Case No. CV0022919
(Consolidated with No. CV0022918 and No. 27CV-JA6-2022-0002 (transferred from the Eleventh Judicial District Court))

Dept. No. 2

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TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

BUTTONPOINT limited partnership,

Petitioner,

vs.

ADAM SULLIVAN, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

And All Consolidated Cases

~~[PROPOSED]~~
ORDER DENYING PETITIONS FOR JUDICIAL REVIEW AND LIFTING STAY ON ORDER 1329

Before the Court are three (3) petitions for judicial review filed by Pershing County Water Conservation District ("PCWCD"), Buttonpoint Limited Partnership and U.S. Water and Land, LLC, (collectively "Buttonpoint"), and Nevada Gold Mines LLC ("NGM") (collectively, "Petitioners") pursuant to NRS 533.450.[1] The Court held oral argument on the petitions for judicial review on November 16, 2023. Also pending before the Court, and fully briefed, is the State Engineer's NRCP 60(b) Motion for Relief from the Court's Order Staying the State Engineer's Order 1329 Pending Disposition ("Rule 60(b) Motion"), filed on February 26, 2024. In that Motion, the State Engineer seeks relief from the Court's Order Staying State Engineer's Order 1329 Pending Disposition, filed on January 24, 2024.

[1] NGM did not originally file a petition for judicial review but was later admitted as a Petitioner pursuant to the Court's Order Granting Motion to Intervene.

PCWCD filed a joinder to the State Engineer's Motion. The Court, having reviewed these filings and the briefing related thereto, and after holding oral argument, hereby **DENIES** the petitions for judicial review. Accordingly, the Court **LIFTS THE STAY** on Order 1329 and **DENIES** the State Engineer's Rule 60(b) Motion as moot.

I. PROCEDURAL HISTORY

A. The Petitioners

On or about January 6, 2022, Buttonpoint filed a petition for judicial review pursuant to NRS 533.450, challenging and seeking the reversal of the State Engineer's Order 1329. PCWCD also filed a petition for judicial review, arguing that Order 1329 did not go far enough—specifically challenging Order 1329 on the basis that PCWCD believes Order 1329 needs more language addressing alleged current conflicts on the Humboldt River. The petitions were ultimately consolidated pursuant to stipulation of the parties. NGM moved to intervene as an additional Petitioner, which PCWCD opposed. The State Engineer partially joined PCWCD's opposition. The Court ultimately permitted NGM to intervene as an additional Petitioner. PCWCD later filed a motion seeking relief from the order permitting NGM to intervene, which the State Engineer partially joined. The Court denied that motion on May 1, 2023.

B. The Proceedings

On or about January 10, 2022, Buttonpoint moved for a stay of Order 1329 pending its petition for judicial review, pursuant to NRS 533.450(5). On or about January 26, 2022, Buttonpoint filed an "Amended" Motion for Stay. The State Engineer and PCWCD opposed Buttonpoint's request to stay Order 1329. The motion for stay was fully briefed and Buttonpoint requested submission of its Amended Motion for Stay on or about February 24, 2022. As the motion remained pending, with no hearing having been set, Buttonpoint filed another Request to Submit the Motion for Stay on or about May 27, 2022. Following a status conference held in Winnemucca, Nevada, on November 29, 2022, the Court entered its Scheduling Order for the briefing on the merits of the petitions for judicial review on or about December 8, 2022. Buttonpoint filed another "Amended Motion for

Stay" on or about December 30, 2022. Once again, both the State Engineer and PCWCD filed oppositions in January of 2023 and requested that Order 1329 remain in place pending a decision on the consolidated petitions for judicial review.

In the meantime, with Buttonpoint's request to stay Order 1329 pending before the Court, the parties proceeded with the litigation pursuant to the Scheduling Order: the State Engineer timely filed the Record on Appeal, followed by the filing of the parties' respective Opening, Answering, and Reply Briefs. The Court held oral arguments on the merits of the petitions for judicial review on November 16, 2023.

On January 24, 2024, the Court issued two orders. First, the Court issued its Order Staying Proceedings Pending Nevada Supreme Court Ruling in Case No. 84739. Specifically, Case No. 84739, *Sullivan v. Lincoln County Water District*, addressed a different decision of the State Engineer, Order 1309, that was related to the State Engineer's authority to conjunctively manage surface and ground water rights and jointly administer water rights across multiple basins. This Court found that whether the State Engineer has this authority has great bearing on its determination of the validity of Order 1329, and therefore warranted a stay of these proceedings pending further guidance from the Nevada Supreme Court.

Second, the Court issued its Order Staying State Engineer's Order 1329 Pending Disposition ("Order Staying Order 1329"). The Court found that the factors under NRS 533.450(5) weighed in favor of staying Order 1329 pending a decision on the merits of the petitions for judicial review. The Court specifically noted that "[s]hould the district court ruling in Nevada Supreme Court Case No. 84739 be upheld, the State Engineer may not have the authority to engage in conjunctive management as it so attempts." Order Staying Order 1329 at 3. Additionally, in granting Buttonpoint's requested stay, the Court found that Order 1329 relied on an undeveloped groundwater model.

On January 25, 2025, one day after this Court issued the above-mentioned Orders, the Nevada Supreme Court issued its published opinion in Case No. 84739, *Sullivan v. Lincoln County Water District*, 542 P.3d 411, 140 Nev. Adv. Op. 4 (2024). In *Sullivan*,

among other findings, the Nevada Supreme Court reversed the district court and found that the State Engineer has authority, under a multitude of statutes, to engage in both (1) conjunctive management of surface water and groundwater and (2) joint administration of interconnected basins. 140 Nev. Adv. Op. 4, 542 P.3d 411, 419–24 (2024).

On February 26, 2024, the State Engineer filed his Rule 60(b) Motion. The State Engineer argued that relief from the Court's Order Staying Order 1329 was warranted based on the intervening change in controlling law in *Sullivan*. The State Engineer also argued that relief was warranted because the Court made a mistake of fact in finding that Order 1329 was based on an undeveloped groundwater model, among other arguments. PCWCD joined the State Engineer's Rule 60(b) Motion, while Buttonpoint and NGM opposed it.

C. FACTS

Water issues along the Humboldt River are not new. The Humboldt River has been the subject of various controversies and litigation for more than 100 years and was finally adjudicated in November 1938. These past cases and controversies include a recent case, initiated via a writ petition filed by PCWCD, between the very parties to this proceeding. *See* PCWCD Writ of Mandamus case, Eleventh Judicial District Court Case No. CV15-12019 ("PCWCD Writ case").

Most of the facts in this case are not in dispute. PCWCD explains at length how the Humboldt River Decree was entered following the Humboldt River Adjudication, and the State Engineer generally does not dispute that history. *See* PCWCD Opening Brief at 8–10. Specifically, following lengthy judicial proceedings, all claims to the surface water of the Humboldt River were finally determined, and decreed, by November 1938. SE ROA 5. The most senior decreed right in the Humboldt River system has a priority date of 1861 and the most junior has a priority date of 1921. *Id.* Decrees can only be modified within three years after their entry, so the Humboldt Decree is final for all intents and purposes. *See* NRS 533.210.

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While this historical acknowledgment is important, more relevant to this case and Order 1329 is the recent history and the recent facts relating to the Humboldt River Region, including the recent climactic conditions, the PCWCD Writ case, and the actions the State Engineer has taken to meet his duties to water right holders under Nevada water law. Order 1329 applies to the Humboldt River Region (sometimes simply referred to as "the Region") which is delineated by the topographic boundary of the Humboldt River watershed "extending over 11,000 square miles, including 34 hydrographic basins in eight Nevada counties." SE ROA 4. The flow of the Humboldt River measured at the Palisade gage is "the primary tool utilized for determining and scheduling delivery amounts of Humboldt River decreed rights." SE ROA 5. The daily flow measurement at the Palisade gage determines whether all water rights, above or below the gage, are scheduled to receive their full duty of water, or whether flows are insufficient such that senior priority water rights are served first. *Id.*

Between the years of 2012 through 2015, the Humboldt River Region experienced a historic drought, where the average annual flow during that 4-year period at the Palisade gage was approximately 30% of the historical average annual flow for the period of record spanning 112 years. SE ROA 5–6. By the end of the 2014 and 2015 irrigations seasons, the Humboldt River at Imlay was dry, and water was unavailable to allocate to downstream surface water users near Lovelock. SE ROA 6. It was during this unprecedented and severe drought that PCWCD initiated its Writ case, alleging that junior priority groundwater use was capturing surface flows leading to conflict with PCWCD's senior, decreed surface water rights. *Id.* PCWCD's Writ Petition requested that the Court require the State Engineer to act within his statutory authority to address the alleged conflict, which it alleged was at least partially to blame for the lack of water deliveries below Imlay. *Id.* The State Engineer answered PCWCD's Writ Petition, after being ordered to do so, but

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ultimately settled the litigation with PCWCD (as discussed in the consolidated Petitions for Judicial Review and later in this Order).[2]

The most important fact in this case is that nearly all groundwater rights within the Humboldt River Region are junior in time to the decreed surface water rights in the Humboldt River and its tributaries. SE ROA 6. This key component of water law was also recently confirmed by the Nevada Supreme Court: "Because vested water rights by definition exist prior to the grant of statutorily granted water rights, all statutory water rights are granted subject to vested rights, and no statutorily granted water right may impair vested water rights." *Sullivan*, 542 P.3d at 420. In fact, "[t]here are only four active groundwater permits having a priority date earlier than 1921, the date of the most junior Humboldt Decree right." SE ROA 6. Most groundwater permits in the Humboldt River region are substantially junior in time to the surface water rights of the Humboldt Decree, as groundwater development in the region really began to increase substantially in the 1960s and increased in the decades since. *Id.*

While PCWCD alleged that groundwater pumping from junior water right holders played a role in causing the lack of deliveries of their decreed rights in 2014 and 2015, the State Engineer has found that "[d]uring the drought period of 2012–2015 available data were insufficient to identify to what extent groundwater pumping was causing the inadequacy of water supply for Humboldt River senior decreed right holders and to what extent it was the result of natural low flow because of drought." SE ROA 7. In fact, given the severity of the drought, the State Engineer's data indicated that curtailing groundwater pumping would result in a "negligible" addition to the Humboldt River's flow and would not help more water reach senior water right holders downstream but would instead have "devastating and severe impacts to the communities and economies" that rely on groundwater. SE ROA 8.

