

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



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 aquifer 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

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

¹⁴⁹SEROA 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.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ State Engineer's answering brief 26.

¹⁵⁵ SEROA 7.

¹⁵⁶ SEROA 8.

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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 419¹⁵⁸ 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

¹⁵⁷SEROA 7.

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

¹⁵⁹Minutes 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

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).

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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

¹⁶⁶Sadler Ranch addendum to reply brief, 001

¹⁶⁷*Id.* 003.

¹⁶⁸The 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.

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

16 Under the DVGMP, the State Engineer is not required to investigate a proposed
 17 change in the place or manner of use and the transfer becomes automatic after 14 days
 18 from submission.¹⁷⁶ The DVGMP provides that the groundwater withdrawn from Diamond
 19

20 ¹⁶⁹NRS 533.330

21 ¹⁷⁰NRS 533.345(1).

22 ¹⁷¹NRS 533.345(2).

23 ¹⁷²NRS 533.345(2)(3).

24 ¹⁷³See NRS 533.370(2).

25 ¹⁷⁴NRS 533.360.

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

¹⁷⁶SEROA 237, sec. 14.7.

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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.

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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.

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.


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December 10, 19 Water Hearing

Presiding Judge Fairman

Present are Bailey's, Christopher Mixson their attorney ,
Sadler's attorneys,

Debbie Leoanard for Plaskett's & Mark Moyle,

Karen Peterson for Eureka county.

State Engineer

Case #'s 1902-348, 1902-349, 1902-350.

M&C Hay, Halpins, Norton's, Sestanovich, baumanns filed briefs

Interveners DV Ranch LLC represented by Marvel, First American Federal, Marshal Family Trust,

Sadler ranch petitioners,

Bailey petitioners

Taggard represent sadler ranch

State Engineer Sr deputy

July 11th filing, September 16 filing, September 16 filing, Oct 23, Oct 23 addendum, Nov 26, Nov 26

Thanked patti peek

Judge explained the process. After petitioners then the respondents to give presentations

Judge after each presentation there will be a break, 5-10 minutes. Lunch around noon. Go until 5. May continue to tomorrow. Judge will take the order under submission and issue a written decision.

Gave instructions for public.

Sworn in court reporter

Mr. Renner and Mr. Frasier, Mr. Shoda. Their attorney Dave did his presentation. The state gave DV the authority to write a plan. However, they DV cannot take away water rights. They are not opposed to the groundwater management plan. Clients participated in the groundwater management plan. They have senior water rights. The plan is not properly written. It forces senior to give up their water to give to junior water right holders.

3 issues: is the plan lawful, doesn't have the necessary steps for removal of the critical management area ,

Did state engineer follow the proper provisions in approving a gmp., and abuse of discretionary

Undisputed: excessive pumping since 1970, basin's perennial year is 30,000 acre-ft, gmp year 35 authorized pumping rights , does not include pumping of right not subject to, gmp violates prior appropriation doctrine, it acknowledges that the gmp does deviate application of the prior

AB419, signed into law June 4th, 2011. Nrs 534.037, 534.110(7)

State engineer came out met with eur and instructed them to develop a plan. Walker & Associates helped w/plan.

Feb 2015, sb81 introduced. Apr 23, 15 gmp workshop, June 11, 2015 workshop with Mike Young –

Australian scheme (share system). Aug 25, 2015 state engineer issues the

Sep 2015 Mike Young publishes the paper on unbundling water rights.

June 7 16, Australian scheme was presented to LCB. Aug 2016 sent the plan to legislature, sb269

Fall 2016 draft gmp draft sent to state eng.

Sep 26, 16 state eng presented gmp share system at western state eng conference. Nov 17, 16 state eng

prefiles a new bill sb73 w/legislature. Feb 28, 17 committee hearing on sb73. Mar 15, 17 sb269

introduced. Neither bill passed legislature.

July 26, 17 2nd draft sent to state eng. Oct 9, 17 workshop. Oct 17 through Jan 18 continued to work on

draft. Jan 26, 18 3rd draft was sent to state eng. Feb 14, 18 state eng sent the plan back.

