

IN THE SUPREME COURT OF THE STATE OF NEVADA

---

*Supreme Court Case No.*

---

NEVADA GOLD MINES LLC

*Petitioner,*

v.

NEVADA DEPARTMENT OF CONSERVATION AND NATURAL  
RESOURCES, OFFICE OF THE STATE ENGINEER OF THE STATE OF  
NEVADA, AND ADAM SULLIVAN, IN HIS CAPACITY AS  
STATE ENGINEER,

*Respondents.*

---

---

**PETITION FOR WRIT OF PROHIBITION OR  
MANDAMUS UNDER NRAP 21**

---

Alex J. Flangas, Esq., Bar No. 664  
aflangas@kcnvlaw.com  
Severin A. Carlson, Esq., Bar No. 9373  
scarlson@kcnvlaw.com  
Ellsie E. Lucero, Esq., Bar No. 15272  
elucero@kcnvlaw.com  
KAEMPFER CROWELL  
50 W. Liberty Street, #700  
Reno, Nevada 89501

Todd L. Bice, Esq., Bar No. 4534  
tlb@pisanellibice.com  
Jordan T. Smith, Esq., Bar No. 12097  
jts@pisanellibice.com  
Dustun H. Holmes, Esq., Bar No. 12776  
dhh@pisanellibice.com  
Emily A. Buchwald, Esq., Bar No. 13442  
PISANELLI BICE PLLC  
400 South 7th Street, Suite 300  
Las Vegas, Nevada 89101  
702.214.2100

*Attorneys for Petitioner Nevada Gold Mines LLC*

Electronically Filed  
May 26 2022 10:21 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

## **RULE 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the foregoing are persons or 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.

Petitioner Nevada Gold Mines LLC is a Delaware limited liability company which is majority owned by Barrick Gold Corporation, a publicly traded company on the New York Stock Exchange. Pisanelli Bice PLLC and Kaempfer Crowell are the only law firms that have or will appear for Petitioner.

Respondents are offices or officers of the State of Nevada.

DATED this 25th day of May, 2022.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice  
Todd L. Bice, Esq., Bar No. 4534  
Jordan T. Smith, Esq., Bar No. 12097  
Dustun H. Holmes, Esq., Bar No. 12776  
Emily A. Buchwald, Esq., Bar No. 13442  
400 South 7th Street, Suite 300  
Las Vegas, Nevada 89101

Alex J. Flangas, Esq., Bar No. 664  
Severin A. Carlson, Esq., Bar No. 9373  
Ellsie E. Lucero, Esq., Bar No. 15272  
KAMEPFER CROWELL  
50 W. Liberty Street, #700  
Reno, Nevada 89501

*Attorneys for Petitioner Nevada Gold Mines LLC*

## **ROUTING STATEMENT**

The Nevada Supreme Court should retain this matter because it involves significant issues of Nevada water law. With this original proceeding, Petitioner challenges jurisdiction and authority of the Nevada State Engineer. NRAP 17(A)(8) provides that the Supreme Court shall retain jurisdiction.

Additionally, the issue presented by this writ petition – the State Engineer's authority to undertake conjunctive management of distinct ground and surface water rights – is also presented in two recently-filed appeals now pending before this Court: Case Nos. 84739 and 84741.

## TABLE OF CONTENTS

RULE 26.1 DISCLOSURE .....	i
ROUTING STATEMENT.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	v
I. OVERVIEW AND RELIEF SOUGHT .....	1
II. ISSUES PRESENTED .....	5
III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION .....	6
A. Nevada Law Has Long Recognized the Separate and Distinct Management of Groundwater Rights Verses Surface Water Rights. ...	6
B. The State Engineer Seeks Authority and Standards for Future Conjunctive Management .....	8
C. Pershing County Water Conservation District's Preexisting Litigation Concerning the Humboldt River. ....	12
D. The State Engineer Makes a Private Settlement Agreement Concerning Conjunctive Management.....	13
E. The State Engineer Issues His Humboldt Conjunctive Order, and Multiple Lawsuits Ensur.....	15
IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE .....	19
A. The State Engineer's Improper Claims of Jurisdiction Compel Writ Relief.....	19
B. The State Engineer Lacks Authority to Issue the Humboldt Conjunctive Order. ....	20
C. The State Engineer Cannot Acquire Power by a Collusive and Private Settlement Agreement.....	23

D.	Without More, NRS 533.024(1)(e) is an Unconstitutional Delegation of Legislature Powers to the State Engineer.....	25
V.	CONCLUSION.....	28
	VERIFICATION/DECLARATION .....	30
	CERTIFICATE OF COMPLIANCE.....	31
	CERTIFICATE OF SERVICE .....	33

