Application 81720 seeks to appropriate groundwater for mitigation at a point of diversion (Well D) that is even closer to the spring complex, and any such well must be constructed so as not to divert water from the spring source. The water developed from the well is to be used to supplement spring water from Big Shipley and Indian Camp Springs when water is no longer available.[162] The State Engineer finds that Application 81720 can be approved for 3 cfs, but not to exceed 975 acre-feet annually, for use only when water is not available from the surface water sources. The State Engineer finds that the total combined duty of water under Applications 81720 and 82268 shall not exceed 975 acre-feet annually.

IX.

QUANTIFICATION OF VESTED RIGHT CLAIMS BY VENTURACCI

Claim Descriptions

Proof of Appropriation V-01114 was filed in the Office of the State Engineer June 26, 1912, claiming a pre-statutory vested water right for irrigation by waters from Horse Canyon.[163] *See generally*, **Figure 2**, attached. Proof of Appropriation V-01115 was filed in the Office of the State Engineer June 26, 1912, claiming a pre-statutory vested water right for irrigation by waters from Taft Springs.[164] Neither a diversion rate nor duty was provided on the proof forms. The waters of Horse Canyon are described as flowing only during a portion of the season from snow melt, and the waters of Taft Springs are described as being consistent in flow. The waters are described as being commingled before being used on a total of 206 acres of land, and it is estimated about 50 acres are irrigated under Horse Canyon and the remaining 156 acres by Taft Spring. The supporting map filed by Geo. S. Nickerson includes cultural descriptions of the number of acres and type of crop by legal subdivision. Two types of culture are described: alfalfa, garden and grain (12.36 acres) and meadow (191.94 acres) for a total of 204.30 acres, a bit less than described in the proof forms. Irrigation from Horse Canyon occurred from April 1st to June 15th of each year, and irrigation from Taft Springs occurred from April 1st to October 30th of each year.

H. M. Payne, who was with the State Engineer's office, inspected the Thompson Ranch on October 14, 1912, and references to Payne are from his field notes.[165] On November 23, 1912, the State Engineer determined the priority and amount of appropriation as required by the

[162] Transcript, p. 288.
[163] Exhibit No. 419.
[164] Exhibit No. 23.
[165] Exhibit No. 339.

1907 Statutes of Nevada and issued Certificate No. 38 for Proof V-01114.[166] Certificate No. 38 described the appropriation as 50 acres with an 1880 priority date. On November 25, 1912, the State Engineer determined the priority and amount of appropriation as required by the 1907 statutes of Nevada and issued Certificate Nos. 39 and 40 for Proof V-01115. These Certificates described the appropriation as 148.30 acres with an 1880 priority date and 6 acres with a 1901 priority date, respectively. The total of these Certificates from these two sources is 204.30 acres.[167,168,169]

Proofs of Appropriation V-01114 and V-01115 were amended on January 30, 1975, to increase the amount of meadow grass by an additional 14.41 acres, to include 405.80 acres of diversified pasture and the watering of 500 head of cattle and 100 head of horses.[170] The amendments also expanded the irrigation season to annual, claimed a duty of 4 acre-feet per acre of land irrigated and a variable flow rate of from Horse Canyon and a flow rate of 3.12 cfs from Taft Springs.

Proofs of Appropriation V-01114 and V-01115 were amended again on February 25, 2013, to expand the claimed acreage to 208.97 acres of alfalfa and grain, 646.52 acres of hay and grasses, and 780.87 acres of diversified pasture for a total of 1,636.36 acres.[171] The claimed priority for V-01115 was also changed from "1880" to "pre 1879," and the source was expanded from "Taft Springs" to "springs and seeps." There were also a third amended proofs filed for each, but this was only to correct offset lines in the cultural table.[172]

Proof of Appropriation V-02845 was filed in the Office of the State Engineer on December 9, 1974, claiming a pre-statutory vested water right for waters from Telegraph Canyon

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[166] The 1907 law pursuant to which the certificates were issued was later repealed in 1913, thus the State Engineer finds that certificates cannot be considered to have "adjudicated" the vested rights in 1912. However, the State Engineer finds that the *information* contained within the certificates may be considered, in addition to all other evidence admitted during the administrative hearing, as a record of the State Engineer's observations made closest in time to when the proofs of appropriation were filed.
[167] Certificate No. 38, Book No. 2, Page No. 38, official records in the Office of the State Engineer.
[168] Certificate No. 39, Book No. 2, Page No. 39, official records in the Office of the State Engineer.
[169] Certificate No. 40, Book No. 2, Page No. 40, official records in the Office of the State Engineer.
[170] Exhibit Nos. 24, 420.
[171] Exhibit Nos. 25, 421.
[172] Exhibit Nos. 422; and File No. V-01115, official records in the Office of the State Engineer.

for irrigation of 58.18 acres of pasture grasses at 4 acre-feet per acre and for watering 100 head of cattle and horses.[173]

Proof of Appropriation V-02846 was filed in the Office of the State Engineer on December 9, 1974, claiming a pre-statutory vested water right for waters from Unnamed Springs for irrigation of 13.97 acres of pasture grasses at 4 acre-feet per acre and for watering 100 head of cattle and horses. The remarks section of the proof indicates that a measurement could not be made because the grounds were sub-irrigated.[174]

Proof of Appropriation V-02847 was filed in the Office of the State Engineer on December 9, 1974, claiming a pre-statutory vested water right for waters from Cox Canyon for irrigation of 8.51 acres of pasture grasses at 4 acre-feet per acre and for watering 100 head of cattle and horses.[175]

Proofs of Appropriation V-02845 and V-02846 were amended on February 25, 2013, and Proof of Appropriation V-02847 was amended on April 15, 2013, to collectively increase the claimed irrigated acreage to 272.07 acres of diversified pasture (red top fescue, Timothy and Johnson grasses) and 72.82 acres of hay and to increase the number of livestock watered to 100 head of horses and 500 head of cattle. The remarks section of the proofs indicate that the water from Telegraph Canyon and Cox Canyon and water from springs and seeps are commingled for the irrigation of the same place of use (on or near the Cox Ranch) under all three claims.[176]

Proof of Appropriation V-010368 was filed in the Office of the State Engineer on February 25, 2013 and amended on March 14, 2013, claiming a pre-statutory vested water right for waters from Judd Canyon, unnamed springs and seeps for the irrigation of 102.35 acres of rye grass and 88.24 acres of diversified pasture (red top fescue, Timothy and Johnson grasses) and for watering 100 head of horses and 500 head of cattle.[177]

Horse Canyon and Taft Springs (V-01114 and V-01115)

Payne writes, "[t]his ranch...is irrigated from both Taft Springs and Horse Canyon, the latter source being snow water which flows a maximum of 2 [cfs] of water from March 15th to June 15th." Taft Springs are described as being two sources a few hundred feet apart that "do

[173] Exhibit No. 428.
[174] Exhibit No. 424.
[175] Exhibit No. 430.
[176] Exhibit Nos. 429, 429, 431.
[177] Exhibit Nos. 426 and 427.

not vary in flow." A current meter was used to measure both sources. The smaller source flowed 0.25 cfs and the larger source flowed 1.29 cfs. Water from the smaller spring is held in a 100-foot diameter reservoir from which "about 20 acres of alfalfa and grain" are irrigated. The larger spring has an irregularly shaped reservoir of about 5 acres in surface area from which "nearly 200 acres of meadow land" are irrigated. Ditches can carry water from the smaller spring to the larger spring and waste water from the smaller spring ditch can be caught by the ditch from the larger spring. Payne continues, "the water of Horse Canyon is used on the lower end of the meadow, but this is also irrigated by water from the springs." The appropriator cuts approximately 150 tons of hay from the meadow in the first crop, and the second crop is used as pasture.[178]

In support of the second amended proofs, a report was filed by George Thiel, a witness for Applicant Venturacci. Mr. Thiel asserts that to consider only flow rates of Taft Springs would underestimate the actual flow that sustained the Thompson Ranch. He states, "Mr. Milton Thompson, a resident of the springs since 1948, estimated that there were over two hundred springs in this area that he had found over his life time." Mr. Thiel's report asserts that the only way to determine the extent of irrigation gained from these seeps and springs is through an examination of all the lands placed to use, as best can be determined through historical record.[179]

The State Engineer rejects the argument that the extent of the vested right claims is a measure of all land that may have been wetted from those sources and rejects the assertion that those potential meadow areas can be considered irrigated acreage entitled to a water right. The Nevada Supreme Court in the case of *State v. State Engineer*, 104 Nev. 709, 766 P.2d 263 (1988), addressed the argument by the Board of Agriculture that a physical diversion is required in all instances for an appropriation of water. The court held that a physical diversion was not an absolute necessity for an *in situ* right under the modern water law; however, it made a distinction between appropriative rights under the statutory water law now, and the requirements for a pre-statutory vested water right. The court cited *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 140 P 720 (1914), which held that both a diversion and application to beneficial use were required to appropriate water. The court, also referencing *Application of Filippini*, 66 Nev. at 22, 202 P.2d 537, indicated that the statutory requirements for appropriating water are distinct from the

[178] Exhibit No. 339.
[179] Exhibit No. 232, p.2

requirements for water appropriation in effect before the enactment of the Nevada Water Law Act in 1913. Referencing *Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 173, 295 P.772, 774 (1931), the court noted that under certain conditions, it could recognize an appropriation of water without a diversion when no diversion was needed to put the water to beneficial use, such as in the case of livestock. However, as the Nevada Supreme Court held in *Walsh v. Wallace*, 26 Nev. at 327-328, 67 P. at 918 in 1902, to constitute a valid appropriation of water of a flowing stream (or a spring source) there must be an actual diversion: the cutting of wild grass produced by stream overflow is not an appropriation.

To claim a water right for irrigation, the State Engineer finds a physical diversion was required to appropriate the water to beneficial use. Here, Applicant Venturacci filed pre-statutory vested water rights claims for meadows and grasslands for which there was no physical diversion of water. Although cattle may have grazed on those lands, this does not also mean a water right can be claimed. That some seeps and springs naturally supplied water to allow for meadow grasses to be grown, which in turn could have been used by stock as pasture, is not the same as diverting water for a beneficial use prior to Nevada Water Law being enacted in 1905.

In the 1982 curtailment proceedings, Milt Thompson stated:

> A well isn't going to help because most of my land is native meadows and it's not the type of ground that is conducive to irrigation, sprinkler or otherwise, and we are not talking merely about the loss of my springs. Back when we bought that ranch our springs weren't that much used because our meadows were so wet from one end of the ranch to the other, and our problem was too much water, which I have pictures here in bogs, we have bogs all over our ranch. Diamond Springs area was the big bog.[180]

Thus, even Mr. Thompson described the land as being naturally supplied water from the springs and bogs, and not from discrete diversions from the springs for irrigation of well defined lands.

The State Engineer does not agree with Mr. Thiel's report. The objective of these applications is to provide mitigation for pre-statutory vested rights that have been impacted by junior appropriators, and issuance of anything in excess of what can be reasonably determined as the extent of that vested right would constitute a new appropriation, rather than mitigation.

In seeking certification of their pre-statutory water rights, it is implausible that the very people making use of that right would not know how they were using the water and fail to claim the full extent of that right. That later owners or the Applicants would 60 or 100 years later seek

[180] Exhibit 315, p. 94.

to amend and expand the claims based on speculation of what might have been possible is not compelling. Mr. Thiel could only describe in vague terms what crops were grown in the valley and was not able to provide evidence of how much land was placed to use or where there was actual irrigation. Mr. Thiel referred to what *could* be grown today or what was *possible now.*[181] Stating that, "short of bananas [they] could grow almost any sort of crop"[182] is not evidence of what crops were grown and how many acres were put in to production during the time when the pre-statutory vested water right was claimed to have been established. The State Engineer finds Mr. Thiel's testimony lacks relevance as to how water had *actually* been placed to beneficial use on the ranch.

Mr. Payne's 1912 field notes support the 1912 certificates issued for proofs V-01114 and V-01115, and they are the strongest evidence of how the water was placed to use as a pre-statutory vested right. His notes describe actual measurements and the method of measurement and a determination of the area under actual irrigation. The State Engineer finds that Horse Canyon provided a flow rate not to exceed 2 cfs for a season from March 15th to June 15th. The State Engineer finds that Taft Springs provided a combined flow rate of 1.54 cfs during an irrigation season from April 1st to October 30th. Therefore, the maximum amount of water that could have been applied from these sources over the irrigation season as described in the 1912 proofs is about 1012 acre-feet per season. This is more than enough to satisfy the requirements of about 13 acres of alfalfa, grain and garden crops and about 192 acres of meadow grass, even at a high per acre duty of 4 acre-feet stated in the proofs.

Eileen Penrod, who was born and raised on the Thompson Ranch and performed work on the ranch, testified that she would mow meadow in two fields, one northwesterly of the springs and one southwesterly of the springs.[183] When questioned about the type of grass she mowed, she described it as "wild grass" having "pointy tips."[184] This description is consistent with sedge, which is a low-nutrition grass that cattle only eat when nothing better is available to them. Ms. Penrod also described a small alfalfa field on the north end of the ranch, but this required pumping water from the spring to hand lines.[185]

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[181] Transcript, pp. 885-887.
[182] Transcript, p. 886.
[183] Transcript, pp. 908, 934-938.
[184] Transcript, pp. 922, 946-947.
[185] Transcript, pp. 922, 946-947.

Nels Toft, the original claimant for Proofs of Appropriation V-01114 and V-01115, set forth by sworn affidavit what he believed in 1912 had been appropriated. The State Engineer finds that what Nels Toft claimed as appropriated in the 1912 proofs of appropriation carries the greatest weight of the actual rights being claimed, as opposed to repeated amendments and expansion of the claims asserted more than 100 years later.

The State Engineer finds that the information contained within Certificates 38, 39 and 40 issued for Proofs of Appropriation V-01114 and V-01115 on Taft Springs demonstrate the extent of the vested rights. Certificate No. 38 for Proof V-01114 is for the irrigation of 50 acres with a priority date of 1880. The source is snow melt from Horse Canyon, the flow rate is 2 cfs and the period of use is April 1st to June 15th of each year. Certificate Nos. 39 and 40 for Proof V-01115 are for the irrigation of 148.30 acres with an 1880 priority date, and 6 acres with a 1901 priority date, respectively. The source is Taft Springs, the flow rate is 1.54 cfs and the period of use is April 1st to October 30th of each year. All three certificates allow for stockwater and domestic use.

Telegraph Canyon, Cox Canyon and Unnamed Springs and seeps (V-02845 to 47)

Three sources are claimed to have served the Cox Ranch: waters from Telegraph Canyon and Cox Canyon and unnamed springs and seeps. Telegraph and Cox Canyon were intermittent sources resulting from spring snow melt, and the primary source of water would be the springs and seeps under Proof of Appropriation V-02846.[186]

Under the originally filed Proof of Appropriation V-02846, the water was diverted from its source by "Sub-irrigated Spring Area," the means of diversion employed was by "Sub-irrigat[ion]" and the remarks section of the proof indicates that a measurement could not be made because the grounds were "sub-irrigated from a spring area."[187] In the amended proof, the diversion was described as from "Open Ditches and sub-irrigated spring areas."[188]

As stated above, the State Engineer finds that to claim a pre-statutory water right for irrigation, a physical diversion was required to appropriate the water for beneficial use. Little evidence was provided to demonstrate actual use of the water on the Cox Ranch, and no evidence was provided to determine flow rates from the spring sources that may have been carried in a ditch. The State Engineer finds that there is insufficient evidence to establish the veracity of Proof of Appropriation V-02846; therefore, approval of applications 82570 and

[186] Transcript pp. 715-716.
[187] Exhibit No. 424.
[188] Exhibit No. 425.

82571 would be a new appropriation and not mitigation of a vested right. For that reason, approval of the applications would conflict with existing rights and threaten to prove detrimental to the public interest, because such approval would violate State Engineer's Orders 717 and 815.

Judd Canyon and Unnamed Springs and Seeps (V-010368)

Two sources are claimed to have served the Willow Ranch: waters from Judd Canyon and unnamed springs and seeps. No measurements of these springs are known to have been taken.[189] Little evidence was provided to demonstrate actual use of the water on the Cox Ranch, and no evidence was provided to determine flow rates from the spring sources that may have been carried in a ditch. Application 82573 seeks to replace the vested water right from springs and seeps for the Willow Field.[190] The State Engineer finds that there is insufficient evidence to establish the veracity of Proof of Appropriation V-010368; therefore, approval of application 82573 would be a new appropriation and not mitigation of a vested right. For that reason, approval of the application would conflict with existing rights and threaten to prove detrimental to the public interest, because such approval would violate State Engineer's Orders 717 and 815.

X.

MITIGATION APPLICATIONS BY VENTURACCI

As stated previously, the State Engineer has determined that the duty for Diamond Valley is 3 acre-feet per acre of land irrigated for alfalfa, which has a NIWR of 2.5 feet. The NIWR for grass hay is 2.4 feet, highly managed pasture grass is 2.5 feet and for low managed pasture grass is 2.0 feet, suggesting a comparable duty would be appropriate.[191] The total of land irrigated under Certificates 38, 39 and 40 is 204.30 acres,[192,193,194] which at 3 acre-feet per acre of land irrigated is 612.9 acre-feet.

The State Engineer finds that Applications 81825 and 82572 can be approved for 1.54 cfs, not to exceed a total combined duty of water of 612.9 acre-feet annually, for mitigation of the impacts to Taft Spring.

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[189] Transcript p. 558.
[190] Exhibit No. 60.
[191] *Evapotranspiration and Net Irrigation Water Requirements for Nevada*, Huntington and Allen, 2010, available online at http://water.nv.gov/mapping/et/et_general.cfm.
[192] Certificate No. 38, Book No. 2, Page No. 38, official records in the Office of the State Engineer.
[193] Certificate No. 39, Book No. 2, Page No. 39, official records in the Office of the State Engineer.
[194] Certificate No. 40, Book No. 2, Page No. 40, official records in the Office of the State Engineer.

XI.

ABANDONMENT

Pre-statutory vested water rights can be lost by intentional abandonment. *Andersen Family Associates v. Ricci*, 124 Nev. 182, 179 P.3d 1201, 1205 (2008). In Nevada, abandonment of a water right is the voluntary "relinquishment of the right by the owner with the intention to forsake and desert it." *In re Manse Spring*, 60 Nev. 280, 108 P.2d 311, 316 (1940) (courts must determine the intent of the claimant to decide whether abandonment has taken place, and in this determination may take non-use and other circumstances into consideration).[195] Abandonment requires both action and intent, and under Nevada law is "a question of fact to be determined from all the surrounding circumstances." *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).[196] Non-use for a period of time may inferentially be some evidence of intent to abandon.[197] Although a prolonged period of non-use may raise an inference of intent to abandon, it does not create a rebuttable presumption.[198] At a minimum, proof of continuous use of the water right should be required to support a finding of lack of intent to abandon.[199]

In 1982, the State Engineer held meetings in Eureka, Nevada, to discuss Mr. Thompson's complaints that groundwater pumping was affecting the flow of Thompson Spring and whether groundwater pumping needed to be curtailed. At that time, discussion took place among the farmers about whether they should contribute to drill a well to help Mr. Thompson.[200] Mr. Thompson refused this offer, stating:

> A well isn't going to help because most of my land is native meadows and it's not the type of ground that is conducive to irrigation, sprinkler or otherwise, and we are not talking merely about the loss of my springs. Back when we bought that ranch our springs weren't that much used because our meadows were so wet from one end of the ranch to the other, and our problem was too much water, which I have pictures of here in bogs, we have bogs all over our ranch. Diamond Springs area was the big bog.[201]

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[195] *U.S. v. Alpine Land & Reservoir Company*, 340 F.3d 903 (9th Cir. 2003).
[196] *U.S. v. Alpine Land & Reservoir Company*, 340 F.3d 903 (9th Cir. 2003).
[197] *Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the State Engineer of the State of Nevada*, 77 Nev. 348, 354-55, 364 P.2d 1069, 1072 (1961).
[198] *U.S. v. Orr Water Ditch Company*, 256 F.3d 935, 945 (9th Cir. 2001).
[199] *U.S. v. Alpine Land & Reservoir Company*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[200] Transcript, pp. 1112-1113.
[201] Exhibit No. 315, p. 94.

While testimony was provided that no water was spread through the use of a shovel, ditch or anything from 1982 on[202] and that in the fall of 1981 or 1982, the condition of the ranch was very rundown, the fields were old and rough and things were not kept up,[203] the loss of the use of water was not through the fault of Mr. Thompson.

Jed Robinson testified on behalf of Venturacci to try to rebut a claim that the water rights on the Thompson, Cox and Willow ranches had not been abandoned prior to Mr. Venturacci's purchase of those ranches. Mr. Robinson works for Private Capital Group, a private lender that had loaned money to a Allen Chamberlain who purchased the Thompson Ranch in 2008.[204] Mr. Robinson testified that Private Capital Group foreclosed on the property in 2009 or 2010 when Mr. Chamberlain failed to make his payments. The testimony indicates that Milton Thompson executed a deed to Cedar Ranches, LLC, which was Mr. Chamberlain's limited liability company. Mr. Robinson testified that the deed of trust listed water rights that Private Capital Group was encumbering to secure Mr. Chamberlain's loan as only 4 afa as the annual duty for vested right claims V-01114 and V-01115.[205] When Private Capital Group subsequently sold the property to Mr. Venturacci, the deed contained the same annual duty of 4 afa for each vested right claim.[206]

Mr. Venturacci attempts to use a lender to argue lack of intent to abandon the water rights; however, the State Engineer finds a lender is not the person placing water to beneficial use and cannot demonstrate the intent of whether or not to abandon water rights and gives no weight to Mr. Robinson's testimony on the matter. However, the State Engineer finds that Mr. Thompson's rejection of the offer to drill a well in 1982 does not rise to the level of abandoning the water right. The State Engineer finds while there is no evidence of continual water use, the water was not able to be used as the Thompson Spring had been dried up by groundwater pumping.

Protestants to Applications 81719 and 81720 (Sadler) assert that the water rights claimed under the proofs of appropriation have been abandoned (V-03289 and V-03290). Protestants to Application 82268 (Sadler) assert that the ranch was purchased with full knowledge that the

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[202] Transcript, p. 1086.
[203] Transcript, p. 1120.
[204] Transcript, pp. 896-897.
[205] Transcript, pp. 902-903.
[206] Exhibit No. 322.

water was not there and the claimed rights have been abandoned (V-03289). Eureka County argues that there were many years of non-use of water on Sadler Ranch prior to the purchase by the current owners. The County points to testimony by Mr. Bailey that indicates that after the Sadler brothers sold the ranch, no more alfalfa was raised on the ranch; however, Mr. Bailey also testified that he never knew anyone as to be so "silly" as to abandon their water rights, and does not believe the Sadlers abandoned their rights.[207] James Gallagher testified that Don Sokul was the last owner of the Sadler Ranch who actively irrigated or farmed the property and he left the property in 1990; however, no evidence was elicited from Mr. Gallagher about Sokul, or other prior owners' intent to abandon the water rights.[208] Finally, Mark Moyle testified that since he moved to Diamond Valley in the spring of 1977, he has not observed any irrigation equipment on the property, the irrigation was all flood irrigation out of the pond, which ran down the meadow on its own, and he never observed much hay production or hay stacks on the Sadler Ranch.[209] Here, again, however, no testimony was elicited from Mr. Moyle on the issue of an intent to abandon the water rights. The current owners bought the Sadler Ranch in 2011.[210]

As to the Sadler Ranch, the State Engineer finds it was not proven by a preponderance of the evidence that the predecessor owners of the Sadler Ranch intended to voluntary relinquish the claimed water rights by intending to forsake and desert them.

XII.

UNAPPROPRIATED WATER AND CONFLICTS WITH EXISTING RIGHTS

Protestants assert that there is no unappropriated water from the source, that the proposed use of the water will conflict with existing rights and protectable interests in existing domestic wells and threaten to prove detrimental to the public interest. Protestants claim that the use of the water will only exacerbate the over-appropriation problem in the valley, that the water the applications seek to appropriate is actually groundwater discharge that is accounted for in the estimation of the perennial yield of Diamond Valley, that the State Engineer cannot affirmatively determine there is water available (NRS § 534.110(3)) and that these springs will cease to flow even if only the perennial yield had been appropriated in the valley. They argue the State Engineer has already held there is no unappropriated water in Diamond Valley citing to State Engineer's Order Nos. 541 and 717 (curtailment orders).

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[207] Transcript, pp. 963, 1004-1005.
[208] Transcript, p. 1101.
[209] Transcript, p. 1123.
[210] Transcript, p. 38.

Protestants argue that Nevada has historically recognized underground water as a separate source from surface water and that Nevada water law provides a bright-line distinction between groundwater and surface water most notably in the adjudication statutes citing to NRS § 534.020(1) and to cases that pre-date the water law. They assert there is no finding that the groundwater and surface water are hydrologically connected and that the State Engineer cannot treat surface water (Thompson/Taft Spring and Shipley Spring) and groundwater as the same source.

Sadler argues that it has presented evidence to show that the mitigation applications will appropriate water from the same source as their pre-statutory vested spring water claims and that this evidence is relevant to the statutory criteria regarding the availability of water. They further assert that the priority date that should be given under any permits granted should be the same as the date of priority for the vested right claims.

Protestants also assert that the Application 82268 is deficient because it proposes to change the point of diversion for a claimed pre-statutory vested surface water right (V-03289) to a groundwater source that is not recognized under Nevada water law as hydrologically connected and that the application is deficient because Nevada water law does not allow a source to be changed through a change application. Protestants claim that the proposed "induction" well under Application 82268 does not serve to induce the infiltration of surface water, but will intercept groundwater and will thus exacerbate the over-appropriation problem in the basin. If these were separate sources the State Engineer would find merit in this argument; however, as discussed below, the State Engineer finds these are not separate sources.

Nevada Revised Statute § 533.370 provides that where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS § 533.014, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. The State Engineer finds the Applicants are not requesting a "new" appropriation of groundwater, but rather are requesting a new method of obtaining the groundwater that formerly discharged at the springs upon which they claim pre-statutory vested water rights. The State Engineer finds Section VI provides the evidence that these sources are hydrologically connected.

The State Engineer finds there is no difference in the source of water requested for appropriation under these applications and that claimed under the pre-statutory vested water rights claims and the Applicants have the prior right to use such water.

The State Engineer finds that the evidence shows that, but for subsequent groundwater appropriations, the water would have naturally discharged at the spring sources and was already appropriated by the senior water right holders. Accordingly, the State Engineer need not find there is additional unappropriated water in the basin even though the basin is over-appropriated. The water these applications seek to use is water already appropriated; it is not an additional new appropriation. The State Engineer finds it is these Applicants who have the better claim to this water and they do not have to establish there is additional "unappropriated" water to support the applications as their senior water rights come from the same source.

The State Engineer finds that granting the applications in the amounts determined below will only restore to the Applicants the quantity of water necessary to produce a similar amount of tonnage. The drilling of said wells and the use of the water from those wells will not conflict with existing rights or be detrimental to the public interest. The State Engineer finds that the restoration of a reasonable determined quantity of water already appropriated mitigates the Applicants' senior water rights and does not conflict with junior groundwater right holders.

A similar situation was addressed by the New Mexico Supreme Court in the case of *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 332 P.2d 465 (N.M. 1958). In that case, the court was addressing applications that were filed for permits to drill wells to supplement the water from the river that was no longer sufficient to satisfy the applicant's water rights. The court found that the decrease in the water table from irrigation pumping had decreased the amount of water that flowed into the surface water source from which the applicant held its water rights. The court followed the source and granted the replacement water even though the basin was fully appropriated.

Although the State Engineer understands that groundwater and surface water can be hydrologically connected, he agrees with Protestants' arguments that Nevada has historically regulated underground water as a separate source from surface water and provided a bright-line distinction between groundwater and surface water; however, the State Engineer finds these bright-line distinctions are fading. Here, the evidence is sufficient to support the assertion that the spring discharge is derived from the same source that the junior appropriators are pumping

and that the groundwater and surface water are hydrologically connected. The State Engineer finds the courts are making this connection, as do hydrologists and hydrogeologists. In *Cappaert v. U.S.,* 426 U.S. 128 (1976), the federal court enjoined groundwater pumping that was impacting the pool at Devils Hole to prevent the water level from going lower than a rock shelf which the fish need for breeding. In *U.S.* and *Pyramid Lake Paiute Tribe of Indians v. Orr Ditch, et al.*, 600 F.3d 1152 (9th Cir. 2010), the court found that the *Orr Ditch* Decree forbids groundwater allocations that adversely affect the Tribe's senior decreed rights to water flows in the river.

XIII.

PRIORITY DATE OF APPLICATIONS

Sadler argues that any applications granted for mitigation water rights must be given a priority date that reflects the priority date of the claimed pre-statutory vested water right, otherwise the right granted by a permit is inferior to the right being mitigated. Nevada Revised Statute § 533.080(3) provides that "[e]xcept as otherwise provided in subsection 4 and NRS § 534.180, the date of priority of all appropriations of water from an underground source mentioned in this section is the date when application is made in proper form and filed in the Office of the State Engineer pursuant to the provisions of chapter 533 of NRS." The priority date of an application is the date a completed application is properly filed in the Office of the State Engineer. NRS § 533.355. Sadler argues that "a loss of priority undoubtedly amounts to an 'impairment' of water rights in violation of NRS 533.085(1)." (Citing *Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 179 P.3d 1201 (2008)). Sadler argues that since Nevada water law does not allow any impairment of vested water rights, the mitigation right must be given the same priority date as the vested claim, otherwise there will be impairment of the claimed vested rights and mitigation cannot be successful.

As to Change Application 82268, Sadler argues it is entitled to the same priority date of the vested right it seeks to change. As to the "new" appropriations, Sadler argues that they are really change applications because they were filed to appropriate the same water that was already appropriated, just at a different point of diversion.

The State Engineer finds the priority date of the "new" appropriations is the date the applications were filed in the Office of the State Engineer, otherwise the State Engineer is adjudicating the right and violating the water law. However, the State Engineer finds the permit terms should reflect the preliminary finding as to the priority date of the pre-statutory vested

right they mitigate or change. Additionally, the State Engineer finds that the mitigating water rights cannot be severed from the unadjudicated vested claims being mitigated.

XIV.

DOCTRINE OF RELATION BACK

The Nevada Supreme Court stated that when work is necessary to complete the appropriation, the law gives a claimant a reasonable time to do it. Although the appropriation is not complete until water is actually diverted, if the work was prosecuted with reasonable diligence, the priority relates back to the time when the first step was taken to secure it. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534 (1869). However, "[i]t is also 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." *In re Application of Filippini*, 66 Nev. at 27, 202 P.2d at 540.

Effective March 1, 1905, the law in Nevada has been that any person, association or corporation desiring to appropriate any of the public waters shall before performing any work in connection with such appropriation make an application to the State Engineer for permission to make the same. This act only applied to surface water. Since March 22, 1913, no lawful appropriation of surface water or artesian groundwater could be made after that date without application to the State Engineer. The intent of the water law was to bring order to the appropriation and use of water in Nevada and to allow continued expansion of pre-statutory vested water rights under the doctrine of relation back past the date that the water law required the filing of an application does not work with the intent of the statute. *In re Application of Filippini*, 66 Nev. at 29. The State Engineer finds that Sadler could not expand the use of its water from Shipley Spring after March 1, 1905, and claim it relates back to an earlier priority date. Any additional use of water past that date required an application to be filed with and approved by the State Engineer.

XV.

ADDITIONAL STUDY

Some Protestants assert that given the state of the Diamond Valley Hydrographic Basin, the State Engineer should require a study prior to granting additional withdrawals from this stressed aquifer. The State Engineer finds that more and more Protestants refer to NRS § 533.368 to assert that the State Engineer should require a study before acting on applications. The State Engineer finds substantial information exists about the resources and use of water in Diamond Valley. The State Engineer finds Protestants merely assert a study needs to be

performed, but provide no reason why another study needs to be conducted or what would be accomplished by that study. The State Engineer finds an additional study is not necessary to act on the applications under consideration in this Ruling.

XVI.

MONITORING AND MITIGATION

Some Protestants assert that if the applications are granted they should be conditioned on the implementation of a monitoring program and if impacts are demonstrated the Applicants should be required to mitigate those impacts. The State Engineer finds the Protestants ignore that it is the over-appropriation of groundwater by the junior groundwater right holders that is creating the greatest impact on Diamond Valley. It is these Applicants who are requesting the State Engineer to protect their senior rights and mitigate the impacts to their senior water rights. The State Engineer currently measures groundwater levels at approximately 100 wells in Diamond Valley on an annual basis, and finds that the level of monitoring already occurring is sufficient.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[211]

II.

The State Engineer is prohibited by law from granting a permit under an application to change or appropriate the public water where:[212]

A. there is no unappropriated water at the proposed source;
B. the proposed use or change conflicts with existing rights;
C. the proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024; or
D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that the water the Applicants seek under Applications 82570, 82571 and 82573 was not proven by a preponderance of the evidence to be water that they are entitled under their senior water rights; therefore, approval of these applications would

[211] NRS Chapters 533 and 534.
[212] NRS § 533.370(2).

conflict with existing rights and threaten to prove detrimental to the public interest because such approval would violate State Engineer's Orders 717 and 815.

IV.

The State Engineer concludes that Application 81719 is redundant to Application 82268; therefore, Application 81719 is denied on the grounds that granting Application 81719 will threaten to prove detrimental to the public interest.

V.

The State Engineer concludes that the water the Applicants seek under Applications 81720, 82268, 81825 and 82572 is water that they are entitled to under their senior water rights, which have been diminished by the junior groundwater pumping; therefore, the applications are not a new appropriation of water. The State Engineer concludes that Applicants' use of their senior water rights will not conflict with existing rights; it is use of the water by the junior water right holders that has conflicted with these senior water right holders.

VI.

The State Engineer concludes that the use of the water under Applications 81720, 82268, 81825 and 82572 for mitigation of impacted senior water rights does not threaten to prove detrimental to the public interest.

RULING

The protests to Applications 82570, 82571 and 82573 are upheld in part and Applications 82570, 82571 and 82573 are hereby denied on the grounds that their approval would conflict with existing rights and threaten to prove detrimental to the public interest. No ruling is made on the remaining protest issues.

Application 81719 is hereby denied on the grounds that it will threaten to prove detrimental to the public interest; no ruling is made on the merits of the protests to this application.

The protests to Applications 81720 and 82268 are overruled. Application 82268 is approved for 3 cfs, but not to exceed 975 acre-feet annually, and that use of the water for stock is allowed from January 1st to December 31st of each year, but no additional duty is granted. The base right V-03289 is considered abrogated until the source is adjudicated and the extent of the right is confirmed through the adjudication process. Application 81720 is approved for 3 cfs, but not to exceed 975 acre-feet annually. The total combined duty of water under Applications 81720 and 82268 shall not exceed 975 acre-feet annually. Approval is subject to existing rights and payment of statutory fees.

The protests to Applications 81825 and 82572 are overruled, and Applications 81825 and 82572 are approved for 1.54 cfs, but not to exceed a total combined duty of water of 612.9 acre-feet annually. Approval is subject to existing rights and payment of statutory fees.

This is not an adjudication of the relevant vested right claims which remain subject to a future adjudication. The granting of the current applications is to mitigate the loss of spring discharge necessary to produce the amount of historical crop production, as may be produced today using modern and efficient irrigation practices.

Respectfully submitted,

JASON KING, P.E.
State Engineer

Dated this 15th day of August, 2014.

CONSTITUENT PARTS OF SADLER RANCH
DIAMOND VALLEY, NEVADA BASIN 10-153

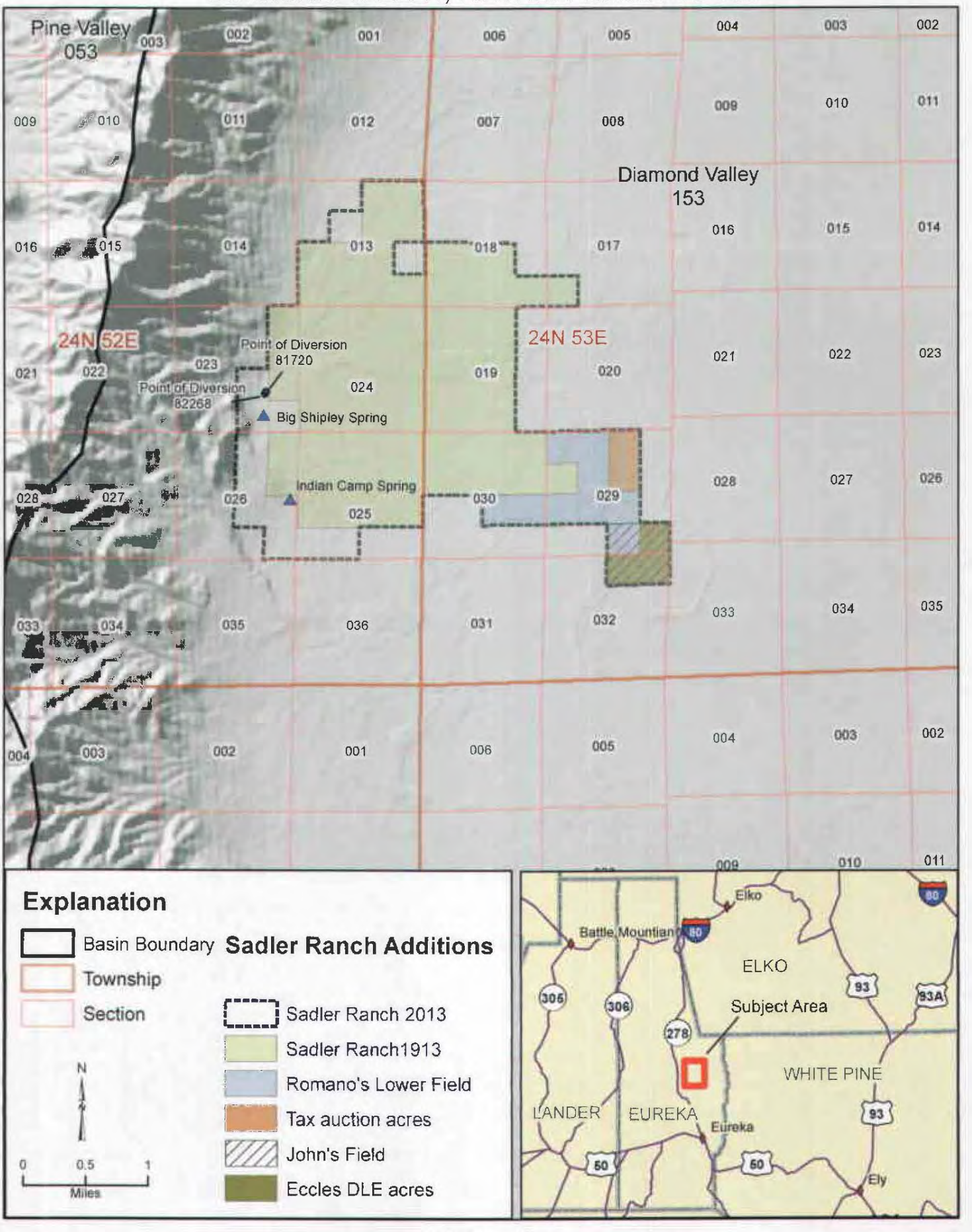

Figure 1

WILLOW, COX AND THOMPSON RANCHES
DIAMOND VALLEY, NEVADA BASIN 10-153

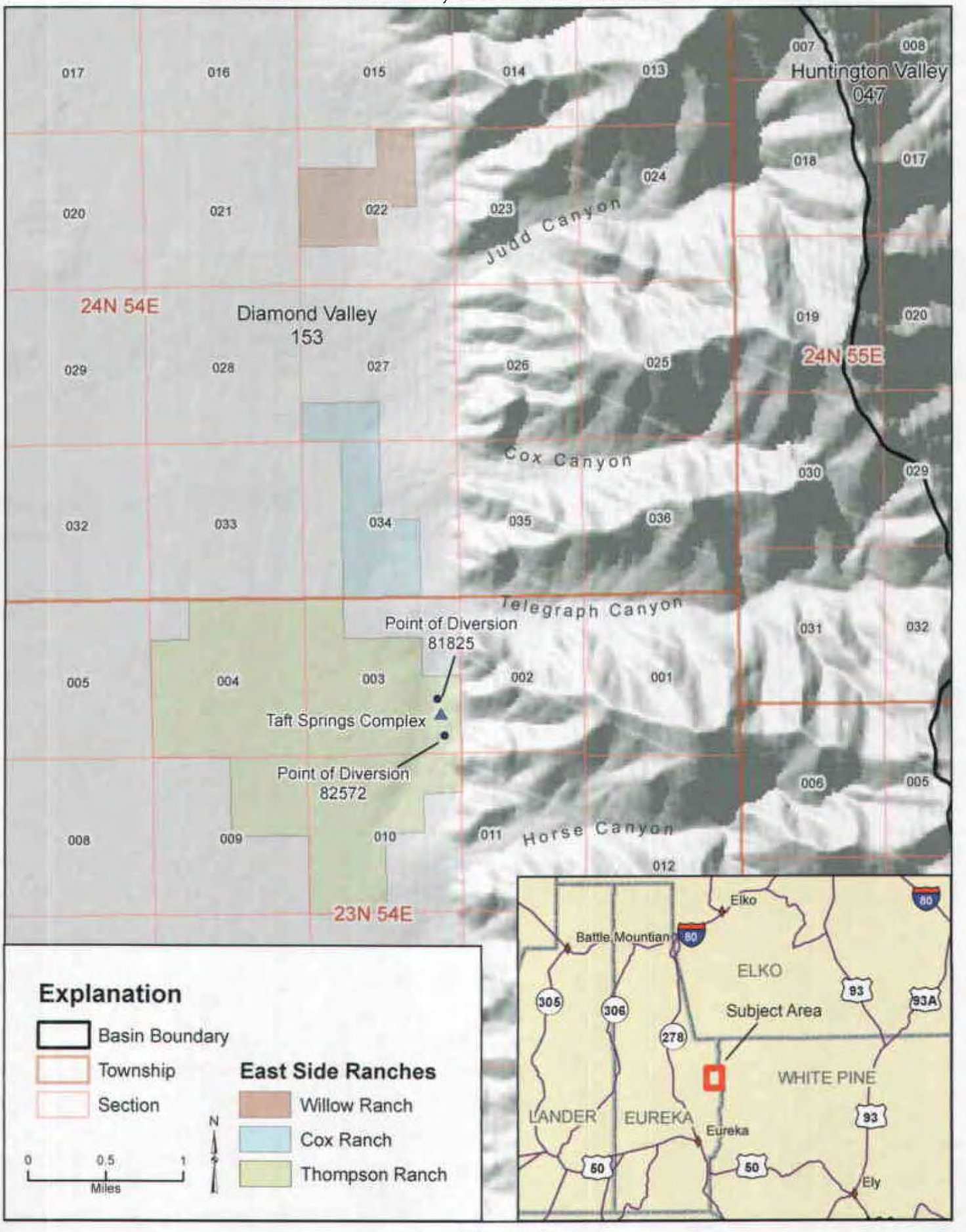

Figure 2

BRIAN SANDOVAL
Governor

STATE OF NEVADA

LEO DROZDOFF
Director

JASON KING, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
http://water.nv.gov

February 10, 2015

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703

Re: Request for adjudication of Big Shipley Hot Springs and Indian Camp Springs (V-03289 & V-03290)

Dear Mr. Taggart:

The Division of Water Resources is in receipt of your petition requesting adjudication of the waters of Big Shipley Hot Springs and Indian Camp Springs in Diamond Valley, Eureka County. The Division has carefully reviewed your petition and has decided not to proceed with initiating the adjudication at this time.

The Division currently has forty-eight adjudications at various stages from the filing of a petition to final order of determination. Of these forty-eight, there are thirty-one proceedings that are ongoing. In the Fall of 2013, our office was allowed to hire additional employees to move these pending adjudications forward. Shortly after hiring new staff, I initiated a review of all pending adjudications and adjudication requests and prioritized the top sixteen. Tremendous progress was made in moving the prioritized adjudications forward in 2014; however, as you noted in your letter, the adjudication process can be lengthy and the claimants currently awaiting the conclusion of their respective adjudication proceedings should not be delayed any further than necessary to determine their claims.

On August 15, 2014, the State Engineer issued Ruling No. 6290, which involved, in part, the subject claims. This ruling has been appealed and is under litigation.

As stated above, after taking into account all of the pending adjudications and other requested adjudications throughout the State and the pending litigation, we will not move forward at this time with your request. As adjudications are completed, we will periodically re-examine our workload. The petition will be kept on file and may be re-considered in the future.

If you have any questions, please contact me at (775) 684-2873.

Sincerely,

Tim Wilson, P.E.

Tim Wilson, P.E.
Manager II, Adjudications

TW/jm

NO._____

FILED

JUN 03 2015

Eureka County Clerk

By Joanna Cantrell

ADAM PAUL LAXALT
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Senior Deputy Attorney General
Nevada Bar No. 6830
100 North Carson Street
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Email: jsnyder@ag.nv.gov
Attorney for Respondent,
Nevada State Engineer

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

SADLER RANCH, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

Case No: CV-1504-218

Dept. No: 2

AFFIRMATION (Pursuant to NRS 239B.030)
The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

MOTION TO DISMISS PETITION FOR CURTAILMENT IN DIAMOND VALLEY

Jason King, the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources ("Nevada State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Senior Deputy Attorney General Jerry M. Snyder, hereby files this Motion to Dismiss Petition for Curtailment in Diamond Valley. This Motion is based upon the attached Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

I. INTRODUCTION

The present action, which Petitioner Sadler Ranch, LLC ("Sadler") styles as a Petition for Curtailment, is the third proceeding that Petitioner has filed with this Court that relates to Sadler's claim to hold a vested right to surface water from certain springs located in the

Diamond Valley Hydrographic Basin. Sadler asserts that as a result of excessive groundwater pumping in the Diamond Valley Basin, these springs no longer flow at historic rates. Sadler applied for a groundwater permit to replace the water that historically flowed from these springs. In Ruling 6290, the State Engineer granted Sadler a permit to pump groundwater to replace the water that formerly flowed from the springs at issue, but in an amount that was substantially less than the amount Sadler applied for.

The first action Sadler filed is a petition for judicial review from Ruling 6290. *Sadler Ranch, LLC v. Jason King, P.E., Nevada State Engineer, et al.*, Seventh Judicial District Court Case No: CV 1409-204. In that Petition, Sadler principally argues that the State Engineer erred in determining the amount of a mitigation right to which Sadler was entitled. That petition is pending before this Court and is scheduled to be heard on June 13, 2015. The second action Sadler filed is a petition for judicial review of the State Engineer's decision to not adjudicate claims in the Diamond Valley at the present time.

Through the present Petition for Curtailment, which is functionally a petition for a writ of mandamus, Sadler argues that this Court should order the State Engineer to issue a curtailment order that would prevent all junior groundwater right holders from pumping groundwater until the springs at issue have recovered and prevent any future use from that point from impacting the springs. The State Engineer submits that this Petition should be dismissed for a number of reasons:

- Sadler has not made any formal request for curtailment to the State Engineer with service of process on the junior groundwater right holders. All stakeholders (i.e., all junior groundwater right holders in Diamond Valley) must be notified of the possibility of curtailment and have an opportunity to be heard prior to a decision that may profoundly affect nearly all water users in Diamond Valley. Because Sadler has not availed himself of administrative remedies, the present petition for curtailment should be dismissed.
- Sadler has not joined all stakeholders in this action. Because the rights of all junior groundwater right holders will be significantly affected by the requested curtailment, they should have notice of these proceedings and an opportunity to be heard. The

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Carson City, Nevada 89701-4717

State Engineer submits that the present case should not proceed absent joinder of all junior groundwater right holders.

- Finally, Sadler's petition is factually unsupported. Under Nevada law, a petition for a writ of mandamus must be supported with an affidavit or declaration. Sadler has not provided any such evidence. Most significantly, Sadler has failed to provide any evidence suggesting that the relief it requests – curtailment of all junior groundwater right holders – will result in the recovery of historic flow rates at the springs at issue here.

