior appropriation states exempt domestic wells from administrative agency control.[104] Challenges to these exemptions are few. However, a recently decided New Mexico case provides some similarities to the present case.

In both New Mexico and Nevada, the State Engineer does not have discretion to restrict the drilling of domestic wells. In New Mexico, the domestic well

---

in ascertaining the true intent and meaning of the legislature, is, in itself, fatal to the claim set up.").

[103] *Building Energetix Corp. v. EHE, LP*, 129 Nev. 78, 83, 294 P.3d 1228, 1232 (2013) ("the preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what is says there") (internal quotations omitted) (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593 (2004)).

[104] *See generally An Analysis of Exempt Well Regulations in the West* (Water Systems Council, 2011); Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010).

exemption is treated as a mandatory approval of domestic well applications.[105] In Nevada, the Legislature exempted domestic wells from the permitting process entirely.[106] In both instances, there is an unambiguous expression of legislative intent to exempt domestic wells from the permitting requirements of other water rights.

In *Bounds v. State, ex rel. D'Antonio*, the New Mexico Supreme Court stated that the Legislature has primary authority over the appropriation of water rights.[107] Accordingly, the Legislature can prescribe exactly how an appropriation will occur.[108] The Legislature may, therefore, exempt domestic wells from the standard permitting process.[109] The Court further stated that an aggrieved party must look to the Legislature, not the courts, for relief from this statutory scheme.[110]

The *Bounds* Court also held that the mere threat of an impairment to existing rights is not sufficient to overcome the legislative exemption provided to domestic wells.[111] The plaintiff had argued that the automatic approval of domestic wells in over appropriated basins would impair his existing rights.[112] This is similar to the

---

[105] N.M. STAT. ANN. § 72-12-1.1 (1978).
[106] NRS 534.180(1).
[107] *Bounds v. State ex rel. D'Antonio*, 306 P.3d 457, 467 (N.M. 2013).
[108] *Id.*
[109] *Id.*, 306 P.3d at 461.
[110] *Id.*, 306 P.3d at 468.
[111] *Id.*, 306 P.3d at 470.
[112] *Id.*

State Engineer's claim that allowing the unbridled drilling of domestic wells in Pahrump may impair existing water rights.[113] The *Bounds* Court rejected this argument holding that the mere threat of impairment is not enough.[114] Instead, the burden is on the senior water rights holder to prove an impairment.[115] Similarly, the mere fact that the Pahrump basin is over appropriated (but not over pumped) does not justify overriding the Legislature's express will to exempt the drilling of domestic wells from the State Engineer's regulatory authority.

Just like the Legislature in New Mexico, our Legislature controls how domestic wells are to be treated, and neither the Court nor the State Engineer can change this scheme, regardless of whether they disagree with "the wisdom, policy, or justness" of the statute.[116]

D. This Court should not give any deference to the State Engineer's interpretation of his own authority.

The State Engineer claims that "[d]ecisions of the State Engineer are entitled to deference with respect to their . . . legal conclusions" but fails to provide any

[113] JT APP 8 (Paragraphs 5 and 6) and 11 (Paragraph 25)
[114] *Bounds*, 306 P.3d at 469.
[115] *Id.*, 306 P.3d at 468.
[116] *Id.*, 306 P.3d at 462 ("we will not question the wisdom, policy, or justness of a statute, and the burden of establishing that the statute is invalid rests on the party challenging the constitutionality of the statute") (citing *State ex rel. Office of State Eng'r v. Lewis*, 150 P.3d 375 (N.M. 2007)); *see also Anthony v. State*, 94 Nev. 338, 340, 580 P.2d 939, 941 (1978) (the judiciary will not declare an act void because it disagrees with the wisdom of the Legislature).

citation that supports this claim.[117] The State Engineer's claim is incorrect and contrary to this Court's precedent.

