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,

Appellants,

v.

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

Respondents.

Supreme Court Case No. 77722

Appeal from Fifth Judicial District Court Case No. 39124

SECOND AMENDED AMICUS BRIEF OF THE NEVADA GROUNDWATER ASSOCIATION AND WATER SYTEMS COUNCIL

Gregory H. Morrison, Esq.
Nevada State Bar No. 12454
Parsons Behle & Latimer
50 West Liberty Street, Suite 750
Reno, NV 89501
Telephone: 775.323.1601
gmorrison@parsonsbehle.com

-and-

Jesse J. Richardson, Esq, *Pro Hac Vice*
969 Vandalia Road
Morgantown, WV 26501
Telephone: 540.327.7508
jessehokie@gmail.com

Attorneys for Amici Curiae
Nevada Groundwater Association and
Water Systems Council

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici have no parent corporations and no public held company holds 10% or more of either Amici's stock. Amici make their first appearance in this case in the Supreme Court of Nevada and the listed attorneys of record constitute all law firms that are expected to appear in this court.

Dated: March 29, 2019.

PARSONS BEHLE & LATIMER

By: */s/ Gregory H. Morrison*
Gregory H. Morrison, Esq.
Nevada Bar No. 12454

-and-

Jesse J. Richardson, Jr., Esq.
Pro Hac Vice

Attorneys for Amici Curiae
Nevada Groundwater Association and
Water Systems Council

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

I. Interest of the Amici

The Nevada Groundwater Association ("Association") was established in 1975 and is a Domestic Non-Profit Cooperative Corporation on file with the Nevada Secretary of State. The Association is an active State Affiliate Association with the National Ground Water Association. Its membership includes contractors and well drillers, pump installers, vendors and technical persons or corporations engaged in water well development projects.

The Association's purpose is to establish the water well industry in the State of Nevada based on sound scientific and business practices, and to assist, promote, encourage and support the interest and welfare of the Nevada water well industry. Further purposes of the Association are promotion of scientific education, development of standards and research to improve the methods of drilling and well completion, and to encouragement of harmony and cooperation with membership and governing regulatory agencies. The Association Board actively advocates for the members of the water well industry by providing public comment on proposed legislation or regulation changes that may impact the industry. In light of the current litigation in the matter of exempt wells, as well as pending legislative and/or regulatory changes in Nevada, the Association has an interest in protecting the right to drill a domestic or exempt well in Nevada.

Founded in 1932, the Water Systems Council ("WSC" or "Council") is a national nonprofit organization with programs solely focused on private water wells and small, shared wells that serve more than 13 million households, or 34 million Americans, nationwide (U.S. Census American Housing Survey 2017).

WSC members are leaders in the water well industry who are dedicated to promoting and protecting our nation's precious groundwater supply. WSC membership consists of 18 major manufacturers of well components, 14 major distributors of said products, 22 state associations of groundwater professionals, and 26 well contractors. Estimated annual sales in the water well industry top $5 billion.

WSC is committed to the twin goals of protecting our nation's groundwater resources and ensuring that Americans who depend on domestic wells have safe, reliable drinking water. The Council works to educate well owners, consumers, and policymakers at the local, state, and federal levels about water wells and the importance of protecting America's groundwater resources. Additionally, WSC maintains voluntary industry standards to promote excellence in the manufacturing of components for water well systems.

Two WSC business members have offices in Nevada: Preferred Pump & Equipment, L.P. has offices in Las Vegas and Sparks, and Western Hydro has an office in Sparks. The Council has a strong interest in protecting a private

homeowner's right to access groundwater through private wells. WSC's participation in this proceeding brings a national, comparative perspective.

If State Engineer Amended Order 1293A is allowed to stand, landowners in the Pahrump Basin would be prevented from utilizing the groundwater beneath their property to supply their domestic water. In addition, the State Engineer would be empowered to issue similar orders in other basins across the state. This barrier to domestic water wells would impose huge costs on the economy of rural Nevada and is contrary to the policy of the State of Nevada.

II. Introduction

On December 19, 2017, the State Engineer issued Order No. 1293, which prohibited the drilling of any new domestic well in the Pahrump Basin without obtaining and relinquishing 2.0 acre-feet annually ("AFY") of water rights in good standing. JT APP Vol. I at 50. A Petition for Judicial Review of Order No. 1293, was subsequently filed by Pahrump Fair Water, LLC. The State Engineer then issued Amended Order No. 1293A on July 12, 2018. JT APP Vol. I at 56. Amended Order 1293A created two exceptions to Order No. 1293. JT APP Vol. I at 56. Pursuant to a settlement agreement, the original action challenging Order 1293 was voluntarily dismissed and a new action was filed against Amended Order 1293A, which included additional petitioners. JT APP Vol. I at 15-30.