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[2] The Parties have stipulated to the Court taking judicial notice of documents from the PCWCD Writ case, while the petitions are still heard "in the nature of an appeal" pursuant to NRS 533.450(1). *See* Stipulation Regarding Documents from PCWCD Writ Proceeding. The Court grants that stipulation and takes judicial notice of those documents as warranted.

However, in recognition of the drought as well as the potential effects of groundwater pumping capturing surface water flow, the State Engineer has since initiated numerous measures to address these issues and improve his data in the Humboldt River Region to help support future decision making. These actions included:

1. All non-designated basins within the Region were designated pursuant to NRS 534.030;
2. Totalizing meter installation and reporting were required by State Engineer's Order 1251;
3. Field investigations were completed to verify installation and meter data;
4. The Nevada Division of Water Resources enhanced its database capacity to maintain and manage the pumping data in a publicly accessible manner;
5. The State Engineer established a policy requiring water rights for pit lake evaporation; and
6. Applications to appropriate groundwater or to change the point of diversion ("POD") of existing groundwater rights were denied if granting the application would conflict with existing senior rights due to stream capture.

SE ROA 8. Further, in 2016, the State Engineer assembled the Humboldt River Working Group to assist in developing draft regulations to resolve future conflict between surface and groundwater rights, though this effort was ultimately unsuccessful. SE ROA 8–9.

Since 2016, the State Engineer has been working with the United States Geological Survey ("USGS") and the Desert Research Institute ("DRI") "to develop improved groundwater budgets at the basin scale and to develop numerical groundwater capture models for the Humboldt River Region." SE ROA 9. When these peer-reviewed products are published, and made publicly available, the State Engineer argues that they will serve as scientific and consistent means for estimating the effects of groundwater pumping on the flows of the Humboldt River and its tributaries, will help with review of perennial yield values for the Region, and will "allow for the development of capture maps, which identify the relative potential for the capture of surface water flow at any given well location and

the potential for the capture of surface water flow over different durations of time." SE ROA 9. The preliminary findings of the capture models have already provided significant valid information regarding the dynamics of the interrelation between surface water flow and groundwater pumping in the Humboldt River Region, and these early findings have been shared with the stakeholders. SE ROA 9–10; 736–982. Further, the Court takes judicial notice of the fact that since this case was originally briefed, two of the models—for the Upper and Lower Humboldt River—have been released as Water Resource Bulletins 49 and 50, respectively.

1. Order 1329

At the time the State Engineer issued Order 1329 in the Fall of 2021, the Humboldt River Region was again experiencing two years of severe to extreme drought. SE ROA 10. Once again, very little decreed water was served during the 2021 irrigation season. *Id.*

Order 1329 implements procedures for the State Engineer's review of *new* applications for groundwater rights in the Humboldt River Region, applying to applications for new appropriations or applications to change existing groundwater permits. SE ROA 11–14. Order 1329 indicates that when reviewing new groundwater applications under NRS 533.370, the State Engineer will review for increased conflict with the decreed rights of the Humboldt River and its tributaries. SE ROA 11–12. Given the expanse of the Humboldt River and its tributaries, and the different aquifer properties in different areas, Order 1329 states that capture will be determined on a case-by-case basis using "established analytical and numerical methods along with any available knowledge of aquifer properties associated with the points of diversion." SE ROA 12. Notably, as made clear in the State Engineer's Rule 60(b) Motion, Order 1329 does not utilize the previously mentioned groundwater capture models (that were unfinished at the time of Order 1329's rendition) for this analysis.

Specifically, Order 1329 implements measures for three categories of applications: (1) applications for new appropriations of groundwater where annual capture is predicted to exceed 10% of the consumptive duty for any year during 50 years of continual pumping;

(2) applications to change the point of diversions ("POD") of existing rights that are predicted to result in an increase of net capture and where annual capture of the proposed new POD is predicted to exceed 10% of the permitted duty in any year during 50 years of continual pumping; and (3) temporary applications filed under NRS 533.345 and NRS 533.371. SE ROA 12. If an application for a new appropriation or new change falls into these categories, then that "[c]apture shall be offset by not diverting an existing decreed right (in-stream replacement water), or by the withdrawal of an existing groundwater permit (meaning that the groundwater permit is no longer active, in part or in its entirety) so the resulting availability of streamflow is not less than it was prior to the appropriation or the change in the point of diversion." *Id.* Order 1329 also outlines the requirements for the water rights used to offset the resulting increase in capture. SE ROA 13. Lastly, Order 1329 exempts (1) any application where pumping at the proposed POD is predicted to capture less than 10% of the permitted duty every year during 50 years of continual pumping; (2) a change application where capture at the proposed POD is less than or equal to capture at the existing POD; (3) any application for groundwater where annual capture associated with pumping at the proposed place of use does not exceed 5 acre-feet during a 50-year period of use; and (4) temporary applications to change PODs within an area designated by State Engineer order allowing for multiple PODs to form a single representative POD for mining, milling, and dewatering operations. SE ROA 13–14.

Finally, Order 1329 is expressly interim in nature—indicating that it is "in effect until it is replaced by a subsequent order establishing long term management practices addressing conflict caused by capture to the satisfaction of the State Engineer, or it is superseded by another order or decision." SE ROA 14.

II. STANDARD OF REVIEW

Water law proceedings are special in character and the provisions of NRS 533.450 establish the boundaries of a court's review and strictly limits the review to the narrow confines established under the statute and as interpreted by the Nevada Supreme Court.

See Application of Filippini, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) ("It is also well settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but *strictly limits* it to that provided." (emphasis added)). All proceedings to review a decision of the State Engineer are subject to the provisions of NRS 533.450, which explicitly provides in part that such proceedings are "in the nature of an appeal" and are "informal and summary."

The Court's review of a decision brought under NRS 533.450 is limited to deciding whether the State Engineer's decision is supported by substantial evidence. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence supporting a finding of the State Engineer exists where "a reasonable mind would accept it as adequate support for the conclusion." *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 16, 481 P.3d 853, 858 (2021) (citing *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018)). When reviewing a decision or order of the State Engineer, the court may not "pass upon the credibility of the witness nor reweigh the evidence." *Revert*, 95 Nev. at 786, 603 P.2d at 264; *see also Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

The Legislature has specified that "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(10); *see also Revert*, 95 Nev. at 786, 603 P.2d at 264. Generally, the State Engineer's "factual determinations will not be disturbed" by the reviewing court on a petition for judicial review pursuant to NRS 533.450 so long as they are "supported by substantial evidence." *Pyramid Lake Paiute Tribe v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (internal citations omitted). However, if a court determines that the State Engineer's decision was "arbitrary and capricious," and therefore an abuse of discretion, the court may then overrule the State Engineer's conclusions. *Id.* A reviewing court's deference on factual issues is especially warranted under circumstances where the factual question is technical and scientifically complex. *Pahrump Fair Water, LLC*, 137 Nev. at 16, 481 P.3d at 858 (citing *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983)).

Further, the Nevada Supreme Court has explained that "an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action," and therefore "great deference should be given to the agency's interpretation when it is within the language of the statute." *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (internal citations omitted); *see also Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) ("[B]ecause 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."). Courts will "defer to an agency's interpretation of its governing statutes . . . if its interpretation is reasonable." *Sullivan*, 542 P.3d at 422 (citing *Pub. Emps.' Ret. Sys. of Nev. v. Nev. Pol'y Rsch. Inst.*, 134 Nev. 669, 673 n.3, 429 P.3d 280, 284 n.3 (2018)).

Where a court is reviewing the State Engineer's decision on a pure question of law, the State Engineer's ruling is persuasive, but not entitled to deference. *Sierra Pac. Indus. v. Wilson*, 135 Nev. 105, 108, 440 P.3d 37, 40 (2019) (citing *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (Stating that the Nevada Supreme Court "review[s] purely legal questions without deference to the State Engineer's ruling.")). Similarly, in Nevada, "[t]he Legislature has established a comprehensive statutory scheme regulating the procedures for acquiring, changing, and losing water rights." *Pahrump Fair Water, LLC*, 137 Nev. at 13–14, 481 P.3d at 856 (citing *Mineral Cty. v. Lyon Cty.*, 136 Nev. Adv. Op. 58, 473 P.3d 418, 426 (2020)). The State Engineer's powers under that statutory scheme are limited to "only those . . . which the legislature expressly or implicitly delegates." *Id.* (citing *Clark Cty. v. State, Equal Rights Comm'n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991)). "[F]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty." *Sullivan*, 542 P.3d at 420 (citing *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011)). Accordingly, where the scope of the State Engineer's authority is a question of statutory

interpretation, it is "subject to de novo review." *Pahrump Fair Water, LLC*, 137 Nev. at 14, 481 P.3d at 856 (citing *Town of Eureka v. Office of State Eng'r*, 108 Nev. 163, 165–66, 826 P.2d 948, 949–50 (1992) (noting that the State Engineer's interpretation of his authority may be persuasive but is not controlling and "the reviewing court may undertake independent review" of questions of statutory construction)).

III. DISCUSSION

The Humboldt River is a complex system, vulnerable to natural occurrences like droughts, which are increasingly common and severe in recent years. SE ROA 5–6. Over the years, as these droughts have impacted the limited surface water supply in the Humboldt River, groundwater pumping near the Humboldt River and its tributaries has also increased. SE ROA 5–10. This groundwater pumping has led to increased capture of the streamflow of the Humboldt River and its tributaries, presenting the possibility of conflict with the vested rights of the Humboldt Decree. SE ROA 2. In recognition of this reality, the State Engineer issued Order 1329 as an interim measure to address capture and conflict that could be caused by *new* applications for appropriations or changes to existing groundwater rights—allowing the State Engineer to act on new applications without increasing the problem of capture and conflict.