Aug 20, 18 gmp proponents submit final plan & petition st eng Oct 1, 18 notice of public meeting sent., Oct 30, 18 public comment meeting. Jan 11, 19 st eng issues order 1302 approving the gmp. April 27, 2015 sadler files a petition requesting the st eng. To begin curtailment. June 3, 15 st eng files to dismiss. Aug 2015 case is stayed while st eng considered cma designation. Nov 16, 15 first amended petition. Jul 25, 16 court denied mtd in part.

Attorney walked through St. eng order 1302.

126,000 acre feet in dv. In 2016 pumping was 76000 afa (253% of py). 53.2% of the farmers supported the plan. 53.2 % seniors did not support the plan.

St eng is to consider the 6 factors in the plan. The st eng argues against the people who are opposed to the plan. St eng states the appropriations are to be set aside? St eng said that he did not mean for ?? to have legal authority, he said it was an example. Leg said no to Lewis case. 1st year the senior is cut to 67 ace-feet. Jr is 54 acr feet. Over 35 yrs, the seniors are cut 70% . This most extreme example.

Other example the sr. is give 72% reduction.

NRS 533.330 permits are tied to single point of diversion. Permit is required to divert water.

Under gpm requests to exceed permitted volume in any given yr are also automatically approved if not acted on in 14 days.

Gmp section 14.2 states that wells linked to an allocation account shall be exempt from well abandonment.

Under banking program, if people do not use allocation they can carry is to the next year. Asr project, eur co expert stated that this fits within the definition of an aquifer storage and recovery asr project.

There are permits that are not being used or are only partially being used.

Gave examples of 3 different water permit holders. 2 were farmers one is not.

The pumping costs will continue to go up. If dv is over pumped over the next 35 years, there will be an impact.

The final part of this section, pg 14 of the order, There are not standards to the advisory board. No guarantees that sr holders will have representatives on the advisory board.

Top of page 15. St eng states they water going into and being pump needs to be equal. Could not find the 34200 number that st eng refers to. Pumping will be adjusted in the future based on the monitoring. St eng states there are 4437 afa of permits not subject to the plan and uses this number to conclude that pumping will not exceed 42000 afa at year 35. Do not know where the 4437 number came from. Table 1 shows 5252 af of permits not used. It states he must consider the hydrology of the basin, but it is not in the order.

In the moly case the supreme court said the st eng cannot base on a future plan.

Banking program, st eng states that this was only component of the gmp expressly based on groundwater model simulation.

They did not include the simulation results or other data. There is no information to test the results in the order. pg 17 is final conclusion. The state eng said he had to base decision on facts, but that information is not in the order. St eng must do independent analysis but did not do that. Based his decision on the Lewis case. That is the only authority that he sites. There is no success of the plan. Nrs 534.037 requires plan to bring pumping will be brought below.?

Court recessed for 15 minutes.

Order 1302, ordinance is in front of judge. St eng ruling on question of law is not entitled to deference.

Court must determine whether substantial evidence substantiates the st. eng.

St eng decision must not be arbitrary.

Supreme court.

ab419 the st eng determine the share program is not legal.

Nrs 534.037(1,3,-5) nothing in the statutes does not give authority to gmp.

If a basin is a critical management area the state eng shall order a curtailment of the basin.

Nrs 534.110(7).

Nowhere does the statute indicate priority should be abandoned.

Purpose of the bill the bottom line is we are just not getting it done. We continue to see the basin decline.

1982 st eng came to dv. He found the water table was declining then due to over pumping. St eng knew there would be problems with the water but there was a great deal of pressure to issue water permits.

1988 st eng testified in Washoe county regarding dv. He said

McKenzie objected because information was not included in petition. No extra evidence can be admissible.

Judge F asked Debbie Leonard (plaskett and moyle). She also objected and st. eng objected.

Judge F asked David to explain why the information should be allowed.

Judge F recognized MacKenzie,. She argued why it should not be allowed.

Judge F sustained the objection. Will allow the leg history.

St eng stated he has tried to work with jr irrigators, but was told to go away.

No steps were taken between 1982-2011 to reduce pumping. The jr holders were to create a plan to reduce pumping.