The district court issued a bench order on November 8, 2018 granting the Petition for Judicial Review and reversing Amended Order 1293A. JT APP Vol. XIII-XIV at 5186-5377. The written order was filed on December 6, 2018, and Notice of Entry of Order was served on December 6, 2018. JT APP Vol. XIV at 5417-5441. The State Engineer timely filed this appeal. Proceedings relating to a district court-ordered stay of Amended Order 1293A are omitted from this discussion.

The district court found, pertinent to this brief, that the State Engineer exceeded his statutory authority in issuing Amended Order 1293A; that Amended Order 1293A impaired vested property rights, so due process should have been afforded; and that Amended Order 1293A lacked support by substantial evidence. Amici Nevada Groundwater Association and Water Systems Council ask this Court to affirm the district court decision and stay enforcement of Amended Order 1293A.

Relaxation of permitting requirements for domestic wells is almost universal in prior appropriation states. Nevada's practice conforms to the national norm, although it generally imposes stricter requirements on domestic wells than other states. Consistent with other state practices, the Nevada State Engineer's authority with respect to exempt wells is limited. This authority does not include the authority to ban domestic wells in the Pahrump Basin unless the landowner obtains and relinquishes 2 AFY, as required by Amended Order 1293A.

In Nevada, as in most other prior appropriation states, domestic water wells remain subject to priority. Senior appropriators retain the standard remedies to impairment by junior appropriators, even when the junior appropriators consist of domestic water wells. However, curtailment—or in this case a ban on further domestic water wells—cannot be based on speculation, possibilities or hypotheticals. Rather, a senior appropriator must demonstrate actual impairment. Generally, a proposed water user must demonstrate that its proposed use will not impair existing rights. Shifting the burden from domestic well owners at the time of application to place the burden on senior appropriators, requiring them to show impairment after issuance of the permit lies within the realm of acceptable policy choices by the state legislature. Such a shift in the burden will not violate constitutional rights.

This common practice of relaxing certain requirements for domestic water wells is supported by important policy considerations. Many Americans, and many Nevadans, rely on private water wells for clean, efficient water supply. Most private water wells are located in rural areas, many of which would lack potable drinking water altogether without private water wells. The rural economy relies on domestic water wells. Bans and moratoria on domestic water wells have proven economically costly in the past.

Domestic water wells provide environmental benefits as compared to public water providers. The localized impact is less because large volume pumping is avoided. In addition, most water withdrawn from domestic water wells is returned to the local groundwater system rather than being consumed as it is with irrigation withdrawals, or returned to distant systems, as with public water system withdrawals. Finally, subjecting domestic water wells to stringent regulation would impose regulatory burdens that far exceed the benefit of such regulation.

III. Argument

A. Exempt Wells Are an Almost Universal Element of the Prior Appropriation Doctrine in the United States.

"The term 'exempt wells' refers to ground water withdrawals that are exempt from one or more state law requirements that apply to water withdrawals generally." Jesse J. Richardson, Jr., *Existing Regulation of Exempt Wells in the United States*, J. Contemp. Water Res. and Educ. No. 148 (August 2012), pp. 3-9. The term is a misnomer, as withdrawals—not wells—are regulated, and the withdrawals are not "exempt" from the water rights regime of the particular state. *Id.* Although a misnomer, Amici utilize the commonly-used term both generally and to refer to domestic groundwater withdrawals as exempt from permit requirements and control by the State Engineer, with very limited exceptions, in Nevada. However, exempt wells in Nevada remain subject to prior appropriation, as is the case in most states.

Exempt wells generally exist in states that use the prior appropriation doctrine for groundwater. Thirteen states use the prior appropriation rule for groundwater: Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. Water Systems Council, *Who Owns the Water: A Summary of Existing Water Rights Laws*, at 6 (August 2016). Each of these states includes exempt well provisions in the system of prior appropriation with the exception of Utah.[1] In addition, four other states use legal approaches to groundwater rights other than prior appropriation, but have permitting systems that provide at least some limited relaxation of some rules for some ("exempt") water wells: Arizona, Nebraska, Oklahoma, and Texas. *See* Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011)

[1] *See* Alaska Admin Code tit. 11, §§ 93.035, 05.010; Ariz Rev. Stat. Ann. §§ 45-402, 45-454; Colo Rev. Stat § 37-90-105, 37-92-602; Idaho Code Ann. §§ 42-111, 42-227, 42-914; Kan. Stat. Ann. §§ 82a-701, 82a-703, 82a-703a, 82a-705a, 82a-728; Mont. Code Ann. § 85-2-306; Neb. Rev. Stat. §§ 46-602, 46-714 , 735, 46-740; Nev. Rev. Stat. §§ 533.024, 533.370, 534.013, 534.180; NMSA 1978, §§ 72-12-1 to -1.3; 19.27.5.14 NMAC; N.D. Cent. Code §§ 61-04-01.1, 61-04-01.2, 61-04-02, 61-04-06.1, 61-04-06.3; Okla. Stat. tit. 82 §§ 1020.1, 1020.3; Or. Rev. Stat. § 537.545; S.D. Codified Laws §§ 46-1-5, 46-1-6, 46-5-8, 46-5-8.2, 46-5-50 to -52; Texas Water Code §§ 11.121 11.201 to 11.207, § 36.117; Utah Code Ann. §§ 73-3-2, 73-3-5.6, 73-3-8; Wash. Rev. Code §§ 90.44.050, 90.44.052**;** Wyo. Stat. Ann. §§ 41-3-907, 41-3-911, 41-3-930, 41-3-935, 41-3-936; *see generally*, Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011); Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010).