For these reasons, the present petition is procedurally improper and factually unsupported. Accordingly, the State Engineer respectfully requests that this petition be dismissed.

II. ARGUMENT

A. Standard For Granting Writ Of Mandamus.

Although the present action is styled as a "Petition for Curtailment," Sadler makes it clear that it seeks a writ of mandate pursuant to NRS 34.150 and NRAP 21. However, Sadler simply has not demonstrated that it has satisfied the statutory requirements for issuance of a writ of mandamus.

"A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion." *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 93, 993 P.2d 50, 53 (2000). However, a writ of mandamus is an extraordinary remedy and will only be issued where "there is not a plain, speedy, and adequate remedy in the ordinary course of law." NRS 34.170. Thus, where there is a plain, speedy, and adequate remedy at law, mandamus is not available. *Nevada Public Land Access Coalition, Inc. v. Humboldt County*, 111 Nev. 749, 895 P.2d 640 (1995). Moreover, a writ shall be issued "upon affidavit, upon the application of the party beneficially interested." NRS 34.170.

The Nevada Supreme Court has explicitly held that a writ of mandamus will not be granted "in anticipation of a supposed omission of duty, however strong the presumption may

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be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives." *Brewery Arts Ctr. v. State Board of Examiners*, 108 Nev. 1050, 1053-54, 843 P.2d 369 (1992). Thus, where a public official has not refused to act, no writ of mandate may issue. Likewise, where the act sought to be compelled is discretionary on the part of the public official, a writ of mandamus is not an appropriate means of review. *State v. Eighth Judicial Dist. Ct.*, 116 Nev. 127, 133, 994 P.2d 725 (2000).

B. Because Sadler Did Not Seek A Curtailment Order From The State Engineer Prior To Filing The Present Action, This Petition Should Be Dismissed.

Before filing the present Petition, Sadler did not make any formal request that the State Engineer curtail groundwater withdrawals in the Diamond Valley. Sadler's failure to seek relief from the State Engineer is fatal to Sadler's petition.

First, because Sadler did not request that the State Engineer curtail groundwater withdrawals in the Diamond Valley, he cannot show that the State Engineer refused to perform his [alleged] duty to issue a curtailment order. If Sadler had requested that the State Engineer issue such an Order, then the State Engineer could have evaluated the legal authority for such an order and determined whether such an order was appropriate under the existing facts. At the conclusion of that process, Sadler could have sought judicial review. However, Sadler has never requested that the State Engineer curtail junior groundwater users in Diamond Valley. For this reason, mandamus is not available. *Brewery Arts Ctr. v. State Board of Examiners*, 108 Nev. 1050, 1053-54, 843 P.2d 369 (1992).

In addition, because Sadler has not requested that the State Engineer curtail junior groundwater right holders, it cannot assert that it has no adequate remedy at law. Sadler has every right to request that the State Engineer curtail junior groundwater users in Diamond Valley. However, Sadler has made no effort to make such a request. Until Sadler makes a request for curtailment, and the State Engineer determines in due course whether or not such a request should be granted, Sadler has an adequate legal remedy available and may not

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seek mandamus under NRS 34.170. *Gumm v. Nevada Dep't of Ed.*, 121 Nev. 371, 375, 113 P.3d 853 (2005).

C. Any Decision By The State Engineer To Curtail Is Discretionary And Therefore Not Subject To Mandamus Review.

Sadler cites to NRS 534.110(6) as authority for the State Engineer's ability to issue a curtailment order. Petition at 18:3-5. This statute provides:

> Except as otherwise provided in subsection 7, the State Engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of the permitees and all vested-rights claimants, and if the findings of the State Engineer so indicate, the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.

(Emphasis added.)

The use of the word "may" indicates that the State Engineer's decision about whether or not to issue a curtailment order is discretionary. As a discretionary determination, this decision is not subject to review through a writ petition. *State v. Eighth Judicial Dist. Ct.*, 116 Nev. 127, 133, 994 P.2d 725 (2000). Thus, even if Sadler had requested that the State Engineer curtail junior groundwater users, and the State Engineer refused to do so, Sadler would not be able to seek mandamus review of such a decision. Rather, such a decision could appropriately be reviewed through a petition for judicial review filed pursuant to NRS 533.450.

Accordingly, any determination as to whether or not a curtailment order should be issued is discretionary and not subject to mandamus review. Accordingly, this petition should be dismissed.

D. Sadler's Petition Is Not Supported By The Required Affidavit.

Finally, Sadler has failed to provide an affidavit in support of its petition for a writ of mandamus. NRS 34.170 requires that a petition for writ of mandamus be supported by an affidavit or verified complaint. *Poulos v. Eighth Judicial Dist.* Court, 98 Nev. 453, 454,

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652 P.2d 1177 (1982). Sadler's failure to provide such an affidavit renders the present petition procedurally infirm.

While a number of Sadler's factual assertions will likely not be contested, there remain a number of key assertions which Sadler has not supported. First, the actual extent of Sadler's asserted vested claim to water from the subject springs will likely be in dispute. Second, and more important, it is not at all clear that a curtailment order will result in the recovery of the springs at issue. Thus, it is not clear that the remedy that Sadler seeks will do anything to address the harm it alleges to have suffered. Sadler has not submitted any evidence, whether by affidavit or otherwise, which addresses this point.

Sadler asserts here that it has incurred damages because overpumping of groundwater in Diamond Valley has caused two of its springs to cease flowing at historic levels. Sadler is asking this Court to prevent any junior groundwater users – in other words, the overwhelming majority of water users in the Diamond Valley – from continuing to use water. Such an order would have a profound, substantial, an immediate effect on nearly all water users in the basin. However, Sadler has not adduced any evidence which suggests that the requested order would bring back Sadler's springs. Because Sadler has not offered such evidence – or indeed, any affidavit whatsoever in support of the present petition – the State Engineer respectfully submits that this petition should be dismissed.

E. <u>This Court Should Not Evaluate Sadler's Petition Without All Affected Parties Having Notice And An Opportunity To Be Heard</u>.

The relief Sadler requests will have a significant and immediate impact on every junior groundwater right holder in Diamond Valley. Indeed, if this Court grants the requested curtailment, the majority of groundwater users in the basin will lose access to water. However, Sadler has not joined any of these junior users as parties. As such, the junior users who will be affected by a curtailment will have no notice of the prospective curtailment, nor will they have any opportunity to be heard in this matter.

NRCP 19 provides that a party should be joined as a defendant where that person "claims an interest in the subject matter of the action and is so situated that the disposition of

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the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest." Here, the junior groundwater users that may be affected by any curtailment order clearly have a significant interest in the subject matter of this action. As such, if this Court determines that the present case may proceed, all junior groundwater users who may be affected by the outcome should be joined as defendants.

III. CONCLUSION

For the forgoing reasons, Defendant respectfully requests that the present Motion to Dismiss be granted.

DATED this 2nd day of June, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____
JERRY M. SNYDER
Senior Deputy Attorney General

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 2nd day of June, 2015, I served a true and correct copy of the foregoing MOTION TO DISMISS PETITION FOR CURTAILMENT IN DIAMOND VALLEY, by placing said document in the U.S. Mail, postage prepaid, addressed to:

PAUL G. TAGGART, ESQ.
RACHEL L. WISE, ESQ.
TAGGART & TAGGART
108 North Minnesota Street
Carson City, Nevada 89703

_____
DORENE A. WRIGHT

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile
Attorneys for Petitioner

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

* * *

SADLER RANCH, LLC., Petitioner, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	CASE NO.: CV1504-218 DEPT. NO.: 2

VERIFICATION OF PETITION FOR CURTAILMENT IN DIAMOND VALLEY

Petitioner, SADLER RANCH, LLC (hereinafter "Petitioner"), by and through its attorneys of record, PAUL G. TAGGART, ESQ. and RACHEL L. WISE, ESQ., of the law firm of TAGGART & TAGGART, LTD., submits to this Court the following Verification pursuant to Nevada Revised Statutes ("NRS") 15.010 and Nevada Rules of Appellate Procedure ("NRAP") 21(a)(5).

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Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

VERIFICATION OF PETITION
FOR CURTAILMENT IN DIAMOND VALLEY

Under penalties of perjury and with the authorization of the Petitioner, the undersigned declares that she is counsel for the Petitioners named in the Petition for Curtailment in Diamond Valley filed with this Court in the above-captioned case on April 27, 2015, and knows the contents thereof; that the pleading is true of her own knowledge, except as to those matters stated on information and belief, and that as to those matters stated on information and belief, she believes to be true.

DATED this 10th day of June, 2015.

RACHEL L. WISE, ESQ.

SIGNED AND SWORN to before me
this 10th day of June, 2015
by RACHEL L. WISE

NOTARY PUBLIC

TAMARA C. MAHE
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 03-10-15
Certificate No: 03-83917-2

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any persons.

DATED this 10th day of June, 2015.

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

By: _____
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
Attorneys for Petitioner

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of this **VERIFICATION OF PETITION FOR CURTAILMENT IN DIAMOND VALLEY**, as follows:

[____] By **U.S. POSTAL SERVICE:** I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

[X] By **HAND DELIVERY**, via:

[____] Reno-Carson Messenger Service
[X] Interoffice-type messenger
[____] other type of delivery service: _____

by placing a true and correct copy of the above-identified document in an envelope addressed as follows:

Jason King, P.E.
Nevada Division of Water Resources
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

DATED this 10 day of June, 2015.

Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile

Shipley Spring

Site_Name	*Location_Name*	*Discharge*	*Units*	*Measure_Date*	*Measured_By*	*Remarks*
153 N24 E52 23DCAD1	DV-065 (Shipley)	1225.306	gpm	2009/03/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1333.025	gpm	2009/06/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1135.540	gpm	2009/09/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1256.724	gpm	2009/12/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1472.162	gpm	2010/03/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1283.654	gpm	2010/06/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1140.028	gpm	2010/09/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1292.320	gpm	2010/10/18	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1175.935	gpm	2010/12/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1359.955	gpm	2011/03/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1301.607	gpm	2011/06/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	947.031	gpm	2011/09/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1605.970	gpm	2011/11/07	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	960.496	gpm	2011/12/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	861.754	gpm	2012/03/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1041.286	gpm	2012/06/15	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	0.000	gpm	2012/09/17	EMLLC	no flow
153 N24 E52 23DCAD1	DV-065 (Shipley)	242.368	gpm	2012/09/27	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	0.000	gpm	2012/10/09	EMLLC	no flow
153 N24 E52 23DCAD1	DV-065 (Shipley)	964.980	gpm	2012/12/20	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	1326.293	gpm	2013/03/06	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	591.195	gpm	2013/08/07	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	507.180	gpm	2013/09/12	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	660.840	gpm	2013/11/20	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	861.759	gpm	2013/12/31	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	305.592	gpm	2014/01/29	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	402.497	gpm	2014/02/12	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	284.589	gpm	2014/03/04	EMLLC	
153 N24 E52 23DCAD1	DV-065 (Shipley)	755.447	gpm	2014/04/29	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	513.934	gpm	2014/05/29	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	419.713	gpm	2014/06/16	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	125.579	gpm	2014/07/30	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	240.790	gpm	2014/08/28	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	224.027	gpm	2014/09/23	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	156.061	gpm	2014/10/09	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	193.828	gpm	2014/11/26	EMLLC	
153 N20 E52 01BC 1	DV-065 (Shipley)	244.448	gpm	2014/12/16	EMLLC	

BRIAN SANDOVAL
Governor

STATE OF NEVADA

LEO DROZDOFF
Director

JASON KING, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
http://water.nv.gov

June 29, 2015

NOTICE OF HEARING

Eureka County Board of Commissioners
P.O. Box 694
Eureka, Nevada 89316
Certified Mail
#7106 7808 0630 0059 7456

Elko County Board of Commissioners
540 Court Street, Suite 101
Elko, Nevada 89801
Certified Mail
#7106 7808 0630 0059 7470

White Pine County Board of Commissioners
297 11th Street East, Suite 2
Ely, Nevada 89301
Certified Mail
#7106 7808 0630 0059 7463

Ladies and Gentlemen:

PLEASE TAKE NOTICE that the State Engineer has set an administrative hearing to take public comment on the proposed order designating the Diamond Valley Hydrographic Basin a critical management area pursuant to NRS § 534.110(7)(a). Any interested party may also submit written comments until close of the hearing.

The hearing will convene promptly at **9:00 a.m. on Thursday, July 23, 2015, at the Eureka County Opera House, 31 South Main Street, Eureka, Nevada.**

Enclosed for your information is a copy of the proposed order, which may also be viewed at http://water.nv.gov. We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the hearing. If special arrangements for the hearing

are necessary, please notify me in writing at the above address or by calling (775) 684-2882 at least 5 working days prior to the hearing.

Regards,

Kristen Geddes
Chief, Hearings Section

KG/jm
Enclosure
cc: Jason King, E-mail
Kelvin Hickenbottom, E-mail
Rick Felling, E-mail
Susan Joseph-Taylor, E-mail
Malcolm Wilson, E-mail
Cy Ryan, E-mail
Patty Kaczmarek, E-mail
Sam Monteleone, E-mail
Steve Del Soldato, E-mail
Elko Branch Office, E-mail
Southern Nevada Branch Office, E-mail
Capitol Reporters, E-mail

IN THE OFFICE OF THE STATE ENGINEER

ORDER #

OF THE STATE OF NEVADA

PROPOSED ORDER

DESIGNATING THE DIAMOND VALLEY HYDROGRAPHIC BASIN (153) AS A CRITICAL MANAGEMENT AREA

WHEREAS, the State Engineer designated the Diamond Valley Hydrographic Basin, located within Eureka County, Nevada, as provided under the provisions of Nevada Revised Statute (NRS) § 534.030, by the following Orders:

1. Order No. 277, dated August 5, 1964, designating a portion of the basin.
2. Order No. 280, dated August 28, 1964, amending the designated area described in Order No. 277.
3. Order No. 815, dated April 4, 1983, amending the description of the designated area.

WHEREAS, pursuant to NRS § 534.120, the State Engineer determined the groundwater of the Diamond Valley Hydrographic Basin was being depleted and the following orders were entered, deemed essential for the welfare of the area involved:

1. Order No. 541, dated December 22, 1975, curtailed new appropriations in location-specific areas subject to limited exceptions.
2. Order No. 717, dated July 10, 1978, curtailed new appropriations for irrigation with limited exceptions.
3. Order No. 809, dated December 1, 1982, ordering the installation of totalizing meters on all permitted and certificated wells. The Order was suspended for one-year by Order 813, dated February 7, 1983, but was never reinstated.
4. Order No. 1226, dated March 26, 2013, curtailed all new appropriations with limited exceptions.

WHEREAS, the United States Geological Survey estimates that 30,000 acre-feet of water annually are available as the perennial yield from the Diamond Valley Hydrographic Basin.[1]

WHEREAS, NRS § 534.110(7)(a) states the State Engineer "[m]ay designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin."

WHEREAS, the State Engineer finds that annual crop inventories conducted by the Division of Water Resources indicate that estimated groundwater pumping for irrigation purposes totaled the following:[2]

Year	Acres Irrigated	Estimated Acre-feet Pumped
1975	17,796	53,388[3]
1976	18,717	56,151[4]
1977	19,988	52,956[5]
1978	21,855	59,760[6]
1979	22,583	61,839[7]
1980	23,055	64,035[8]

[1] J.R. Harrill, *Hydrologic Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada, 1950-65,* Water Resources Bulletin No. 35, (Department of Conservation and Natural Resources, Division of Water Resources and U.S. Department of Interior, Geological Survey), 1968.

[2] The State Engineer's method for estimating pumpage has changed over the years. In 1975 and 1976, pumpage was estimated at 3 acre-feet per acre irrigated. From 1977 to 2005, pumpage was estimated at 3 acre-feet per acre for alfalfa, and 2 acre-feet per acre for grain, pasture and grass hay. From 2006 to 2013, pumpage was estimated to equal the water right for the acreage irrigated, usually 4 acre-feet per acre. In 2014, a method that considers crop type and irrigation method was used to estimate pumpage. *See generally*, inventories cited *infra*.

[3] *Diamond Valley Crop and Water Survey* (November 3-7, 1975), official records in the Office of the State Engineer.

[4] *Diamond Valley Crop and Water Survey* (November 8-11, 1976), official records in the Office of the State Engineer.

[5] *Diamond Valley Crop and Water Survey* (November 14-17, 1977), official records in the Office of the State Engineer.

[6] *Diamond Valley Crop and Water Survey* (November 8-15, 1978), official records in the Office of the State Engineer.

[7] *Diamond Valley Crop and Water Survey* (November, 1979), official records in the Office of the State Engineer.

[8] *Diamond Valley Crop and Water Survey* (November, 1980), official records in the Office of the State Engineer.

Year	Acres Irrigated	Estimated Acre-feet Pumped
1981	25,279	71,745[9]
1982	25,305	73,336[10]
1983	24,812	71,857[11]
1984	26,844	78,730[12]
1985	26,844	78,730[13]
1986	20,656	58,883[14]
1987	22,966	66,028[15]
1988	21,569	63,356[16]
1989	23,485	66,734[17]
1990	22,235	64,210[18]
1991		No report for 1991
1992	20,640	58,585[19]
1993	21,421	60,478[20]
1994	21,556	60,883[21]

[9] *Diamond Valley Crop and Water Survey* (November, 1981), official records in the Office of the State Engineer.
[10] *Diamond Valley Crop and Water Survey* (November 9, 10, 12, 16, 1982), official records in the Office of the State Engineer.
[11] *Diamond Valley Crop and Water Survey* (November 7-10, 1983), official records in the Office of the State Engineer.
[12] *Diamond Valley Crop and Water Survey* (November 1, 7-9, 14, 1984), official records in the Office of the State Engineer.
[13] *Diamond Valley Crop and Water Survey* (December 3-4, 1985), official records in the Office of the State Engineer.
[14] *Diamond Valley Crop and Water Survey* (November 4-5, 12-13, 1986), official records in the Office of the State Engineer.
[15] *Diamond Valley Crop and Water Survey* (November 12, 17-19, 1987), official records in the Office of the State Engineer.
[16] *Diamond Valley Crop and Water Survey* (October 17-21, 1988), official records in the Office of the State Engineer.
[17] *Diamond Valley Crop and Water Survey* (November 2-3, 1989), official records in the Office of the State Engineer.
[18] *Diamond Valley Crop and Water Survey* (November 28, 1990), official records in the Office of the State Engineer.
[19] *Diamond Valley Crop Inventory* (August, 1992), official records in the Office of the State Engineer.
[20] *Diamond Valley Crop Inventory* (June, 1993), official records in the Office of the State Engineer.
[21] *Diamond Valley Crop Inventory* (June, 1994), official records in the Office of the State Engineer.

Year	Acres Irrigated	Estimated Acre-feet Pumped
1995	19,750	55,140[22]
1996	20,413	57,779[23]
1997	19,750	55,140[24]
1998	18,916	60,985[25]
1999	23,588	68,883[26]
2000	22,525	70,601[27]
2001		No report for 2001[28]
2002	21,850	60,900[29]
2003	21,850	60,900[30]
2004	23,126	65,687[31]
2005	23,126	65,687[32]
2006	24,152	96,610[33]
2007	24,011	95,738[34]
2008	24,220	96,603[35]

[22] *Diamond Valley Crop Inventory* (August, 1995), official records in the Office of the State Engineer.
[23] *Diamond Valley Crop Inventory* (August, 1996), official records in the Office of the State Engineer.
[24] *Diamond Valley Crop Inventory* (August, 1997), official records in the Office of the State Engineer.
[25] *Diamond Valley Crop Inventory* (September, 1998), official records in the Office of the State Engineer.
[26] *Diamond Valley Crop Inventory* (November, 1999), official records in the Office of the State Engineer.
[27] *Diamond Valley Crop Inventory* (November, 2000), official records in the Office of the State Engineer.
[28] No inventory was conducted in 2001 due to lack of funding.
[29] *Diamond Valley Crop Inventory* (October, 2002), official records in the Office of the State Engineer.
[30] *Diamond Valley Crop Inventory* (December 9, 2003), official records in the Office of the State Engineer.
[31] *Diamond Valley Crop Inventory* (October 6, 2004), official records in the Office of the State Engineer.
[32] *Diamond Valley Crop Inventory* (September 15, 2005), official records in the Office of the State Engineer.
[33] *Crop Inventory and Groundwater Pumpage Inventory from Irrigation*, Diamond Valley, Basin 153 (2006), official records in the Office of the State Engineer.
[34] *Crop Inventory and Groundwater Pumpage Inventory from Irrigation*, Diamond Valley, Basin 153 (2007), official records in the Office of the State Engineer.
[35] *Crop Inventory and Groundwater Pumpage Inventory from Irrigation*, Diamond Valley, Basin 153 (2008), official records in the Office of the State Engineer.

Year	Acres Irrigated	Estimated Acre-feet Pumped
2009	24,435	97,539[36]
2010	24,608	97,536[37]
2011	24,357	96,791[38]
2012	25,234	100,539[39]
2013	25,323	100,893[40]
2014	25,181	67,452[41]

WHEREAS, the State Engineer finds that the withdrawals of groundwater have exceeded the perennial yield of the basin at least since 1975, and therefore, the State Engineer finds that groundwater withdrawals have consistently exceeded the perennial yield.

WHEREAS, the State Engineer finds that the groundwater level in the area of the farms has locally declined over one-hundred feet since 1960, and that the water level continues to decline at the rate of two feet per year or more.[42]

NOW THEREFORE, it is ordered that the Diamond Valley Hydrographic Basin is hereby designated a critical management area pursuant to NRS § 534.110(7)(a).

_____

Jason King, P.E.
State Engineer

Dated at Carson City, Nevada this

____ day of _____, 2015.

_____

[36] *Crop Inventory and Groundwater Pumpage Inventory from Irrigation*, Diamond Valley, Basin 153 (2009), official records in the Office of the State Engineer.
[37] *Crop Inventory and Groundwater Pumpage Inventory from Irrigation*, Diamond Valley, Basin 153 (2010), official records in the Office of the State Engineer.
[38] *Crop Inventory and Groundwater Pumpage Inventory from Irrigation*, Diamond Valley, Basin 153 (2011), official records in the Office of the State Engineer.
[39] *Crop Inventory and Groundwater Pumpage Inventory from Irrigation*, Diamond Valley, Basin 153 (2012), official records in the Office of the State Engineer.
[40] Preliminary data.
[41] Preliminary data.
[42] Water level data for Basin 153, official record in the Office of the State Engineer, available at http://water.nv.gov/data/waterlevel/ (last accessed June 26, 2015).

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF EUREKA

SADLER RANCH, LLC, Petitioner, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No.: CV1504-218 Dept. No.: 2

OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Petitioner, SADLER RANCH, LLC (hereinafter "Petitioner"), by and through its attorneys of record, PAUL G. TAGGART, ESQ., RACHEL L. WISE, ESQ., and DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., hereby oppose Respondent, JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES'S (hereinafter "Respondent"), Motion to Dismiss Petition for Curtailment in Diamond Valley. This Opposition is based on the papers and pleadings on file in the above-captioned case, any oral arguments allowed by this Court, and the attached Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTUAL BACKGROUND

On April 27, 2015, Petitioner filed its Petition for Curtailment in Diamond Valley requesting this Court issue a Writ of Mandamus to require Respondent to initiate proceedings to curtail the more than four decades-long over pumping of groundwater in Diamond Valley and to reimburse Petitioner for damages to its senior water rights resulting therefrom.

On June 2, 2015, Respondent filed a Motion to Dismiss Petition for Curtailment in Diamond Valley requesting this Court Dismiss the Petition for: (1) failure of the Petitioner to exhaust administrative remedies, (2) failure of petitioner to join all stakeholders in this action, and (3) failure of the Petitioner to file an affidavit or declaration with the Petition.

For the sake of brevity, Petitioner hereby incorporates by reference the extensive history and background contained within Petitioner's Petition, and accompanying exhibits, demonstrating Respondent's more than four decades-long failure to take required statutory action to protect holders of senior water rights from over pumping by holders of junior water rights. Petitioner does, however, point to the following items as being particularly relevant to a determination of Respondent's Motion to Dismiss:

(1) Respondent has established no formal procedure whereby an injured party may request curtailment of pumping within a hydrographic basin.[1]

(2) As far back as 1982, due to the massive over-pumping in southern Diamond Valley, Respondent held a hearing to consider curtailment of groundwater rights in southern Diamond Valley.[2] Despite the overwhelming evidence of over pumping in the record of that proceeding, Respondent refused to order any curtailment of pumping and instead merely ordered the installation of totalizing

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[1] *See* http://water.nv.gov/forms/ listing all forms and applications created by the State Engineer related to the application, use and enforcement of water rights. Note the absence of any form or application to request curtailment of pumping pursuant to NRS 534.110(6).

[2] Petition at p.5.

meters on all permitted and certificated groundwater rights in the basin.[3] Refusing to comply with this Order, holders of junior rights requested an amendment to the Order to allow for substitute recording devices. This amendment was granted on February 17, 1983 in the form of an Order issued by Respondent.[4] To Petitioner's knowledge Respondent never enforced either of these Orders nor has Respondent ever reinstituted the curtailment proceedings based upon the rampant non-compliance with these Orders by the holders of junior rights.

(3) On or about March 19, 2009 Respondent hosted a meeting with water rights holders in Eureka County to address issues related to the over pumping and in his presentation specifically rejected curtailment as an option.[5]

(4) For the past four decades, Respondent has been aware of, and, through its issuance of certificates and appropriations far in excess of the perennial yield of the basin, is directly responsible for, the negative effects on holders of senior water rights resulting from over-pumping in Diamond Valley. Despite this, Respondent has failed time and again in his statutory duty to take appropriate measures to mitigate or eliminate the harm to the holders of vested senior water rights.[6]

(5) Respondent, in Ruling 6290, has admitted to the essential facts contained within Petitioner's Petition and has made the following statements in a brief filed with this Court:

> Following a four-day hearing at which Sadler Ranch, as well as Eureka County and other Protestants presented evidence, the State Engineer concluded that Sadler Ranch had shown a historic use of Big Shipley Springs and Indian Camp Springs. The State Engineer concluded that the flow of these springs had been reduced due to overpumping of groundwater in the basin.
>
> . . .
>
> Petitioners and the State Engineer agree that Sadler Ranch appropriated water from Big Shipley Springs and Indian Camp Springs prior to 1905, and therefore have established an unadjudicated vested water right. Sadler Ranch

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[3] Petition Exhibit 13.
[4] Petition Exhibit 14.
[5] *See* Petition Exhibit 18 at p.4 ("WE ARE NOT here to say that beginning tomorrow we will begin cutting off rights by priority.").
[6] *See generally* Petition at pp.2-8.

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> and the State Engineer agree that overpumping in Diamond Valley has sharply reduced the flow rate of these springs.
>
> . . .
>
> To say that Diamond Valley is over appropriated and over pumped is an understatement. The State Engineer estimates that the perennial yield of the Diamond Valley Hydrographic Basin is approximately 30,000 afa. However, previous State Engineers have issued over 130,000 afa in groundwater rights. In 2011, more than 96,000 afa were actually pumped from the basin. Thus, permit holders are actually pumping more than three times the amount of available water out of the basin every year. By 1978, the State Engineer recognized that Diamond Valley was vastly over-appropriated and ordered that any applications for further groundwater appropriations be denied.[7]

II. ARGUMENT

A. Standard of review

In reviewing a motion to dismiss a court must recognize all factual allegations in the non-moving party's pleading as true and draw all inferences in its favor.[8] The action should be dismissed only "if it appears *beyond a doubt* that [the non-moving party] could prove no set of facts, which, if true, would entitle it to relief."[9]

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station *or to control an arbitrary or capricious exercise of discretion.*"[10] An arbitrary determination is one "made without consideration of or regard for facts, circumstances, fixed rules or procedures."[11] A capricious act is one which is "contrary to the evidence or established rules of law."[12]

The prior appropriations doctrine establishes the basic rule of "first in time, first in right."[13] It is a well-established principle of this doctrine that junior appropriators are only allowed to divert water

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[7] Petition Exhibit 35 at pp.1, 3, & 8 (citations omitted).
[8] *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008).
[9] *Id.* (emphasis added).
[10] *International Game Technology, Inc. v. Dist. Ct.*, 124 Nev. 193, 197 (2008) (internal citations omitted, emphasis added).
[11] BLACK'S LAW DICTIONARY 125 (10th ed. 2014).
[12] *Id.* at 254.
[13] *Ormsby County v. Kearney*, 37 Nev. 314 (1914).

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when *all* prior appropriations are being met *in the manner and under the conditions that existed at the time the junior appropriations began.*[14] Accordingly, Nevada's statutory scheme enshrining the prior appropriation doctrine provides a mechanism in NRS 534.110(6) to protect the interests of holders of senior water rights.

NRS 534.110(6) provides that:

> Except as otherwise provided in subsection 7, the State Engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants, and if the findings of the State Engineer so indicate, the State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.

The statute, therefore, entrusts the interests of the senior holders to the State Engineer. This effectively creates a trustee/beneficiary relationship between the State Engineer and the holders of senior rights. Pursuant to this relationship, if the State Engineer (trustee) fails take discretionary action to protect the holder of senior rights (the beneficiary), after being presented with substantial, competent evidence that such senior rights are being systematically impinged by the exercise of junior rights, then the State Engineer violates his or her duty and his or her failure to act is, by definition, arbitrary and capricious. The only remedy available to a holder of senior water rights in such a scenario is to seek a writ petition from the judiciary compelling the State Engineer do his or her job.

B. NRS 534.110(6) places the burden squarely upon the State Engineer to, sua sponte, investigate and take remedial action to protect the interests of holders of senior water rights. Therefore, Petitioner need not make a formal request for the State Engineer to do so. In addition, the State Engineer has made clear by his prior actions that any such request would be futile.

[14] *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 507 (Idaho 1944).

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Respondent argues that Petitioner's Petition should be dismissed for failure to file a formal request for curtailment with respondent. However, Respondent has established no formal process for making such a request.[15] In addition, the statutory scheme, including NRS 534.110(6) and NRS 534.120(1), places the burden squarely upon Respondent to, sua sponte, investigate and take remedial action to protect the interests of holders of senior water rights.

Furthermore, the Nevada Supreme Court has made it clear that "exhaustion [of administrative remedies] is not required when a resort to administrative remedies would be futile."[16] Here, Respondent has not only failed to act in accordance with his statutory duty for over four decades, but, as noted above, has twice indicated that he would not implement the relief requested.[17]

Additional evidence of Respondent's disinclination to act on any request to remediate the situation in Diamond Valley can be found in his handling of Petitioner's June 11, 2014 formal request to adjudicate the water rights in Diamond. It took Respondent until February 10, 2015, a full seven months after the request was made, to formally decline to proceed with initiating the adjudication.[18] In his refusal of Petitioner's request, Respondent noted that "the Division currently has forty-eight adjudications at various stages" and that, given staffing constraints, he "will not move forward at this time with your request."[19] Respondent's lack of staff to manage his current workload is a clear indication that any request to begin curtailment proceedings would be just as futile as the request to adjudicate the relative water rights of Diamond Valley.

Respondent's Motion to Dismiss for failure to exhaust administrative remedies is just another attempt to delay any action to that would protect the interests of holders of vested senior water rights. Respondent has known for four decades that the pumping situation in Diamond Valley is untenable.

---

[15] *See* http://water.nv.gov/forms/ listing all forms and applications created by the State Engineer related to the application, use and enforcement of water rights. Note the absence of any form or application to request curtailment of pumping pursuant to NRS 534.110(6).

[16] *Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation*, 118 Nev. 837, 839 (2002).

[17] See notes 3-5 supra (Order for totalizing meters, Amended Order, and March 19, 2009 Powerpoint presentation ruling out curtailment as an option.)

[18] Petition Exhibit 34.

[19] *Id.*

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He has also admitted in a formal Ruling that "groundwater appropriators of Diamond Valley have resisted the State Engineer's efforts to address over-appropriation of the basin."[20] In the face of this resistance, Respondent has taken the politically expedient path of doing nothing. Requiring Petitioner to make a formal request of Respondent, and, inevitably, have such request denied, would only further delay action for months, if not years. The saying "to delay justice is injustice"[21] represents a long-standing maxim of Anglo-American jurisprudence. This Court should not allow Respondent to continue with the manifest injustice being perpetrated upon Petitioner by Respondent's over four decades-long failure to take any meaningful steps to protect Petitioner's vested interest.

Accordingly, Respondent's Motion to Dismiss should be denied.

C. It is not necessary to join all stakeholders in this Petition since the Petition seeks merely to compel the State Engineer to initiate a curtailment action in which all stakeholders will be properly noticed.

Respondent argues that the Petition should be dismissed for failure to join holders of junior water rights as necessary parties. He argues that "junior users who will be affected by a curtailment will have no notice of the prospective curtailment, nor will they have any opportunity to be heard in this matter."[22]

Nothing could be further from the truth. The relief Petitioner seeks from this Court is an Order requiring Respondent to initiate curtailment proceedings as required by NRS 534.110(6). During these proceedings all holders of rights in Diamond Valley will be properly noticed and have an opportunity to be heard. In addition, such parties will have the right to seek judicial review of any ruling issued upon completion of the proceedings. Thus, a disposition in favor of issuing the writ requested by Petitioner will not "impair or impede [any] person's ability to protect [their] interest"[23]

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[20] Petition Exhibit 29 at p.13.
[21] WILLIAM PENN, SOME FRUITS OF SOLITUDE 86 (1693).
[22] Respondent's Motion at p.6.
[23] NRCP 19.

but rather will allow for an administrative proceeding, with the opportunity for judicial review, in which all interested parties will have a full opportunity to be heard.

D. Mandamus review is available even where an action is discretionary.

Respondent argues that because NRS 534.110(6) is discretionary, mandamus relief is unavailable. However, the only citation they provide in support of this contention is inapposite.[24] In *State v. Eight Judicial Dist. Ct.*, the case cited by Respondent, the court explicitly stated that "we have utilized mandamus to control an arbitrary or capricious *exercise of discretion*."[25] This acknowledgment is a far cry from Respondent's assertion that "[a]s a discretionary determination, this decision is not subject to review through a writ petition."[26]

An arbitrary determination is one "made without consideration of or regard for facts, circumstances, fixed rules or procedures."[27] A capricious act is one which is "contrary to the evidence or established rules of law."[28] Nevada law entrusts Respondent with a clear obligation to act to preserve and protect the rights of prior appropriators in situations where the evidence so clearly and unambiguously demonstrates that such rights are being abrogated by junior rights holders. It is, therefore, axiomatic that Respondent's failure to take the discretionary action of initiating curtailment proceedings after four decades of scientifically documented harm to the hydrographic basin as a result of over pumping is both arbitrary and capricious. Therefore, mandamus review is both justified and appropriate.

E. Sadler's Petition is verified and supported by indisputable facts.

Respondent argues that Petitioner failed to provide an affidavit in support of its Petition. However, Petitioner filed the required affidavit in a supplemental pleading on June 9, 2015. In addition, the essential facts included within the Petition, and which will control the determination in

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[24] *State v. Eighth Judicial Dist. Ct.*, 116 Nev. 127, 133 (2000).
[25] *Id.*
[26] Respondent's Motion at p.5.
[27] BLACK'S LAW DICTIONARY 125 (10th ed. 2014).
[28] *Id.* at 254.

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this matter, have been admitted by Respondent in various official pleadings including Ruling 6290. Respondent is, therefore, judicially estopped from challenging them.

Respondent points out that the actual extent of Petitioner's vested claim remains in dispute. While this may be true, it is immaterial to Petitioner's requested relief – namely, an order requiring Respondent to initiate curtailment proceedings. Regardless of the extent of Petitioner's right, Respondent has acknowledged that Petitioner holds a vested right that is senior to the permitted water rights issued by Respondent's predecessors. In addition, Respondent has conceded that the Diamond Valley basin is over-allocated by more than 400% and that over-pumping of the basin has resulted in a drop in the water table in excess of 100 feet causing harm to Petitioner's vested right.[29]

This Court is not being asked to determine the relative rights of the various holders of water rights in the basin, or to determine which holders should be curtailed. These are determinations that will properly be made once the curtailment process has been initiated by Respondent and all holders have been notified and provided the opportunity to submit evidence. Given this, there are no disputable facts relevant to whether the curtailment process should be initiated and Respondent's Motion should be denied.

III. CONCLUSION

In order to succeed on a motion to dismiss Respondent must prove *beyond a doubt* that Petitioner can prove no set of facts, which, if true, would entitle it to relief.[30] Respondent's Motion utterly fails to meet this burden. Petitioner's Petition adequately demonstrates, through indisputable evidence, that Respondent's over four decades-long failure to act to protect holders of vested senior water rights in Diamond Valley from over pumping by junior appropriators requires action by this Court. Accordingly, Petitioner respectfully requests this Court deny Respondent's Motion to Dismiss.

[29] Petitioner's Exhibit 29 at p.11 and 23.
[30] *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008) (emphasis added).

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any persons.

DATED this 1st day of July, 2015.

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By: _____
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
DAVID H. RIGDON, ESQ.
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Attorneys for Petitioner

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this 1 day of July 2015, I served or caused to be served, a true and correct copy of the **OPPOSITION TO RESPONDENT'S MOTION TO DISMISS** as follows:

[X] By **U.S. POSTAL SERVICE:** I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

[___] By **U.S. CERTIFIED, RETURN RECEIPT POSTAL SERVICE:** I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

[___] By **ELECTRONIC DELIVERY**, via:

Jerry Snyder
Nevada Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701

Karen A. Peterson, Esq.
Allison MacKenzie, LTD.
402 N. Division St.
Carson City, NV 89703

Theodore Beutel, Esq.
Eureka County District Attorney
701 S. Main St.
PO Box 190
Eureka, NV 89316

An Employee of Taggart & Taggart, LTD.

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Case No. CV-1504-218

Dept. No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

******

SADLER RANCH, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

_____/

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

REQUEST FOR REVIEW

EUREKA COUNTY, by and through its counsel of record, ALLISON MacKENZIE, LTD. and THEODORE BEUTEL, ESQ., the EUREKA COUNTY DISTRICT ATTORNEY, pursuant to 7JDCR 7(10) its "Request for Review" of its MOTION TO INTERVENE pursuant to local rule 7(11). Request is hereby made that there be no oral argument or evidentiary hearing.

AFFIRMATION

The undersigned hereby affirms that this document does not contain a social security number.

///

///

DATED this 14th day of July, 2015.

KAREN A. PETERSON, ESQ.
Nevada State Bar No. 0366
ALLISON MacKENZIE, LTD.
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Carson City, Nevada 89703

-and -

EUREKA COUNTY DISTRICT ATTORNEY
701 South Main Street
Post Office Box 190
Eureka, Nevada 89316

BY: _____
THEODORE BEUTEL, ESQ.
Nevada State Bar No. 5222

Attorneys for EUREKA COUNTY

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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served to all parties to this action by:

✔ Placing a true copy thereof in a sealed postage prepaid envelope, in the United States Mail in Carson City, Nevada [NRCP 5(b)(2)(B)]

✔ Electronic transmission

Paul G. Taggart, Esq.
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Carson City, NV 89701
jsnyder@ag.nv.gov

Courtesy Copy to:

Hon. Gary D. Fairman
Department Two
P.O. Box 151629
Ely, NV 89315

(Also copies of Eureka County's Motion to Intervene; and Eureka County's Reply to Opposition to Motion to Intervene)

DATED this 14th day of July, 2015.

Nancy Fontenot
NANCY FONTENOT

4837-3720-2213, v. 1

Case No. CV-1504-218

Dept. No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

SADLER RANCH, LLC.,

Petitioners,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

REPLY IN SUPPORT OF MOTION TO DISMISS PETITION FOR CURTAILMENT IN DIAMOND VALLEY

AFFIRMATION (Pursuant to NRS 239B.030)
The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources ("Nevada State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Senior Deputy Attorney General Micheline N. Fairbank, hereby files this Reply in Support of Motion to Dismiss Petition for Curtailment in Diamond Valley. This Reply is based upon the attached Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

Dismissal of the present case is appropriate because: (1) Sadler Ranch has not, prior to filing the present Petition, requested that the State Engineer initiate curtailment proceedings, (2) Sadler Ranch has not joined all affected parties in this case, and (3) Sadler Ranch failed to support its petition with an affidavit. On June 11, 2015, after the Motion to Dismiss was filed, Sadler Ranch filed a Verification of the Complaint.

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Sadler Ranch's Opposition to the present Motion to Dismiss is based entirely upon its assertion that the relief it is requesting is merely an order requiring the State Engineer "to initiate proceedings to curtail . . . ." Sadler Ranch asserts that such proceedings, to be held by the State Engineer, would be sufficient to address any procedural concerns that arise from the affect that none of the affected water users in Diamond Valley are before this Court.

This position that Sadler Ranch takes in its Opposition to the present Motion to Dismiss is strikingly different from the position that Sadler Ranch takes in its April 28, 2015 Petition for Curtailment. In the Petition, Sadler Ranch specifically states that:

> The ultimate prayer for relief in this Petition is the regulation of groundwater pumping by priority and pumping area. Regulation by priority should limit irrigation water in the southern pumping center. Such a curtailment and pumping cessation program should be started within 90 days.

Petition for Curtailment at 24:25-25:2.

Sadler Ranch does not even attempt to demonstrate that its petition, as written, can survive the present Motion to Dismiss. Instead, like a character in T.S. Elliot's J. Alfred Prufrock, Sadler Ranch argues, "That is not what I meant at all; [t]hat is not it, at all." In effect, Sadler Ranch is attempting to amend its Petition by way of its Opposition to the present Motion to Dismiss. This, obviously, is procedurally improper. If Sadler wishes to amend its complaint in order to survive the arguments set forth in the State Engineer's Motion to Dismiss, it must seek leave to do so pursuant to NRCP 15(a). In the meantime, the State Engineer respectfully submits that the present motion should be granted.

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Office of the Attorney General
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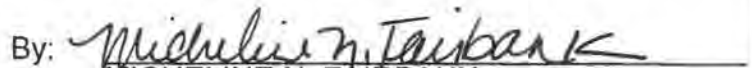
CONCLUSION

For the forgoing reasons, Respondent respectfully requests that the present Motion to Dismiss be granted.

DATED this 22nd day of July, 2015.

ADAM PAUL LAXALT
Attorney General

By: 

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 22nd day of July, 2015, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS PETITION FOR CURTAILMENT IN DIAMOND VALLEY**, by placing said document in the U.S. Mail, postage prepaid, addressed to:

PAUL G. TAGGART, ESQ.
RACHEL L. WISE, ESQ.
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Input on Proposed Order Designating Diamond Valley Hydrographic Basin (153) as a Critical Management Area

Eureka County

July 23, 2015

My name is Jake Tibbitts, Eureka County Natural Resources Manager. Eureka County is represented here today by the Eureka County Board of Commissioners, Chairman J.J. Goicoechea, Mike Sharkozy, and Fred Etchegaray, and other County officials and staff. The Board met on Monday the 20th and discussed the Proposed Order to designate Diamond Valley as a Critical Management Area. I'm here to present the County's perspective and input on the Proposed Order and CMA designation.

First, Eureka County strongly believes any action must be based upon the best available information. While we understand the table in the Proposed Order is meant to highlight the withdrawals of groundwater exceeding the perennial yield as one of the criteria required for CMA designation, we have concerns about the estimation and reporting of acre-feet pumped which exaggerate the quantity of water pumped. Recent legal proceedings in District Court regarding water rights in Diamond Valley have used the erroneous estimates of pumping as "proof" of increased pumping in Diamond Valley with no local efforts to reduce pumping. The table shows from 2006 through 2013, pumping increased by 30,000 to 35,000 acre-feet per year. This, while the acreage irrigated remained relatively stable. And then the 2014 estimates in the table show declines in pumping by about this same amount. We agree that the 2014 estimate in the table is close to reality. When the Division of Water Resources came to Eureka in March, 2009 to present management options in Diamond Valley, DWR used three different methodologies to show gross pumping from 2.5 to 3.1 acre-feet per acre which we believe are good estimates. We request these discrepancies be clarified in any Final Order so the record is clear about the actual level of overpumping in Diamond Valley.

Second, Eureka County wants the SE to know actions are being taken to obtain the best available information, and to use that information to identify options to reduce pumping in Diamond Valley. The County, Eureka Conservation District (ECD), Diamond Natural Resources Protection and Conservation Association (DNRPCA), Eureka Producers Cooperative, and individual irrigators have worked together on the following:

- Multi-year Joint Funding Agreement with USGS to study and refine the hydrology, including available water, in the entire Diamond Valley Flow System. The final report will be out later this year with the conclusions of this study.
- Comprehensive groundwater monitoring in Diamond Valley through a network of 12 wells, with good geographic distribution, equipped with tranducers and dataloggers.
- Irrigation efficiency projects in partnership with US Bureau of Reclamation (Agrimet Program), University of Nevada Cooperative Extension (Jay Davison) and University of Idaho (Dr. Howard Niebling). A BoR Agrimet site is in DV to assist farmers with real-time weather and ET estimates to schedule efficient irrigation. These data are used by many irrigators in DV. Multiple fields under center-pivot irrigation are equipped with state-of-the-art nozzle packages and *in situ* soil moisture probes to assist with irrigation scheduling. Multiple workshops over the last few years have been held to present results and assist in efficient

irrigation practices with the most recent being held April 21, 2015. A large portion of the DV irrigators push the limits of water conservation through application of these learned practices.

- Hansford Economic Consulting June 2013 study of financial feasibility of a General Improvement District (GID) to execute a water management program to enhance the sustainability of underground water supply and storage for Basin 153.
- Hansford Economic Consulting May 2014 study of potential water use set-aside programs for DV.
- Retention of a professional services in 2014 to facilitate formal scoping of the issues, hurdles, and solutions for a GMP in Diamond Valley.
- Eureka Conservation District, as the request of irrigators, sent out a questionnaire in October 2014 asking opinions of DV water users regarding designation of CMA by SE.
    - Results of questionnaire:

Water Use	*Mailed*	*Received*	*Total % Received*	*Total # In Support*	*Total # Do Not Support*	*Total # Did Not Mark Any Box*	*Total % of Support*
Domestic	67	9	13.43%	9	0	0	100.00%
Irrigation	73	26	35.62%	19	6	1	73.08%
Municipal	221	38	17.19%	26	8	3	68.42%

Note that number sent out/received did not separate by amount of water used or appropriated or by priority. In other words, an individual with water rights for one pivot were counted the same as an individual with rights for 20 pivots.

- Numerous irrigator meetings strategizing on opportunities for pumping reductions and water right retirement.
- GMP workshops held April 23, June 11, and July 16, 2015 with another planned August 18, 2015.
    - A GMP outline/working model has been developed during these workshops.

Additionally, Eureka County supported AB 419 during the 2011 Nevada Legislative session that created the statute allowing designation of a Critical Management Area and development of a Groundwater Management Plan. Eureka County also stood in support of the failed SB 81 during the recently completed 2015 session that sought to provide clarity on the tools available under the CMA and GMP.

Third, regarding the proposed CMA designation itself, Eureka County is generally supportive but there are some serious reservations that go with that support. Eureka County would like to hear from you about these reservations, which I will describe now:

We understand CMA designation as the mechanism under current Water Law to provide flexibility and additional tools to the SE through development and implementation of a GMP. It gives us pause that a popular water rights consultant and water attorney that represent exiguous interests in Diamond Valley were extremely vocal and active in their opposition to SB 81. We are confused as to why, while Eureka County and the vast majority of water users in Diamond Valley were standing behind and supportive of the State Engineer grasping for clarity and solutions through SB 81 to the ultimate benefit of all Diamond Valley, these individuals chose to thwart that effort rather than seek solutions. We are fearful that efforts to get a GMP approved for Diamond Valley under a CMA designation, within the 10 year statutory timeframe, will be fought at every turn by these same few individuals. We are fearful legal wrangling will cause 10 years to tick by and the State Engineer will be statutorily obligated to regulate

Diamond Valley outside of the provisions of a GMP. Will you (State Engineer/DWR) commit that when a GMP is brought forward, that the majority of water rights holders in Diamond Valley support, which will reduce pumping over time, you will support and vigorously defend it?