This Court has clearly and unambiguously held that "[w]hile the State Engineer's interpretation of a statute is persuasive, it is not controlling."[118] This Court has further held that a reviewing court is required to "decide pure legal questions *without deference* to an agency determination."[119] The *no deference* standard of review articulated in *Town of Eureka*, *Felton*, and *Pyramid Lake Paiute Tribe* is consistent with the evolving nationwide rollback of judicial deference to administrative agency rulings. In 2018 alone, four states, through either constitutional amendment, legislation, or judicial determination, joined Nevada and a multitude of other states in explicitly adopting no deference standards of review.[120]

---

[117] Appellant's Opening Br. at 19.

[118] *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).

[119] *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added); *see also Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (a district court must "review purely legal questions without deference to the State Engineer's ruling.").

[120] *See* H.B. 2238, Leg., 2d Regular Sess. (Ariz. 2018); FLA. CONST. art. V, § 21 (2018); *King v. Mississippi Military Dep't*, 245 So.3d 404, 408 (Miss. 2018) ("we abandon the old standard of review giving deference to agency interpretations of statutes."); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Rev.*, 914 N.W.2d 21, 54 (Wis. 2018) ("we are leaving our deference doctrine behind because it is unsound in principle."); on December 5, 2018, the Wisconsin Legislature adopted S.B. 884 codifying the *Tetra Tech* decision in the Wisconsin statutes.

In addition, several legal scholars and judges have criticized deferential standards of review because they create within the judiciary an "institutional bias in favor of the most powerful parties (the [ ] bureaucracy), which violates parties' due process rights when their life, liberty, or property is at issue."[121] As United States Supreme Court Justice Brennan noted more than forty years ago, "there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time."[122]

One scholar has pointed out that "when a judge 'respects,' 'defers,' or otherwise relies on an agency's judgment about the law . . . she needs to worry not about an agency's authority, but more centrally about whether she candidly is abandoning her very office as a judge and denying due process of law."[123] While he was on the Court of Appeals, current United States Supreme Court Justice Gorsuch joined this chorus of criticism lamenting that "the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations."[124]

---

[121] Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 15 Geo. J.L. & Pub. Policy 103 (2018).
[122] William J. Brenan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Har. L. Rev. 489, 495 (1977).
[123] Phillip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1192 (2016).
[124] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

More than 200 years ago, Justice Marshall uttered his famous dictum that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[125] As his title suggests, the State Engineer is a professional engineer by background and training. There is nothing in his educational background that provides him with any special expertise regarding the common law rules of statutory construction or legal interpretation. Rather, it is the courts which possess this unique expertise. Accordingly, the Court should not give deference to the State Engineer's legal determinations, particularly regarding determinations of the scope and limit of the State Engineer's own authority. This is especially true in cases, such as this one, where the State Engineer's current interpretation of his authority differs from previous interpretations.

III. Orders 1293 and 1293A are Not Supported by Reliable or Substantial Evidence in the Record.

A. The Pahrump Basin is not being over-pumped and the State Engineer has not shown that new domestic wells will unduly interfere with existing wells.

Even if the State Engineer has the authority to apply NRS 534.110(8) to domestic wells, which he does not, before he can do so, NRS 533.370(2) and NRS 534.110 require that he demonstrate that additional wells will *unduly* interfere with existing wells. Under NRS 534.110(4), all appropriations of groundwater must

[125] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

allow for a "reasonable lowering of the static water level at the appropriator's point of diversion." The State Engineer never established an objective standard for what constitutes an "undue" interference with an existing well. Therefore, the State Engineer could not make a determination whether predicted declines in the water table are reasonable.

By contrast, the State Engineer's own records show that the Pahrump Basin is not currently over-pumped (i.e., current pumping does not exceed the established perennial yield). Pumping rates in the basin have steadily declined since 1969 and as a result of this decline, water levels in some portions of the basin have leveled-off or risen (in some cases by as much as 45 feet).[126] Most importantly, the record is devoid of any scientific evidence showing that the drilling of new domestic wells will unduly impact existing wells in the basin.[127]

The hydrogeology of any particular groundwater basin is complex. Pumping in one part of a basin may have a variable effect on water levels in another part of a basin. This is why tools like monitoring wells and groundwater models are used to

---

[126] *See* JT APP 5161 (slide showing hydrographs of monitoring wells in Pahrump. The hydrographs show that in some areas water levels have rebounded or leveled off, in other areas declines are relatively slight, while in a few areas significant declines have occurred).