## TABLE OF AUTHORITIES

### Cases

<i>Andrews v. Nev. State Bd. of Cosmetology</i> , 86 Nev. 207, 467 P.2d 96 (1970) .....	24
<i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988) .....	22
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142 (2012) .....	22
<i>City of Henderson v. Kilgore</i> , 122 Nev. 331 (2006) .....	20
<i>City of Reno v. Civil Service Comm'n of City of Reno</i> , 117 Nev. 855 (2001) .....	24
<i>Clark Cnty. School Dist. v. Clark Cnty. Classroom Teachers Ass'n.</i> , 115 Nev. 98, 977 P.2d 1008 (1999) .....	20
<i>Clark Co. v. State Equal Rights Comm'n</i> , 107 Nev. 489, 813 P.2d 1006 (1991) ....	24
<i>Defs. of Wildlife v. Norton</i> , 258 F.3d 1136 (9th Cir. 2001) .....	23
<i>Felton v. Douglas Cnty.</i> , 134 Nev. 34, 410 P.3d 991 (2018) .....	21
<i>Galloway v. Truesdell</i> , 83 Nev. 13, 422 P.2d 237 (1967) .....	26
<i>Home Builders Ass'n of Chester &amp; Del. Cty. v. Com. Dep't of Env'tl. Prot.</i> , 828 A.2d 446 (Pa. Commw. Ct. 2003) .....	24, 25
<i>Howell v. Ricci</i> , 124, Nev. 1222, 197 P.3d 1044 (2008) .....	21
<i>Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.</i> , 124 Nev. 193, 179 P.3d 556 (2008) .....	19
<i>J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC</i> , 127 Nev. 72, 249 P.3d 501, (2011) .....	22
<i>Jerry's Nugget v. Keith</i> , 111 Nev. 49, 888 P.2d 921 (1995) .....	21
<i>McNeill v. State</i> , 132 Nev. 551, 375 P.3d 1022 (2016) .....	27
<i>Mountain View Hosp., Inc. v. Eighth Jud. Dist. Ct.</i> , 128 Nev. 180, 273 P.3d 861, (2012) .....	19

<i>Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.</i> , 132 Nev. 784, 383 P.3d 246, (2016).....	19
<i>Pawlik v. Deng</i> , 412 P.3d 68 (2018).....	22
<i>Roberts v. State</i> , 104 Nev. 33, 752 P.2d 221 (1998).....	22
<i>Sheriff, Clark Cnty. v. Luqman</i> , 101 Nev. 149, 697 P.2d 107 (1985) .....	26
<i>Smith v. Eighth Jud. Dist. Ct.</i> , 107 Nev. 674, 818 P.2d 849 (1991).....	19
<i>Southern Nev. Mem. Hosp. v. State</i> , 101 Nev. 387, 705 P.3d 139 (1985).....	24
<i>State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.</i> , 116 Nev. 290, 995 P.2d 482, (2000).....	21
<i>Stockmeier v. State, Bd. of Parole Com'rs</i> , 127 Nev. 243 (2011) .....	20
<i>Tim Wilson, P.E., Nev. State Eng'r v. Pahrump Fair Water, LLC</i> , 137 Nev. 10, 481 P.3d 853 (2021).....	21
<b>Statutes</b>	
NRS 34.160 .....	19
NRS 34.170 .....	19
NRS 34.320 .....	19
NRS 34.330 .....	19
NRS 533.024 .....	passim
NRS 533.024(1)(e).....	passim
NRS Chapter 533 .....	6
NRS Chapter 534 .....	6

## **Other Authorities**

Nev. Const. art. 3 § 1(1).....	25
Nev. Const. Art. 6, §4. A .....	19

## **Rules**

NRAP 17(A)(8).....	ii
NRAP 26.1(a).....	i



## **I. OVERVIEW AND RELIEF SOUGHT**

Nevada Gold Mines LLC ("NGM") seeks a writ of prohibition or, alternatively, a writ of mandamus to restrain the State Engineer to his legislatively-authorized legal authority. The State Engineer previously acknowledged his lack of authority for the very action that he now purports to undertake: The conjunctive management of water rights – restricting the interest of existing groundwater rights holders relative to the holders of surface water rights. In 2019, the State Engineer emphasized to the 80th Session of the Nevada Legislature his lack of legal authority to manage these two, separate water sources conjunctively and asked the Legislature for authority to develop such standards and regulations. The Legislature declined.

Despite this rebuke of the State Engineer's request, on December 7, 2021, the State Engineer nonetheless issued administrative Order 1329.<sup>1</sup> It purports to enact conjunctive management requirements on existing permitted and certificated groundwater rights, as well as new groundwater appropriation applications, affecting all of the basins throughout the Humboldt River Region, an area that extends over 11,000 square miles, including 34 hydrographic basins in eight Nevada counties.

---

<sup>1</sup> The full name of the Order 1329 reads, "Order #1329, Establishing Interim Procedures for Managing Groundwater Appropriations to Prevent the Increase of Capture and Conflict With Rights Decreed Pursuant to the Humboldt River Adjudication." (Vol. I NGM0148-160.)

Order 1329 stems from an obligation the State Engineer incurred in settling a private lawsuit with Pershing County Water Conservation District ("PCWCD") that was originally filed in 2015. PCWCD had complained about alleged effects that groundwater had on Humboldt River flows. PCWCD requested a writ of mandamus from the district court in Pershing County directing the State Engineer to, among other things, curtail existing rights of others. But, PCWCD tellingly avoided joining in that action the very water rights holders it sought to restrict.

After NGM and other impacted parties successfully fought to intervene, the court ordered PCWCD to give notice to *all* water rights holders threatened by its action. Thereafter, PCWCD and State Engineer quietly entered into a collusive settlement agreement, excluding all interveners in the litigation, and giving no notice to other impacted rights holders. Through this private settlement, the State Engineer now purported to possess the very legal authority and powers he previously eschewed possessing. Pursuant to the settlement agreement, the State Engineer agreed to issue an order concerning conjunctive management of ground and surface water rights in the Humboldt River Region. Signed by the State Engineer in October of 2020, the settlement relies upon an amendment to Nevada's Declaration of Public Policy, NRS 533.024, as purportedly providing legal grounds for this collusive expansion of the State Engineer's authority. But, that very same statute and declaration of policy

is what the State Engineer acknowledged to the Legislature in 2019 was an insufficient basis for such conjunctive management.