We also have serious reservations about moving forward with a CMA and subsequent GMP without fully understanding the relative rights and priorities of ***all*** water rights claimants in Diamond Valley – surface and underground. As you know, there are current appeals in front of the District Court considering issues related to adjudication, asserted impacts to claims of vested right, and a petition for curtailment. We are aware of other folks in Diamond Valley, in addition to those being considered now, that may pursue similar claims in the future. Claims of vested water rights in Diamond Valley total several thousand acre-feet of water per year and when validated have a real potential to affect the water-right situation in the basin. This presents extreme difficulty in setting benchmark water reductions that give weightings to priority because priorities are a moving target and the extent of all relative rights are either unknown or undetermined. For any CMA and GMP to be successful, the solution has to be ultimate and final. We cannot afford to continue piecemeal solutions on a case-by-case basis. We must address the whole of Diamond Valley and bring conclusive management actions forward. We cannot fathom how any legal actions could be taken by your office to substantially reduce pumping in Diamond Valley – through GMP or strict priority – without having a final determination of the rights and priorities in the Basin. You are also aware Eureka County has supported moving forward with adjudication of Diamond Valley. Our position has not changed. If an adjudication were initiated (or ordered), do you envision the CMA/GMP and adjudication proceedings working together? Will a GMP be able to be integrated into the Order of Determination or other regulatory actions under an adjudication? We will not be able to support CMA designation and subsequent development of a GMP if we will be back in front of the State Engineer and the courts to do it all over again through a separate adjudication process. We strongly encourage the State Engineer to pair any CMA designation with adjudication proceedings. We ask for the CMA and subsequent GMP to be developed as a parallel track with adjudication, to eventually be integrated as the mechanism to manage the rights determined through adjudication. Will the SE reconsider in what priority adjudications must be accomplished across the State, and put Diamond Valley at the top of the list in conjunction with CMA designation?

Finally, there are still a lot of questions about the mechanics and details under CMA designation and the GMP. Before a Final Order is published, we ask you to clarify these issues to ensure the GMP process continues on the right path. We do not want years of the 10 year timeframe to be "lost" due to having to "get on the same page" after a CMA designation. Some outstanding questions, in addition to those already posed, include, but are not limited to:

- NRS 534.037 requires a petition for approval of the GMP be "signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer...." Irrigators representing the majority of water use in the basin have been actively participating in the GMP workshops. A question has come up as to what constitutes a "majority of holders of permits or certificates." Does an irrigator with 10 separate permits have one "vote" on the petition or 10 "votes?" What do you consider a "majority?"
- The Town of Eureka and Devils Gate GID public water systems serve more than 500 individuals (about one-half of the population in Diamond Valley) although the quantity of water they consume is a small fraction of the total water pumped. How do these consumers fit into the mix?

- What are the immovable sideboards under which a GMP must operate? How much flexibility can be granted through a GMP (i.e., what tools are available)?
- How would a GMP be integrated with adjudication?
- Are you able to commit to defending a GMP if it is approved and subsequently appealed?
- Can the CMA designation include a timeframe for submittal of a GMP, in order to keep everyone on track?
- Can the CMA designation include factors the SE wishes to see in any GMP for Basin 153?

Thank you for consideration of our input and questions.

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Attorneys for Petitioner

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF EUREKA

SADLER RANCH, LLC, Petitioner, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No.: CV1504-218 Dept. No.: 2

EX PARTE REQUEST FOR IMMEDIATE STAY OF PROCEEDINGS

Petitioner, SADLER RANCH, LLC (hereinafter "Petitioner"), by and through its attorneys of record, PAUL G. TAGGART, ESQ., RACHEL L. WISE, ESQ., and DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., hereby request that this Court immediately stay consideration of these proceedings due to the State Engineer's recent publication of a Proposed Order to designate the Diamond Valley Hydrographic Basin as a Critical Management Area. This Request is based on the papers and pleadings on file in the above-captioned case, any oral arguments allowed by this Court, and the attached Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTUAL BACKGROUND

On April 27, 2015, Petitioner filed its Petition for Curtailment in Diamond Valley requesting this Court to issue a Writ of Mandamus requiring Respondent to initiate proceedings to (1) curtail the more than four decades-long over pumping of groundwater in Diamond Valley, and (2) award Petitioner reimbursement for damages to its senior water rights resulting therefrom.

Since the filing of the Petition, three separate motions have been filed including: (1) a Motion to Dismiss filed by Respondent which has been fully briefed and is awaiting a decision of this Court, (2) a Motion to Intervene filed by Eureka County which has been fully briefed and is awaiting a decision of this Court, and (3) a Motion to Intervene filed by various holders of junior water rights in Diamond Valley which has been only partially briefed.

On July 23, 2015, Respondent in this case held a hearing regarding a Proposed Order to designate the Diamond Valley Hydrographic Basin as a Critical Management Area.[1] At the hearing, Respondent allowed for a 30-day period following the hearing during which he would continue to take comments regarding the proposed order. After the end of this period, Respondent indicated he will issue his final order based on the comments received. This Proposed Order represents a substantial change in the circumstances underlying the instant Petition.

II. ARGUMENT

This request is being made ex parte due to the fact that there are existing fully-briefed motions awaiting a decision of this Court, and Petitioner believes that, given the significance of the potential Critical Management Area designation, it is in the interests of all parties to have this Request heard before a final decision on those matters.

[1] *See* Exhibit 1 (Notice of Hearing and Proposed Order).

The designation of the Diamond Valley Hydrographic Basin as a Critical Management Area could have a significant impact on the proceedings in the instant case. Petitioner believes that the issuance of the final order may, at the very least, necessitate an amendment of the Petition and/or the requested relief contained therein.

Importantly, the Proposed Order issued by Respondent effectively admits the basic claims made in Petitioner's Petition, including that the Diamond Valley Hydrographic Basin has been over-pumped for at least the past four (4) decades and that, as a result, the groundwater level in the basin has declined by over 100 feet, and the groundwater decline has substantially impacting holders of senior rights.[2] If a final order is issued by Respondent and the basin is designated as a critical management area, Respondent will have certain additional tools at his disposal to address the over-pumping problem.[3] In addition if the basin retains its status as a Critical Management Area ("CMA") for a period of ten (10) consecutive years, NRS 534.110 mandates that Respondent begin curtailment of pumping on the basis of priority of rights.

Under NRS 534.110, respondent also does not have to wait the full ten (10) years to adopt a groundwater management plan or order curtailment, but could require such actions to occur much sooner. Petitioner made comments related to this point at the State Engineer's hearing on the CMA designation, and Petitioner urged the State Engineer to not wait ten (10) years to curtail pumping. If Respondent's Final Order includes a provision that directs curtailment to begin if a groundwater management plan is not submitted and approved within one (1) year, Petitioner's Petition would no longer be needed and could be voluntarily dismissed.

In addition, Petitioner has a pending action regarding the approval of a satisfactory replacement water right.[4] If that action results in an award of sufficient additional water, and such award is not challenged by either Eureka County or the other holders of junior rights, the instant

[2] See Exhibit 1 (Proposed Order p.5).
[3] *See* NRS 534.120.
[4] Case No.: CV1409-204.

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Petition may become unnecessary. The requested stay will allow time for this Court to issue a decision on that pending replacement water right action before this Court spends time making substantive rulings in this petition, only to have the petition voluntarily dismissed by Petitioner.

Petitioner, therefore, respectfully requests this Court issue an immediate stay of these proceedings to provide all parties time to review the Respondent's final order,[5] allow this Court to rule in the replacement water right case, determine the effect of those two actions on the Petition, and file with this Court any stipulations, requests, or motions necessitated by the changed circumstances. Should this Court agree that issuance of a stay is warranted, Petitioner has prepared and attached a Proposed Order.[6]

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any persons.

DATED this 31st day of August, 2015.

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Attorneys for Petitioner

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[5] Petitioner reasonably expects that a final order will be issued by respondent within the next 60 days.
[6] Exhibit 2.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this ____ day of August, 2015, I served or caused to be served, a true and correct copy of the EXPARTE REQUEST FOR IMMEDIATE STAY OF PROCEEDINGS, as follows:

[X] By **U.S. POSTAL SERVICE:** I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

[___] By **U.S. CERTIFIED, RETURN RECEIPT POSTAL SERVICE:** I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

[___] By **ELECTRONIC DELIVERY**, via:

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LIST OF EXHIBITS

Exhibit	Title	Pages
1	Notice of Hearing and Proposed Order	7
2	Proposed Order Request for Stay	2

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EXHIBIT "1"

EXHIBIT "1"

CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,261 words.

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

DATED this 26th day of December, 2012.

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Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

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/s/ Nancy Fontenot
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Shipley Hot Spring Historic and Current Discharge, and Evidence for Impact to Flow Due to Groundwater Pumping in Diamond Valley, Eureka County, Nevada

Prepared by:

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Prepared for:

Sadler Ranch, LLC
Eureka County, NV

September 11, 2013

Shipley Hot Spring Historic and Current Discharge, and Evidence for Impact to Flow Due to Groundwater Pumping in Diamond Valley, Eureka County, Nevada

Background

This report provides a summary of data, references, observations and interpretations that support my professional hydrogeologic opinion that drawdown from long-term regional groundwater pumping in Diamond Valley is impacting flow of Shipley Hot Spring and has caused the cessation of discharge from Indian Camp Spring, both situated on the Sadler Ranch. Water rights for these spring sources are on file with the Nevada Division of Water Resources (NDWR) as proofs of appropriation V03289 and V03290.

Sadler Ranch LLC has filed applications 81719 and 81720 to appropriate underground water and application 82268 to change the point of diversion of a spring water right in order to mitigation the losses of spring flow and continue agriculture and ranching. Subject to issuance of permits, wells are planned to be pumped to sustain agriculture at levels similar to historic operations.

Historic and Current Shipley Hot Spring Discharge

From 1965 to 1994, the USGS made measurements of Shipley Hot Spring discharge. Discharge measurements were discontinued in the mid-1990s, but were resumed by hydrologists working for General Moly / Eureka Moly in 2008. Prior to the mid-1960s, spring discharge is reported over a wide range, between 8 to 15 cubic feet per second (cfs). Based on the information summarized below, the historic Shipley Hot Spring discharge prior to any groundwater development (pre-1940s) averaged about 11 to 12 cfs, consistent with the rate reported in Stearns, Stearns, and Waring (1937).

Discharge in mid-1960 to early 1990s ranged between approximately 6 to 8 cfs, and is interpreted to have already been affected by the drilling and use of artesian flowing wells to the north and south. The artesian wells were primarily drilled in the time frame of the 1940s to 1960.

Shipley Hot Spring discharge from the mid-1990s to present shows a declining trend, which in the summer of 2013 has been less than 2 cfs. The present-day declining trend is the result of the regional expansion of a basin-scale cone-of-depression resulting from extensive agricultural pumping in the southern portion of Diamond Valley.

Summer-time 2013 discharge measurements from Shipley Hot Spring are at period-of-record lows, ranging between 0.7 to 1.9 cfs. Based on the current trend of decline, Shipley Hot Spring will cease to produce outflow within the next 2 to 6 years.

The following are notes on the reported discharge of Shipley Hot Spring from 1912 to 2013.

1. Shipley Hot Spring(s) has been historically known as Big Shipley Spring and Sadler Hot Spring. Discharge is warm, reported between 103 to 106^{o}F (Garside and Schilling, 1979).

2. U.S. Geological Survey (USGS) topographic mapping (Bailey Pass, Nevada Quadrangle, 1986 edition, compiled from 1982 aerial photography) labels a spring about ¼ south of the Shipley Hot Spring pond as Shipley Hot Spring. This is not the main geothermal spring. The main Shipley Hot Spring is located at the pond, and includes a number of submerged orifices and discharges along the western bank of the pond. The topo map labeled spring is presently dry.

3. In November 1912, State Engineer H.M. Payne made a visual estimate of flow from Shipley Hot Spring at, "*about 8 second feet or a little more*." Discharge from Shipley Hot Spring could not be accurately measured when Payne visited the spring because the dam had recently breached and, "*flow was not being confined to any one channel*."

4. Court proceedings in 1913 and 1917 between Romano and Sadler, and Eccles and Sadler, respectively, made determinations of 1/3 of the Shipley Hot Spring discharge being allocated to the parties other than Sadler, quantifying 1/3 of the flow as 5 cfs. These court rulings suggest that the total discharge was 15 cfs.

5. Alfred Sadler in 1931 correspondence regarding a ranch inventory states that "*the springs supply 13 second feet of water, which runs in the reservoirs and ditches*" (within the Sadler vs. Sadler, 1947 litigation, U.S. Court of Appeals 9th Circuit No. 11715)

6. The U.S. Geological Survey (USGS) reported Shipley Hot Spring discharge at approximately 11.1 cfs (5000 gallons per minute – gpm) in the publication *Thermal Springs of the United States*, by Stearns, Stearns, and Waring (1937).

7. Floyd Slagowski who worked on the Sadler Ranch from 1937 to 1940 reported that Shipley Hot Spring discharge was "*about 12 second feet*" (McCracken, 1993).

8. Thomas E. Eakin, hydrologist with the with the USGS, noted in September 1961 field notes, "*report Shipley Hot Springs discharge about 12.5 cfs*."

9. In Eakin (1962), Ground-Water Appraisal of Diamond Valley, there includes a photo of Shipley Hot Spring on the inside report cover, with the note of "*Shipley Hot Springs discharge is reported to be about 15 cfs*." The photo caption differs from his Eakin's field notes of September 1961.

10. Mifflin (1968) reports Shipley Hot Spring discharge at 15 cfs (no source cited, but suspected to be from Eakin, 1962).

11. Harrill (1968) reports three Shipley Hot Spring discharge measurements ranging between 6.2 to 7.2 cfs. The measurements were made in September 1965 (7.2 cfs), and April and November 1966 (7.0 cfs and 6.2 cfs, respectively).

12. Arteaga and others (1995) report Shipley Hot Spring discharge measurements for the time frame of 1965 to 1990, ranging from 5.2 to 8.2 cfs.

13. USGS measurements of Shipley Hot Spring discharge are currently published on the National Water Information System (NWIS) database for the time period of 1965 to 1994, and range from 4.4 to 8.3 cfs (Figure 1).

14. Shipley Hot Spring discharge measurements have been made by consulting hydrologists to General Moly – Eureka Moly from 2008 to 2013, and range from 1.6 to 3.6 cfs (Figure 1).

15. Shipley Hot Spring discharge in August of 2013 was measured by Interflow Hydrology at between 0.7 to 1.2 cfs from the primary northern diversion channel. Discharge from the Shipley Hot Spring pond may differ depending on whether the northern or southern diversions are being used, how measurements are made, and how the pond level and diversion outflows are being managed. Diversion from the southern outlet was observed at 1.9 cfs early in September 2013 (Parshall Flume, standard rating curve).

16. Potentiometric head currently driving spring discharge into the pond is only about 0.5 feet above average pond level, and about 1.1 feet above the pond outlet elevations, based on the potentiometric head in the adjacent “production” well (Interflow, 2013).

17. Seasonal variance in spring discharge is present in the measurement period of 2009 to 2013, and indicates that summer discharge (July-September) are on average 25% lower than winter and spring discharge (January-April). The frequency of spring discharge measurements prior to 2009 is insufficient to assess seasonal variances for the previous period of record. The seasonal spring discharge variance could be a response to seasonal pumping cycles for agriculture.

18. No water-year climate effects associated with spring discharge can be defined, i.e., a wet or dry water-year does not correlate with above or below average spring discharge (Figure 2).

19. Linear regression of the discharge measurements between May 2008 to August 2013 indicates that Shipley Hot Spring Discharge is declining at a rate that projects to a cessation of flow in approximately 6 years (2019) (Figure 3).

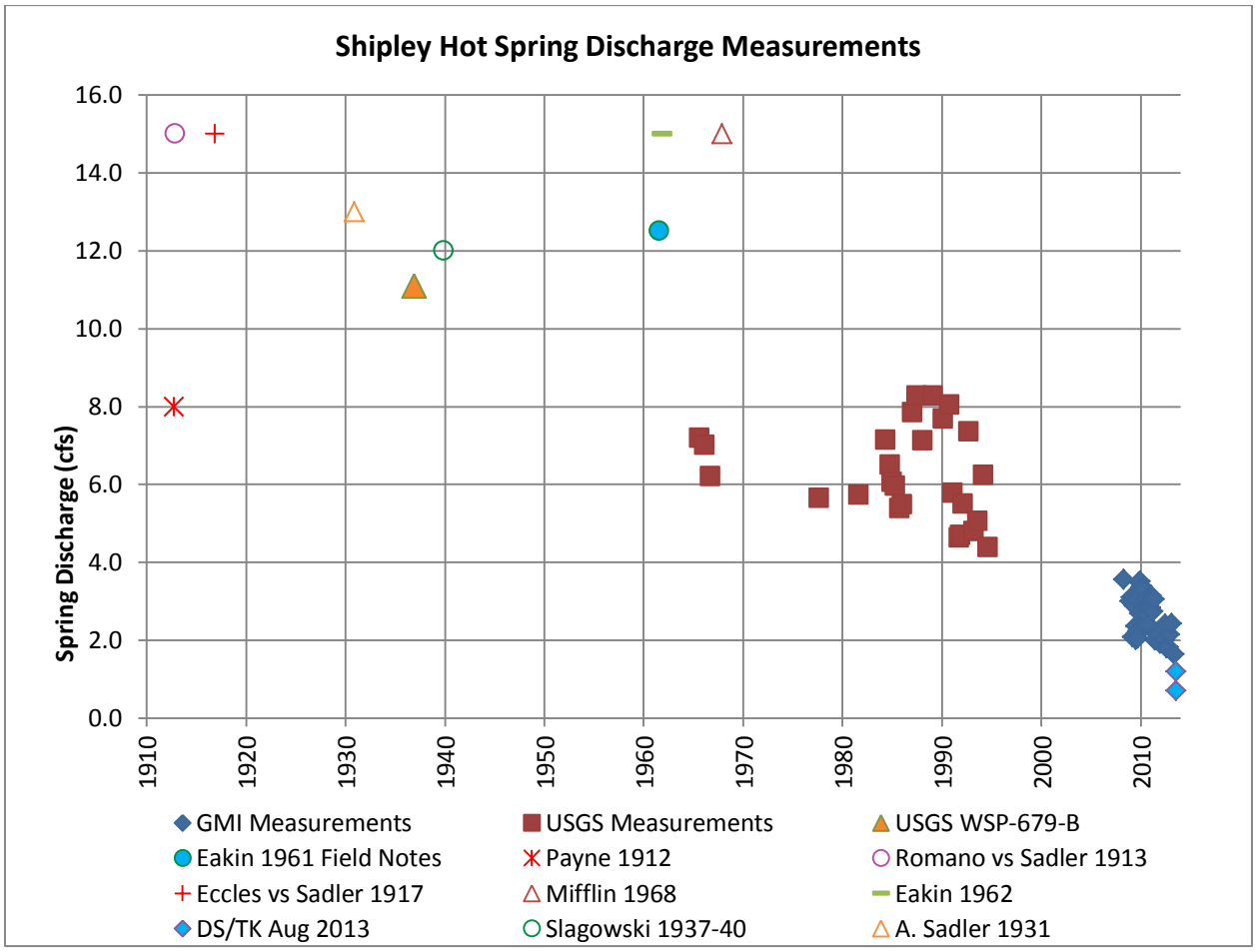

Figure 1 – Shipley Hot Spring Discharge Measurements and Reported Discharge, 1912 to 2013

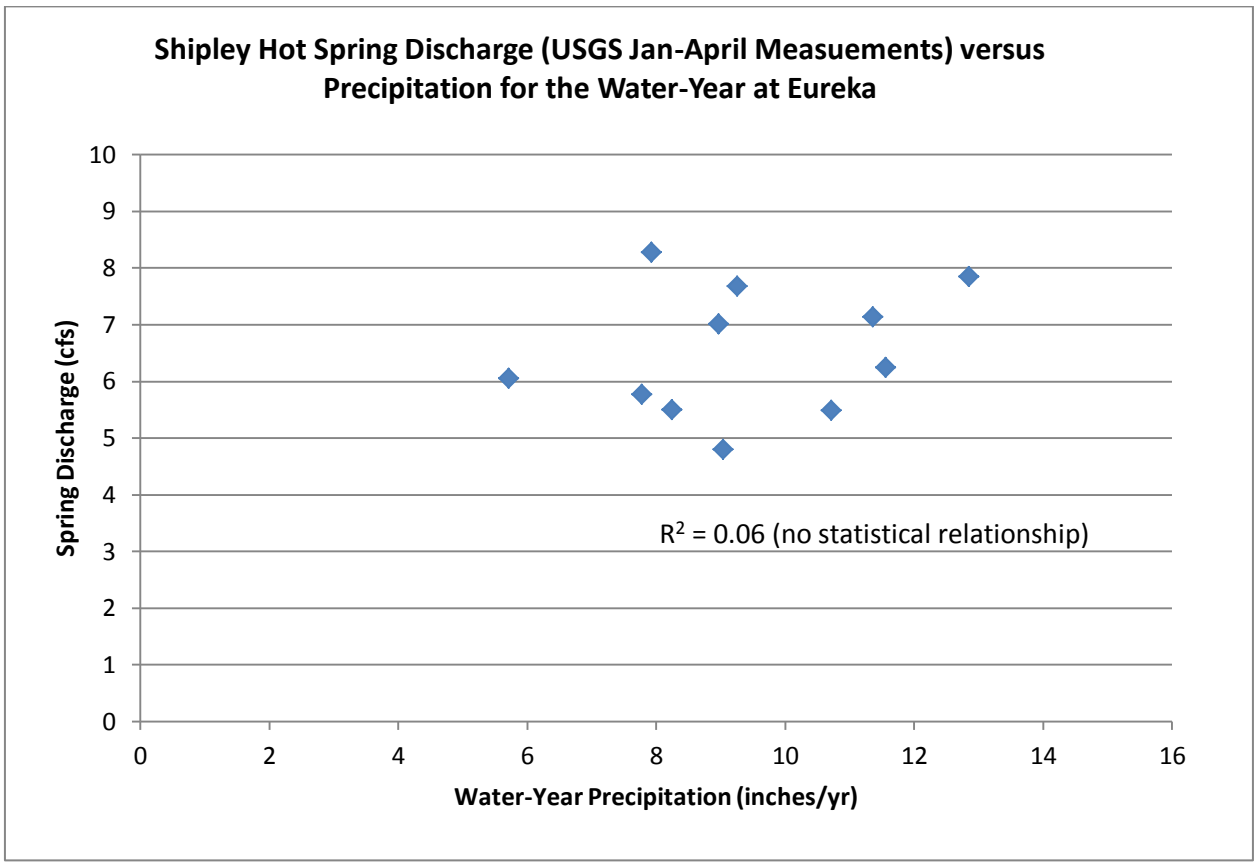

Figure 2 – Water-year Precipitation Recorded at the Eureka vs. Shipley Hot Spring Discharge Measurements (USGS data, 1965-1994 January to April measurements)

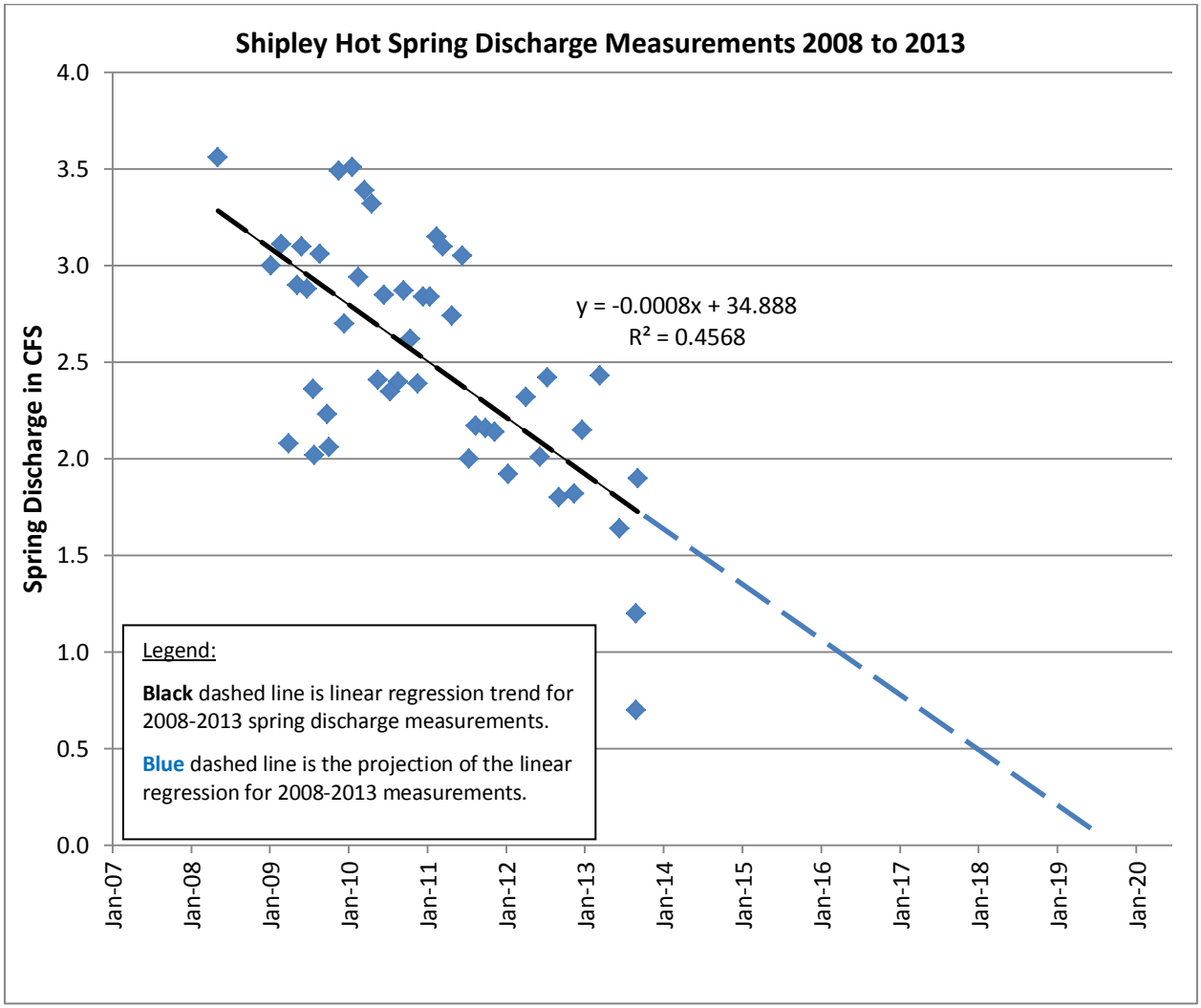

Figure 3 – Shipley Hot Spring Discharge Measurements, 2008 to 2013

Indian Camp Spring Discharge

Indian Camp Spring is located approximately ¾-mile south of Shipley Hot Spring. The spring was historically developed to irrigate about 73.9 acres as reported in proof of appropriation V03290. 1953 photography of the spring illustrates that the spring was actually comprised of over a dozen springs and seeps emanating along a spring-line (probably a fault scarp). Eakin in September 1961 observed that the spring had been developed via a north-south trench cut parallel to contour and was producing an estimated flow of 1.5 to 2 cfs (USGS field notes at Carson City). Harrill (1968) reports discharge from Indian Camp Spring as 0.66 cfs in December 1965, and 0.82 cfs in April 1966 (Table 9, 24/52-26d "Unnamed"). Discharge is believed to have been warm, about 80°F, similar in temperature to Sulphur Spring to the south and Siri Ranch Spring (Eva Spring) to the north.

Artesian wells drilled south of the spring in the 1940s to 1960 probably had some initial impact, latter followed by regional drawdown sourced from the southern portion of Diamond Valley. Indian Spring appears in aerial photography to have produced flow until the late 1980s or early 1990s (appears dry in 1994).

An excavation in the spring source area to thirteen (13) feet in depth in September 2013 did not encounter water. A cistern excavated near the spring (Plate 1), believed to have been built in the 1980s in an effort to sustain a source of water, has a current depth to groundwater of approximately 8 feet (groundwater encountered at the very base of the cistern). Given the information available today regarding the extent and magnitude of regional drawdown caused by southern Diamond Valley agriculture, as detailed in following sections of this report, it is probable that flowing artesian wells in use for farming along the western side of the playa may have had some initial influence on spring discharge (1940s to early 1960s). During this period (1950s), a trench was cut to better collect flow from Indian Camp Spring. The spring then produced discharge until the impacts of regional drawdown from agriculture in southern Diamond captured spring discharge in late 1980s to early 1990s time-frame.

Examination of the Cause of Shipley Hot Spring Discharge Decline

Regional effects of large-scale and decadal pumping in southern Diamond Valley are pronounced, and exasperated by over-appropriation of the basin. Water level data, and regional evidence of cessation of spring flows, indicate that drawdown stemming from the southern agricultural area has systematically spread northward, capturing spring discharge all along the southern edge of the playa, drying Tule marshes, large meadows, and peat bogs, and lowering water levels at springs and ranches along both the eastern and western sides of the playa. As springs and artesian wells dried up along the western side of the playa, some ranches drilled new wells or pumped prior flowing wells to replace their lost water sources (Bailey Ranch, Romano Ranch, and Siri Ranch). Ranches on the east side of the basin did not drill and pump wells, and there is currently no agriculture (Thompson Ranch, Cox Ranch, Willow Ranch, and Rock Ranch).

Shipley Hot Spring stands out as the last remaining flowing spring in central Diamond Valley, in an area that once contained abundant springs.

An overview of groundwater development and pumping in Diamond Valley is presented below.

Initial Affects to Shipley Hot Spring Discharge from Flowing Artesian Wells

In the 1940s, several artesian wells were drilled on the Romano Ranch, approximately 4.5 miles south of the Shipley Hot Spring. Eakin (1962) reported that several artesian wells were drilling in about 1943, with initial discharge of 600 gpm, diminishing to about 200 gpm. Artesian flows measured by the USGS in October 1947 totaled 250 gpm from three wells owned by Florio (Romano Ranch) (USGS fieldwork notes in Carson City). Five well logs filed in 1948 and 1949 for A.C. Florio (Romano Ranch) indicate artesian well discharge from five wells ranging from 0.5 to 1.5 cfs, and totaling 4 cfs (NDWR Well Logs 509, 625, 626, 627, and 1037; note 1.5 cfm on well log 1037 assumed to be cfs). Artesian flows reported on well logs probably diminished after of a period of time. In November of 1965, the USGS

measured a total combined discharge from 13 artesian wells on the Romano Ranch at 521 gpm, equal to 840 acre-feet per year (Harrill, 1968; and USGS fieldwork notes in Carson City).

Harrill (1968) reported a total of seventeen flowing wells on the western side of central-northern Diamond Valley, including the Romano Ranch wells. One flowing well is reported on the northern portion of the Sadler Ranch ("Middle Well", see Plate 1) drilled in 1960 (Well Log 5526). This well had a reported flow of 400 gpm and pressure head of 14 feet on the driller's well log. Reported flow by Harrill (1968) had decreased to 100 gpm in 1965. One flowing well is reported in Harrill (1968) on the Brown Ranch (24/53 – 6BDAB). The driller's well log (Well Log 5527) indicates the well drilled in 1960 with a reported flow of 400 gpm. Reported flow by Harrill (1968) in 1965 was 200 gpm. Besides these wells, two artesian wells are also reported in Harrill (1968) at the Flynn Ranch, 10 miles north of Shipley Hot Spring.

Artesian wells drilled during the time period of the mid 1940s and possibly into the 1950s on the Romano Ranch could have affected Indian Camp Spring and Shipley Hot Spring discharge prior to being measured in the 1965 and 1966 by Harrill (1968). Drawdown estimates using the Theis equation to assess the potential for affect by the mid-1960s. The following parameters were used in the Theis computations:

- confined storage coefficient of 0.003,
- transmissivity of 10,000 ft^2/day,
- and reported discharges from flowing wells on well drillers logs diminishing to those reported in Harrill (1968) and cessation of flow as reported in various documents in the 1970s-1980s.

Theis computations indicate that equilibrated drawdown affects at Shipley Hot Spring would have been experienced within approximately 3 years of continuous artesian well discharge at the Romano Ranch. The computed drawdown at Shipley Hot Spring is approximately 4 feet. A higher storage coefficient would result in a lower magnitude of predicted drawdown, and slower times for drawdown to become an equilibrated condition. For example, a storage coefficient of 0.007 produces an equilibrated drawdown effect at the spring of 3 feet in approximately 5 years.

The two artesian wells drilled in 1960 to the north of Shipley Hot Spring, one on the Sadler Ranch (Middle Well) and one on the Brown Ranch (N24/E53 - 6BDAB) also may have created water level drawdown and spring discharge reduction by the 1965 and 1966 measurements made by Harrill (1968). Estimated drawdown at Shipley Hot Spring from the Middle Well is 2 feet, with a time to equilibration of drawdown of approximately 1 year, using a storage coefficient of 0.003. Estimated drawdown at Shipley Hot Springs from the Brown Ranch well is 1 foot, and equilibrates to this level of drawdown within approximately 3 years, using a storage coefficient of 0.003.

The predicted drawdown from these flowing artesian wells indicates that about 5 to 6 feet of drawdown may have been experienced at Shipley Hot Spring by the time discharge measurements began in the mid-1960s. The historic artesian head driving flow at Shipley Hot Spring source is not known. But assuming the artesian head may have been greater than the 14 feet of head as reported on the 1960 Middle Well log (5526), then perhaps the spring originally had around 16 to 18 feet of pressure head.

The predicted head reduction due to artesian well discharge would then equal about 1/3 of the total head, resulting in a similar level of reduction of discharge from Shipley Hot Spring by the time measurements began in the mid-1960s.

As regional drawdown effects from pumped wells encroached from the south, the flowing artesian wells eventually ceased to flow and were no longer affecting Shipley Hot Spring or Indian Camp Spring. The artesian well influences were effectively replaced by regional pumping influences. In some cases, continued pumping from the formerly artesian wells simply perpetuated the original aquifer stress, with regional pumping influences becoming additional.

Diamond Valley Over-Appropriation of Groundwater

The perennial yield of Diamond Valley is estimated at 30,000 acre-feet per year (af/yr). A portion of the perennial yield supports spring discharge with historic agricultural water uses, such as Shipley Hot Spring and Indian Camp Spring. Diamond Valley is significantly over-appropriated, and pumping has been greater than the defined perennial yield for the basin for over four (4) decades. Approximately 131,000 af/yr of underground water right are currently permitted, with consumptive use by agriculture estimated at 60,000 to 65,000 af/yr.

The following are notes regarding the appropriation and development of groundwater in Diamond Valley.

1. In 1951, the first groundwater appropriation for irrigation was issued in Diamond Valley, but the level of groundwater appropriation and use remained low throughout the 1950s. NDWR (2009) reports 1,180 and 1,854 af/yr of groundwater use for irrigation in 1957 and 1958, respectively.

2. T. E. Eakin (1962) presents a groundwater perennial yield estimate for Diamond Valley of 23,000 af/yr.

3. In concert with a large amount of Desert Land Entry (DLE) filings made in the late 1950s, the State Engineer issues over 100,000 af/yr of underground water rights in the early 1960s (Figure 4). Adjusted for supplemental duties, the total of new appropriations was approximately 90,000 af/yr (NDWR, 2009). The typical success rate for DLE filings was low, and the State Engineer expected similar in Diamond Valley (Shamberger, 1967).

4. In 1960 to 1964, there was a large spike in the drilling of irrigation wells in Diamond Valley in support of the DLE development (Figure 5).

5. Harrill (1968) presents an updated perennial yield estimate of 30,000 af/yr, after accounting for subsurface inflow from the Garden Valley portion of Pine Valley. This perennial yield estimate is the currently relied upon value by the NDWR.

6. Pumping history and totals based on annual crop inventory data by NDWR, time periods 1966-1969, and 1975 to present, and Arteaga and others (1995), indicate that irrigation pumping peaked in the mid-1980s at approximately 125,000 af/yr (assuming 4 ft per year total duty pumped), with a crop consumptive use estimate of 80,000 to 85,000 af/yr (Figure 6). Electricity became available to agriculture (pumps) in the early 1970s, and resulted in an increase in large-scale pumping (Arteaga and others, 1995).

7. From the 1990s to present, pumped quantities for irrigation have stabilized at approximately 100,000 af/yr pumped, with estimated crop consumptive use at 60,000 to 65,000 af/yr, based on NDWR Net Irrigation Water Requirement values (Figure 6).

8. Pumping and consumptive use of groundwater by agriculture has exceeded the perennial yield since 1970, without consideration of municipal and mining uses of groundwater in the basin, and without any allocation of a portion of perennial yield to springs that have historically been used for agriculture. The total consumptive use of pumped groundwater that has occurred over the perennial yield since 1970 is approximately 1.6 million acre-feet (Figure 7).

9. Current (August, 2013) groundwater appropriations in Diamond Valley total 131,380 acre-feet per year, after supplemental duty adjustments, of which approximately 95% are for irrigation uses (NDWR records).

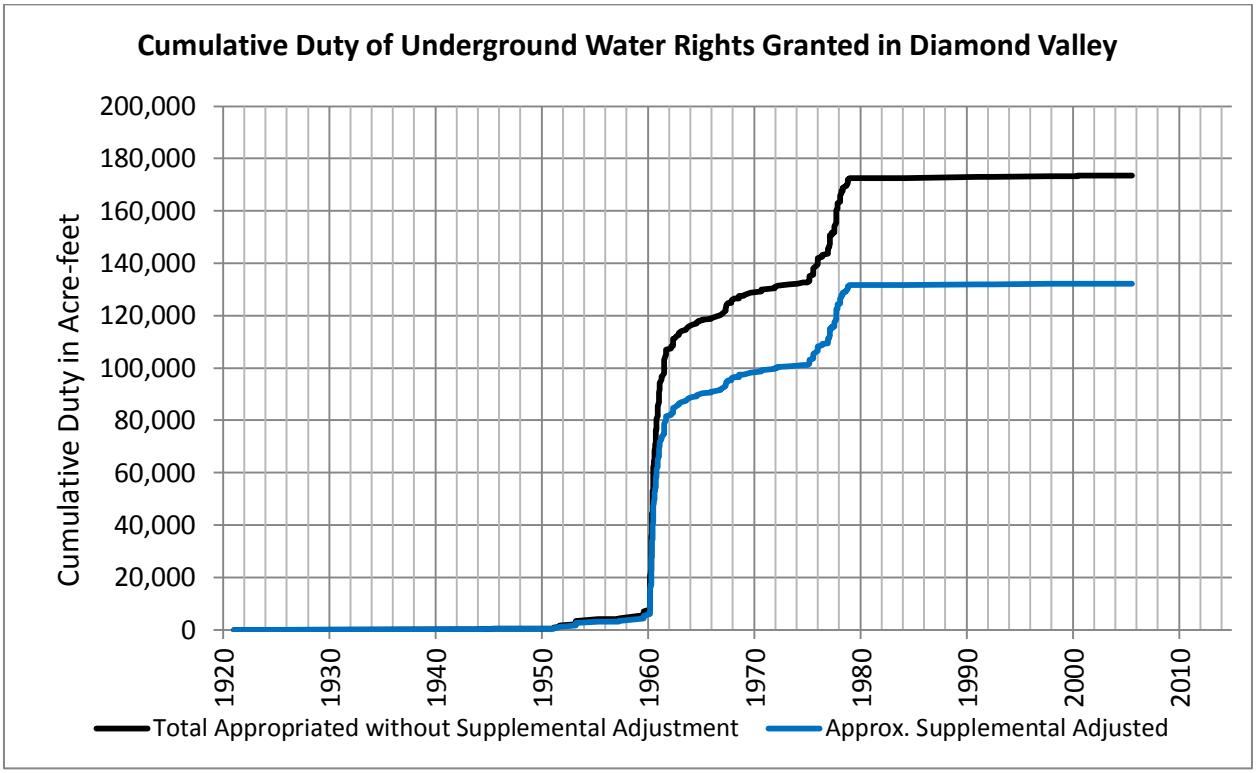

Figure 4 – Underground Water Rights Issued (permitted – active) in Diamond Valley (NDWR records), Scaled for Supplemental Duties

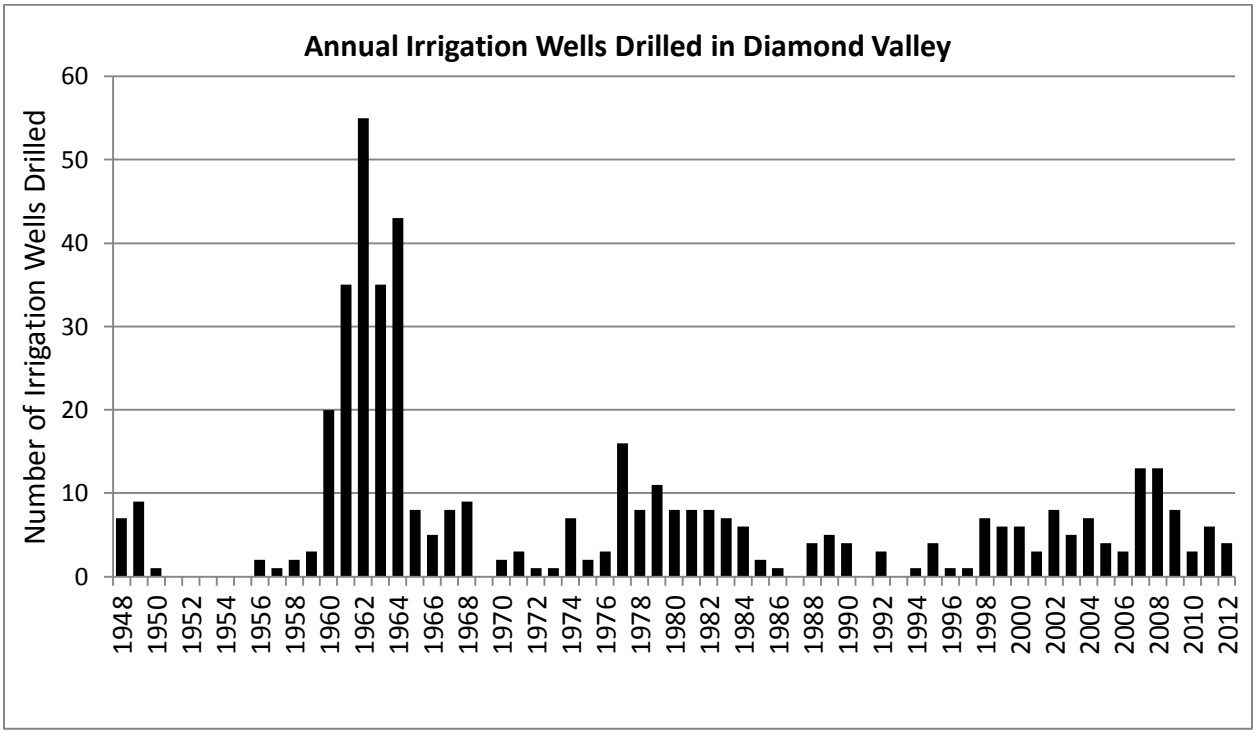

Figure 5 – Irrigation Wells Drilled in Diamond Valley (NDWR records)

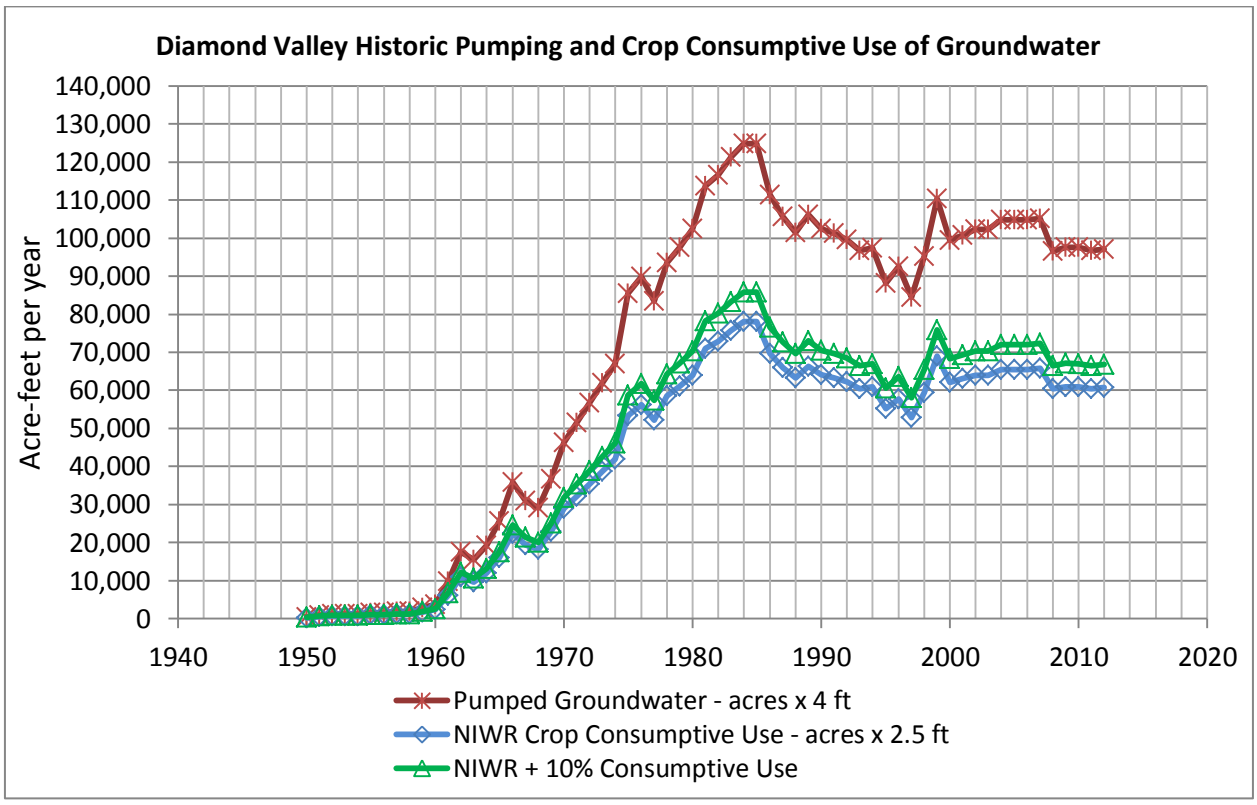

Figure 6 – Estimated Total Irrigation Pumping in Diamond Valley and Crop Consumptive Use of Groundwater (Based on NDWR Crop Inventory Data and NDWR Net Irrigation Water Requirement)

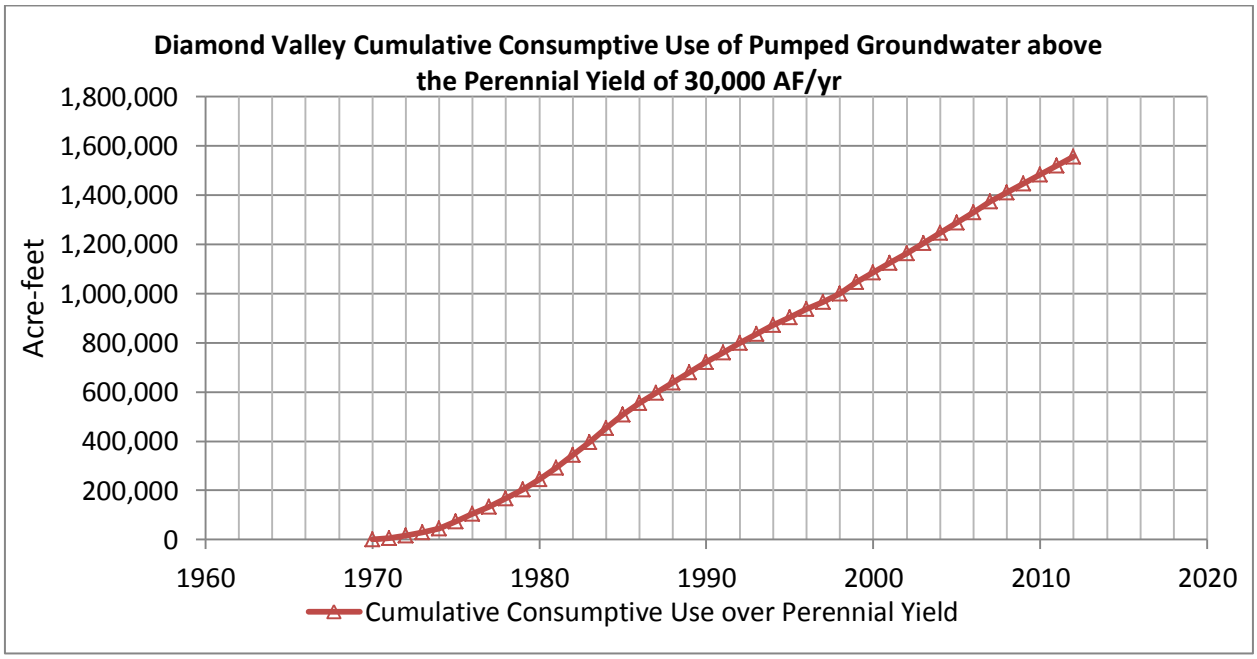

Figure 7 – Cumulative Consumption of Groundwater by Agriculture in Diamond Valley above the Perennial Yield of 30,000 acre-feet per year.

