IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

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

Respondents.

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Case No. 77722

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The district court erred in overturning the State Engineer's Amended Order No. 1293A (hereafter "the Order"). Despite the arguments to the contrary from Respondent Pahrump Fair Water, LLC, *et al.* (hereafter "PFW") in its Answering Brief, the fact remains that there is no vested property right in the ability to drill a domestic well when there has been no improvement to an empty parcel of land. Because there was no vested property right, the State Engineer did not need to provide notice and a chance for PFW to be heard prior to issuing the Order. Furthermore, the State Engineer properly exercised his statutory authority under NRS 534.110(8) and NRS 534.120(1), given the troubling nature of the groundwater situation in Pahrump, to restrict the free proliferation of new domestic wells in the Pahrump Basin. Similarly, substantial evidence existing in the Record on Appeal ("ROA") before the district court, in the form of groundwater studies, monitoring data, and historical data, supports the State Engineer's decision to issue the Order.

Additionally, the district court did not reach a decision on the issue of whether the Order results in an unconstitutional taking, and the State Engineer did not raise this issue on appeal. Therefore, this issue is not

properly before this Court. Nonetheless, should this Court consider this issue, PFW improperly raised this issue for the first time in a judicial review proceeding pursuant to NRS 533.450. Notwithstanding, the Order does not result in a taking.

Lastly, the separate entity, Pahrump Fair Water, LLC, lacked standing to participate as a petitioner in challenging the Order and the district court committed reversible error by considering PFW's Supplemental Record on Appeal ("SROA").

II. STATEMENT OF FACTS

The State Engineer incorporates Section V of his Opening Brief, "Standard of Review," by reference. State Engineer's Opening Brief, pp. 3–11. The State Engineer now timely submits his Reply Brief following the filing of PFW's Answering Brief on March 26, 2019.

III. ARGUMENT

A. Standard of Review

The State Engineer incorporates Section VII(A) of his Opening Brief, "Standard of Review," by reference as if fully set forth herein. State Engineer's Opening Brief, pp. 16–20.

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B. The Order Did Not Violate Due Process as Nevada Law Does Not Provide an Entitlement to a Potential New Domestic Well

Contrary to PFW's assertions, the ability to drill a new domestic well is not a property right that vests immediately upon creation of a parcel. PFW predicates this argument on the false idea that, prior to the issuance of the Order, no further governmental discretionary action was required for these alleged parcel owners to drill a domestic well on their property. Answering Brief, p. 11 (*citing Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995)). This is not true.

The State Engineer agrees that, under Nevada law, in order for real property rights to vest, "zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement." *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112. However, in addition to the lack of any further governmental discretionary action, the developer of the real property "must prove considerable reliance on the approvals granted." *Id.*

PFW's assertion that the notice of intent ("NOI") to drill a well process, or for that matter the building permit process, are merely

"ministerial acts" is patently incorrect. Answering Brief, p. 19. The State Engineer's approval of a NOI for a domestic well is not a "ministerial act," and it would be improper for the State Engineer to treat it as such. PFW fails to provide any specific authority or analysis for how they reached this conclusion. In fact, in a case cited by PFW, this Court found the opposite: that property rights did not vest until *after* issuance of a building permit. *See City of Reno v. Nev. First Thrift*, 100 Nev. 483, 487, 686 P.2d 231, 233 (1984) ("We hold that when a building permit has been issued, vested rights against changes in zoning laws exist after the permittee has incurred considerable expense in reliance thereupon.").

It is clear that Nevada adheres to the discretionary act approach in determining when a landowner's rights vest in its planned project. *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112; *see also Wal-Mart Stores, Inc. v. Cty. of Clark*, 125 F. Supp. 2d 420, 424–26 (D. Nev. 1999). Yet, PFW improperly concludes, without support, that the filing of an NOI, and the issuance of *any* building permit, are ministerial acts.

PFW reached this conclusion in large part because of the *Wal-Mart Stores* case, where the United States District Court of the District of Nevada determined that "the issuance of a building permit is a purely

ministerial act **in this case**." *See Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 427 (emphasis added). The federal district court reached this conclusion following a fact-specific inquiry regarding the process for the issuance of a building permit under specific regulations. *Id.* Even after making this determination, the federal district court continued on to the second step of the vested right test: whether Wal-Mart could show reliance on the approvals given. *Id.*

Here, PFW cannot satisfy either element of the test to prove that its members had a vested right to drill new domestic wells on their empty parcels. The process requiring submission, and approval, of a NOI to drill is discretionary in nature, not "ministerial," and PFW cannot show considerable reliance on any previous discretionary approvals from the State Engineer regarding the feasibility of a new domestic well.