The State Engineer not only has the authority to manage groundwater in a manner that protects vested surface water rights (*i.e.*, conjunctive management), he has affirmative duties under the law to do so. While NGM argued that the State Engineer lacked this authority, the Nevada Supreme Court has since ruled unanimously and emphatically in *Sullivan* that the State Engineer has this authority under a multitude of statutes as well as the foundational doctrine of prior appropriation itself. The law requires the State Engineer to ensure that he is protecting existing rights, not impairing senior vested water rights, and carrying out his duties in a manner that does not conflict with the Humboldt Decree. This is especially true when considering the Legislature's declared policies that "require" the State Engineer to consider the best available science when rendering decisions and manage conjunctively the appropriation, use and administration

of all waters of this State, regardless of the source of water. NRS 533.024(c); (e); *see also Sullivan*, 542 P.3d at 421.

Further, Order 1329 is intended to be interim in nature and expressly acknowledges the forthcoming publication of the regional groundwater capture models[3] currently in development by USGS and DRI. SE ROA 2–3. However, the fact that better science is forthcoming in the form of these models does not mean that the State Engineer must wait for the models to be complete and published before doing something to address an issue (streamflow capture) that he knows is occurring and will occur under new applications. This is especially true considering the State Engineer's Rule 60(b) Motion which makes clear that Order 1329 does not rely on the unfinished models but serves as an interim tool for use while the models were being completed. The Court rejects NGM and Buttonpoint's arguments that the State Engineer cannot take any immediate actions to address a known problem just because more data is forthcoming.

Additionally, the State Engineer did not violate the Settlement Agreement with PCWCD. PCWCD cannot use its incorrect interpretation of the Settlement Agreement as a basis to undo Order 1329. PCWCD cannot force the State Engineer to take further action beyond what he did in Order 1329. This is an appeal of Order 1329 under NRS 533.450 to determine whether it is authorized by law and supported by substantial evidence. Order 1329 is not intended to be, nor is it required to be, an all-encompassing solution to all the issues facing the Humboldt River. Arguing what a State Engineer's decision "doesn't do" is not a valid basis for challenging his decisions. Rather, the standard of review is to determine whether what the State Engineer did do in Order 1329 is authorized under the law and supported by substantial evidence. Order 1329 meets both of these requirements.

For these reasons and others, as discussed in more detail below, this Court denies the petitions for judicial review, affirms Order 1329, and lifts the stay of Order 1329. Because this order lifts the stay of Order 1329, the State Engineer's Rule 60(b) motion is denied as moot.

[3] Again, since this case began, two of the three models have been published.

A. The State Engineer was Legally Authorized to Issue Order 1329

In light of *Sullivan*, it is clear that the State Engineer was legally authorized to engage in conjunctive management of groundwater and surface water in the way he did in Order 1329. NRS 532.120 authorizes the State Engineer to make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law. *See also* NRS 534.120(1). Furthermore, the State Engineer is entirely exempted from the requirements of Nevada's Administrative Procedure Act, NRS 233B, except as provided in NRS 533.365, and therefore did not need to comply with NRS 233B in issuing orders like Order 1329. *See* NRS 233B.039(i).

Vested (sometimes called decreed or prestatutory) surface water rights are those appropriations that have been initiated in accordance with law prior to March 22, 1913. NRS 533.085(1). Similarly, vested underground water rights acquired from an artesian or definable aquifer are those appropriations of water that have been initiated in accordance with the law prior to March 22, 1913. NRS 534.100(1). A vested right for an underground water right for percolating water is a water right acquired prior to March 25, 1939. NRS 534.100(1).[4] Both surface water and underground water belong to the public and use of the water is subject to **all** existing rights. *See* NRS 533.025; NRS 533.030(1); NRS 533.430; *see also* NRS 534.020. The State Engineer is prohibited under the law from impairing vested rights. NRS 533.085(1). The State Engineer is also expressly prohibited from carrying out his duties in a manner that conflicts with any applicable provision of a decree or order issued by a state court. NRS 533.0245. "Because vested water rights by definition exist prior to the grant of statutorily granted water rights, all statutory rights are granted subject to vested rights, and no statutorily granted water right may impair vested water rights." *Sullivan*, 542 P.3d at 420.

Additionally, the Legislature has declared that it is the policy of the State of Nevada both (1) to encourage the State Engineer to consider the best available science in rendering

[4] The distinction as to whether water is in a definable aquifer or whether it is percolating water, the course and boundaries of which are incapable of determination (*i.e.*, whether it is a vested right before March 13, 1913, or before March 25, 1939), is a matter to be determined by the State Engineer.

decisions concerning the available surface and underground sources of water in Nevada; and (2) to manage **conjunctively** the appropriation, use and administration of all waters within this State, regardless of the source of water (*i.e.*, groundwater or surface water). NRS 533.024(1)(c); (e) (emphasis added); *see also Sullivan*, 542 P.3d at 421 ("We further note the legislative policy declarations set forth in NRS 533.024(1)(c) and (e), which require the State Engineer to 'consider the best available science in rendering decisions concerning the available surface and underground sources of water' and '[t]o manage conjunctively the appropriation use and administration of all waters.").

These types of legislative declarations are given great weight and provide the State Engineer with the lens through which he must view and apply his express and implied authorities under the law. Managing waters conjunctively (and using the best available science for that matter) better ensures that the State Engineer complies with his other duties under the law to enforce prior appropriation and protect existing rights (NRS 533.025; NRS 533.030(1); NRS 533.430; NRS 534.020), ensure that his actions do not impair vested rights (NRS 533.085(1)), and ensure that he is not carrying out his duties in a manner that conflicts with any applicable provision of a decree or order issued by a state court (NRS 533.0245). These duties, viewed under the Legislature's declared policies and taken together with the State Engineer's authority to issue rules, regulations, and orders under NRS 532.120 and 534.120(1), authorized the State Engineer to issue Order 1329.

NGM is incorrect that the State Engineer is limited to express authorities in statute—*i.e.*, every action taken by the State Engineer needs to be expressly spelled out in statute. This is not the law. As the Nevada Supreme Court recently stated in *Wilson v. Pahrump Fair Water, LLC*, the State Engineer's powers under the statutory scheme are limited to "only those . . . which the legislature expressly **or implicitly** delegates." *Pahrump Fair Water, LLC*, 137 Nev. at 14, 481 P.3d at 856 (emphasis added). "[F]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty." *Sullivan*, 542 P.3d at 420 (internal citations omitted). The State Engineer is given broad powers under the law—and these include, but are not limited to,

protecting existing rights through regulation and control by the State Engineer (NRS 533.030; 533.430; 534.020), making such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law (NRS 532.120), and making such rules, regulations and orders as are deemed essential for the welfare of the area involved in an area designated by the State engineer where, in his judgment, the groundwater basin is being depleted (NRS 534.120(1)).

Throughout Nevada water law, there are instances of the Legislature authorizing the State Engineer to act, but not explicitly spelling out *how* he should do so. For example, in *Pahrump Fair Water*, the Supreme Court found that "[a] straightforward reading of NRS 534.110(8) supports the State Engineer's 2.0 afa requirement—the section expressly permits the State Engineer to restrict the drilling of 'additional wells' under circumstances that the State Engineer found here, and the 2.0 afa requirement restricts the drilling of additional *domestic* wells, which the phrase 'additional wells' implicitly includes as a subset." *Pahrump Fair Water, LLC*, 137 Nev. at 14, 481 P.3d at 857. There, in one breath, the Nevada Supreme Court confirmed two things. First, the Court confirmed that the State Engineer has powers that are **implicit** in statute, and not necessarily explicit (*i.e.*, wells includes "domestic wells"). Second, that the State Engineer receives wide latitude as to *how* he exercises his powers and complies with his duties under the law, so long as he is acting within those explicit or implicit powers and duties set out by the Legislature. More recently, the Nevada Supreme Court likewise found that the State Engineer had the implied authority under a multitude of statutes to enter Order 1309, holding that the State Engineer has the implied authority to conjunctively manage surface water and groundwater rights and to jointly administer water rights across multiple basins in order to prevent impairment of senior vested rights. *Sullivan*, 542 P.3d at 421–24.

The same rationale applies to Order 1329. When reviewing applications for new appropriations or to change water already appropriated, the State Engineer must consider whether there is unappropriated water in the source of supply, whether the uncommitted groundwater has been reserved pursuant to NRS 533.0241, whether the proposed use or

change conflicts with existing rights or protectable interests in existing domestic wells, and whether it threatens to prove detrimental to the public interest. *See* NRS 533.370(2); *see also* SE ROA 11.

A straightforward reading of the above authorities, viewed alongside the Legislature's policy declaration to manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water under NRS 533.024(1)(e), authorizes the State Engineer's actions in Order 1329. More specifically, under the requirement that the State Engineer reject an application if it conflicts with existing rights, the State Engineer is necessarily empowered to determine whether a conflict would occur. *See* NRS 533.370(2). The decreed surface water rights of the Humboldt River are vested rights that are senior in time to nearly all groundwater rights in the Humboldt River Region, and by definition existed prior to the grant of any statutorily granted water rights. SE ROA 6; *see also Sullivan*, 542 P.3d at 420. The State Engineer, through his technical expertise, understands that groundwater pumping can capture streamflow when surface water and groundwater are hydraulically connected. SE ROA 2, 6–7. Based on the State Engineer's knowledge of the Region as well as data he has collected therein, he has established that capture of Humboldt River streamflow does occur through groundwater pumping in the Humboldt River Region. SE ROA 9–10.

