

SEVENTH JUDICIAL DISTRICT COURT
 GARY D. FAIRMAN
 DISTRICT JUDGE
 DEPARTMENT 3
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA



Valley can be used "for any beneficial purpose under Nevada law."¹⁷⁷ Under NRS 533.330, "No application shall be for the water of more than one source to be used for more than one purpose." The only Diamond Valley water subject to the DVGMP is that which is subject to permits or certificates issued for irrigation purposes.¹⁷⁸ The DVGMP allows for the irrigation sourced shares to be used for "any other beneficial purpose under Nevada water law".¹⁷⁹ The DVGMP fails to take into consideration that the transferee of the shares could use the water for other beneficial uses that may consume the entirety of the water being transferred under the shares without any return water or recharge to the Diamond Valley basin.¹⁸⁰ Water placed to beneficial use for irrigation results in some return or recharge to the aquifer. There is no State Engineer oversight on the impact of the transfer of water shares for the proposed new well or place or manner of use unless the new well or additional withdrawals from an existing well exceeds the volume or flow rate initially approved for the base permit.¹⁸¹

The DVGMP and Order 1302 state the DVGMP was modeled after NRS 533.345(2)(4).¹⁸² The State Engineer is incorrect. Under the DVGMP, the State Engineer does not review a different use of the water shares transferred because the DVGMP allows water shares to be used for any beneficial purpose under Nevada law, not solely for irrigation purposes.¹⁸³ Under the DVGMP the State Engineer cannot deny the transfer of shares to an existing well, unless the transfer would exceed the well's flow rate and conflicts

¹⁷⁷SEROA 234, sec. 13.8.

¹⁷⁸SEROA 228, sec. 8.1

¹⁷⁹SEROA 234, see 13.8.

¹⁸⁰Such beneficial uses could include mining and municipal uses; see NRS 533.030.

¹⁸¹SEROA 237, sec. 14.7, 14.8.

¹⁸²SEROA 237, n.20; SEROA 009.

¹⁸³SEROA 237, sec. 14.7.

SEVENTH JUDICIAL DISTRICT COURT
 GARY D. FAIRMAN
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 DEPARTMENT 2
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA



with existing rights.¹⁸⁴ The State Engineer's vital statutory oversight authority to ensure the temporary change is in the public interest or that the change does not impair water rights held by other persons is otherwise lost. The court finds that the DVGMP and Order 1302 violate NRS 533.325 and NRS 533.345, The court finds Order 1302 is arbitrary and capricious.

CONCLUSION

The court has empathy for the plight of the ranchers and farmers in Diamond Valley given the distressed state of the basin's aquifer. It is unfortunate that the State Engineer and/or the Nevada Legislature did not vigorously intervene 40 years ago when effects of over appropriation were first readily apparent.¹⁸⁵ That being said, the DVGMP is contrary to Nevada water laws, laws that this Court will not change. The court is not bound by the State Engineer's interpretation of Nevada water law.

Order 1302 is arbitrary and capricious.

Good cause appearing,

IT IS HEREBY ORDERED that the petition for review of Nevada State Engineer's Order No. 1302 filed by Timothy Lee Bailey and Constance Marie Bailey and Fred Bailey and Carolyn Bailey in case No. CV-1902-350, is GRANTED.


IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by Sadler Ranch in case no. CV-1902-349, is GRANTED.

IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by Ira R. Renner and Montira Renner in Case No. CV-1902-348, is GRANTED.

¹⁸⁴SEROA 237, sec. 14.9.

¹⁸⁵As noted by Sadler Ranch, in 1982, State Engineer Peter Morros recognized that "what is happening right now in Diamond Valley [declining groundwater levels affecting spring flows] was predicted . . . It was predicted in 1968 . . . almost to the 'T'". Transcript of proceedings at 42; 17-22, In the Matter of Evidence and Testimony Concerning Possible Curtailment of Pumpage of Groundwater in Diamond Valley, Eureka, Nevada (May 24, 1982). Morros also stated "there was a tremendous amount of pressure put on the State Engineer's Office to issue permits, far in excess of what we had identified at the time was their perennial yield." *Id.* at 41, 1.6-10. Sadler Ranch opening brief, 2-3.

DATED this 23rd day of April, 2020.


DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



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NO _____ FILED

MAY 14 2020

By: [Signature] Eureka County Clerk

CASE NO.: CV-1902-348 (consolidated with
Case Nos. CV-1902-349 and CV-1902-350)

DEPT. NO.: 2

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

* * *

TIMOTHY LEE & CONSTANCE MARIE
BAILEY; FRED & CAROLYN BAILEY; IRA
R. & MONIRA RENNER; SADLER RANCH,
LLC

Petitioners,

vs.

**DNRPCA INTERVENORS'
CASE APPEAL STATEMENT**

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

Respondent.

EUREKA COUNTY; DIAMOND NATURAL
RESOURCES PROTECTION AND
CONSERVATION ASSOCIATION, J&T
FARMS, GALLAGHER FARMS, JEFF
LOMMORI, M&C HAY, CONLEY LAND &
LIVESTOCK, LLC, JIM AND NICK
ETCHEVERRY, TIM AND SANDIE HALPIN,
DIAMOND VALLEY HAY CO., MARK
MOYLE FARMS, LLC, D.F. AND E.M.
PALMORE FAMILY TRUST, BILL AND
PATRICIA NORTON, SESTANOVICH HAY
& CATTLE, LLC, JERRY ANDERSON, BILL
AND DARLA BAUMANN,

Respondents/Intervenors.

Leonard Law, PC
915 South Virginia Street, Suite 220 | Reno, Nevada 89502
775-964-4656 | Debbie@leonardlawpc.com

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MAY 14 2020

Eureka County Clerk

1 DNRPCA Intervenor submit the following Case Appeal Statement pursuant to Nevada
2 Rule of Appellate Procedure 3(f):

3 **1. Name of Appellants filing this Case Appeal Statement:**

4 Intervenor DIAMOND NATURAL RESOURCES PROTECTION AND
5 CONSERVATION ASSOCIATION, J&T FARMS, GALLAGHER FARMS, JEFF LOMMORI,
6 M&C HAY, CONLEY LAND & LIVESTOCK, LLC, JIM AND NICK ETCHEVERRY, TIM
7 AND SANDIE HALPIN, DIAMOND VALLEY HAY CO., MARK MOYLE FARMS, LLC,
8 D.F. AND E.M. PALMORE FAMILY TRUST, BILL AND PATRICIA NORTON,
9 SESTANOVICH HAY & CATTLE, LLC, JERRY ANDERSON, BILL AND DARLA
10 BAUMAN ("DNRPCA Intervenor")

11 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

12 The Honorable Gary D. Fairman in Department Two of the Seventh Judicial District
13 Court of the State of Nevada in and for the County of Eureka.

14 **3. Identify each appellant and the name and address of counsel for each**
15 **appellant:**

16 Appellants Diamond Natural Resources Protection and Conservation Association, J&T
17 Farms, Gallagher Farms, Jeff Lommori, M&C Hay, Conley Land & Livestock, LLC, Jim and
18 Nick Etcheverry, Tim and Sandie Halpin, Diamond Valley Hay Co., Mark Moyle Farms, LLC,
19 D.F. and E.M. Palmore Family Trust, Bill and Patricia Norton, Sestanovich Hay & Cattle, LLC,
20 Jerry Anderson, Bill and Darla Bauman.

21 Counsel: Debbie Leonard
22 Leonard Law, PC
23 955 S. Virginia Street, Suite 220
24 Reno, NV 89502

25 Other respondents below who may or may not appeal are:

26 Respondent Tim Wilson, P.E., Nevada State Engineer
27 Division of Water Resources, Department of Conservation and Natural Resources
28 Counsel: James Bolotin, Senior Deputy Attorney General
Office of the Attorney General
100 North Carson Street

1 Carson City, NV 89701

2 Intervenor Eureka County

3 Counsel: Karen Peterson and Theodore Beutel

4 Karen Peterson

5 Allison MacKenzie, Ltd.

6 402 North Division Street

7 Carson City, NV 89703

8 Theodore Beutel

9 Eureka County District Attorney

10 701 South Main Street

11 Post Office Box 190

12 Eureka, Nevada 89316

13 Intervenor Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties
14 California, LLC, and Blanco Ranch, LLC

15 Counsel: John E. Marvel

16 Marvel & Marvel, Ltd.

17 217 Idaho Street

18 Elko, NV 89801

19 Intervenor: Beth Mills, Trustee Marshall Family Trust

20 HC 62, Box 62138

21 Eureka, Nevada 89316

22 **4. Identify each respondent and the name and address of appellate counsel, if**
23 **known, for each respondent (if the name of a respondent's appellate counsel is unknown,**
24 **indicate as much and provide the name and address of that respondent's trial counsel):**

25 Timothy Lee Bailey & Constance Marie Bailey, Fred Bailey & Carolyn Bailey
26 (collectively, the "Bailey Petitioners").

27 Counsel:

28 Don Springmeyer

Christopher W. Mixson

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP

5594-B Longley Lane

Reno, NV 89511

Sadler Ranch, LLC

Counsel:

Paul G. Taggart

David H. Rigdon

Taggart & Taggart, Ltd.

108 North Minnesota Street

Carson City, NV 89703

Ira R. & Montira Renner
Counsel:
Paul G. Taggart
David H. Rigdon
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, NV 89703

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada, and if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

All attorneys are licensed in the State of Nevada.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

No.

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

The Bailey Petitioners, Sadler Ranch, LLC and Ira & Montira Renner filed Petitions for Judicial Review of Nevada State Engineer Order No. 1302 on February 11, 2019.¹

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

¹ The cases were consolidated on March 27, 2019.

1 On January 11, 2019 the State Engineer issued Order 1302 approving and adopting the
2 Diamond Valley Groundwater Management Plan. The Bailey Petitioners, Sadler Ranch, LLC
3 and Ira & Montira Renner filed Petitions for Judicial Review of State Engineer Order 1302,
4 which the district court granted on April 27, 2020. The order being appealed from is the April
5 27, 2020 Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review.

