water right holder under Nevada law was, and is, entitled to rely on the priority date of a valid water right they own to place all of the water under its right to beneficial use. Neither Nevada Supreme Court nor the Legislature have ever waivered from this legal precedent. Nevada ranchers and farmers have always valued and defended their water right priority. Every rancher and farmer, until Order 1302, have relied on Nevada's stone etched security that their water right priority date entitled them to beneficially use the full amount of a valid water right prior to all those junior. Every Nevada rancher and farmer has known and presumably understood that if their water right was junior to others, that the senior right holder was entitled to satisfy the full amount of the senior right before the junior holder would be satisfied, even if it meant the junior holder had less water or no water at all to place to beneficial use.[145]

Clearly, there is no express language in either NRS 534.037 or NRS 534.110(7) stating a GMP can violate the doctrine of prior appropriation or that the doctrine is somehow abrogated. Knowing the long standing legislative and judicial adherence to Nevada's prior appropriation doctrine, the drafters could have easily inserted provisions in the CMA and/or GMP legislation giving the State Engineer the unequivocal authority to deviate from Nevada's "first-in-time, first-in-right" prior appropriation law if that was their intent.

"The legislature is 'presumed not to intend to overtum long-established principles of law' when enacting a statute"[146] When the language of a statute is unambiguous, courts are not to look beyond the statute itself when determining meaning.[147] The court finds that NRS 534.037 is not ambiguous. The court finds that the express language of NRS 534.037 and NRS 534.110(7) do not allow a GMP to violate the doctrine of prior appropriation by

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[145]Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS 534.020(1).

[146]*Happy Creek,* 1111, citing *Shadow Wood Homeowners Ass'n. v. N.Y. Cmty. Bancorp. Inc.,* 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016).

[147]*In re Orpheaus Trust,* 124 Nev. 170, 174, 179 P.3d 562 (2008)

reducing the amount of water a senior right holder is entitled to put to beneficial use under its permit/certificate.

The State Engineer and intervenors contend that once a GMP is approved, the State Engineer is not required to order curtailment by priority. This is true, provided a viable GMP without curtailment can be implemented in a CMA basin. However, there is no language in either NRS 534.110(7) or NRS 534.037 that prohibits or restricts some measure of curtailment by priority as part of a GMP. Likewise, should a GMP prove ineffective, there is no statutory language prohibiting curtailment during the term of the GMP or even during the 10 year period from when a basin is designated a CMA if such action is necessary to prevent continuing harm to an acquifer in crisis as exists in Diamond Valley. Sadler Ranch, the Renners, and the Baileys offered a number of possible plan alternatives that would not violate the prior appropriation doctrine, including, but not limited to, junior pumping reduction, a rotating water use schedule, cancellation of permits if calls for proof of beneficial use demonstrate non-use, restriction of new well pumping, establish a water market for the trade of water shares, a funded water rights purchase program, implementation of best farming practices, upgrade to more efficient sprinklers, and a shorter irrigation system.[148] Many of these alternatives were also considered by the Diamond Valley water users in developing the DVGMP and are recommendations, but not requirements of the DVGMP.[149]

"When a statute is susceptible to more than one reasonable, but inconsistent interpretation, the statute is ambiguous," requiring the court "to look to statutory interpretation in order to discern the intent of the Legislature."[150] The court must "look to legislative history for guidance."[151] Such interpretation must be "in light of the policy and

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[148]Sadler Ranch reply brief 7-9; Bailey opening brief 17-18; SEROA 252-254.

[149]SEROA 244-245.

[150]*Orpheas Trust.* 174, 175.

[151]*Id.* 175.