Diamond Valley Regional Pumping Drawdown and Capture of Spring Discharge

The development and progression of pumping drawdown has continued through present day to expand to the north and to cause declining water levels throughout southern and central Diamond Valley, all within the influence of the pumping center in southern Diamond Valley. The effects of progressive drawdown are clearly evident. All springs in central Diamond Valley and along the western side of the playa south of the Brown Ranch, except Shipley Hot Spring, have ceased to flow. This totals over 100 mapped springs as located on USGS topographic maps (Plate 1, spring locations from the USGS National Hydrography Dataset).

Water level records along the western side of the playa, south of Shipley Hot Spring show long-term trends of water level drawdown ranging between 12 to 35 feet. Water level drawdown at Shipley Hot Spring is estimated to be at least 10 feet, as shown in Plate 1. Estimated drawdown values on Plate 1 are considered minimum values, and do not take into account pressure heads on springs and artesian wells greater than 2 feet above land surface (a typical height of well casing above land surface). In reality, pressure heads were probably greater in pre-development conditions.

Discharge from Shipley Hot Spring, while still present, has been progressively declining, and is well below historic levels (currently at about 10 to 15% of historic flow rates). Discharge in August 2013 was between 0.7 to 1.2 cfs.

Regional pumping drawdown has likely extended as far north as the Brown Ranch on the west side of Diamond Valley, and to the Rock Ranch on the east side of Diamond Valley (Plate 1).

The following data and observations support my interpretations.

1. Regional groundwater drawdown in response to pumping in southern Diamond Valley is well documented by historic measurements of water levels by the USGS and NDWR, and as interpreted and reported in Harrill (1968), Harrill (1982), Arteaga and others (1995), Tumbusch and Plume (2006), NDWR (2009), and Knochenmus and others (2011).

2. Spring observations and water level data indicate that the drawdown effects from regional pumping in southern Diamond Valley have extended north to near the southern edge of the playa, and further north along the eastern and western margins of the valley, between the mountain front and the playa edge. Springs which have ceased to flow include:
    a. Thompson Spring, Birch Spring, Willow Ranch and Rock Ranch springs along the east margin of valley (Plate 1),
    b. Over sixty (60) unnamed springs on the southern edge of the playa, as mapped by the USGS on 7.5-minute topographic maps (Plate 1),
    c. Tule Dam Spring, Sulphur Spring, springs on the Romano Ranch, Bailey Ranch Spring, Indian Camp Spring, James White Spring, and Eva Spring, all on the western side of the valley.

3. In 1982, Tule Dam Spring and Sulphur Spring (6.5 to 7 miles south of Shipley Hot Spring), and Birch Spring (Diamond Spring in Harrill 1982, 1 mile north of Thompson Ranch Springs) were all noted to be dry by Harrill (1982). Sulphur Spring was reported in Stearns, Stearns, and Waring (1937) to have a discharge of approximately 20 gpm, with a warm water temperature (74^{o}F). Harrill reported a flow in 1965 of 40 gpm. Tule Dam Spring is reported by Harrill to discharge 54 gpm. Tule Dam spring and Sulphur spring are observed in historic photography, and mapped on topo maps, as supporting marsh conditions, with braided discharge channels. Today, these areas exhibit extensive areas of dried organic peat soils. Similar conditions are observed at Indian Camp Spring, the spring area ¼-mile south of Shipley Hot Spring, and other areas where formerly wet meadow and Tule conditions existed.

4. Harrill (1968, p. 30) reported: "*Eventually, a gradual decrease of spring discharge in the North Diamond subarea should occur in response to pumping in the South Diamond subarea as sufficient water is removed from storage to induce subsurface flow from the spring areas toward the well field*." Harrill's prediction has proved to be correct.

5. Harrill (1968, p. 60) concludes that "*In time, discharge from springs may have to be supplemented or replaced by pumping from wells*."

6. Thompson Spring was reported be declining in the 1970s, and was the subject of review by the State Engineer in the early 1980s. The last known flow measurement from Thompson Spring made by the USGS was in 1990, at approximately 0.1 cfs. Depth to groundwater at the Thompson Spring is approximately 8 feet below the former spring discharge elevation (measurements by Interflow Hydrology and Cordilleran Hydrology, August 2013).

7. Drawdown interpretations based on available water level and spring data are shown in Plate 1, and are considered conservative for the western and eastern margins of the valley, based on a conservative assumption for artesian head for springs and wells being near land surface or the tops of well casings. Data considered in this interpretation includes water level measurements for the period of time from the 1960s to 2013. Based on water level data, over 100 feet of water level drawdown exists in the southern agricultural area, and sustained rates of drawdown range between 1 to 3 feet per year. The cone-of-depression created by pumping extends for many miles north of that agricultural area, and the level of drawdown decreases systematically with greater distance from the pumping center. The cone-of-depression however is extending more aggressively up the outer edges of the valley, between the mountain front and playa, where higher permeability basin-fill materials are present.

8. Water level drawdown in the vicinity of Sulphur Spring, 7 miles south of Shipley Hot Spring, appears to be approximately 35 feet, based on the current depth to groundwater in well N23 E52 36BBDB1 (Figure 8, Plate 1).

9. Water level drawdown in the vicinity of the Romano Ranch, 4.5 miles south of Shipley Hot Spring, has been approximately 19 to 25 feet (Figure 8, Plate 1) based on wells N23 E52 11ADAA1 and N23 E52 13CDBC1, respectively. Artesian wells drilled in the late 1940s and 1950s on the Romano Ranch, located approximately 4.5 miles south of Shipley Hot Spring, have ceased to flow. Flow from these wells is reported to have begun declining in the mid-1960s, and the wells were reported to no longer flow in 1972 (NDWR records for V04476 and V04479).

10. Water level drawdown in the vicinity of the Bailey Ranch, 2.5 miles south of Shipley Hot Spring has been approximately 12 feet (Figure 8, Plate 1) based on well N23 E52 11ADAA1, and records that the well once produced artesian flow. A spring at the Bailey Ranch ("Bailey Spring") has ceased to flow, and was reported in Harrill (1968) to produce 1.14 cfs (510 gpm). A well was drilled in 1998 to replace lost spring discharge under vested claim V01104, under water right Permit 63497.

11. Indian Camp Spring, located ¾-mile south of Shipley Hot Spring is dry. This spring was reported to have a flow of 0.66 and 0.82 cfs (300 and 370 gpm) in Harrill (1968, Table 9 spring 24/52-26d). An excavation in the summer of 2013 at the spring location did not encounter groundwater to an excavation depth of 13 feet below land surface.

12. An excavation at the spring location ¼-mile south of Shipley Hot Spring did not encountered groundwater to a depth of excavation of 11 feet below land surface.

13. James White Spring located approximately 3 miles north of Shipley Hot Spring on the southern portion of the Brown Ranch is dry. The spring appears to have gone dry by 1975 based on aerial photography.

14. Eva Spring (also called Siri Ranch Spring) at the Brown Ranch, approximately 3.5 miles north of Shipley Hot Spring is dry. This spring appears to have produced flow up until the late-1990s or early 2000s, based on aerial photographs. Harrill (1968) reported a flow of 0.58 cfs (255 gpm) from Siri Spring. Vested proof of appropriation (V02658, filed in 1969) stated irrigation of 81.4 acres from the spring source with a water use of 407 acre-feet per year. Combined effects of localized pumping from a previously flowing well, and a new well drilled in 1977, along with the progression of drawdown from the southern agricultural center are interpreted to have cumulatively resulted in the cessation of flow Eva Spring.

15. In total, over 100 mapped valley-floor springs on the USGS topographic maps, south in latitude of the Shipley Hot Spring, have ceased to flow in Diamond Valley and are now dry.

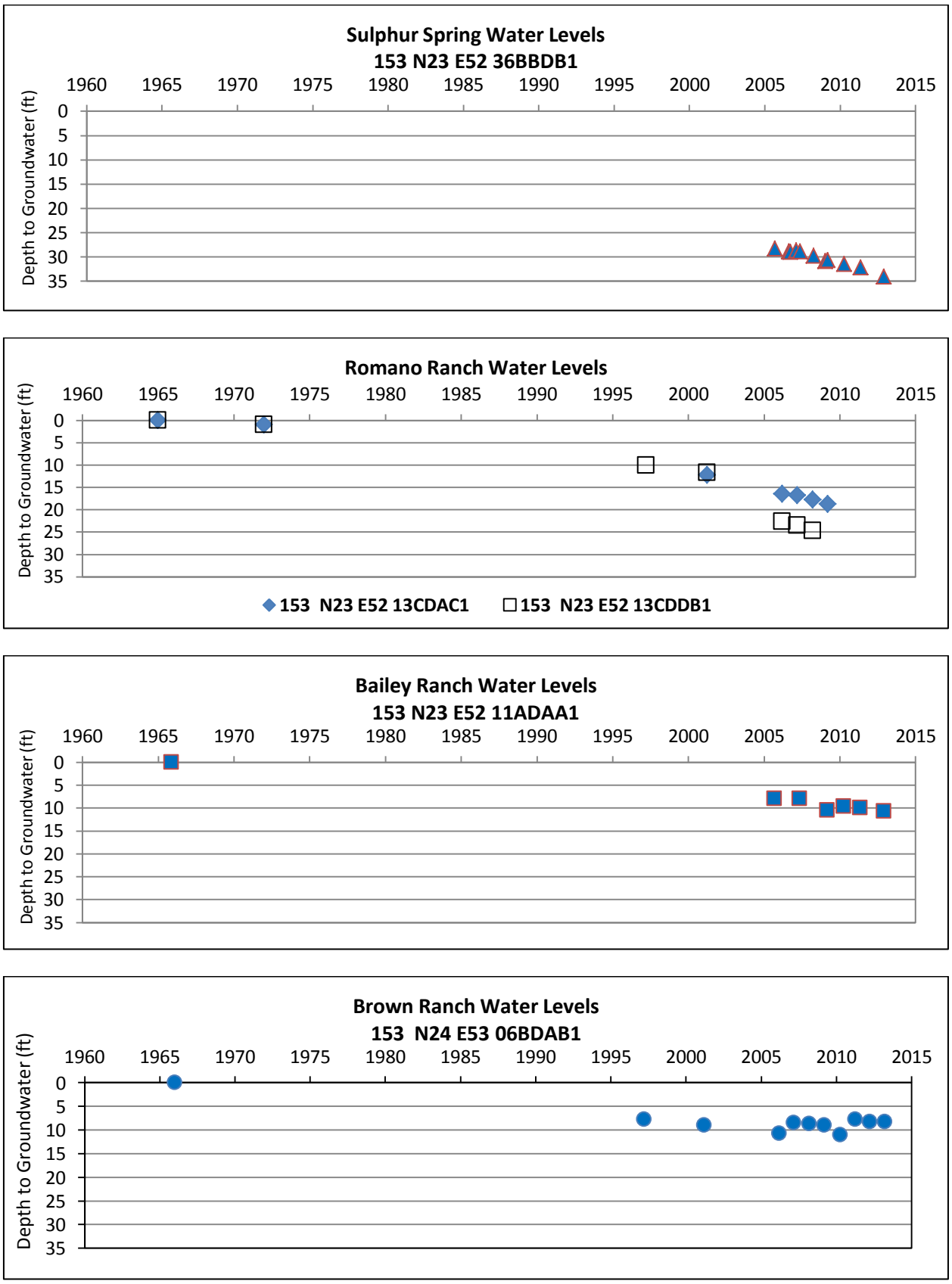

Figure 8 – Water Level Hydrographs for Wells along the Central-Western Edge of Diamond Valley

Conclusions & Professional Opinion

Historic discharge from Shipley Hot Spring is reported in the range of 8 to 15 cubic-feet per second (cfs), which is equal to 5,790 to 10,860 acre-feet, annually. The best available estimate of average pre-development Shipley Hot Spring discharge (prior to the 1940s) is approximately 11 to 12 cfs, consistent with reporting of spring discharge in Stearns, Stearns, and Waring (1937).

Flowing artesian wells initially produced a decline in Shipley Hot Spring discharge of possibly about 30 percent. The artesian wells no longer flow due to regional groundwater pumping and associated drawdown, which is now the dominant source of drawdown at Shipley Hot Spring. A transition from artesian well effects to regional pumping effects probably occurred over the time frame of the 1970s to 1990s, and by the mid-1990s, regional pumping had become the principal cause of the decline in spring discharge.

From the mid-1990s to present, Shipley Hot Spring discharge has progressively declined, and in the summer of 2013 has been at the lowest historically recorded discharge (1.6 cfs in June, and 0.7 to 1.2 cfs in August, 1.9 cfs in September). The expanding and deepening cone of depression caused by extensive pumping in the southern part of the valley is exasperated by continual annual pumping at levels above the perennial yield for the basin, which has occurred since 1970. Cumulative withdrawal of groundwater above the perennial yield totals approximately 1.6 million acre-feet, and grows by approximately 30,000 acre-feet each year under present pumping levels. As basin-wide pumping above the perennial yield continues, drawdown will continue to progress into the northern portion of Diamond Valley. At the current rate of decline of Shipley Hot Spring, flow will cease within the next 2 to 6 years.

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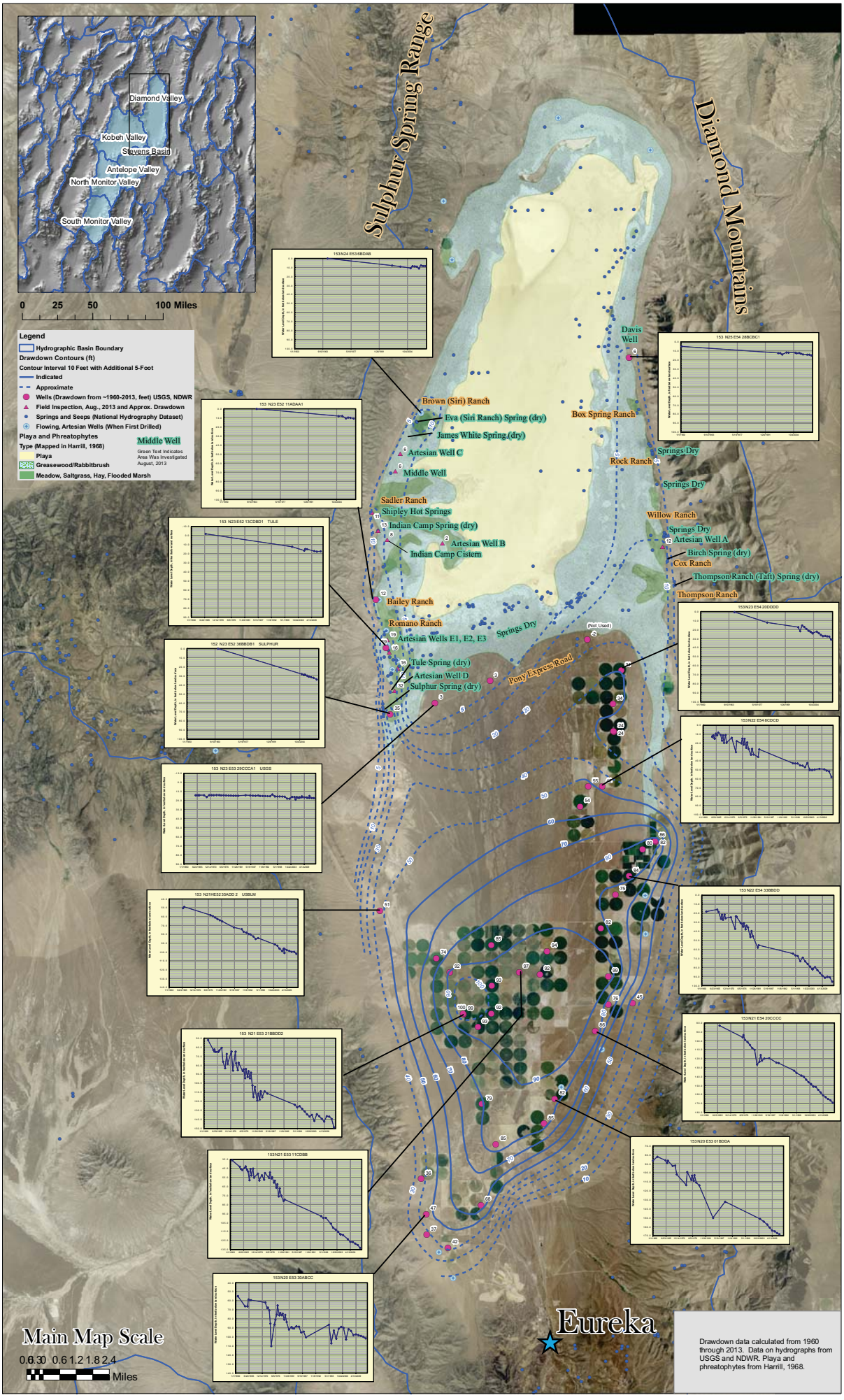

Plate 1: Drawdown in the Basin-Fill Aquifer, Diamond Valley 1960-2013

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GREGORY H. MORRISON

June 11, 2014

Jason King
State Engineer
DIVISION OF WATER RESOURCES
901 South Stewart Street, 2nd Floor
Carson City, Nevada 89701

Re: Request for Adjudication of the Relative Rights of Big Shipley Hot Springs and Indian Camp Springs in Eureka County, Nevada

Dear Mr. King:

This letter serves as a formal request by Sadler Ranch, LLC, to begin the proceedings to adjudicate the relative rights of Big Shipley Hot Springs and Indian Camp Springs located in Diamond Valley, Eureka County, Nevada.

As you are aware, the vested spring rights of the Sadler Ranch have been declining since the onset of the excessive groundwater development in Diamond Valley. In an attempt to continue its historic ranching operation, Sadler Ranch filed a change application of its vested right off Shipley Hot Springs along with several groundwater applications in order to mitigate the diminishment and potential loss of its vested rights. Those applications were protested, and subject to a hearing in your office.

During the hearing process, the Protestants raised a multitude of excuses as to why Sadler Ranch should be denied mitigation opportunity regarding its diminishing vested water sources. One of the issues raised was the ability under Nevada law to change or mitigate a non-adjudicated vested right. While Sadler Ranch continues to hold that all vested rights are entitled equal protection under the law, be they adjudicated or not, we do not object to the initiation of adjudication on these sources.

During the hearing process, volumes of historical data and supporting information were assembled to demonstrate the vesting date and extent of the historic pre-statutory rights of the Sadler Ranch. Experts were hired by the Sadler Ranch to review and opine regarding the historic water use, and those experts are currently familiar with those volumes of documents. Additional documents and research that would be needed for a full adjudication process could easily be provided. In sum, we are ready for adjudication. To delay adjudication would remove the freshness of the material and add extra research time and expert witness cost for experts to become reacquainted with the historic data. With the current conflicts over the mitigation of the Sadler Ranch rights, and the ever diminishing flow of the vested sources, it is imperative that this

issue be addressed in a judicious manner. Soon, there will be nothing left of the once plentiful flows of the vested rights of Sadler Ranch, and continued delay of protecting these valuable rights is simply not an option.

During the said hearing, there was much debate as to what adjudication in Diamond Valley should entail. Sadler Ranch contends that an all-inclusive adjudication of every water source in the entire basin is not judicious and not necessary in this instance. A formal adjudication can take decades for such a vast area, and the inclusion of such a vast area is not necessary to resolve the immediate issues at hand concerning the diminishment of the Sadler water rights. Indeed as was pointed out in the hearing, a basin wide adjudication was originally initiated in the 1980s, and sat inactive for decades.

As such, Sadler Ranch formally requests adjudication of the spring sources known as Indian Camp Springs, Big Shipley Springs, and any other springs, tributaries, or drainages in the immediate vicinity of those water sources. Such a limited adjudication would take a fraction of the time of a basin-wide adjudication and would be a prudent step in resolving the question as to the legitimate extent of the vested rights of Sadler Ranch.

Therefore, pursuant to NRS 533.090, Sadler Ranch petitions the State Engineer to begin the proceedings to adjudicate the relative rights of Indian Camp Springs and Big Shipley Springs, being the same two springs documented under Proofs of Vested Claims V03289 and V03290.

Thank you for your attention to this matter. Please contact me at your convenience with any questions or concerns that may arise.

Sincerely,

GREGORY H. MORRISON, ESQ.
For PAUL G. TAGGART, ESQ.

PGT/tcm

cc: Client

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATIONS)
81719, 81720, 81825, 82268, 82570, 82571,)
82572 AND 82573 FILED TO APPROPRIATE)
THE PUBLIC WATERS OF THE DIAMOND)
VALLEY HYYDROGRAPHIC BASIN (153),)
EUREKA COUNTY, NEVADA.)

RULING

#6290

GENERAL

I.

Application 81719 was filed on March 30, 2012, by Sadler Ranch LLC, c/o Doug Frazer to appropriate 6.0 cubic feet per second (cfs), not to exceed 3,462.38 acre-feet annually (afa), of groundwater for irrigation purposes (supplemental). The proposed point of diversion is described as being located within the NW¼ SE¼ of Section 23, T.24N., R.52E., M.D.B.&M. The proposed place of use is described as being located within portions of the NE¼, SW¼ and SE¼ of Section 13, T.24N., R.52E., M.D.B.&M., portions of the SW¼ and SE¼ of Section 18, T.24N., R.53E., M.D.B.&M., the SW¼ SW¼ of Section 17, T.24N., R.53E., M.D.B.&M., portions of the S½ SW¼, SW¼ SE¼, NW¼, NW¼ NE¼, SW¼ NE¼ of Section 19, T.24N., R.53E., M.D.B.&M., portions of the SE¼ NE¼, portions of the E½ SE¼ of Section 23, T.24N., R.52E., M.D.B.&M., portions of Section 24, T.24N., R.52E., M.D.B.&M., portions of the NW¼, NE¼ of Section 25, T.24N., R.52E., M.D.B.&M., a portion of the NE¼ NE¼ of Section 26, T.24N., R.52E., M.D.B.&M., portions of the NW¼, N½ SW¼, SW¼ NE¼, SE¼ of Section 29, T.24N., R.53E., M.D.B.&M., portions of the NW¼, NE¼, SE¼ of Section 30, T.24N., R.53E., M.D.B.&M., portions of the N½ NE¼ of Section 32, T.24N., R.53E., M.D.B.&M., and portions of the S½ of Section 25, T.24N., R.52E., M.D.B.&M. (1,731.19 acres). Item 12 of the application, which describes the proposed works of diversion, indicates that a groundwater well will be used to provide supplemental resources when water from Big Shipley Spring and tributaries and Indian Camp Springs and tributaries under Proofs of Appropriation V-03289 and V-03290 are not capable of providing sufficient water to irrigate the place of use under the proofs.[1]

[1] Exhibit No. 3, public administrative hearing before the State Engineer November 18-22, 2013, official records in the Office of the State Engineer. Hereinafter the exhibits and transcript will be referred to solely by the exhibit number or transcript page.

II.

Application 81720 was filed on March 30, 2012, by Sadler Ranch LLC, c/o Doug Frazer to appropriate 6.0 cfs, not to exceed 3,462.38 afa, of groundwater for irrigation purposes (supplemental). The proposed point of diversion is described as being located within the NW¼ SE¼ of Section 23, T.24N., R.52E., M.D.B.&M. The proposed place of use and remarks are the same as described under Application 81719.[2]

III.

Applications 81719 and 81720 were timely protested by Diamond Natural Resources Protection and Conservation Association and Mark Moyle Farms, LLC on grounds summarized as follows:[3]

1. The proposed use of the water would conflict with existing rights.
2. There is no unappropriated water from the source.
3. The granting of the applications would be detrimental to the public interest.
4. The Applicant has failed to provide proof as required by NRS § 533.370 of its intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and the financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence.
5. The applications seek to appropriate large quantities of groundwater for irrigation purposes in violation of State Engineer's Order No. 717.
6. The State Engineer may not grant supplemental groundwater rights to mere alleged water rights set forth in the proofs of appropriation.
7. The historic acreage irrigated under the proofs may be insufficient to support the quantity of water sought under the applications.
8. The historic flow of water from Big Shipley Spring and tributaries and Indian Camp Springs and tributaries under the proofs of appropriation may be insufficient to support the quantity of water sought under the applications.
9. The State Engineer should postpone action on the applications until an adjudication of all vested water rights in the basin has been completed.

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[2] Exhibit No. 9.
[3] Exhibit Nos. 4, 8, 10 and 14.

10. The points of diversion under the applications may cause the spring flow to be reduced and eliminated thereby converting the "supplemental" groundwater rights into "primary" groundwater rights.
11. If the applications are granted they should be conditioned on the implementation of a monitoring program and if impacts are demonstrated the Applicant should be required to mitigate those impacts.
12. The water rights claimed under the proofs of appropriation have been abandoned.

IV.

Applications 81719 and 81720 were timely protested by Etcheverry Family, Ltd. Partnership, Diamond Cattle Company and Kenneth Benson (jointly) on grounds summarized as follows:[4]

1. The applications request the year round use of water, which is inconsistent with irrigation practices in the proposed location.
2. The applications seek a duty of 4.0 acre-feet per acre, which is excessive for the meadow hay crop type and weather patterns in the area would likely limit production abilities of meadow hay.
3. Given the state of the Diamond Valley Hydrographic Basin, the State Engineer should require a study prior to granting additional withdrawals from this stressed aquifer.
4. The use of the water will adversely affect the cost of water for other holders of water rights in the hydrographic basin because of the likelihood of increased pumping from lowered water tables.
5. The use of the water will conflict with and be detrimental to the public interest and interfere with existing wells as this stressed groundwater table will suffer further draw down.
6. The use of the water will conflict with existing rights and existing domestic wells.
7. There is no unappropriated water.
8. The applications violate State Engineer's Order No. 815.
9. The proposed manner and place of use are already subject to regulation by the State Engineer's Orders of designation and curtailment.

[4] Exhibit Nos. 5 and 11.

V.

Applications 81719 and 81720 were timely protested by Eureka County on grounds summarized as follows:[5]

1. The water the applications seek to appropriate is actually groundwater discharge accounted for in the estimation of the perennial yield of Diamond Valley. These springs will cease to flow even if only the perennial yield had been appropriated in the valley. The use of the water will only exacerbate the over-appropriation problem in the valley. There is no unappropriated water in the source of supply, the use will conflict with or impair existing rights and protectable interests in existing domestic wells and threaten to prove detrimental to the public interest.
2. The proofs of appropriation make no mention of the annual amount of water that was actively applied to irrigation nor have the claims been validated by the State Engineer through an adjudication. Therefore, the amount of water needed as a supplemental source of irrigation is unknown. Therefore, it seems to follow that the State Engineer cannot grant permits for supplemental groundwater use until a determination is made as to the historical use to be supplemented.
3. Historical evidence does not support a duty of 4.0 acre-feet per acre.
4. While the applications assert they will be supplemental to the vested rights claimed under the proofs of appropriation, the proposed location of the well will likely dry up the springs.
5. The State Engineer is requested to weigh the granting of the applications in balance with State Engineer's orders that regulate use of water in the valley, including State Engineer's Order No. 717.

VI.

Applications 81719 and 81720 were timely protested by James E. Gallagher on grounds summarized as follows:[6]

1. Diamond Valley is over-appropriated; therefore, granting new groundwater appropriations will be detrimental the basin.

[5] Exhibit Nos. 6 and 12.
[6] Exhibit Nos. 7 and 13.

2. Approval of the applications would be contrary to the State Engineer's direction given to the water right holders in the basin to seek solutions to the overdraft situation.
3. The amount of water applied for greatly exceed the amount of water ever put to beneficial use and is more than ever flowed from the springs.

VII.

Application 81825 was filed on April 26, 2012, by Daniel S. Venturacci to appropriate 8.0 cfs, of groundwater for irrigation and domestic purposes. The proposed point of diversion is described as being located within the NE¼ SE¼ of Section 3, T.23N., R.54E., M.D.B.&M. The proposed place of use is described as being located within portions of the S½ NW¼, SE¼ and SW¼ of Section 3, T.23N., R.54E., M.D.B.&M., portions of the NE¼ and SE¼ of Section 4, T.23N., R.54E., M.D.B.&M., portions of the NE¼ of Section 9, T.23N., R.54E., M.D.B.&M., and portions of the N½ NW¼ of Section 10, T.23N., R.54E., M.D.B.&M. (607.93 acres). Item 12 of the application, which describes the proposed works of diversion, indicates that the lands to be irrigated are identical to those described and mapped under amended Proof of Appropriation V-01115 and that the application seeks to restore irrigation by diverting groundwater that formerly discharged at the surface as Taft[7] Springs and applied to the land in a supplemental manner.[8]

VIII.

Application 81825 was timely protested by Diamond Cattle Company, Dusty L. Moyle, Eureka County, James L. Moyle, Kenneth Benson and Mark S. Moyle, and a joint protest was filed by Etcheverry Family Ltd. Partnership, Diamond Cattle Company and Kenneth Benson on grounds nearly identical to those asserted against Applications 81719 and 81720, including also the following:[9]

1. The application seeks to replace the loss of spring flow from Taft Spring, but only references Proof of Appropriation V-01115 yet the land described is also included under Proof of Appropriation V-01114, which claims water from seasonal flow from Horse Canyon. There is no indication of the amount of water flow rate or total quantity used from Horse Canyon.

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[7] Taft Spring is also commonly known as Thompson Spring.
[8] Exhibit No. 15.
[9] Exhibit Nos. 18, 19, 20, 21 and 22.

2. Statements in the proof of appropriation contradict that 4.0 afa duty is used to irrigate crops in that the proof also asserts that a continuous flow of 3.12 cfs has been used to irrigate 607.93 acres.
3. The claimed use of water under Proof of Appropriation V-01114 and V-01115 have not been adjudicated; therefore, the State Engineer cannot grant permits for supplemental groundwater.
4. It is not clear whether the Applicant seeks a right to supplement the vested claims or to fully replace the former spring flow.

IX.

Application 82268 was filed on November 2, 2012, by Sadler Ranch LLC, c/o Doug Frazer to change the point of diversion of water claimed to have been appropriated under Proof of Appropriation V-03289. The application seeks to change "the maximum flow of Big Shipley Spring Complex" – not to exceed 7,457.76 afa of groundwater for irrigation and stockwater purposes. The proposed point of diversion is described as being located within the NW¼ SE¼ of Section 23, T.24N., R.52E., M.D.B.&M. The existing points of diversion are described as Ditch No. 1, Ditch No. 2 and Ditch No. 3, all in the NE¼ SE¼ of Section 23, T.24N., R.52E., M.D.B.&M. The proposed place of use is described as being located within portions of the NE¼, SW¼ and SE¼ of Section 13, T.24N., R.52E., M.D.B.&M., portions of the SW¼ and SE¼ of Section 18, T.24N., R.53E., M.D.B.&M., the SW¼ SW¼ of Section 17, T.24N., R.53E., M.D.B.&M., portions of the S½ SW¼, SW¼ SE¼, NW¼, NW¼ NE¼, SW¼ NE¼ of Section 19, T.24N., R.53E., M.D.B.&M., the SE¼ NE¼, portions of the SE¼ of Section 23, T.24N., R.52E., M.D.B.&M., portions of Section 24, T.24N., R.52E., M.D.B.&M., portions of the NW¼ and NE¼ of Section 25, T.24N., R.52E., M.D.B.&M., the NE¼ NE¼ of Section 26, T.24N., R.52E., M.D.B.&M., portions of the NW¼, SW¼, SW¼ NE¼ and portions of the SE¼ of Section 29, T.24N., R.53E., M.D.B.&M., portions of the NW¼, NE¼ and SE¼ of Section 30, T.24N., R.53E., M.D.B.&M., the N½ NE¼ of Section 32, T.24N., R.53E., M.D.B.&M. (1,657.28 acres). Items 15 and 16 of the application indicate that Proof of Appropriation V-03289 was filed for the diversion of all water from Big Shipley Spring and tributaries for the irrigation of 1,657.28 acres of land and asserts a duty of 4.5 acre-feet per acre and a total duty of 7,457.76 afa. It further indicates that a well designed to intercept the Big Shipley Spring

Complex has been completed and test pumped and that the well is in direct communication with the geologic features that provide water to the Big Shipley Spring Complex.[10]

X.

Application 82268 was timely protested by Diamond Cattle Company, Diamond Natural Resources Protection and Conservation Association, Etcheverry Family Ltd. Partnership, Eureka County, James E. & James T. Gallagher, James L. Moyle, Kenneth Benson and Mark Moyle Farms, LLC on grounds nearly identical to those asserted above, in addition to the following:[11]

1. The application is deficient because it proposes to change the point of diversion for a claimed pre-statutory vested surface water right (V-03289) to a groundwater source that is not recognized under Nevada water law as hydrologically connected.
2. The application is deficient because Nevada water law does not allow a source to be changed through a change application.
3. The appropriate remedy for the claimed decline in the surface water source is enforcement of priority of rights to use water.
4. The application requests a duty that is nearly double the best estimates of historical annual flow from the springs and the 4.5 af per acre duty is far in excess of the generally accepted annual evapotranspiration of crops in Diamond Valley, which is 2.7 af per acre.
5. The proposed "induction" well does not serve to induce the infiltration of surface water, but will intercept groundwater and will thus exacerbate the over-appropriation problem in the basin.
6. The ranch was purchased with full knowledge that the water was not there.
7. The claimed rights have been abandoned.

XI.

Application 82570 was filed on February 25, 2013, by Daniel S. Venturacci to appropriate 2.5 cfs of groundwater for irrigation and domestic purposes. The proposed point of diversion is described as being located within the SE¼ SW¼ of Section 27, T.24N., R.54E., M.D.B.&M. The proposed place of use is described as being located within portions of the SW¼, portions of the SW¼ SE¼ of Section 27, portions of the E½ SE¼ of Section 28, portions of the N½ NW¼, SE¼ NW¼, portions of the W½ NE¼, E½ SW¼, W½ SE¼ of Section 34, all

[10] Exhibit No. 28.
[11] Exhibit Nos. 29, 30, 31, 32, 33, 34, 35 and 36.

in T.24N., R.54E., M.D.B.&M. (344.89 acres). Item 12 of the application indicates that the appropriation seeks to replace pre-statutory vested rights and was filed to mitigate impacts to those existing rights on the Cox Ranch.[12]

XII.

Application 82571 was filed on February 25, 2013, by Daniel S. Venturacci to appropriate 2.5 cfs of groundwater for irrigation and domestic purposes. The proposed point of diversion is described as being located within the NW¼ SE¼ of Section 34, T.24N., R.54E., M.D.B.&M. The proposed place of use is described as being located within portions of the SW¼ and SW¼ SE¼ of Section 27, E½ SE¼ of Section 28, N½ NW¼, SE¼ NW¼, W½ NE¼, W½ SE¼, E½ SW¼ of Section 34, all within T.24N., R.54E., M.D.B.&M. (344.89 acres). Item 12 of the application indicates that the appropriation seeks to replace pre-statutory vested rights on the property from springs and seeps, that the application was filed to mitigate impacts to those existing rights on the Cox Ranch, that the application seeks to supplement existing rights for mitigation purposes and that the water will be used in conjunction with that requested for Cox Well #2 (Application 82570).[13]

XIII.

Application 82572 was filed on February 25, 2013, by Daniel S. Venturacci to appropriate 5.0 cfs of groundwater for irrigation and domestic purposes. The proposed point of diversion is described as being located within the SE¼ SE¼ of Section 3, T.23N., R.54E., M.D.B.&M. The proposed place of use is described as being located within Lot 4, S½ NW¼, portions of the S½ NE¼, SW¼ SE¼ of Section 3, Lots 1-3, S½ NW¼, S½ NE¼, SW¼, SE¼ of Section 4, NE¼ of Section 9, NW¼, N½ NE¼, portions of S½ NE¼, portions of the NW¼ SE¼, SW¼ of Section 10, all within T.23N., R.54E., M.D.B.&M. (1,636.36 acres). Item 12 of the application indicates that the appropriation seeks to replace pre-statutory vested rights, that the application was filed to mitigate impacts to those existing rights on the Thompson Ranch, and that the application seeks to supplement existing rights for mitigation purposes only.[14]

XIV.

Application 82573 was filed on February 25, 2013, by Daniel S. Venturacci to appropriate 2.0 cfs of groundwater for irrigation and domestic purposes. The proposed point of diversion is described as being located within the SE¼ NW¼ of Section 22, T.24N., R.54E.,

[12] Exhibit No. 37.
[13] Exhibit No. 44.
[14] Exhibit No. 52.

M.D.B.&M. The proposed place of use is described as being located within portions of the E½ NE¼, portions of the E½ SE¼ of Section 21, portions of the NW¼, portions of the N½ SW¼, portions of the SW¼ SW¼ of Section 22, all within T.24N., R.54E., M.D.B.&M. (190.59 acres). Items 12 and 13 of the application indicate that the appropriation seeks to mitigate impacts to those existing rights on the Willow Field and is seeking to replace vested water rights on the property from springs and seeps.[15]

XV.

Application 82570 was timely protested by Diamond Cattle Company, Diamond Natural Resources Protection and Conservation Association, Etcheverry Family Ltd. Partnership, Eureka County, Kenneth Benson and Mark Moyle Farms, LLC on grounds nearly identical to those asserted above, in addition to the following:[16]

1. The application seeks to replace unidentified and unadjudicated vested right claims.
2. The Applicant has failed to demonstrate historical and continued use of the underlying vested rights.
3. Nevada water law does not allow a surface water right to be converted to a groundwater right.
4. The historic acreage of land irrigated may be insufficient to support the quantity of water applied for under the application.
5. The historic flow from Cox Canyon and Telegraph Canyon is only seasonal, intermittent, snow-melt runoff that happens only in the spring. No spring complex exists in the area that comes from an underground source.
6. The duty of water requested is too high.
7. The application does not show the decline in the groundwater table is the cause of the reduction in the amount of water available to service the primary vested surface water claims.
8. The Applicant is attempting to circumvent the basin designation orders by first filing a new unadjudicated vested surface water claim and then filing for supplemental groundwater under State Engineer's Order No. 1226.

[15] Exhibit No. 60.
[16] Exhibit Nos. 38, 39, 40, 41, 42 and 43.

XVI.

Application 82571 was timely protested by Diamond Cattle Company, Diamond Natural Resources Protection and Conservation Association, Etcheverry Family Ltd. Partnership, Eureka County, James L. Moyle, Kenneth Benson and Mark Moyle Farms, LLC on grounds nearly identical to those asserted above.[17]

XVII.

Application 82572 was timely protested by Diamond Cattle Company, Diamond Natural Resources Protection and Conservation Association, Etcheverry Family Ltd. Partnership, Eureka County, James L. Moyle, Kenneth Benson and Mark Moyle Farms, LLC on grounds nearly identical to those asserted above, in addition to the following:[18]

1. The historic flow of water from Horse Canyon has always only been seasonal, intermittent, snow-melt runoff that only happens in the spring. No spring complex exists in the area that comes from an underground source outside of Taft or Thompson spring [sic]. Documented spring flows may suggest that Taft or Thompson springs is also fed from seasonal intermittent snow melt.

XVIII.

Application 82573 was timely protested by Diamond Cattle Company, Diamond Natural Resources Protection and Conservation Association, Etcheverry Family Ltd. Partnership, Eureka County, James L. Moyle, Kenneth Benson and Mark Moyle Farms, LLC on grounds nearly identical to those asserted above, in addition to the following:[19]

1. The historic flow of water from Judd Canyon has always only been seasonal, intermittent, snow-melt runoff that only happens in the spring. No spring complex exists in the area that comes from an underground source outside of Taft or Thompson spring [sic]. Documented spring flows may suggest that Taft or Thompson springs are also fed from seasonal intermittent snow melt.

FINDINGS OF FACT

I.

DIAMOND VALLEY HISTORY

The Diamond Valley Hydrographic Basin is significantly over-appropriated due to the fact that groundwater permits and actual groundwater pumping far exceed the perennial yield of

[17] Exhibit Nos. 45, 46, 47, 48, 49, 50 and 51.
[18] Exhibit Nos. 53, 54, 55, 56, 57, 58 and 59.
[19] Exhibit Nos. 61, 62, 63, 64, 65, 66 and 67.

the basin. Diamond Valley has an estimated perennial yield of approximately 30,000 acre-feet annually,[20] but over 130,000 acre-feet of groundwater rights were issued prior to the tenure of the current State Engineer. In 2011, over 96,000 acre-feet of groundwater was actually pumped from the basin.[21]

The over-appropriation of Diamond Valley resulted from water right permits issued in the 1960s pursuant to the Desert Land Entry Act of 1877 (Act). The Act authorized the withdrawal of 640 acres of public land under a single application for private ownership through the reclamation of land for agriculture. When Desert Land Entry applications under the Act were the most active between 1950 through 1964, the State Engineer granted a large number of groundwater permits for Desert Land entries quickly in order to promote settlement throughout Nevada.[22] In issuing water right permits in Diamond Valley, the State Engineer relied upon his experience in dealing with Desert Land entries statewide, and his experience was that the success rate of Desert Land entries was quite low - about 18%.[23] The oral history of a former State Engineer gives one estimate that "nine out of ten people who obtained a Desert Land Entry failed in trying to develop [the] desert lands."[24] The low success rate was attributed to the Federal Government's denial of Desert Land Entry applications; hence, over-appropriation of the water resources of Nevada was not considered probable due to the fact that overwhelmingly, Desert Land Entry applications turned out to be unsuccessful. However, unlike the experiences in other areas of the state, the success rate in Diamond Valley turned out to be much higher than expected and the quantity of groundwater issued under permits soon exceeded the perennial yield. Here, the high success rate was attributed to the availability of electricity for agricultural pumping in the early 1970s, which resulted in an increase in large-scale pumping.[25]

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[20] Nevada Division of Water Resources (NDWR) Hydrographic Area Summary for Diamond Valley – Basin 153; *and see* Exhibit No. 304.
[21] NDWR Crop Inventory and Groundwater Pumping Inventory for Diamond Valley – Basin 153 (2011).
[22] *See* University of Nevada Oral History Program, *Hugh A. Shamberger: Memoirs of a Nevada Engineer and Conservationist*, UNOHP Catalog #019, p. 35, 1967.
[23] U.S. Department of Interior, Bureau of Land Management, Nevada State Office, *Analysis of Agricultural Potential for Desert Land entries in Nevada*, p. 5, May 1979.
[24] University of Nevada Oral History Program, *Hugh A. Shamberger: Memoirs of a Nevada Engineer and Conservationist*, UNOHP Catalog #019, p. 37, 1967.
[25] Exhibit No. 108, p. 9.

In 1964, the State Engineer issued State Engineer's Order Nos. 277 and 280, which designated a portion of the basin as coming under the provisions of Nevada Revised Statute Chapter 534 as providing for the conservation and distribution of groundwater. In December 1975, the State Engineer curtailed granting applications in the southern portion of Diamond Valley because the groundwater was being depleted in that area of the basin. In July 1978, the State Engineer ordered that all applications filed after December 31, 1978, to appropriate groundwater for irrigation purposes in Diamond Valley be denied. In 1982, the State Engineer held several hearings to consider whether to curtail the pumping of groundwater in Diamond Valley. The State Engineer did not curtail pumping at that time; but, for the purpose of obtaining more accurate information concerning the effects of pumping on the average annual replenishment to the groundwater supply, in 1983 ordered that measuring devices be placed on irrigation wells in the basin, and later that same year, extended the boundaries of the designated area to include all of Diamond Valley.

At the 1982 hearing, the State Engineer discussed with water right holders his concern that the basin's irrigators were going to reach a point where their economic survival would be in danger due to water level declines and impacts to existing senior rights, ultimately requiring regulation by priority. At that hearing, there was discussion about drilling a groundwater well for Mr. Milton (Milt) Thompson due to the reduced flow of his spring, which is the same issue and one of the same water sources currently before the State Engineer in the present Applications.

Similarly, in 1992, the State Engineer met with the Diamond Valley farmers to discuss forming a Diamond Valley Groundwater Board pursuant to NRS § 534.035. The State Engineer suggested that if a Board were to be formed, it should consider ideas to bring the basin back into balance, including:

1. Forfeiting water rights that had not been used in a long time;
2. Having every water right holder take a "cut" across the board to their water rights (which could be accomplished by an Order);
3. Requesting the State Engineer reduce agricultural duties to an appropriate level; and
4. Requesting that water rights be curtailed by priority as set forth in NRS Chapter 534.

The formation of a Diamond Valley Groundwater Board never occurred due to funding issues.

Again, in March of 2009, the Office of the State Engineer held a meeting in Eureka, Nevada, to provide information to the Diamond Valley water right holders regarding the status of the basin and possible solutions to the water level declines and impacts to water rights. The State Engineer outlined various regulatory tools he had at his disposal, but most importantly, implored the water right holders to begin working on a groundwater management plan among themselves in the hope that stakeholders would take the opportunity to control their destiny in terms of future basin management. Currently, no groundwater management plan has been submitted to the State Engineer.

II.

THE CURRENT APPLICATIONS

The applications under consideration in this ruling present unique questions and challenges. While most of the applications under consideration were filed as "new appropriations" of groundwater, in effect, they could also be considered as applications that are changing the points of diversion from those where the spring water was previously diverted to new wells that will penetrate the aquifer from which the springs discharged. The water rights these applicants seek to mitigate were from springs along the margins of the valley floor that either no longer flow or flow at a significantly reduced rate. Sadler seeks to replace water lost from Shipley Spring and tributaries and Indian Camp Springs along the west side of the valley. Venturraci seeks to replace water that formerly discharged at the surface as Taft (Thompson) Springs and waters claimed to have been used on the Cox Ranch and Willow Field along the east side of the valley. As will be discussed below, this is not an adjudication of the relevant vested right claims which remain subject to a future adjudication. The granting of any of the current applications is to mitigate the loss of spring discharge necessary to produce the amount of historical crop production, as may be produced today using modern and efficient irrigation practices.

As above-described, historically, many groundwater appropriators of Diamond Valley have resisted the State Engineer's efforts to address over-appropriation of the basin; however, the State Engineer cannot continue to delay action at the request of groundwater appropriators and must address allegations that groundwater pumping by junior right holders is conflicting with senior water rights on springs along the mountain front on either side of the valley. The first effort to address the issue came on March 26, 2013, when the State Engineer issued Order No. 1226, which provided for the filing of applications to, among other things, appropriate

groundwater to mitigate senior surface water rights that have been impacted by groundwater pumping under junior water rights.[26]

A. Big Shipley Spring (west side of valley)

Applications 81719 and 81720 indicate that the groundwater will be used to provide supplemental resources when water from Big Shipley Spring and tributaries and Indian Camp Springs and tributaries under Proofs of Appropriation V-03289 and V-03290 are not capable of providing sufficient water to irrigate the place of use claimed under the proofs.