6 **11. Indicate whether the case has previously been the subject of an appeal to or**
7 **original writ proceeding in the Supreme Court, and if so, the caption and Supreme Court**
8 **Docket number of the prior proceeding:**

9 This case has not been the subject of any prior appeals in the Nevada Supreme Court.

10 **12. Indicate whether this appeal involves child custody or visitation:**

11 This appeal does not involve child custody or visitation.

12 **13. If this is a civil case, indicate whether this appeal involves the possibility of**
13 **settlement:**

14 Based upon the nature of this dispute and the history of the proceedings, DNRPCA
15 Intervenor believe that this appeal is unlikely to involve the possibility of settlement.

16 **AFFIRMATION**

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

19 DATED: this 14th day of May, 2020

20 LEONARD LAW, PC

21 

22 DEBBIE LEONARD (NSBN 8260)
23 955 S. Virginia Street, Suite 220
24 Reno, NV 89502
25 775-964-4656
26 debbie@leonardlawpc.com

27 *Attorney for DNRPCA Intervenor*

Leonard Law, PC

955 South Virginia Street, Suite 220 | Reno, Nevada 89502
775-964-4656 | Debbie@leonardlawpc.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of LEONARD LAW, PC and that on this date I caused the foregoing document to be served to all parties to this action by electronic transmission to:

Paul G. Taggart
David H. Rigdon
Timothy D. O'Connor
Taggart & Taggart
108 North Minnesota Street
Carson City, NV 89703
Paul@legaltnt.com
David@legaltnt.com
Tim@legaltnt.com

Counsel for Petitioners Renner, Sadler Ranch and Venturacci

Karen Peterson
Allison MacKenzie Ltd.
402 North Division Street
Carson City, NV 89703
Kpeterson@allisonmackenzie.com
Counsel for Eureka County

Don Springmeyer
Christopher W. Mixson
Wolf Rifkin Shapiro Schulman & Rabkin
5594-B Longley Lane
Reno, NV 89511
dspringmeyer@wrslawyers.com
cmixson@wrslawyers.com
Counsel for Petitioner Baileys

COURTESY COPY TO:
Honorable Gary D. Fairman
Department Two
P.O. Box 151629
Ely, NV 89315
wlopez@whitepinecountynv.gov

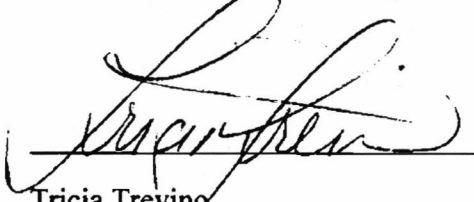
Dated: May 14, 2020

James Bolotin
Senior Deputy Attorney General
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701
jbolotin@ag.nv.gov
Counsel for Tim Wilson, P.E. and Nevada Division of Water Resources

Theodore Beutel
Eureka County District Attorney
701 South Main Street
P.O. Box 190
Eureka, NV 89316
tbeutel@eurekacountynv.gov
Counsel for Eureka County

John E. Marvel, Esq.
Dustin J. Marvel, Esq.
Marvel & Marvel, Ltd.
217 Idaho Street
Elko, NV 89801
johnmarvel@marvellawoffice.com
Attorney for Intervenors Diamond Valley Ranch, LLC; American First Federal, Inc.; Berg Properties California, LLC; and Blanco Ranch, LLC ("DVR Parties")

US MAIL TO:
Beth Mills, Trustee
Marshall Family Trust
HC 62 Box 62138
Eureka, NV 89316


Tricia Trevino

Seventh Judicial District Court - Eureka County

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Case Summary

Page 1

Case #: CV1902348

Judge:

Date Filed: 02/11/2019

Department:

Case Type: CIVIL APPEAL

Title/Caption: Plaintiff Not Entered vs. NEVADA STATE ENGINEER

Attorney(s)

NEVADA STATE ENGINEER

No *Attorney 1* Listed

RENNER, IRA & MONTIRA

No *Attorney 1* Listed

Filings:

| Date | Filing |
|------------|--|
| 02/11/2019 | PETITION FOR JUDICIAL REVIEW |
| 02/11/2019 | NOTICE OF APPEAL |
| 02/11/2019 | NOTICE OF APPEAL OF NEVADA STATE ENGINEER ORDER #1302 |
| 02/11/2019 | PETITION FOR JUDICIAL REVIEW |
| 02/25/2019 | NOTICE OF APPEARANCE OF RESPONDENT STATE ENGINEER |
| 03/04/2019 | NOTICE OF APPEARANCE OF COUNSEL |
| 03/27/2019 | STIPULATION AND ORDER TO CONSOLIDATE CASES |
| 04/03/2019 | EUREKA COUNTY'S MOTION TO INTERVENE |
| 04/05/2019 | AFFIRMATION |
| 04/05/2019 | NOTICE OF ENTRY OF STIPULATION AND ORDER TO CONSOLIDATE CASES |
| 04/24/2019 | REQUEST FOR REVIEW |
| 04/25/2019 | CERTIFICATE OF SERVICE |
| 04/25/2019 | ORDER FOLLOWING TELEPHONE STATUS HEARING HELD APRIL 9, 2019 |
| 05/10/2019 | ORDER GRANTING EUREKA COUNTY'S MOTION TO INTERVENE |
| 05/13/2019 | MOTION TO INTERVENE |
| 05/28/2019 | REQUEST FOR SUBMISSION |
| 05/28/2019 | UNOPPOSED MOTION TO EXTEND TIME TO FILE THE STATE ENGINEER'S RECORD ON APPEAL |
| 06/03/2019 | NOTICE OF CHANGE OF FIRM AFFILIATION AND CONTACT INFORMATION |
| 06/07/2019 | ORDER GRANTING MOTION TO EXTEND TIME TO FILE THE STATE ENGINEER'S RECORD ON APPEAL |
| 06/07/2019 | (PROPOSED) ORDER GRANTING MOTION TO EXTEND TIME TO FILE THE STATE ENGINEER'S RECORD ON APPEAL |
| 06/07/2019 | ORDER GRANTING MOTION TO INTERVENE |
| 06/11/2019 | MOTION IN LIMINE |
| 06/11/2019 | SUMMARY OF RECORD ON APPEAL |
| 06/11/2019 | ORDER FOLLOWING TELEPHONE STATUS CONFERENCE HELD JUNE 4, 2019 |
| 06/12/2019 | NOTICE OF ENTRY OF ORDER GRANTING EUREKA COUNTY'S MOTION TO INTERVENE |
| 06/14/2019 | CORRECTED CERTIFICATE OF SERVICE FOR NOTICE OF ENTRY OF ORDER GRANTING EUREKA COUNTY'S MOTION TO INTERVENE |
| 06/14/2019 | NOTICE OF WITHDRAWAL OF PETITIONER DANIEL S. VENTURACCI |

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Case Summary

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06/17/2019 NOTICE OF ENTRY OF ORDER GRANTING MOTION TO EXTEND TIME TO FILE THE STATE ENGINEER'S RECORD ON APPEAL

06/17/2019 NOTICE OF EMAIL ADDRESS FOR ELECTRONIC SERVICE

06/17/2019 NOTICE OF ENTRY OF ORDER GRANTING MOTION TO INTERVENE

06/17/2019 ERRATA TO DNRPCA INTERVENOR'S NOTICE OF CHANGE OF FIRM AFFILIATION AND CONTACT INFORMATION

06/20/2019 NOTICE OF ERRATA: CERTIFICATES OF SERVICE TO SUMMARY OF RECORD ON APPEAL AND MOTION IN LIMINE

06/20/2019 EUREKA COUNTY'S JOINDER TO STATE ENGINEER'S MOTION IN LIMINE

06/24/2019 SADLER RANCH, LLC AND IRA R. & MONTIRA RENNER OPPOSITION TO MOTION IN LIMINE

06/24/2019 (PROPOSED) ORDER DENYING MOTION IN LIMINE

06/24/2019 DNRPCA INTERVENOR'S JOINDER TO STATE ENGINEER'S MOTION IN LIMINE AND EUREKA COUNTY'S JOINDER THERETO

06/24/2019 OPPOSITION OF BAILEYS TO MOTION IN LIMINE A HEARING ON THIS MOTION IS NOT REQUESTED

07/01/2019 NOTICE OF MAILING OF NOTICE OF LEGAL PROCEEDINGS

07/01/2019 NOTICE OF CHANGE OF EMAIL ADDRESS

07/01/2019 EUREKA COUNTY'S JOINDER TO STATE ENGINEER'S AND DNRPCA'S REPLIES IN SUPPORT OF MOTION IN LIMINE

07/01/2019 DNRPCA INTERVENOR'S REPLY IN SUPPORT OF JOINDER TO STATE ENGINEER'S MOTION IN LIMINE AND EUREKA COUNTY'S JOINGDER THERETO