In the Pahrump Basin, the State Engineer requires registration of domestic wells. *See* NRS 534.180(2). Per NAC 534.320(1), "a well driller shall not set up a well rig or commence drilling or plugging a well until the well driller has submitted to the Division [of Water Resources] a notice of intent to drill **and the Division has approved the notice of intent to drill**." (emphasis added). Thus, it is clear from NAC 534.120

that a new domestic well requires more than simply filing an NOI, which would constitute a ministerial act. Rather, not only must a well driller submit an NOI to the Nevada Division of Water Resources ("DWR") prior to commencing drilling, but DWR and its administrator, the State Engineer, must also **approve** that NOI.

Where a governmental agency has *any* discretion in granting or denying a necessary authorization, there can be no entitlement and no constitutionally protected interest in that authorization. *Boulder City v. Cinnamon Hills Assoc.*, 110 Nev. 238, 246, 871 P.2d 320, 325 (1994) (*citing Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992)). In the *Cinnamon Hills* case, the Court found that Boulder City retained discretion in granting a building permit by virtue of language in its regulations requiring that a certain class of housing be "approved by the City." *Cinnamon Hills*, 110 Nev. at 247, 871 P.2d at 325. In the *Wal-Mart Stores* case, the federal district court similarly noted the importance of the "approved by the City" language in the regulation when interpreting this Court's finding in *Cinnamon Hills*. *See Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 427.

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Additionally, the Court in *Cinnamon Hills* found it important that Boulder City thought that it had discretion to accept or reject applications under the regulations, as Boulder City's interpretation of its own regulations is "cloaked with a presumption of validity and will not be disturbed absent a manifest abuse of discretion." *Cinnamon Hills*, 110 Nev. at 247, 871 P.2d at 326 (*citing State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

In the instant case, the NOI process is one that is discretionary in nature, like that addressed in *Cinnamon Hills*, rather than the ministerial act described in *Wal-Mart Stores*. NAC 534.320(1) clearly contains language that leaves discretion with DWR as to the approval of a NOI. A well driller may not commence drilling without approval of the NOI by DWR and must have the NOI approval in their possession at the well drilling site and be able to produce the approval upon request by a representative of DWR. NAC 534.320(1); *see also* NAC 534.330(4). The NOI process requires DWR to exercise its discretion in determining whether to, ultimately, approve or deny the NOI. DWR has always approached the NOI process with the belief that it has discretion to

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approve or deny NOIs, even though denial was uncommon prior to the situation in Pahrump.

Lastly, PFW fails to make any showing that its members relied on prior discretionary approvals from the State Engineer. PFW consists of three different subsets of individuals: parcel owners, real-estate brokers, and owners of well drilling companies. JT APP Vol. I at 16. PFW makes no showing that it, as a whole, made any reliance on prior discretionary approvals from the State Engineer, nor do they make a showing that the parcel owners, real-estate brokers, or owners of well drilling companies have individually relied on any prior discretionary approvals. Rather, PFW argues that the mere creation of parcels vested an entitlement in the ability to drill a domestic well on that parcel. *See* Answering Brief, p. 19. While not addressed specifically, PFW infers that the parceling of the land also, somehow, created a vested property right in the potential business for real-estate brokers and owners of well drilling companies. However, the parceling of land, or even the purchase of a parcel by a member of PFW, does not rise to the level of reliance required to meet the vested property right test.

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During the adoption of NRS 533.024(1)(b), the legislative history is clear that protectable interests in domestic wells only occur "after there has been an improvement on the property and a well has been drilled." JT APP Vol. V at 959. Here, PFW makes no showing that its members have made any improvements on their property. Those parcel owners that have made improvements, which would require the issuance of a building permit, have an express exemption from the provisions of the Order. JT APP Vol. I at 56. Thus, in effect, the Order creates an exemption for those individuals who can in fact prove considerable reliance on the previous governmental discretionary approvals. Those that cannot, such as PFW, are still subject to further governmental discretionary action via the NOI process and cannot show reliance on any previous approvals.