[127] The record does include a report of a groundwater model simulation performed by John Klenke (JT APP 1385-1435); however, the State Engineer admits that Mr. Klenke did not simulate the effects of pumping from new wells, only the effects of pumping existing wells. JT APP 54 ("The study did not take into account anticipated increases in future demand . . .").

determine the likelihood of conflicts arising from pumping at specific locations. Here, no independent hydrologic analysis was conducted. Instead, the State Engineer relied exclusively on the results of a groundwater model that was never designed to determine whether new wells would cause undue interference with existing wells.[128] Instead, the model only estimated the likelihood of well failures resulting from the pumping at existing wells in the basin.

B. Order 1293A is both overbroad and being applied too narrowly.

Substantial evidence cannot exist to support Order 1293A because Order 1293A imposes a blanket, basin-wide ban on the drilling of new domestic wells even in areas where water levels have significantly rebounded.[129] Yet, the State Engineer is authorized under NRS 534.110(8) to only limit drilling in portions of a basin where water levels are declining. Not only does NRS 534.110(8) not authorize impairment of domestic wells, it was an abuse of the State Engineer's discretion to impose a basin-wide ban when the evidence in the record indicates that there are significant areas of the basin water levels are static or rising.

[128] Notably the State Engineer has refused throughout this process to address any of PFW's specific criticisms of Mr. Klenke's groundwater study. Such a failure should be deemed an admission that Petitioners' arguments are meritorious, that the groundwater study is fundamentally flawed, and that the study cannot be considered substantial evidence supporting the issuance of the Orders.

[129] *See* JT APP 5161 (aerial with hydrographs of basin water levels).

In addition, Order 1293A applies only to domestic wells, not any other type of well. Individual domestic wells are limited to a draught of two (2) acre feet.[130] They are typically the smallest wells in a basin and generally have much smaller effects on groundwater levels than do larger municipal, industrial, and agricultural wells. Since Order 1293A does not limit those wells, it allows for the drilling of the much larger wells while banning smaller ones.[131]

The State Engineer has argued that larger production wells are exempt from the Order because they are required to undergo a permitting process that includes a conflicts analysis.[132] However, the State Engineer was also required to perform a similar conflicts analysis before banning domestic wells and failed to do so.[133] Instead he relied solely on his unsupported belief that because *some* existing wells may be causing a problem in *some* parts of the basin, *all* new domestic wells should be prohibited *everywhere* in the basin.

---

[130] NRS 534.180(1).

[131] The State Engineer states in his Opening Brief that he has "already prohibited every other type of well that may withdraw water from the aquifer." Appellant's Opening Br. at 36. This is incorrect and highly misleading. The State Engineer has indeed barred new *appropriations* of water; however, he still allows applications to be filed to change the place of diversion (i.e., to drill a new well) for existing permits. Therefore, he has not issued a blanket ban on the drilling of new industrial, commercial, or agricultural wells in the basin as he has done with domestic wells.

[132] JT APP 4927:22-24.

[133] *See* NRS 534.110(8) (prior to restricting the drilling of new wells the State Engineer must demonstrate that the banned wells would have unduly interfered with existing wells in the basin).

Because the record in this case is both unreliable and does not provide substantial evidence supporting the State Engineer's action, the district court properly invalidated Order 1293A.

C. No deference should be given to the State Engineer's factual determinations in this case because no evidentiary proceedings were held to provide a basis for those determinations.

Normally, when the State Engineer holds a hearing on a water-related matter, interested parties are given an opportunity to view and challenge the evidence the State Engineer will be relying on to make his decision. The evidence provided by both sides is then included in the record on appeal submitted to the district court. Here, none of these procedures were followed and, therefore, the State Engineer's record on appeal should be viewed skeptically.