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spirit of the law, and the interpretation shall avoid absurd results."[152] "The court will resolve any doubt as to the Legislature's intent in favor of what is reasonable."[153]

Assuming arguendo, that NRS 534.037 and NRS 534.110(7) are ambiguous, the only reasonable interpretation is that the Nevada Legislature did not intend for the two statutes to allow a GMP to be implemented in that would violate Nevada's doctrine of prior appropriation. As stated earlier, a GMP may employ any number of remedies to address a water crisis depending on the cause of a water basin's decline, its hydrology, number of affected rights' holders, together with any other of factors which may be specific to a particular CMA designated basin. These remedies could yield to the doctrine of prior appropriation, yet be effective given the particular circumstances of a CMA basin. But in some CMA basins, curtailment may be a necessary element of a GMP. Respondents assert that "NRS 534.037 illustrates the unambiguous intent of the Legislature to provide water users in a particular basin with the ability to come up with a community based solution to address a water shortage problem."[154] The court agrees. Order 1302 observes that "the legislative history contains scarce direction concerning how a plan must be created or what the confines of any plan must be."[155] Again, the court agrees. Yet, there is nothing in NRS 534.037's legislative history that lends to an interpretation that a GMP can provide for senior water rights to be abrogated by junior permit and certificate holders whose conduct caused the CMA to be designated. The State Engineer's finding that, ". . . NRS 534.037(1) does not require a GMP to impose reductions solely against junior rights . . ."[156] is a misinterpretation of the statute, not only facially, but in light of the legislative history as discussed below.

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[152] *Id.*

[153] *Id.*

[154] State Engineer's answering brief 26.

[155] SEROA 7.

[156] SEROA 8.

The State Engineer found that the legislative enactment of NRS 537.037 ,"expressly authorized a procedure to resolve a shortage problem," "the State Engineer assumes that the Legislature was aware of Nevada's prior appropriation doctrine when it enacted NRS 534.037, and . . . interprets the statute as intending to create a solution other than a priority call as the first and only response."[157] It is clear that the Legislature was aware of the prior appropriation doctrine before enacting NRS 534.037 and that the statute allows for a GMP in a particular basin that may not involve curtailment by priority as a workable solution. Yet, nowhere in the Legislative history of AB 419[158] is one word spoken that the proposed legislation will allow for a GMP whereby senior water right holder will have its right to use the full amount of its permit/certificate reduced or that the amount of water that shall be allocated will be on a basis other than by priority. In fact, just the opposite is true. At a Senate Committee on Government Affairs hearing held May 23, 2011, Assemblyman Pete Goicoechea stated:

> "That junior users would bear the burden to develop a 'conservation plan that actually brings that water basin back into some compliance."[159]

Assemblyman Goicoechea further stated:

> "This bill allows people in overappropriated basins ten years to implement a water management plan to get basins in balance. People with junior rights will try to figure out how to conserve enough water under these plans. Water management plans will also limit litigation that occurs before the State Engineer regulates by priority. When the State Engineer regulates by priority, it starts a water war and finger – pointing occurs. This bill gives water right owners ten years to work through those issues."[160]

Earlier, at the same committee hearing, Assemblyman Goicoechea gave examples of ways an over appropriated basin could be brought back in to balance through "planting

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[157]SEROA 7.

[158]See DNRPCA intervenors' addendum to answering brief 0079-0092.

[159]Minutes of Sen. Committee on Government Affairs, May 23, 2011, at 16.

[160]*Id.*

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alternative crops, water conservation, or using different irrigation methods."[161] Assemblyman Goicoechea went on to say:

> "water rights in Nevada are first in time; first in right. The older the water right the higher the priority. We would address the newest permits and work backwards to get basins back into balance. The more aggressive people might be the newer right holders."[162]

No one at any Legislative subcommittee hearings stated or implied that the proposed GMP legislation was "an exception to or otherwise abrogated Nevada's doctrine of prior appropriation." The court finds persuasive the steadfast commitment of Nevada's courts and legislation upholding the doctrine of prior appropriation and the absence of any legislative history to the contrary for AB419.

There is a presumption against an intention to impliedly repeal where express terms to repeal are not used.[163] "When a subsequent statute entirely revises the subject matter contained in a prior statute, and the legislature intended the prior statute to be repealed, the prior statute is considered to be repealed by implication. This practice is heavily disfavored, and we will not consider a statute to be repealed by implication unless there is no other reasonable construction of the two statutes.[164] Not only did NRS 534.034 and NRS 534.110(7) not revise the doctrine of prior appropriation, the Legislature did not even mention the subject.