The product of that private settlement agreement – Order 1329 – purports to "establish[] interim procedures for managing groundwater appropriations to prevent the increase of capture and conflicts with rights decreed pursuant to the Humboldt River Adjudication" (the "Humboldt Conjunctive Order"). This Humboldt Conjunctive Order has spawned multiple suits in three different judicial districts, including claims by PCWCD that the State Engineer breached their settlement agreement by not taking conjunctive management far enough. Relatedly, in another action in the Eighth Judicial District Court, the district court there recently concluded that – consistent with his prior acknowledgements to the Legislature – the State Engineer lacks authority to engage in such conjunctive management.<sup>2</sup>

Because the Humboldt Conjunctive Order is beyond the State Engineer's jurisdiction, this Court has original jurisdiction to halt such ultra vires actions. The question of the State Engineer's jurisdiction is a question of law which is appropriate for this Court's prompt writ relief. Indeed, the definitive resolution of this issue from the State's highest court is warranted now so as to provide clarity before next year's

---

<sup>2</sup> Vol. I NGM0357-92 Case No. A-20-816761-C (consolidated), Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review, at pp. 27-29, and 35, which is subject to two recently filed appeals to this Court: Case Nos. 84739 and 84741.

legislative session. This Court's prompt intervention will also serve judicial economy by helping to resolve the multitude of cases that have already arisen and potentially avoiding a multitude of more suits that are destined to follow when the State Engineer improperly seeks to apply the Humboldt Conjunctive Order to individual water rights holders.

## **II. ISSUES PRESENTED**

- A. To Reverse Decades of Nevada Law and Now Conjunctively Manage Water Rights between Ground and Surface Holders, Would the State Engineer Need a Grant of Authority from the Nevada Legislature, as he Previously Acknowledged?**
- B. Can a Governmental Body, Like the State Engineer, Expand Their Own Jurisdiction through a Private Settlement Agreement?**
- C. Even if NRS 533.024's Declaration of Public Policy were intended as a Grant of Authority to the State Engineer, Would Not Such a Grant be an Unconstitutional Delegation Considering the Lack of Standards or Guidance as the State Engineer has also Acknowledged?**

### **III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION**

#### **A. Nevada Law Has Long Recognized the Separate and Distinct Management of Groundwater Rights Verses Surface Water Rights.**

The provision of Nevada Law governing water rights is generally set forth in Chapters 532, 533 and 534. NRS Chapter 533 is generally recognized as the section governing Nevada's surface water law, though several of the statutes and procedures outlined in Chapter 533 apply to both surface and groundwater applications and permits. The genesis of today's NRS Chapter 533 began with the Irrigation Act of 1903 that created the Office of the State Engineer. The act declared that all natural rivers, streams, lakes, and waters not held in private ownership were subject to appropriation for beneficial use, and that beneficial use would be the basis, the measure, and the limit of the right.

Thereafter in 1913, the State updated and revised its water law, again focusing on surface water rights. In 1939, the Legislature formally recognized groundwater as a separate source of water subject to state laws relating to appropriation in what is now NRS Chapter 534 entitled "Underground Water and Wells." Underground water was also made subject to State Engineer permitting.

As set forth in both NRS Chapters 533 and 534, the Legislature vested the State Engineer with specified jurisdiction and legal authority concerning both surface and groundwater. Consistent with these two distinct statutory chapters, the State Engineer long ago "conclude[d] that Nevada law provides for the management

of surface and groundwater as distinct sources. The State Engineer concludes that in order to change that scheme of water management at this point in time would conflict with existing rights and threaten to prove detrimental to the public interest." (Vol. I NGM0001-22, *State Engineer Ruling 5079 at p.20, September 25, 2001.*)

No one seriously doubts that there can be some interaction between surface and groundwater, although the specific hydrology is frequently disputed. Thus, in 2017, the Nevada Legislature took an initial, but small, step to acknowledge this potential for interaction through Assembly Bill 47. It added a single sentence to NRS 533.024, creating subsection (1)(e) to include the first and only reference to conjunctive management of these two distinct water resources:

Sec. 1.3      NRS 533.024 is hereby amended to read as follows:

533.024      The Legislature declares that:

1.      It is the policy of this State:
  - (a)      To encourage and promote the use of effluent, where that use is not contrary to the public health, safety or welfare, and where that use does not interfere with federal obligations to deliver water of the Colorado River.
  - (b)      To recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated.
  - (c)      To encourage the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada.

(d) To encourage and promote the use of water to prevent or reduce the spread of wildfire or to rehabilitate areas burned by wildfire, including, without limitation, through the establishment of vegetative cover that is resistant to fire.

*(e) To manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water.*

(2). The procedures in this Chapter 4 changing the place of diversion, manner of use or place of use of water, and for conforming a report of conveyance, are not intended to have the effect of quieting title to or changing ownership of a water right and that only a court of competent jurisdiction has the power to determine conflicting claims of ownership of a water right.

(Emphasis is 2017 Amendment.) Other than this single sentence added to the State's Statement of Policy in 2017, the Legislature has made no other reference to conjunctive management of water rights and has certainly enacted no standards or guidelines for such management.

**B. The State Engineer Seeks Authority and Standards for Future Conjunctive Management.**

Confirming that this 2017 single-sentence addition to the State's broad statement of water policy did not constitute a grant of authority/jurisdiction – particularly one including standards or guidance – the State Engineer sought such authorization at the next Legislative session. At the 2019 Legislature, the State Engineer requested and urged the passage of proposed Assembly Bill 51 ("AB 51"), which would have made multiple substantive amendments empowering



the State Engineer to adopt regulations relating to the conjunctive management of ground and surface water. (Vol. I NGM0045-50.)