St eng agreed that the Australian share scheme was unlawful.

St eng objected to power point and the briefing.

Judge F asked if anyone else objects. He asked David to make his case why it should be allowed.

Judge F recognized Ms. Leonard

She objects. The courts role is not to second guess the

Judge F overrules the objection.

2017 sb73 and sb269, both bills failed. He went over the bills.

Sb 73: The arguments made by Jake Tibbets in 2017 legislation are the same arguments that sadlers are making today.

Dave compared tobacco lawsuit to this.

Sb269 – Jake said there was a lot of talk and no action. Co comm was asking the leg to exempt water rights from certain statutes. They also wanted to banking to carry from year to year.

Nrs 533.330, cannot use water for more than one purpose. The gmp allows to use for more than one purpose.

Nrs 533.380

The gmp cannot exempt water right holders to not show proof of usage.

Nrs 537.037, 534.110(7)

The plan must contain necessary steps for removal of cma designation. MS designation applies when withdrawals consistently exceed py.

1968 usgs/st eng report. Identifies a hydrologic divide between north and south basins. If pumping remains at 1968 levels of 12000 ad, equilibrium will take 300-400 years. It has exceeded this. It will never be reached.

2016 usgs report states the basin budget is not in balance. reducing pumping 76000 afa to 34,000 does not

Turnipseed st eng report stated 1750000 acre feet of aquifer storage, over pumping has already removed.

Under gmp at the end of 35 yrs. 2517155 afa of storage will be permanently removed.

Gmp does not discuss how benchmark water allocation percentages were developed.

Conclusion the gmp as written will continue to allow for the exploitation...

The bottom of the water basin is at 400'. The plan does not bring regulated pumping under the py.

The gmp approval process did not comply with nrs 534.037

Nrs 534.037, 534.037(3), 533.240,

Petition must be signed by a majority of the holders of permits or certificates... the st eng did not count the holders, her counted permits. No explanation why he did this

Some holders did not sign but were counted as a vote.

Evidence was not properly vetted. There was no author listed of who wrote it.

Conclusion he respectfully overturn the order 1302 from st eng.

Recessed for lunch at 12:45.

2:05 court reconvened.

Christopher Mixson, attorney for Bailey's. Tim, Connie, Carol & Fred were present.

Bailey have been here since 1863 and have had water rights since that time.

1970's St eng started approving groundwater permits. Annual perennial yield is 30000 acre feet

Permitted rights 126000 acre feet.

Pumping estimate 76000 acre feet in 2016.

2011 passage of nrs 534.037 and 534.110(7). Record is not clear why it was not followed through.

2014 there was a scoping process. Proposed solutions: voluntary water right buyout, generating funds through an annual fee for each pivot.; mechanical & operation irrigation efficiency improvements, grow lower water use crops, modify state water law to allow non-use w/o losing water right/protect existing duty.

The record does not indicate why the suggestions were discarded.

Mr. young's Australian scheme was not mentioned in the 2014 solution summary. His product of the local ground water right holders.

Gmp converts rights into shares. It is not a 1 for 1 conversion. Then it reduces from 1% to 20% off the top.

There is a new position of water manager. The manager would oversee the allocations. It's possible the st eng will not see them.

Gmp allows paper water rights to be banked. Only restriction is annual depreciation of 1% in southern valley and 17% in north valley: Sec 13.9

Effects on Bailey. They have 5 sr water permits, just shy of 2000 acre'. By year 35 they would have 560 acre'.

Order 1302 determine gmp deviates from prior appropriation law but approved because leg must have intended to allow deviations from law and application of priority factor (20%) to share.

St eng state he did not need to address impacts. Determine safeguards of statutory water right transfer procedure not necessary because authority to review is only reduced for temp changes less than 1 yr.

Went over the Water Law Overview from st eng website. It discusses appropriation of water rights and sr water rights.

Law of appropriation: first in time first in right.

Doctrine of beneficial use. Nrs 533.035. water must be actually used. Use it or lose it.

Gmp violates prior appropriation. It redistributes water from sr rights to jr rights

Gmp violates beneficial use. Neither gmp nor Order 1302 provide the amount of unperfected rights.