The State Engineer has the authority and duty to protect prior existing rights, comply with decrees, and ensure that his actions do not conflict with applicable decrees. Therefore, given the State Engineer's data confirming that capture does occur in this system, the State Engineer was authorized under NRS 532.120 to issue Order 1329 as it was necessary for the proper and orderly execution of his powers. Specifically, Order 1329 was necessary for the execution of his powers and duties which include reviewing new applications for appropriations or changes to existing rights, and determining whether granting a new application would result in a conflict with existing rights (include proposed groundwater uses conflicting with senior, vested, and decreed surface water rights) or threaten to prove detrimental to the public interest.

Similarly, all basins within the Humboldt River Region are designated pursuant to NRS 534.030. SE ROA 7. The State Engineer also recognized that the depletion of these groundwater basins is occurring, thus causing either greater infiltration losses from the Humboldt River or causing a reduction in the amount of groundwater that would otherwise be discharging as baseflow to the stream. SE ROA 6–7. NRS 534.120(1) and its clause "enabling the State Engineer to 'make such rules, regulations and orders as are deemed essential for the welfare of the area involved' is a broad delegation of authority'" in previously designated basins. *Sullivan*, 542 P.3d at 423. Accordingly, NRS 534.120(1) similarly authorizes Order 1329, as the State Engineer has deemed it essential to the welfare of the area involved (the Humboldt River Region) to address surface water capture caused by new applications for groundwater appropriations or changes to existing groundwater appropriations.

Under NGM's argument, so long as the other requirements under NRS 533.370 are met, the State Engineer would still have to approve the change application because he would "lack authority" to consider the effect groundwater pumping has on surface water sources and therefore could not consider surface water as "an existing right" under NRS 533.370(2). This effectively puts the junior groundwater rights in better standing than senior, vested, and decreed surface water rights that typically predate groundwater rights by a century. The Court rejects NGM's position as it would lead to clear violations of the State Engineer's duties under the law owed to vested and decreed rights. NRS 533.0245; NRS 533.085.

Accordingly, Order 1329 is authorized under existing water law.[5]

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[5] Conjunctive management is clearly authorized under the law, as further established in the recent *Sullivan* case. However, the Court still addresses NGM's argument regarding unpassed legislation, AB 51, for the sake of discussion. The State Engineer included unpassed legislation, AB 51, and the minutes, in the Record on Appeal ("SE ROA") because it is an important part of the series of events that led to where we are now—and why there is no program for financial mitigation for surface water users whose rights are impacted by groundwater pumping. SE ROA 8–9, 578–635. A review of AB 51 reveals that its proposed provisions were broader than simply encouraging conjunctive management policies, but included new policies to resolve disputes between junior and senior rights holders that would be implemented through new regulations. SE ROA 579–580 (AB 51, §§ 3–4). For this, and any number of reasons, AB 51 may not have passed. "Unpassed legislation . . . has little value when interpreting a statute." *Diamond Natural Res. Prot. & Conservation Assoc.*, 138 Nev. Adv. Op. 43, 511 P.3d at 1010 (internal citations omitted). This is because

B. Order 1329 is Supported by Substantial Evidence

As discussed previously in the Standard of Review section above, NRS 533.450 sharply limits this Court's review of State Engineer decisions. *See Revert*, 95 Nev. at 786, 603 P.2d at 264 (1979); *Application of Filippini*, 66 Nev. at 27, 202 P.2d at 540. On a petition for judicial review, the State Engineer's decision is "prima facie correct" and the burden of proof is on the petitioner. NRS 533.450(10).

The State Engineer's factual findings cannot be disturbed if they are supported by substantial evidence. *Pahrump Fair Water, LLC*, 137 Nev. at 16, 481 P.3d at 858; *see also Sierra Pac. Indus.*, 135 Nev. at 108, 440 P.3d at 40 (Courts review the State Engineer's factual findings "for an abuse of discretion and will only overturn those findings if they are not supported by substantial evidence."). Substantial evidence is merely the amount of evidence that "a reasonable mind would accept as adequate support for the conclusion." *Id.* The reviewing court may not reweigh the evidence or pass upon witnesses' credibility. *Revert*, 95 Nev. at 786, 603 P.2d at 264. And the Court's review must be "at its most deferential" where—like here—it is reviewing technical and scientifically complex determinations within the State Engineer's area of special expertise, at the frontiers of science. *Pahrump Fair Water, LLC*, 137 Nev. at 16, 481 P.3d at 858.

Prior to the advent of some of the scientific advancements in hydrology that exist today, courts would refer to groundwater in mysterious terms like "under ground, invisible, subterranean, and its general course and direction wholly unknown." *Mosier v. Caldwell*, 7 Nev. 363, 365 (1872). Thankfully, the hydrologic principles of streamflow capture caused by groundwater pumping are now scientifically well-established in the State Engineer's areas of special expertise—hydrology and civil engineering. SE ROA 2, 6–7, 9–10. Groundwater hydrology, while squarely within the State Engineer's expertise, remains

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there are any number of possible reasons why the Legislature might have failed to enact a proposed provision, and "proposed legislation that was not adopted leads to conflicting inferences." *Id.*; *see also Arnett v. Dal Cielo*, 923 P.2d 1, 16 (Cal. 1996). What is clear is that NRS 533.024(1)(e)'s policy of conjunctive administration of all waters in the state remained in effect, as did the other statutory provisions that authorize Order 1329.

particularly technical and complex—and therefore the State Engineer's conclusions in this area are owed deference by reviewing courts.

Since at least 2015, the State Engineer has been discussing streamflow capture generally and streamflow capture specifically related on the Humboldt River with stakeholders, while updating stakeholders as to the modeling progress and preliminary data from their various studies in the Region. SE ROA 736–982. While the forthcoming published models will hone this process for more precise decision making to be used as part of long-term solutions, the State Engineer's Glover's solution results (not the unfinished models) make clear that existing permitted groundwater wells are likely to capture decreed surface water, with the percentage of groundwater that is captured from surface stream flow increasing the closer that a groundwater point of diversion is to the Humboldt River or a tributary. SE ROA 285–287, 516–517, 748–757, 766–769.[6] A reasonable mind would accept this evidence as adequate to support the State Engineer's decision in Order 1329. Therefore, Order 1329 is supported by substantial evidence and is not an abuse of discretion.

The Court also rejects some of Petitioners' mischaracterization that Order 1329 is a form of "curtailment." *See, e.g.*, Buttonpoint Opening Brief, p. 11; NGM Opening Brief, p. 50. No one is being forced to file applications for new appropriations or changes, and Order 1329 contains no offset requirement for use of existing groundwater rights. Order 1329 does not require any existing permit holders to cease using water. Order 1329 is not curtailment as it has no effect on use of existing groundwater rights at all. Order 1329 only imposes a capture consideration, and potential offset requirement, for ***new*** applications by seeking to avoid "increasing conflict by adding to any capture impacts above what is already occurring." SE ROA 11. In that way, it is much more similar to the

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[6] This same analysis was used to support the State Engineer's decision not to curtail groundwater use during the 2012–2015 drought, as it was clear that climate and drought were the primary cause of reduced surface water flows during that period and curtailing groundwater use would not cause an appreciable gain in Humboldt River flows. SE ROA 758.

2.0 afa relinquishment requirement in *Pahrump Fair Water, LLC* than it is to any alleged "curtailment."

Further, the applicable threshold for Order 1329 to apply (where an application is predicted to result in an appropriation where annual capture is predicted to exceed 10% of duty for any year during 50 years of continual pumping) is supported by substantial evidence. The State Engineer explains it clearly—he chose this threshold to "represent the range of certainty of the methods currently being used to calculate capture." SE ROA 12. In other words, in order to *avoid* uncertainty in the methods used to calculate capture, the State Engineer implemented a buffer before Order 1329 would apply to a given application. This is not to allow some capture. Rather, this is to ensure that Order 1329 is only applied to applications where it is scientifically clear the proposed groundwater use would be capturing surface water flows. Accordingly, this is a reasonable threshold and conclusion set by the State Engineer and the Court defers to his analysis.

The evidence in the record demonstrates that capture is already occurring and will continue to occur with new appropriations or changes to existing appropriations. These more recent instances of capture are later in time and therefore more likely to be the appropriations where their capture would cause conflict with existing rights. Substantial evidence supports the State Engineer's actions in Order 1329 to ensure that these new applications do not result in additional capture from the Humboldt River that can lead to a higher likelihood of conflict with decreed surface water rights.

1. Order 1329 is Valid Despite Being Interim in Nature and the Capture Models Not Yet Being Published

Petitioners NGM and Buttonpoint spend a substantial amount of their Opening Briefs attempting to argue that Order 1329 is arbitrary and capricious because it is interim in nature and because the USGS and DRI capture models are not yet published. *See* NGM Opening Brief at 43–52; Buttonpoint Opening Brief at 8–13. Order 1329 readily admits in its very title it is interim in nature. SE ROA 2 ("Establishing **Interim** Procedures for Managing Groundwater Appropriations to Prevent the Increase of Capture and Conflict

with Rights Decreed Pursuant to the Humboldt River Adjudication") (emphasis added). Similarly, throughout the Order, the State Engineer makes it clear that he is awaiting publication of the USGS and DRI capture models and intends to use those in a public process to develop a long-term management strategy for the Region. SE ROA 2. The State Engineer does not hide from these facts, nor does he need to. In his Rule 60(b) Motion, the State Engineer has since further clarified how Order 1329 works, making clear that it is not based on the groundwater models that were unfinished at the time he issued Order 1329.