Rather, because those parcel owners would have been subject to further discretionary acts via the NOI process, and quite possibly the building permit process, PFW falls squarely within this Court's decision in *Malfitano v. Cty. of Storey by & through Storey Cty. Bd. of Cty. Comm'rs*, ___ Nev. ___, 396 P.3d 815, 819 (2017). Like the appellant in *Malfitano*, PFW does not have a legal entitlement to new domestic wells

simply because the State Engineer approved domestic wells generously in the past. *See* 396 P.3d at 820.

There is no legal entitlement to a new domestic well, as discretionary acts exist between the purchase of a parcel of land and the drilling of a new domestic well. The mere expectation that someone will be able to drill a domestic well on their property (or that their businesses will reap the benefits of the ability to drill new domestic wells) is insufficient for procedural due process protections to attach. Thus, the State Engineer did not violate due process by issuing the Order without notice and a hearing.

C. The "Protectable Interest" Language in Nevada Water Law Was Enacted to Protect *Existing* Domestic Wells

The State Engineer recognizes the protectable interest language and the legislative history that led to the adoption of NRS 533.024(1)(b). The State Engineer is also aware, as evidenced by the plain language of NRS 533.024(1)(b) and NRS 533.370(2), that this protectable interest lies exclusively with existing domestic wells. There is no protectable interest in potential new domestic wells.

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PFW focuses intently on the legislative history to argue that the Legislature added the "protectable interest" language to the water law "to provide *additional* protections for domestic wells, not to remove existing protections." Answering Brief, p. 22. The State Engineer agrees that that this language provides additional protections to **existing** domestic wells. In fact, the State Engineer issued the Order, and utilized the "protectable interest" language, to protect those existing domestic wells within the Pahrump Basin. Absent from the legislative history, including those portions highlighted by PFW, was any intent by the Legislature to create some kind of protectable interest in potential new domestic wells.

As detailed in the Opening Brief, studies show that under current conditions, approximately 3,085 existing wells in the Pahrump Basin will fail by the year 2065. JT APP Vol. VII at 1541–1550. Additionally, prior to the Order, the State Engineer already restricted all other potential new commitments for the use of groundwater within the Pahrump Basin. JT APP Vol. I at 78. Thus, the State Engineer faced a situation where many existing domestic wells, with protectable interests, were going to fail. The reality is, even without additional pumping in the Pahrump

Basin, these existing domestic wells, as well as appropriated rights, face a dire future. While the State Engineer has restricted all new appropriations, prior to the issuance of Order No. 1293, there is still the potential for 8,000 new domestic wells with the ability to withdraw 2.0 acre-feet of groundwater per year. NRS 534.013; NRS 534.180; *see also* JT APP Vol. I at 52, Vol. I–III at 86–560, Vol. V at 1022–1157, Vol. VI–VIII at 1436–1652, Vol. IX–X at 1792–3495. This would only exacerbate the problems in the Pahrump Basin.

In an effort to safeguard the undisputed protectable interest in existing domestic wells, the State Engineer issued the Order, at the request of the Nye County Water District, to prevent new domestic wells in the Pahrump Basin, without relinquishment of 2.0 acre-feet of existing water rights. *See* JT APP Vol. VI at 1365–1384. In other words, the only tool left to protect existing domestic wells, short of regulation of the Pahrump Basin by priority, was to restrict potential new domestic wells.

It is important to note that the Order also continues to allow for new domestic wells so long as the individual seeking to drill the new domestic well relinquishes 2.0 acre-feet of water rights to offset the water that may be used by that new domestic well. JT APP Vol. I at 55.

Regulation by priority (curtailment) would prohibit any committed water use[1] in junior priority to the sustainable water use in the Pahrump Basin. If a basin is under a curtailment order, it would also prohibit the drilling of new domestic wells because their priority date would certainly be "junior" in time. *See* NRS 534.080(4); NRS 534.110(6).

The Order allows for the drilling of new domestic wells so long as any new draught of water from the Pahrump Basin does not increase the total water commitments. The State Engineer accomplished this goal by requiring the acquisition and relinquishment of 2.0 acre-feet of existing water rights to account for the 2.0 acre-feet of water that a domestic well is statutorily allowed to withdraw. The goal was to protect existing rights, including those in existing domestic wells, without curtailing anyone's existing water uses, while providing an avenue for individuals to drill a new domestic well if desired. Should the Order be overturned, regulation by priority becomes more likely, which would result in individuals with protectable interests in their existing domestic wells to,

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[1] Committed water uses include water right permits, certificates, and domestic wells.

nonetheless, lose their ability to use water while new domestic wells would not be allowed.