("*Analysis of Exempt Well Regulations*"); Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010).[2]

Nevada, along with each of the states that provides special provisions for domestic wells, regulates domestic wells by subjecting them to special provisions, either explicitly or by giving different requirements for low yield wells or low quantity withdrawals.[3] These regulations include quantity and/or yield limitations, geographic limitations, and irrigation limits. Richardson, Jr., at 3; Water Systems Council, *see also Analysis of Exempt Well Regulations*. Other provisions include mandatory connection, construction standards and required filing of information. Richardson, Jr. at 3, 5-7.

B. Nevada Generally Imposes Strict Requirements on Exempt Wells

A comparison of western states reveals that Nevada generally imposes one of the most stringent requirements and regulates in a relatively broad number of ways. With regard to diversion for domestic use, Nevada is among the strictest. Four states, Idaho, Kansas, North Dakota and Oklahoma, place no quantity or capacity limits on exempt domestic wells.[4] Several other states have relatively lenient restrictions on

---

[2] Some of these states also incorporate priority into their permitting systems. *Id.*
[3] Only Idaho, South Dakota, and Wyoming exempt domestic wells from priority and only South Dakota appears to completely exempt domestic wells from regulation under the prior appropriation doctrine. *See Analysis of Exempt Well Regulations*.
[4] *Idaho Code Ann*. §§ 42-111, 42-227, 42-914; *Kansas Statutes Ann*. §§ 82a-701, 82a-703, 82a-703a, 82a-705a, 82a-728; *North Dakota Centennial Code* §§ 61-04-

the amount of water that may be diverted. Nebraska restricts withdrawals to 50 gallons per minute ("GPM"), or 80.65 acre-feet per year ("AFY"). *See* Neb. Rev. Stat. §§ 46-602, 46-714 , 735 and 46-740. Arizona and Montana each allow a maximum capacity of 35 gallons per minute, or 56.46 AFY. *See* Ariz. Rev. Stat. §§ 45-402, 45-454; Mont. Code Ann. § 85-2-306.[5] Wyoming limits diversions to .056 cubic feet per second, or 25 GPM, which translates to 42.01 AFY. *See* Wyo. Stat. Ann. §§ 41-3-907, 41-3-911, 41-3-930, 41-3-935, 41-3-936. South Dakota limits the amount to 18 GPM, or 29.03 AFY, while Texas limits diversions in groundwater management districts to 25,000 gallons/day, or 28.00 AFY. *See* S.D. Codified Laws §§ 46-1-5, 46-1-6, 46-5-8, 46-5-8.2, 46-5-50 to 46-5-52; Texas Water Code §§ 11.121, 11.201 to 11.207, § 36.117. Colorado allows a maximum capacity of 15 GPM, or 24.195 AFY, with an annual limit of 5 AFY in designated groundwater basins. *See* Colo. Rev. Stat. Ann. § 37-90-105, 37-92-602. Oregon limits diversions to 15,000 gallons per day, or 16.80 AFY. *See* Or. Rev. Stat. § 537.545.

Other states, including Nevada, place stricter limits on domestic diversion. Washington allows diversions of 5,000 gallons per day (5.60 AFY), while Nevada caps diversions at 2 AFY. *See* Wash. Rev. Code §§ 90.44.050, 90.44.052; NRS

01.1, 61-04-01.2, 61-04-02, 61-04-06.1, and 61-04-06.3; *Oklahoma Statutes* Title 82 §§ 1020.1, 1020.3.

[5] However, Arizona includes a 10 AFY quantity limit in certain active management areas and Montana imposes the same annual capacity limit. *Id.*

533.024, 533.370, 534.013, and 534.180. Only two states, Alaska and New Mexico, impose limits on domestic well diversions that are less than Nevada's, allowing withdrawals of 500 gallons per day (.56 AFY) and 1 AFY, respectively. *See* Alaska Admin Code tit. 11; NMAC 19.27.5.9.D.1.

Table 1 lists the state limitations on withdrawals or capacity of domestic water wells from the most stringent to the least stringent, expressed as AFY.

Table 1.