07/02/2019 REPLY IN SUPPORT OF MOTION IN LIMINE

07/08/2019 REQUEST FOR SUBMISSION

07/31/2019 MOTION TO INTERVENE

08/01/2019 MOTION TO INTERVENE

08/01/2019 NOTICE OF APPEARANCE AND INTENT TO PARTICIPATE

08/08/2019 NOTICE OF SUBSTITUTION OF ATTORNEY FOR RESPONDENT STATE ENGINEER

09/04/2019 CERTIFICATE OF SERVICE

09/04/2019 ORDER GRANTING MOTION IN LIMINE

09/06/2019 ORDER GRANTING MOTION TO INTERVENE

09/13/2019 NOTICE OF ENTRY OF ORDER GRANTING MOTION IN LIMINE

09/16/2019 PETITIONERS UNOPPOSED MOTION TO EXCEED PAGE LIMIT

09/16/2019 OPENING BRIEF OF BAILEY PETITONERS

09/16/2019 OPENING BRIEF OF PETITIONERS SADLER RANCH, LLC AND IRA R. & MONTIRA RENNER

10/10/2019 STIPULATION FOR EXTENDING BRIEFING SCHEDULE

10/18/2019 ORDER GRANTING STIPULATION FOR EXTENDING BRIEFING SCHEDULE

10/23/2019 NOTICE OF ENTRY OF ORDER GRANTING STIPULATION FOR EXTENDING BRIEFING SCHEDULE

10/23/2019 DNRPCA INTERVENORS' ADDENDUM TO ANSWERING BRIEF

10/23/2019 STATE ENGINEER'S AND INTERVENORS' UNOPPOSED MOTION TO EXCEED PAGE LIMIT

10/23/2019 RESPONDENTS STATE ENGINEER'S ANSWERING BRIEF

10/23/2019 DNRPCA INTERVENORS' ANSWERING BRIEF

10/23/2019 ANSWERING BRIEF OF EUREKA COUNTY

11/01/2019 ORDER GRANTING STATE ENGINEER'S AND INTERVENORS' UNOPPOSED MOTION TO EXCEED PAGE LIMIT

11/18/2019 STIPULATION FOR EXTENDING BRIEFING SCHEDULE

11/26/2019 SADLER RANCH, LLC AND IRA R. & MONTIRA RENNER'S ADDENDUM TO REPLY BRIEF

11/26/2019 REPLY BRIEF OF PETITIONERS SADLER RANCH, LLC AND IRA R. & MONTIRA RENNER

11/26/2019 REPLY BRIEF OF BAILEY PETITIONERS

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Case Summary

Page 3

11/26/2019 BAILEY, RENNER AND SADLER RANCH PETITIONERS' UNOPPOSED MOTION TO EXCEED
PAGE LIMIT FOR REPLY BRIEFS

04/27/2020 CERTIFICATE OF SERVICE

04/27/2020 FINDINGS OF FACT CONCLUSIONS OF LAW, ORDER GRANTING PETITIONS FOR JUDICIAL
REVIEW

04/30/2020 NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSION OF LAW, ORDER GRANTING
PETITIONS FOR JUDICIAL REVIEW

04/30/2020 NOTICE OF ENTRY OF ORDER

05/14/2020 DNRPCA INTERVENORS CASE APPEAL STATEMENT

05/14/2020 DNRPCA INTERVENORS MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING
PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302

05/14/2020 DNRPCA INTERVENORS EX PARTE MOTION FOR ORDER SHORTENING TIME ON MOTION FOR
STAY OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER
ORDER 1302 PENDING APPEAL

05/14/2020 PROPOSED ORDER GRANTING DNRPCA INTERVENORS EX PARTE MOTION FOR ORDER
SHORTENING TIME

05/14/2020 PROPOSED ORDER GRANTING DNRPCA INTERVENORS MOTION FOR STAY OF ORDER
GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302 PENDING
APPEAL

05/14/2020 NOTICE OF APPEAL

05/15/2020 NOTICE OF APPEAL

05/15/2020 COMPLAINT

05/15/2020 CASE APPEAL STATEMENT

05/18/2020 DNRPCA INTERVENORS REPLY IN SUPPORT OF EX PARTE MOTION FOR ORDER SHORTENING
TIME ON MOTION FOR STAY OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF
STATE ENGINEER ORDER 1302 PENDING APPEAL

05/18/2020 OPPOSITION OF THE BAILEYS TO DNRPCA INTERVENORS EX PARTE MOTION FOR ORDER
SHORTENING TIME ON MOTION FOR STAY OF ORDER GRANTING PETITIONS FOR JUDICIAL
REVIEW OF STATE ENGINEER ORDER 1302 PENDING APPEAL

05/18/2020 SADLER RANCH LLC & IRA & MNTIRA RENNER OPPOSITION TO DNRPCA INTERVENORS EX
PARTE MOTION FOR ORDER SHORTENING TIME

05/19/2020 STATE ENGINEER'S JOINDER TO DNRPCA INTERVENORS' MOTION FOR STAY PENDING
APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER
ORDER 1302

05/19/2020 DNRPCA INTERVENORS' REPLY IN SUPPORT OF EX PARTE MOTION FOR ORDER
SHORTENING TIME ON MOTION FOR STAY OF ORDER GRANTING PETITIONS FOR JUDICIAL
REVIEW OF STATE ENGINEER ORDER 1302 PENDING APPEAL

05/19/2020 ORDER DENYING DNRPCA INTERVENORS' EX PARTE MOTION FOR ORDER SHORTENING
TIME; ORDER GRANTING DNRPCA INTERVENORS' MOTION FOR TEMPORARY STAY PENDING
DECISION ON INTERVENORS' MOTION FOR STAY PENDING APPEAL

05/20/2020 CERTIFICATE OF SERVICE

05/21/2020 NOTICE OF ENTRY OF ORDER DENYING DNRPCA INTERVENORS' EX PARTE MOTION FOR
ORDER SHORTENING TIME; ORDER GRANTING DNRPCA INTERVENORS' MOTION FOR
TEMPORARY STAY PENDING DECISION ON INTERVENORS' MOTION FOR STAY PENDING
APPEAL

No. _____ FILED

APR 27 2020

By: MA EUREKA COUNTY CLERK

Case No. CV-1902-348 consolidated with case nos.
CV-1902-349 and CV-1902-350

Dept No. 2

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

TIMOTHY LEE BAILEY and
CONSTANCE MARIE BAILEY; FRED
BAILEY and CAROLYN BAILEY; IRA
R.RENNER, an individual, and
MONTIRA RENNER, an individual; and
SADLER RANCH, LLC.

Petitioners,

vs.

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

Respondent,

and

EUREKA COUNTY; and DIAMOND
NATURAL RESOURCE PROTECTION
AND CONSERVATION
ASSOCIATION, et al.,

Intervenors.

**FINDINGS OF FACT. CONCLUSIONS OF
LAW. ORDER GRANTING PETITIONS
FOR JUDICIAL REVIEW**

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APR 27 2020

EUREKA COUNTY CLERK

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



SEVENTH JUDICIAL DISTRICT COURT
 GARY D. FAIRMAN
 DISTRICT JUDGE
 DEPARTMENT 2
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA



RELEVANT PROCEDURAL HISTORY

On January 11, 2019, Jason King, P.E., Nevada State Engineer¹ ("State Engineer"), entered Order #1302 ("Order 1302"). On February 11, 2019, Timothy Lee Bailey and Constance Marie Bailey, husband and wife, and Fred Bailey and Carolyn Bailey, husband and wife ("Bailey" or "Baileys" or "petitioners" where referenced collectively with the Sadler Ranch and Renner petitioners) filed a notice of appeal and petition for review of Nevada State Engineer Order no. 1302 in case no. CV-1902-350. On February 11, 2019, Sadler Ranch, LLC, a Nevada limited liability company, and Daniel S. Venturacci,² an individual ("Sadler Ranch" or "petitioners" when used collectively with the Bailey and Renner petitioners) filed a petition for judicial review in case no. CV-1902-349. On February 11, 2019, Ira R. Renner, an individual, and Montira Renner, an individual, ("Renner" or "Renners" or "petitioners" when used collectively with Sadler Ranch and Bailey petitioners) filed a petition for judicial review in case no. CV-1902-348. On February 25, 2019, the State Engineer filed a notice of appearance in the three cases. On March 27, 2019, petitioners and respondent, Tim Wilson, P.E., acting State Engineer, Division of Water Resources, Department of Conservation and Natural Resources ("State Engineer") filed a stipulation and order to consolidate cases whereby case no. CV-1902-348 (Renner) was consolidated with case no. CV-1902-349 (Sadler Ranch) and with case no. CV-1902-350 (Bailey). On June 7, 2019, the State Engineer filed a summary of record on appeal ("SE ROA"). On September 16, 2019, Sadler Ranch and Renners filed opening brief of petitioners' Sadler Ranch, LLC and Ira R. and Montira Renner ("Sadler Ranch opening brief"). On September 4, 2019, the court entered an order granting motion in limine limiting

¹Subsequent to issuing order no. 1302, Mr. King retired from this position, and Timothy Wilson, P.E. became the acting Nevada State Engineer and the State Engineer.

²Daniel S. Venturacci filed a notice of withdrawal of petition on June 14, 2019.

SEVENTH JUDICIAL DISTRICT COURT
 GARY D. FAIRMAN
 DISTRICT JUDGE
 DEPARTMENT 2
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA



1 the record on appeal in the district court to the State Engineer's record on appeal filed June
 2 7, 2019. On September 16, 2019, the Baileys filed opening brief of Bailey petitioners
 3 ("Bailey opening brief"). On October 23, 2019, the State Engineer filed respondent State
 4 Engineer's answering brief ("State Engineer's answering brief"). On October 23, 2019,
 5 Diamond Natural Resource Protection and Conservation Association ("DNRPCA") filed
 6 DNRPCA intervenors' answering brief ("DNRPCA answering brief") and DNRCPA
 7 intervenors' addendum to answering brief ("DNRPCA addendum"). Intervenor, Eureka
 8 County filed answering brief of Eureka County ("Eureka County's answering brief") on
 9 October 23, 2019.³ DNRPCA and Eureka County are collectively referred to a
 10 "intervenors". On November 29, 2019, Sadler Ranch filed reply brief of petitioners' Sadler
 11 Ranch, LLC and Ira R. and Montira Renner ("Sadler Ranch reply brief") and Sadler Ranch,
 12 LLC and Ira R. and Montira Renner's addendum to reply brief ("Sadler Ranch reply
 13 addendum"). On November 26, 2019, the Baileys filed reply brief of Bailey petitioners,
 14 ("Bailey reply brief").