Application 82268 is an application that seeks to change the point of diversion of water claimed to have been appropriated under Proof of Appropriation V-03289, and the application indicates that a well has been designed to intercept the Big Shipley Spring Complex where the well is in direct communication with the geologic features that provide water to the Big Shipley Spring Complex.

B. Thompson Spring and others (east side of valley)

Application 81825 indicates that the lands to be irrigated are identical to those described and mapped under amended Proof of Appropriation V-01115 and that the application seeks to restore irrigation by diverting groundwater that formerly discharged at the surface as Taft Springs and applied to the land in a supplemental manner.

Applications 82570 and 82571 indicate that the appropriations seek to replace pre-statutory vested rights on the property from springs and seeps; that the applications were filed to mitigate impacts to existing water rights on the Cox Ranch; and that the applications and seek to supplement those existing rights for mitigation purposes.

Application 82572 indicates that the appropriation seeks to replace pre-statutory vested rights; the application was filed to mitigate impacts to those existing rights on the Thompson Ranch; and that the application seeks to supplement existing rights for mitigation purposes.

Application 82573 indicates that the appropriation seeks to replace pre-statutory vested water rights on the property from springs and seeps and to mitigate impacts to those existing rights on the Willow Field.

[26] Exhibit No. 2.

The State Engineer finds there has been confusion over the intent of the applications by the reference to "supplement," which is a term of art in water law when discussing "supplemental water rights." Applicants refer both to "mitigate" and "supplement" in their applications and the State Engineer must determine the purpose for which the applications were filed. The State Engineer finds that Applications 81719, 81720, 81825, 82570, 82571, 82572 and 82573 are applications that were filed to replace pre-statutory vested spring water rights claimed under various proofs of appropriation; and, Application 82268 was filed to change the point of diversion of water claimed to have been appropriated under Proof of Appropriation V-03289. The applications are not filed as "supplemental" water rights as that term is interpreted and used by the Office of the State Engineer, for example, to supplement a stream source with groundwater when the surface water is not available. Rather, the State Engineer finds the intent of the applications is to mitigate the decrease in flow or loss of spring rights through replacement water.

III.

THE STATE ENGINEER HAS AUTHORITY TO ACT ON THE APPLICATIONS WITHOUT AN ADJUDICATION OF ALL PRE-STATUTORY VESTED RIGHTS

Protestants question whether the State Engineer has authority to protect pre-statutory vested water rights prior to, or without a full adjudication of all pre-statutory vested rights first. They argue that the final scope of any claimed pre-statutory vested water right can only be judicially determined, and until a court determines the scope of all rights through an adjudication, including the priority date, diversion rate, duty and season of use, the State Engineer lacks authority to determine the scope of pre-statutory vested water rights himself. Relying on *Pacific Livestock Co. v. Malone*, 53 Nev. 118, 294 P. 538 (1931), Protestants argue that since an adjudication is an indispensible prerequisite for subsequent administration of the rights by the State Engineer, there is no authority for the State Engineer to regulate these rights until after an order of determination is filed in the district court. Consequently, Protestants argue the State Engineer cannot grant "mitigation" rights for impaired pre-statutory vested rights pursuant to State Engineer Order 1226, because the proofs of appropriation are merely placeholders for yet-to-be-determined vested rights.

Applicant Sadler argues that pre-statutory water rights are "vested" rights and disputes Protestants' position that the right is not vested until decreed by a court.[27] Citing *In re Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535 (1949), Sadler asserts that a vested water right is "a right to use water that has become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provide by the water law." Sadler argues that pre-statutory water rights, often referred to as "vested rights," are established through "appropriation," defined as "[a]n actual diversion of the [water], with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time." *Id.* 66 Nev. at 23, 202 P.2d at 537-38 (quoting *Walsh v. Wallace*, 26 Nev. 299, 67 P. 914 (1902)).

Sadler argues that once the water was diverted with the intent to apply it to a beneficial use, and then put to beneficial use within a reasonable time, the water was "appropriated" and a vested water right was established, which the State Engineer should and can protect. Sadler asserts that Protestants are incorrect in stating a vested right does not come into existence until after an adjudication, and that neither the filing of a proof of appropriation nor an adjudication of such a claim is necessary for a pre-statutory vested water right to exist. Sadler asserts that while an adjudication of pre-statutory vested water rights creates a final determination of a pre-statutory vested right, it does not establish, create, or otherwise bring the right into existence, and neither the filing of a proof of appropriation with the State Engineer nor an adjudication is necessary for a pre-statutory water right to vest.

The State Engineer agrees with Applicants' argument regarding the existence pre-statutory vested rights and also concurs with Applicants that the State Engineer has the responsibility under NRS § 533.085 to take action to protect pre-statutory vested water rights in Diamond Valley - even absent a final decree in a statutory adjudication.

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[27] The State Engineer notes that one must carefully use the term "vested." "The term 'vested rights,' as that term is used in relation to constitutional guarantees, implies an interest it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice. It is some interest in property that has become fixed and established. When used in connection with a water right . . . it means simply that a right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by the water law, and is a right which is regarded and protected as property. The term 'vested right' is sometimes used to describe water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, related to appropriation. We use it here, however, as a term describing a water right which has become fixed and established either by diversion and beneficial use or by permit procured pursuant to the statutory water law relative to appropriations." *In re Application of Filippini*, 66 Nev. 17, 22, 202 P.2d. 535, 537 (1949) (internal citations omitted).

In *Orsmby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914), the Nevada Supreme Court held that the adjudication statutes as originally enacted, were unconstitutional because the statutes permitted the State Engineer to finally adjudicate water rights with no right to appeal from that decision. In its analysis, the court recognized that most water rights upon the streams of the state were undetermined by any judicial decree or other record; however, the rights existed nonetheless – albeit undefined. For the state to administer such rights, it was necessary that they should be defined. This, however, did not attempt to take away the right to have the matter finally adjudicated by the courts. 37 Nev. at 339, 142 P. at 806.

The District Court of Nevada in *Bergman v. Kearney*, 241 F. 884, 898 (D. Nev. 1917), citing Willoughby, *The Constitutional Law of the United States*, observed that "[t]here is no constitutional objection to vesting the performance of acts essentially judicial in character in the hands of the executive or administrative agents, provided the performance of these functions is properly incidental to the execution by the department in question of functions peculiarly its own." *See also, Nev. Industrial Ins. Comm'n v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977) (discussing State Engineer's quasi-judicial powers). The State Engineer finds that any quantification he makes in determining the scope of the water use claimed, including the priority date, diversion rate, duty, season and manner of use, is merely preliminary and made within the capacity of his administrative/quasi-judicial function and any claimed pre-statutory vested water right will still be subject to a full adjudication and judicial final determination. *See Salmon River Canal Co. Ltd. V. Bell Branch Ranches, Inc.*, 564 F.2d 1244, 1247 (9th Cir. 1977) (permit application proceedings do not have such conclusive effect and can only attain that status after being subject to the adjudication proceedings). The consideration of the State Engineer of mitigation applications is not an adjudication of the relative water rights, but rather, is confined to the administrative powers of the State Engineer in the supervision of the state's water. *See id.* (interpreting permit application proceedings under NRS § 533.430(1) not to be an adjudication of the relative water rights, but rather only for the administrative use of the State Engineer to aid in his supervision of the state's waters).[28]

[28] *See also, e.g.*, Ruling No. 16, official records in the Office of the State Engineer (State Engineer's administrative determination of vested rights claims in acting on permit applications).

Nevada Revised Statute § 533.085(1) provides that "[n]othing contained in [Chapter 533] shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913." Additionally, NRS § 533.030(1) provides that "[s]ubject to existing rights, and except as otherwise provided in this section, all water may be appropriated for beneficial use as provided in this chapter and not otherwise." The State Engineer issued water right permits junior in priority to the claimed pre-statutory vested water rights and those junior rights were issued subject to existing rights. The issuance of the junior permitted groundwater rights does not defeat the interest claimed by senior water right holders.

Protestants dispute the extent of the claimed pre-statutory vested rights and argue the State Engineer has no authority over the rights until at least the filing of an order of determination with a district court pursuant to the statutory adjudication process. There, they claim, a court will make a final determination as to the parameters of any pre-statutory vested water right. The State Engineer rejects these arguments and finds he is acting within the scope of his administrative/quasi-judicial duties to protect pre-statutory vested water rights and that any determination he makes as to the scope of those rights is merely preliminary subject to a final adjudication by a court of law. Nothing in acting on the pending applications is intended to supplant a later determination by a court of the extent of the pre-statutory vested water rights, nor is the right to have the matter finally adjudicated by the courts taken away. The performance of protecting senior rights is properly incidental to the exercise of the State Engineer authority in the issuance of, and protection of water rights.[29] The State Engineer finds the examination of the evidence on the vested right claims serves to factually establish the extent of any limitation that may be placed on any permit issued to mitigate a pre-statutory vested water right.

[29] NRS § 534.090(1) provides that the State Engineer may forfeit an "undetermined right," which could be an unadjudicated pre-statutory vested groundwater right or an unperfected permitted right. "If such right was undetermined right, *i.e.*, a vested right that had not been determined by an adjudication procedure, the loss would be by forfeiture." *Biennial Report of the State Engineer for the Period July 1, 1948, to June 30, 1950, Inclusive*, Carson City, Nevada, pp. 66-67 (1950). This is a clear demonstration of the State Engineer's authority to act with regard to unadjudicated pre-statutory vested water rights has been the law for a long period of time.

IV.

THE STATE ENGINEER HAS AUTHORITY TO PROTECT SENIOR RIGHTS THROUGH "REPLACEMENT" OR "MITIGATION" WATER

Protestants argue that NRS § 532.110 provides that the State Engineer may only perform those duties that are granted by the legislature. Additionally, Protestant Eureka County argues that no statutory or case law exists to allow the State Engineer to grant "replacement" or "mitigation" groundwater rights for an unadjudicated claim of a pre-statutory vested water right that will carry the same date of priority as the unadjudicated claim.

Applicants assert that any water right permit issued for "mitigation" or "replacement" water should carry the priority date of the claimed pre-statutory vested water right. Applicant Sadler argues if no remedy exists, the junior groundwater users' use of the water violates Nevada water law and the junior users should be immediately ordered to cease pumping in order to comply with the terms of their permits, which requires them to yield to existing senior rights.

Nevada's water law provides the State Engineer with various tools to address appropriations of water in Nevada, including situations involving declining groundwater levels or over-appropriated basins. Nevada Revised Statute § 534.120(1) provides that within a designated area that the State Engineer determines the groundwater basin is being depleted, the State Engineer may administratively make rules, regulations and orders deemed essential for the welfare of the area involved. The State Engineer may also conduct investigations in a basin where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and vested-right claimants, and if the findings indicate, the State Engineer may order that withdrawals, including from domestic wells, be restricted to conform to priority of rights. NRS § 534.110(6). In addition, NRS § 534.110(7) provides that the State Engineer may designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.

The State Engineer possesses express statutory power pursuant to NRS § 534.120(1) by which Order 1226 was issued as an order deemed essential for the welfare of the Diamond Valley basin.[30] "It is the universal rule of statutory construction that wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." *Checker, Inc. v. Public Service Comm'n*, 84 Nev. 623, 629-630, 446 P.2d 981, 985 (1968). Any implied power must be essential to carry out an agency's express statutory duties. *City of Henderson v. Kilgore*, 122 Nev. 331, 131 P.3d 11, 14 (2006). As previously noted, NRS § 533.085 provides for the protection of vested rights from new appropriations granted under the statutory permitting process. The State Engineer's duty to avoid conflicting with existing rights by the issuance of permits necessarily implies the authority to use his judgment as to the content of such rules, regulations and orders that are necessary to protect the welfare of senior right holders in designated areas.

The water law does not direct the State Engineer to use a particular tool based upon the situation, but rather, gives him the discretion to fashion the most appropriate remedy. If the State Engineer has no authority to protect senior rights then the entire prior appropriation system would be meaningless for the lack of any a right or remedy for senior right holders whose rights are impacted by junior rights. For that reason, the label "mitigation" or "replacement," does not control the analysis, as the purpose for which the applications are being considered is to carry out the duty of the State Engineer in protecting senior rights.

In addition to express and implied statutory authority, *supra*, an additional source of authority for the State Engineer to mitigate impacts to pre-statutory vested rights is through inherent police powers. *See Ormsby County v. Kearney*, 37 Nev. 314, 336, 142 P. 803, 806 (1914) (one of the main purposes of the 1913 [water] law was to place stream systems under state control, a lawful exercise of police powers which may be legitimately exercised for the purpose of preserving, conserving, and improving the public health, safety morals, and general welfare); *and see, Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650 (D. Nev. 1926) (the condition of the need for water and insufficient supply have demanded from the state an exercise of its police power to ascertain rights and to regulate and *protect them*); *Humboldt Lovelock Irr. Light & Power Co. v. Smith*, 25 F.Supp. 571 (D. Nev. 1938) (it is well settled law in the arid and semi-arid states that a state, in the exercise of its police power, may regulate the matter of appropriation and distribution of water from natural streams for irrigation). In *Ormsby County*,

[30] No appeal was taken from State Engineer Order No. 1226.

the Court recognized the importance of securing users to their rights, but also stated that the state "at large" has an interest in protecting prior appropriators in their rights. 37 Nev. 337, 142 P. at 805.[31]

> Indeed, in *Bergman v. Kearney*, the court there stated:
>
> The idea that the individual has a vested right to enjoy the use of running water without public regulation or control is subversive of the sovereignty of the state. The state cannot divest itself of, or surrender, grant, or bargain away, this authority. Whenever the general public morals, health, safety, or welfare demand it, it becomes the duty of the state to exercise its police power of regulation and control, to the end that the individual may be restrained from exercising rights of ownership or possession to the substantial injury of others, or to the detriment of the community; and this restraint may be such as the Legislature in its wisdom deems reasonable and expedient.

241 F. at 893.

The State Engineer finds that since the 1960s, State Engineers have had meetings in Diamond Valley to address the over-appropriation of the basin and each time, the State Engineer has been discouraged by many groundwater right holders from regulating the basin on the basis of priority. If the basin is regulated by priority, there will undoubtedly be large impacts, including financial impacts to many citizens of Eureka County. The State Engineer has contemplated declaring the Diamond Valley a critical management area pursuant to NRS § 534.110(7), but again, has been largely discouraged from pursuing that remedy by citizens

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[31] As Mr. Justice Coleman, in *Vineyard Land & Stock Co. v. Dist. Ct.*, 42 Nev. 1, 26-27, 171 P. 166, 172-173 (1918), explained, radical changes are not accepted without protest. "If a statute is radically different from anything to which we have been accustomed is enacted, the average lawyer becomes alarmed and at once brands it as unconstitutional. Lawyers generally were very much excited and alarmed when the statutes of the various states creating railroad commissions, corporation commissions, industrial insurance commissions, and the like, were enacted. They considered them not only unconstitutional but revolutionary. Lawyers do not feel that way about the matter today, because they have become used to such statutes. . . .We are too prone to view legislation as unconstitutional, unmindful of the fact that, unless a statute violates the letter or spirit of some portion of the constitution, it should be upheld. . . . hidebound constructions are unnecessary, and they imperil the existence of constitutional government. The constitutional guaranties must be maintained; but the only way to maintain them is to mold them to the requirements of modern civilization. They must be reins to guide the chariot of progress in the road of safety, not barriers across its track."

Although granting a mitigation right may appear "revolutionary," causing alarm and concern among Protestants, the State Engineer has authority to protect users in their rights, as evidenced by the State Engineer's prior grant of a mitigation right in Diamond Valley. *See* Joint Exhibit No. 297.

concerned with the stigma that declaration will place on the basin. Diamond Valley had been a designated basin for decades and it is widely known that the groundwater basin is being depleted.

The State Engineer finds, as discussed later in this Ruling, a preponderance of the evidence shows that the groundwater pumping has lowered the water table and caused the reduction in spring flows. The State Engineer finds he has the express statutory authority to issue Order No. 1226, which necessarily also provides implied authority to articulate a remedy to assist pre-statutory vested water right holders whose rights have been impacted by junior groundwater users. Action on the applications is compelled, where, the State Engineer finds he has the obligation to protect existing water rights generally, in addition to the actual water right holders specifically in this case.

Over-and-above the State Engineer's express and implied statutory authority, the State Engineer finds he can also act pursuant to inherent police power to protect the welfare of senior right holders by securing and protecting them to their rights, including remedying injury to the rights.

V.

THE APPLICATIONS ARE NOT VIOLATIVE OF PRIOR ORDERS BY THE STATE ENGINEER

Protestants assert that the applications seek to appropriate large quantities of groundwater for irrigation purposes in violation of State Engineer's Order Nos. 717 and 815. The State Engineer recognizes that at the time several of the applications were filed, State Engineer's Order No. 1226 was not in effect. Order No. 717 issued in 1978 prohibited the granting of new appropriations of groundwater for irrigation purposes, and Order No. 815 issued in 1983 expanded the area designated in Diamond Valley. However, the State Engineer finds at the time this Ruling is issued, these applications are being considered under the provision of State Engineer's Order No. 1226, which provides for applications filed to mitigate senior surface water rights that have been impacted by groundwater pumping under junior rights.

VI.

DID GROUNDWATER PUMPING DRY UP SPRINGS ON SADLER AND VENTURACCI PROPERTY?

Applicants assert that the evidence supports a determination that groundwater pumping in Diamond Valley has caused springs to no longer flow at rates they formerly flowed, including Indian Camp Springs, Shipley Spring (a.k.a. Big Shipley Spring or Shipley Hot Springs) and Taft Spring (a.k.a. Thompson Spring).

Testimony and evidence was provided to support a claim that groundwater pumping in southern Diamond Valley has caused basin-wide groundwater level declines reaching drawdowns of 100 feet or more in portions of southern Diamond Valley.[32] The evidence demonstrates that a "cone of depression" of up to 100 feet in southern Diamond Valley is expanding to the north.[33] Sadler asserts that springs have dried up as a result of this lowering of groundwater levels.[34] Venturacci also asserts that the groundwater pumping in southern Diamond Valley has caused Shipley Spring and Thompson Spring flows to decline.[35]

Sadler argues that the impacts to the springs in Diamond Valley were predicted by the USGS in the 1960s and that pumping in the southern end of Diamond Valley is the obvious cause of the declines in these springs. Venturacci asserts that the Protestants have conceded the same and that Protestants' expert agreed that Thompson Spring no longer flows due to drawdown of the groundwater level in the valley.[36]

Sadler's expert hydrogeologist, Dwight Smith, is of the opinion that drawdown from long-term regional groundwater pumping in Diamond Valley is impacting the flow of Shipley Spring and has caused the cessation of discharge from Indian Camp Springs, both located on the Sadler Ranch.[37] Exhibit No. 108 is the expert witness report from Mr. Smith, which provides the information included below.

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[32] Exhibit No. 108, p. 12, Plate 1; Exhibit No. 290, pp. 5, 10; Exhibit No. 302, pp. 1, 5, 6, 7, 11; Transcript, pp. 1071, 1284, 1336 -1367.
[33] Exhibit No. 108, pp. 0, 6, 12-14, Plate 1; Exhibit No. 189, pp. 2, 7; Transcript, pp. 1071-1072, 1368-1370.
[34] Exhibit No. 108, pp. 2, 12-14, Plate 1; Exhibit No. 201, p. 1; Exhibit No. 203, p. 1; Exhibit No. 302, pp. 1, 7, 11; Transcript, pp. 533-534, 569-570, 1284, 1320, 1387.
[35] Exhibit No. 108, pp. 0, 6, 12, 16; Exhibit No. 189, p. 7; Exhibit No. 201, p. 3; Exhibit No. 302, pp. 1, 7, 11; Transcript, pp. 533-534, 1304, 1320.
[36] Transcript, pp. 1387-1388.
[37] Exhibit No. 108.

Prior to the mid-1960s, reported discharge from Shipley Spring covered a wide range, varying between 8 and 15 cfs. Mr. Smith opines that an average of those estimates of between 11 to 12 cfs (8,000 to 8,700 afa) is the likely average flow of Shipley Spring prior to accurate measurements in the 1960s.[38] In the mid 1960s, discharge measurements of Shipley Spring by the USGS averaged about 6.8 cfs (4,900 afa). From the mid 1980s to early 1990s, Shipley Spring discharge ranged between 4.4 and 8.3 cfs, averaging 6.2 cfs (4,500 afa). In the summer of 2013, the flow of Shipley Spring was measured to be less than 2 cfs. Mr. Smith states that the declining trend of flow prior to the 1960s is the result of flowing artesian wells in the area of Shipley Spring. Flow decline since the 1960s he attributes to the regional expansion of the basin-scale cone of depression resulting from extensive agricultural pumping in the southern portion of Diamond Valley.[39] Mr. Smith concludes that the flowing artesian wells may have caused about 30% of the decline in Shipley Spring.[40]

Smith notes that starting in the 1940s, several artesian wells were drilled on the Romano Ranch, approximately 4.5 miles south of Shipley Spring. At the time they were drilled, the wells flowed at a rate of about 4 cfs, (approximately 2,800 afa annualized). In 1968, Harrill reported a total of seventeen flowing artesian wells on the western side of central-northern Diamond Valley, including one on the Sadler Ranch itself (Middle Well). Flow from the Romano Ranch wells had declined to about 1.2 cfs (840 afa annualized). The total artesian flow from wells in the Romano Ranch, Sadler Ranch, and Siri Spring areas in 1965 was measured at 1.9 cfs (1,350 afa annualized).[41] Flow of these wells decreased substantially over the course of a decade after they were drilled.[42]

Indian Camp Springs is located about ¾ of a mile south of Shipley Spring. Mr. Smith indicates that the "spring" was actually comprised of over a dozen springs and seeps emanating along a spring-line that was developed by cutting a trench parallel to the land contour. Flow at Indian Camp Spring was estimated in 1961 at 1.5 to 2 cfs. In 1965, flow was measured at 0.66 cfs and 0.82 cfs in 1966 (540 afa). The spring discharge was believed to have been warm water.[43] Mr. Smith believes that artesian wells drilled to the south of the spring in the 1940s to 1950s probably had some initial impact on the flow of Indian Camp Spring, which was later

[38] Exhibit No. 108, p. 0.
[39] Exhibit No. 108, p. 6.
[40] Exhibit No. 108, p. 16.
[41] Exhibit No. 304, pp. 71-73.
[42] Exhibit No. 108, p. 7.
[43] Exhibit No. 108, p. 5.

further impacted by regional drawdown sourced from the southern portion of Diamond Valley.[44] Mr. Smith opines that the artesian wells drilled in the area could have affected the flows at Indian Camp Spring and Shipley Spring and that artesian wells drilled north of Shipley Spring, one on the Sadler Ranch (Middle Well) and one on the Brown Ranch (now owned by Sadler Ranch) may have also created water-level drawdown that resulted in reduced spring discharge.[45] However, Mr. Smith also believes that as the effects of regional drawdown continue to affect Shipley Spring and Indian Camp Spring.[46] Mr. Smith notes that all the springs in central Diamond Valley and along the western side of the playa south of the Brown Ranch, except Shipley Spring, have ceased to flow.[47]

The Protestants' expert witnesses Dale Bugenig and Mary Tumbusch note that "[i]t is widely acknowledged that over-appropriation of the groundwater resources in Diamond Valley resulted in a widespread decline in water levels in the basin as well as the reduction in the flow of springs within the groundwater discharge areas mapped by the United States Geological Survey in the northern half of the valley."[48] They agree that it is possible that discharge from Shipley Spring and Indian Camp Spring has to some degree been diminished by the pumping of junior groundwater appropriators; however, they also assert that other stresses may have affected the discharge from Shipley Spring and Indian Camp Spring. "The most likely influence is groundwater pumping by Sadler Ranch LLC and its predecessors at a location approximately three miles north-northeast of Shipley Hot Springs."[49]

Prior to the Brown Ranch being combined with the Sadler Ranch, three irrigation wells were drilled on the Sadler and Brown ranches. One well was drilled in 1960 on the Sadler Ranch 1.5 miles north-northeast of Shipley Spring. This well originally flowed under artesian pressure at a rate of 400 gallons per minute (gpm) and had a shut-in pressure of 14 feet of water above land surface, but by 1965 the rate of flow had reduced to 100 gpm (160 afa). Two wells were drilled on the Brown Ranch approximately 3 miles north-northeast of Shipley Spring. One well was completed in 1967 and reportedly flowed under artesian pressure at a rate of 400 gpm. Another well was drilled in the same area in 1977. While the well on the Sadler Ranch may have only been used as a stockwater well, the wells on the Brown Ranch historically provided as

[44] Exhibit No .108, p. 6.
[45] Exhibit No. 108, p. 7.
[46] Exhibit No. 108, p. 8.
[47] Exhibit No. 108, p. 12.
[48] Exhibit No. 302, p. 1.
[49] Exhibit No. 302, p. 1.

much as 2,002 acre-feet per year.[50] Mr. Bugenig and Ms. Tumbusch performed an analysis to demonstrate that some of the reduction in flow at Shipley Spring and Indian Camp Spring is likely the result of self-imposed harm by locating wells so close to the springs and concluded that, given their proximity, pumping from wells on the Sadler and Brown Ranches may have a greater affect on Shipley Spring flows than irrigation wells south of the playa in the main farm district.

Mr. Bugenig and Ms. Tumbusch also theorize that the decline in Shipley and Indian Camp Springs are caused by other influences such as long-term climate change, watershed and land use changes such as pinion and juniper trees growing in the hills and changes in aquifer permeability due to compaction, mineral precipitation or solution, or sediment movement/accumulation into open fracture spaces.[51] The Protestants' expert witnesses were of the opinion that "78 percent of the cause in decline in Shipley Spring is from pumping in southern Diamond Valley," and "there is an uncertainly of about 20 percent having been not caused by the pumping."[52]

The State Engineer finds that there is sufficient information to estimate historic flows from Shipley Spring. Figure 1 of Exhibit No. 108 shows reported estimates and reported measurements of flow from Shipley Spring from 1912 to 2012. Accurate measurements, that is, all those made by the USGS and all measurements made after 2000,[53] show low to moderate variability in spring flow. Natural variability appears to be about 1 cfs in the 1960s, about 3 cfs based on measurements from the 1980s, and less than 2 cfs since 2008.[54] There is a distinct declining trend from 1965 to 2012, and the State Engineer finds that this decrease in discharge is caused by the decline in the groundwater table due to agricultural pumping in the areas near Shipley Spring and in the southern portion of the valley. The State Engineer does not agree sufficient evidence exists for a finding of reduced flow at Shipley Spring as a result of climate change, land use and watershed changes, or due to mineral precipitation in the spring vents.

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[50] Exhibit No. 302, p. 23.
[51] Exhibit No. 302, p. 7; Transcript, p. 1283.
[52] Transcript, pp. 1372-1373, 1402-1403.
[53] Transcript, pp. 1296-1297.
[54] Exhibit No. 108, p. 3.

In the 1960s, estimates of spring discharge by Eakin and Sadler are not consistent with the measurements of the USGS in their National Water Information System, even though Eakin was employed by the USGS. None of the discharge estimates prior to 1960 are represented as actual measurements in their source reports. Even the Nevada State Engineer's estimates from 1912 are noted as estimates, not measurements. Therefore, the State Engineer is discounting all reported discharge estimates made prior to 1970 that were not performed by the USGS, as being unreliable.[55]

It is important to ascertain the actual flow of Shipley Spring prior to the effects of nearby wells, regardless of whether the wells were pumped or flowed under artesian conditions. In 1965, Shipley Spring had an average discharge of approximately 6.8 cfs (4,900 afa annually).[56] Flows in 1965 are not likely to have been influenced by pumping from the main agricultural area in the southern part of the basin. Harrill indicates the limit of drawdown from pumping in 1966 was still eight miles from Shipley Spring, and as such could not cause a decline in spring discharge. Therefore, the flow of Shipley Spring in 1965 could only have been reduced by natural causes (+/- 3 cfs) or by nearby wells along the northwestern edge of the valley. Wells were drilled as early as the 1940s. Many wells flowed under artesian conditions, and as noted by Smith, natural flows from the wells decreased fairly rapidly from the time they were first drilled.[57] Wells on the Romano Ranch, 4½ miles south of Shipley, were reported to flow about 4 cfs at the time they were drilled (2,900 afa annualized), but those same wells flowed at 1.2 cfs (840 afa) by 1965. The well on the Brown Ranch, about 1½ miles north of Shipley, flowed at 400 gpm (640 afa annualized) when it was drilled in 1960,[58] but flow had declined to 100 gpm by 1965.[59] The total discharge of all the flowing wells in the vicinity of Shipley Spring in 1965 was reported at 1.8 cfs (1,320 afa). The Applicant's expert witness argues that flowing wells at Romano Ranch and Brown Ranch caused a 4 cfs decline in the discharge of Shipley Spring prior to 1965.[60] That is, a near 1:1 effect relative to initial flow conditions, and by all accounts, more than the average discharge from the flowing wells. The State Engineer finds that a 1:1 decrease in Shipley Spring discharge due to flowing wells 1½ to 4½ miles away is not possible, because there must be a loss of water from storage in the aquifer and associated water table decline at

[55] Exhibit No. 108, p. 3.
[56] Exhibit No. 304, Table 9, p. 31.
[57] Exhibit No. 304, p. 44; *see also*, Exhibit No. 108, p. 6.
[58] Well log 5526, official records in the Office of the State Engineer.
[59] Exhibit No. 304, p. 73.
[60] Exhibit No. 108, pp. 7-8.

Shipley Spring. Furthermore, the average of the flowing wells for the period prior to 1965 is between 4 cfs and 1.8 cfs.

The Bailey Ranch springs lie about two miles south of Shipley Spring, equidistant between Romano Ranch and Shipley Spring. Mr. Wilfred Bailey was born in 1930 and was raised on the Bailey Ranch. His recollections are that flows from Bailey springs did not decline in the period prior to the mid 1960s.[61] Because the Bailey springs lie directly between the Romano Ranch and Shipley Spring, it is unclear how the Romano flowing wells could diminish the flow at Shipley and not diminish the flow at Bailey by an even greater amount. The State Engineer finds that this testimony is credible and significantly limits the decline in Shipley Spring flow that can be attributed to the Romano flowing wells. The State Engineer finds that measured flow from Shipley Spring in the early 1960s had not been significantly affected by groundwater flow from artesian wells in the Romano Ranch area. The State Engineer agrees with the expert testimony and evidence presented by Eureka County that pre-development flows of Shipley Spring were approximately 7 to 8 cfs (5,100 to 5,800 afa).[62] It should also be noted that the well at Siri Ranch was reported to flow at 0.45 cfs (320 afa annualized) in 1965, but was also pumped, yielding a total 1.8 cfs during the irrigation season.[63] This well and its associated water rights are currently owned by Sadler. Unfortunately, it is unknown when the Siri well was drilled.

Sadler's expert, Dwight Smith, opined that the "on-going trend of water level declines south of Shipley Hot Spring since the mid-1990s and earlier, clearly shows a systematic encroachment of drawdown from the southern agricultural center up to Shipley Hot Spring."[64] He correlates the declining flows at Shipley Spring from 2008 to 2013 with the water-level decline observed to the south, which he indicates does not correlate with water-level measurements from the Brown Ranch.

Terry Katzer, the expert hydrogeology witness for Venturacci, testified that in his opinion the cause of Thompson Spring and the associated spring complex drying up was the cone of depression moving north from the area of concentrated groundwater pumping.[65] Mr. Katzer

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[61] Transcript, p. 1014.
[62] Exhibit No. 326, pp. 5-14.
[63] Exhibit No. 304, p. 73.
[64] Exhibit No. 189, p. 2.
[65] Transcript, p. 592-593.

believes the effects of drawdown were first seen in Thompson/Taft Spring in the mid-1960s because there were a series of irrigation pivots that were much closer to the springs than anything found on the west side of the valley and that those specific pivots significantly contributed to the decline in flow at Thompson/Taft Spring.[66] Mr. Katzer opines that a mountain-front fault that runs along the area where the pivots and Thompson/Taft Spring are found allowed for water-level declines to propagate northward more quickly. However, Eureka County argues that numerous opinions by the Applicants' experts are not based in fact. For example, Eureka County disputes Mr. Katzer's claims that groundwater declines in Diamond Valley started in 1964 or 1965 and the pressure head was coming off the springs at that time. Eureka County asserts that the record reflects that electricity did not come to Diamond Valley until the early to mid 1970s, but later argues that electricity came from 1975 to 1981.[67] The County asserts that the evidence is that James Moyle did not put in his irrigation pivots, which are the closest pivots to Thompson Ranch, until the late 1970s.[68] Eureka County argues that Mr. Katzer's testimony is inconsistent with Mr. Harrill's conclusion that the 1964-1965 slight decreases in discharge at Shipley Spring and Thompson Spring were not the result of pumping in the southern Diamond Valley subarea. Mr. Katzer agrees that other factors may have impacted the flow at Thompson Spring. However, he believes the more significant cause is water table decline.[69] There are not many records for flow from Thompson Spring prior to the 1980s. The USGS measured Taft (Thompson) Spring three times from 1965 to 1966, and the flow varied from 2.06 to 2.33 cfs.[70] In the mid-1980s, after two consecutive very wet years, the spring resumed flow, discharging up to 4.15 cfs in 1984, with the flow decreasing until 1992, when flow ceased.[71] The Nevada State Engineer measured the flow of two sources at Taft Spring by current meter in 1912, and reported a total flow of 1.54 cfs. The State Engineer also noted that the springs "do not vary in flow."[72]

Based on the limited available evidence, the State Engineer finds that flow of Taft Spring likely did vary prior to groundwater development in response to annual changes in precipitation, and that variation of up to 4 cfs is documented. Flow measurements in 1912 and the 1960s were

[66] Transcript, pp. 503-504, 592-593.
[67] Transcript, pp. 998-999, 1111-1112; Exhibit No. 307, p. 21; Exhibit No. 324, p. 3.
[68] Transcript, pp. 1129-1132, 1142.
[69] Exhibit No. 263, p. 2.
[70] Exhibit No. 206.
[71] Exhibit No. 206.
[72] Exhibit No. 339.

not affected by groundwater pumping, and are representative of pre-development conditions. Average predevelopment discharge from Taft Spring was probably in the range of 1.5 to 3 cfs.

The perennial yield of the Diamond Valley Hydrographic Basin is estimated to be 30,000 acre-feet.[73] "By 1964 permits to pump more than 150,000 acre-feet per year had been issued which greatly exceeded the preliminary estimates of recharge for the entire valley."[74] Permits to use groundwater in Diamond Valley currently exceed 130,000 acre-feet annually,[75] and for decades groundwater pumping in Southern Diamond Valley has exceeded the perennial yield of the basin.[76] Since the 1960s, the use of groundwater in Diamond Valley has exceeded the perennial yield, peaking in the 1980s at around 125,000 acre-feet per year and currently exceeding 90,000 acre-feet per year.[77] The estimated consumptive use of groundwater has exceeded the perennial yield since the 1970s, and significantly exceeded it since the late 1970s.[78] The flow of Thompson Spring dropped substantially after the wet years in the mid-1980s and since the late-1980s has fallen to zero around 2008.[79]

Eureka County acknowledges that pumping of groundwater under junior water rights has impacted spring flow to some extent. However, it asserts that pumping from the southern Diamond Valley irrigators is not the sole reason for the decline in groundwater levels and other factors need to be considered in determining whether to grant the applications. The County argues that, in 1982, the State Engineer acknowledged there were other factors, such as drought and numerous shot holes, contributing to the decrease in spring flow.[80] The County also argues that Mr. Thompson himself may have diminished the spring flow by building up the embankment around his spring and damming it up.[81]

The State Engineer finds there is no dispute that Diamond Valley is significantly over-appropriated, and pumping has been greater than the defined perennial yield for the basin for over 4 decades. The State Engineer finds that the loss of some of the spring flow prior to the mid-1960s at Shipley Spring and Indian Camp Spring may have been a result of the wells drilled

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[73] Exhibit No. 304, p. 33; Exhibit No. 108, p. 8.
[74] Exhibit No. 324, p 3.
[75] NDWR Hydrographic Area Summary for Diamond Valley, official records of the Office of the State Engineer (February 11, 2013).
[76] Exhibit No. 108, pp. 8, 16; Exhibit No. 302, p. 5; Transcript, p. 1368.
[77] Exhibit No. 208.
[78] Exhibit No. 209.
[79] Exhibit No. 210.
[80] *See* Exhibit Nos. 202, 203, 315 at pp. 40, 62-63, 141; and Exhibit Nos. 323 and 332.
[81] Transcript, pp. 1016, 1100, 1138-1139.

on the Sadler and Brown ranches and thus was self imposed, but that the decrease in spring flow caused by the flowing wells at Romano Ranch was minimal. The decline in flow at Shipley and Indian Camp Springs since the 1960s has been caused by groundwater pumping from the area of the springs extending southeasterly to the main farm areas of the valley. The State Engineer finds Applicants have proven by a preponderance of the evidence that the groundwater pumping in southern Diamond Valley is the main cause of decline in groundwater levels at Thompson Spring, which resulted in the spring drying up in the 1970s and again from the 1990s until now. The State Engineer finds the theory that tree regrowth (after heavy logging) or climate change as causes of the decline in the spring is not supported by the evidence and does not outweigh the evidence that the groundwater pumping in southern Diamond Valley is the main cause of stress on groundwater levels in the valley.

VII.

QUANTIFICATION OF VESTED RIGHT CLAIMS BY SADLER

Claim Descriptions

Applicant Sadler provided historical documents and expert testimony to support its position on the quantity of water rights claimed in the filings for Proofs of Appropriation V-03289 and V-03290. H. M. Payne, who was with the State Engineer's office, inspected the Sadler Ranch on November 18, 1912, and references to Payne are from his field notes.[82]

Proof of Appropriation V-03289, which claims a pre-statutory vested water right, was filed in the Office of the State Engineer on January 15, 1980.[83] The proof claims the use of the waters from Shipley Spring and tributaries for the irrigation of 1,657.28 acres of land. A diversion rate was not provided on the proof form, but the amount of water placed to beneficial use was claimed to be 4.5 acre-feet per acre for the various different types of culture. The supporting map filed by Alan S. Boyack (Boyack Map) includes cultural tables that describe the number of acres by legal subdivision and also the type of culture claimed on the acreages. Three types of culture are described: alfalfa (227.85 acres), harvested meadow hay (882.34 acres) and meadow (547.09 acres). The priority date claimed is "prior to 1879" for when construction began on the works of diversion.

Proof of Appropriation V-03290, which claims a pre-statutory vested water right, was filed in the Office of the State Engineer January 15, 1980, for the irrigation of 73.91 acres of land

[82] Exhibit No. 145.
[83] Exhibit No. 26.

by water from Indian Camp Spring and tributaries.[84] A diversion rate was not provided on the proof form, but the amount of water placed to beneficial use per acre of land was claimed to be 4 acre-feet per acre. The Boyack Map also includes in its cultural tables the number of acres by legal subdivision and type of culture being claimed on those acreages for the Indian Camp Spring diversion. Two types of culture described are: alfalfa (43.1 acres) and harvested meadow hay (30.81 acres). The priority date claimed is "prior to 1879" for when construction began on the works of diversion.

Ranch Description

The Sadler Ranch is comprised of components acquired over time. *See generally*, **Figure 1**, attached. Payne notes that Mr. Edgar Sadler informed him that the ranch was nearly 3,000 acres (for the purposes of this Ruling, this will be referred to as the "original ranch"). Payne mentions the *Romano v. Sadler* case pending in the courts, and an examination of the map from that case shows an outline of Sadler Ranch as being 74 sixteenth sections, or about 2,960 acres in total.[85,86] These include lands described by Applicant Sadler as "Upper Fields," "North Fields," "North Meadow," and a portion of "South Meadow."[87]

Payne also describes the Romano land below the Sadler Ranch: "for some years [Romano's land] has received the benefit of the wastewater[88] from Sadler's field when the latter is irrigating."[89] This has also been referred to as the "Romano's Lower Field"[90] and at least a portion has been referred to as the "Lower Taft Field."[91]

These Romano lands became part of the Eccles Ranch when Matilda Eccles purchased it along with 80 adjacent acres from a tax auction and then added 120 acres through a Desert Land Entry.[92] The 120 acres from the Desert Land Entry plus the 40 adjacent acres that were part of the Romano's Lower Field became known as "John's Field," as referenced in the hearing and

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[84] Exhibit No. 27.
[85] Exhibit No. 145.
[86] Exhibit No. 138.
[87] *See* Exhibit No. 617, p. 6; Transcript, p. 45.
[88] In this context, "waste water" is drain water that is captured downstream to be placed to use.
[89] Exhibit No. 145.
[90] Exhibit No. 138.
[91] Transcript, pp. 988-989.
[92] File No. 4273, official records in the Office of the State Engineer.

this Ruling.[93] The Eccles Ranch was first leased to the Sadlers and was then eventually purchased by them.[94]

Shipley Spring Flow Rate

Payne writes of Shipley Spring (a.k.a. Shipley Hot Spring or Big Shipley Spring):

> I intended to take an accurate measurement of this source, but was unable to do so on account of there being a break in the dam at the reservoir, and the water [was] not confined to any one channel. By an estimate, I should place the flow of this spring at about 8 [cfs] or a little more.[95]

The *Romano v. Sadler* stipulation of 1913 is cited by Sadler as an indicator of the amount of water that flowed from Shipley Spring. Because the 5 cfs of water, that the parties stipulated was required to flow onto the Romano lands from January 1st to April 1st, was characterized as one-third of the flow that Shipley Spring could produce, Applicants' experts conclude that Shipley Spring must have been able to produce 15 cfs. However, no evidence was provided as to when or how this might have been measured, and it must be recognized that this requirement was only for the winter flow (January through March). Also, the stipulation provided that the diversion to the Romano lands must not prevent sufficient diversion from the springs for stockwater and domestic purposes by Sadler, which would imply variation in flow of Shipley Spring.[96]

In a different case entitled *Sadler v. Sadler,* the flow rate of Shipley Spring was described as 13 cfs, but these descriptions appear to be information provided in an appraisal of the ranch and there is no evidence that these numbers came from an actual measurement or observation of the spring.[97]

Applicant Sadler's expert witnesses also refer to USGS Water Supply Paper 679-b, which shows an approximate discharge of 5,000 gallons per minute, or about 11.1 cfs.[98] Mr. Smith's report cites to the book Eureka Memories and the interview contained therein of Floyd Slagowski who worked on the Sadler Ranch four years from 1937 to 1940. Slagowski reported the spring discharge to be about 12 cfs.[99,100]

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[93] *See* Exhibit No. 617, p. 6; Transcript, p. 45.
[94] *See* Exhibit 340, pp. 19, 21.
[95] Exhibit No. 145.
[96] Exhibit No. 138.
[97] Exhibit No. 139, pp. 319-320.
[98] Exhibit No. 121.
[99] Exhibit No. 108, p.1
[100] Exhibit No. 132, p. 22.

Wilfred Bailey testified that Floyd "Tiny" Sadler treated the flow at 3,200 gallons per minute, which is a little more than 7 cfs.[101]

Thomas E. Eakin with the USGS reported in 1961 field notes that the discharge was about 12.5 cfs.[102] The inside cover of the USGS report by Eakin (*Ground-Water Resources – Reconnaissance Series Report 6*) has a caption for the Shipley Hot Springs labeled "Discharge is reported to be about 15 cfs," but nothing indicates from where this value comes from.[103] Mifflin apparently reports this value in 1968, but it is not cited.[104]

Harrill reports in *Hydrologic Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada, 1950-65* (Water Resources Bulletin No. 35) three USGS measurements of the spring in the years 1965 and 1966: 7.2 cfs, 7.0 cfs and 6.2 cfs.[105]

As explained in Finding of Fact VI above, the State Engineer finds that the measurements by USGS were the most reliable for the pre-development flow rate of Shipley Spring. The State Engineer finds that the references to flow rates in the *Romano v. Sadler* stipulation, the *Sadler v. Sadler* case, the inside cover caption from *Reconnaissance Series Report 6* and the reference by Mifflin do not cite a source for the values, and therefore cannot be accepted as evidence of actual flow. The State Engineer finds that 7-8 cfs is the best estimate of discharge from Shipley Spring prior to extensive groundwater development.

Sadler Ranch Beneficial Use from Shipley Spring – Upper Fields

Payne describes the acreage under cultivation as being hard to determine, but was informed by Edgar Sadler that the ranch was nearly 3,000 acres, about 250 of which was alfalfa, grain and garden, and the rest was meadow land, "part of which [was] cut for hay and the remainder used for pasture."[106] Descriptions of the Sadler Ranch from testimony in the *Sadler v. Sadler* case come from appraisals and inventories admitted into evidence in that case. The Sadler Ranch was described as 3,120 acres with 600 acres covered by the springs and reservoir, 160 acres in alfalfa and 80 acres for garden (240 acres total of alfalfa and garden), 200 acres in tame hay and 300 acres for pasture, and the balance in pasture and wild hay (suggesting 1,780 acres).[107] Wilfred Bailey testified that Floyd "Tiny" Sadler paid a crop duster for 200 acres, 40

[101] Transcript, p. 975.
[102] Exhibit No. 151.
[103] Exhibit No. 303.
[104] Exhibit No. 108, p.2.
[105] Exhibit No. 304, p. 31.
[106] Exhibit No. 145.
[107] Exhibit No. 139, pp. 319-320.

acres of which was at the Indian Camp, leaving 160 acres of alfalfa at the Upper Fields.[108] Proof of Appropriation V-03289 claims the use of the waters from Shipley Spring and tributaries for the irrigation of 1,657.28 acres of land, of which 227.85 acres is shown on the Boyack Map to be alfalfa in the Upper Fields.[109] Payne's field notes and the *Sadler v. Sadler* case have a comparable description of the number of acres placed to use for alfalfa, grain and garden (240 to 250 acres). Mr. Bailey's testimony is consistent with the *Sadler v. Sadler* case with respect to the number of acres in alfalfa (160 acres).

Irrigation of the Upper Fields occurred from April 2nd, after water was no longer needed to be turned down to the meadowlands and into Romano's lands, to November 30th, when irrigation of the fields would have to cease and the water was diverted into the "duck pond" reservoir.[110,111]

The State Engineer finds that at the time beneficial use was established, the Upper Fields were irrigated for 160 acres of alfalfa and 80 acres of grain and garden from April 2nd to November 30th.