State	**Capacity Limit**	**Diversion Limit (AFY)**
Alaska	None	0.56
New Mexico	None	1.0
Nevada	None	2.0
Washington	None	5.6
Oregon	None	16.80
Colorado	15 GPM	24.195 (5 in designated groundwater basins)
Texas	None	28.00 in groundwater management districts
South Dakota	None	29.03
Wyoming	None	42.91
Arizona	35 GPM	56.46 (10 in certain active management areas)
Montana	35 GPM	None
Nebraska	None	80.65
Idaho	None	None
Kansas	None	None
North Dakota	None	None
Oklahoma	None	None

Table derived from Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010); Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011); Jesse J. Richardson, Jr., Existing Regulation of Exempt Wells in the

United States, *Journal of Contemporary Water Research & Education,* Issue 148, pp. 3-9 (August 2012).

Eight of the 16 exempt well states, including Nevada, provide for designation of certain geographic areas where more stringent limits may be placed on exempt wells.[6] In Nevada, exempt wells in designated areas must be registered. NRS 534.180(2). Only Kansas, Nevada, North Dakota, Oregon and Wyoming require the owners of exempt wells to submit information to the state. Richardson, Jr., at 6. In Nevada, the owner must furnish "any information required by the State Engineer". NRS 534.180(1).

Nevada is one of only three states (along with Arizona and New Mexico) that mandates that landowners connect to public water in certain circumstances rather than use an exempt well. Richardson, Jr., at 5. The State Engineer may require connection to a public water supply and plugging of an exempt well drilled on or after July 1, 1981 where water can be provided by a political subdivision of the state or a public utility regulated by the Public Utilities Commission of Nevada. NRS 534.180(3). The connection and plugging requirement can be imposed only after public water service has been available for at least one year, and where the charge for making the service is less than $200. *Id.*

[6] Those states are Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, Texas and Washington.

C. As in Other States, Exempt Wells in Nevada are Subject to Priority, but Exempt from Permitting and from Control of the State Engineer.

Chapter 534 of the Nevada Revised Statutes governs groundwater and wells. As with the water of all sources in Nevada, groundwater belongs to the public and is subject to appropriation under the laws of the state. NRS 534.020. The provisions of Chapter 534 create a permitting program based upon prior appropriation. The State Engineer may issue permits for water withdrawals only where unappropriated water exists in the area. NRS 534.110(3).

However, Chapter 534 does not apply "in the matter of obtaining permits for the development and use of … a well for domestic purposes where the draught does not exceed 2 acre-feet per year," with certain exemptions. NRS 534.180(1). These withdrawals are Nevada's version of "exempt wells" and, as in many other states, these wells do not require a water rights permit.

Nevada law also places exempt wells outside of the scope of control of the State Engineer, with certain limited exceptions. NRS 534.030(4) requires the State Engineer to supervise all wells, with certain exceptions, "except those wells for domestic purposes for which a permit is not required." Other provisions give the State Engineer limited authority with respect to exempt wells. The user of an exempt well must provide "any information" required by the State Engineer. NRS 534.180(1). In a basin or portion of a basin designated by the State Engineer, the

State Engineer may require registration of exempt wells. NRS 534.180(2). The well driller must register the information required within 10 days of completion of the well. *Id.*

Where public water becomes available, the State Engineer may also require the use to connect to that public water supply, and to plug the exempt well. NRS 534.180(3). The State Engineer may impose this requirement no earlier than one year after a political subdivision of the state or a public utility regulated by the Public Utilities Commission of Nevada can furnish water to the site; in addition, the charge for making the connection must be less than $200. *Id.*

The public policies motivating water law in Nevada include recognition of "the importance of domestic wells" and the creation of "a protectable interest in such wells." NRS 433.04(1)(b). The supply of water from exempt wells must be "protected from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated." *Id.* Consequently, NRS Chapter 534 provides several protections and priorities for exempt wells. Permits may be granted where diversions under the proposed later appropriation may reduce the water level to the point of diversion of a senior appropriator. NRS 534.110(5). However, existing domestic well appropriations and other senior appropriations must be capable of being satisfied. *Id.* For certain diversions of this type, the State Engineer must include as a permit condition that

pumping may be limited or prohibited to prevent "unreasonable adverse effects" on domestic wells located within 2,500 feet of the withdrawal, unless an agreement exists between the proposed permittee and owner of the domestic well. *Id.*

In designated areas when groundwater is being depleted, the State Engineer may establish preferred uses and utilize those preferences in permit applications for appropriations. NRS 534.120(2). Domestic uses are listed in the first category, along with industrial, irrigation, and stock water in the limitations provided for the State Engineer in establishing these preferred uses. NRS 534.120(2)(a). This preference for domestic uses in times of shortage comports with preferences in "regulated riparian" states in the Eastern United States. *See generally* Jesse J. Richardson, Jr., *Agricultural Preferences in Eastern Water Allocation Statutes*, 55 Nat. Res. J. 329 (2015).