When proper evidentiary procedures are followed, the State Engineer's factual findings are accorded deference. However, this Court has made clear that its deference is pre-conditioned on the "fullness and fairness of the administrative proceedings" below.[134] Accordingly, a reviewing court can only defer to the State Engineer's factual findings if: (1) opposing parties were given a "full opportunity to be heard" during the administrative proceedings, (2) the State Engineer fully resolved all issues raised by the parties, and (3) the State Engineer prepared written

[134] *Revert*, 95 Nev. at 787, 603 P.2d at 264.

findings "in sufficient detail to permit judicial review."[135] Without these safeguards there is no way to determine the authenticity, relevance, or veracity of the "evidence" the State Engineer relied on.[136]

Here, the State Engineer provided no notice that he was intending to issue the orders, nor did he hold any hearing to seek input from affected property owners. Accordingly, unlike with other appellate-type proceedings, there was little to no administrative record for the district court to review. While the State Engineer provided the district court an ostensible "record on appeal" for consideration, that record consisted of nothing more than hand-picked documents that the State Engineer claims he relied on in making his decision. None of the documents were authenticated or validated, nor have the authors of the documents been required to testify in a formal hearing or been subject to cross-examination. In addition, neither the State Engineer not anyone from his office provided any declaration or affidavit supporting his claim of reliance on these documents.

---

[135] *Id*., 95 Nev. at 787, 603 P.2d at 264-65.

[136] The principle that evidence should be tested in an evidentiary proceeding is also reflected in this Court's holdings in *Great Basin Water Network* and *Eureka Cty. v. State Eng'r*. In those cases, the Court determined that protesters must have a fair opportunity to challenge evidence before water rights applications are approved. *Great Basin Water Network v. State Eng'r.*, 126 Nev. 187, 197, 234 P.3d 912, 919 (2010); *Eureka Cty. v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120 (2015).

In short, none of the processes and procedures which are designed to ensure a full and fair opportunity to challenge evidence or to determine if such evidence is relevant, credible, and accurate were followed. Accordingly, the district court properly reviewed such materials with skepticism and this Court should do likewise. In cases where the State Engineer refuses to subject his evidence to the test of an adversarial proceeding, the courts should accord that evidence little to no weight.[137] Therefore, the State Engineer's evidence cannot be considered substantial.

IV. Order 1293A Results In An Unconstitutional Taking.[138]

"The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to states through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation."[139] Likewise, Article 1, Section 8 of the Nevada Constitution states "[p]rivate property shall not be taken for public use without just compensation having first been made, or secured."[140]

---

[137] *See Eureka Cty.*, 131 Nev. Adv. Op. 84 at 14, 359 P.3d at 1120 (Protesters must have a full opportunity "to challenge the evidence upon which the State Engineer's decision may be based.").

[138] The district court did not need to adjudicate PFW's final contention that Order 1293A violates the takings clause of the Nevada and the United States Constitutions. In the unlikely event the Court reverses the district court, PFW asks the Court to remand to the district court for consideration of the takings claim.

[139] *McCarran Int'l Airport*, 122 Nev. at 661-62, 137 P.3d at 1121.

[140] NEV. CONST. art. 1 § 8.

The State Engineer's issuance of Order 1293A resulted in both a per se taking and a regulatory taking.[141] State-issued water right permits are considered real property in Nevada.[142] Order 1293A requires a property owner to first acquire two acre-feet of state-issued water rights, and then forever relinquish those water rights to the State Engineer in order to drill a domestic well. By definition, this is a per se taking of private property – the relinquishment completely divests the property interest in the state-issued water rights without compensation.

Order 1293A is also a regulatory taking.[143] No reasonable person can dispute that the Orders interfere with reasonable investment-backed expectations of the owners. Testimony established that these owners performed due diligence before they purchased their property and confirmed that they could have a well.[144] The

---

[141] A per se taking occurs: (1) where the action requires a property owner to suffer a permanent physical invasion of the property, or (2) where the action "completely deprives an owner of all economical beneficial use" of the property. *McCarran Int'l. Airport*, 122 Nev. at 662, 137 P.3d at 1122. By contrast a regulatory taking occurs when a government regulation requires an individual property owner to "bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522-23, 122 S. Ct. 1522, 1524 (1992).