Sadler Ranch Beneficial Use from Shipley Spring – Meadow Sloughs

As described above, in Payne's 1912 field notes, he describes the acreage under cultivation as being hard to determine, but states he was informed by Edgar Sadler that the ranch was nearly 3,000 acres, about 250 of which was alfalfa, grain and garden, and the rest was meadow land, "part of which [was] cut for hay and the remainder used for pasture."[112] According to Payne, Edgar Sadler was unable to say how many acres were cut for hay, but that he "puts up several hundred tons of hay." This might suggest 2,750 acres of meadowland; however, the terrain is hummocky and only the sloughs would have received water and grown meadow grass.[113] Descriptions of the Sadler Ranch were given in *Sadler v. Sadler* which considered appraisals and inventories admitted into evidence in that case. The Sadler Ranch was described as 3,120 acres with 600 acres covered by the springs and reservoir, 160 acres in alfalfa and 80 acres for garden (240 acres total of alfalfa and garden), 200 acres in tame hay and 300 acres for pasture, and the balance in pasture and wild hay (suggesting 1,780 acres).[114] Mr. Bailey

[108] Transcript, p. 957.
[109] Exhibit No. 26.
[110] Exhibit No. 138.
[111] Transcript, pp. 958-959.
[112] Exhibit No. 145.
[113] Transcript, pp. 63-64.
[114] Exhibit No. 139, pp. 319-320.

testified that there was about 250 acres of the meadow hay that could be cut.[115] Proof of Appropriation V-03289 claims the use of the waters from Shipley Spring and tributaries for the irrigation of 1,657.28 acres of land, of which 882.34 acres of harvested meadow hay and 547.09 acres of meadow are shown on the Boyack Map.[116]

In support of Proof of Appropriation V-03289, the claimant procured the deposition of Reinhold ("Reiny") Sadler, on January 23, 1976.[117] Mr. Sadler described the ranch as more or less natural meadows where water stayed in sloughs. However, Sadler testified that the meadowlands in the sloughs received one to two feet of water in the winter, and might have received drain water from the irrigation of alfalfa during the spring to allow additional growing time before the grass dried out, which allowed it to be cut in July or August. This water would freeze as it flowed away from the spring and through the sloughs. In the spring, the water, which was effectively stored during winter, would thaw to irrigate the meadow sloughs. Reiny Sadler's testimony is supported by Mr. Bailey's testimony, where Bailey described 3 months when water was diverted to the John's Field through the sloughs during winter and was then diverted to the alfalfa fields in spring, where run-off would be transported into the sloughs and ultimately to John's Field.[118] The *Romano v. Sadler* stipulation of 1913 required that water be allowed to flow onto the Romano lands from January 1st to April 1st.[119] Reiny Sadler described how his father (Edgar Sadler) would allow 2 cfs to flow to the Eccles Ranch, since it would otherwise be wasted out onto the alkali flats. This water travelled by the natural slough, but could be stopped.[120]

Assuming a flow of 2 cfs reached the Eccles Ranch and that this was one-third of the total flow turned down the sloughs, then 4 cfs of flow was converted to ice as it flowed (which would then thaw in spring to irrigate the sloughs). A flow of 4 cfs over three months is approximately 724 acre-feet. If one to two feet of water was placed on the meadowlands in the winter, then the land irrigated was about 360 to 725 acres.

The State Engineer finds that the irrigated area of the meadow sloughs was not more than 725 acres of harvestable meadow hay and pasture land irrigated from January 1st to April 1st.

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[115] Transcript, p. 964.
[116] Exhibit No. 26.
[117] Exhibit No. 340, pp. 10-11.
[118] Transcript, pp. 958-959.
[119] Exhibit No. 138.
[120] Exhibit No. 340, pp. 20-22.

Sadler Ranch Beneficial Use from Shipley Spring – Stockwater Pond

Reiny Sadler described in his deposition how water would only flow off of the deeded lands of Sadler Ranch in wet winters. When water did flow outside of their fenced area, it would pool in a pond on 80 acres they owned where it was used for watering livestock.[121] This is also supported by Mr. Bailey's testimony, where he described how during one month of the year water would be diverted to a "duck pond." Rather than storing water for irrigation on lower lands, Mr. Bailey characterized the diversion to the pond as waste, but "necessary waste" when irrigation was not needed "because you had to go someplace with your water" from the continuously flowing spring.[122] Doug Frazer testifying for Applicant Sadler, characterized the area as a lake that is often flooded.[123] The State Engineer finds that the water diverted to the "duck pond" or "lake" was at best placed to beneficial use only for watering wildlife or stock from December 1st to December 31st.

Sadler Ranch Beneficial Use from Shipley Spring – Eccles Ranch

As described above, Reiny Sadler testified in his deposition how his father (Edgar Sadler) would allow 2 cfs to flow to the Eccles Ranch when it would otherwise be wasted out onto the alkali flats. This water travelled by the natural slough, but could be stopped.[124] A flow of 2 cfs over three months is approximately 362 acre-feet, and over about 160 acres would be a little over 2 acre-feet per acre of land, which is consistent with Sadler's deposition testimony that the meadowland sloughs would get one to two feet in the winter. Also, 2 cfs is approximately the diversion rate allowed under Permit 4273, Certificate 964, which serves Romano's Lower Field and John's Field.

Romano's Lower Field became part of the Eccles Ranch when Matilda Eccles purchased it along with 80 adjacent acres from a county tax auction and added 120 acres[125] through a Desert Land Entry. In order to gain entry, Mrs. Eccles had to demonstrate beneficial use of water on the lands with works and title. Although allowed 5 cfs from the stipulation resolving the *Romano v. Sadler* case of 1913, Mrs. Eccles filed on this same water under Application 4273 to be able to demonstrate a water right in support of her Desert Land Entry application. Permit

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[121] Exhibit No. 340, pp. 9-11, 15.
[122] Transcript, p. 959.
[123] Transcript, p. 46.
[124] Exhibit No. 340, pp. 20-22.
[125] These 120 acres plus the 40 adjacent acres that were part of the Romano's Lower Field became known as "John's Field," as referenced in the hearing and this Ruling. *See* Exhibit No. 617, p. 6; Transcript, p. 45.

4273 was approved October 22, 1917, with the understanding that it was not an additional appropriation of water from Shipley Spring, but rather, was a filing on the same water allowed from the Sadler lands above.[126]

Mike Buschelman, expert for Applicant Sadler, testified that irrigation was occurring outside the areas depicted on the Boyack Map.[127,128] However, in the course of proving beneficial use for Permit 4273, a map prepared by C.F. De Armond was filed in support of the Proof of Application of Water to Beneficial Use. In a letter dated December 29, 1923, the State Engineer requested clarification about a note on the map that read:[129]

> The area within the dotted line and fence is flooded with water from Big Shipley Spring during the months of January, February and March. The soil is such that the moisture is then held until time for haying.

It was unclear whether the note referred to the colored area of the map depicting the culture, or the area of the map that was not colored. In a response dated December 31, 1923, Mr. De Armond explained how the water was used in this area that would become known as John's Field:[130]

> The entire area within the dotted line and fence is flooded as shown on the map, both the colored and uncolored portions. However the entire area does not consist of meadow, much of it being a short salt grass.
>
> The culture shown does not result from irrigation during other months than those named in the permit and proof. The land is adobe and it is necessary to divert the water away from it after March so that it will be dry enough to cut by haying time. The land is practically level, being part of the old lake bed.

The implication then is that the place of use of Permit 4273, Certificate 964, is how the water had been placed to use on the Lower Romano Field and John's Field, since outside of that area, it was not meadowland and the water simply flowed to waste; hence, the water flowing to waste was not beneficially used.[131] It also follows that irrigation from water flowing onto Romano's Lower Field that resulted in the *Romano v. Sadler* case of 1913, was only for the Romano lands, as the 120 acres comprising the rest of John's Field was not disposed of until decades after 1905.

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[126] File No. 4273, official records in the Office of the State Engineer.
[127] Transcript, p. 286.
[128] Exhibit No. 114.
[129] File No. 4273, official records in the Office of the State Engineer.
[130] File No. 4273, official records in the Office of the State Engineer.
[131] The term "waste" is used here in the same context as in NRS Chapter 533, specifically §§ 533.460 and 533.463 and not as a synonym for drain water.

The portion of Permit 4273, Certificate 964, located within the Romano lands is 99.40 acres, which would also be covered by Proof of Appropriation V-03289. This leaves 134.80 acres not within the Romano lands and only under Permit 4273, Certificate 964. The State Engineer finds that the water flowing outside of the place of use described by Certificate 964 and onto salt grass was not a beneficial use of water. The State Engineer also finds that the water use on the Romano Lower Field could have been pre-statutory, but the water use on the additional 120 acres for John's Field could not have been pre-statutory. Accordingly, any mitigation of the water used at the additional 120 acres comprising John's Field would not be mitigating vested right claims.

Indian Camp Spring Flow Rate

In his report, Dwight Smith described measurements of the flow of Indian Camp Spring:[132]

> Eakin in September 1961 observed that the spring had been developed via a north-south trench cut parallel to contour and was producing an estimated flow of 1.5 to 2 c.f.s. (USGS field notes at Carson City). Harrill (1968) reports discharge from Indian Camp Spring as 0.66 cfs in December 1965, and 0.82 cfs in April 1966 (Table 9, 24/52-26d "Unnamed"). Discharge is believed to have been warm, about 80°F, similar in temperature to Sulphur Spring to the south and Siri Ranch Spring (Eva Spring) to the north.

The State Engineer finds that 1.5 cfs is a conservative estimate of discharge by Indian Camp Spring.

Indian Camp Spring Beneficial Use

Reiny Sadler described the field irrigated from Indian Camp Spring was 40 acres since the irrigation had been improved in 1961,[133] and this is consistent with Wilfred Bailey's recollection.[134] However, prior to that, the field was only irrigated for the production of 10 to 15 acres of wheat. There was also some irrigation by Native Americans prior to this, but Sadler said nothing regarding where or when that occurred.[135]

The State Engineer finds that there was insufficient evidence to support that 40 or more acres of land was irrigated prior to 1905, and that, at best, only 15 acres were irrigated sometime prior to 1961.

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[132] Exhibit No. 108, p. 5.
[133] Exhibit No. 340, pp. 12-13.
[134] Transcript, pp. 957, 966.
[135] Exhibit No. 340, pp. 12-13.

Priority Dates

Proofs of Appropriation V-03289 and V-03290 both claim a priority date "prior to 1879" for the date construction began on the works of diversion.[136] Mike Bushelman for Applicant Sadler concluded that the priority date should be "prior to 1870."[137,138] Evidence supporting this opinion include the United States General Land Office cadastral field survey notes and plats, which identified structures such as a hay corral and topographical features during the 1870 survey.[139] Additional evidence of ranching activity comes from Lander County Assessment Rolls for 1870 and 1871.[140] The focus of this evidence was on the Big Shipley Spring diversion, and there is not as much evidence of an appropriation this early from Indian Camp Spring.

The Romano lands were receiving water prior to enactment of Nevada water law based on the 1913 *Romano v. Sadler* stipulation. The stipulation establishes a date of January 1, 1892, as the date water was first turned down through the Romano lands to be placed to beneficial use.[141] The map accompanying the stipulation depicts the same ditches as shown on the cultural map filed in support of the proof of beneficial use for Permit 4273.[142] The stipulation states that, in essence, if the water was not used by Romano on his lands for irrigation, then it would flow onto desert where it was wasted; therefore, there was no beneficial use on the lands outside of Romano's Lower Field prior to Matilda Eccles purchasing it and appropriating the water under Permit 4273, Certificate 964.[143]

The State Engineer finds that the Sadler Ranch water rights from Big Shipley Spring are comprised of three priority dates split between Proof of Appropriation V-03289 and Permit 4273, Certificate 964. Under the proof, the lands nearest the spring were irrigated from April 2nd to November 30th, and water was turned into a pond between December 1st and December 31st, which was used to water livestock, with a priority date of prior to 1870. Meadowlands in the sloughs benefitted from run-off during this period of use and then benefitted from winter irrigation, including the water turned down to Romano's Lower Field from January 1st to April 1st - this also has a priority date of prior to 1870. The Romano Lower Field received water from

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[136] Exhibit Nos. 26 and 27.
[137] Transcript, pp. 285-286, 288-290.
[138] Exhibit No. 105.
[139] Exhibit Nos. 110, 111 and 124.
[140] Exhibit No. 135.
[141] Exhibit No. 138.
[142] File No. 4273, official records in the Office of the State Engineer.
[143] Exhibit No. 138.

January 1st to April 1st, with a priority date of January 1, 1892. The lower portion was irrigated only under Permit 4273, Certificate 964, from January 1st to April 1st, with a priority date of January 2, 1917.

The State Engineer finds that the evidence is insufficient to determine a priority date for the first diversion of water from Indian Camp Spring under Proof of Appropriation V-03290, or if the first diversion was pre-statutory.

VIII.

DUTY AND MITIGATION APPLICATIONS BY SADLER

Production

According to Payne, Edgar Sadler was unable to say how many acres were cut for hay, but that Sadler "puts up several hundred tons of hay."[144] In *Sadler v. Sadler* the leased land (*i.e.*, the Eccles Ranch) was described as producing 200 tons of hay per year.[145] Edgar Sadler's testimony in the *Sadler v. Sadler* case was that the Eccles Ranch would produce about 300 tons of hay per year.[146] Some descriptions of the Sadler Ranch from testimony in that case was from appraisals and inventories admitted into evidence in the litigation. In one description, the ranch could cut up to 1,500 tons of hay, but this would require reseeding. In another description, it could cut 600 tons of hay with potential for more.[147] In a letter to Clarence Sadler admitted in the *Sadler v. Sadler* case, 400 tons of hay was being harvested and the letter indicated that re-seeding was necessary because 1,000 tons of hay should be cut from the ranch.[148] During Edgar Sadler's testimony, the ranch would produce on average about 400 to 600 tons of hay per year.[149] These values approximately agree with Payne's 1912 field notes, from the overall size of the ranch, the number of acres in production for alfalfa and garden, and the number of tons of hay that could be cut (400 to 600 tons could reasonably be described as "several hundred tons"). During Mr. Edgar Sadler's testimony regarding reference to 900 tons of hay related to a mortgage, he stated that these 900 tons included previous year's cutting and the leased land (Eccles Ranch).[150] Although this testimony is describing the ranch many years after the pre-statutory use, it reinforces and clarifies what Payne found during his 1912 field investigation.

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[144] Exhibit No. 145.
[145] Exhibit No. 139, p. 71.
[146] Exhibit No. 139, p. 626.
[147] Exhibit No. 139, pp. 319-320.
[148] Exhibit No. 139, p. 346.
[149] Exhibit No. 139, pp. 625-626.
[150] Exhibit Nos. 139, 626.

The State Engineer finds that the appraisals, which describe the amount of hay that could *potentially* be cut under different circumstances, is not compelling evidence as to how much *actual* production occurred. The State Engineer finds that the maximum hay production from the ranch as a whole is 900 tons. Of these, 300 tons are from the Eccles Ranch. Assuming a proportional distribution over the irrigated acreage, of the 300 tons from the Eccles Ranch, 125 tons are from the Romano's Lower Field portion.

Duty

Sadler's expert, Mike Buschelman, testified that 4.7 acre-feet per acre is the expected duty per acre based on efficiencies for flood irrigation.[151] His report builds a case for this duty rate by dividing the NIWR value for Diamond Valley by the irrigation efficiencies from a publication by the Food and Agriculture Organization of the United Nations.[152] However, the State Engineer finds that the mitigation rights, which will allow for on-demand pumping from a well, should be based on modern practices, which require less water per acre of land irrigated.

The U.S. Geological Survey published results of well-efficiency tests by the University of Nevada Cooperative Extension Service Office where the median value of pumping from the wells was around 1,000 gallons per minute, which is equivalent to about 4.4 acre-feet per day per well.[153] The number of days that wells would be pumping within a season is estimated from the "freeze free" probabilities (105 days with 50% probability to exceed 32.5 degrees F)[154] and reducing the number of days by 21 to account for cutting and baling hay. The result is 84 days of pumping, which, at 4.4 acre-feet per day is 370 acre-feet per well. If each well is driving a pivot to irrigate 125 acres,[155] then the duty per acre of land irrigated is about 3.0 acre-feet (370 divided by 125).

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[151] Transcript, pp. 286-287.
[152] Exhibit Nos. 105 and 106.
[153] Freddy E. Arteaga, et al., *Irrigated Croplands, Estimated Pumpage, and Water-Level Changes in Diamond Valley, Eureka and Elko Counties, Nevada, through 1990, Open-File Report 95-107,* (United States Geological Survey), 1995. pp. 8-9, available online at http://pubs.usgs.gov/of/1995/0107/report.pdf.
[154] *Length of 'Freeze Free' Season Probabilities*, (Western Regional Climate Center), http://www.wrcc.dri.edu/
[155] Freddy E. Arteaga, et al., *Irrigated Croplands, Estimated Pumpage, and Water-Level Changes in Diamond Valley, Eureka and Elko Counties, Nevada, through 1990, Open-File Report 95-107,* (United States Geological Survey), 1995. p. 7.

The U.S. Geological Survey pumpage estimate for the year 1990 by confirming Landsat imagery with field checking, was 64,400 acre-feet on 22,200 acres, resulting in an estimate of 2.9 acre-feet per acre.[156]

In Diamond Valley, alfalfa has a Net Irrigation Water Requirement (NIWR) of 2.5 acre-feet per acre.[157] Assuming a pumpage efficiency between 65% and 75%, the gross estimate for the pumping requirement is about 2.9 to 3.3 acre-feet per acre.

Using an arithmetic mean (simple average) of the estimates from these different approaches, the State Engineer finds that in Diamond Valley, the duty of water is 3 acre-feet per acre of land irrigated for alfalfa through modern irrigation practices.

Mitigation

Applications 81719 and 81720 indicate that a groundwater well will be used to provide supplemental resources when water from Big Shipley Spring and tributaries and Indian Camp Springs and tributaries under Proofs of Appropriation V-03289 and V-03290 are not capable of providing sufficient water to irrigate the place of use under the proofs.[158] Application 82268 was filed to change the point of diversion of water claimed to have been appropriated under Proof of Appropriation V-03289. The application indicates that a well designed to intercept the Big Shipley Spring Complex has been completed and test pumped and that the well is in direct communication with the geologic features that provide water to the Big Shipley Spring Complex.[159] Testimony clarified that the purpose of the Application 82268 was to mitigate loss of flow from the spring by allowing an induction well and that Applications 81719 and 81720 were to be used to supplement flow deficits when the Big Shipley and Indian Camp Springs were unable to produce the full water righted duty.[160]

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[156] Freddy E. Arteaga, et al., *Irrigated Croplands, Estimated Pumpage, and Water-Level Changes in Diamond Valley, Eureka and Elko Counties, Nevada, through 1990, Open-File Report 95-107,* (United States Geological Survey), 1995. pp. 5-6.
[157] *Evapotranspiration and Net Irrigation Water Requirements for Nevada*, Huntington and Allen, 2010, available online at http://water.nv.gov/mapping/et/et_general.cfm, pp. 251.
[158] Exhibit Nos. 3, 9.
[159] Exhibit No. 28.
[160] Transcript, pp. 287-288, 443-444.

The State Engineer finds that the three applications are to work in concert to mitigate loss of spring flow due to groundwater pumping. In modern practice using an efficient pivot with the on-demand water provided by a well, and with modern practices of tilling, leveling, fertilizing, etc., a producer could expect to yield 5 to 6 tons per acre of alfalfa hay. Mr. Bailey, familiar with farming in Diamond Valley, testified that under ideal conditions a farmer could get 6 tons of timothy hay per acre after two cuttings.[161] Thus, to get 600 tons (the original ranch production) a modern producer would need to put about 100 to 120 acres into production, and to get 125 tons (the Romano's Lower Field production), 21 to 25 acres would have to be placed into production.

Therefore, 435 acre-feet per season for the irrigation of 145 acres represents the hay production portion, 240 acre-feet per season for the irrigation of 80 acres represents the garden portion, and 300 acre-feet per season for the irrigation of 300 acres represents the pasture grass portion, for a total of 975 acre-feet annually.

The water being intercepted by the proposed point of diversion for Application 82268 (Well A) is the water that would have been discharged from the spring and State Engineer finds that the point of diversion can be changed to the new induction well location. Since Application 82268 is a change of point of diversion for Shipley Spring, it can only be used to mitigate the Shipley Spring portion of the historic production. Unlike being at the mercy of natural discharge, the induction well can be used to provide water on-demand, greatly increasing efficiency. For these reasons, the State Engineer finds that Application 82268 can be approved to change 3 cfs, but not to exceed 975 acre-feet annually, and that use of the water for stock is allowed from January 1st to December 31st of each year, but no additional duty is granted.

Application 81719 was filed to appropriate groundwater to mitigate the loss of the spring water, but the point of diversion is the same well (Well A) as proposed under Application 82268. If the well is diverting spring water by inducing flow, then it cannot logically be used to also develop groundwater. The State Engineer finds that Application 81719 is redundant and approval would not be in the public interest.

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[161] Transcript, p. 1021.

little inflated.

So here we are. Okay? We're in 2009. We've had problems, well, since the 60's. We're been out here in '82, and in '92, the State Engineer has. We're out here again.

We have this problem. We know what the problem is, and so now what I wanted to tell you is what are the tools that the State Engineer has available to us to go and manage and regulate a basin. None of these are meant as any kind of a threat. It's just a statement of fact of what's available to us.

The first bullet is the most heavy-handed, and that's regulated by priority. Now, before I go into the rest of those bullets, I want to just do a what-if scenario for you.

If the State Engineer were forced to come to Diamond Valley and regulate by priority -- I have 12 screens of, what you're looking at here. I'm going to have 12 more screens of this. This is a list of all active water rights, ground-water water rights in Diamond Valley listed by priority. Okay?

So based on the perennial yield of 30,000 acre-feet, if the State Engineer had to regulate, these people have water. These people have water. Get to the third slide, and here we have at 30,000 acre-feet. This is

the line in the sand. Okay? It's at permit number -- I think it's 18851, and that is May 16th, 1960.

So if we regulated by priority, based on 30,000 acre-feet perennial yield, these water right holders, after this line, would be out of priority. And I'm just going to go through this. So these (showing slides).

We do not want to do this. We don't have any plans to do this, but I want to let everyone know that is what we have available to us to regulate and manage the basin, based on the statutes and regulations that are provided to us.

I'm going to go through the rest of this list. Forfeit of water rights. Again, not another very popular topic. It's been done all over the state. It's been done in Diamond Valley.

Future changes of irrigation rights to other uses, we'll be looking at transferring only the consumptive use portion of that irrigation right. As you heard earlier, our office has determined that that consumptive use is 2.3 acre-feet per acre.

Cancellation of water rights for failure to show due diligence. We have the ability to deny all extensions of time requests and call for PBU's, and we have done that once before in Lemon Valley.

I want to point out that these bullets apply

statewide. This isn't just Diamond Valley. Again, these are the tools that are available to the State Engineer.

And then lastly, effective July 1st of this year, we will have the ability to assess fines and penalties under Nevada's Water Law. And so fines and penalties can be issued for over pumping, illegal places of use, or any other violation of the water law, or permits, certificates, et cetera.

And, again, please don't take this as any kind of a threat at all. We just wanted to show you that these are the tools that we have. Now, the previous slide I talked about extensions of time. We queried our water right database, and right now we have about 1400 acre-feet of water rights that are under an extension of time for filing proofs of completion.

We have about 6600 acre-feet of water rights that are under extension of time right now for the filing of a proof of beneficial use, and then we have about 8100 acre-feet of water rights under extension of time to prevent the working of a forfeiture.

I only put this up there to show you that as we move forward into managing, regulating the basin, we could get to the point where we would deny extensions of time, and, if so, we're talking about taking 16,000 acre-feet of water off the books, off of the committed water resources.

Okay. Then we did a little bit of brainstorming. We just said, "Well, okay. What about some other options out there?" And we didn't say, "Well, no, that's not a good option. Don't put this that." Anything that came to mind, we put down.

So, you know, the first bullet is withdraw water rates covering pivot corners. And we know there's a lot of pivot corners out there that have not been irrigated, because you're pivot irrigating. Now, by withdrawing those water rights off the books -- again, it does nothing to the declining water table.

What it does, though, in the future, perhaps, would stop the transfer of those water rights from those corners to other farms within the basin which will only make the problem worse. Again, it's just an option we threw down there.

Spread out pumping. You heard Rick Felling talk about the localized pumping and where the greatest drawdown is. Spread pumping throughout valley is another option.

Become more efficient. Easy for me to say, right, up here? Absolutely. Again, sprinkler or pivot irrigation, very efficient, but there's probably other opportunities out there.

Grow crops that have a lower consumptive use.

Again, easier said than done for me. Again, not any one of these is the ends-all answer, but perhaps a mix of some or all of these is a solution to at least some of the problem.

Interbasin transfers of water to replace recharge or replace the recharge existing water resources. It's kind of weird to think that, well, okay, we want to continue to farm in this valley, and we have declining water tables, then maybe we need to go outside our basin to look for other water resources and bring it into the basin. Does that pencil out? Probably not. At least not today. In the future? Who knows?

Cloud seeding? Again, just throwing things out, and just new technology that's out there. You know, this is really my last slide.

If I can leave anything -- having anything taken home with you today after this meeting, it would be that I think it would be very prudent for the water users in Diamond Valley to form some kind of a localized Diamond Valley-specific ground water task force. And if one is already formed, then I apologize, because I haven't had communication with them. But I think it would be very important. You're the one that knows your basin better than anyone else. You know the hydrologic conditions. You know the declining water tables. You know the lifting costs. I guess -- not I guess. I would encourage you to

form some kind of a task force.

And some of the things that you could work on are to set goals to systematically reduce pumping. You know, have certain goals. Reduce a certain percentage of pumping over a certain amount of years, and then incrementally after that. Explore ideas for retiring water rights. And those are just two examples that I put up there.

And then the last bullet just "Necessity is the mother of invention." So, again, we threw, just some options down there. And I really am looking forward to hearing your comments and taking your questions.

And, again, it's easy for me to sit up here and talk about doing some of these things, I'm not a farmer or rancher out in Diamond Valley, and I do not pretend to be, and that's why I want to hear from you.

We are going to -- I think we're going to take -- how long of a break? We're going to take a ten-minute break. I have it almost right at 2:00 o'clock. So at about 2:10 we're going to come back, we're going to open it up to questions and discussion.

As you probably noticed, we're having all of this taken down here. So when you are going to ask questions and make comments, Tim is going to be the moderator. He would like you to come up to the microphone,

say your name, and ask your question or make your comments.

So, with that, we will see new 10 minutes. Thank you.

(Proceedings recessed from 2:00 p.m. until 2:18 p.m.)

HEARING OFFICER WILSON: All right. Let's be back on the record.

This is the discussion portion of the presentation. We hope that the presentation covered some of your questions. We know it probably raised a lot more, and hopefully everybody will come up, and not been shy, and ask some questions of our panel, here.

And your questions can be for anyone. Anybody can answer a particular question. What I'll do is I'll pass the microphone. It Looks like we just have that one mic. So it will be a little bit of a procedure, but we'll make sure to get it done.

We are going to have you come up and talk in a microphone, because we are recording with a Court Reporter, and she does need to hear your voice in order to get it recorded.

So, with that, I notice the first individual that asked to speak -- and the State Engineer just wanted to remind me that our presentation, the Power Point, that is going to be posted our public web page. That's www.water.nv.gov. If you don't have Internet access or you

don't want to get it that way, you can just call our office, and we'll send you a copy, as well.

With that, Allen Chamberlain, Mr. Chamberlain, you indicated you'd like to speak.

DR. CHAMBERLAIN: First? I thought I was going to be last.

HEARING OFFICER WILSON: You're up, number one.

DR. CHAMBERLAIN: Like I did --

HEARING OFFICER WILSON: Please state your name for the record.

DR. CHAMBERLAIN: Allen Chamberlain. I'll speak a little slower than last time.

I appreciate your presentation. I guess the question I have is: Is there a way of providing some funding to maybe buy back some of the water rights? Can that kind of a process be done in any kind of a way, you know, to -- you know, as we get -- as we retire water rights, is there a way to, you know, kind of help financially with some of these guys who put their whole lives in this, into this process?

So I guess that's the first biggest question: Is there a chance of doing that anyway at all?

MR. KING: And that's a good question, Mr. Chamberlain, and, unfortunately, as far as I know, there isn't. It's -- the State of Utah has done something

similar to this, in terms of gone to some of the basins where they're having problems, and have stakeholders meetings. And at now at least one of the basins -- I'm not sure how they got an appropriation. I assume it was some kind of a state-funded appropriation, but there was a buy-out program.

Rick, I don't know if you know more about it. I'll let him talk afterwards, but the problem with that is -- you know, as many of you know, you go to the State Legislature, and you say, "We have a problem in Diamond Valley, and we would like to get an appropriation maybe for a water rights buy-out," and the first thing that is going to come up is, "Why should everyone else in the state put together our money to take care of a problem in Diamond Valley?"

You know, That's the first question that's going to be asked. So the short answer is, no, I don't know of any funding source, and how likely that would be to get a funding source.

DR. CHAMBERLAIN: Okay. The second question is: As we get new geologic information, as we're drilling oil wells, we get seismic data, some gravity data, are we going to be able to come back and revisit some of the water allocations from these valleys, as new information comes in? And what is the process of doing that as we -- you

know, as we hit a new seismic line, do we have to come up to the state or how do we -- what's the vehicle of bringing that back to attention of the state?

MR. FELLING: Well, Mr. Chamberlain, we look at new data as it's presented. Often applicants for water will complete studies that might -- they might feel demonstrates that there's more water than was previously estimated in the reconnaissance reports.

Often communities will hire, primarily the U.S. Geological Survey to determine the amount of water that might be available. So on a basin-by-basin basis, we look at it as new data is presented.

For some basins, for instance, Diamond Valley, no study will ever change the amount -- there's no study that could ever be completed that would demonstrate that we could allocate more water, for instance, in Diamond Valley. We don't need that kind of study to know that it's over allocated. In basins where we don't know, we are always looking for the newest and best information so that we can base a perennial yield on the best science.

DR. CHAMBERLAIN: So what is the vehicle of presenting this new data? I know you can do it a hearing, like we had with General Moly, but is there -- what is the other vehicle? Are there any other vehicles to bring that information to the state? What's the vehicle for doing

that?

MR. FELLING: Many of the studies are presented to the State Engineer during hearings. It could be published in a report, in a publication. The USGS publishes many publications that re-estimate ground-water supply. If you're looking for a specific venue that an individual might take, I would say that the best -- the best avenue would be to present it to our office at a hearing.

DR. CHAMBERLAIN: Okay. So You wait for a hearing or make an opportunity for a hearing, I guess?

MR. FELLING: Well, if you wanted -- if you're going to do a study to demonstrate there was more water, I presume that is it would be because of something you wanted it or somebody wanted it.

DR. CHAMBERLAIN: Okay. I think that pretty well answers that. Thank you very much.

MR. KING: Mr. Chamberlain, I'm just going to add on to a little bit of what Rick said, and I agree that typically that is where we hear about this are at hearings.

But I think if someone really wanted to submit some kind of compelling evidence, some kind of study that shows that there is more water in a basin, it doesn't have to be a hearing. That's just typically where it's been. And -- and I understood what Rick said, but I want to make

sure that all of you understood what Rick said.

That's not to say that we believe that the perennial yield of Diamond Valley, forever and a day, is 30,000 acre-feet. We don't ever think the perennial yield is ever going to be established at 133,000 acre-feet. We've seen what has happened.

But, again, that's not to say -- and I'm not trying to provide hope or -- I want there to be hope, but if somebody comes forward with some compelling information, compelling data, compelling study that shows the perennial is 40,000 acre-feet instead of 30,000, then absolutely, we would adjust our perennial yield to that number, if we -- if we believed in it.

What does that mean in the big picture? Again, if we ever had to go to a time where we had to regulate by priority, you saw where that line was for 30,000, if we bought into the perennial of 40,000, that line moves somewhat, but I just wanted to follow up with that.

HEARING OFFICER WILSON: All right. Thank you, Mr. Chamberlain.

It looks like up next we have Mark Moyle, please. Is Mark still here?

MARK MOYLE: Yeah. I've just got -- for the record, my name is Mark Moyle, and I just kind of got the information, but I wanted to mention a few things. First

of all, I want to thank you guys for coming out and giving us a chance to interact, brainstorm ideas.

One thing I'm a little concerned about is -- well, I'm not concerned, but I guess the offer for a task force to get together and decide options is a good option. It's a double-edged option, because the burden right now somewhat lies with the Division of Water Resources, I assume, to take some action.

Giving us a chance to be a part of that, I think, is a good -- a very good thing, although it puts the burden back on us. And I want to make it clear that I believe for most of us, for myself, that the big part of this burden does belong with the Division of Water Resources.

And not to stand here and point fingers at anybody, but the economic ramifications of anything happening as far as taking away water rights, or forfeiting, or going to the priority system is going to be devastating and open lawsuits to go on forever. So I think it's a good option. I think it's something we need to do.

My second question would be: What kind of political pressure or timetable are you guys under to do something with Diamond Valley?

MR. KING: First of all, thank you for the comments, Mr. Moyle. And actually I think all of us up

here accept a large portion of that burden.

Having said that, our remedy to take care of this burden is set by statute. We don't do what we want to do. We do what we're told to do, what we're allowed to do by statute and regulation. And I showed you those options. So there is an administrative process to deal with this issue. We don't want to do that. We want to work with the stakeholders in Diamond Valley to come up with some kind of a water resources management plan so that we can move into the future and stretch every drop of water. That's what we want to do. And I appreciate that comment. And again we look at the graph and how much water we've issued in the basin. We issued those permits. There's no doubt about that.

Second question: We're not under any pressure right now to come in here and do anything. We are certainly aware of it. We were trying to be proactive by coming out here and having this meeting, but I guess the biggest pressure I'd have right now is that I would like to pressure of Diamond Valley water users to start getting together, and then we'll come out and meet with you as often as would you like, and start working on a water resource management plan.

But, no, there's not any mandates saying, you know, by January 1 of 2010 you'd better be back in balance.

That's not how it works.

MARK MOYLE: Okay. Thanks. I may have something later.

HEARING OFFICER WILSON: Then that's fine. If we go through the discussion here and more questions come up, and even if you had spoken before, please don't been shy about raising your hand to speak again.

Next on my list I have Mr. Bob Bernham. Go ahead and come forward, sir.

BOB BERNHAM: My name is Bob Bernham. I appreciate you coming over here. It's a lot better to be queried than dictated to.

As I said in the testimony that you heard over in Carson, and that I sent in, I'd say that the first thing to do is make a commitment to not let anything get worse than it is now in terms of usage. You know, we -- we have seen ground come into usage recently that probably should have been addressed. You know, back in the mid 70's, nobody had been aware of what was really at stake, but after that period of time, I think everybody knew what was at stake.

And not casting any aspersions on you fellows, because I realize that you weren't the people that made most of those decisions, but not only was there an initial error, huge initial error in the appropriation, certainly

from the late 70's on, when everybody was aware of the situation and the legalities. I think the State's been remiss in managing the law here in Diamond Valley.

So I would say, you know, the first thing is don't do something that makes things even worse. There are a number of stakeholders involved in this overall area. There's those of us who live here. There's the State. There's the local community. There's mining interests. Mr. Chamberlain brought up the idea of buying up and retiring water rights. Perhaps between all of those interests, some of that could be done.

As to the State's obligation and the State legislature saying, you know, why should we address Diamond Valley? Well, I'd say the first thing is because the State precipitated this situation, not maliciously, but through human error. In other words, everybody who came in here and drilled a well did so believing on the basis of what was appropriated, that this was a sustainable deal.

And certainly those of us who have been here for 45 years and have put two or three generations' worth of capital and life's work into this, did so feeling that this was something that could continue on and did that with, we felt, the assurance of the State that it was sustainable. So I think that's something that could be done, but certainly don't allow water just continuously to

be turned on that has any chance of affecting things.

I suspect that if we were all absolute cutting-edge in terms of application, we probably could get another 10 to 20 percent out of the water. Maybe that's something that needs to be addressed, whether it's State funds, local funds, whatever. I'm assuming that just added efficiencies could change these numbers, certainly not enough to come into balance, but enough to change that balance point quite a bit.

Anyway, I appreciate the opportunity to talk to you, and I think all of us here appreciate the opportunity to have some input.

MR. KING: Thank you.

HEARING OFFICER WILSON: All right. Thank you, Mr. Bernham.

(Discussion off the record)

HEARING OFFICER WILSON: All right. I only have one more on my list, but as I said afterwards I'll ask if anybody else has a question as well.

Mr. James Moyle? Go ahead, sir.

JAMES MOYLE: My name is James Moyle. My question would pertain to the formation of some kind of ground water management board or association within the valley here. And I was wondering how much authority would the State Engineer be willing to give that board and how

much -- the second question: How much support would the State Engineer's Office be willing to stand behind the decisions of that board?

MR. KING: Thank you for that question, Mr. Moyle.

Obviously we have to work within, you know, the state law framework, in terms of who makes the decision and everything, but I would tell you here, right now, that if you formed a broad and brought good ideas, we would give it a lot of weight. We would listen to you, again, if it's a good idea. You're the ones that know the valley better than anyone else, and if it can be done within the framework of state law, we're going to be right there with you, and I give you my word on that.

I don't know what the formation, you know, has to look like or anything like that. In my simple mind it's just -- again, you users in Diamond Valley get together. You know the problems. You meet every so often. We'll come and meet with you as often as we need to. We'll talk about it and start coming up with ideas of how we can manage the resource, but, absolutely, we would listen to you.

JAMES MOYLE: Thank you. One comment about the committee is that in the past the response to some people's ideas has been quite violent in the area. And I, for one,

don't want to go back to that. So I would feel like any kind of committee needs a lot of support out of the State Engineer's Office, whether they make the right decisions or the wrong decisions, something like that. But to get the valley fighting against one another is not a real positive direction to take. So if a committee were formed, it definitely has to have support from the State Engineer, or the Governor, or somebody.

MR. KING: Well, we would support that, and again, we would offer personnel from our office to even facilitate some of those meetings. And obviously we don't want a fight within the basin, either, but, you know, as contentious as water rights are it's certainly going to be heated at times, but, absolutely, don't want to resort to violence.

JAMES MOYLE: Thank you.

HEARING OFFICER WILSON: All right. Thank you, sir.

And I have a gentleman in the back. Go ahead and come on forward. When you get on the mic -- you can use this mic, too -- just make sure you state your name for the record.

LLOYD MORRISON: Okay. My name is Lloyd Morrison. I live in Diamond Valley. I'm a second generation farmer there, and I've kind of watched that

whole valley develop from sagebrush as I was a little boy.

I know that in this complicated issue. One of the reasons is because we developed a community. We're not just a bunch of individual people. You know, we have junior and senior water righted individuals in this -- in this town, and in the valley that have kids, that have married, you know. It's really -- I don't think it's our job to put junior water right users out of business, because it destroys the community. Now, the goal is to keep and maintain, intact, the small town community. I mean, there is a lot of value in that, and there's a lot of good ideals here that could be taken other places, just how this community can interact and work.

Now, a lot of the irrigators have been working on this, and we did throw a proposal together, and talked to General Moly about doing some retirement of some property in Diamond Valley to try to balance the basin. They weren't very interested. They didn't think it was a private problem, and they're a private company. You know, it makes no sense to me to over allocate another basin right next to an adjacent over-allocated basin. So I think that there should be some interaction here.

It's not an insurmountable problem, but it's probably the biggest problem that we have, and if it's not dealt with cooperatively, it will be insurmountable.

A couple questions. What does the State see as sustainable? I hear 30,000 acre-feet. Okay? So if you -- you know, if you just divide the water 30,000 acre-feet up amongst the 24,000 or so acres, that would give you, what, the -- you know, you just cut -- spread the water right thin. But, you know, there are some things -- retiring the corners helps in a way that it -- that water doesn't get transferred somewhere else. But those corner water rights were given to me, and I maintained them all these years, and now they're going to be curtailed, and that's almost like a taking. You know, it's almost like I'm given something and having it taken back.

I do think that the burden of this is on the State. Why was 133,000 acre-feet of water allocated in a basin that only had 30,000 acre-feet of sustained use? I mean, these people -- I mean, our mistake is being too darn good. You know, the State really asked us to go out there, you know, said, "Hey, you guys, go give it a whirl. We know that 97 percent of you are going to fail." We didn't -- they didn't tell us that, but, you know, we -- we beat the odds, and over 50 percent of us survived, and we took something, and we made something out of it, and we're still willing to do that.

This community still works together, but this is a huge obstacle to get over, and I would like to have

the State's support in making sure that all of the entities involved come to the table. Thank you.

MR. KING: Thank you, Mr. Morrison. And I'm probably going to respond with a couple of unpopular answers.

In the case of Kobeh Valley, I -- I understand what you're saying, but with all due respect, that's not the issue, Kobeh Valley. That Kobeh Valley ruling actually should be coming out fairly soon. We had actually hoped to have it out by now. We are not going to over appropriate Kobeh Valley. It will not become an over-appropriated basin. I want to make that clear.

Secondly -- and, again, I don't want to turn this -- I don't want to make this adversarial. Every water right that the State Engineer approves is issued subject to existing rights. So we could have a basin that has a perennial yield of 15,000 acre-feet, and we appropriate 15,000 acre-feet, and we all of a sudden start seeing declining water levels, springs start to have reduced flows, and even though we did what we thought our goal was, which was to appropriate that perennial yield, we're seeing adverse effects, again, our heaviest or our -- our, you know, biggest hammer is to regulate by priority.

So we would be coming in on those water right holders that were still within the perennial, and they

would be regulating. So, again, it's not a popular answer, but every water right we issue is subject to existing rights. All of you know that -- you know, that's what our water law is based on: First in time, first in right.

I wanted to -- we've thrown a lot of numbers out at you, and we said that we're pumping about 70,000 acre-feet. In terms of what is actually being consumed by the crops, if you were to use that 2.3-acre foot per acre -- and let's just use 22,000 acres -- 22,000 acres, the consumptive use, 2.3, gets you about 50,000 acre-feet. That is actually what's being consumed by the crop. And the whole idea is that that difference between 3 acre-feet and the 2.3 gets back to the aquifer.

So when we're talking about working towards managing the resource and bringing the basin back into balance, we could be talking about going from 50,000 acre-feet down to 30,000, not quite as big of a gap. Again, it's another number to be thrown out there.

It's not an insurmountable. It would be nice if Diamond Valley and the successes for Diamond Valley in the future could be attempted for the other basins that we have in the states. We have problems in many others, including Pahrump, Amargosa. The list goes on. But it would be nice if the Diamond Valley template could be the success story.

HEARING OFFICER WILSON: All right. Thank you. I don't have anybody else on the list. So if anybody would like to raise their hand.

Mr. Benson, go ahead and come forward. Just state your name for the record.

KEN BENSON: Yes. My name is Ken Benson. I would like also to add my thanks to the diligent efforts that you guys did in preparation. You did a much better job of presenting a picture to the group that's assembled here today than I had anticipated you would. You have my thanks for that.

A couple comments relating to Mr. Felling's presentation. Number one, with respect to his acknowledgement of flows, that the direct intersection of the Devils Gate flow into Diamond Valley, it's a little bit unclear to me whether he made a differential between the surface flows and the underground flows at that specific point, but he mentioned a hundred acre-feet.

I don't think any user in the Diamond Valley water basin places any credibility on that figure. We've seen floods coming through there. We've seen water come through there in as recently as the last two years and stand on crop land that would appear to be in excess of a hundred acre-feet.

As recently as August of 2008, some eight

months ago, you guys, in fact, granted a water right on those flows to a farmer in Diamond Valley that's in excess of what you said. So that does not fly with me, big time. Sorry. The other thing that is --

MR. FELLING: Let me answer that before you go on.

KEN BENSON: Go ahead.

MR. FELLING: It was underground flows. I was not addressing any surface flows in my discussion.

KEN BENSON: Well, once again, my credibility of what I perceived to be going on there indicates, in my personal estimation, and I'm sure the neighbors' minds, as well, that there's more that goes underground than there is sub-surface. So here we go.

But, anyway, the second part of your presentation was very interesting to me. I consider it to be favorable with respect to my personal cause, if you will, is some anticipation of flows from Kobeh under the mountain range from Diamond -- from Devils Gate north to Mount Hope, which is essentially west of the mountain. You estimated those at a thousand acre-feet.

I admit to you, quite freely, I have no way to ascertain that figure through my own personal resources. I'm very pleased that you acknowledged the possibility that that exists, but it is also somewhat disjunctive to me that

you recognize the flow in that area that's ten times greater than the flow you recognize specifically at Devils Gate, and that -- I have a hard time digesting that differential.

I suppose where I'm really getting is I think you guys probably already have the nuts and bolts of the Kobeh Valley decision written, and I think what I'm going to do is kind of lay claim to the perennial yield of the five other units involved in the Diamond Valley flow system that contribute to the water balance or lack thereof in Diamond Valley.

The only thing you've documented here today about a flow system encompassing six basins is maybe a hundred acre-feet of inter-activity at points specific to Devils Gate and possibly a thousand acre-feet which converges under Whistler Mountain.

Do you want to comment on those, because I have some comments about Mr. Gallagher's figures, as well?

MR. FELLING: Well, with respect to the estimates of flow into Diamond Valley from Kobeh, either at Devils Gate or between Mountain Hope and Whistler Mountain, I recited work of others. I didn't recite any of my own work. We don't -- we don't have any in-house studies to demonstrate what the flow might be in either of those locations.

KEN BENSON: Uh-huh.

MR. FELLING: Clearly there is flow permissible at Devils Gate that could be in excess of that recognized today. I think that much is clear, and it's indicated because as time has moved on, new -- new hydrologists recognize that a lot of the water can flow through limestone than the older hydrologists did. That's just that the concept of interbasin flow has advanced.

With respect to flow into Diamond Valley, between say Whistler Mountain and Mountain Hope, that was something that the applicant in the Kobeh Valley simulated in their ground-water flow model.

KEN BENSON: Uh-huh.

MR. FELLING: They imposed a series of restrictions into their flow model, with transmissivities and hydraulics properties of the rocks in that area, and water flowed into Diamond Valley. Does it really occur? To be honest, I really don't have the clue whether it occurs at that amount or any other specific amount.

KEN BENSON: I share in that point of view. In a larger context of the historical perspective, of the fact that I'm kind of laying claim to perennial yield in other basins that contribute to Diamond Valley flow system, in fact, in the 1982 timeframe that Mr. Jason King referenced earlier on in his Power Point presentation, a group of us

met, both in Diamond Valley, and with the Legislature in Carson City, and with State Engineer's representatives at various times immediately preceding the first few days of a Legislative session, I believe, in 1983.

At that time there was a gentleman that was proactive with respect to bringing water on line in Diamond Valley. Other individuals that participated those discussions were myself, Mr. Jim Moyle, who testified here just a few minutes ago, and Mr. Robert Bernham senior who has since passed on and is more than adequately represented by his son, Bob Bernham, who testified here today, as well.

We, in fact, made ascertations (sic) at that time that perennial yield in the upstream basins compromising the Diamond Valley flow system were the life blood of Diamond Valley. This is not a new concept. To the extent that it's been verified is far less cut and dry, but we do lay claim to the fact that people that were here utilizing this resource, probably earlier than 1982, but certainly from 1982 forward, recognize that you can't come up with any balance that makes sense pumpage inventory year to year in that perennial yield.

I suspect that some light could be thrown on that subject through an ongoing process of somebody developing a model that would express the volumetric total picture of the alluvial fill in Diamond Valley and see

where it indicated excesses in yearly pumpage. Do they fill that void? Do they half fill that void? Or what did fill that void? Did the water come from somewhere else?

Please indulge me to speak to a couple of Mr. Gallagher's comments. Again, the methodologies Mr. Gallagher used were impressive to me, in that his presentation and expression of annual pumpage, particularly on a well-by-well basis, and the cumulative acre-foot total very much parallel my personal thoughts and investigations as developed as a guy who grows hay, pays power bills, kind of watches what's going on around him for about 35 years.

Comments that perhaps would refine Mr. Gallagher's perspective slightly more in the line with mine are: We are essentially pivoted irrigated, and that was the thesis of his assumptions. I come up with somewhat less hours of pumpage in a given year, and that's mostly attributed to this frost-free concept. Even on areas of decent growing conditions, these pivots mostly all shut off automatically at about 35 degrees, because the water gets super cool and anything at 32 to 28 degrees, certainly 26 degrees, puts enough ice on the machine that it crashes the machine to the ground, and you're out of business for some extended period of time. So I would suggest that Mr. Gallagher's figures pretty much coincide with mine. I'm just going to suggest that my view of the world

indicates a consumptive use on an annual basis of about 10 percent less than he does.

One thing that I do think his data supports is -- I don't think, on analysis of the wells he presented -- he came up with about 900 gallons per minute on the average, and he came up with a figure of 125 acres, and he came up with a figure of 94 days of pumpage. You cannot get to the acknowledged water duty of four or four and a half acre-feet per water (sic) -- the underlying rights are specified in language of the certificates, and make a case that anybody is abusing their right to access the water, and I think that's very important that everybody recognize that.