Order 1329 puts groundwater applicants in the Humboldt River Region on notice in a consistent and understandable manner that streamflow capture will be considered on new applications moving forward and that this capture may need to be offset in order for an application to be approved. Just because "the science that will be used to inform . . . long-term management strategies is being finalized" does not void any interim protocols, like Order 1329, that are independently authorized by the law and supported by substantial evidence. *See* SE ROA 4. Capture of Humboldt River surface water is already occurring due to groundwater pumping—and therefore is likely to occur under applications for new appropriations or changes to existing appropriations. The State Engineer is waiting for the publication of the USGS and DRI models before moving forward with the process to determine long-term management strategies, which could include regulation of *existing* groundwater rights based on their impacts to the Humboldt River. However, existing science can accurately estimate capture of surface water flows caused by groundwater pumping from a specific proposed PODs, and therefore substantial evidence supports the State Engineer's decision to apply this capture analysis to new applications submitted for review right now.

Lastly, Buttonpoint's concern that there is no "timeline for a permanent regulation to replace Order 1329" is not a valid basis to overturn Order 1329. *See* Buttonpoint Opening Brief at 12. The State Engineer makes clear that once the USGS and DRI models are published, he intends to work with the stakeholder community to develop long-term

strategies for the Humboldt River Region, but that "an interim protocol is necessary to avoid exacerbating existing problems." SE ROA 4, 11. While the publication of these models has been delayed over the course of their development, they are complete, undergoing peer-review, and nearing publication—and two of the three models are already published as of the date of this Order. In the meantime, the State Engineer is authorized to implement, and substantial evidence supports, "interim management practices described [in Order 1329] focus[ing] on statutorily available mechanisms for avoiding conflict due to increased capture caused by new appropriations or changes to existing groundwater permits." SE ROA 10.

Buttonpoint identifies no authority that would require the State Engineer to predict with specificity when he will be able to issue a potential long-term replacement for Order 1329, because no such authority exists. The State Engineer readily admits that as more science becomes available, Order 1329 will likely be replaced, amended, or augmented in the future. However, it is not necessary to establish *when* that will happen as Order 1329 currently stands on its own, authorized by the law and supported by substantial evidence under the best currently available science.

2. Order 1329 is Not "contradictory" as Alleged by Buttonpoint, Nor Does it Rely on Incomplete Models as Alleged by NGM

Buttonpoint and NGM both seek to invalidate Order 1329 by arguing that it does things that it does not do. Order 1329 is not premature, nor does it "contradict" its own findings as alleged by Buttonpoint. Buttonpoint Opening Brief at 8–10. As Buttonpoint shows, the State Engineer acknowledges the wet year/dry year phenomena and the effects of climate. SE ROA 7, 9–10. However, acknowledging these things and the need to explore them further with the model findings for long-term management strategies has no bearing on the State Engineer's decision in Order 1329 to try and ensure that capture does not increase during the interim period. The State Engineer has the authority to enter Order 1329, and he is aware that groundwater pumping is already causing streamflow capture in the Humboldt River Region. He already has the tools available to estimate

potential capture of new applications. Therefore, it was appropriate and supported for the State Engineer to implement the requirements of Order 1329 on new applications to prevent *additional* capture of streamflow.

However, the State Engineer also readily recognizes that this will not solve the problems in the Region—rather, it is "necessary to avoid **exacerbating existing problems**" and to "avoid **additional harm** to water rights above what is already occurring." SE ROA 4 (emphasis added). Therefore, the State Engineer agrees that the forthcoming models will be vital in addressing existing problems, which may include addressing current conflicts caused by existing groundwater uses. However, Order 1329 expressly seeks to prevent making the problem any worse by preventing additional new groundwater capture, caused by new applications, from occurring in the meantime.

Order 1329 is also not based on incomplete models, as alleged by NGM. NGM Opening Brief at 43–52. The State Engineer persuasively made this point even more clear in his Rule 60(b) Motion. The State Engineer readily admits that the models are forthcoming and acknowledges that they will be extremely beneficial to support his future management decisions. However, those future management decisions are not the subject of this case. The State Engineer has deemed Order 1329 necessary *now* and it stands on its own without the models. It is independently supported by the science confirming streamflow capture and the fact that the Humboldt River is a fully adjudicated surface water source. The final data from the models is not necessary to implement the requirements of Order 1329 on *new* applications to prevent *additional* capture of surface water flows. Nowhere in Order 1329 does the State Engineer say he is using the unpublished USGS and DRI models to support the Order. Rather, the models are always mentioned in the context that more administrative processes are still to come. The Court finds that Order 1329 is based on substantial evidence.

3. Order 1329 is Not Vague

Buttonpoint argues that Order 1329 is "unconstitutionally vague" and therefore void. Buttonpoint Opening Brief at 13–15. The Court disagrees. Order 1329 is clear on

what is required in terms of offsetting capture if a *new* application is expected to lead to an appropriation where annual capture is predicted to exceed 10% of duty for any year during 50 years of continual pumping or if a *new* application to change a POD results in an increase of net capture and annual capture at the new POD is predicted to exceed 10% of the permitted duty in any year during 50 years of continual pumping.[7] SE ROA 12–14.

Rather, any terms of Order 1329 that are left open-ended are the result of its application to the entire Humboldt River Region which "extend[s] over 11,000 square miles, including 34 hydrographic basins in eight Nevada counties." SE ROA 4. Each new application that falls under the provisions of Order 1329 will be evaluated individually based on where the POD is located considering the unique characteristics of each basin and how pumping groundwater in that POD affects surface flow of the Humboldt River and/or its tributaries. The percentage of capture and necessary offsetting requirements will be determined once the new applications are reviewed, just like the State Engineer's other considerations under NRS 533.370(1) and (2). These are scientific findings on which the State Engineer receives the most deference, and this is not a proper basis to overturn Order 1329.

The "void for vagueness" doctrine is typically applied to consideration of laws or ordinances of a criminal variety, as an extension of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See Cornella v. Justice Ct.*, 132 Nev. 587, 591–92, 377 P.3d 97, 100–01 (2016); *Eaves v. Bd. of Clark Cty. Comm'rs*, 96 Nev. 921, 923, 620 P.2d 1248, 1249–50 (1980). "Civil laws are held to a less strict vagueness standard than criminal laws 'because the consequences of imprecision are qualitatively less severe.'" *Carrigan v. Comm'n on Ethics of State of Nev.*, 129 Nev. 894, 900, 313 P.3d 880, 884 (2013) (citing *Vill. of Hoffman Est. v. Flipside, Hoffman Est., Inc.*, 455 U.S. 489, 498–99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). Even where not strictly "criminal" in nature, the void-for-vagueness doctrine has typically been reserved for

[7] Order 1329 also applies to temporary applications filed under NRS 533.345 to, change the point of diversion of existing groundwater rights and applications for new groundwater appropriations filed under the provisions of NRS 533.371. SE ROA 12.

reviewing punishments of an administrative variety or otherwise challenging after-the-fact application of a provision resulting in some alleged injury. *See, e.g., Carrigan*, 129 Nev. at 899, 313 P.3d at 883–84 (challenge to finding that appellant violated state ethics laws, resulting in public censure); *Edwards v. City of Reno*, 103 Nev. 347, 349, 742 P.2d 486, 487 (1987) (appeal of license fee award imposed because appellant and his crew had sold items door-to-door in the city without the required licenses); *W. Cab Co. v. Eighth Jud. Dist. Ct.*, 133 Nev. 65, 65–66, 390 P.3d 662, 665–66 (2017) (writ petition from cab company challenging provisions of the State's Minimum Wage Amendment after being sued based on allegations that drivers' wages fell below the constitutionally mandated minimum); *see also Vandehoef v. Nat'l Transp. Safety Bd.*, 850 F.2d 629 (10th Cir. 1988) (appeal of an order suspending professional balloon pilot's certificate); *Jensen Cont. Co. of Okla., Inc. v. Occupational Safety & Health Review Comm'n*, 597 F.2d 246 (10th Cir. 1979) (review of order finding contractor guilty of serious violations of safety regulations and assessing penalties).

Typically applying to laws and ordinances that result in punishment, such may be struck down as impermissibly vague for two independent reasons "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Carrigan*, 129 Nev. at 899, 313 P.3d at 884 (citing *State v. Castaneda*, 126 Nev. 478, 481–82, 245 P.3d 550, 553 (2010)). It is also well established that "one who is not prejudiced by the operation of a statute or ordinance may not question its validity." *Edwards*, 103 Nev. at 350, 742 P.2d at 488. Further, when a government rule or regulation applies to conduct that is not constitutionally protected, courts may consider the challenged rule or regulation not only in terms of the language "on its face" but also in light of the conduct to which it is applied. *U.S. v. Nat'l Dairy Corp.*, 372 U.S. 29, 36, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1962).

First and foremost, the void-for-vagueness doctrine does not apply to this type of order issued by the State Engineer. The Nevada cases cited by Buttonpoint address either

constitutional amendments, statutes, or city/county ordinances, many of which are challenges to applications of penalties (criminal or otherwise). Further, the administrative-type cases from the 10th Circuit address reviews of penalties imposed after findings of violations of administrative regulations. Upon a review of Nevada Supreme Court case law, it does not appear that a State Engineer order or decision has ever been declared void-for-vagueness, nor has the doctrine ever been considered in the context of NRS 533.450 judicial review proceedings in a published opinion. It is not part of the standard of review—which as stated above, is whether the State Engineer was authorized by the law and whether his decision is supported by substantial evidence.

Order 1329 is not a law or ordinance, nor is it similar to the types of laws, ordinances, or regulations punishing specific conduct where the "void-for-vagueness" doctrine has been analyzed in the past. Rather, the State Engineer issued Order 1329 pursuant to his authority to do so under NRS 532.120 and NRS 534.120(1) in order to meet his other duties under the law. It does not require any conduct, nor does it prohibit any conduct—rather it only applies *if* a new groundwater application is filed and *if* the appropriation granted under that application captures more than a specific amount of streamflow from the Humboldt River and/or its tributaries. Only *if* a new application falls under these thresholds would the applicant need to offset the capture if it wishes for that application to be granted. Order 1329 itself does not cause anyone to "permanently lose a portion of their real property right as in-stream replacement water or replacement groundwater" as alleged by Buttonpoint. Buttonpoint Opening Brief at 15. Nor does any Petitioner allege that Order 1329 has already been applied to one of their applications such that they have suffered some injury based on the alleged "vagueness."