[142] *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949).

[143] In determining whether a regulation constitutes a taking a court must consider: (1) the regulation's economic impact on the property owner, (2) whether the regulation interferes with reasonable investment-backed expectations, and (3) the nature and the character of the government action. *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. In examining whether a regulatory taking has occurred, the reviewing court "must consider the property as a whole" and "the purpose of the regulation." *Id*.

[144] JT APP 4581:20-4582:17.

State Engineer has never refuted this evidence. Accordingly, Order 1293A interferes with reasonable investment-backed expectations.

V. PFW Has Standing To Participate In This Case.

The State Engineer argues that Respondent PFW lacks standing to file or participate in this action.[145] The State Engineer's argument is without merit. PFW has both constitutional and statutory standing to assert the interests of its members because it was formed for the express purpose of doing so.[146] In addition, Respondents are seeking only prospective injunctive relief that "if granted, will inure to the benefit of those members of the association actually injured."[147]

An association has constitutional standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to their organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.[148] Here, PFW has members that would otherwise have the right to bring this action on their own.[149] Also, because PFW

---

[145] Appellant's Opening Br. at 51.
[146] JT APP 4518:22-4519:1.
[147] *Id.*
[148] *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977); *see also, WildEarth Guardians v. U.S. Dep't of Agric*., 795 F.3d 1148, 1154 (9th Cir. 2015).
[149] JT APP 4532:8-23; JT APP 4560:17-23; JT APP 4580:19-25; JT APP 4586:13-23; JT APP 4591:6-17; JT APP 4595:4-10.

was formed for the express purpose of fighting the Orders,[150] this challenge is germane to its purpose.[151] Finally, participation by PFW's individual members is not required because only declarative and injunctive relief is being sought.[152]

PFW also has statutory standing. In *Citizens for Cold Springs v. City of Reno*,[153] this Court reviewed whether an association had statutory standing based NRS 268.668. The Court ruled that an association of property owners affected by an annexation decision had standing to challenge that decision.[154] NRS 268.668 grants standing to "any person or city claiming to be adversely affected by such proceeding."[155] Because of this broad language the Court, in the "tradition of [its] long-standing jurisprudence," found that the association had standing.[156] The Court held that even property owners who do not have constitutional standing *because they*

---

[150] JT APP 4519:22-4519:1.

[151] The State Engineer argues that the nature of a limited-liability company ("LLC") structure prohibits its use for this type of purpose. Appellant's Opening Br. at 57. However, this Court has recognized that LLCs may be formed for the express purpose of undertaking litigation activities. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 587, 245 P.3d 1190, 1196 (2010). In addition, NRS 86.141(a) expressly states that an LLC can be organized for "any lawful purpose." Filing an appeal of a State Engineer order is lawful under NRS 534.450.

[152] *See Warth v. Seldon*, 422 U.S. 490, 515, 95 S. Ct. 2197, 2213 (1975) ("whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought.").

[153] *Citizens for Cold Springs*, 125 Nev. 625, 218 P.3d 847.

[154] *Id.*, 125 Nev. at 634, 218 P.3d at 853.

[155] *Id.*, 125 Nev. at 629, 218 P.3d at 850.

[156] *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

did not own property in the area of annexation can have statutory standing under NRS 268.668.[157]

The language of NRS 533.450 is at least as broad than NRS 268.668 because it grants standing to any person *feeling* aggrieved rather than any person *claiming* to be aggrieved.[158] Accordingly, just as Citizens for Cold Springs had standing to assert the rights of its members pursuant to NRS 268.668, PFW has standing to do the same pursuant to NRS 533.450.[159]

VI. The District Court Properly Considered PFW's Supplemental Record on Appeal.

The State Engineer's final claim is that the district court erred when it took judicial notice of PFW's SROA. An administrative record "is not necessarily [limited to] those documents that the *agency* has compiled and submitted as the administrative record."[160] Rather, a 'whole' administrative record "consists of all