D. The State Engineer Has Authority to Regulate Domestic Wells, Including Restricting the Drilling of New Domestic Wells

Despite PFW's contention otherwise, the State Engineer did not abandon his argument that Nevada's domestic well exemption only exempts domestic wells from the permitting requirement. *See* Answering Brief, pp. 26–28. Rather, the State Engineer's interpretation, and longstanding application, of the water law is that the statutory exemptions for domestic wells only exempts the well from the permitting requirements, as illustrated by other portions of the water law that allow the State Engineer to regulate domestic wells, **and** that these exemptions only apply to existing domestic wells.

Per NRS 534.030(4), the State Engineer has a duty to supervise all wells "except those wells for domestic purposes for which a permit is not required." Further, under NRS 534.180(1), NRS Chapter 534 "does not apply in the matter of obtaining permits for the development and use of underground water from a well for domestic purposes where the draught

does not exceed 2 acre-feet per year." Both of these exemptions specifically refer to the permitting requirements, and the State Engineer does not dispute that he cannot require a permit for a domestic well that does not withdraw more than 2.0 acre-feet of water each year. Thus, existing domestic wells have an exemption from the responsibilities and requirements that accompany a water right permit, such as completing necessary works and applying the water to beneficial use within prescribed periods of time. *See* NRS 533.380.

While the Legislature exempted existing domestic wells from the permitting requirements, the Legislature also specifically provided language allowing the State Engineer to regulate domestic wells under certain circumstances. Notably, these provisions pertain to overall health of the basin, and do not involve the day-to-day supervision that the State Engineer conducts through the permitting process.

Specifically, NRS 534.110(6) allows the State Engineer to order withdrawals, including those from domestic wells, be restricted to conform to priority rights (curtailment). For purposes of NRS 534.110(6), NRS 534.080(4) assigns a date of priority to domestic wells as the date of completion of the well.

Then, there are the broader statutory tools that the State Engineer utilized in issuing the Order, NRS 534.110(8) and NRS 534.120(1). NRS 534.110(8) provides that the State Engineer may restrict drilling of wells in any designated basin, or portion thereof, where he determines that additional wells would cause an undue interference with existing wells. NRS 534.120(1) provides that in an area designated by the State Engineer, where in his judgment the groundwater basin is being depleted, he may "make such rules, regulations and orders as are deemed essential for the welfare of the area involved." The domestic well exemptions from the State Engineer's supervision through the permitting process do not limit the State Engineer's ability to make those decisions deemed necessary for the health of the groundwater basin.

PFW argues that the exemptions from the permitting process in NRS 534.030(4) and NRS 534.180(1) are extraordinarily broad such that the State Engineer cannot use NRS 534.110(8) and NRS 534.120(1) to restrict the drilling of new domestic wells. Under PFW's rationale, the groundwater law prohibits the State Engineer from taking any action regarding potential new domestic wells, even where the State Engineer knows that new domestic wells will interfere with existing rights

(including existing domestic wells) and that new domestic wells are causing depletion of a groundwater basin. This contravenes the policy and purpose behind the various statutes that empower the State Engineer to take the necessary steps to protect existing water users and groundwater basins as a whole.

What would be the purpose of creating a protectable interest in existing domestic wells if there was an unhindered ability to drill new domestic wells, even where they would cause a direct interference and failure of existing domestic wells? Similarly, what would be the purpose of NRS 534.120(1) if the State Engineer is not allowed to restrict the drilling of new domestic wells, even where this is deemed the essential step to preventing depletion of the groundwater basin? Under PFW's logic, the State Engineer would only have two options: (1) sit idly by while the proliferation of domestic wells both interferes with existing wells and causes the depletion of a groundwater basin; or (2) curtail by priority,[2] whereby many existing domestic well owners would lose use of their water. This cannot be the case.

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[2] As detailed in the Opening Brief, PFW and the district court questioned whether the State Engineer even has this authority. Opening Brief, pp. 13, 38.