Exempt wells remain subject to prior appropriation. Priority for most groundwater appropriations is established by an application filed with the State Engineer. NRS 534.080(3). However, the date of priority for the use of groundwater in an amount of less than 2 AFY from a domestic water well is the date of completion of the well. NRS 534.080(4). That date is documented by a log filed by the well driller or other documentation or evidence. *Id.*

D. The State Engineer May Not Presume Impairment and Curtail Use Based on Speculation

Appellant asks this Court to find that water users in the Pahrump Basin would necessarily be impaired if more exempt wells are allowed (and to presume that the State Engineer holds authority to address this presumed impairment). However, the allegation of impairment is purely speculative. *See* District Court Opinion, p. 7. In Order 1293A, the State Engineer determined only that "pumping by domestic wells has the *potential* to be the largest use of groundwater in the basin." Order 1293A, at p. 2, ¶ 6 (emphasis added). That finding was, in turn, based on the idea that "there is *potential* for up to 8,000 new domestic wells to be drilled on existing parcels for which no domestic well currently exists." *Id*. at p. 3, ¶ 7 (emphasis added).

Adding to the speculative nature of the findings, the State Engineer based his calculations on the maximum 2 AFY that domestic well owners *may* legally withdraw. Although the State Engineer consistently cites the 2 AFY figure in estimating the impact of exempt wells in the Pahrump basin, the amount of water actually withdrawn by exempt wells is much less. Self-supplied domestic water withdrawals average 77 gallons per day (GPD) nation-wide, but that number is higher in the arid west. Dieter, et al., *Estimated Use of Water in the United States in 2015*, USGS Circular 1441 (2018) at 65, Table 5.[7] The average exempt well user

[7] Available at https://doi.org/10.3133/cir1441.

in Nevada withdraws 186 GPD. That number, multiplied by the average number of people in a household in the United States (2.58) and then multiplied by 365 days per year, results in the conclusion that the average household in Nevada withdraws 175,156.2 gallons—0.5375 acre-feet—per year.

Assuming that the State Engineer's concerns regarding over-appropriation persist despite the actual annual use of domestic wells, mere "paper impairment" cannot serve as a proxy for actual impairment. Courts that have considered this issue have uniformly found that impairment is a factual issue, and is not amenable to resolution as a matter of law. The State Engineer argues that a determination of impairment should be based on the quantity of its *allowed* withdrawals. However, a *potential* right—one that may (or may not) be used—is not a solid foundation upon which to demonstrate injury to a water user. *Actual* impairment must be shown to order curtailment.

The New Mexico Supreme Court case *Bounds v. State ex rel. D'Antonio,* 306 P.3d 457 (N.M. 2013), is very similar to the case at bar in many respects. In *Bounds*, the court considered an argument that the issuance of further domestic well permits in a closed basin necessarily impairs senior water users. 306 P.3d at 462. The Court declined to find impairment as a matter of law, reasoning that "well-established case law" in that state had repeatedly rejected the notion of impairment as a matter of law.

*Id. (*citing *Mathers v. Texaco, Inc*., 421 P.2d 771, 776-777 (N.M. 1966) and *Montgomery v. Lomos Altos, Inc.,* 150 P.3d 971 (N.M. 2007)).

In *Bounds,* the plaintiff offered the testimony of an expert witness who opined that since the basin was fully appropriated the water for any new wells must come from senior appropriators. 306 P.3d at 469. The expert had failed, however, to conduct his own scientific study of the basin, make any calculations, or present any models to quantify the impact of domestic wells on other water rights. *Id.* at 469-470. The court rejected the expert's "conclusory statement as a substitute for scientific analysis." *Id.* at 470. Here, the district court similarly rejected the State Engineer's conclusory statements in Amended Order 1293A.

The *Bounds* court also found that a "... water user who is able to show actual or impending impairment can make a priority call against junior users and, if that fails, the water user could then file an as-applied challenge...." *Id.* at 468. The court acknowledged that "showing such an impairment can be a difficult task," but would not hold that impairment had occurred "without more than the mere speculation of impairment." *Id.*

*Bound*s relied on the settled law in New Mexico that whether a user's water rights have been impaired is a factual question that must be decided based upon the specific circumstances present in each case. In *Mathers v. Texaco, Inc*., 421 P.2d 771, 776 (N.M. 1966), Texaco applied for a withdrawal permit in a nonrenewable

groundwater basin. The State Engineer had determined the amount of water contained in the basin, the amount already appropriated, and the amount that could be appropriated in the future. 421 P.2d at 774. In making the determination to grant the permit, the State Engineer calculated the amount of water that could be withdrawn while leaving one-third of the water in the basin after forty years. *Id.* Senior appropriators in the basin objected, claiming that the withdrawal by Texaco would lower the water table for the wells of the senior appropriators, result in increased pumping costs, and shorten the time within which senior appropriators could economically withdraw water. *Id.* at 775. The New Mexico Supreme Court found that the definition of impairment "must generally be decided upon the facts in each case" and that providing a definition of impairment would not only be "difficult" but would "lead to severe complications." *Id.* at 776.