15 On December 10-11, 2019, oral arguments were held at the Eureka Opera House,
 16 Eureka, Nevada. Sadler Ranch and the Renners were represented by David H. Rigdon,
 17 Esq., the Baileys were represented by Christopher W. Mixon, Esq., the State Engineer was
 18 represented by Deputy Attorney General, James Bolotin, Esq., Eureka County was
 19 represented by Karen Peterson, Esq., and the DNRPCA intervenors were represented by
 20 Debbie Leonard, Esq. The court has reviewed the SEROA, the parties' briefs, all papers
 21 and pleadings on file in these consolidated cases, the applicable law and facts, and makes

22 ³On September 6, 2019, the court entered an order granting motion to intervene to
 23 Diamond Valley Ranch, LLC, a Nevada limited liability company, American First
 24 Federal, Inc., a Nevada Corporation, Berg Properties California, LLC, a Nevada limited
 25 liability company, and Blanco Ranch, LLC, a Nevada limited liability company. On July
 26 3, 2019, Beth Mills, trustee of the Marshall Family Trust, filed a motion to intervene.
 The court never entered an order granting her motion to intervene. The motion was
 timely filed without opposition. The court thus grants Beth Mills' motion to intervene.
 None of these intervenors filed briefs in this case.

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the following findings of fact and conclusions of law.

II

FACTUAL HISTORY

It is a matter of accepted knowledge that Nevada currently has and at all relevant times has always had an arid climate. Its also undisputed that the Diamond Valley aquifer has been severely depleted through over appropriation of underground water for irrigation which the State Engineer has allowed to occur for over 40 years without any cessation or reduction. The State Engineer has issued permits and certificates that have allowed irrigators the right to pump approximately 126,000 acre feet ("af") of water per year from the Diamond Valley aquifer in Eureka County and Elko County which has an estimated perennial yield of only 30,000 af of water that can be safely pumped each year.⁴ The 126,000 af exclude other groundwater rights such as domestic use, stock water, and mining.⁵ The total duty of ground water rights that impact the aquifer is close to 130,265 af.⁶ Of the 126,000 af approved for irrigation pumping, the State Engineer estimates approximately 76,000 af were pumped in 2016, with the annual Diamond Valley pumping exceeding 30,000 af for over of 40 years.⁷

The unbridled pumping in Diamond Valley has caused the groundwater level to decline approximately 2 feet annually since 1960.⁸ The over pumping by junior irrigators has caused senior claimed vested water rights holders' naturally flowing springs to dry up in northern Diamond Valley. Big Shipley Springs, to which Sadler Ranch has a claim of

⁴SEROA 3.

⁵*Id.*

⁶*Id.*

⁷*Id.*; State Engineer's answering brief 4-5.

⁸SEROA 59, Water Resource Bulletin no. 35 at 26.

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1 vested rights, Thompson Springs and other springs in northern Diamond Valley have either
 2 ceased flowing, as is the case of the Bailey Ranch Spring, or have suffered greatly
 3 diminished flow.⁹ In Ruling 6290, State Engineer King extensively discussed diminished
 4 spring flow in Diamond Valley concluding that "ground water pumping in southern Diamond
 5 Valley is the main cause of stress on groundwater levels in the valley."¹⁰

6 To address statewide over appropriation issues, the Nevada Legislature passed
 7 Assembly Bill ("AB") 419 in 2011, which established a critical management area ("CMA")
 8 designation process. Changes to NRS 534.110 allowed the State Engineer to designate
 9 CMA basins where withdrawals of groundwater had consistently exceeded the perennial
 10 yield of the basin.¹¹ The Legislature also enacted NRS 534.037 in 2011, establishing a
 11 procedure for the holders of permits and certificates in a basin to create a groundwater
 12 management plan ("GMP") setting forth the necessary steps to resolve the conditions
 13 causing the groundwater basin's CMA designation and remove the basin as a CMA.¹² On
 14 August 25, 2015, the State Engineer issued Order no. 1264 designating the Diamond
 15 Valley hydrologic basin ("Diamond Valley") as the Nevada's first CMA.¹³ As a result of the
 16 CMA designation, if Diamond Valley remains a CMA for 10 consecutive years, the State
 17 Engineer shall order that withdrawals of water, "including, without limitation, withdrawals
 18 from domestic wells,¹⁴ be restricted in that basin to conform to priority rights, unless a

19 _____
 20 ⁹SEROA 328.

21 ¹⁰State Engineer ruling 6290, 23-31.

22 ¹¹NRS 534.110(7).

23 ¹²NRS 534.037.

24 ¹³SEROA 3, 134-138, 226.

25 ¹⁴The 2019 Nevada Legislature granted relief to domestic wells to withdraw up to 0.5 af
 26 of water annually where withdrawals are restricted to conform to priority rights by either
 court order or the State Engineer. Assembly Bill, 95; NRS 534.110(9).

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1 groundwater management plan has been approved for the basin pursuant to NRS
 2 534.037.¹⁵ This process is curtailment.

3 Groundwater right holders and vested water right holders began to meet in March,
 4 2014, regarding the creation of a Diamond Valley GMP ("DVGMP").¹⁶ The intent of the
 5 meetings and any plan was to reduce pumping and stabilize groundwater levels in
 6 Diamond Valley to avoid curtailment of water by priority.¹⁷ Although many options were
 7 considered, ultimately the DVGMP was in large part "influenced significantly by a water
 8 allocation system using a market based approach similar to that authored by professor
 9 Michael Young."¹⁸ Professor Young's report, *Unbundling Water Rights: A Blueprint for*
 10 *Development of Robust Allocation Systems in the Western United States* (2015) was
 11 described by Young as "a blueprint ready for pilot testing in Nevada's Diamond Valley and
 12 Humboldt Basins."¹⁹ The Young report was "developed in consultation with water users,
 13 administrators, and community leaders in Diamond Valley and Humboldt Basin."²⁰ The
 14 Young report describes itself as a "blueprint ready for testing in Diamond Valley" and "if
 15 implemented, the blueprint's reforms would convert prior appropriation water rights into
 16 systems that stabilize water withdrawals to sustainable limits, allow rapid adjustment to
 17 changing water supply conditions, generate diverse income systems, and improve
 18 environmental outcomes."²¹ "If implemented properly, no taking of property rights

19
 20 ¹⁵NRS 534.110(7), SEROA 225.

21 ¹⁶SEROA 226.

22 ¹⁷SEROA 226, 277-475.

23 ¹⁸SEROA 227 N8, 294.

24 ¹⁹Bailey reply addendum 2, SEROA 294.

25 ²⁰Bailey reply addendum 3.

26 ²¹*Id.* at 1.

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occurs."²²

The DVGMP, a hybrid²³ of Professor Young's blueprint, excludes and does not apply to vested water rights, including spring vested rights, that have been mitigated with groundwater rights by the State Engineer, court order, ruling or decree.²⁴ Also excluded from the DVGMP are domestic wells, stock water, municipal, commercial groundwater rights and mining groundwater rights without an irrigation source permit.²⁵ The DVGMP applies to permit or certificated underground irrigation permits and underground irrigation rights that have an agricultural base right in Diamond Valley.²⁶

The DVGMP water share formula factors a priority to the permit/certificate underground irrigation rights and converts the rights into a fixed number of shares.²⁷ The spread between the most senior and junior groundwater rights is 20 %.²⁸ The shares are used on a year-to-year basis and groundwater is allocated to each share annually in a measurement of acre-feet per share. Existing shares for each water right are fixed and water rights users may continue to use water in proportion to their water rights and seniority.²⁹ The conversion of water rights to shares under the DVGMP formula does not provide for each acre-foot of water under a permit/certificate to be converted to one

²²*Id.*

²³SEROA 313.

²⁴SEROA 5, 220, 229, 240-241.

²⁵SEROA 240-241.

²⁶SEROA 11-12, 218, 220, 228-229.

²⁷SEROA 5, 218, 232.

²⁸SEROA 232.

²⁹SEROA 218, 234-235.

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share.³⁰ Using a "priority factor" applied to each acre foot of a water right in a permit or certificate, the most senior water right receives a priority factor of 1.0 and the most junior right receives a priority factor of 0.80. This formula results in a reduction in the ultimate shares allocated based on an arbitrary range of a 1% reduction for the most senior water right to a 20% reduction for the most junior water right.³¹ With the "priority factor" always being less than 1, the share conversion always results in less than 1 share for each former acre foot of water as illustrated in Appendix F to the DVGMP.³² The priority factor causes junior water rights to be converted to fewer shares per acre-foot than senior water rights' holders. Significantly, the formula of taking priority as a basis to reduce the shares awarded to senior rights' holders by using a designated percentage less than the shares granted to the junior rights' holders does not give the senior rights' holders all of the water to which their priority permit/certificate entitles the holders to use for irrigation purposes. The result of the DVGMP formula is that senior water rights' holders receive fewer shares than one per acre foot. Thus, senior water rights' holders cannot beneficially use all of the water which their permit/certificate entitles them to use. The DVGMP reduces the senior water rights by annually reducing their allocation of water for each share.³³ Ultimately, for the most senior user, the acre-feet per share allocations are reduced from 67 acre-feet per share in year 1 to 30 acre feet per share in year 35 of the DVGMP³⁴ and for the most junior user, allocations are reduced from 54 acre feet in year 1 to 24 acre feet in year 35 of the

³⁰SEROA 232.

³¹*Id.* The DVGMP formula is: total volume of water right X priority factor = total groundwater shares.

³²SEROA 499-509.

³³SEROA 234-236, 510 (appendix G to DVGMP).

³⁴*Id.* For example, in the Bailey's case, their 5 senior groundwater rights entitle them to use 1,934.116 af. In the first year of the DVGMP they are reduced to 1,250.4969 af, and by year 35, the Baileys are reduced to 467.7960 af.