At least once we're in agreement on that, our original time, depending on certificate by certificate was four acre-feet. In some cases 4.5. And I do not anticipate that you guys are going to come out here and be fining anybody for over using the resources. Is that correct?

MR. KING: Correct.

MR. GALLAGHER: That's correct. Mr. Benson, you hit on the perfect good-news-bad-news part of my presentation, was that we had this discussion internally, because somebody had brought up the issue about whether or not it would do any good to install flow meters on all the

wells in the basin. But given what we've looked at, in terms of total water application, I don't think it would do anybody any good to install flow meters on something that we don't think is being exceeded.

If it was the reserves, if it -- if the data indicated that we were pumping five feet per acre, then flow meters might be a concept that we might entertain. But right now we believe that there's enough information to ascertain, on a basin-line basis, what the pumpage is and what the application rate is.

In generalizations on a basin-wade basis, some people may include a little bit more, and some wells may produce a little bit less, but we think we've got the ballpark figures figured -- you know, hammered out pretty well. So that is good news for anyone coming in here working for a meter or a basin line to be forced on all the wells.

KEN BENSON: Thank you for your acknowledgement of that. I consider that somewhat of a community victory for today's circumstance. And I have a lot of other questions that I'm going to ask, but I'm going to take the Fifth, because I won one, and I don't want to lose two of the others. Thank you very much.

HEARING OFFICER WILSON: All right. Thank you, Mr. Benson. We appreciate all those comments.

I was going to ask if there's anybody else just by a raising of hands. Mr. Chamberlain, do you want to come back up?

DR. CHAMBERLAIN: Yeah.

HEARING OFFICER WILSON: State your name for the record.

DR. CHAMBERLAIN: Dr. Allen Chamberlain.

Just another question. It might be more of a practical thing. One thing we haven't talked about a lot is the carbonate aquifer, the one that goes underneath, like underneath Whistler Peak. Mr. Benson just talked about that a little bit and a few others.

A question that I have, back in the 50's, the State of Nevada passed a kind of a -- for permitting oil wells, that oil companies have to give up well logs and cuttings. Is there a possibility of passing something similar to that, to turn all these expensive oil wells in -- for example, a well just drilled just north of Mount Hope drilled down through that impermeable Bonini formation, went back into the carbonate aquifer. Is there a way that we can legislate or make that part of the permitting process of a well to turn that into a monitor well? And then we can begin getting data for this coverage aquifer from the well, just kind of, you know, arm waving about it, but that way we would actually have some data.

Is that a possibility to bring that up and make that part of the regulations of drilling oil wells in Nevada? There's a lot of questions.

MR. GALLAGHER: You're talking about oil exploration wells?

DR. CHAMBERLAIN: Yes.

MR. GALLAGHER: I believe the Nevada Bureau of Mines requires logs and even some core samples to be stored there permanently.

DR. CHAMBERLAIN: That's correct.

MR. GALLAGHER: But in terms of converting it into a monitor well, I guess -- I would look to USGS again in terms of finding out exactly what it is we would want to be monitoring. And I don't know what mechanism there would be to compel the gas company to convert an exploration well into a monitor well. Who would take responsibility for the physical well would be one question.

DR. CHAMBERLAIN: Right.

MR. GALLAGHER: But that's a good point --

DR. CHAMBERLAIN: It's one way --

MR. GALLAGHER: -- and it's something to think about.

DR. CHAMBERLAIN: Yeah, like that well cost five million dollars, and it's a five-million-dollar monitor well that could be used. I mean, once it's filled

with cement, you're wasting a five-million-dollar investment. And there's hundreds of wells like that in Nevada. It could very valuable for entire carbonate aquifer of eastern Nevada.

MR. GALLAGHER: That's a very good point.

DR. CHAMBERLAIN: So just a thought.

HEARING OFFICER WILSON: All right. Thank you, Dr. Chamberlain. And I'm sorry I keep calling you Mr. Chamberlain, and I know you're Dr. Chamberlain. I apologize for that.

Any other questions? All right. I don't see any others. The State Engineer wanted me to mention that, you know, if you think of something later, or you just didn't feel comfortable coming up to a microphone here, you are more than welcome to send us some written comments, or send us written questions, or to call our office. You can call any of our staff. Just ask for us by name, and they'll direct you to us, and we'll be more than happy to answer all your questions that we can. And if we -- you know, if there's any question that an individual can't answer, then we certainly get the answer for you and get back to you.

Go ahead, sir. Did you want to go ahead and come back up?

MARK MOYLE: Based -- sorry. My name's Mark

Moyle. Based on what you just said, I, first of all, just want to thank you for doing this. But it's pretty hard to really -- in this environment, where you've got to walk up to a mic, and be nervous and get anything accomplished.

So I would hope that we could maybe set up another meeting where we sit around a table and -- or as a group and do some more brainstorming, because that's when we're really going to be able to get something done. It's pretty difficult for all of us, as individuals, to send information to all of you, as individuals, and accomplish anything. So I would hope that we can have the door open to continue on with those kinds of round table discussions in the future.

MR. KING: Thank you, Mr. Moyle, and we would look forward to that. We would be look forward to being invited. Whenever you want to meet, we'll come to Eureka and do just that.

HEARING OFFICER WILSON: And certainly with a little smaller crowd it's easier to be a little more informal. We knew we were going to have a big crowd today, and have people up in the balcony. So we knew we had to be on a microphone in order for everybody to hear and be part of this. But certainly we could come back, I think, in a less formal setting, maybe with a smaller crowd, and I know the State Engineer's indicated he's more than happy to do

that.

And I saw a hand. Go ahead, sir.

JIM GALLAGHER: My name's Jim Gallagher. I'm curious in one of your slides you talked about cloud seeding. Is there any funding in Nevada to seed clouds or take cloud seeding funds away from California?

MR. KING: Hi, Mr. Gallagher. I don't know. That is my short answer. Rick, do you know if there's any kind of funding mechanism through DRI or anything like that for cloud seeding?

MR. FELLING: Is there cloud seeding in Nevada. It's focused on the Sierra, though. I don't know if there's any that's done in Elko County, but I know that there's cloud seeding throughout the Sierra.

JIM GALLAGHER: If there are, we could use the clouds to come over. We aren't using that, and it doesn't do much Diamond. Well, either that, or we can take California funds away from them and let that come our way.

HEARING OFFICER WILSON: Go ahead. Come forward, sir.

BOB BERNHAM: My name is Bob Bernham. I would hope that in analyzing the relationship between Kobeh and Diamond Valley, that you don't forget about or discount the intermittent but occasionally really large surface flows that come through Devils Gate. I know those, to some

extent, fall out of the purview of what you do, but they do impact, on an intermittent basis, heavily impacts over here, and I hope that goes into your overall analysis when you look at the relationship between those two basins.

HEARING OFFICER WILSON: All right. Thank you, sir.

Go ahead. Come on up.

CRAIG BENSON: My name is Craig Benson. I just had a few clarifications going forward to be on the record. We do seem to be in agreement that we have plenty of data on an established trend of downward trend on ground water depths.

Do you have a mechanism in place for continued monitoring? Is there funding for mining or mitigation going forward? If this trend line was to steepen down even more, what would be attributed to those factors to -- based on our current acreage and long-term established irrigation trend?

HEARING OFFICER WILSON: All right. Those are some great questions.

MR. KING: We will continue to take water levels from Diamond Valley, since -- we have since the 60's. That's not going to stop. We will continue to conduct crop inventories in order to get a handle, again, on how much water's being pumped out of the basin every

year. In terms of mitigation, again, I was showing you a slide of the tools that we have available to us.

We threw out some options of spreading out pumping, becoming more efficient. So that slide outlined those tools. That's what we would be using terms of curtailing or regulation.

CRAIG BENSON: Your tools are more specifically pertaining to enforcement and statutory regulation, not so much as proactive sources of funding or cooperative mechanisms in place?

MR. KING: Yeah, funding is definitely not part of what we do, to provide for that, but I'm hoping that this meeting will hopefully kick off a relationship between Diamond Valley water users and our office and work towards managing the resources, looking at how best we can stretch that water resource.

CRAIG BENSON: And just to take away the slide showing on paper, the difference between 132,000 acre-feet versus the perennial yield estimated in 1960's as 30,000, once we get back to consumptive use, based on pumping, we're really talking more like the difference between 50,000 and 30,000?

MR. KING: In rough numbers, yes, that's true.

CRAIG BENSON: Okay. So we're not talking a three- to four-fold out-of-balance situation, only on

paper? In the real world scenario, we're 20 percent?

MR. KING: That's our belief.

CRAIG BENSON: Thank you.

MR. KING: And Rick Felling touched on this a couple of times. You know, the worst drawdowns are in that central farming area where all those wells are concentrated.

CRAIG BENSON: And based on everybody's knowledge of a cone of depression, isn't that to be attributed to just the fact that that's where the wells are physically located? However, can that trend be extrapolated further to where -- what I'm getting at is: That is where most wells are. However, what is the time, in years in lag, between flows in sub-surface flows, if we are getting more flow, getting less flow? If we were to be -- have water pulled out above us on the flow system, to the west, what would we expect to see in terms of a year timeframe to where those -- the cone of depression changes?

Where would we see that there was something happening to our trend? Five years? Ten years? What's the timeframe on an impact to our current trend?

MR. KING: You know, I might turn this over to Rick, but I'm not exactly clear on the question.

CRAIG BENSON: Okay.

MR. KING: Did you -- that's okay. I'm going

to pass this to Rick.

MR. FELLING: Well, with respect to how additional pumping in other basins could affect Diamond Valley, it depends on how close it is to the basin boundary and how much pumping there is, but it also depends on how much naturally flows from the other basins into Diamond Valley.

If the amount that flows into is small, then pumping in, say, Kobeh Valley or whatever that valley might be, Antelope Valley, who knows, it's not going to change much, how much flows into Diamond valley, because the original amount, it's not a substantial portion of Diamond Valley's water budget.

The inflow appears to be coming from the north end of the basin more than from the south end of the basin. In the south end, the recharge to the aquifer is generated primarily in-basin. There is inflow, but I don't think it's a huge portion of your water budget.

CRAIG BENSON: Okay. So if we were to see an established change in trend or direction going forward, we have to acknowledge something else is happening outside of our basin, that we are not doing to ourselves. Is that correct?

MR. FELLING: How would you -- I guess I don't understand what you mean by --

CRAIG BENSON: Based on your figures, it seems to me that you've established on your contour lines in your presentation, based on pumping levels, static levels, that we have an established trend. That trend seems to be fairly lineal to 2 feet per year, correct?

MR. FELLING: That's correct.

CRAIG BENSON: If that changes dramatically, what do we attribute that to?

MR. FELLING: If that were to change dramatically, one would have to think that it might be attributable to other causes.

CRAIG BENSON: And what would the timeframe, in your estimation, to where we would see anything be? What would be statistically significant in a timeframe, year to year, before we might anticipate a change based on your estimation of flows?

MR. FELLING: I think it would be safe to say that if pumping were to increase in, let's say, Kobeh Valley, that you would not see any change in Diamond Valley in your lifetime.

CRAIG BENSON: My lifetime. Okay. Thank you very much.

KEN BENSON: Tell your kid that.

HEARING OFFICER WILSON: All right. Thank you very much. Any other questions? Go ahead and look around.

Anybody up top? I've been looking up in the balcony.

All right. I don't see anybody. So, with that, Dr. Chamberlain, you wanted to add one more question?

DR. CHAMBERLAIN: It kind of goes long with the question you just brought up here. Just a quick question. What if we do see a dramatic change quickly with this pumping Kobeh? What would be the mitigation? I guess that's the thing. How would we mitigate that? If this trend is going for two feet a year, and all of a sudden we go to four feet a year, within a year or two after they start pumping over there? Then what's the mitigation? What would be the possible mitigation of that?

MR. KING: Well, first we have to get over the hurdle of whether or not there will be any permits issued to General Moly in Kobeh Valley. If there is, there would probably be a monitoring mitigation plan associated with that. And if the approved monitoring and mitigation -- well, if the monitoring plan that we've approved clearly shows that it's due to pumping in Kobeh Valley, then the remedy is a reduction of pumping in Kobeh Valley, up to the cessation of pumping in Kobeh Valley.

DR. CHAMBERLAIN: Okay. That answers the question. Thank you.

HEARING OFFICER WILSON: All right. Thank you, Dr. Chamberlain. And if there's nothing further, I guess

that will be it for this meeting. We appreciate -- oh, we've got one more, a last-minute speaker.

PATTY BENSON: Real quick. I'm Patty Benson. And I really am very interested in what you're seeing happen once the flow is coming under. This was the -- I've been here to a meeting previously, when they were going to do something with monitoring wells on the Devils Gate flow. Has anything happening with that? Is anything happening? That was a USGS presentation a couple years ago.

MR. KING: Mary, do you want to come and talk?

MS. TUMBUSCH: Sure. I was hoping to get out of this.

PATTY BENSON: I really enjoyed that.

MS. TUMBUSCH: Oh, thank you. Mary Tumbusch with the USGS.

We're on Phase II of the flow system. The Phase I report you saw us present here. We've just, last summer, finished drilling four new exploration wells. There's a nest of piezometer, which is two wells, one deep, one shallow in the Devils Gate area. And looking at`-- I'm out this week monitoring wells, as a matter of fact.

We have one south of Devils Gate on. We have one north of Whistler Peak, and then one in eastern Antelope Valley. So we have -- we're trying to figure out now`-- I'm in the process of putting all the data together

to be able to present a report. That should be out end of September, and I will be coming back and giving another presentation.

PATTY BENSON: Thank you.

MS. TUMBUSCH: You're welcome. And I don't want to give any numbers or any information out now.

PATTY BENSON: I'm glad your funding wasn't -- didn't disappear for that.

MS. TUMBUSCH: No, no. It ends the 30th of this year, but we have -- I've been the talking with the County, and we're looking at ongoing --

PATTY BENSON: Good.

MS. TUMBUSCH: -- and looking at more monitoring.

PATTY BENSON: Thank you.

MS. TUMBUSCH: You're welcome.

PATTY BENSON: Now, my other real quick question: This is the first time I'd ever heard any discussion of water that traveled from Garden Valley, Pine Valley into -- and the 9,000 feet. My question is: Does any of that underground come to the cone of depression where we are in the most pumped area in Diamond Valley?

HEARING OFFICER WILSON: I think I'll let Mr. Felling answer that.

MR. FELLING: Well, the short answer is: It is

beginning to, because the springs that once existed there have, for the most part, dried up.

PATTY BENSON: Unfortunately.

MR. FELLING: They've dried up because of the pumping in Diamond Valley. So, yes, this pumping is beginning to capture the -- that inflow from Garden Valley.

PATTY BENSON: Thank you.

HEARING OFFICER WILSON: All right. And thank you, Mary, for answering that. We appreciate it.

And with that, I guess we'll close our meeting here today. And as I mentioned, the Power Points will be on our web site if anybody wants to have a copy, and we appreciate everybody coming out here. We appreciate all the good questions and discussion, and we really felt like it was worthwhile. Thank you, everybody.

(Proceedings concluded at 3:16 p.m.)

STATE OF NEVADA,)
) ss.
CARSON CITY.)

I, CARRIE HEWERDINE, Official Court Reporter for the State of Nevada, Department of Water Resources, do hereby certify:

That on Thursday, the 19th day of March, 2009, I was present at the Eureka Opera House, Eureka, Nevada, for the purpose of reporting verbatim stenotype notes the within-entitled public meeting;

That the foregoing transcript, consisting of pages 1 through 79, inclusive, includes a full, true and correct transcription of my stenotype notes of said public meeting.

Dated at Carson City, Nevada, this 24th day of March, 2009.

CARRIE HEWERDINE, RDR
Nevada CCR #820

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IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; KENNETH F. BENSON, INDIVIDUALLY; DIAMOND CATTLE COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, A NEVADA REGISTERED FOREIGN LIMITED PARTNERSHIP,

Appellants,

vs.

THE STATE OF NEVADA STATE ENGINEER; THE STATE OF NEVADA DIVISION OF WATER RESOURCES; AND KOBEH VALLEY RANCH, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Respondents.
_____/

No. 61324

District Court Case Nos.
CV 1108-155; CV 1108-156;
CV 1108-157; CV 1112-164;
CV 1112-165; CV 1202-170

APPELLANT EUREKA COUNTY'S OPENING BRIEF

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Docket 61324 Document 2012-40828

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APPELLANT EUREKA COUNTY'S OPENING BRIEF

Appellant, EUREKA COUNTY, a political subdivision of the State of Nevada (hereinafter "EUREKA COUNTY"), by and through its counsel, ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY,

hereby files its Opening Brief in accordance with Nevada Rules of Appellate Procedure ("NRAP") 28 and 32.

I.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this case because this is an appeal from the District Court's denial of EUREKA COUNTY's Petitions for Judicial Review. NRS 533.450(9) provides that an appeal may be taken to this Court from a judgment of the District Court in the same manner as in other civil cases. See NRAP 3A(b)(1).

On June 13, 2012, the District Court entered its Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review. Joint Appendix ("JA") Volume ("Vol.") 36 at 6823-6881. Written notice of entry of the District Court's Order was served on June 14, 2012. JA Vol. 36 at 6882-6944. EUREKA COUNTY timely filed its Notice of Appeal, pursuant to NRAP 4(a)(1), on July 10, 2012. JA Vol. 36 at 6945-6949.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Does the STATE ENGINEER have authority to grant applications to appropriate 11,300 acre feet annually ("afa") of water under NRS 533.370(2)[1] when the proposed use or change conflicts with existing rights on the reliance of a future, undefined monitoring, management and mitigation plan?

B. Does Nevada water law and the prior appropriation doctrine preclude the STATE ENGINEER from granting groundwater permits to applicants later in time when the junior appropriations would impact prior surface water rights?

C. Did the STATE ENGINEER apply the correct standard when he granted KVR's Applications and concluded an interbasin transfer of 11,300 afa of water from Kobeh Valley to Diamond Valley was environmentally sound pursuant to NRS 533.370(3)(c)?

[1] NRS 533.370 was amended by Assembly Bill 115 during the 2011 Nevada Legislative Session. See 2011 Nev. Stats. Ch 166 at 758. The amendments renumbered the provisions of NRS 533.370. All citations to NRS 533.370 in this appellate brief use the amended numbering of NRS 533.370 as codified in 2011.

III.

STATEMENT OF THE CASE

This is an appeal from the Seventh Judicial District Court's Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review entered on June 13, 2012 by the Honorable Dan L. Papez, District Judge.

The District Court erroneously concluded that Nevada water law allows the NEVADA STATE ENGINEER (hereinafter "STATE ENGINEER") to grant applications to appropriate or change 11,300 afa of water even if the proposed use or change conflicts with existing water rights, so long as the impacts to existing water rights can be mitigated.

Further, the District Court confused surface water and groundwater rights when it wrongly concluded that NRS 534.110(4) and (5) allow an appropriation of groundwater that will cause a "reasonable lowering" of the static surface water level as long as the prior appropriators can be satisfied under express conditions.

Finally, the District Court erroneously determined that the STATE ENGINEER applied the correct standard when he granted KVR's Applications and concluded that an interbasin transfer of 11,300 afa of water from Kobeh Valley to

Diamond Valley was environmentally sound in contravention of NRS 533.370(3)(c).

IV.

STATEMENT OF THE FACTS

A. The Applications and Proposed Use.

Between May 2005 and June 2010, KOBEH VALLEY RANCH, LLC (hereinafter "KVR" or the "Applicant") filed Applications with the STATE ENGINEER to appropriate new water or to change the point of diversion, place of use and/or manner of use of existing water rights (collectively hereinafter "Applications") for a mining project known as the Mount Hope Mine Project located in Eureka County, Nevada.[2] JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460; JA Vol. 26 at 4985-4988, 4994.

The Applications sought a total combined duty of 11,300 afa of groundwater for mining and milling purposes associated with the proposed mine. JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460; JA Vol. 26 at 4994. The mine life is expected to be 44 years and the 11,300 afa of groundwater to be pumped is a consumptive use, meaning that it will be fully

[2] Some of the Applications were originally filed by a different entity. JA Vol. 13 at 2111-2149. The Applications not originally filed by KVR were later assigned or transferred to KVR. JA Vol. 26 at 4985-4986.

consumed in the mining process. JA Vol. 2 at 281-282, 312, 320; JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460. This is not a dewatering project for mining in that less than ten percent of the requested water will be needed to dewater the pit. JA Vol. 26 at 3596. All water sought under the Applications, including the water pumped from and around the pit to dewater the pit, is essentially used to create slurry necessary for the movement of material and the molybdenum recovery process, ultimately resulting in the conveyance of material through and eventually away from the mine process facilities in the form of tailing slurry to a tailing storage facility in Kobeh Valley. JA Vol. 2 at 282. While some of the water in the tailing slurry is anticipated to be recoverable and recycled back to the ore process circuit, the full fresh water need of 11,300 afa from the well field and pit dewatering applied for under the Applications is fully consumed in the mining process (e.g., evaporates) or is entrained forever in the tailings and can never be used again. Id. No water extracted for the mining project will be returned to the aquifer (e.g., injected or infiltrated) for later beneficial use as is often the case with pit dewatering for gold mining. JA Vol. 2 at 282, 311-312, 320.

The water to be appropriated is located in two different hydrographic basins, the Kobeh Valley Hydrographic Basin ("Kobeh Valley") and the Diamond

Valley Hydrographic Basin ("Diamond Valley"). JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460. The quantity of water requested to be pumped from Kobeh Valley, being 11,300 afa, has never been pumped from that basin, and Diamond Valley is severely over appropriated. JA Vol. 8 at 1384-1385, 1449.

The groundwater for the Mount Hope Mine Project will come primarily from a well field located within Kobeh Valley. JA Vol. 26 at 5008. The well field will consist of 10 production wells and 2 construction wells, concentrated in a limited geographic area in Kobeh Valley. JA Vol. 8 at 1363, 1371; JA Vol. 10 at 1698-1699; JA Vol. 11 at 1881; JA Vol. 23 at 4408. KVR's proposed wells are in fairly close proximity to existing springs, stockwatering wells and at least one domestic well in Kobeh Valley. JA Vol. 7 at 1242-1243; 1248-1252; JA Vol. 9 at 1552a-1552d.

The place of use for the water was identified by KVR as an approximately 90,000 acre area, which sits astride the boundaries of Kobeh Valley, Diamond Valley and Pine Valley Hydrographic Basins. JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460. Most of the groundwater to be appropriated will be diverted in Kobeh Valley and put to beneficial use in

Diamond Valley, constituting an interbasin transfer of water. JA Vol. 26 at 5008-5009.

The Applications were protested by various individuals and entities including EUREKA COUNTY. JA Vol. 7 at 1155-1174; JA Vol. 22 at 4240-4248; JA Vol. 25 at 4819-4860; JA Vol. 26 at 4988-4994. The STATE ENGINEER held administrative hearings on the Applications in December 2010 and in May 2011.[3] JA Vol. 7 at 1110-1118; JA Vol. 26 at 4995.

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[3] The Applications were previously before the STATE ENGINEER in an administrative hearing held October 13-17, 2008. JA Vol. 26 at 4995. In Ruling 5966 issued on March 26, 2009, the STATE ENGINEER approved some of the Applications and others were denied. See ROA Vol. 26 at 4995; ROA Vol. 36 at 6827-6828. Ruling 5966 was appealed to the District Court, and the District Court vacated Ruling 5966 in its Order entered on April 21, 2010. Id. Thereafter, KVR filed Change Applications 79911 through 79942 on June 15, 2010. JA Vol. 26 at 4995.

At the hearing before the STATE ENGINEER in December 2010, one of the Protestants filed a motion to adopt the previous record from the October 2008 hearing. JA Vol. 7 at 1151-1154. The motion was unopposed and the STATE ENGINEER adopted the Exhibits and Transcript from the previous hearing. JA Vol. 7 at 1146-1147; JA Vol. 26 at 4995.

In compliance with NRAP 30(b), only excerpts of the Transcript from the October 2008 hearing are included in the Joint Appendix because the excerpts are

B. Existing Vested, Permitted and Certificated Water Rights and Domestic Wells.

Numerous witnesses using and holding a variety of water rights in the Kobeh Valley Basin and Roberts Mountain area testified before the STATE ENGINEER, describing the history of their ranches, their vested, permitted, certificated and domestic water rights and the customary use of their water. JA Vol. 4 at 615-629, 637-644, 649-658, 660-666, 670-681; JA Vol. 10 at 1711; JA Vol. 25 at 4933; JA Vol. 26 at 4934-4938.

Mr. Martin Etcheverry, whose family owns the Roberts Creek Ranch, testified he uses all the water that is on his Bureau of Land Management ("BLM") allotment, known as the Roberts Creek allotment, comprised of approximately 156,000 acres. JA Vol. 4 at 615-617, 619-620, 626. Mr. Etcheverry testified: "It's been documented that there are over a hundred springs on the allotment." JA Vol. 4 at 621. It is a unique allotment with water all throughout the allotment. JA Vol. 4 at 621. The cows use the entire area, including the springs and the creeks in the lower part of the ranch up to the top of the mountain, for grazing. JA Vol. 4 at 621. The surface water is also used to irrigate all of the meadows on the private ground at Roberts Creek. JA Vol. 4 at 622. The private ground at Roberts Creek is approximately 320 acres and the private ground using Vinini Creek is 240 acres.

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essential to the decision of issues presented in this appeal.

JA Vol. 4 at 620, 622. Mr. Etcheverry has 7 underground wells on his BLM allotment and private ground. JA Vol. 4 at 623. Roberts Creek, springs above the ranch area and certain wells are also used for domestic purposes. JA Vol. 4 at 622-623. A portion of his BLM allotment is in a wilderness study area. JA Vol. 4 at 632.

These springs and creeks make Mr. Etcheverry's ranch and BLM allotment unique because they provide so much water and forage for his cattle. JA Vol. 4 at 621, 626-627. Mr. Etcheverry testified "…with all the springs and creeks, the cattle are distributed good throughout the pasture and they are utilizing the whole pasture." JA Vol. 4 at 626. "That's what makes it unique, just the water on the ranch, there's so many springs and creeks, plenty of water and the cattle do well there." JA Vol. 4 at 626. Mr. Etcheverry explained why the cattle do well and why it is important that cattle are disbursed throughout the pastures. JA Vol. 4 at 626-627. If too many cattle graze in one concentrated area, BLM rules and regulations are violated. JA Vol. 4 at 627.

The testimony of other witnesses with existing water rights in Kobeh Valley and the Roberts Mountain area was similar. See, Testimony of John Colby, JA Vol. 4 at 637-644, JA Vol. 26 at 4935, 4938; Testimony of Kenneth Buckingham, JA Vol. 4 at 649-658; JA Vol. 25 at 4933; Testimony of Jim

Etcheverry, JA Vol. 4 at 660-666, JA Vol. 26 at 4937-4938; Testimony of Gary Garaventa, JA Vol. 4 at 670-681; JA Vol. 26 at 4936. These water rights holders use the water on their private ground or BLM allotments for stockwater and to irrigate the meadows for pasture for their cattle and/or sheep. JA Vol. 4 at 637-639, 651-655, 662-664, 671-672. The numerous springs and creeks keep their cattle disbursed, the cattle do not have to walk very far for water, and the abundant springs and creeks provide forage for their stock. JA Vol. 4 at 639-640, 665-666. Most of the water right holders also have groundwater wells on their BLM allotment and private property for domestic and stockwatering purposes. JA Vol. 4 at 638, 657-658, 662, 665, 667-671; JA Vol. 25 at 4933; JA Vol. 26 at 4935-4938. A portion of Mr. Colby's BLM allotment is also part of a wilderness study area. JA Vol. 4 at 639-640. Wells cannot be drilled in the wilderness study area. JA Vol. 4 at 639-640, 643.

Mr. Jim Etcheverry testified he rotates his livestock around to different fields and if they are in a specific field at a specific time they need to use the water in that field. JA Vol. 4 at 665-666. Springs producing 2 to 3 gallons per minute of water are very valuable for the cows and sheep to water when they are in a specific field and need to use that water. JA Vol. 4 at 665. "So, if they [the

springs] were compromised, you know, it would really hurt right then." JA Vol. 4 at 665.

Finally, several witnesses described the shallow water table in the Kobeh Valley Basin. JA Vol. 4 at 640-641, 676-677; JA Vol. 25 at 4751. Lowering the water table would impact their surface and groundwater rights and wildlife in the area. JA Vol. 4 at 641, 643, 673-677.

In the 2008 hearing, Thomas Buqo, an expert hydrogeologist for KVR responsible for KVR's well drilling program, confirmed Mr. Martin Etcheverry's statement regarding the number of springs in the area. JA Vol. 36 at 6956-6958, 6960-6961. Mr. Buqo testified:

> Mr. Etcheverry I think said there's 100 springs in the Roberts Mountains and I think he's absolutely correct.
>
> I know there's a lot of small springs and seeps. . . . . What we noticed is there are numerous springs in the Roberts Mountains area, lots and lots of them.
>
> There's also springs over on the valley floor.

JA Vol. 36 at 6961.

Martin Etcheverry, Jim Etcheverry and John Colby further testified regarding vested surface water rights they, or their predecessors, used prior to 1905

for stockwatering and cattle grazing purposes.[4] These witnesses testified there are hundreds of springs and creeks on both their private land and BLM allotments in Kobeh Valley and the Roberts Mountain area, with uses that pre-date 1905.[5] JA Vol. 4 at 634-636, 638-640, 664, 666, 668-669, 678-679; JA Vol. 26 at 4934, 4935, 4937, 4938.

Ron Damele testified that in 1878 his family came from Italy to Alpha, Nevada, which is located 36 miles north of the town of Eureka. JA Vol. 4 at 685-686. From the late 1800's, Mr. Damele's family owned the Three Bar, JD, Tonkin, Willow Creek and Indian Ranches. JA Vol. 4 at 699. His family ran cattle and sheep and irrigated the meadows on those properties and there was no doubt the water was used based on the information his family has handed down, the works he saw there and "because there's good creeks." JA Vol. 4 at 699.

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[4] At the 2008 hearing, the STATE ENGINEER's Office asked and Martin Etcheverry confirmed during public comment the rights he had on the springs in the Roberts Creek area were claims of vested rights. JA Vol. 36 at 6954. The STATE ENGINEER was put on notice in 2008, even if public comment is not evidence pursuant to NAC 533.060 and NAC 533.110, that there was a water user contending he had claims of vested rights in the Roberts Creek area.

[5] These vested rights were not listed in KVR's exhibits showing water rights KVR identified from records of the STATE ENGINEER's Office. JA Vol. 3 at 536-537, 541-542. All water rights owned by Kobeh Valley and Roberts Mountain area water users may not have been depicted on EUREKA COUNTY's exhibits.

C. The Conflicts.

At the hearings before the STATE ENGINEER, KVR's experts testified the Applications would conflict with existing rights. Terry Katzer, KVR's expert in hydrogeology, testified in response to questioning from KVR's attorney:

> Q. Okay. Will the pumping over time cause impacts to springs in direct stock watering wells in the floor of Kobeh Valley?
>
> A. I believe it will. And I can't name the springs because I'm not that familiar with them. Mud Springs, for instance, I know where that is. I've been there. It will probably dry that up with time. And other springs that are in close proximity to the well field.
>
> Q. Stock watering wells?
>
> A. Stock watering wells, yes, probably.

JA Vol. 2 at 338-339, 363. On cross examination, Mr. Katzer confirmed his earlier opinion that KVR's proposed groundwater pumping would impact existing surface and groundwater rights holders in the alluvial system:

> Q. But in this case you've already testified that there's going to be impacts to existing rights from this pumping; is that correct?
>
> A. That's in the alluvial system. That's a given.

JA Vol. 2 at 373-374 (emphasis added).

JA Vol. 5 at 915.

Dwight Smith, KVR's hydrogeology and groundwater modeling expert, and the individual responsible for the preparation of the numerical groundwater flow model presented by KVR, reading from the model report, testified that "[h]owever, the model offers the best available tool from any predictions and it suggests a potential to impact spring flows in Roberts Creek and Henderson Creek water sheds." JA Vol. 3 at 436-438, 525. Mr. Smith described the impacts to a specific existing permit, the Mud Spring permit, as follows:

> Q. And then going down to spring 721 [Mud Spring permit]?
>
> A. Yes.
>
> Q. That's in green?
>
> A. Yes.
>
> Q. Which indicates it's a spring in the valley?
>
> A. Yes, that's correct.
>
> Q. And that's the Etcheverry Mud Spring permit that's referenced on page 189 of your text?
>
> A. That's correct.
>
> . . . .
>
> Q. And in the text that also indicates that that spring would have a permanent impact?

A. Well, not permanent because it does recover over time. Well, it recovers to within one foot of pre-pumping water levels. But that spring might be helpful to refer to Figure 4.4-20. I know we don't have the well field superimposed on this figure. But that spring is in very close proximity to a proposed production well site. I visited that spring and I actually recall finding a metal casing in the middle of that. I don't know if that's a spring that's just been augmented by drilling a well in the middle of it. I'm not quite sure the conspiracies [sic]. But very low flow supports a small pooled area of water that I've seen wild horses and occasionally cattle using as a source of stock water.

But I do, I think there's a high probability that that spring [Mud Spring] will cease the flow of it is -- see the flow as a direct result of pump-out from the well.

Q. It will cease the flow as a result of direct pumping from the well field?

A. I believe it would.

JA Vol. 3 at 544-545 (discussing Table 4.4.10 of the KVR model report found at JA Vol. 9 at 1687d and Figure 4.4-20 found at JA Vol. 11 at 1854a).

Mr. Smith reiterated in his testimony that Mud Spring "would potentially cease to flow" because of its close proximity to the KVR well field. JA Vol. 3 at 531. Mr. Smith agreed with Mr. Katzer's opinions regarding impacts and testified:

A. . . . [N]othing is definitive, but at the same time I think it's pretty likely that those stock water resources will require mitigation. I think those stock water sources would potentially cease to flow. I think we'll see that effect fairly clearly and fairly soon in the pumping. I don't want to suggest that those impacts can't be fully mitigated.

Q. So you agree with the opinion from Mr. Katzer yesterday regarding impacts from the mine's proposed pumping to certain existing rights?

A. He was I think referencing these same references in his testimony.

Q. And you agree with that?

A. Yes, I concur with Terry's testimony.

JA Vol. 3 at 531.

Although Mr. Smith testified impacts to existing water rights could be "fully mitigated," no evidence was presented by KVR at the hearings before the STATE ENGINEER that KVR had proposed or had any type of management or mitigation plan in place. JA Vol. 2 at 305-306, 315; JA Vol. 5 at 902; JA Vol. 7. at 1240. There is no evidence of a mitigation plan proposed by KVR that is part of the record before the STATE ENGINEER.[6] JA Vol. 2 at 305-306, 315; JA Vol. 5

[6] EUREKA COUNTY submitted a proposed plan to the STATE ENGINEER which was designed to address the potential ***unknown*** impacts to senior water rights holders as a result of the mining operations. JA Vol. 14 at 2478-2492; JA Vol. 24 at 4681. EUREKA COUNTY's proposed plan was not

at 902; JA Vol. 7 at 1240**.** One of KVR's witnesses, the director of environmental permitting for the mine project, described such a plan as undeveloped and speculative:

> A. I don't know what we would propose in a mitigation plan. A mitigation plan hasn't been developed yet. It would be speculative to say what we would or would not propose.

JA Vol. 2 at 267-268, 315.

In addition to the expert testimony by Mr. Smith, KVR's model report states:

> Springs located in lower altitudes in the Roberts Mountains, such as sites 630 and 640 (Figure 4.4-20) are more likely to be impacted due to closer proximity to the KVCWF [Kobeh Valley Central Well Field], resulting in larger predicted drawdown at these locations. Discharge at Mud Spring (Site 721) and Lone Mountain Spring (Site 742), located near the southeast edge of the KVCWF near proposed well 226, are predicted to be impacted and will likely cease to flow based on predicted drawdowns of 40 to 50 feet. Both of these springs discharge less than approximately one gallon per minute.
>
> . . . .

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designed to address the ***known*** impacts to senior water rights as it was believed that such senior water rights holders would be protected by the STATE ENGINEER's denial of KVR's Applications that conflicted with existing rights as required by NRS 533.370(2), codified at the time of the hearing as NRS 533.370(5). See JA Vol. 2 at 192-194, 200.

> Only a few wells and water rights not directly associated with the EMLLC Mt. Hope project are within the area of predicted 10-foot drawdown contour (Tables 4.4-8 and 4.4-9; Figure 4.4-20). Notably, significant drawdown is projected for a well at the Roberts Creek Ranch.

JA Vol. 9 at 1552b-1552c. See also JA Vol. 3 at 535-536, for Mr. Smith's testimony regarding impacts to the Roberts Creek Ranch domestic well. KVR's model report also describes the impacts from KVR's pumping and includes a list of non-mine owned wells, water rights, and springs within the area of the mine's 10-foot drawdown predicted at project year 44 and post-project years 10, 30, 50, 100, 200, 300, and 400. JA Vol. 8 at 1360-1361, 1364a; JA Vol. 9 at 1552a-1552d, 1687a-1687d.[7]

A KVR exhibit also presented an overview of predicted impacts from the mine's proposed groundwater pumping:

> - Significant ground water consumption in Kobeh Valley is expected to remove water from storage and lower groundwater elevations in portions of Kobeh Valley.
>
> - Reduction of spring or surface water flows in portions of Kobeh Valley is possible as a result of the lowered groundwater levels.

[7] Vested water rights were not listed in KVR's exhibits showing impacts to existing rights within the area of the mine's 10-foot drawdown. See JA Vol. 3 at 536-537, 541-542.

- Groundwater drawdown in the extreme western portion of Diamond Valley, in the vicinity of Tyrone Gap, is predicted to occur as the open pit extends below the water table.

. . . .

- As the cone of groundwater depression propagates to the north from the well field or to the north and northwest from the pit area, it could encroach upon the southernmost or south-easternmost portions of the Roberts Mountains. This could result in reduction of spring or surface water flows or lowering of shallow groundwater tables that support wet meadow complexes and associated wildlife habitat in these areas.

- Water rights within the cone of depression could be affected: Appropriated surface waters could experience diminished flows. Appropriated groundwater could experience groundwater elevation declines which could impact well efficiencies or pumping costs.

- In general, the potential for impacts increases both with proximity of a given resource to the proposed well field and with increased duration of pumping.

- Figure 1 [JA Vol. 7 at 1248] shows the area that is predicted to experience groundwater drawdown in excess of ten feet at 5 years following project start-up, the water rights within this area and the monitoring locations proposed for this WRMOP [Water Resources Monitoring Plan]. Figure 2 [JA Vol. 7 at 1249] provides this same information, except that it shows the area predicted to experience drawdown in excess of 10 feet at 44 years following project start-up. Figures 3 through 5 [JA Vol. 7 at 1250-1252] show a more detailed view of Kobeh, Diamond, and Roberts Mountains monitoring locations, respectively.

JA Vol. 7 at 1242-1243, 1248-1252.

One witness testified at the December, 2010 hearing he had already experienced impacts as a result of limited pump tests completed by KVR. JA Vol. 4 at 625. Martin Etcheverry, the owner and operator of the Roberts Creek Ranch, testified:

> THE WITNESS: As soon as 206 was done testing their well our Nichols Springs dropped in half the water and it hasn't recovered since then.
>
> Q. (By Ms. Peterson) And that pump test was about two and a half years ago?
>
> A. I believe so, yes.

JA Vol. 4 at 625. KVR was aware of these impacts to Nichols Springs in January, 2010, but had not provided any mitigation. JA Vol. 5 at 903-904.

KVR's identified impacts were based on a 10-foot groundwater drawdown contour that had been used for BLM permitting purposes to identify impacts. JA Vol. 2 at 332. Dale Bugenig, an expert witness for EUREKA COUNTY, provided a report and figures showing impacts to existing rights using KVR's numeric groundwater flow model with a 5-foot drawdown contour. JA Vol. 24 at 4688-4689; JA Vol. 25 at 4750, 4752. The 5-foot drawdown contour

depicts additional existing water rights subject to impacts from KVR's pumping. JA Vol. 24 at 4688-4689; JA Vol. 25 at 4750, 4752.

Extensive evidence was presented at the hearing before the STATE ENGINEER to show that Mud Spring and other springs and creeks in the alluvial system would be impacted—likely dried up entirely—by granting KVR's Applications. JA Vol. 2 at 363, 373-374; JA Vol. 3 at 525, 531, 544-545; JA Vol. 9 at 1687a-1687d. There would also be impacts to stockwatering wells and at least one domestic well in the alluvial system. JA Vol. 2 at 363, 373-374; JA Vol. 3 at 535-536; JA Vol. 9 at 1552c. Such springs and creeks and the wells are subject to vested, permitted or certificated water rights or domestic uses held by appropriators senior to KVR. JA Vol. 4 at 634-636, 638-641, 643, 664-665, 673-677; JA Vol. 25 at 4933; JA Vol. 26 at 4934-4938.

D. Ruling 6127 and the District Court's Order.

The STATE ENGINEER issued Ruling 6127 on July 15, 2011 (hereinafter sometimes referred to as "Ruling"). JA Vol. 26 at 4985-5026. The Ruling references the extensive area of water table drawdown predicted by KVR's proposed groundwater pumping and identified impacts to existing water right holders:

> Those three ranchers [Martin Etcheverry, Jim Etcheverry and John Colby] utilize available surface waters across

> the grazing allotments and own a variety of surface and groundwater rights in Kobeh Valley. The groundwater flow model predicts water table drawdown at the end of mine life of three feet or more in the general area of Kobeh Valley north of U.S. Highway 50 and east of 3-Bars Road. This includes the well field area, where drawdown is extensive. Drawdown of ten feet or less extends westerly to the Bobcat Ranch and southerly to the Antelope Valley boundary. Water rights that could potentially be impacted are those rights on springs and streams in hydrologic connection with the water table that would include valley floor springs.

JA Vol. 26 at 5005.

> The STATE ENGINEER also stated:
>
> In Eureka County's Exhibit Nos. 526, 527, 529 and 530, numerous spring and stream water rights are shown. Water rights that could potentially be impacted are those rights on the valley floor where there is predicted drawdown of the water table due to mine pumping.

JA Vol. 26 at 5006.

Although Ruling 6127 acknowledges "certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping" and "[w]ater level drawdown due to simulated mine pumping is thoroughly documented," the Ruling granted the majority of KVR's Applications. JA Vol. 26 at 5002, 5005-5006, 5026. Ruling 6127 allowed the appropriation of a total combined duty of 11,300 afa of water, subject to minimal conditions, for example, the submission of

a future, undefined monitoring, management and mitigation plan. JA Vol. 26 at 5026.

EUREKA COUNTY requested judicial review of Ruling 6127. JA Vol. 1 at 01-06. After briefing by all the parties and oral argument, the District Court issued its Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review on June 13, 2012. JA Vol. 36 at 6823, 6825-6826. In its Order, the District Court concluded the STATE ENGINEER had the authority to grant KVR's Applications, even though the proposed use or change conflicted with existing rights, on the reliance of a future, undefined plan to mitigate such impacts. JA Vol. 36 at 6834-6835. The District Court stated:

> The Court concludes that NRS 533.370(2) does not prevent the State Engineer from granting applications that may impact existing rights if the existing right can be protected through mitigation, thus avoiding a conflict with existing rights. . . . NRS 533.370(2) requires the State Engineer to deny a water right application if there is no water available for appropriation in the basin or if the proposed use conflicts with existing rights. The statute does not require the State Engineer to deny applications that may impact certain water sources, if the applicant can successfully mitigate those impacts.

JA Vol. 36 at 6834. The District Court explained "[n]othing in Nevada's water law statutes (NRS Ch. 533-534) prohibits the State Engineer from expressly conditioning approval of a permit on the submission and approval of a mitigation

plan to protect the rights of prior appropriators." JA Vol. 36 at 6835. This appeal ensued. JA Vol. 36 at 6945.

V.

SUMMARY OF THE ARGUMENT

In Ruling 6127, the STATE ENGINEER granted KVR's Applications to appropriate 11,300 afa of water to the detriment of existing water rights, and in direct conflict with the mandates of NRS 533.370(2).

NRS 533.370(2) obligates the STATE ENGINEER to reject applications that will conflict with existing rights. Although KVR's own experts testified at the hearings before the STATE ENGINEER that conflicts with existing rights would occur from pumping 11,300 afa of water, the STATE ENGINEER failed to apply the law and granted KVR's Applications on the reliance of a future, undefined monitoring, management and mitigation plan.

The STATE ENGINEER also failed to apply the standard he articulated in Ruling 6127 when he granted KVR's Applications and erroneously concluded that an interbasin transfer of 11,300 afa of groundwater from Kobeh Valley to Diamond Valley was environmentally sound.

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VI.

STANDARD OF REVIEW ON APPEAL

Questions of statutory construction presented in this appeal are questions of law which require de novo review by this Court. This Court recently held "[i]n the context of an appeal from a district court order denying a petition for judicial review of a decision made by the State Engineer, this court has the authority to undertake an independent review of the State Engineer's statutory construction, without deference to the State Engineer's determination." Andersen Family Associates v. Ricci, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (citing Bacher v. State Engineer, 122 Nev. 1110, 1115, 146 P.3d 793, 798 (2006) and Kay v. Nunez, 122 Nev. 1100, 1103, 146 P.3d 801, 804 (2006).

Any "presumption of correctness" of a decision of the STATE ENGINEER as provided by NRS 533.450(10), "does not extend to 'purely legal questions,' such as 'the construction of a statute,' as to which 'the reviewing court may undertake independent review.'" In re State Engineer Ruling No. 5823, 128 Nev. ___, ___, 277 P.3d 449, 453 (2012) (quoting Town of Eureka v. State Engineer, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the STATE ENGINEER's interpretation of a statute control if an alternative reading is

compelled by the plain language of the statute. See Andersen Family Associates, 124 Nev. at 186, 179 P.3d at 1203.

Whether the STATE ENGINEER exceeded his authority in granting KVR's Applications to appropriate 11,300 afa of water to the detriment of existing water rights and in reliance on a future, undetermined mitigation plan, are purely legal questions. Therefore, this Court should undertake independent review without deference to the STATE ENGINEER's Ruling. See Jones v. Rosner, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986) (reviewing court is free to decide legal questions without deference to an agency determination); accord Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. ___, ___, 245 P.3d 1145, 1148 (2010)("[w]e review purely legal questions without deference to the State Engineer's ruling."). The District Court's statutory construction to affirm the STATE ENGINEER's Ruling should also be reviewed de novo by this Court. See Great Basin Water Network v. State Engineer, 126 Nev. ___, ___, 234 P.3d 912, 916 (2010) ("We review a district court's statutory construction determination de novo."). Accordingly, EUREKA COUNTY's Opening Brief highlights the errors made in statutory construction by the STATE ENGINEER in Ruling 6127, and as affirmed by the District Court in its Order Denying Petitions for Judicial Review.

VII.

OVERVIEW OF NEVADA WATER LAW AND THE PRIOR APPROPRIATION DOCTRINE

Nevada's water law, like most western states, adheres to the prior appropriation doctrine. The prior appropriation doctrine "recognizes water rights based on the time of use, as well as actual use, of water without regard to the ownership of land contiguous to a water course." United States v. State Engineer, 117 Nev. 585, 591, 27 P.3d 51, 55 (2001) (Becker, J., concurring in part and dissenting in part). "Where the right to the use of running water is based upon appropriation, and not upon an ownership in the soil, it is the generally recognized rule here that priority of appropriation gives the superior right." Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 543 (1869). Accord Reno Smelting, Milling and Reduction Works v. Stevenson, 20 Nev. 269, 282, 21 P. 317, 322 (1889) (concluding the common law doctrine of riparian rights was unsuited to our State and that rights should be determined by the principles of prior appropriation).

An appropriative right "'may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.'" Desert Irrigation, Ltd. v. State of Nevada, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) (quoting Frank J. Trelease & George A.