[157] *Id.*, 125 Nev. at 631, 218 P.3d at 851.
[158] NRS 533.450.
[159] Also, in *Farmers Against Curtailment Order, LLC v. State Engineer*, Case No. 15-CV-00227 (Third Jud. Dist. Ct. of Nevada, May 4, 2015), the State Engineer acknowledged at a hearing in front of the district court that an LLC has standing to bring an action under NRS 533.450 on behalf of its members. His recognition of associational standing in FACO is inconsistent with his claim PFW does not have standing in this case.
[160] *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis in original, internal quotations omitted).

documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position."[161]

Here, the SROA contains records related to the petition for judicial review of Order 1293. Those records included briefs filed in district court and the transcript of an evidentiary hearing. At that hearing, *which the State Engineer personally attended*, PFW members testified that they did not receive notice before they lost their right to drill a domestic well, and the loss of that right caused irreparable harm to their property.[162]

After that hearing, the State Engineer took action to cut off those proceedings by issuing the amended order and then claiming that this action mooted the pending appeal. This action violated this Court's express holding in *Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada*.[163] *Westside Charter* states that an administrative agency may not attempt to circumvent and moot judicial review by taking subsequent action on a matter while that matter is being appealed.[164]

Despite this violation of the district court's exclusive jurisdiction, the State Engineer's actions placed both the district court and PFW in a quandary – declaring Order 1293A invalid based on *Westside Charter* would harm some of the very

---

[161] *Id*. (emphasis in original).
[162] JT APP 4533:19-4534:11; JT APP 4561:6-12; JT APP 4583:9-12; JT APP 4589:18; JT APP 4593:13-19;
[163] 99 Nev. 456, 664 P.2d 351 (1983).
[164] *Id*. 99 Nev. at 460, P.2d at 353.

individuals PFW sought to protect. However, having to start the entire appeal process over would also significantly increase the expense of litigation and delay relief to the majority of PFW's members. Accordingly, PFW entered into a settlement agreement and agreed to dismiss the appeal of Order 1293 and file a new appeal of Order 1293A. The State Engineer agreed to an expedited briefing and hearing schedule for the new appeal.

The State Engineer claims he "did not consider *any* of the documents in the SROA in reaching his decision in Amended Order 1293A."[165] This claim cannot be verified because no affidavit or declaration was provided to support the State Engineer's claim.[166] Also, the SROA contains the State Engineer's own briefs and a transcript of a hearing which he attended. This information was generated before Order 1293A was issued, so the information was certainly available to the State Engineer when he was deliberating over the issuance of Order 1293A. Accordingly, the State Engineer's claim that he did not consider the SROA information before issuing Order 1293A is without merit.[167]

---

[165] Appellant's Opening Br. at 64 (emphasis added).

[166] Even if the State Engineer disagrees with certain evidence, he should not be able to keep such evidence out of the reviewable record merely by claiming he did not rely on it when making his determination.

[167] To the extent the State Engineer did, in fact, ignore this information before issuing Order 1293A, that decision was arbitrary and capricious.

In addition, the documents included in PFW's SROA consist solely of official court records that were all filed within the district court's own jurisdiction. Pursuant to NRS 47.150(2), a court must take judicial notice such matters when requested to do by a party. The documents in PFW's SROA are public documents whose contents were generally known within the jurisdiction of the court and capable of easy authentication. Accordingly, the district court was required by statute to take judicial notice of them.

CONCLUSION

For the reasons stated above, and others that may arise in the course of this proceeding, PFW respectfully requests that the district court's ruling be affirmed in its entirety and the stay on that ruling be lifted.

Respectfully submitted this 26th day of March, 2019.

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

By: /s/ Paul G. Taggart
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify this answering brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 12,575 words.

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

///

///

///

I understand that I may be subject to sanctions in the event that the accompanying answering brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of March, 2019.

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

By: /s/ Paul G. Taggart
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document by electronic service, via the Court's electronic notification system, to:

James N. Bolotin, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701
jbolotin@ag.nv.gov

DATED this 26th day of March, 2019.

/s/ Sarah Hope
Employee of TAGGART & TAGGART, LTD.