The Washington Supreme Court reached a similar result in *Lummi Indian Nation v. State,* 241 P.3d 1220 (Wash. 2010). There, the court concluded that "the challengers have cited no case, and [the court] found none, where mere *potential* impairment of some hypothetical person's enjoyment of a right has been held to be sufficient for a successful facial due process challenge." *Id.* at 1231 (emphasis added).

Although *Bounds* and *Lummi Indian Nation* both involved facial challenges, *Mathers* illustrates that the principle applies in all contexts. Potential, speculative

or hypothetical impairment fails to support curtailment. That principle applies here to the State Engineer's proposed a ban on further exempt wells. A senior appropriator must demonstrate actual impairment to deprive a junior appropriator of its right to withdraw. To hold otherwise would allow exempt wells, a preferred use under the law, to be curtailed using a lower threshold than other junior uses.

E. Senior Appropriators Possess a Remedy if Domestic Wells Impair their Withdrawals

Nevada law does not exempt domestic wells from the priority system, NRS 534.080, and all remedies remain available to senior appropriators. Senior appropriators may enforce their rights under prior appropriation by requesting a priority call or filing suit against a junior appropriator to enjoin any use that harms the senior user's receipt of water. NRS 533.430 (water users take subject to senior appropriations); NRS 534.195 (injunctive relief is available to enforce any provision of water law); *McCormick v. Sixth Judicial Dist. Ct.*, 69 Nev. 214, 226-27, 246 P.2d 805, 811 (1952) (State Engineer, subject to judicial oversight, retains authority to enforce priority of water rights); s*ee also Bounds,* 306 P.3d, 468 ("[a] water user who can show actual or impending impairment can make a priority call against junior users...").

These remedies are the same remedies, and the ONLY remedies, available to senior appropriators with respect to ANY other water right, whether an "exempt well" or otherwise. *See generally* NRS Chapters 533 & 534; s*ee, e.g., Bounds,* 306

P.3d at 468 ("The same protections for senior users apply against domestic wells as against any other water right."). In addition, these are the remedies that existing appropriators MUST avail themselves of in Nevada. That proving impairment by a domestic well may prove difficult does not allow "mere speculation of impairment in the present case" to support a ban of domestic wells. *Bounds*, 306 P.2d. at 468.

As explained by the New Mexico Supreme Court in *Bounds*, a legislative policy decision to essentially shift the burden of proof in a prior appropriation system violates no constitutional doctrine. 306 P.2d at 464-468. Similar to the Nevada system, the New Mexico State Engineer must issue a domestic well permit without examining the impact on senior appropriators. NMSA 1978, § 72-12-1.1. Issuance of a permit does not equate to an absolute right to take and use water under that permit. *Bounds*, 306 P.2d at 466. Only if the mere issuance of a permit (or waiver of a permit) in a fully appropriated basin equated to an absolute right to physically divert water would the issuance "necessarily take water from senior water users and impair senior water rights." *Id.* However, NRS Chapter 534 "does not create such an unconditional right." *Id.*

F. Exempt Domestic Wells Provide Many Economic and Environmental Benefits

1. Domestic Wells Benefit Many Americans

Over 15 million households in the United States, approximately 15 percent of Americans, rely on private water wells for their drinking water. United States

Environmental Protection Agency, *Learn About Private Water Wells*.[8] The United States Congress has recognized the efficacy of individual water wells for domestic water supply. On December 16, 2016 President Obama signed the Water Infrastructure Improvements for the Nation Act ("WIIN Act") into law. Section 2108 of the WIIN Act, Water Supply Cost Savings, provides for the creation of a drinking water technology clearinghouse to gather information on the cost-effectiveness of "innovative and alternative drinking water delivery systems, including wells and well systems." 42 U.S.C.A. § 300j-3d(a)(1). In addition, in any application for a grant or loan relating to drinking water delivery systems serving 500 or fewer persons, where the funding comes from the federal government, the applicant must self-certify that individual wells, shared wells, and community wells have been considered as an alternative drinking water supply. 42 U.S.C.A. § 300j-3d(b).

The exempt well policies across the west were developed to promote many important benefits to both citizens and government agencies. Nevadans in particular benefit from the provisions which excuse some small users from the usual permit requirements. If the State Engineer's Amended Order 1293A is upheld, private water wells in rural Nevada are at risk.

[8] Available at https://www.epa.gov/privatewells/about-private-water-wells (last accessed on March 15, 2019).