Gould, Water Law Cases and Materials 33 (4th ed. 1986)). Thus, "first in time is the first in right" is the general rule of the prior appropriation doctrine. See Prosole v. Steamboat Canal Co., 37 Nev. 154, 166, 140 P. 720, 724 (1914) (acknowledging the "just and well-established rule that in cases [of water appropriation] the first in time is the first in right").

This Court has described three different types of water rights in Nevada—vested, permitted, and certificated. See Andersen Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (2008). "Vested" water rights are "'water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation.'" Waters of Horse Springs v. State Engineer, 99 Nev. 776, 778, 671 P.2d 1131, 1132 (1983) (quoting Application of Filippini, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949)). This Court has determined that it is not always essential water be diverted to constitute an appropriation, such that the use of water by grazing livestock constitutes sufficient appropriation to establish a vested water right. See Waters of Horse Springs, 99 Nev. at 778, 671 P.2d at 1132. Accord State v. State Engineer, 104 Nev. 709, 716, 766 P.2d 263, 268 (1988) ("Nevada law and longstanding custom recognize stockwatering as a beneficial use of water.").

It is imperative to Nevada water law that prestatutory vested rights not be impaired by statutory law. Nevada's nonimpairment statute is set forth at NRS 533.085(1):

> 1. Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

See also Andersen Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (concluding that although prestatutory vested rights may be subject to state regulation, such regulation may not impair the quantity or value of the vested rights).

The second type of water rights in Nevada are "permitted" rights. Permitted rights are granted after the State Engineer approves a party's application for water rights. Such permit grants the applicant the right to develop a specific amount of water for a designated purpose. See Andersen Family Associates v. Ricci, 124 Nev. at 188-89, 179 P.3d at 1205.

Finally, the third type of water rights in Nevada are "certificated" rights. Certificated rights are granted after a party perfects his or her permitted water rights. In order to perfect permitted water rights, an applicant must file proof of beneficial use with the State Engineer. Once proof has been filed, the State

Engineer will issue a certificate in place of the permit. See Id. at 189, 179 P.3d at 1205.

Existing water rights include vested, permitted and certificated water rights. See Andersen Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (2008). NRS 533.370(2) prohibits the granting of applications to appropriate water, whether surface or groundwater, when the proposed use or change conflicts with existing water rights.[8]

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[8] In its entirety, NRS 533.370(2) states:

> 2. Except as otherwise provided in subsection 10, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

(Emphasis added.)

VIII.

ARGUMENT

A. The STATE ENGINEER Exceeded His Authority By Granting Applications When the Proposed Use or Change Conflicts With Existing Rights.

The powers of the STATE ENGINEER, like other state administrative agencies, are limited to those set forth in the law. See City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); Andrews v. Nevada State Board of Cosmetology, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970) ("Official powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function. The grant of authority to an agency must be clear.") (internal citation omitted). See also NRS 532.110 ("[t]he State Engineer shall perform such duties as are or may be prescribed by law"); NRS 532.120(1) ("The State Engineer may make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.").

Although an administrative agency's powers are generally limited to the powers set forth by statute, "certain powers may be implied even though they were not expressly granted by statute, when those powers are necessary to the agency's performance of its enumerated duties." City of Henderson v. Kilgore,

122 Nev. at 334, 131 P.3d at 13. Therefore, for implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty of the agency. Id. at 335, 131 P.3d at 14. See also Clark County School District v. Teachers Association, 115 Nev. 98, 103-104, 977 P.2d 1008, 1011 (1999) (concluding that a hearing officer had the implied authority to issue subpoenas for limited pretrial discovery since the language of the statute authorized the hearing officer to subpoena witnesses to testify at the hearing).

The STATE ENGINEER has the express authority to approve applications to appropriate water if the conditions of NRS 533.370(2) are satisfied, and to reject applications if they are not. See Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. ___, ___, 245 P.3d 1145, 1146 (2010) ("The State Engineer is prohibited by law from granting a permit under a change application to appropriate public waters if: . . . the 'proposed use or change conflicts with existing rights . . . .'") (quoting NRS 533.370(3), now codified as NRS 533.370(2)). "Under NRS 533.370[(2)] the State Engineer must deny applications when there is no unappropriated water in the proposed source or when the proposed use conflicts with existing rights or is detrimental to the public interest." State Engineer v.

Morris, 107 Nev. 699, 701, 819 P.2d 203, 204 (1991) (internal footnote omitted) (emphasis added).[9]

Nowhere in Nevada's water law does it state the STATE ENGINEER has the power to grant applications to appropriate water when the proposed use or change conflicts with an existing water right. In fact, the plain language of NRS 533.370(2) unambiguously and expressly prohibits the STATE ENGINEER from granting applications where the proposed use or change conflicts with existing rights. NRS 533.370(2) expressly states that "where [an application's] proposed use or change conflicts with existing rights . . . the State Engineer shall reject the application and refuse to issue the requested permit." (Emphasis added.) "[I]t is well established that '[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.'" United States v. State Engineer, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) (quoting City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989)). Accord Bacher v. State Engineer, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006).

[9] In the 2008 hearing, then Deputy State Engineer, Jason King, acknowledged that one of the criteria looked at in determining whether to grant or deny an application is will the application have an adverse impact on existing water rights. JA Vol. 36 at 6953. Mr. King stated the STATE ENGINEER's Office has a mandate to protect existing rights. JA Vol. 36 at 6953.

Moreover, in Great Basin Water Network v. State Engineer, 126 Nev. ___, 234 P.3d 912 (2010), this Court reiterated its determination that "[t]he word "shall" is a term of command; it is imperative or mandatory, not permissive or directory.'" Great Basin Water Network, 126 Nev. at ___, 234 P.3d at 916 (quoting Blaine Equipment Co. v. State, 122 Nev. 860, 867, 138 P.3d 820, 824 (2006)) (quoting Adkins v. Oppio, 105 Nev. 34, 37, 769 P.2d 62, 94 (1989)). Thus, it is mandatory that the STATE ENGINEER reject an application and refuse to issue the requested permit when the proposed use or change conflicts with existing rights. See NRS 533.370(2).

Furthermore, no implied power is conferred on the STATE ENGINEER to grant applications if the conditions of NRS 533.370(2) are not met. Implied powers are conferred on an agency when such powers are necessary to the agency's performance of its enumerated duties. See City of Henderson v. Kilgore, 122 Nev. at 334, 131 P.3d at 13.

As set forth above, the STATE ENGINEER has the express authority to approve applications to appropriate water if the conditions of NRS 533.370(2) are satisfied, and to reject applications if they are not. See Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. at ___, 245 P.3d at 1146. If the conditions of NRS 533.370(2) are not met, then the STATE ENGINEER has no implied power to

approve the applications. The STATE ENGINEER has no implied power to nullify one of the conditions of NRS 533.370(2)—namely the condition that a proposed use or change shall not conflict with existing rights. "While this court has determined that an administrative agency may possess an implied limited power, any implied limited power must be essential to carry out an agency's express statutory duties." City of Henderson v. Kilgore, 122 Nev. at 335, 131 P.3d at 14.

B. NRS 533.370(2) Expressly Mandates that Applications that Conflict With Existing Rights Shall be Rejected by the STATE ENGINEER.

As set forth above, NRS 533.370(2) expressly provides that "where [an application's] proposed use or change conflicts with existing rights . . . the State Engineer shall reject the application and refuse to issue the requested permit." (Emphasis added.) In construing this statute, this Court has determined that "the State Engineer must deny applications . . . when the proposed use conflicts with existing rights. . . ." State Engineer v. Morris, 107 Nev. at 701, 819 P.2d at 204.

In Griffin v. Westergard, 96 Nev. 627, 630, 615 P.2d 235, 237 (1980), the hydrographic basin from which the applicant sought to appropriate water was overappropriated and, accordingly, the State Engineer entered a finding that granting any additional groundwater rights in that basin would conflict with

existing rights. Thus, the State Engineer denied the applications. Id. This Court affirmed the State Engineer's denial of the applications because the applications conflicted with existing rights. Id. at 632, 615 P.2d at 238.

In affirming the State Engineer's denial in Griffin, this Court held that NRS 533.370(4), now codified as NRS 533.370(2), "required respondent [the State Engineer] to deny any permit that would impair existing rights and prove detrimental to the public interest." Id. at 631, 615 P.2d at 237 (emphasis added). Thus, this Court equated "conflict" with "impair" in the context of impacts to existing rights. Id.

Other states with similar statutes have also strictly construed the statutory mandate that applications proposing conflicts with existing rights must be denied. See Heine v. Reynolds, 367 P.2d 708, 710 (N.M. 1962); Piute Reservoir & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962).

In Heine v. Reynolds, the New Mexico Supreme Court concluded that "[t]he state engineer had a positive duty to determine if esisting [sic] rights would be impaired; and having found that they would be, there is no necessity under the statute to further determine the degree or amount of impairment. The burden is on the applicant to show no impairment of existing rights. . . ." Heine, 367 P.2d at 710 (emphasis in original).

Further, in Piute Reservoir & Irr. Co. v. West Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962) the Utah Supreme Court held that change applications must be denied where evidence showed that existing water users would be denied some quantity of water. The Utah Supreme Court reasoned as follows:

> This court has never adopted the so-called 'de minimus' theory, which we understand to be that an application either to appropriate or change the diversion or use of water should be approved if the effect on prior vested rights is so small that courts will not be concerned therewith. This would seem to require the approval of an application if it were shown that the adverse effect on vested rights is very small, even though there is a definite showing of some such adverse effect. . . . However, the correct rule on this question is that the applicant must shown [sic] reason to believe that the proposed application for change can be made without impairing vested rights. This means that if vested rights will be impaired by such change or application to appropriate, such application should not be approved.

Piute Reservoir, 367 P.2d at 858 (internal footnote omitted). See also Postema v. Pollution Control Hearings Bd., 11 P.3d 726, 741 (Wash. 2000) ("The statutes do not authorize a de minimis impairment of an existing right. RCW 90.03.290 plainly permits no impairment of an existing right.").

In City of Albuquerque v. Reynolds, 379 P.2d 73, 81 (N.M. 1962), the New Mexico Supreme Court upheld the state engineer's decision to deny the City

of Albuquerque's application to drill wells in the underground basin unless the City retired its existing surface water rights to offset the effect of new groundwater pumping on the flows of the Rio Grande River. In reaching its conclusion, the New Mexico Supreme Court determined that the state engineer had the authority to promulgate rules requiring surface water right retirements as a condition to new appropriations of underground water from the Rio Grande River. Reynolds, 379 P.2d at 80. "[The requirement] that surface rights be retired to the extent necessary to protect prior stream appropriators as a condition of the granting of an application to appropriate from the basin, is within the lawful power and authority of the state engineer." Id. at 81.

The conditions imposed by the New Mexico state engineer and affirmed by the Court in Reynolds protected the existing water rights holders because no new appropriations of groundwater would be approved by the state engineer unless existing surface water rights were first retired. In the appeal before this Court, the conditions imposed on KVR by the STATE ENGINEER and approved by the District Court clearly do not protect the existing water rights holders because they are not defined.

Based on the uncontested expert evidence before him, the STATE ENGINEER's Ruling acknowledges the flow loss to certain springs impacted by KVR's proposed pumping.[10] Ruling 6127 states:

> The Applicant recognizes that certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping. These springs produce less than one gallon per minute and provide water for livestock purposes. The State Engineer finds that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur.

JA Vol. 26 at 5006 (internal footnotes omitted). No evidence of a mitigation plan by the Applicant, KVR, to protect the existing water rights was presented to the STATE ENGINEER. JA Vol. 2 at 305-306, 315; JA Vol. 5 at 902; JA Vol. 7 at 1240.

Further, in 2008, KVR's expert in hydrogeology, Thomas Buqo, testified before the STATE ENGINEER that: "Springs are an important consideration because they tell you things about the hydrogeologic conditions and you also don't want to dry up springs when you're developing water." JA Vol. 36 at 6961. Although the STATE ENGINEER acknowledged the evidence of impacts

[10] KVR's expert in hydrogeology, Terry Katzer, testified at the hearings before the STATE ENGINEER that KVR's proposed groundwater pumping would impact existing water rights holders in the alluvial system. JA Vol. 2 at 338-339, 363, 373-374.

to existing rights, the STATE ENGINEER nonetheless granted KVR's Applications. JA Vol. 26 at 5005-5006.[11]

The District Court compounded the STATE ENGINEER's error when it improperly concluded that NRS 533.370(2) does not prevent the STATE ENGINEER from granting applications that may impact existing rights if the existing rights can be protected through mitigation, thus allegedly avoiding a conflict with existing rights.

In its Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review, the District Court concluded that the STATE ENGINEER had the implied power to grant applications even if the proposed use or change conflicts with existing rights. The District Court stated as follows:

> The Court concludes that NRS 533.370(2) does not prevent the State Engineer from granting applications that may impact existing rights if the existing right can be protected through mitigation, thus avoiding a conflict with existing rights. . . . NRS 533.370(2) requires the

[11] In his Ruling, the STATE ENGINEER discounted Mr. Katzer's testimony that impacts were "a given" to numerous springs and stockwatering wells in the Kobeh Valley alluvial system, by minimizing the extent of impacts to select springs flowing less than one gallon per minute and one domestic well. JA Vol. 2 at 338-339, 363, 373, 374; JA Vol. 26 at 5006, 5011, 5023. The Ruling summarily categorizes all such impacted springs as having flows of less than one gallon per minute. JA Vol. 36 at 5006, 5011. Mud Spring and Lone Mountain Spring were the only springs KVR specifically identified with a purported flow of less than one gallon per minute. JA Vol. 3 at 544-545; JA Vol. 9 at 1552b.

> State Engineer to deny a water right application if there is no water available for appropriation in the basin or if the proposed use conflicts with existing rights. The statute does not require the State Engineer to deny applications that may impact certain water sources, if the applicant can successfully mitigate those impacts.

JA Vol. 36 at 6834.[12]

In support of its conclusion that "[n]othing in Nevada's water law statutes (NRS Ch. 533-534) prohibits the State Engineer from expressly conditioning approval of a permit on the submission and approval of a mitigation plan to protect the rights of prior appropriators," the District Court cites to United States v. Alpine Land & Reservoir Co., 919 F. Supp. 1470 (D. Nev. 1996). JA Vol. 36 at 6835. The District Court's reliance on Alpine Land, however, is misplaced.

In Alpine Land, the federal district court noted that in Ruling 4207, the State Engineer granted the applicant's change applications, but imposed a

[12] It is important to note that EUREKA COUNTY has always advanced that KVR change the location of its well field so that the wells are not in close proximity to existing water rights in Kobeh Valley or reduce the size of its project by requesting a smaller quantity of water to minimize potential impacts. JA Vol. 5 at 909; JA Vol. 35 at 6666-6667. EUREKA COUNTY's contention that KVR should scale down it mining project or reconfigure its well field to minimize impacts to existing water rights shows that the District Court's concern and KVR's argument that EUREKA COUNTY's statutory interpretation of NRS 533.370(2) would create a near impossibility for the future development of any new groundwater in Nevada is without merit. JA Vol. 36 at 6835-6836.

number of conditions upon them. Alpine Land, 919 F. Supp. at 1478. First, the State Engineer approved the applicant's change applications for surface water rights so long as no irrigation wells were drilled in California to re-irrigate the land being stripped of water. Id. The condition expressed by the State Engineer in granting the change applications stated as follows: "[T]he approval is null and void if any attempt is made to drill wells and irrigate, from a groundwater source, the land being stripped of water." Id. at 1473 (emphasis added). Although the applicant argued that the State Engineer had no authority to issue such a condition, the federal district court concluded that "[t]he Nevada State Engineer has the inherent authority to condition his approval of an application to appropriate based on his statutory authority to deny applications if they impair existing water rights." Id. at 1479.

The second condition imposed by the State Engineer in Alpine Land was to order that the applicant shall bear the transportation loss attributable to granting the change applications. Id. In granting the change applications, the State Engineer determined that there would be a large transportation loss because the distance between the applicant's proposed diversion and place of use covered a distance of about eight miles. Id. The State Engineer determined that the applicant should bear the entire transportation loss attributable to granting the change

applications in order to protect downstream users. Id. The federal district court concluded the second condition was a proper exercise of the State Engineer's authority in granting the change applications. Id. at 1479-80.

Based on the foregoing, it is clear that the holding in Alpine Land does not support the District Court's determination that the STATE ENGINEER can grant applications that conflict with existing rights based on a future, undefined mitigation plan. Instead, the holding in Alpine Land reaffirms the statutory mandate that applications that conflict with existing rights cannot be approved. See NRS 533.370(2). See also Alpine Land, 919 F. Supp. at 1473 (condition imposed by the State Engineer stated that the approval of the applications would be null and void if any attempt was made to re-irrigate the land stripped of water–thus protecting the existing surface water rights holders).

Accordingly, the District Court's decision to defer to the STATE ENGINEER's interpretation of his authority under NRS 533.370(2) because there was no specific prohibition in the law to conditioning approval on the submission and approval of a future, undefined mitigation plan to remediate impacts to existing water rights is not within the statutory provisions and was, thus, in error. The STATE ENGINEER had no discretion to grant KVR's Applications under NRS 533.370(2). KVR's Applications conflicted with existing rights and they

should have been rejected. See Great Basin Water Network, 126 Nev. at ___, 234 P.3d at 916 (noting that the word "shall" is a term of command; it is mandatory, not permissive or directory).

C. The STATE ENGINEER is Precluded from Granting Groundwater Permits to Applicants Later in Time if the Junior Appropriations Will Impact Prior Surface Water Rights.

The District Court determined that because subsections (4) and (5) of NRS 534.110 allow an appropriation of groundwater that will cause a "reasonable lowering" of the static water level as long as the prior appropriators can be satisfied under express conditions, and there is a legislative declaration regarding mitigation of impacts to domestic wells contained in NRS 533.024(1)(b), impacts on existing water rights are permitted under NRS 533.370(2) in Nevada. JA Vol. 36 at 6834-6836. The statutes cited by the District Court, however, address standards associated with groundwater—not surface water.

The springs and creeks at issue in this case are surface water, not groundwater, and it is impossible to have a "reasonable lowering" of a spring or a creek.[13] Vested surface water rights cannot be impaired or affected nor can the customary manner of use of vested rights be impaired or affected pursuant to NRS

[13] Even if a "reasonable lowering" was permitted for surface water, it is not plausible to assert that such reasonable lowering should include drying up the surface water source as will occur in this case. JA Vol. 9 at 1687a-1687d.

533.085(1). Therefore, the provisions of NRS 534.110(4) and (5) and NRS 533.024(1)(b), which apply to groundwater diversions, do not apply to allow impacts to senior surface water rights.

Moreover, based on the STATE ENGINEER's approval of a future, undefined mitigation plan, and his reliance on NRS 534.110, a question arises regarding the procedure the STATE ENGINEER must use to impose "express conditions" as provided in NRS 534.110 for new groundwater appropriations. Pursuant to the prior appropriation doctrine, express conditions must protect the rights of holders of existing groundwater appropriations prior to the approval of an application. The simple answer can be found not only in the doctrine of prior appropriation, as discussed above, but in NRS 534.110(5) which states that a permit for an underground water right may be granted "so long as … the rights of holders of existing appropriations can be satisfied under such express conditions." This clearly mandates that such express conditions must be imposed and the senior/existing groundwater appropriations satisfied before the STATE ENGINEER grants a permit to a junior groundwater appropriator. Such timing forces a hard look at impacts because the senior groundwater appropriator will demand protection of his appropriation as part of express conditions, or in the alternative the senior groundwater appropriator will be made whole in some other

way. See Alpine Land, 919 F. Supp. at 1473 (State Engineer imposed an express condition that approval of the change applications would be null and void if any attempt was made to re-irrigate the land from which the water was being stripped—thus protecting existing water rights holders).

D. The STATE ENGINEER's Ruling Fails to Adhere to the Prior Appropriation Doctrine and the Well-Established Rule of "First in Time, First in Right" Because it Allows KVR to Pump 11,300 afa of Water at the Expense of Existing Water Rights Holders.

As discussed in detail above, the appropriation of water in Nevada is in accordance with the prior appropriation doctrine. Moreover, the appropriation of water in Nevada is governed by statute and the STATE ENGINEER is authorized to regulate such appropriations. See NRS 532.110; NRS 532.120; NRS 533.030(1). This Court has recognized that water in Nevada "is a precious and increasingly scarce resource. Consequently, state regulation like that in NRS Chapters 533 and 534 is necessary to strike a sensible balance between the current and future needs of Nevada citizens and the stability of Nevada's environment." Bacher v. State Engineer, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006).

Although Ruling 6127 acknowledges that "certain water rights on springs in Kobeh Valley are likely to be impacted by [KVR's] proposed pumping" and that "[w]ater level drawdown due to simulated mine pumping is thoroughly documented," the STATE ENGINEER nevertheless granted KVR's Applications

to pump 11,300 afa of water to the detriment of the holders of existing water rights. JA Vol. 26 at 5002, 5005-5006, 5026. Because Nevada adheres to the prior appropriation doctrine and the "first in time, first in right" model, the STATE ENGINEER does not have the authority to grant KVR's proposed use or change at the expense of existing water rights holders.

E. The STATE ENGINEER Exceeded His Authority by Relying on a Future, Undefined Monitoring, Management and Mitigation Plan that was Not in the Record to Protect Existing Water Rights.

In accordance with NRS 533.370(2), the STATE ENGINEER has no authority to grant applications and issue permits where the proposed use or change conflicts with existing rights, regardless of any future, undefined mitigation plan. See Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 750, 918 P.2d 697, 701 (1996) ("NRS 533.370(3) [now codified in NRS 533.370(2)]), which has remained essentially unchanged for decades, limits the role of the State Engineer. The State Engineer has no express authority to engage in a comparative economic analysis of water delivery alternatives."). Further, NRS 533.370(2) does not provide the STATE ENGINEER the authority to rely on a future, undefined monitoring, management and mitigation plan that was not in the record to protect existing water rights, including the protection of

vested rights which may not be impaired or affected pursuant to NRS 533.085(1).[14]

It is undisputed that the STATE ENGINEER must provide all parties a full opportunity to be heard in compliance with the basic notions of fairness and due process. See Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979). A well-accepted concept of fairness and due process in administrative law requires that an administrative agency not rely on information that is not presented at the hearing. See Revert, 95 Nev. at 787-88, 603 P.2d at 265. See also Welch v. County Bd. of Sch. Trustees of Peoria County, 160 N.E.2d 505, 507 (Ill. App. Ct. 1959) ("the findings of an administrative agency must be based on facts established by evidence which is introduced as such, and the administrative agency cannot rely on its own information to support its findings").

In Revert v. Ray, appellants argued before the State Engineer that their predecessors in interest had acquired a vested interest in the waters of Beatty Springs. Id. at 785, 603 P.2d at 263-64. Without considering the issue of adverse possession, the State Engineer found that the subject rights in Beatty Springs had

[14] KVR testified at the hearings before the STATE ENGINEER that it had no current mitigation plan. JA Vol. 2 at 305-306, 315; JA Vol. 5 at 902; JA Vol. 7 at 1240.

been abandoned and, as a result, the water rights reverted to the State and were subject to appropriation. Id. at 785, 603 P.2d at 264. Appellants appealed the State Engineer's decision to the district court. Id.

The district court in Revert v. Ray conducted a limited review of the proceedings before the State Engineer to determine whether substantial evidence existed in the record to support the State Engineer's decision. Id. at 786, 603 P.2d at 264. Although the district court expressed some concern over the State Engineer's failure to consider whether appellants' predecessors in interest had adversely possessed the springs prior to the time of abandonment, the district court nonetheless relied on a post-review brief filed by the State Engineer which asserted that any use of the Beatty Springs by appellants' predecessors in interest had been permissive and not adverse. Id. at 785-86, 603 P.2d at 264-65.

On appeal, this Court in Revert v. Ray reversed the district court's judgment and remanded the case back to the State Engineer "for a full and fair determination of appellants' adverse possession claim." Id. at 788, 603 P.2d at 265. In reaching its conclusion, this Court noted that resolution of appellants' adverse possession claim was essential to the "full and fair determination" of the appropriation application. Id. at 787, 603 P.2d at 265. Further, this Court stated that if the alleged adverse possession had been completed prior to the date of

abandonment, then appellants would have established a vested interest in the disputed waters. Id. Since the State Engineer did not address the issue at the administrative hearing, appellants were deprived of a "full and fair determination" of their claim. Id.

This Court in Revert v. Ray further noted that the district court compounded the State Engineer's error when the district court failed to remand the matter back to the State Engineer for a proper determination of the adverse possession issue. Id. Instead, the district court erroneously relied on a post-review brief filed by the State Engineer to supply the missing findings. Id. This Court held that since the post-review brief was not part of the record before the State Engineer, the brief should not have been considered by the district court. Id. This Court stated:

> The State Engineer's brief amounted to nothing more than a post hoc rationalization for the State Engineer's prior error of omission and is not the type of "explicit and concise" finding of fact required by NRS 233B.125. The brief, in short, was not a part of the record and thus, should not have been considered by the district court.

Id. Thus, this Court reversed the district court's judgment and remanded the case back to the State Engineer for findings.

The holding in Revert v. Ray is applicable to the facts of this case in that the STATE ENGINEER relied on a future, undefined monitoring,

management and mitigation plan that was not in the record, and the District Court affirmed the STATE ENGINEER's reliance on such future, undefined plan that was not part of the record. The STATE ENGINEER's Ruling denied the Protestants a "full and fair determination" of the conflicts with existing rights because the STATE ENGINEER relied on a future, undefined mitigation plan not in the record.

Furthermore, NRS 533.370(2) mandates that applications which conflict with existing rights must be rejected. NRS 533.370(2) does not authorize the STATE ENGINEER to mitigate the impacts to existing rights and issue the permits. If the Nevada Legislature had intended to give the STATE ENGINEER such power, the Nevada Legislature would have specifically set out such authority in the statutes. For example, the Nevada Legislature expressly gave the STATE ENGINEER the power to restrict the drilling of wells in any basin or portion thereof designated by the STATE ENGINEER if the STATE ENGINEER determined that additional wells "would cause an undue interference with existing wells." NRS 534.110(8).

Even assuming *arguendo* that the STATE ENGINEER has the authority to grant applications that conflict with existing rights based on a mitigation plan, the mitigation measures must be expressly determined and

approved by the STATE ENGINEER as part of a "full and fair determination" of the issue prior to granting the applications. See Revert v. Ray, 95 Nev. 782, 787-88, 604 P.2d 262, 265 (1979) (concluding that matters not in the record before the State Engineer should not be considered to ensure a full and fair determination). Therefore, the STATE ENGINEER needs to promulgate rules and regulations regarding how such mitigation measures are to be presented for consideration prior to an application being granted, assuming *arguendo* that he has the authority to grant applications that conflict with existing rights.

Since there is no guidance in Nevada law regarding the definition, purpose or scope of mitigation within the strictures of NRS 533.370(2), the laws of other jurisdictions illustrate that mitigation measures have been expressly authorized by statutes and administered in accordance with specific rules and regulations.

For example, Colorado has adopted a process by which it authorizes a plan for augmentation to be filed by water appropriators. See Colo. Rev. Stat. Ann. §37-92-302 (West 2012). In Colorado, a "plan for augmentation" is:

> [A] detailed program . . . to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies

> of water, by the development of new sources of water, or by any other appropriate means . . . .

Colo. Rev. Stat. Ann. §37-92-103(a) (West 2012). The intent of the Colorado Legislature in authorizing plans for augmentation was to allow new users of water to come into being so long as the vested rights of others are protected. See Upper Eagle Regional Water Authority v. Wolfe, 230 F.3d 1203, 1010-11 (2010) ("An augmentation decree holder must replace water to the stream in the amount, time, and location necessary to provide vested water rights and decreed conditional water rights the water that would have been available absent the out-of-priority diversion and resulting depletion.") See also 2 Colo. Code Regs. §410-1:5-5.6 (2012) (setting forth specific regulations for replacement plans for new appropriations of groundwater in an overappropriated area to protect existing water rights).

As another example, Oregon's regulatory scheme defines mitigation as "taking action or measures that avoid, minimize, rectify, reduce or compensate for impact." Or. Admin. R. 690-051-0010(19) (2012). Moreover, Oregon's statutory provisions associated with mitigation provide that water officials "shall consider mitigation measures and may include mitigation measures as conditions in any water right permit or certificate to ensure the maintenance of the free-flowing character of the scenic waterway in quantities necessary for recreation,

fish and wildlife." Or. Rev. Stat. §390.835(10) (2012). See Waterwatch of Oregon, Inc. v. Water Resources Commission, 112 P.3d 443, 453 (Or. Ct. App. 2005) (noting that Oregon's water laws require the "maintenance" of stream flows and an attempt at "moderation" of impacts does not satisfy the statutory requirement). Oregon also has an entire system established for the award and use of mitigation credits. See Or. Rev. Stat. §537.746 (2012).

Finally, Montana allows for mitigation of adverse effects occurring as the result of a new water appropriation. See Mont. Code Ann. §85-2-362 (2011). However, in allowing for mitigation, the Montana statute plainly dictates what must be provided for in a mitigation plan as follows:

> (a) where and how the water in the plan will be put to beneficial use;
>
> (b) when and where, generally, water reallocated through exchange or substitution will be required;
>
> (c) the amount of water reallocated through exchange or substitution that is required;
>
> (d) how the proposed project or beneficial use for which the mitigation plan is required will be operated;
>
> (e) evidence that an application for a change in appropriation right, if necessary, has been submitted;
>
> (f) evidence of water availability;

> (g) evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator; and
>
> (h) evidence that the appropriate water quality permits have been granted pursuant to Title 75, chapter 5, as required by 75-5-410 and 85-2-364.

Mont. Code Ann. 85-2-362 (2011). Thus, Montana water law requires that a mitigation plan must be prepared before an application may be granted.[15]

In Ruling 6127, the STATE ENGINEER continually relies on a future mitigation plan that he intends KVR to draft and submit after issuance of the permits. JA Vol. 26 at 5005-5006, 5022-5023, 5026. For example, the STATE ENGINEER states:

> However, because there are uncertainties with respect to the complex hydrogeology of the area and the ability of a model to accurately simulate future effects of pumping, the State Engineer will require a substantial surface and groundwater monitoring program to establish baseline groundwater and stream flow conditions to improve the predictive capability of the model and to increase the ability to detect future changes in the hydrologic regime.

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[15] Similarly, federal courts have also addressed the impropriety of administrative agencies relying on future mitigation measures. See South Fork Band Council of Western Shoshone of Nevada v. United States Department of Interior, 588 F.3d 718, 727 (9th Cir. 2009) (noting that "[a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective . . . . A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.") (emphasis in original).

JA Vol. 26 at 5005. Further, the STATE ENGINEER ignores his violation of NRS 533.370(2) in granting KVR's Applications that conflict with existing rights by finding "that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur." [16] JA Vol. 26 at 5006. The STATE ENGINEER contends that he has the authority to grant applications that conflict with existing rights subject to future mitigation in Ruling 6127:

> [T]the only way to fully ensure that existing water rights are protected is by closely monitoring hydrologic conditions while groundwater pumping occurs. The State Engineer has wide latitude and broad authority in terms of imposing permit terms and conditions. This includes the authority to require a comprehensive monitoring, management and mitigation plan prepared with assistance from Eureka County.

JA Vol. 26 at 5022. Finally, Ruling 6127 concludes:

> The evidence and testimony show that select springs on the floor of Kobeh Valley and one domestic well near Roberts Creek may be impacted by the proposed pumping in Kobeh Valley; however, any impacts can be detected and mitigated through a comprehensive monitoring, management and mitigation plan. The State Engineer has found that the domestic well and spring flow reduction can be adequately and

[16] This conclusion, repeatedly stated by the STATE ENGINEER in his Ruling [JA Vol. 26 at 5006, 5011, 5023], does not cite to any portion of the record to support the conclusion nor did the STATE ENGINEER provide any discussion, rationale or evaluation of mitigation measures to support his conclusion.

> fully mitigated by the Applicant should impacts to existing rights or the domestic well occur. . . .
>
> Based on substantial evidence and testimony, and the monitoring, management and mitigation plan requirement, the State Engineer concludes that the approval of the applications will not conflict with existing rights, will not conflict with protectable interests in existing domestic wells as set forth in NRS 533.024, and will not threaten to prove detrimental to the public interest.

JA Vol. 26 at 5023.

The STATE ENGINEER's reliance on a future, undefined mitigation plan in granting KVR's Applications is in direct violation of NRS 533.370(2). The STATE ENGINEER granted KVR's Applications based on the broad conclusion that the future action of drafting a mitigation plan will bring the Applications into compliance with NRS 533.370(2)'s prohibition at some point in the future, after the permits have already been issued. The STATE ENGINEER acknowledges that existing water rights will be impacted, but he alleges that such impacts can be adequately and fully mitigated. Further, no evidence of a mitigation plan proposed by KVR was presented to the STATE ENGINEER, and neither EUREKA COUNTY, nor any of the other protestants, were able to assess the validity of any alleged mitigation steps or the mitigation plan. Moreover, having never reviewed any proposed mitigation, the STATE ENGINEER was unable to determine before

approving KVR's Applications if future mitigation would be sufficient to avoid the conflicts with existing water rights holders and bring the Applications into compliance with NRS 533.370(2). There is no evidence cited in Ruling 6127 to support the STATE ENGINEER's findings that any impacts can be mitigated or that mitigation would be effective.

Additionally, Nevada does not have the basic statutory and regulatory requirements found in other jurisdictions to allow for mitigation. This lack of authority, especially in light of the explicit and detailed authority provided by states authorizing mitigation, must be viewed as a denial of the authority to consider mitigation. Furthermore, even if relying on mitigation were appropriate, the STATE ENGINEER has not adequately defined the purpose and the scope of the alleged mitigation to ensure the appropriate protections to existing water rights holders as would have been required in states in which mitigation is permitted.

Accordingly, the STATE ENGINEER's interpretation of his authority pursuant to NRS 533.370(2), to include the power to grant statutorily non-compliant applications based on future undefined actions, is in direct violation of Nevada water law.

F. The STATE ENGINEER Did Not Apply the Correct Standard When He Granted KVR's Applications and Erroneously Concluded that an Interbasin Transfer of 11,300 afa of Water From Kobeh Valley to Diamond Valley Was Environmentally Sound.

An interbasin transfer of groundwater is a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use. See NRS 533.007. In this appeal, most of the water to be appropriated by KVR (11,300 afa pursuant to the Applications as approved by the STATE ENGINEER) will be diverted in Kobeh Valley and put to beneficial use in Diamond Valley, constituting an interbasin transfer of water. JA Vol. 26 at 5007.

NRS 533.370(3)(c) requires the STATE ENGINEER to consider whether an interbasin transfer of water is "environmentally sound as it relates to the basin from which the water is exported." In Ruling 6127, the STATE ENGINEER interprets this statutory requirement to mean that he must determine "whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources." JA Vol. 26 at 5010.

EUREKA COUNTY agrees with the foregoing standard and presented evidence at the hearings before the STATE ENGINEER to show that the proposed interbasin transfer was not environmentally sound.

Although Ruling 6127 espouses the correct standard for an interbasin transfer of water, the STATE ENGINEER did not apply this standard to his analysis. Rather, the STATE ENGINEER merely considered the impacts on the existing water rights in Kobeh Valley, the impacts on the springs and streams in the area, and then stated the proposed mining project and existing rights will use less water than the perennial yield of the basin. JA Vol. 26 at 5011. All of these conditions are applicable under an analysis of NRS 533.370(2), not NRS 533.370(3).

The interbasin transfer analysis employed by the STATE ENGINEER in Ruling 6127 is nearly identical to the analysis conducted under NRS 533.370(2), that is, whether KVR's Applications conflict with existing rights and whether there is water available to appropriate. It is a well-accepted maxim of statutory interpretation that statutes must be interpreted "to give meaning to each of their parts, such that, when read in context, none of the statutory language is rendered mere surplusage." Stockmeier v. Psychological Review Panel, 122 Nev. 534, 540, 135 P.3d 807, 810 (2006). Nowhere in Ruling 6127 does the STATE ENGINEER, applying his own standard, identify or discuss the "hydrologic-related natural resources" of Kobeh Valley and whether these "hydrologic-related natural resources" will be unreasonably impacted by KVR's proposed pumping. Ruling

6127 merely mentions "wildlife" in ordering future undefined mitigation to address impacts. See JA Vol. 26 at 5011. The STATE ENGINEER's failure to use the standard he articulated is contrary to law because it failed to give meaning to portions of the interbasin transfer statutory language and merely applies the same standard as NRS 533.370(2) in determining whether to approve or reject an application for an interbasin transfer of water, rendering the language of NRS 533.370(3)(c) mere surplusage. See Andersen Family Associates v. Ricci, 124 Nev. at 187-88, 179 P.3d at 1204 ("[n]o statutory language should be rendered mere surplusage if such a consequence can properly be avoided").

The STATE ENGINEER determined that any impacts to the basin from which the water is appropriated can be mitigated by a future, undefined plan to allow access for wildlife that customarily use the water resource and to ensure that existing rights are satisfied. JA Vol. 26 at 5011. NRS 533.370(3)(c) does not allow the STATE ENGINEER to approve an application simply because he orders mitigation to address any impacts.

The flaw in the STATE ENGINEER's analysis regarding whether an interbasin transfer is environmentally sound is even more apparent in light of the extensive evidence presented and ignored by the STATE ENGINEER regarding

the unreasonable impacts to the hydrologic-related natural resources in Kobeh Valley caused by the interbasin transfer.

Rex Massey, a witness for EUREKA COUNTY with 24 years of experience in socioeconomic and demographic analysis, as well as environmental compliance, provided substantial testimony with regard to the various recreational and wildlife hydrologic-related natural resources in Kobeh Valley in the Mount Hope/Roberts Mountain area. JA Vol. 5 at 867-874. "The area supports important outdoor recreation resources and activities which provide social and economic benefits. The most popular recreational activities are directly or indirectly related to water resources." JA Vol. 5 at 871. The Mount Hope/Roberts Mountain recreation area is regularly used for camping, fishing, hiking, biking, hunting and wildlife viewing. JA Vol. 5 at 873. Thus, "for all the reasons listed above, the proximity, the valued activities, the high participation rates, the needed and desired types of facilities and areas and the limited availability of those types of resources, the Roberts Mountains area provides important recreation and contributes to the quality of life and the well-being of Eureka County residents." JA Vol. 5 at 874.

At the 2008 hearings before the STATE ENGINEER, KVR's expert admitted that there are many springs throughout the area. JA Vol. 36 at 6961. See also JA Vol. 3 at 541-542 for testimony from the 2010 hearing. As one of KVR's

exhibits predicted, drawdown in the Roberts Mountains area "could result in reduction of spring or surface water flows or lowering of shallow groundwater tables that support wet meadow complexes and associated wildlife habitat in these areas." JA Vol. 7 at 1242. These springs and shallow groundwater tables in Kobeh Valley support the hydrologic-related natural resources in Kobeh Valley.

The Nevada Department of Wildlife and United States Fish and Wildlife Services have designated both Henderson and Vinini Creek as potential Lahontan Cutthroat Trout recovery streams, something that requires a sufficient and reliable quantity and quality of water. JA Vol. 5 at 912-913. Further, Gary Garaventa, a local rancher and an individual who has worked for the United States Department of Agriculture Wildlife Services for 36 years, testified that if the Lone Mountain Spring[17] or the Mud Spring were impacted there would be definite impacts on wild horses and local wildlife, including the sage hen (sage grouse), since that was the only source of water in the areas where those wildlife are located. JA Vol. 4 at 670, 672-677.

At the hearings, the STATE ENGINEER's Chief Hydrologist acknowledged in his questioning of Mr. Smith that in this area of Eureka County,

[17] The existing water rights to Lone Mountain Spring are held by the BLM. The BLM entered into an agreement with KVR and withdrew its protest to KVR's Applications in 2008. JA Vol. 26 at 6832.

with less than five feet of water level declines, many springs have dried up. JA Vol. 3 at 578, 582 (discussing water level declines in the south playa of Diamond Valley not simulated in KVR's model).

KVR presented no evidence regarding whether the proposed interbasin transfer was environmentally sound other than testimony that it was complying with all environmental permitting requirements. ROA Vol. 1 at 295, 300-301. This is not the standard under the interbasin transfer statute, nor does it satisfy the standard espoused by the STATE ENGINEER in Ruling 6127. See NRS 533.370(3)(c). KVR simply did not address this issue or present any evidence on this standard of the interbasin transfer statute before the STATE ENGINEER.

There was no evidence in contradiction of the admitted unreasonable impacts to the water resources and hydrologic-related natural resources in Kobeh Valley which will result if the interbasin transfer occurs. Further, there was no evidence submitted to support the STATE ENGINEER's findings that environmental impacts can be mitigated based on a future, undefined monitoring, management and mitigation plan, nor does Ruling 6127 cite to any such evidence to support the STATE ENGINEER's findings. Thus, the STATE ENGINEER's

determination that the interbasin transfer is environmentally sound is in contravention of NRS 533.370(3)(c).

IX.

CONCLUSION

Based on the foregoing, it is clear that the STATE ENGINEER had a statutory obligation to reject KVR's Applications and refuse to issue the requested permits pursuant to NRS 533.370(2). Further, the District Court erred when it concluded that the STATE ENGINEER could grant KVR's Applications to appropriate 11,300 afa of water, to the detriment of existing water rights, on the basis of an undefined, future mitigation plan that was not part of the record. The STATE ENGINEER has no authority to rely on a future, undefined mitigation plan to protect existing water rights holders. Moreover, in contravention of NRS 533.370(3)(c), the STATE ENGINEER applied the wrong standard when he granted KVR's Applications and concluded that an interbasin transfer of 11,300 afa of groundwater from Kobeh Valley to Diamond Valley was environmentally sound. Therefore, any permits issued by the STATE ENGINEER to KVR must be vacated.

DATED this 26th day of December, 2012.

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Case No. 72317

In the Supreme Court of Nevada

EUREKA COUNTY AND DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION,

PETITIONERS,

VS.

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF EUREKA AND THE HONORABLE GARY D. FAIRMAN, DISTRICT COURT JUDGE,

RESPONDENTS,

AND

SADLER RANCH, LLC; ET AL.,

REAL PARTIES IN INTEREST.

SADLER RANCH, LLC'S APPENDIX

VOLUME 3 OF 5

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CHRONOLOGICAL APPENDIX
TO SADLER RANCH, LLC'S ANSWERING BRIEF

DOCUMENT	DATE	BATES	
United States Department of the Interior, Geological Survey, Water Resource division, September 1961, Field Notes of Shipley Spring Discharge, Eakin and Winchester	1961	SR APP 1	SR APP 2
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Harrill, J.R., and Lamke, R.D., 1968, Hydrologic Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada: State of Nevada, Department of Conservation and Natural Resources, Water Resources Bulletin No. 35	1968	SR APP 77	SR APP 190
State Engineer Order 541	12/22/1975	SR APP 191	SR APP 192
State Engineer Order 717	07/10/1978	SR APP 193	SR APP 194
Permit No. 34561	09/20/1978	SR APP 195	SR APP 196

Garside, Larry J, and Schilling, John H., 1979, Thermal Waters of Nevada: Nevada Bureau of Mines and Geology Bulletin 91; pp.29-35, 95-98	1979	SR APP 197	SR APP 208
Transcript of Proceedings of the Hearing before the State Engineer, State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, Monday, May 24, 1982, District Courtroom, Eureka County Courthouse, Eureka, Nevada, In the Matter of Evidence and Testimony Concerning Possible Curtailment of Pumpage of Ground Water in Diamond Valley, Eureka County, Nevada.	05/24/1982	SR APP 209	SR APP 380
State Engineer Order 809	12/01/1982	SR APP 381	SR APP 382
State Engineer Order 813	02/07/1983	SR APP 383	SR APP 383
Transcript of Hearing before the State Engineer, State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, Wednesday, March 19, 2009, Eureka, Nevada, In the Matter of Concern Re: Eureka County, Nevada.	03/19/2009	SR APP 384	SR APP 479
Appellant Eureka County's Opening	12/27/2012	SR APP 480	SR APP 560

Brief, Case No. 61324			
Smith, Dwight L., September 11, 2013, Shipley Hot Spring Historic and Current Discharge, and Evidence for Impact to Flow Due to Groundwater Pumping in Diamond Valley, Eureka County, Nevada.	09/11/2013	SR APP 561	SR APP 580
Letter to State Engineer re: Request for Adjudication of Big Shipley and Indian Camp Springs	06/11/2014	SR APP 581	SR APP 582
State Engineer Ruling 6290	08/15/2014	SR APP 583	SR APP 646
Petition for Judicial Review, CV-1409-204	09/12/2014	SR APP 1299	SR APP 1309
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Shipley Springs Flow Data	06/17/2015	SR APP 1359	SR APP 1359
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Valley Hydrographic Basin			
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Request for Review	07/14/2015	SR APP 677	SR APP 679
Reply in Support of Motion to Dismiss Petition for Curtailment in Diamond Valley	07/22/2015	SR APP 680	SR APP 683
Eureka County Comments on Proposed Order Designating Diamond Valley as a CMA	07/23/2015	SR APP 684	SR APP 687
Ex Parte Request for Immediate Stay of Proceedings	08/03/2015	SR APP 688	SR APP 704
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Notice of State Engineer Order 1263	08/21/2015	SR APP 718	SR APP 724
Letter to Kristen Geddes regarding Comments on Proposed Order Designating Diamond Valley as CMA	08/24/2015	SR APP 725	SR APP 732
Notice of Entry of Order	08/27/2015	SR APP 733	SR APP 739

Motion to Strike a Portion of Eureka County's Notice of State Engineer's Order 1263	10/07/2015	SR APP 740	SR APP 744
Opposition to Petitioner's Motion Requesting Leave to File First Amended Petition for Curtailment in Diamond Valley	10/13/2015	SR APP 745	SR APP 752
Joinder to Opposition to Petitioner's Motion Requesting Leave to File First Amended Petition for Curtailment in Diamond Valley	10/14/2015	SR APP 753	SR APP 755
Reply in Support of Petitioner's Motion Requesting Leave to File First Amended Petition for Curtailment in Diamond Valley	10/23/2015	SR APP 756	SR APP 792
Order Granting Leave to File First Amended Petition	11/09/2015	SR APP 793	SR APP 794
Notice of Entry of Order	11/16/2015	SR APP 795	SR APP 799
Supplement to First Amended Petition	11/19/2015	SR APP 800	SR APP 804
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Part and Denying in Part Motion to Dismiss First Amended Petition for Curtailment in Diamond Valley			
Case No. 71090, Verified Petition for Writ, Document 2016-26135	08/23/2016	SR APP 825	SR APP 856
Letter from Eureka County to State Engineer Requesting Postponement of Hearing	08/23/2016	SR APP 857	SR APP 857
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Declaration of Mark Moyle in Support of Answer to Writ	08/29/2016	SR APP 860	SR APP 865
Answer to Alternate Writ of Mandamus and First Amended Petition for Curtailment in Diamond Valley	08/30/2016	SR APP 866	SR APP 980
Answer to First Amended Petition for Curtailment in Diamond Valley	09/14/2016	SR APP 981	SR APP 1009
Answer of Intervenor Ruby Hill Mining Company, LLC and Joinder to Answer to Alternate Writ of Mandamus and First Amended Petition for Curtailment in Diamond Valley of DNRPCA Intervenors	09/14/2016	SR APP 1010	SR APP 1015
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Order Relocating Show Cause Hearing to Eureka Opera House	09/30/2016	SR APP 1086	SR APP 1087
Sadler Ranch, LLC's Reply to Answers to the First Amended Petition for Curtailment in Diamond Valley	10/24/2016	SR APP 1088	SR APP 1129
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Supplemental Petition for Judicial Review, Case No. CV-1409-204	11/30/2016	SR APP 1208	SR APP 1243
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Eureka County Testimony on AB 298	04/04/2017	SR APP 1280	SR APP 1284
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Verification of Petition for Curtailment in Diamond Valley	06/11/2015	SR APP 655	SR APP 658

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the foregoing document, as follows:

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DATED this 17th day of April, 2017.

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