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1 DVGMP.³⁵ The DVGMP proposes a gradual reduction in pumping to a level of 34,200 af
 2 at the end of 35 years. For 35 years the pumping in Diamond Valley will exceed the
 3 30,000 af perennial yield.³⁶

4 The DVGMP provides that all annual allocations of water be placed in to an account
 5 for each water user and allows the "banking" of unused water in future years, subject to the
 6 annual Evapotranspiration "(ET)" depreciation of the banked water which accounts for
 7 natural losses of water while the water is stored in an underground aquifer.³⁷ The
 8 DVGMP allows the current water allocations and the banked allocations of the water
 9 shares to be used, sold, or traded among the water share holders in Diamond Valley for
 10 purposes other than irrigation so long as the base right is tied to irrigation.³⁸ The DVGMP
 11 authorizes the State Engineer to review a share transfer among holders or an allocation
 12 to a new well or place or manner of use if the transfer would cause the new well to exceed
 13 the pumping volume of the original water right permitted for the well or if the excess of
 14 water pumped beyond the original amount of volume allowed for the well conflicted with
 15 existing rights.³⁹

16 Sadler Ranch claims pre-statutory vested rights to the waters flowing from springs
 17 that are senior in priority to all permits/certificates issued by the State Engineer.⁴⁰ It is
 18 undisputed by the State Engineer that Sadler Ranch's spring flows have diminished as a

19 _____
 20 ³⁵*Id.*, SEROA 5, 218.

21 ³⁶SEROA 510. See State Engineer's oral argument hearing transcript pg. 152.

22 ³⁷*Id.*

23 ³⁸SEROA 5, 218, 234-235.

24 ³⁹*Id.*

25 ⁴⁰Sadler Ranch opening brief 4, Order of Determination at 164-175, In the Matter of the
 26 Determination of the Relative Rights in and to all Waters of Diamond Valley,
 Hydrographic Basin no. 10-153, Elko and Eureka Counties, Nevada (January 31, 2020).

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1 result of over-pumping by junior irrigators in southern Diamond Valley. The Renners, who
 2 also have a senior priority date, are experiencing impacts to their springs due to continual
 3 groundwater declines.⁴¹ The Baileys hold senior irrigation groundwater rights consisting of
 4 Permit no. 22194 (cert. 6182) for 537.04 afa with a March 7, 1960 priority; Permit 22194
 5 (cert. 6183) for 622.0 afa with a March 7, 1960 priority; Permit 55727 (cert. 15957) for
 6 20.556 afa with a March 7, 1960 priority; Permit 28036 (cert. 8415) for 244.0 afa with a
 7 May 3, 1960 priority; Permit 48948 (cert. 13361) for 478.56 afa with a May 3, 1960 priority;
 8 and Permit 28035 (cert. 8414) for 201.56 afa with a January 23, 1974 priority.⁴² The
 9 Baileys also claim vested and/or permitted water rights and stock water rights.⁴³

10 All permits/certificates issued by the State Engineer have the cautionary language,
 11 "this permit is issued subject to all existing rights on the source."⁴⁴ In Nevada, all
 12 appropriations of groundwater are "subject to existing rights to the use thereof."⁴⁵

13 After a public hearing held on October 30, 2018, the State Engineer issued Order
 14 1302. Order 1302 states, "while it is acknowledged that the GMP does deviate from the
 15 strict application of the prior appropriation doctrine with respect to 'first in time, first in right,'
 16 the following analysis demonstrates that the legislature's enactment of NRS 534.037
 17 demonstrates legislative intent to permit action in the alternative to strict priority
 18 regulation."⁴⁶ The State Engineer and all intervenors who filed briefs and orally argued this
 19

20
 21 ⁴¹Sadler Ranch opening brief 4, *Id.* 152-164; SEROA 593.

22 ⁴²Bailey opening brief 4, SEROA 500,506.

23 ⁴³Bailey opening brief 4, SEROA 536-538.

24 ⁴⁴Sadler Ranch opening brief 4; see certificates/permits listed in SEROA 499-509.

25 ⁴⁵NRS 534.020.

26 ⁴⁶SEROA 6.

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case agree that the DVGMP deviates from the prior appropriation doctrine.⁴⁷

III

DISCUSSION

STANDARD OF REVIEW

A party aggrieved by any order or decision of the State Engineer may have the order or decision reviewed in a proceeding for that purpose in the nature of an appeal.⁴⁸ The proceedings must be informal and summary.⁴⁹ On appeal, the State Engineer's decision or ruling is prima facie correct, and the burden of proof is upon the person challenging the decision.⁵⁰ The court will not pass upon the credibility of witnesses or reweigh the evidence, nor substitute its judgment for that of the State Engineer.⁵¹ With respect to questions of fact, the reviewing court must limit its determination to whether substantial evidence in the record supports the State Engineer's decision.⁵² When reviewing the State Engineer's findings, factual determinations will not be disturbed on appeal if supported by substantial evidence.⁵³ Substantial evidence has been defined as "that which a reasonable mind might accept as adequate to support a conclusion."⁵⁴ With

⁴⁷State Engineer's answering brief 26, DNRPCA intervenors' answering brief 11-13, Eureka County's answering brief 5, 11.

⁴⁸ NRS 533.450(1).

⁴⁹ NRS 533.450(2).

⁵⁰ NRS 533.450(10).

⁵¹ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1974) (citing *N. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 279, 429 P.2d 66 (1967)).

⁵² *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1997) (citing *Revert* at 786).

⁵³ *State Engineer v. Morris*, 107 Nev. 694, 701, 819 P.2d 203, 205 (1991).

⁵⁴ *Bacher v. State Engineer*, 122, Nev. 1110, 1121, 146 P.3d 793, 800 (2006). (internal citations omitted).

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regard to purely legal questions, the standard of review is de novo.⁵⁵ Findings of an administrative agency will not be set aside unless they are arbitrary and capricious.⁵⁶ The court must review the evidence in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion.⁵⁷ A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by rules or procedure."⁵⁸ A decision is capricious if it is "contrary to the evidence or established rules of law."⁵⁹

"The State Engineer's ruling on questions of law is persuasive, but not entitled to deference."⁶⁰ The presumption of correctness accorded to a State Engineer's decision "does not extend to 'purely legal questions, such as 'the construction of a statute, as to which the reviewing court may undertake independent review.'"⁶¹

A. THE STATE ENGINEER'S PUBLIC HEARING AFFORDED PETITIONERS DUE PROCESS

On October 30, 2018, the State Engineer, after giving notice required by statute,⁶² held a public hearing in Eureka, Nevada. The public hearing was followed by a written public comment period ending November 2, 2018. On June 11, 2019, the State Engineer filed a motion in limine which was briefed by all parties. Sadler Ranch, the Renners, and

⁵⁵ *In re Nevada State Engineer Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449 (2012.)

⁵⁶ *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1991).

⁵⁷ *Shetakis v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992).

⁵⁸ Black's Law Dictionary, Arbitrary (10th ed. 2014).

⁵⁹ Black's Law Dictionary, Capricious (10th ed 2014).

⁶⁰ *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019)

⁶¹ *In Re State Engineer Ruling no. 5823 at 239*, (internal citations omitted).

⁶² NRS 534.037(3).

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the Baileys argued that their due process rights were violated, alleging the State Engineer failed to hold a proper evidentiary hearing where witnesses could be subject to cross-examination and evidence challenged.⁶³ This Court entered an order granting motion in limine on September 4, 2019. In its order, the court specifically found that "the public hearing process to consider the GMP under NRS 534.035 provided notice and the opportunity for anyone to be heard and to offer evidence, thus satisfying due process standards."⁶⁴ The court's position has not changed. The court incorporates the entirety of the order granting motion in limine in these findings of fact and conclusions of law. The court finds that petitioners were afforded due process in the public hearing held on October 18, 2018, pursuant to NRS 534.037(3).

B. THE STATE ENGINEER CONSIDERED APPLICABLE NRS 534.037(2) FACTORS PRIOR TO APPROVING THE DVGMP

In determining whether to approve a GMP, NRS 534.037(2) requires the State Engineer to consider: (a) the hydrology of the basin; (b) the physical characteristics of the basin; (c) the geographic spacing and location of the withdrawals of groundwater in the basin; (d) the quality of the water in the basin; (e) the wells located in the basin, including domestic wells; (f) whether a groundwater management plan already exists to the basin; (g) any other factors deemed relevant by the State Engineer. The State Engineer must ultimately decide whether a proposed GMP "sets forth the necessary steps for removal of the basin's designation as a CMA."⁶⁵ Petitioners argue that (1) the State Engineer failed to consider the NRS 534.037(2) factors, and (2) that the DVGMP failed to demonstrate that decreased pumping over the 35 year life of the plan will result in "stabilized groundwater

⁶³Sadler Ranch opening brief 34; Sadler Ranch opposition to motion in limine filed June 24, 2019; Bailey opposition to motion in limine filed June 24, 2019.

⁶⁴Order granting motion in limine 10.

⁶⁵NRS 534.037(1).

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1 levels⁶⁶ based on the evidence presented at and after the public hearing. Petitioners
 2 submit that the DVGMP fails to bring the Diamond Valley basin into equilibrium within 10
 3 years and over pumping will continue even at the 35th year of the plan.⁶⁷ Order 1302,
 4 describes the State Engineer's review of the NRS 534.037(2) factors in relation to the
 5 DVGMP.⁶⁸ The DVGMP's review of the factors is in Appendices D-I.

6 The State Engineer specifically rejected petitioners' arguments that the DVGMP
 7 failed to reach an equilibrium, that groundwater modeling and hydro geologic analysis must
 8 be the basis for the DVGMP's determination of pumping reduction rates and pumping
 9 totals at the plan's end date, and that the DVGMP pumping reductions would not bring
 10 withdrawals to the perennial yield.⁶⁹ The record shows that the State Engineer considered
 11 evidence of the NRS 534.037(2) factors as set forth in appendix D to the DVGMP.⁷⁰ Sadler
 12 Ranch's assertion that their expert, David Hillis' report questioning DVGMP's viability
 13 should be accepted by the State Engineer does not require the State Engineer to accept
 14 Mr. Hillis' findings and conclusions. The State Engineer was satisfied that the DVGMP
 15 would cause the Diamond Valley basin to be removed as a CMA at the end of 35 years.
 16 The State Engineer is not required to undertake an extensive factor analysis in his order
 17 if he is otherwise satisfied that sufficient facts and analysis are presented in the petition
 18 and the proposed DVGMP from which he could make a determination whether to approve
 19 or reject the DVGMP.

20
 21 _____
 22 ⁶⁶Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief
 15-20.