2. Exempt Well Provisions Particularly Benefit Rural Residents.

Domestic wells are vital for Nevada, where private water wells provide cost-effective, dependable and safe drinking water for thousands of households. The exact number of households connected to private water wells in Nevada is uncertain, but likely exceeds 50,000. The 1990 United States Census—the last to ask about water supply for households—estimated that 36,185 Nevada households utilized individual water wells.[9] The Nevada State Engineer reports approximately 51,200 domestic well logs. Telephone conversation with Trevor Price, Well Supervisor, Nevada Department of Water Resources, March 12, 2019. However, well logs were rarely reported before the 1990's. *Id.*[10] According to USGS estimates, 193,000 Nevadans, or 6.4% of the population, rely on domestic water wells. *Estimated Water Use* at Table 5. Based on the average household size in the United States, 74,806 households in Nevada use a domestic water well. This number is not inconsistent with the State's estimate, given the gap in data.

---

[9] Pertinent 1990 U.S. Census data summarized at https://www.census.gov/hhes/www/housing/census/historic/water.html (last accessed March 18, 2019).

[10] Mr. Price explained that he used the database at http://water.nv.gov/welllogquery.aspx to make the calculations. First, using the pull down menu under "Use", the total number of domestic well permits. Then, Mr. Price used the work type menu to subtract the number of replacement domestic well permits and plugged domestic well permits to yield the estimate of 51,200 domestic wells.

Domestic wells are most prevalent in rural areas. A public water supply is not a viable option in rural Nevada due to its high cost and the remoteness of most Nevada counties from metropolitan centers. *See* Washington State Groundwater Ass'n, *White Paper Focusing On Instream Flows and Exempt Wells* (2004) at 3, 9.[11] Not only are these wells the most practical and efficient source of water available to rural citizens, in many cases, they are the only viable option for obtaining potable water for households. *See* Western States Water Council, *Water Laws and Policies for a Sustainable Future: A Western States Perspective* (June 2008);[12] Washington State Groundwater Ass'n, *White Paper Focusing On Instream Flows and Exempt Wells*.[13]

3. Exempt Wells Help Promote Industry and Are Vital to the Economy.

Domestic wells are also critical for rural development. *See, e.g.*, Resolution and Recommendation of the Umatilla County, Oregon Critical Groundwater Task Force (Jan. 6, 2005).[14] Where public water is not available or feasible, exempt wells

---

[11] *Available at* http://robinson-noble.com/publications/white-papers/instream-flows-and-exempt-wells.
[12] *Available at* http://www.westernstateswater.org/wp-content/uploads/2012/10/laws-policies-report-final-with-cover-1.pdf (last accessed March 18, 2019).
[13] *Available at* http://robinson-noble.com/publications/white-papers/instream-flows-and-exempt-wells (last accessed March 18, 2019).
[14] *Available at* https://static1.squarespace.com/static/5897d8662994ca37c62df8a7/t/59d6c290c53

allow the development of individual rural lots. *See, e.g.,* Exempt Wells Topic Paper, Island County, Washington (2004).[15] A moratorium on exempt wells in a portion of Kittitas County, Washington several years ago resulted in "lost jobs, reduced property value, investments wiped out, shifting tax burdens, significant local economic damages, and significant opportunity costs." Paul Jewell, Kittitas County Board of Commissioners, Presentation to Conference, *Exempt Wells: Problems and Approaches in the Northwest* (Walla Walla, WA, May 2011) summarized in *Conference White Paper* at p. 7.[16]

The recent decision by the Supreme Court of Washington in *Whatcom County v. Hirst,* 381 P.3d 1 (Wash. 2016), caused most rural counties in that state to place a moratorium on domestic water wells. A study of the economic impact of this virtual halt in rural residential development estimated that the decision cost the state almost $7 billion per year in lost economic activity. HR2 Research and Analytics, *Building Industry Association of Washington (BIAW) Economic Impact Research of Exempt*

4a520dacb7927/1507246744966/Appendix+E+Umatilla+County+Exempt+Well+Resolution.pdf.

[15] *Available at* https://www.islandcountywa.gov/Health/DNR/Documents/Topic%20Paper%20Exempt%20Wells.pdf.

[16] *Available at* https://www.eiseverywhere.com/file_uploads/c0eea58c3d987fa399d191a1d5bf287a_Summary_2.pdf.

Wells (September 7, 2017), Executive Summary.[17] Reversing the decision of the court below could cause similar economic impacts in Nevada. In addition to the burden on water users, requiring a cumbersome, time consuming permitting process would also have a negative impact on the water well industry—an important industry—in Nevada.

In light of national recognition of the struggles facing rural Americans, *see, e.g.,* Exec. Order No. 13,575, 76 Fed. Reg. 34,841 (June 14, 2011) (President Obama creates a council to focus on rural economies and improving the quality of life in rural communities), making it more difficult to have an exempt well in Nevada would be unsound from a policy perspective. The addition of a time consuming, burdensome, and expensive hurdle for rural residents to overcome in order to provide domestic water to their properties will only cause further difficulties in rural communities.