"When construing statutes and rules together, this court will, if possible, interpret a rule or statute in harmony with other rules and statutes."[165] The doctrine of prior appropriation can logically exist in harmony with NRS 534.037 and 534.110(7) and allow

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[161] *Id.*

[162] *Id.* at 13.

[163] *W. Realty Co. V City of Reno*, 63 Nev. 330, 344 (1946). citing *Ronnan v. City of Las Vegas*, 57, Nev, 332, 364-65 (1937)

[164] *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134 (2001) (internal citations omitted).

[165] *Hefetz v. Beavor*, 133 Nev. Adv. Op. 46, 197 P.3d 472, 475 (2017) citing *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).

for GMP's to address the water issues present in a particular CMA basin. The court finds that neither NRS 534.037 nor NRS 534.110(7) are in conflict with the prior appropriation doctrine.

More compelling evidence exists that the State Engineer knew that NRS 534.037 and NRS 534.110(7) did not abrogate or repeal the doctrine of prior appropriation. On November 16, 2016, Legislative Bill S.B 73 was introduced on behalf of the State Engineer.[166] The proposed legislation sought to modify NRS 534.037 by giving authority to the State Engineer to consider a GMP, "limiting the quantity of water that may be withdrawn under any permit or certificate or from a domestic well on a basis other than priority, . . ."[167] Although SB 73 was never passed by the Legislature, the fact that the State Engineer specifically sought 2017 legislation authorizing a GMP to be approved that allowed for water to be withdrawn from a CMA basin on a basis other than priority, demonstrates the State Engineer's knowledge that NRS 534.037 and NRS 534.110(7) as enacted did not either expressly or impliedly allow for a GMP to violate Nevada's prior appropriation law.[168] The court finds that the AB 419's Legislative history did not intend to allow either NRS 534.037 or NRS 534.110(7) to repeal, modify, or abrogate Nevada's doctrine of prior appropriation.

I. THE DVGMP VIOLATES NRS 533.325 and NRS 533.345

NRS 533.325 states in pertinent part ". . . any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use, or place of use of water already appropriated, shall before performing any work in connection with such appropriation, change in place of diversion or change in matter or place of use, apply to the State Engineer for a permit to do so." This is so because permits are tied to a single point

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[166]Sadler Ranch addendum to reply brief, 001

[167]*Id.* 003.

[168]The State Engineer's knowledge that the DVGMP violated the doctrine of prior appropriation was also evidenced by his presentation at the 2016 Western States Engineer's Annual Conference. See Sadler Ranch opening brief, ex. 1, slide 21.

of diversion.[169] "Every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer."[170] The State Engineer can approve a temporary change if, among other requirements, "the temporary change does not impair the water rights held by other persons."[171] The filing of an application under NRS 533.325 allows the State Engineer to determine what, if any, potential adverse impact is created by the proposed change in well location, location of the use of the water or manner of the proposed use. The State Engineer is required to review a temporary change application regardless of the intended use of the water to determine if it is in the public interest and does not impact the water rights used by others.[172] If a potential negative impact is found, the application could be rejected.[173] Other rights' holders who may be affected by the temporary change could protest the application if notice were given by the State Engineer.[174] No protest and notice provisions at the administrative level exist in the DVGMP for a temporary change of use, or place of use, or manner of use for less than one year.[175]

Under the DVGMP, the State Engineer is not required to investigate a proposed change in the place or manner of use and the transfer becomes automatic after 14 days from submission.[176] The DVGMP provides that the groundwater withdrawn from Diamond

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[169]NRS 533.330

[170]NRS 533.345(1).

[171]NRS 533.345(2).

[172]NRS 533.345(2)(3).

[173]See NRS 533.370(2).

[174]NRS 533.360.

[175] The only remedy is a petition for judicial review under NRS 534.450.

[176]SEROA 237, sec. 14.7.

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 acquifer. 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

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[177]SEROA 234, sec. 13.8.

[178]SEROA 228, sec. 8.1

[179]SEROA 234, see 13.8.

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

[181]SEROA 237, sec. 14.7, 14.8.

[182]SEROA 237, n.20; SEROA 009.

[183]SEROA 237, sec. 14.7.