23 ⁶⁷*Id.*

24 ⁶⁸SEROA 14-17.

25 ⁶⁹SEROA 17-18.

26 ⁷⁰SEROA 17-18, 223, 227-28, 476-496.

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Petitioners' contention that "the Legislature determined that a GMP should accomplish its goals within ten years, not thirty-five" is misplaced.⁷¹ First, NRS 534.110(7) states that if a basin has been designated as a CMA for 10 consecutive years, the State Engineer shall order withdrawals based on priority, unless a GMP has been approved pursuant to NRS 534.037 (emphasis added). NRS 534.110(7) does not state a GMP must accomplish the goal of equilibrium in a CMA basin within 10 years from the GMP approval. An undertaking as immense as bringing a depleted aquifer into balance could easily surpass 10 years depending on the extent of harm to the aquifer. Sadler Ranch misconstrues Assemblyman Goicoechea's statement to the Legislature that, "[again] you have ten years to accomplish your road to recovery."⁷² The court views Assemblyman Goicoechea's words as meaning that once a basin is designated as a CMA, a 10 year clock starts wherein a GMP must be approved within the 10 year period, and if not, curtailment by priority must be initiated by the State Engineer. A GMP "must set forth the necessary steps for removal of the basin's designation as a critical management area"⁷³ not that equilibrium in the CMA basin must be accomplished within 10 years. If the State Engineer finds, which he did here, that the DVGMP sets forth the necessary steps for removal of the basin as a CMA, he may approve a GMP even if the DVGMP exceeds a 10 year period.

Petitioners claim the DVGMP will allow for continued depletion of the Diamond Valley aquifer.⁷⁴ The court agrees with petitioners. However, the State Engineer, using his knowledge and experience, and based on the evidence presented at the public hearing,

⁷¹Sadler Ranch opening brief 13.

⁷²Minutes of Assmb. Comm. on Gov't Affairs, 69 (March 30, 2011).

⁷³NRS 534.037(1).

⁷⁴Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief 15-20.

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including the DVGMP and appendices, rejected petitioners' arguments that the DVGMP would not enable the basin to be removed as a CMA. Again, this Court will not reweigh the evidence presented nor substitute its judgment for that of the State Engineer. The court finds that there is substantial evidence in the record to support the State Engineer's approval of the DVGMP as achieving the goal of removing the Diamond Valley basin from CMA status. The court finds that there is substantial evidence in the record to support the State Engineer's findings that the DVGMP contained the necessary relevant factors in NRS 534.037(2) to approve the DVGMP.⁷⁵

C. THE STATE ENGINEER RETAINS HIS AUTHORITY TO MANAGE THE DIAMOND VALLEY BASIN

Notwithstanding his approval of the DVGMP, the State Engineer is not precluded from taking any necessary steps in his discretion to protect the Diamond Valley aquifer, including, ordering curtailment by priority, at any time during the life of the DVGMP if he finds that the aquifer is being further damaged. NRS 534.120(1) gives the State Engineer discretion to "make such rules, regulations and orders as are deemed essential for the welfare of the area involved." Order 1302 specifically found the DVGMP did not waive "any authority of the State Engineer to enforce Nevada water law."⁷⁶ It would be ludicrous to find that the State Engineer was prohibited from taking whatever action was necessary to prevent a catastrophic result in Diamond Valley during the life of the DVGMP, including curtailment, regardless of the provisions built into the DVGMP that otherwise trigger his plan review.⁷⁷ The court finds the DVGMP does not limit the State Engineer's authority to

⁷⁵This finding is narrowly limited to the State Engineer's fact finding only in relation to the NRS 534.037(2) factors and that he found the DVGMP would allow the basin to be removed as a CMA after 35 years, not whether the DVGMP and Order 1302 violates Nevada law in other respects..

⁷⁶SEROA 18.

⁷⁷See SEROA 235, sec. 13.13; 246, sec. 26.

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1 manage the Diamond Valley basin pursuant to NRS 534.120(1).

2 D. ORDER 1302 DOES NOT VIOLATE NEVADA'S AQUIFER STORAGE RECOVERY
3 ("ASR") STATUTE

4 An ASR project under Nevada law contemplates the recharge, storage, and
5 recovery of water for future use for which a permit is required.⁷⁸ The DVGMP does not
6 include a proposed source of water for recharge into the Diamond Valley aquifer, the
7 quantity of water proposed to be recharged into the aquifer, nor any stated purpose for
8 the storage of water for future use.⁷⁹ The DVGMP uses the term "banking" as meaning
9 unused shares of water in a year may be carried forward or "banked" for use in the
10 following year if appropriate. The State Engineer held that the DVGMP provision to carry
11 over water shares for use in a subsequent year was outside the scope of NRS 534.260 to
12 534.350 as not being a project involving the recharge, storage and recovery of water
13 subject to statutory regulations,⁸⁰ but "to allow flexibility by users to determine when to use
14 their limited allocation and to encourage water conservative practices."⁸¹ The State
15 Engineer's finding is supported by substantial evidence in the record. The court finds the
16 term "banked" when used in the manner as stated in the DVGMP to mean water shares
17 that are not used but saved for use in a subsequent year.⁸² The court finds the DVGMP is
18 not required to comply with and does not violate NRS 534.250 to NRS 534.340.

19
20
21
22 ⁷⁸NRS 534.250-534.340.

23 ⁷⁹*Id.*

24 ⁸⁰SEROA 8, 9.

25 ⁸¹*Id.*

26 ⁸²SEROA 234, sec. 13.9.

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E. PETITIONERS FAILED TO SHOW THAT A VIOLATION OF NRS 534.037(1) WHEN SEEKING PETITION APPROVAL AFFECTED THE VOTE RESULT

A GMP petition submitted to the State Engineer for approval "... must 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 ..."⁸³ The DVGMP petition was thus required to be signed by a majority of the holders of permits or certificates for surface rights, stock water rights, and underground rights in the Diamond Valley basin.

Order 1302 found there were 419 water right permits or certificates in the Diamond Valley basin at the time the DVGMP petition was filed.⁸⁴ By limiting the computation to those signatures from a confirmed owner of record, the State Engineer found 223 of 419 permits or certificates,⁸⁵ or 53.2 percent, was a majority of the permits or certificates in the basin.⁸⁶ The DVGMP petition was only sent to groundwater permit holders to be considered and voted upon.⁸⁷ The State Engineer argues that since the procedure for approving a GMP is found in Chapter 534 related to underground water that only permit/certificate holders for underground irrigation were required to vote.⁸⁸ This position misconstrues the clear language of NRS 534.037(1). The Baileys assert that the DVGMP petition should have been submitted to all vested and surface right or other permit and certificate holders for consideration and vote.⁸⁹ The court agrees that all certificate and

⁸³NRS 534.037(1).

⁸⁴SEROA 3.

⁸⁵Those signatures by a confirmed owner of record. *Id.*

⁸⁶SEROA 3.

⁸⁷SEROA 148.

⁸⁸State Engineer's answering brief 25, "... surface water rights and vested rights were properly omitted from the State Engineer's calculation for majority approval under NRS 534.037(1) ..."

⁸⁹Bailey opening brief 33-34, Bailey reply brief 17-19.

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1 permit holders should have had the petition submitted to them. However, NRS 534.037(1)
 2 does not require a petition to be submitted to vested right holders. NRS 534.037(1) does
 3 not restrict petition approval to only underground permit or certificate holders. The
 4 exclusion of all surface permit and certificate holders or other certificate holders from
 5 considering whether to approve the DVGMP or not was incorrect and violated NRS
 6 534.037(1). The court so finds. But, petitioners have not shown that they or other holders
 7 of permits or certificates to appropriate water in the basin were not included in the State
 8 Engineer's count of 419 water right permits or certificates in the Diamond Valley basin.⁹⁰
 9 There is no evidence in the ROA that the State Engineer excluded any holders of permits
 10 or certificates in the 419 count. Although petitioners and others similarly situated may not
 11 have been presented with the petition to approve the DVGMP, the fact that they would not
 12 have signed the petition is irrelevant as a majority of the holders of permits or certificates
 13 in the basin did sign the petition. The court finds substantial evidence in the record to
 14 support the State Engineer's determination that the petition was signed by a majority of the
 15 permit or certificate holders in the Diamond Valley basin.

16 At the oral argument hearing, Sadler Ranch and the Renners untimely challenged
 17 the accuracy of the vote approving the DVGMP petition. First, they contend that NRS
 18 534.037(1) requires that votes be counted by the number of people who own the
 19 permits/certificates, not the number of permits. The statute's focus is counting by the
 20 permit/certificates. The State Engineer limited his count to the permits and certificates, and
 21 compared petition signatures with the confirmed owner of record in his office files.⁹¹ Under
 22 petitioners' interpretation,⁹² if one permit or certificate was owned by 25 owners, there

23 ⁹⁰SEROA 3.

24 ⁹¹SEROA 3.

25 ⁹²Sadler Ranch's example was that the Moyle Family has 5 people who own 50 permits
 26 thereafter the State Engineer should have only counted 5 votes instead of 50.

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1 should be 25 votes counted. This method of assigning votes improperly places the vote
2 calculation on the number of owners of certificates or permits rather than the number of
3 permits or certificates in the Diamond Valley basin. The court rejects Sadler Ranch's and
4 the Renner's interpretation of the method by which votes must be counted under NRS
5 534.037(1). Second, they contend the record fails to support how the State Engineer
6 verified petition signatures or what rights were counted as eligible to vote. The court is
7 satisfied that the State Engineer reviewed his office's records, confirmed the owner(s) of
8 record with the signatures on the petition as representing the owner(s) of record in his
9 office, and then counted the permits or certificates, not the owners of the certificates or
10 permits.⁹³ Third, Sadler Ranch and the Renners state some signatures were not by the
11 owner of record. There is no requirement under the NRS 534.037(1) that an individual
12 representing a permit or certificate holder could not sign the petition for the holder. No
13 challenges exist in the record by any permit or certificate holders claiming that their vote
14 was fraudulently cast by someone not authorized to vote on their behalf. Fourth, Sadler
15 Ranch and the Renners suggest that the permit or certificate should not have been
16 counted if only signed by 1 of the owners of record. Again, nothing in the statute requires
17 the petition be signed by each owner of a permit or certificate. Again, there are no
18 challenges in record from any co-owners alleging the vote of their certificate or permit was
19 invalid because not all of the record owners signed the petition. Last, they cite that the
20 DVGMP tally sheet had double and triple counted votes. This may be so, but the State
21 Engineer's method of calculation represented the true count of votes. Sadler Ranch's and
22 the Renner's objections are rejected. The court finds substantial evidence in the record
23 to support the State Engineer.
24
25
26

⁹³SEROA 3-4.