There is a clear dichotomy between those statutes that exempt domestic wells from the permitting process and those that allow the State Engineer to take actions for the general well-being of the basin. Despite PFW's arguments to the contrary, this conclusion does not render NRS 534.120(3)(d) & (e) and NRS 534.110(6) meaningless. *See* Answering Brief, pp. 29–33. The rationale behind these limitations that specifically target domestic wells is very different from the rationale behind NRS 534.110(8) and NRS 534.120(1).

NRS 534.120(3)(d) & (e) allow the State Engineer to take various actions that assist with his ability to account for a basin's water budget. For example, NRS 534.120(3)(d) allows the State Engineer to require connection to a water utility where one exists, rather than drilling a domestic well. Similarly, NRS 534.120(3)(e) allows the State Engineer to require dedication or relinquishment of water rights for new parcel maps where the developer proposes that the parcels will be served by domestic wells. Neither NRS 534.120(3)(d) nor (e) addresses those types of dire situations that trigger NRS 534.110(8) (interference with existing wells) or NRS 534.120(1) (groundwater basin being depleted), as the State Engineer has deemed present in the Pahrump Basin.

Similarly, the State Engineer's interpretation of NRS 534.110(8) and NRS 534.120(1) does not render NRS 534.110(6) "wholly superfluous." Answering Brief, pp. 31–32. As discussed above, the State Engineer recognizes his ability per NRS 534.110(6) to curtail a groundwater basin by priority,[3] including domestic wells, where his investigation indicates that the average annual replenishment to the groundwater supply is inadequate for the needs of all permittees and all vested-right claimants. Thus, NRS 534.110(6) involves a situation where the State Engineer's investigation shows that there is insufficient water available to meet the needs of all existing permits and vested rights. NRS 534.110(8) deals specifically with the State Engineer determining that additional wells would cause undue interference with existing wells, regardless of total water availability in the basin, whereas NRS 534.120(1) addresses depletion of the groundwater basin, even

[3] However, the State Engineer disagrees with PFW that NRS 534.110(6) would only allow curtailment of domestic wells on parcels created after 2011. *See* Answering Brief, p. 32 n.100. At no point in the legislative history of Assembly Bill 419 in 2011 did the Legislature exhibit intent that it only be prospective. Additionally, in 2007 the Legislature clarified the date of priority for domestic wells. *See* Senate Bill 275, 74th Leg. Sess. (Nev. 2007). A priority date for a domestic well would be irrelevant if not for purposes of curtailment.

where sufficient water currently exists to serve the needs of existing permits and vested rights. Simply because the State Engineer can restrict new domestic wells under NRS 534.110(8) and NRS 534.120(1) does not render meaningless the language allowing him to curtail existing domestic wells under NRS 534.110(6).

Further, the State Engineer does not use the legislative declaration in NRS 533.024(1)(b) "to overcome express and unambiguous provisions of NRS 534.030(4) and NRS 534.180(1)." Answering Brief, pp. 28–29. Rather, the State Engineer cites NRS 533.024(1)(b) for two reasons. First, to illustrate the State's policy in protecting interests in existing domestic wells, as this was part of the rationale in issuing the Order. Second, to show the legislative intent that the protectable interest in domestic wells does not vest until such time as an improvement is made to the property and/or a domestic well is actually drilled.

New domestic wells were the last unrestricted new use of water in the Pahrump Basin and evidence showed that the new domestic wells would interfere with existing wells and lead to the depletion of the basin. Thus, the State Engineer properly issued the Order pursuant to his statutory authority found in NRS 534.110(8) and NRS 534.120(1).

E. Nevada Water Law Regarding Domestic Wells is Distinguishable from New Mexico and *Bounds*

PFW cites to *Bounds v. State ex rel. D'Antonio*, 306 P.3d 457 (N.M. 2013), for the proposition that "[i]n both New Mexico and Nevada, the State Engineer does not have discretion to restrict the drilling of domestic wells." Answering Brief, p. 33. This conclusion is incorrect, and the instant case is distinguishable from *Bounds* and New Mexico water law.

As detailed above, even after a parcel is created and/or purchased, the State Engineer retains discretion over the drilling of domestic wells by virtue of the NOI process. *See* NAC 534.320(1). This differs from New Mexico, where there is no discretion, as the applicable statute requires the State Engineer to issue a permit for a domestic well "[u]pon the filing of each application describing the use applied for." N.M. STAT. ANN. § 72-12-1.1 (1978). This difference alone makes *Bounds* inapplicable.