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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.

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[184]SEROA 237, sec. 14.9.

[185]As 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

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DISTRICT JUDGE
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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioners,

vs.

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

Respondent.

EUREKA COUNTY, NEVADA, DNRPCA INTERVENORS, et al.,

Intervenors.

Case No. CV1902-348

(Consolidated with Case Nos. CV1902-349 and CV-1902-350)

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSION OF LAW, ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW

NOTICE IS HEREBY GIVEN that the **FINDINGS OF FACT, CONCLUSION OF LAW, ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW** was entered in the above-captioned matter on the 27th day of April, 2020. A true and correct copy is attached hereto.

Affirmation Pursuant to NRS 239B.030(4)

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

DATED April 21, 2020.

WOLF, RIFKIN, SHAPIRO,
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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on April 29th, 2020, pursuant to the Court's April 25, 2109 Order, a true and correct copy of **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSION OF LAW, ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW** was sent via electronic mail to the following:

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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

I

RELEVANT PROCEDURAL HISTORY

On January 11, 2019, Jason King, P.E., Nevada State Engineer[1] ("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

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[1]Subsequent 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.

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

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

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

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[3]On September 6, 2019, the court entered an order granting motion to intervene to Diamond Valley Ranch, LLC, a Nevada limited liability company, American First Federal, Inc., a Nevada Corporation, Berg Properties California, LLC, a Nevada limited liability company, and Blanco Ranch, LLC., a Nevada limited liability company. On July 3, 2019, Beth Mills, trustee of the Marshall Family Trust, filed a motion to intervene. The court never entered an order egranting 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 acquifer 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 acquifer 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 DiamondValley. Big Shipley Springs, to which Sadler Ranch has a claim of

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[4]SEROA 3.

[5]*Id.*

[6]*Id.*

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

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

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

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

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[9]SEROA 328.

[10]State Engineer ruling 6290, 23-31.

[11]NRS 534.110(7).

[12]NRS 534.037.

[13]SEROA 3, 134-138, 226.

[14]The 2019 Nevada Legislature granted relief to domestic wells to withdraw up to 0.5 af 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).

groundwater management plan has been approved for the basin pursuant to NRS 534.037."[15] This process is curtailment.

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

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[15]NRS 534.110(7), SEROA 225.

[16]SEROA 226.

[17]SEROA 226, 277-475.

[18]SEROA 227 N8, 294.

[19]Bailey reply addendum 2, SEROA 294.

[20]Bailey reply addendum 3.

[21]*Id.* at 1.

occurs."[22]

The DVGMP, a hybrid[23] 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

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[22] *Id.*

[23] SEROA 313.

[24] SEROA 5, 220, 229, 240-241.

[25] SEROA 240-241.

[26] SEROA 11-12, 218, 220, 228-229.

[27] SEROA 5, 218, 232.

[28] SEROA 232.

[29] SEROA 218, 234-235.

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 DVGMP[34] 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

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[30]SEROA 232.

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

[32]SEROA 499-509.

[33]SEROA 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.

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

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

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

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[35] *Id.*, SEROA 5, 218.

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

[37] *Id.*

[38] SEROA 5, 218, 234-235.

[39] *Id.*

[40] Sadler Ranch opening brief 4, Order of Determination at 164-175, In the Matter of the 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).

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

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

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

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

[42]Bailey opening brief 4, SEROA 500,506.

[43]Bailey opening brief 4, SEROA 536-538.

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

[45]NRS 534.020.

[46]SEROA 6.

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

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[47] State 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).

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

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[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

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[63]Sadler 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.

[64]Order granting motion in limine 10.

[65]NRS 534.037(1).

levels"[66] based on the evidence presented at and after the public hearing. Petitioners submit that the DVGMP fails to bring the Diamond Valley basin into equilibrium within 10 years and over pumping will continue even at the 35th year of the plan.[67] Order 1302, describes the State Engineer's review of the NRS 534.037(2) factors in relation to the DVGMP.[68] The DVGMP's review of the factors is in Appendices D-I.

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

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[66]Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief 15-20.

[67]*Id.*

[68]SEROA 14-17.