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F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

In Nevada, "beneficial use shall be the basis, the measure and the limit of the right to the use of the water"⁹⁴ "Beneficial use depends on a party actually using the water."⁹⁵ The DVGMP does not require prior beneficial use of water in order for a permit holder to receive shares under the DVGMP formula.⁹⁶ Petitioners contend that any permits or certificates that are in abandonment status should not be allowed water shares. The State Engineer found that because "... time is of the essence for rights holders to get a GMP approved" ... "it would be a lengthy process to pursue abandonment."⁹⁷ The State Engineer also cites the notice of non-use provisions required by NRS 534.090 as potentially causing owners of unused water rights to resume beneficial use, and exacerbate the water conditions in Diamond Valley.⁹⁸ The court agrees such a situation could occur, however, the State Engineer's analysis fails to address that permit holders who have done nothing to beneficially use water will receive just as many, if not more, shares of water will as holders of water rights who have placed water to beneficial use. The GMP gifts to permit holders, who have done nothing to place their water to beneficial use, valuable water shares to trade, lease, or sell to others in Diamond Valley.

Of the 126,000 af of water rights in Diamond Valley, currently there is only 76,000 af of actual beneficial use.⁹⁹ Under the DVGMP those permit holders who have never proved up their water by placing it to beneficial use could potentially receive more water

⁹⁴NRS 533.035.

⁹⁵*Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793 (2006).

⁹⁶SEROA 232-236, sec. 12,13

⁹⁷SEROA 9.

⁹⁸*Id.*

⁹⁹SEROA 2.

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than those holders who have placed their water to beneficial use. The DVGMP allocates the total amount of 76,000 af actually being pumped to 126,000 af of irrigation ground water rights in good standing in Diamond Valley all of which will receive shares under the DVGMP formula.¹⁰⁰ By example, a farmer with a center pivot on a 160 acre parcel at 4 af per acre would be permitted for 640 af. Upon prove up, if he actually watered less than the 160 acre parcel because watering by using a center pivot does not water the 4 corners of a parcel, he may only prove up the water right for 512 af and receives a certificate for this amount. Another farmer in Diamond Valley, who has a 160 acre parcel at 4 af per acre but who has never proved up the beneficial use of the water and stands in a forfeiture status, receives the full 640 af of water. In the 1st year of the DVGMP, the farmer who has a permit for 640 af, but never has proved it up through beneficial use, actually received 85 af more water than the farmer who proved up beneficial use on the same size parcel. When transferred into shares under the DVGMP, the farmer who has not proved up his permit receives windfall of water shares to sell or trade. The DVGMP acknowledges that some water rights in good standing have not been used and tied to corners of irrigation circles and that most, but not all, "paper water" is tied to currently used certificates or permits.¹⁰¹ Even though the DVGMP caps the amount of water the first year of the plan at the "ceiling of actual pumping (76,000 afa)",¹⁰² it remains that the 76,000 afa will be allocated to some permits who have not proved up beneficial use.

Under Nevada water law, a certificate, vested, or perfected water right holder enjoys the right to and must beneficially use all of the water it has proved up. The DVGMP rewards permit holders who have not placed water to beneficial use, of which there are

¹⁰⁰SEROA 218, 219, 221, 232-33 3m 461, 465.

¹⁰¹SEROA 467.

¹⁰²SEROA 12.

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1 approximately 50,000 af in Diamond Valley.¹⁰³ The DVGMP also allows the banking of
 2 unperfected paper water rights for future use which can be sold, traded or leased.¹⁰⁴ The
 3 court finds that Order 1302 violates the NRS 533.035. The court finds Order 1302 is
 4 arbitrary and capricious.

5 G. THE DVGMP IMPAIRS VESTED RIGHTS IN VIOLATION OF NRS 533.085(1)

6 It is undisputed that the Baileys and Renners have senior vested surface water
 7 rights that have been adversely impacted by the 40 years plus of overpumping¹⁰⁵.
 8 Respondent and intervenors agree that the DVGMP was not developed for mitigation
 9 purposes, but to reduce pumping, bring equilibrium to the Diamond Valley aquifer in 35
 10 years, and cause the CMA designation to be removed.¹⁰⁶ The State Engineer's position
 11 is that the GMP "is not a mitigation plan, and NRS 534.037 does not require the
 12 proponents of a groundwater management plan or the State Engineer to consider the
 13 alleged effects on surface water rights or mitigate those alleged effects."¹⁰⁷ The State
 14 Engineer is wrong. A GMP must consider the effect it will have on surface water rights.
 15 In *Pyramid Lake Paiute Tribe v. Ricci* 126 Nev. 531.524 (2010), the Nevada Supreme
 16 Court acknowledged the State Engineer's ruling that "[t]he perennial yield of a hydrological
 17 basin is the equilibrium amount or maximum amount of water that can be safely used
 18 without depleting the source." Moreover, [t]he maximum amount of natural discharge that
 19 can be feasibly captured . . . [is the] perennial yield . . . the maximum amount of withdrawal

20
 21 ¹⁰³SEROA 2, 9, 10.

22 ¹⁰⁴SEROA 234; see sec. 13.2

23 ¹⁰⁵Sadler Ranch had impacted senior vested rights that have been mitigated by
 24 certificate.

25 ¹⁰⁶State Engineer's answering brief, 36.

26 ¹⁰⁷*Id.* This position is also shared by the DNRPCA intervenors. DNRPCA answering
 brief, 24; and Eureka County, Eureka County answering brief, 22.

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1 above which over appropriation occurs." *State Engineer v. Morris*, 107 Nev. 699 703
 2 (1991).The DVGMP on its face fails to reduce the harm caused by overpumping and
 3 aggravates the depleted water basin.

4 A GMP developed under NRS 534.037 is not required to mitigate adversely affected
 5 surface water rights, but it cannot impair those rights.NRS 533.085(1) provides, "nothing
 6 contained in this chapter shall impair the vested right of any person to the use of water, nor
 7 shall the right of any person to take and use water be impaired or affected by any of the
 8 provisions of this chapter where appropriations have been initiated in accordance with law
 9 prior to March 22, 2013." NRS 534.100 reads, "Existing water rights to the use of
 10 underground water are hereby recognized. For the purpose of this chapter a vested right
 11 is a water right on underground water acquired from an artesian or definable aquifer prior
 12 to March 22, 1913."

13 The DVGMP authorizes continuous pumping beginning with 76,000 af in year one,
 14 reducing pumping to 34,200 af at the end of 35 years,¹⁰⁸ clearly in excess of the 30,000 af
 15 perennial yield in the Diamond Valley aquifer.¹⁰⁹ The DVGMP and Order 1302
 16 acknowledge that there will be ongoing additional withdrawals of water from the basin of
 17 approximately 5,000 af annually of non-irrigation permits.¹¹⁰ Venturacci, Sadler Ranch and
 18 the Bailey's are entitled to withdraw an approximate 6,400 af annually.¹¹¹ The State
 19 Engineer admits that neither groundwater modeling nor hydro geologic analysis were the
 20 basis for the DVGMP's "determination of pumping reduction rates and target pumping at
 21
 22

23 ¹⁰⁸SEROA 510.

24 ¹⁰⁹SEROA 3.

25 ¹¹⁰*Id.*

26 ¹¹¹Permits 82268, 81270, 63497, 81825, 82572, 87661.

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the end of the plan¹¹² but that "the pumping reduction rate was selected by agreement of the GMP authors, . . ."¹¹³ The State Engineer's reasoning that NRS 534.037 does not require a GMP "to consider alleged effects on surface water rights" is a misunderstanding of Nevada's water law. The DVGMP's annual pumping allocation will certainly cause the aquifer groundwater level to decline with continuing adverse effects on vested surface rights. The court finds that the DVGMP and Order 1302 impair senior vested rights. The court finds that Order 1302 is arbitrary and capricious.

ESTOPPEL ISSUE

Contrary to the position of Eureka County, petitioners are not estopped from making claims that the DVGMP impacts their vested rights.¹¹⁴ No facts are present in the ROA that any respondent relied to their detriment upon representations or any petitioners or that any other estoppel elements are present in the ROA.¹¹⁵

I. ORDER 1302 VIOLATES NEVADA'S DOCTRINE OF PRIOR APPROPRIATION

The history of prior appropriation in the Western states dates to the mid-1800's and has been well chronicled in case law. Notably, In *Re Water of Hallett Creek Stream System*,¹¹⁶ discusses at length the development of the doctrine of prior appropriation, "first in time, first in right", with its genesis linked to the early California gold miners' use of water and a local rule of priority as to the use of water. Nevada has long recognized the law of prior appropriation.¹¹⁷ The priority of a water right is the most important feature.¹¹⁸ Court's

¹¹²SEROA 16.

¹¹³*Id.*

¹¹⁴Eureka County answering brief 22-23.

¹¹⁵*Torres v. Nev. Direct Ins. Co.*, 131 Nev. 531, 539, 353 P.3d 1203 (2015). (internal citations omitted).

¹¹⁶749 P.2d 324, 330-34 (Cal 1988) cert. denied 488 U.S. 834 (1988).

¹¹⁷*Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78, 87, (1885).

¹¹⁸See *Gregory J. Hobbs, Jr., Priority: The Most Misunderstood Stick in the Bundle*, 32 *Envtl. L.* 37(2002).