However, when comparing the merits of the instant case versus *Bounds*, the cases are further distinguishable. In *Bounds*, the petitioners, making a facial challenge to the constitutionality of

New Mexico's Domestic Well Statute ("DWS"), "mistakenly equat[ed] the issuance of a permit under the DWS with an absolute right to take and use water pursuant to that permit." 306 P.3d at 466. New Mexico's domestic wells go through a permitting process, such that they are not entitled to an absolute right to take water, but "are conditioned on the *availability* of water to satisfy that right." *Id.*

The New Mexico Court also found that domestic wells are "subject to curtailment by priority administration." *Id.* at 467 (*citing* 19.27.5.13(B)(11) New Mexico Administrative Code ("NMAC")). Importantly, the New Mexico Court noted multiple times that the petitioner had failed to demonstrate an actual conflict or harm to his wells or water rights, and rather depended on "a speculative inference from the fact of a closed and fully appropriated basin." *See id.* at 462–463, 470. The court held "there can be no constitutional challenge to the statute without at least a specific probability of impairment in a given case. The constitutional principles of prior appropriation are not in peril when senior water users cannot demonstrate a concrete risk of impairment—that they are in danger of losing the very water guaranteed them by that same prior appropriation doctrine." *Id.* at 463.

As detailed in the Opening Brief, and again below, the State Engineer based his decision to issue the Order on studies showing actual impending impairment of existing wells and on historical data from when pumping in the Pahrump Basin regularly exceeded the perennial yield. *See* Opening Brief, pp. 22–27. Even without new domestic wells, by the year 2065, studies show that approximately 3,085 existing wells will fail; any increase in pumping, as supported by historical data contained within the record, will only worsen that harm. *See* JT APP Vol. I at 54, Vol. VI at 1301–1345, Vol. VI–VIII at 1385–1652. This is a significant departure from the mere threat of impairment raised by the petitioner in *Bounds*.

Additionally, the way that the exemption for domestic wells works in New Mexico differs greatly from Nevada. As discussed above, domestic wells in Nevada are exempt from the State Engineer's permitting process, though other statutes allow the State Engineer to take steps in managing designated groundwater basins that affect existing domestic wells and potential new domestic wells. *See* NAC 534.315(1); NRS 534.030(4); NRS 534.180(1); NRS 534.110(6) & (8); NRS 534.120(1);

NRS 534.120(3)(d) & (e). Conversely, in New Mexico, the DWS itself is a permitting statute. *Bounds*, 306 P.3d at 468.

Thus, even in New Mexico, where the *Bounds* court upheld the DWS, the court found that domestic wells were not entitled to "an absolute right to take and use water." *Id*. at 466. The *Bounds* court noted, however, that "[i]t would only be in the case of such an absolute water right that the mere issuance of a permit in a fully appropriated basin would necessarily take water from senior users and impair senior water rights." *Id*. This is the case facing Pahrump, as the Order is the State Engineer's attempt, pursuant to NRS 534.110(8) and NRS 534.120(1), to restrict new domestic wells before they are drilled. Domestic wells in Nevada, unlike New Mexico, do not require a permit. Rather, once a domestic well is completed, the owner has statutory authorization to withdraw up to 2.0 acre-feet per year, absent basin-wide curtailment by priority. NRS 534.013; NRS 534.080(4); NRS 534.110(6); NRS 534.180.

The State Engineer has authority to restrict new domestic wells, as he did in the Order. The Supreme Court of New Mexico's decision in *Bounds* does not alter that conclusion. The Legislature has not restricted

the State Engineer from making decisions that affect the feasibility of new domestic wells, but rather has provided him with tools to take necessary steps to protect groundwater resources, a public resource. NRS 533.025. Here, based on substantial evidence, the State Engineer decided that the health of the basin depends on restricting the free proliferation of new domestic wells. He has the statutory authority to do so.