In advancing this legislation, the State Engineer explained how and why existing law provided no authority: "While the 2017 Legislative declaration helpfully recognizes the hydrological connection that often exists between groundwater and surface water sources, *existing statute does not provide the framework necessary to effectively implement the Legislature's policy direction.*" (Vol. I NGM0082 (Testimony of Tim Wilson, P.E., Administrator and acting State Engineer, Division of Water Resources; Minutes of the Meeting of the Assembly Committee on Natural Resources, February 27, 2019) (emphasis added).)

Nevada Department of Conservation and Natural Resources' Director, Brad Crowell, confirmed the same, explaining that "[w]hen we look at our waters conjunctively, we are going to have some conflict" and that the proposed AB 51 "is designed to recognize that [conflict] and get some direction from the Legislature as to how to best manage that situation." (Vol. I NGM0081 (Testimony of Bradley R. Crowell, Director of DCNR; Minutes of the Meeting of the Assembly Committee on Natural Resources, February 27, 2019).) Director Crowell also stated, "[i]f there is sentiment and the will to not look at our waters conjunctively, then we can choose to do that. If we are going to move forward and manage our waters conjunctively, *then we need guidance to implement that.*" (*Id.* (emphasis added).)

The Deputy Administrator for Division of Water Resources echoed these points when she testified: "Without a framework and guidance in terms of how we establish these [conjunctive] management programs, we are stuck with competing interests." (Vol. I NGM0085 (Testimony of Micheline Fairbank, Deputy Administrator, Division of Water Resources; Minutes of the Meeting of the Assembly Committee on Natural Resources, February 27, 2019).)

Deputy Fairbank further offered: "This is a mechanism to pave the way of how we can go ahead, within the statutory framework and through regulatory process, provide that management solution, so that any potential conflict that may arise with regards to those differing and conflicting interest [surface water and groundwater], can have a mechanism in state law to be resolved. (Vol. I NGM0085-86.) Finally, she explained: "The first part of AB 51 allows and directs our office to establish conjunctive management regulations and *to allow for the authorization to adopt conjunctive management programs . . .* we need the ability, we need direction, and we need to have that from this body because right now we are left with very little." (Vol. I NGM0098 (emphasis added).<sup>3</sup>)

---

<sup>3</sup> Recall, Ms. Fairbank previously served as legal counsel for the State Engineer in her role as Deputy Attorney General before becoming Deputy Administrator. She plainly understood and confirmed the State Engineer's need for statutory authority in order to obtain the authorization and the ability from the Legislature to actually proceed with conjunctive management.

Then-Deputy Administrator Adam Sullivan, who is the current State Engineer, also requested passage of AB 51 and explained that "[w]e need to work within the prior appropriations system, and in order to address existing conflicts, we have very limited tools within statute. Simply put, until the senior water user gets 100 percent of their water, the junior water user does not get any. The response to that would be to entirely curtail a groundwater user. In this example of the Humboldt River, we could entirely curtail groundwater users, but because of the hydrogeology of the system, that still would not result in a full delivery of water to the senior surface water users . . . . What we need is to have some flexibility to work with the stakeholders in the affected region to fully satisfy the senior users but also allow junior users at least a portion of their water to the extent that it does not conflict." (Vol. I NGM0087 (Testimony of Adam Sullivan, Deputy Administrator, Division of Water Resources; Minutes of the Meeting of the Assembly Committee on Natural Resources, February 27, 2019).)

As the current State Engineer then acknowledged: "there is no fixed direction within our legislative prerogative to give us a more direct approach to resolve the existing conflict [surface and groundwater] to the extent that it exists." (Vol. I NGM0089.) However, despite the State Engineer's robust effort to secure authority, AB 51 failed to pass. And, as the State Engineer and his colleagues emphasized to the Legislature, absent Legislative direction through something like

AB 51, there was no legal framework or guidance for implementing any type of conjunctive management between surface and groundwater rights in Nevada.

**C. Pershing County Water Conservation District's Preexisting Litigation Concerning the Humboldt River.**

Despite the State Engineer's repeated acknowledgements as to the limitations of his own legal authority, he shortly thereafter reversed course as a litigation position to settle a case that had been pending since 2015. Specifically, in August, 2015, PCWCD commenced an action in the Eleventh Judicial District against the State Engineer, Case No. CV15-12019. That action sought to compel the State Engineer to exercise powers to benefit PCWCD's water rights relative to that of other water right holders. (Vol. I NGM0023-44.)

PCWCD claimed that the State Engineer had allowed the many groundwater basins adjacent to and surrounding the Humboldt River to become over-appropriated and over drafted, thereby reducing PCWCD's claimed surface rights to Humboldt River water. (*Id.* at NGM0033.) Thus, with this 2015 lawsuit, PCWCD raised the very conjunctive management concept that the State Engineer would later urge upon the Legislature.

But PCWCD's litigation became bogged down in procedural problems because PCWCD failed (purposefully) to name any of the other affected water rights holders. Indeed, based on its vague and broad complaint, it appeared that every water rights holder in the Humboldt River Region was likely impacted and directly

interested. Over the objection of PCWCD, NGM and others who knew of PCWCD's writ proceeding were eventually granted intervention, but it was apparent that PCWCD wanted to limit the intervenors' opportunity to demonstrate that PCWCD's water rights were not affected by the intervenors' activities and that PCWCD's requested relief should be denied.