Even if the "void-for-vagueness" doctrine did apply to the Court's review of Order 1329, Order 1329 is not impermissibly vague. First, it is not criminal in nature and therefore it is held to a less strict vagueness standard, pursuant to *Carrigan*. It also fails to meet either test for vagueness under *Carrigan*. Order 1329 does not prohibit anything at all—so on that basis alone, it does not meet the first test of whether it "fails to provide a

person of ordinary intelligence fair notice of what is prohibited." But regardless, Order 1329 is clear in its application—it is "understandable English and means what it says." *See Vandehoef*, 850 F.2d 629 at 630. It is clear from its language (1) to which applications it applies, and (2) what is required in terms of offset if it applies in order for an application to be granted. SE ROA 11–14.

Similarly, it also fails to meet the second *Carrigan* test as it is not "so standardless that it authorizes or encourages seriously discriminatory enforcement." It has objective triggers, with a specific capture volume (in excess of 10% of duty for any year during 50 years of continual pumping) that would require its application. SE ROA 12. Further, it has specific provisions for what is adequate to offset the capture should Order 1329 apply to a given application. SE ROA 12–13. Likewise, the provision treating "[u]ncommon or unforeseeable circumstances" on a case-by case basis as determined by the State Engineer does not undercut this specificity—rather, this simply recognizes the unique nature of the relationship between groundwater and surface water. Further, this recognizes that there may be fact-specific considerations in one of the 34 applicable hydrographic basins that the State Engineer may need to make to ensure that additional stream capture is prevented when reviewing new applications. These are the kinds of considerations "within [the State Engineer's] area of special expertise, at the frontiers of science" such that the Court must be at its most deferential. *Pahrump Fair Water, LLC*, 137 Nev. at 16, 481 P.3d at 858.

Buttonpoint's arguments regarding the alleged "omission" as to whether the relinquishment must be permanent or temporary is also rejected. The stated purpose of Order 1329 is to prevent additional capture. If capture is expected to be permanent under a new application that falls under Order 1329, then the applicant would need to offset that capture permanently; likewise, temporary increases in capture would have a requirement for offset that could be temporary in nature. This is clear under the plain reading of Order 1329.

Lastly, it is important to note once again that the entire "void-for-vagueness" doctrine stems from the due process clauses. Due process rights only stem from a

legitimate claim of entitlement—not merely "a unilateral expectation of it." *Malfitano v. Cty. of Storey*, 133 Nev. 276, 282, 396 P.3d 815, 819–20 (2017). Here, there are no allegations that any of the Petitioners in this case have had any applications wrongfully denied or subjected to the requirements of Order 1329. Rather, Buttonpoint/UWSL's and NGM's briefs tend to treat the application process as some kind of foregone conclusion that future applications would have been granted *but for* Order 1329.[8] This unilateral expectation is insufficient for due process to apply and certainly insufficient for due process considerations to void Order 1329 due to vagueness. Order 1329 is not impermissibly vague.

C. The State Engineer Provided Proper Notice of Order 1329

1. NGM Lacks Standing to Make This Notice Argument

NGM is a private LLC and does not allege they did not receive notice themselves, and they lack the standing to assert the due process rights of others. Standing requires that the litigant personally suffer an injury that can be fairly traced to allegedly unconstitutional action, and which would be redressed by invalidating the government action. *See Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988). Here, "the necessary nexus between injury and constitutional violation is missing." *Id.* at 104 Nev. at 416, 760 P.2d at 771. NGM does not allege that it did not receive notice, but rather seeks to invalidate Order 1329 based on the alleged lack of notice to unnamed other groundwater rights holders.

NGM is not raising this issue to be benevolent to the other groundwater rights holders along the Humboldt River—it is raising this issue because it would seemingly benefit from Order 1329 being voided based on this alleged violation of other peoples' due process rights. NGM also assumes, without proof, that other groundwater rights holders

[8] Order1329 actually provides for a process whereby applications can still be granted despite capturing (or increasing capture) of surface flows from the decreed Humboldt River and its tributaries. Rather, without Order 1329, the State Engineer would be authorized to simply deny these types of applications on the basis that they conflict with existing rights and/or threaten to prove detrimental to the public interest under NRS 533.370(2) or conflict with the provisions of the Humboldt Decree under NRS 533.0245 and 533.085.

failed to receive notice of the administrative process preceding Order 1329 and Order 1329 itself. NGM is "merely [a] remote part[y] who are looking for some way—any way—to avoid the application of" Order 1329. *Id.*, 104 Nev. at 416, 760 P.2d at 770–71. However, its alleged aggrievement has nothing to do with the alleged unsatisfactory notice provided by the State Engineer. NGM is "asserting someone else's potential legal problem; they are not the proper party to assert this alleged constitutional violation." *Id.*, 104 Nev. at 416–17, 760 P.2d at 771. Therefore, NGM lacks standing to make this notice argument and the Court rejects this argument.

2. The State Engineer Nonetheless Provided Adequate Notice of Order 1329

This case—consolidated Petitions for Judicial Review challenging Order 1329—is vastly different than the PCWCD Writ case, and NGM's role as a mining corporation is vastly different than the State Engineer's role in that prior litigation. That prior proceeding sought a writ to require the State Engineer to act—action that could have included curtailment. The State Engineer is the steward of Nevada's water resources and the person in charge of managing those water rights issued by his office, and therefore was an appropriate party to argue that PCWCD needed to provide notice to the groundwater rights holders along the Humboldt River if PCWCD was going to proceed with that case (similar to Eureka County's duties to its citizens giving rise to its similar arguments in *Eureka Co. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 417 P.3d 1121 (2018)).

In *Eureka County*, a vested, senior water rights holder had asked the district court via writ petition to order the State Engineer to curtail junior water rights. 134 Nev. at 276, 417 P.3d at 1122–23. The State Engineer and Eureka County argued that the senior water rights holder needed to provide notice to all appropriators who might be affected by the district court's upcoming decision. *Id.*, 134 Nev. at 277, 417 P.3d at 1123. After this argument was rejected by the district court, Eureka County filed a writ petition to the Nevada Supreme Court once again arguing that this notice was required. *Id.*, 134 Nev. at 278, 417 P.3d at 1124. The Nevada Supreme Court agreed with Eureka County, finding

that because the upcoming hearing "may result in a court order to begin curtailment proceedings, resulting in possible deprivation of property rights, due process requires junior water rights holders . . . to be given notice and an opportunity to be heard before the district court conducts the hearing." *Id.*, 134 Nev. at 282, 417 P.3d at 1127. The ultimate finding of the Supreme Court turned on the fact that "the language of the show cause order indicates that the district court may enter an order forcing curtailment to begin" and therefore "junior water rights holders must be given an opportunity to make their case for or against curtailment." *Id.* 134 Nev. at 280, 417 P.3d at 1125.

There is no possibility of curtailment in this action—this is an appeal of Order 1329 under NRS 533.450, with the possible outcomes of Order 1329 being affirmed, reversed, or remanded. The instances cited by NGM (the PCWCD Writ case and *Eureka County*) both stemmed from writ petitions seeking to have district courts force the State Engineer to take specific action, *i.e.*, curtailment. Those cases were not under NRS 533.450 and were not simply appellate review of a State Engineer's decision. Even if this Court were to rule in PCWCD's favor by ruling that the State Engineer should expand Order 1329 (which the Court refuses to do), it would still require a remand to the State Engineer to take further action—as the court may not substitute its judgment for that of the State Engineer under *Revert*—and only then, depending on the terms of the remand and the actions required of the State Engineer, would due process protections potentially require providing the type of notice that NGM incorrectly argues is required here.

NGM's attempt to equate relinquishment under Order 1329 with curtailment is unpersuasive. Curtailment is the required cessation of water use under an EXISTING water right, and therefore invokes due process protections. Relinquishment under Order 1329 is merely a procedure which would allow someone seeking a *new* groundwater right or seeking to move an existing groundwater right to a *new* POD to offset the resultant capture from these *new* applications with an existing right. *See* SE ROA 2–14. Thus, the relinquishment under 1329 would be a voluntary choice—a vast difference from a curtailment order. Order 1329 has no effect on existing groundwater rights, but only

applies when the State Engineer considers certain subsets of *new* applications, and therefore does not require the same notice to comply with due process as those proceedings in the PCWCD Writ case or *Eureka County*. Further, and importantly, the State Engineer *did* provide notice of the proceedings preceding Order 1329 by email, publication, and by posting it on the DWR website. SE ROA 652–653.

This type of appellate proceeding has no possibility of leading to curtailment and therefore the type of notice described in *Eureka County* was not required. The Court is limited to simply determining whether substantial evidence in the record supports Order 1329. Further, none of the Petitioners to this action argue that they failed to receive notice. The Court finds that the State Engineer provided adequate notice leading up to and issuing Order 1329.

D. Order 1329 Complies With the Terms of the Settlement Agreement With PCWCD

PCWCD alleges that the State Engineer's Order 1329 violates the terms of the Settlement Agreement in the PCWCD Writ case, constituting a "breach of that contract." PCWCD Opening Brief at 21–25. PCWCD either misunderstands or misconstrues the terms of the Settlement Agreement. The Settlement Agreement made clear that the State Engineer was already in the process of developing the "Draft Order" at the time of the agreement, and that it would first be issued as a "Draft Order" that would be circulated among stakeholders and "be subject to a public administrative process that will include taking comments from interested parties and the general public on the Draft Order as well as a public administrative hearing." PCWCD Writ Case, Settlement Agreement (also found in NGM's Appendix, Exhibit 20, Exhibit 1). The "Final Order", which ended up being Order 1329, was to be issued "following the public administrative hearing."