F. The State Engineer's Legal Conclusions are Entitled to Deference

PFW incorrectly argues that the State Engineer failed to provide any citation that supports his claim that "[d]ecisions of the State Engineer are entitled to deference with respect to their . . . legal conclusions." Answering Brief, pp. 35–36. PFW cites to the State Engineer's Opening Brief, where he stated that his decisions "are entitled to deference with respect to their factual determination and legal conclusions." Opening Brief, p. 19. While this sentence itself did not have a citation, immediately following this sentence, the State Engineer went on to provide legal support for deference as to his factual determinations and legal conclusions. *Id.*

PFW argues that decisions of the State Engineer receive a "no deference" standard of review. Answering Brief, p. 36. However, this Court has held that the State Engineer is entitled to deference as "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action" and "great deference should be given to the agency's interpretation when it is within the language of the statute." *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). Further, as recently as 2008, the Court held that "because the appropriation of water in Nevada is governed by statute, and the State Engineer is authorized to regulate water appropriations, that office has the implied power to construe the state's water law provisions and great deference should be given to the State Engineer's interpretation when it is within the language of those provisions." *Andersen Family Assoc. v. Hugh Ricci, P.E.*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008).

PFW focuses on the recent decision in *Felton v. Douglas County*, a case that did not involve water law or the State Engineer. *See* 410 P.3d 991 (2018); *see also* Answering Brief, p. 36. Given the special nature of water law, "the provisions of such law not only lay down the method of

procedure but strictly limits it to that provided." *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949).

Additionally, PFW attempts to support its advocacy for a no deference standard by questioning the State Engineer's qualifications. Answering Brief, p. 38. While the State Engineer is a professional engineer by background and training, his duties require a unique skillset as his role requires administering Nevada's water law, statutes, and regulations. Additionally, the State Engineer has regularly had attorneys on his staff to assist with his decision-making. The same reasoning supporting deference in *Morros* exists to this day.

G. Substantial Evidence in the Record Supports the Order

The State Engineer stands by his analysis from his Opening Brief showing that substantial evidence in his record on appeal supported the issuance of the Order. *See* Opening Brief, pp. 21–31. Thus, rather than rehashing these arguments, the State Engineer will address specific claims made by PFW in its Answering Brief.

As has been stated multiple times, based on **current** pumping rates alone, which admittedly fall below the perennial yield, studies

predict approximately 3,085 wells to fail by 2065. JT APP Vol. I at 54, Vol. VI–VIII at 1385–1652. Undue interference, as required for the State Engineer to take action pursuant to NRS 534.110(8), is not defined anywhere in statute. However, it is difficult to fathom a more "undue interference" than outright failure of a well.

Thus, knowing the historical effects of pumping groundwater at greater rates, as well as the forecast under existing pumping, the State Engineer reasonably determined that more wells and more pumping will increase the number, and speed up the occurrence, of well failures. The State Engineer already restricted all other types of new groundwater commitments via Order No. 1252. JT APP Vol. I at 7. The State Engineer's last option for preventing further lowering of the water table, while avoiding curtailment, was to restrict new domestic wells. It is not a true characterization to state that larger production wells are exempt from the Order; rather, the State Engineer would deny an application for a new well of this type.

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The State Engineer did not "rely exclusively" on the results of Mr. Klenke's groundwater model[4], but rather utilized this groundwater model in conjunction with historical data, other studies, current monitoring data, and trends to issue the order based on substantial evidence. JT APP Vol. I at 54, Vol. VI at 1301–1345, Vol. VI–VIII at 1385–1652.[5] For this reason, this Court should reverse the district court's Order.

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[4] PFW provides no legal or factual support for its conclusion that the State Engineer "has refused throughout this process to address any of PFW's specific criticisms of Mr. Klenke's groundwater study" such that it should be deemed an admission that the study is flawed and cannot be considered substantial evidence. Answering Brief, p. 40 n.128. Such a proposition is completely belied by the fact that the State Engineer has at all times cited Mr. Klenke's study as supporting the Order, and has addressed in detail why it was relevant to the State Engineer's decision. *See* Opening Brief, pp. 21–31.

[5] PFW also attacks the State Engineer's record on appeal by arguing that the evidence therein should be given little to no weight because the State Engineer did not hold a hearing. Answering Brief, pp. 42–44. The State Engineer previously addressed this argument in those sections of the Opening Brief and this Reply Brief regarding PFW's lack of a vested property right and the resulting lack of procedural due process protections. The cases cited by PFW, *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 197, 234 P.3d 912, 919 (2010), and *Eureka Cty. v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1120 (2015), both involved challenges from existing water right holders, who are entitled to procedural due process protections. Here, there is no right to a potential new domestic well, and therefore no entitlement to notice and right to be heard.