G. Exempt Wells Provide Environmental Benefits and Regulating These Wells is Administratively Burdensome.

Exempt wells drawing small amounts of water might provide environmental benefits. One large municipal well creates a large cone of depression, while smaller wells create much smaller cones of depression; thus, smaller domestic wells may help to avoid adverse effects. *See, e.g.*, Island County, Washington, *Exempt Wells*

[17] *Available at* http://src.wastateleg.org/wp-content/uploads/2017/09/Economic-Study.final_9_7_2017.pdf (last accessed March 13, 2019).

Topic Paper (2004).[18] Smaller cones of depression also mean that domestic wells have a greatly reduced impact on groundwater and hydrologically connected streams. *See* Western States Water Council, *Water Laws and Policies for a Sustainable Future*, at p. 61.

Although the State Engineer consistently cites the 2 AFY figure in estimating the impact of exempt wells in the Pahrump basin, the amount of water actually withdrawn by exempt wells is much less. Self-supplied domestic water withdrawals average 77 GPD nation-wide, with slightly higher averages in the arid west. *Estimated Water Use* at Table 5. In Nevada the average per-person withdraw is 186 GPD. Multiplied by the average number of people in a United States household, 2.58, and then by 365 days per year, and the average Nevada household withdraws 175,156.2 gallons—0.5375 acre-feet—per year.

Cumulatively, domestic wells in Nevada withdraw approximately 35.8 million gallons per day of groundwater, or 2.6 percent of the total freshwater groundwater withdrawals in the State. *Estimated Water Use* at Table 4.4. In comparison, irrigation withdrawals account for 71.5 percent of freshwater groundwater withdrawals in Nevada. *Id.* Much of the water withdrawn from domestic water wells is returned to the underlying aquifer through septic systems.

[18] *Available at* https://www.islandcountywa.gov/Health/DNR/Documents/Topic%20Paper%20Exempt%20Wells.pdf.

Conversely, the majority of groundwater pumped for irrigation purposes is consumed. *See* American Geosciences Institute, *Groundwater Use in the United States* (2010).[19] The net impact of exempt domestic wells on groundwater levels is therefore negligible compared to irrigation pumping, both in Nevada in general and in the Pahrump Basin.

It should also be considered that the retroactive and prospective licensing, permitting, and metering of wells that are currently exempt would place an overwhelming burden on regulatory agencies and the public. *See Water Laws and Policies for a Sustainable Future* at p. 61. In light of that fact, the benefits of imposing additional regulations on exempt wells are likely to be minimal when compared to the significant costs that would be added by the regulation. *See, e.g.*, Dave Tuthill, Idaho Water Engineering, Presentation to Conference, *Exempt Wells: Problems and Approaches in the Northwest* (Walla Walla, WA, May 2011).[20]

IV. Conclusion

Domestic water wells provide safe, clean and efficient water supplies to tens of thousands of Nevadans. Without private domestic wells, the economy of rural Nevada would suffer greatly. The facts and science fail to support State Engineer's

[19] *Available at* https://www.americangeosciences.org/critical-issues/factsheet/groundwater-use-united-states.
[20] *Available at* https://www.eiseverywhere.com/file_uploads/b2ebaa7026619363260f1eaf978bb16c_Tuthill.pdf (last accessed March 15, 2019).

Amended Order 1293, which is based on speculation and hypotheticals. This Court should keep in place the Legislature's carefully constructed public policies that balance the relaxation of regulatory requirements for domestic water wells, the rural economy, environmental protection and administrative efficiency.

Based on the foregoing, Amici Nevada Groundwater Association and Water Systems Council respectfully requests that this Court affirm the district court's order invalidating the State Engineer's Amended Order No. 1293A.

V. Certificate of Compliance

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6351 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: March 29, 2019.

PARSONS BEHLE & LATIMER

By: */s/ Gregory H. Morrison*
Gregory H. Morrison, Esq.
Nevada Bar No. 12454

-and-

Jesse J. Richardson, Jr., Esq.
Pro Hac Vice

Attorneys for Amici Curiae
Nevada Groundwater Association and
Water Systems Council

CERTIFICATE OF SERVICE

I certify that I am an employee of Parsons Behle & Latimer and that on this 29th day of March, 2019, I cause and true and correct copy of the foregoing document, SECOND AMENDED AMICUS BRIEF OF THE NEVADA GROUNDWATER ASSOCIATION AND WATER SYSTEMS COUNCIL, to be served by filing with the Clerk of the Court using the Court's CM/ECF system, which sent electronic notification to all registered users:

Aaron D. Ford Attorney General
James N. Bolotin Deputy Attorney
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Counsel for Appellant

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

/s/ Roni L. Shaffer
Employee of Parsons Behle & Latimer