By the end of 2019, the district court in PCWCD's writ case recognized that because of the efforts by PCWCD to impact all other water rights – both surface and ground in the Humboldt River Region – the law required PCWCD to give notice to the impacted parties and allow those parties the opportunity to intervene as well. (Vol. I NGM0105 (Scheduling Order and Order on Intervention and Service in Case No. CV 15-12019 (entered December 2, 2019) at 3 ("ORDERED that all water rights holders be given notice of the above captioned proceeding.")). Just how PCWCD subsequently avoided providing such notice is the genesis of the State Engineer's disregard of the clear limits on his authority and jurisdiction.

**D. The State Engineer Makes a Private Settlement Agreement Concerning Conjunctive Management.**

To circumvent the requirements of notice to impacted rights holders, by October 15, 2020, PCWCD entered into a stipulation and order of dismissal of Case No. CV15-12019 solely with the State Engineer, based upon a settlement agreement that only the two negotiated. None of the other existing intervening parties were participants in the settlement agreement, but they necessarily prevailed

in that case because PCWCD dismissed its claims with prejudice as to all parties, including intervenors like NGM. (Vol. I NGM0107-15.)

This private settlement agreement solely between PCWCD and the State Engineer sets forth various provisions that were never established in any actual proceeding. For instance, through the settlement, the State Engineer agreed to "[r]ecognition of the hydrologic connections between the Humboldt River and the Tributary Groundwater Basins, in accordance with the Nevada Legislature's adoption of NRS 533.024(1)(e) declaring it the policy of the State to 'manage conjunctively the appropriation, use and administration of all waters of [Nevada], regardless of the source of water.'" (Vol. I NGM0112.)

Pursuant to this private settlement – and betraying the representations he made to the Legislature just a year earlier – the State Engineer now agreed with PCWCD to develop an administrative order to design procedures and standards for review of groundwater applications within the Humboldt River Region to engage in conjunctive management of groundwater rights relative to PCWCD's claimed surface water rights. (*Id.*)

The State Engineer contractually agreed to issue that draft order within 90 days of the settlement. As their private settlement provides, the draft order would then be subject to public comment and further proceedings. But after comment, the settlement directs that the State Engineer would issue a final order governing

administrative procedures for new groundwater applications, groundwater change applications, and addressing conflicts between groundwater and surface water rights in the Humboldt River Region. (Vol. I NGM0113.)

Simply stated, a year after the Legislature declined to grant the State Engineer's request for conjunctive management authority and guidance, he entered into a private settlement agreement purporting to grant himself the very sweeping powers he admitted to not possessing.

**E. The State Engineer Issues His Humboldt Conjunctive Order, and Multiple Lawsuits Enue.**

The State Engineer issued the draft interim order in January 2021 along with a notice of hearing, and invited comments. NGM responded to that invitation by, among other things, reminding the State Engineer of his prior representations to the 2019 Legislature explaining his lack of legal authority and noting that the State Engineer could not acquire legal authority through a private settlement agreement that he had entered into with PCWCD. (Vol. I NGM0117-47.) Beyond the naked power grab for the benefit of PCWCD, NGM also noted how this bargained-for private process – between the State Engineer and PCWCD – had not

provided for any evidentiary record for crafting such decisions.<sup>4</sup>  
(Vol. I NGM0128-29.)

On December 7, 2021, the State Engineer issued his Humboldt Conjunctive Order by posting it on his office's webpage. (Vol. I NGM0148-160.) The State Engineer provided no form of direct notice to any of the water rights holders in the Humboldt River Region. As with his prior draft, the Conjunctive Order enlists NRS 533.024(1)(e) as the jurisdictional predicate, the very same statute the State Engineer previously acknowledged was simply a statement of policy which lacked substantive powers or guidance.<sup>5</sup>

The product of the State Engineer's collusive bargain with PCWCD has spawned a multitude of litigation. First, on January 5, 2022, PCWDC filed a petition for judicial review in the Eleventh Judicial District, Case No. 27-cv-JA6-2022-0002. (Vol. I NGM0161.) The next day, Buttonpoint Limited Partnership filed a petition

---

<sup>4</sup> Indeed, it was PCWCD's recognition that it needed to avoid that evidentiary record – which NGM submitted in response to the State Engineer's comment invitation – that prompted PCWCD's voluntary dismissal of its claims with prejudice, thinking that it could avoid the consequences of actual evidence.

<sup>5</sup> Notably, even the Humboldt Conjunctive Order itself acknowledges that the State Engineer failed to obtain the authority to implement regulations on the Humboldt River for conjunctive management that he had proposed to the 2019 Legislature. (*See* Vol. I NGM0154-55 ("However, in the 2019 Legislative session, the statutory revisions required to give the State Engineer the authority to implement the draft regulations were unsuccessful.").)



for judicial review in the Sixth Judicial District, Case No. CV-0022919. (Vol. I NGM0214.) Also on January 6, U.S. Water & Land, LLC filed its own petition for judicial review in the Sixth Judicial District, Case No. CV-0022918. (Vol. II NGM0321.) And finally, also on January 6, 2022, PCWCD filed a complaint for breach of contract against the State Engineer in the First Judicial District, Case No. 22 OC 00001 1B, contending that the State Engineer breached their private settlement agreement by purportedly not going far enough with conjunctive management. (Vol. II NGM0241.) These are the suits that arose even before the State Engineer sought to actually apply the order to any particular water rights holders. When he attempts to apply Order 1329, a multitude of more litigation will inevitably ensue.<sup>6</sup>