H. Though the Taking Issue is Not Properly Before this Court, the Order is Not an Unconstitutional Taking

The district court declined to make a determination as to whether the Order is an unconstitutional taking of private property without just compensation. JT APP Vol. XIV at 5424. Given that the district court declined to rule on this issue, the State Engineer did not raise this issue on appeal, and PFW did not appeal this omission on its own, this issue is not properly before this Court. *See Alway v. State*, 2014 WL 2466312, Docket No. 61790, filed May 30, 2014 (unpublished disposition) (*citing Neverson v. Farquharson*, 366 F.3d 32, 39 (1st Cir. 2004) ("a party may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder.").

Nonetheless, the State Engineer argues, as he did at the district court, that PFW improperly raised its takings claim for the first time during proceedings initiated via a petition for judicial review under NRS 533.450. Additionally, even if the takings claim is considered, the Order does not result in a taking.

Specifically, PFW initiated this litigation as a petition for judicial review under NRS 533.450. Under NRS 533.450(1), the district court

acts in an appellate capacity. It would be improper under NRS 533.450 to decide the taking claim in that proceeding. Additionally, any alleged taking claim would not be ripe. The threshold determination before this Court and the district court is whether substantial evidence supports the Order. If the Court upholds the State Engineer's decision, then PFW *may* be able to assert a taking claim in a new action. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (A taking claim is not ripe unless and until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.").

Notwithstanding, the State Engineer adamantly disputes PFW's assertion that the Order is a *per se* or regulatory taking. As established above, Petitioners do not possess a protected property interest in their expectations regarding new domestic wells, and therefore no taking occurred as to the potential new domestic wells themselves. Further, there is an essential nexus between the legitimate state interest of preventing the depletion of the Pahrump Basin and the requirement that those who wish to drill new domestic wells relinquish sufficient water

rights to account for the potential draught of that domestic well. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831–37 (1987); *see also Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). Further, because domestic wells, by statute, may withdraw up to 2.0 acre-feet annually from publicly owned waters, there is a reasonable relationship for the State Engineer's requirement that 2.0 acre-feet be acquired and relinquished before drilling the new domestic well. *See Dolan*, 512 U.S. at 394–96.

To the extent PFW argues that the Order effects a regulatory taking as to their currently owned[6] parcels of land, this argument also fails. The Order is not a *per se* taking: it does not impose any physical invasion of property on property owners in the Pahrump Basin (let alone a permanent invasion), nor does it deprive parcel owners of all economical beneficial use of their property. *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662, 137 P.3d 1110, 1122 (2006). Simply because the value of the property is affected or, conversely, building a home on the property

[6] To the extent that those members of PFW identified as real-estate brokers doing business in Pahrump and owners of well drilling companies argue the Order results in a taking against them, such a proposition defies all logic considering they do not allege to own a parcel of land in the Pahrump Basin eligible for a domestic well. *See* JT APP Vol. I at 16.

that will be served by a domestic well now includes the added expense of acquiring and relinquishing a water right, does not effect a taking, and certainly does not effect a *per se* taking of private property.

I. Pahrump Fair Water, LLC, Lacked Standing to Challenge the Order

The State Engineer stands by and restates those arguments in his Opening Brief regarding Pahrump Fair Water, LLC, lacking standing. Opening Brief, pp. 51–62. However, for clarification, the State Engineer makes it clear that he is not challenging the standing of PFW as a whole (that is, collectively, Pahrump Fair Water, LLC, Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte). Rather, the State Engineer's challenge to standing only targets the entity Pahrump Fair Water, LLC.

J. The District Court Improperly Considered the SROA

Similarly, the State Engineer restates his arguments that the district court erred in admitting and considering PFW's SROA. Opening Brief, pp. 63–65. While the State Engineer did not consider the documents in the SROA at all in his issuance of the Order, the State Engineer concedes to PFW's point that there is no affidavit or declaration

supporting this assertion. However, as stated previously, any document in the SROA created after July 12, 2018, clearly did not play a role in the State Engineer's July 12, 2018, decision. Once again, the State Engineer's decisions depend on the record on appeal he submits to the district court. If the record is insufficient, the State Engineer must bear the consequences, however it is not proper for the court to supplement the State Engineer's record on appeal after the fact.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 25th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,854 words.

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

conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 25th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 25th day of April, 2019, I served a copy of the foregoing APPELLANT'S REPLY BRIEF, by electronic service to:

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