The consideration for the Settlement Agreement is found in the terms in paragraphs 3 and 4, on pages 3 and 4, of the Settlement Agreement. NGM's Appendix, Exhibit 20, Exhibit 1 at 3–4. Specifically, the State Engineer agreed to issue the Draft Order within ninety (90) days of the effective date of this agreement, while PCWCD agreed to dismiss its

Amended Writ Petition with prejudice in exchange for the State Engineer's agreement to issue the Draft Order "within the aforementioned time period." *Id.* There is no allegation that the State Engineer did not timely issue the Draft Order as agreed to in the Settlement Agreement; accordingly, there can be no violation of the Settlement Agreement.

1. No Breach Occurred

To prevail on a claim for breach of contract, a party must establish (1) the existence of a valid contract, (2) that the party claiming breach performed, (3) that the opposing party breached, and (4) that the breach caused damages to the party claiming breach. *Iliescu, Tr. of John Iliescu, Jr. & Sonnia Iliescu 1992 Fam. Tr. v. Reg'l Transportation Comm'n of Washoe Cty.*, 138 Nev. Adv. Op. 72, 522 P.3d 453, 458 (Nev. App. 2022). A breach of contract is a "material failure to perform 'a duty arising under or imposed by agreement.'" *See NDOT v. Eighth Jud. Dist. Ct.*, 133 Nev. 549, 554, 402 P.3d 677, 682 (2017) (internal citations omitted). Settlement agreements constitute contracts subject to general contractual principles. *See id.*, 133 Nev. at 553, 402 P.3d at 682. Neither parties nor courts should interpose language into a contract which does not exist. *See id.*, 133 Nev. at 554, 402 P.3d at 682.

Here, the plain language of the Settlement Agreement bound the State Engineer to issue a Draft Order within 90 days of execution. *See* NGM's Appendix, Exhibit 20, Exhibit 1 at 3 ("The State Engineer *hereby agrees to issue the aforementioned Draft Order within ninety (90) days* of the Effective Date of this Agreement") (emphasis added). The State Engineer performed accordingly, as the Effective Date of the Agreement was October 19, 2020, and the State Engineer issued the Notice of Hearing on Proposed Interim Order ("Draft Order") on January 19, 2021, following the Martin Luther King Jr. Day Holiday (*see* SE ROA 652–662), satisfying the express obligation set forth in the Settlement Agreement.

PCWCD acknowledged receipt of the draft order and fully participated in the subsequent public hearing, along with many others. Specifically, PCWCD provided both oral and written comments contesting the contents of the order. *See* SE ROA 689–691

(verbal), 983–989 (written). Although the State Engineer's only binding obligation under the Settlement Agreement was for the issuance of the Draft Order within 90 days, which he did, to the extent PCWCD alleges that the State Engineer breached paragraph 2(c) of the Agreement by omitting how "future conflicts" will be addressed, a review of both the Draft Order and Order 1329 reveals that both documents contain language creating a framework of how "future conflicts" will be analyzed, as well as an explanation of the real existing constraints to quantifying and resolving conflict.

Specifically, the Draft Order had language regarding "Addressing Future Conflict." SE ROA 661. Further, Order 1329 itself addressed future conflicts, making it clear that following public input, an interim protocol (like that established in Order 1329) was necessary to avoid exacerbating existing problems, but that long-term strategies to address future conflicts with Humboldt River decreed rights caused by existing groundwater rights would need to wait for "completion of the modeling effort and a process of public review and deliberation to determine best practices" before moving forward. SE ROA 3–4, 10–11, 14.

The Settlement Agreement's plain language states that once the Draft Order was issued, as agreed to, it was going to be "subject to a public administrative process that will include taking comments from interested parties and the general public on the Draft Order as well as a public administrative hearing" and that the Final Order (ultimately Order 1329) would be issued after this public process. *See* NGM's Appendix, Exhibit 20, Exhibit 1 at 3. PCWCD's argument that paragraph 2(c) of the Settlement Agreement allows PCWCD to specifically dictate both the language of Order 1329, and the outcome of future conflicts among water users throughout the Humboldt River Region, would render the balance of the Agreement illusory, making the State Engineer's public hearing and the public comments arising from the hearing and the draft order both perfunctory and *pro forma*. *See Sala & Ruthe Realty, Inc. v. Campbell*, 89 Nev. 483, 486–87, 515 P.2d 394, 396 (1973) (internal citations omitted) (illusory promises destroy the mutuality of obligation conferred by consideration).

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It is clear, based on the language of the Settlement Agreement, and the subsequent actions of the State Engineer, that no breach occurred. The Court rejects these arguments from PCWCD.

2. PCWCD Cannot Control the State Engineer's Policymaking Authority via the Settlement Agreement, Especially in Light of the State Engineer's Statutory Powers and Duties

The State Engineer acted within his authority to enter into a contract to promulgate the Draft Order by a time certain. However, PCWCD's assertion that he contractually obligated himself to the textual content of the "final order" (*i.e.*, Order 1329) is an improper reading of the contract, which if adopted, would render the contract illegal and unconscionable. Nevada courts may refuse to enforce contractual provisions that are unconscionable. *See Burch v. Second Jud. Dist. Ct.*, 118 Nev. 438, 443, 49 P.3d 647, 650 (2002) (internal citations omitted). Dual findings of procedural and substantive unconscionability are necessary to nullify a provision on that basis, but one factor greatly counterbalancing the other has significance. *See id.* Furthermore, contractual provisions that violate Nevada law are unenforceable in breach; offending provisions may be severed so as not to destroy the symmetry of the contract. *See Vincent v. Santa Cruz*, 98 Nev. 338, 341, 647 P.2d 379, 381 (1982) (internal citations omitted) (summarizing the doctrine of illegality).

The State Engineer has both statutory rulemaking authority and statutory duties as steward of Nevada's waters, which belong to the public. *See* NRS 532.120 and NRS 534.120(1); *see also* NRS 533.0245 (State Engineer prohibited from carrying out duties in conflict with decrees); NRS 533.085 (State Engineer shall not impair vested water rights); NRS 533.024(1)(e) (Legislative declaration that it is the policy of this State to conjunctively manage surface water and groundwater); NRS 533.025 (Nevada's water belongs to the public). Here, PCWCD alleges that the State Engineer breached the Settlement Agreement's paragraph 2(c) by omitting language from Order 1329 that would address "future conflicts." PCWCD Opening Brief at 23–24. As explained above, both the

Draft Order and Order 1329 included language regarding a framework for how the State Engineer intends to deal with "future conflicts." However, should paragraph 2(c) of the Settlement Agreement be interpreted or construed to require some additional specific "future conflicts" dispute resolution mechanism in Order 1329 (as yet unspecified by PCWCD), it would countermand the State Engineer's explicit statutory authority and statutory duties by constraining his ability to make policy, undermine the agreed upon public input process, and likely be indefensible in light of the unfinished models.

In seeking to modify Order 1329 by alleging breach, PCWCD attempts to control the State Engineer's discretion, using paragraph 2(c) of the Agreement to override the State Engineer's expression of policy following a public hearing. Nevada law does not allow PCWCD's weaponization of the Agreement in derogation of the State Engineer's governing statutes, which cannot be altered by the Agreement. The State Engineer issued a Draft Order within 90 days of the Agreement's execution, as obliged, and held a public meeting regarding the Draft Order, receiving extensive public commentary from members of the public, including PCWCD. SE ROA 652–718, 983–989. Order 1329's resulting provisions and language, following the public hearing process, were the sole prerogative of the State Engineer. PCWCD's attempt to circumvent NRS Chapters 532, 533, and 534 represents both an unconscionable and illegal attempt to commandeer the State Engineer's official powers. *See Vincent*, 98 Nev. at 341, 647 P.2d at 381 (illegal contractual provisions are unenforceable in breach).

Further, the State Engineer stated repeatedly in Order 1329 that he intends to work with stakeholders to establish long-term management practices addressing conflict with Humboldt River rights caused by groundwater pumping, as requested by PCWCD in its Petition and Opening Brief. SE ROA 3–4, 10–11, 14. However, following the public process, the State Engineer has concluded (and made clear) that the completion of the modeling process is necessary to defensibly establish those long-term solutions so that they are supported by the best available science, for the likely future legal challenges to the State Engineer's chosen eventual long-term management strategy. SE ROA 4.

Accordingly, the State Engineer did not breach the Settlement Agreement, and the Court rejects those arguments.

3. Buttonpoint Lacks Standing to Argue for Enforcement of the Settlement Agreement

Curiously, Buttonpoint also attempts to argue that Order 1329 "violated the Settlement Agreement which dismissed the PCWCD Writ [case]." Buttonpoint Opening Brief at 15–16. Buttonpoint was not a party to the Settlement Agreement and lacks standing to try and "enforce" the Settlement Agreement by requesting that Order 1329 be vacated on this basis. The Court rejects Buttonpoint's arguments regarding the settlement agreement.

In order to assert standing as a third-party beneficiary to a contract, a party must show "(1) a clear intent to benefit the third party, and (2) the third party's foreseeable reliance on the agreement." *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 197, 444 P.3d 436, 441 (2019) (citing *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824–25 (1977)). The Ninth Circuit has held that a party can enforce a third-party contract only if it reflects an "express or implied intention of the parties to the contract to benefit the third party." *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) (citing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999)). The party attempting to enforce a third-party contract must fall within a class clearly intended by the parties to benefit from the contract. *Id.* Further, when the contract is with a government entity, the test is even more stringent: "Parties that benefit . . . are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Id.* "The contract must establish not only an intent to confer a benefit, but also 'an intention . . . to grant [the third party] enforceable rights." *Id.*

While Buttonpoint did intervene in the PCWCD Writ case, their intervention was, in essence, to oppose PCWCD's Writ Petition. They requested intervention based upon their ownership of groundwater rights that they argued were in danger should PCWCD's Writ Petition be granted and require curtailment. However, Buttonpoint was not a party

to the Settlement Agreement. Therefore, their only possible route to have standing to argue breach of the Settlement Agreement is to argue they are a third-party beneficiary. They clearly were not third-party beneficiaries. Nowhere in the language of the contract is there an express intention to benefit anyone besides the State Engineer and PCWCD. Further, the State Engineer is a governmental entity and therefore the more stringent standard applies here. There is nothing in the Settlement Agreement expressing a clear intent to benefit Buttonpoint, and the Court finds no language showing an intention to grant Buttonpoint any enforceable rights under the Settlement Agreement.