But there is more. In a preexisting case unrelated to the Humboldt Conjunctive Order, the Eighth Judicial District Court recently ruled in the action styled *Las Vegas Valley Water District, et al. v. Adam Sullivan, P.E., acting State Engineer, et al.*, Case No. A-20-816761-C (consolidated cases), that the State Engineer lacks legal authority to undertake conjunctive management of

---

<sup>6</sup> To aggressively assert and preserve all of its rights, NGM has filed motions to intervene in all four of these actions. The first three actions have been consolidated before the Sixth Judicial District Court. That court has not acted on NGM's motion to intervene. The First Judicial District stayed PCWCD's breach of contract claim in favor of the now-consolidated action pending in the Sixth Judicial District. The First Judicial District Court thus stayed NGM's motion to intervene in that action.

competing ground and surface water rights absent legislative authority. (Vol. II NGM0327.) Again, while the Humboldt Conjunctive Order was not at issue in that case, there exists a core overlap: The limits of the State Engineer's actual legal authority.

In light of the existing and future multitude of cases of state-wide concern about the State Engineer's legal authority to conjunctively manage water rights, this Court should take up the issue and resolve whether such authority currently exists in the State Engineer. The existence of multiple district court proceedings and the likely multitude of future proceedings is not grounds to delay this Court's intervention; rather, it is why this Court should intervene now. Doing so is in the interests of judicial economy, preservation of resources, and clarification for the Nevada Legislature. Nevada's precious water resources are too important to be left in a state of uncertainty.

NGM requests a writ of prohibition, or alternatively mandamus, to halt the State Engineer's ultra-vires action, set aside the Humboldt Conjunctive Management Order 1329, and direct the State Engineer that his powers are limited to those granted by the Legislature and cannot be expanded by way of litigation-driven private settlements.

#### **IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE**

##### **A. The State Engineer's Improper Claims of Jurisdiction Compel Writ Relief.**

"This Court has original jurisdiction to issue writs of mandamus and prohibition" *Mountain View Hosp., Inc. v. Eighth Jud. Dist. Ct.*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); *see also* Nev. Const. Art. 6, §4. A writ of prohibition is the appropriate means to arrest the proceeding of any governmental actor exercising judicial or quasi-judicial functions that are beyond the scope of their jurisdiction. NRS 34.320; *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (Writ of prohibition against district court exceeding its jurisdiction). Furthermore, a writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

Generally, such writs are available from this Court where there is no plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; *Smith*, 107 Nev. at 677, 818 P.2d at 851. And, while entertaining writ relief is a matter of discretion, this Court has emphasized that it will not hesitate to exercise its discretion "when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 132 Nev. 784, 788, 383 P.3d 246, 248 (2016).

As set forth herein, the State Engineer is acting in excess of his legal authority, which is a question of law. This Court's entertaining of writ relief serves significant judicial interest and economy in that the State Engineer's Humboldt Conjunctive Order has prompted multiple legal proceedings. This Court can and should address the scope of the State Engineer's jurisdiction now and promptly resolve this issue. It is a paramount issue of state-wide concern impacting the interests and rights of all holders of water rights in Nevada.

**B. The State Engineer Lacks Authority to Issue the Humboldt Conjunctive Order.**

Because the State Engineer has no inherent powers, he only has those expressly given to him by the Legislature and those that may "be implied even though they were not expressly granted by statute, when those powers are necessary to the agency's performance of its enumerated duties." *Stockmeier v. State, Bd. of Parole Com'rs*, 127 Nev. 243, 248 (2011), citing *City of Henderson v. Kilgore*, 122 Nev. 331, 334 (2006); *see also Clark Cnty. School Dist. v. Clark Cnty. Classroom Teachers Ass'n.*, 115 Nev. 98, 102, 977 P.2d 1008, 1011 (1999) (governmental agencies' "powers are limited to those powers specifically set forth by statute").

For any implied authority to exist, the implication must be essential to carrying out an express power granted by the Legislature. *Id.*, citing *City of Henderson* at 335. In short, the "State Engineer's powers . . . are limited to 'only those . . . which the

Legislature expressly or impliedly delegates.'" *Tim Wilson, P.E., Nev. State Eng'r v. Pahrump Fair Water, LLC*, 137 Nev. 10, 13, 481 P.3d 853, 856 (2021).

As this Court holds, any action, rule, regulation, or order from an administrative agency is invalid when it "violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious." *Felton v. Douglas Cnty.*, 134 Nev. 34, 38, 410 P.3d 991, 995 (2018) (quotations omitted); *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000); *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995).

Thus, the State Engineer is forbidden from acting beyond the statutory authority granted by the Legislature. *Howell v. Ricci*, 124, Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008). And since the State Engineer's authority is a question of statutory interpretation, it is an issue for this Court to resolve de novo. *Tim Wilson, P.E.*, 137 Nev. at 14, 481 P.3d at 856.

As supposed authorization for the Humboldt Conjunctive Order, the State Engineer relies upon NRS 533.024(1)(e), which is simply an expression of legislative policy amended in 2017. (Vol. I NGM0229-30.) Yet, the 2017 amendment to NRS 533.024 – adding a single policy sentence – cannot be construed as a grant of express or implied authority to the State Engineer for implementation of a wholesale change to long-standing Nevada water law.