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1 have stated, "priority in a water right [as] property in itself."¹¹⁹ Although, "... those holding
 2 certificates, vested, or perfected water rights do not own or acquire title to the water, they
 3 merely enjoy the right to beneficial use,"¹²⁰ the Nevada Supreme Court has stated, "a water
 4 right 'is regarded and protected as real property.'¹²¹ The Nevada Supreme Court
 5 recognized as well established precedent "that a loss of priority that renders rights useless
 6 'certainly affects the rights' value and 'can amount to a defacto loss of rights.'¹²² The prior
 7 appropriation doctrine ensures that the senior appropriator who has put its water to
 8 beneficial use has a right to put all of the water under its permit/certificate to use and that
 9 right is senior to all water rights holders who are junior. This doctrine becomes critically
 10 important during times of water scarcity, whether temporary, or as a result of prolonged
 11 drought. This is certainly the case in Diamond Valley. With the security attached to a
 12 senior priority right to beneficially use all of the water associated with the right also comes
 13 obvious financial value not only to the current water right holder, but to any future owner
 14 of that senior right. The loss or reduction of any water associated with the senior right can
 15 significantly harm the holder.

16 The State Engineer found that, "the GMP still honors prior appropriation by
 17 allocating senior rights a higher priority than junior rights."¹²³ The court disagrees. The
 18 DVGMP reduces the amount of water it allocates to senior rights' holders in the formula
 19 for shares effectively ignoring 150 years of the principle of "first in time, first in right"¹²⁴
 20 which has allowed a senior right holder to beneficially use all of water allocated in its right

21 ¹¹⁹*Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005).

22 ¹²⁰*Sierra Pac. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40, (2019), citing *Desert*
 23 *Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 994 P.2d 835, 842 (1997).

24 ¹²¹*Town of Eureka*, 167.

25 ¹²²*Wilson v. Happy Creek*, 135 Nev. Adv. Op. 41, 448 P.3d 1106, 1115 (2019) (internal
 26 citations omitted).

¹²³SEROA 8.

¹²⁴*Ormsby County v. Kearny*, 37 Nev. 314, 142 P. 803, 820 (1914).

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1 before any junior right holder can use its water right. The DVGMP allows the senior right
2 holder a higher priority to use less water.

3 The court finds that the DVGMP formula for water shares that reduces the amount
4 of water to which a senior water rights' holder is entitled to use violates the doctrine of prior
5 appropriation in Nevada. The court finds that Order 1302 violates the doctrine of prior
6 appropriation in Nevada. The court thus finds that Order 1302 is arbitrary and capricious.

7 H. THE LEGISLATIVE HISTORY OF NRS 534.037 and 534.110(7) DOES NOT
8 DEMONSTRATE AN INTENT TO MODIFY THE DOCTRINE OF PRIOR
9 APPROPRIATION IN NEVADA

10 As stated above, the doctrine of prior appropriation has existed in Nevada water law
11 for in excess of 150 years. The DVGMP reduces the annual allocation of water rights to
12 both junior and senior rights holders.¹²⁵ Relying on a New Mexico Supreme Court case,
13 *State Engineer v. Lewis*,¹²⁶ Order 1302 held that NRS 534.037 "demonstrates legislative
14 intent to permit action in the alternative to strict priority regulation."¹²⁷ Order 1302 states
15 that, "... in enacting NRS 534.037, the Nevada legislature expressly authorized a
16 procedure to resolve a shortage problem. And, likewise, the State Engineer assumes that
17 the Legislature was aware of prior appropriation when it enacted NRS 534.037, and the
18 State Engineer interprets the statute as intending to create a solution other than a priority
19 call as the first and only response."¹²⁸ The State Engineer further found that, "Nothing in
20 the legislative history of A.B. 419 or the text of NRS 534.037 suggests that reductions in
21 pumping have to be borne by the junior rights holders alone – if that were the case, the
22 State Engineer could simply curtail junior rights – a power already granted by pre-existing

23 _____
24 ¹²⁵SEROA 499-526, appendix F is the preliminary table of all rights subject to the
25 DVGMP and the share calculation for each right.

26 ¹²⁶150 P.3d 375 (N.M. 2006).

¹²⁷SEROA 5.

¹²⁸SEROA 6.

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1 water law in NRS 534.110(6).¹²⁹ The State Engineer argues the plain language of NRS
 2 534.037 and NRS 534.110(7) "shows the legislature's intent to allow local communities to
 3 come together and agree upon a solution for groundwater management other than strict
 4 application of prior appropriation, such as the Diamond Valley GMP."¹³⁰ His reasoning is
 5 that since NRS 534.110(7) requires junior priority rights to be curtailed in favor of senior
 6 priority rights where a basin has been designated a CMA for at least 10 years, the
 7 legislature provided an exception to the curtailment requirement and the application of the
 8 prior appropriation doctrine where "a groundwater management plan has been approved
 9 for the basin pursuant to NRS 534.037."¹³¹ Order 1302 held that "NRS 534.037 illustrates
 10 the unambiguous intent of the Legislature to allow a community to find its own solution to
 11 water shortage, including "out-of-the-box solutions," "to resolve conditions leading to a
 12 CMA designation."¹³²

13 The community based solution approved by the State Engineer allows junior rights'
 14 holders who, by over pumping for more than 40 years have created the water shortage in
 15 Diamond Valley, to be able to approve a GMP that dictates to senior rights' holders that
 16 they can no longer use the full amount of their senior rights. This is unreasonable. Taking
 17 it a step further, using the State Engineer's analysis, a majority vote of water
 18 permits/certificates in Diamond Valley could approve a GMP whereby the senior rights
 19 holders are subject to a formula reducing their water rights by an even greater percentage
 20 of water than in the current DVGMP.

21 The State Engineer's position is shared by the intervenors. Eureka County asserts
 22 (1) NRS 534.110(6) and (7) are not ambiguous; (2) that subsection (7) is a specific, special
 23 statute authorizing CMA's which controls over subsection (6), a general subsection for

24 ¹²⁹SEROA 6-7.

25 ¹³⁰State Engineer's answering brief 25.

26 ¹³¹*Id.* 25-26.

¹³²*Id.* 26.

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1 CMA designated basins; and (3) thus regulation by priority is not required for at least 10
 2 consecutive years for a CMA designated basin "unless a groundwater management plan
 3 has been approved for the basin in that time frame."¹³³ Eureka County maintains that
 4 subsection NRS 534.110(7) "is a plain and clear 'exception' to the general discretionary
 5 curtailment provision in subsection 6,"¹³⁴ concluding that "NRS 534.110(7) does not require
 6 the State Engineer to order senior rights be fulfilled before junior rights in the critical
 7 management area for at least 10 consecutive years after the designation."¹³⁵ DNRPCA
 8 intervenors advocate that a community based GMP deviating from water right regulation
 9 contrary to the prior appropriation doctrine is authorized by NRS 534.110(7),¹³⁶ stating, ".
 10 .. the Legislature deliberately enacted legislation that created an exception to the seniority
 11 system in exactly the circumstances that exist here."¹³⁷ (Emphasis added). The State
 12 Engineer and intervenors further agree that if a GMP has been approved, that the State
 13 Engineer cannot order any curtailment by priority for at least 10 years from the date the
 14 basin was designated a CMA. The foregoing interpretations, if sustained, would turn 150
 15 years of Nevada water law into chaos.

16 The State Engineer and intervenors have misinterpreted NRS 534.037 by using the
 17 *Lewis* case as either authority for or as being "instructive" as to the legislative intent behind
 18 NRS 534.037.¹³⁸ Now conceded by the State Engineer, the *Lewis* facts and holding are
 19 clearly distinguishable from the present case.¹³⁹ In *Lewis*, a U.S. Supreme Court mandated
 20 settlement agreement was litigated. The *Lewis* plan was presented to, and expressly

21 ¹³³Eureka County's answering brief 12-13.

22 ¹³⁴*Id.*

23 ¹³⁵*Id.* 12.

24 ¹³⁶DNRPCA answering brief 11-12.

25 ¹³⁷*Id.* 11.

26 ¹³⁸State Engineer's answering brief 29-3..

¹³⁹*Id.*

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ratified by the New Mexico Legislature.¹⁴⁰ The DVGMP has never been presented to or ratified by the Nevada Legislature. The State Engineer now claims the *Lewis* case is an example "that shows another state has utilized an innovative solution in order to resolve water shortages." The State Engineer analyzes that, "NRS 534.037 was expressly ratified by the Nevada Legislature, and has a clear intent to allow local water users to agree to a solution other than curtailment by priority."¹⁴¹ Critically, there is no language, either express or implied in NRS 534.037, that allows for a GMP to be approved by a majority of right holders in a CMA that reduces the amount of water to which a senior right holder is entitled to beneficially use. The State Engineer amazingly argues that "Baileys, Sadler Ranch, and the Renners provide no authority for someone in the minority (*i.e. someone who did not want the GMP approved*) in a basin where a groundwater management plan is approved to act outside of the plan that was agreed to, per statute, by a majority of the holders of water permits and certificates, nor do they legitimately challenge the language of the statute providing for a simple majority to create a basin-wide groundwater management plan."¹⁴² By the State Engineer's analysis of the legislative intent of NRS 534.037, a majority of junior right holders, who, by their collective knowing over appropriation of a water basin, combined with the State Engineer's neglectful acquiescence, can vote to deprive a senior right holder's use of all of its water, thus enabling the junior holders who created the crisis to continue to irrigate by using water which they were never entitled to use.¹⁴³ This is simply wrong.

The Nevada Supreme court has noted, "our adherence to long-statutory precedent provides stability on which those subject to this State's law are entitled to rely."¹⁴⁴ Every

¹⁴⁰*Lewis*, 376.

¹⁴¹State Engineer's answering brief 29.

¹⁴²*Id.* 30.

¹⁴³53.2percent of the senior priority water right owners did not support the DVGMP.

¹⁴⁴*Happy Creek*, 1116.