The fact that Buttonpoint were not intended third-party beneficiaries of the contract is evident on the face of their Opening Brief when compared to PCWCD's Opening Brief. Before arguing that Order 1329 does not comply with the Settlement Agreement, Buttonpoint spend the entirety of their Opening Brief arguing that Order 1329 is arbitrary and capricious and void-for-vagueness, ultimately requesting that "this Court vacate Order 1329." Buttonpoint Opening Brief at 16. This is vastly different than the relief requested by PCWCD, who was a party and intended beneficiary of the Settlement Agreement, who supports the things that *were* included in Order 1329 but requests a remand **"in part"** to the State Engineer "with specific instructions requiring the State Engineer to provide a procedure to address current and future conflicts between Humboldt River Decreed Rights and groundwater rights issued by the State Engineer including a timeline for implementation of said procedure." PCWCD Opening Brief at 30 (emphasis added).

Essentially, Buttonpoint argues that Order 1329 should be vacated in its entirety for going too far while PCWCD argues that Order 1329 does not go far enough and that it should be partially remanded to add additional provisions. Buttonpoint challenges Order 1329 for failing to comply with the Settlement Agreement and, in doing so, challenges portions of Order 1329 that PCWCD agrees comply with the Settlement Agreement. Again, PCWCD was an actual party to the Settlement Agreement. Buttonpoint were not intended beneficiaries of the Settlement Agreement, and their

allegation that the Settlement Agreement was "a generally desirable resolution" of the PCWCD Writ case is insufficient to change that conclusion. Rather, Buttonpoint are trying to stand up a breach argument as a means to an end—they want Order 1329 to be vacated. Buttonpoint is not a third-party beneficiary, and therefore lacks standing, to make this argument based on alleged lack of compliance with the Settlement Agreement.[9]

E. PCWCD's Other Grounds are Not a Valid Basis to Challenge Order 1329

In essentially an extension of their prior breach arguments, PCWCD makes a number of other arguments regarding what Order 1329 *should have done*, arguing that failure to include these other provisions constitutes "a clear error of law." PCWCD Opening Brief at 25–30. However, these arguments do not challenge any of the provisions of Order 1329 as being unauthorized by the law, unsupported by substantial evidence, or otherwise arbitrary and capricious. Rather, each of the arguments in section II of PCWCD's Opening Brief rely on general principles of water law (prior appropriation, the legislative declaration on conjunctive management, the Humboldt River Decrees, other "statutory tools") to argue that Order 1329 should be partially remanded to include these provisions. *Id.* PCWCD even goes as far as to argue, troublingly, that "the assertion that [previously issued] groundwater rights are 'valid' is in question." *Id.* at 28.

None of this is relevant for the purposes of this proceeding under NRS 533.450. As discussed at length in the Standard of Review section above, proceedings to review a decision of the State Engineer are subject to the provisions of NRS 533.450, such that the proceedings are "in the nature of an appeal" and are "informal and summary." The Court's review of a decision brought under NRS 533.450 is limited to deciding whether the State Engineer's decision is supported by substantial evidence. *See Revert*, 95 Nev. at 786, 603 P.2d at 264. When reviewing a decision or order of the State Engineer, the court may not "pass upon the credibility of the witness nor reweigh the evidence." *Revert*, 95 Nev.

[9] Notwithstanding, the same analysis for why the State Engineer did not breach the settlement agreement with PCWCD nonetheless applies for why there is no breach in regard to Buttonpoint.

at 786, 603 P.2d at 264; *see also Bacher*, 122 Nev. at 1121, 146 P.3d at 800. "The decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(10); *see also Revert*, 95 Nev. at 786, 603 P.2d at 264.

Nowhere in the standard of review for an NRS 533.450 proceeding is the Court required to consider what a petitioner thinks the State Engineer *should* have done in the challenged decision. With every order the State Engineer promulgates, he could go further or stop shorter than he ultimately goes. However, for purposes of a challenge thereto, the same standard of review applies: was the State Engineer allowed to do this under the law, and was this decision supported by substantial evidence? There is no requirement that his decisions address every potential problem on a given water system or source, despite PCWCD's arguments otherwise. Rather, stated slightly differently, the State Engineer must simply be authorized by law to address the problem he intends to address, and base that decision on substantial evidence. Here, the State Engineer's stated intention in Order 1329 was to "avoid exacerbating existing problems" and "to avoid additional harm to water rights above what is already occurring." SE ROA 4. As the Court has found above, he was authorized to do this, and this decision was supported by substantial evidence.

This Court is aware that there are many other existing issues facing the Humboldt River Region in terms of water law and policy, and the State Engineer even acknowledges this in Order 1329. SE ROA 4. However, Order 1329 is not intended to resolve those other existing issues, and PCWCD's list of what Order 1329 does not do, or what it could or should have done, is not relevant. This Court's consideration is limited to determining whether what Order 1329 *does* do is supported by substantial evidence. It is. The Court rejects these arguments for partial remand advanced by PCWCD.

F. The Court Disregards Any References by NGM to the Brief Filed in Nevada Supreme Court Case No. 84739, Now Known as *Sullivan*

NGM inappropriately attaches briefing from the *Sullivan* case, pending at the Nevada Supreme Court at the time NGM submitted its Opening Brief, because NGM

"anticipates" certain arguments will be the same in this case. NGM Opening Brief at 17. NGM does not request judicial notice—it simply attaches the briefing and cites it directly.

As a general rule, the Nevada Supreme Court has held that courts "will not take judicial notice of records in another and different cases, even though the cases are connected." *Mack v. Est. of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (citing *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981)). There is an exception to this rule that requires examination of the closeness of the relationship between the two cases. *Id.* at 91–92. That exception cannot be met here. The parties are not the same (except for the State Engineer) and the State Engineer decision at issue is not the same. Yes, certain legal issues decided in *Sullivan* have a strong bearing on this case and the management of the Humboldt River (and water management issues statewide). However, analyses on those issues have now been set forth in the Nevada Supreme Court's published opinion in *Sullivan* and therefore there is no basis for the Court to consider the underlying briefing in that case.

NGM violates the general rule against this type of judicial notice of records of other cases—especially since they attach a brief submitted by multiple parties, not solely the State Engineer, and not even a court order. This case is in the nature of an appeal under NRS 533.450(1) and the court's review is limited to determining "whether substantial evidence in the record supports the State Engineer's decision." *Revert v. Ray*, 95 Nev. 786, 603 P.2d 262, 264 (1979). This is completely different than the other documents in NGM's Appendix, which are from the PCWCD Writ case, which the parties stipulated to being judicially noticed because that case is obviously connected to this one. This attached brief is not proper for judicial notice, is not in the record, and NGM did not receive permission from the Court or the other parties before attaching it. Therefore, the brief attached by NGM and any references thereto are disregarded by the Court in this case.

IV. ORDER

Based on the foregoing, and after considering the briefs submitted by the parties, oral argument, the Nevada Supreme Court's opinion in *Sullivan*, and the factual and legal

clarifications in the State Engineer's Rule 60(b) Motion, the Court finds that the State Engineer was authorized by law to issue Order 1329 and that Order 1329 is supported by substantial evidence. The Court further finds that the State Engineer did not breach the settlement agreement.

Accordingly, the Court **DENIES** the petitions for judicial review filed by Buttonpoint, NGM, and PCWCD. Furthermore, the Court **LIFTS THE STAY** of Order 1329, effective immediately, and **AFFIRMS** Order 1329 in its totality. Because this Order lifts the stay of Order 1329, the State Engineer's Rule 60(b) Motion is hereby **DENIED AS MOOT.**

IT IS SO ORDERED this 16th day of October, 2024.

DISTRICT JUDGE

Submitted this 19th day of July, 2024, by:

AARON D. FORD
Attorney General

JAMES N. BOLOTIN (Bar No. 13829)
Senior Deputy Attorney General
J. GREGORY CLOWARD (Bar No. 15890)
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: jbolotin@ag.nv.gov
jcloward@ag.nv.gov

SIXTH JUDICIAL DISTRICT COURT
• HUMBOLDT COUNTY, NEVADA •
MICHAEL R. MONTERO
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Honorable Michael R. Montero, District Court Judge, Sixth Judicial District Court and am not a party to, nor interested in, this action; and that on this 21st day of October, 2024, I caused to be served a true and correct copy of the enclosed **ORDER DENYING PETITIONS FOR JUDICIAL REVIEW AND LIFTING STAY ON ORDER 1329** upon the following parties:

KAEMPFER CROWELL Alex Flangas, Esq. Severin A. Carlson, Esq. Ellsie E. Lucero, Esq. 50 W Liberty Street, Ste 1100 Reno, NV 89501 *Via US Mail*	James N. Bolotin, Esq. Ian E. Carr, Esq. Office of the Attorney General 100 N Carson Street Carson City, NV 89701 *Via US Mail*
PISANELLI BICE, LLC Todd L. Bice, Esq. 400 S 7th Street, Ste 300 Las Vegas, NV 89101 *Via US Mail*	Laura A. Schroeder, Esq. Therese A. Stix, Esq. Caitlin R. Skulan, Esq. SCHROEDER LAW OFFICES P.C. 10615 Double R Blvd., Ste 100 Reno, NV 89521 *Via US Mail*
Paul G. Taggart, Esq. Timothy D. O'Connor, Esq. TAGGART & TAGGART, LTD. 108 N Minnesota Street Carson City, NV 89703 *Via US Mail*	

TAYLOR M. STOKES, ESQ.
STAFF ATTORNEY
SIXTH JUDICIAL DISTRICT COURT