The law provides that such Legislative policy declarations are not self-executing and are instead viewed as an interpretive guide for authority that is otherwise granted. *See e.g., Pawlik v. Deng*, 412 P.3d 68, 71 (2018) quoting *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (noting that "if the statutory language is subject to two or more reasonable interpretations, the statute is ambiguous, and we then look beyond the statute to the legislative history and interpret the statute in a reasonable manner 'in light of the policy and the spirit of the law.'").

***1. The State Engineer admits he lacks such authority.***

The State Engineer's own contemporaneous interpretation of NRS 533.024(1)(e) following the 2017 amendment belies his current claims of authority. After all, courts recognize that an agency's contemporaneous interpretation of a purported enabling statute, one developed while legislative directives are fresh, is considered to be highly authoritative. *See Roberts v. State*, 104 Nev. 33, 39, 752 P.2d 221, 225 (1998).

On the other hand, no deference can be afforded where an agency's interpretation as to its authority is a reversal of position and is newly-minted, particularly when this later interpretation is adopted as a "litigation position" or "a post hoc rationalization." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)

("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate."); *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9th Cir. 2001).

Here, the State Engineer promptly confirmed that the 2017 amendment to NRS 533.024 did not grant the powers now being claimed. Rather, the State Engineer and many state officials emphasized the lack of such authority under existing Nevada law and sought such power during the 2019 Legislature. Yet, the Legislature declined.

Respectfully, the State Engineer's claim of authority now is not predicated upon actual law, but is a litigation-driven position developed in conjunction with PCWCD as part of their private settlement. The rights of Nevada's water rights holders cannot and should not be put in limbo by such dealings. The State Engineer knows and concedes that this is a matter for the Legislature.

**C. The State Engineer Cannot Acquire Power by a Collusive and Private Settlement Agreement.**

The origin of the Humboldt Conjunctive Order is a private agreement between the State Engineer and PCWCD, rather than any actual legislative empowerment. The State Engineer bound itself as part of a settlement to issue Order 1329. But contrary to the apparent wants of the PCWCD and the State Engineer, an administrative body cannot acquire or expand its powers based upon consent or a negotiated agreement, particularly one as self-serving as their private settlement here.

After all, "[a]dministrative agencies cannot enlarge their own jurisdiction," and the scope of an agency's authority is confined to the matters the Legislature has expressly or implicitly delegated. *City of Reno v. Civil Service Comm'n of City of Reno*, 117 Nev. 855, 858 (2001), citing *Southern Nev. Mem. Hosp. v. State*, 101 Nev. 387, 394, 705 P.3d 139, 144 (1985) and *Clark Co. v. State Equal Rights Comm'n*, 107 Nev. 489, 492, 813 P.2d 1006, 1008 (1991).

The settlement of litigation is an agreement between private parties binding only upon those parties. An order, adjudication or settlement does not create a regulation or binding norm that the government can impose upon the general public, and it does not vest an agency with statutory authority that otherwise does not exist. *See Home Builders Ass'n of Chester & Del. Ctys. v. Com. Dep't of Env'tl. Prot.*, 828 A.2d 446, 455 (Pa. Commw. Ct. 2003); *Andrews v. Nev. State Bd. of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (1970) ("powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function.").

Even when an agency negotiates a settlement that provides the agency will adopt rules or regulations pursuant to the administrative process, such negotiated rulemaking deals are viewed skeptically by the courts – and for good reason. Administrative rules and regulations "are presumed to be promulgated by agencies acting in the public interest while negotiated rulemaking creates a system in which



parties make an agreement among and for themselves, resulting in the transformation of a process that was created to promulgate public law serving the public interest into a private law relation that is nothing more than the expression of a private interests mediated through some governmental body." *Home Builders*, 828 A.2d at 454 (citations and quotations omitted). This is the very impropriety undertaken by the State Engineer in coordination with PCWCD.

**D. Without More, NRS 533.024(1)(e) is an Unconstitutional Delegation of Legislative Powers to the State Engineer.**

The State Engineer's attempt to enlist NRS 533.024 as a grant of expansive substantive powers – as opposed to a mere policy declaration – only underscores his lack of genuine legal authority. After all, if that was the Legislature's intent with its one-sentence amendment in 2017 – even though the State Engineer previously conceded otherwise – then NRS 533.024(1)(e) would violate the Constitution's prohibition on the delegation of legislative power to the executive branch.

The Nevada Constitution imposes an express separation of powers. It provides that "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments – the Legislative, the Executive, and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. 3 § 1(1). *See Galloway v. Truesdell*, 83 Nev. 13, 22, 422 P.2d 237,

243-44 (1967) (addressing paramount importance of separation of powers to the State's constitutional system).

As such, the Legislature may only delegate to administrative agencies "the power to determine the facts or state of things upon which the law makes its own operations depend." *Sheriff, Clark Cnty. v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985). Agencies are only authorized to ascertain the facts which will make the statute applicable or operative. *Id.*

"Such [delegations of] authority will be upheld as constitutional so long as suitable standards are established by the legislature for the agency's use of its power. These standards must be sufficient to guide the agency with respect to the purpose of the law and the power authorized." *Id.* at 153-54, 697 P.2d at 110. Without supplying suitable standards to cabin an agency's authority, the executive agency's power is virtually boundless and prone to arbitrary and capricious abuses. *Id.* at 154, 697 P.2d at 110 ("Sufficient legislative standards ***are required*** in order to assure that the agency will neither act capriciously nor arbitrarily") (emphasis added).