[69]SEROA 17-18.

[70]SEROA 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 acquifer into balance could easily surpass 10 years depending on the extent of harm to the acquifer. 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 acquifer.[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,

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[71]Sadler Ranch opening brief 13.

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

[73]NRS 534.037(1).

[74]Sadler 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 acquifer, including, ordering curtailment by priority, at any time during the life of the DVGMP if he finds that the acquifer 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

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[75]This 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..

[76]SEROA 18.

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

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

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

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

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[78]NRS 534.250-534.340.

[79]*Id.*

[80]SEROA 8, 9.

[81]*Id.*

[82]SEROA 234, sec. 13.9.

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

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[83]NRS 534.037(1).

[84]SEROA 3.

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

[86]SEROA 3.

[87]SEROA 148.

[88]State 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) . . ."

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

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

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

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[90]SEROA 3.

[91]SEROA 3.

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

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

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[93]SEROA 3-4.

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

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[94]NRS 533.035.

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

[96]SEROA 232-236, sec. 12,13

[97]SEROA 9.

[98]*Id.*

[99]SEROA 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

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

[101]SEROA 467.

[102]SEROA 12.

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

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

It is undisputed that the Baileys and Renners have senior vested surface water rights that have been adversely impacted by the 40 years plus of overpumping[105]. Respondent and intervenors agree that the DVGMP was not developed for mitigation purposes, but to reduce pumping, bring equilibrium to the Diamond Valley acquifer in 35 years, and cause the CMA designation to be removed.[106] The State Engineer's position is that the GMP "is not a mitigation plan, and NRS 534.037 does not require the proponents of a groundwater management plan or the State Engineer to consider the alleged effects on surface water rights or mitigate those alleged effects."[107] The State Engineer is wrong. A GMP must consider the effect it will have on surface water rights. In *Pyramid Lake Paiute Tribe v. Ricci* 126 Nev. 531.524 (2010), the Nevada Supreme Court acknowledged the State Engineer's ruling that "[t]he perennial yield of a hydrological basin is the equilibrium amount or maximum amount of water that can be safely used without depleting the source." Moreover, [t]he maximum amount of natural discharge that can be feasibly captured . . . [is the] perennial yield . . . the maximum amount of withdrawal

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[103]SEROA 2, 9, 10.

[104]SEROA 234; see sec. 13.2

[105]Sadler Ranch had impacted senior vested rights that have been mitigated by certificate.

[106]State Engineer's answering brief, 36.

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

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

A GMP developed under NRS 534.037 is not required to mitigate adversely affected surface water rights, but it cannot impair those rights.NRS 533.085(1) provides, "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, 2013." NRS 534.100 reads, "Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable acquifer prior to March 22, 1913."

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

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[108]SEROA 510.

[109]SEROA 3.

[110]*Id.*

[111]Permits 82268, 81270, 63497, 81825, 82572, 87661.

the end of the plan"[112] 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 acquifer 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 estoppal 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

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[112]SEROA 16.

[113]*Id.*

[114]Eureka County answering brief 22-23.

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

[116]749 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).

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

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

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

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

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

[121] *Town of Eureka*, 167.

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

[123] SEROA 8.

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

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

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

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

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

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

[126]150 P.3d 375 (N.M. 2006).

[127]SEROA 5.

[128]SEROA 6.

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

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

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

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[129]SEROA 6-7.

[130]State Engineer's answering brief 25.

[131] *Id.* 25-26.

[132] *Id.* 26.

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

The State Engineer and intervenors have misinterpreted NRS 534.037 by using the *Lewis* case as either authority for or as being "instructive" as to the legislative intent behind NRS 534.037.[138] Now conceded by the State Engineer, the *Lewis* facts and holding are clearly distinguishable from the present case.[139] In *Lewis,* a U.S. Supreme Court mandated settlement agreement was litigated. The *Lewis* plan was presented to, and expressly

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[133]Eureka County's answering brief 12-13.

[134]*Id.*

[135]*Id.* 12.

[136]DNRPCA answering brief 11-12.

[137]*Id.* 11.

[138]State Engineer's answering brief 29-3..

[139]*Id.*