As the State Engineer has previously conceded, NRS 533.024(1)(e) does not provide any suitable standards dictating how the State Engineer should or can conjunctively manage surface and groundwater. There are no guidelines about when, how, or under what circumstances the State Engineer may create rules or programs to conjunctively manage competing claims or the procedures for even defining a

competing claim. *See McNeill v. State*, 132 Nev. 551, 57, 375 P.3d 1022, 1026 (2016) (finding an unlawful delegation and explaining "the Legislature did not explicitly provide the Board the authority to create additional conditions. And, even assuming that the Legislature had intended to do so, that delegation of power would fail because the Legislature has not provided guidelines informing the Board how, when, or under what circumstances, it may create additional conditions.").

Indeed, this was the entire point of the State Engineer and related representatives' testimony before the 2019 Legislature concerning AB 51. (*See, e.g.*, Minutes of the Meeting of the Assembly Committee on Natural Resources, February 27, 2019) (Vol. I NGM0082 (" . . . existing statute does not provide the framework necessary to effectively implement the Legislature's policy direction"); Vol. I NGM0087 ("If we are going to move forward and manage our waters conjunctively, then we need guidance to implement that."); Vol. I NGM0099 (" . . . we need direction, and we need to have that from this body because right now we are left with very little.").)

NRS 533.024 is merely a general policy statement and is devoid of any factors or elements to guide the State Engineer in implementing conjunctive management. If this statute were interpreted as giving the State Engineer jurisdiction to act, it provides absolutely no limit on the types of rules, regulations, or orders the State Engineer could impose. Those are matters solely for the Legislature. As such,

if the State Engineer is now pretending – contrary to his prior position – that the 2017 single-sentence amendment to NRS 533.024 constitutes a substantive grant of power, then it is an unconstitutional one. As the State Engineer previously acknowledged, the Legislature has provided no guidelines.

## **V. CONCLUSION**

The Humboldt Conjunctive Order is beyond the scope of the State Engineer's legal authority, a fact he confirmed to the 2019 Legislature. This Court should issue a writ of prohibition, or alternatively mandamus, directing the State Engineer to rescind the Humboldt Conjunctive Order as it is beyond the scope of the State Engineer's authority. The Legislature can then address this matter in next year's legislative session.

DATED this 25th day of May, 2022.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice  
Todd L. Bice, Esq., Bar No. 4534  
Jordan T. Smith, Esq., Bar No. 12097  
Dustun H. Holmes, Esq., Bar No. 12776  
Emily A. Buchwald, Esq., Bar No. 13442  
400 South 7th Street, Suite 300  
Las Vegas, Nevada 89101

and

KAEMPFER CROWELL

Alex J. Flangas, Esq., Bar No. 664  
Severin A. Carlson, Esq., Bar No. 9373  
Ellsie E. Lucero, Esq., Bar No. 15272  
50 W. Liberty Street, #700  
Reno, Nevada 89501

*Attorneys for Petitioner Nevada Gold Mines LLC*

## VERIFICATION/DECLARATION

I, Todd L. Bice, Esq., declare as follows:

1. I am counsel for the Petitioner Nevada Gold Mines LLC.
2. I verify that I have read and compared the foregoing Petition for Writ of Prohibition or Mandamus Under NRAP 21(A)(5), and that the same is true to my own knowledge, except for those matters stated on information and belief, and as those matters, I believe them to be true.
3. I have also reviewed the contents of the appendix filed with this petition and verify that the documents included are true and correct copies. NRAP 21(A)(4).
4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is executed on 25th day of May, 2022 in Las Vegas, Nevada.

/s/ Todd L. Bice  
TODD L. BICE, ESQ.

## **CERTIFICATE OF COMPLIANCE**

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 Office Word 2013 in size 14 font in double-spaced Times New Roman.

I certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted, it is proportionately spaced, has a typeface of 14 points or more and 6,189 words.

I further certify that, 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 that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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.

Finally, I certify that the Appendix accompanying this petition complies with NRAP 21(a)(4) and NRAP 30 in that the Appendix includes a copy of the State Engineer's Order #1329 and other original documents essential to understand the matter set forth in herein.

DATED this 25th day of May, 2022.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice  
Todd L. Bice, Esq., Bar No. 4534  
Jordan T. Smith, Esq., Bar No. 12097  
Dustun H. Holmes, Esq., Bar No. 12776  
Emily A. Buchwald, Esq., Bar No. 13442  
400 South 7th Street, Suite 300  
Las Vegas, Nevada 89101

KAEMPFER CROWELL

Alex J. Flangas, Esq., Bar No. 664  
Severin A. Carlson, Esq., Bar No. 9373  
Ellsie E. Lucero, Esq., Bar No. 15272  
50 W. Liberty Street, #700  
Reno, Nevada 89501

*Attorneys for Petitioner Nevada Gold Mines LLC*



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 25th day of May, 2022, I electronically filed and served in the manner indicated below a true and correct copy of the above and foregoing **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS UNDER NRAP 21** properly addressed to the following:

Adam Sullivan, P.E.  
State Engineer  
Division of Water Resources  
901 South Stewart Street, Suite 2002  
Carson City, Nevada 89701

*State Engineer, Division of Water Resources,  
Department of Conservation and Natural Resources*

Bradley Crowell, Director  
Nevada Department of Conservation and  
Natural Resources  
901 S. Stewart Street, Suite 1003  
Carson City, Nevada 89701

Aaron D. Ford, Esq.  
Attorney General  
Ian Carr, Esq.  
Deputy Attorney General  
STATE OF NEVADA  
Office of the Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717

*Attorneys for the State Engineer, Division of Water  
Resources, Department of Conservation and  
Natural Resources*

/s/ Kimberly Peets  
An employee of Pisanelli Bice PLLC