Shares in the bank can be sold or traded.

Gmp statutes: nrs 534.110(7), subsec 6 provides st eng

NRS 534.037(2) st eng shall consider when reviewing gmp but says w/o limitation to only those factors as respondents argue, st eng should have considered whether bmp complies with existing law

St eng argues that strict curtailment by priority is not the only alternative.

Liberal transfers violate statute. Sec 13.8 and 13.10. The restrictions only apply to new water rights and transfers from one well to another. Contrary to nrs 533.325 and 533.370(2).

Springs have been drying up due to pumping. Some sr water rights are surface water, (these springs).

The sr holders have already been affected. Violates 533.085(1).

Water banking delays aquifer recovery: st eng should have analyzed how quick aquifer could recover w/o arbitrary water banking.

He agrees with David's argument on the voting. It is very difficult to follow. The surface water permit holders were not counted.

Court recessed for 10 minutes to allow the st eng to prepare for their presentation.

Court reconvened 3:02

He states the NRS 534 is insufficient to knock down the gmp. Dv is over appropriated and pumped. The groundwater is declining. AB419 passage, in 2016 and DV was designated a critical managment area (cma). Dv farmers met to create gmp. The gmp was to reduce pumping. The majority of the people passed the gmp. St eng found the majority did pass the gmp, did 2 different calculations.

St eng held a hearing, reviewed public comments, he ordered 1302. A petition was filed by Renner, Sadlers, and Bailey's.

Standard of Review: the burden of proof is on the petitioners. He quoted some cases – Anderson and some others.

Key issue is for the st eng to exercise discretion. Order 1264 went unchallenged. The reduction would be, and safe sr rights except with there is an approved gmp. The st eng must consider the hydrology, domestic wells etc.

St eng disputes the argument made by petitioners. The gmp can be approved by st eng at his discretion.

St eng finds that the gmp addresses the over pumping.

St eng can review the plan to see if it is working and can modify it. The 10 yr clock stops when the plan is approved.

Order 1302: it is clear that leg's intent for the st eng ... the dv gmp does enough for the st eng to remove the cma. St eng maintains his authority. It complies with beneficial use. It does not mean the banking is a beneficial use. The petitioners are confusing the issues. the st eng retains the authority to made changes after year 10. Sec 26.

Vested rights are not part of the gmp. The goal is to reduce the pumping. The gmp is not a aquifer storage. The asr arguments do not apply to the gmp . Petitioners disliking the plan is irrelevant when the majority approved the plan. NAC 533.110 discusses public comment.

Lewis case: the st eng did not use lewis case as a binding authority. The nv leg provided flexibility. The sadlers and bailey are taking the Order 1302 out of contents.

These issues have not been dealt with in depth in Nevada.

He objected to the calculation mr. Reagan discussed earlier. St eng respectfully request to uphold the Order

Court recessed to allow time for the next presenter.

Court reconvened at 3:47.

Karen Peterson represents Eureka county. The consumptive use was addressed in detail., pag 11. She talked about consumptive use.

St eng recognizes the gmp that pumping must be reduced and addresses the water level.

Plan sec 13, and others. Modifications were made regarding the pumping.

Ashley-

3 pages that have to do with consumptive use that contributes to net loss. Peterson reads except and response. Discusses perennial yield and pumping reductions plan. Page 469.

Peterson discusses their answering brief and non-answering. By not addressing it, does not mean that they agree with the petitioners. The court addresses her concern.

Peterson would like to start the 10-year management plan. States that what happened 10+ years ago does not matter. State engineer did what they were supposed to do regarding the plan for Diamond Valley Ground Water Management for the basin. ST Engineer addresses comments both in writing and orally that was presented to him regarding this plan.

Arguments in the Opening Briefs, Petitioners had new things to add to their reply brief and arguments.

Pg 10 line 59, petitioner's vague factors. St E. did consider the 6 factors in the. Petitioner's said that there is a difference in the documents and the reply briefs. Reply 21-23 regarding SR and JR rights. Curtailment of Junior rights.

Peterson states that the petitioners are making false legal assumptions. Order 1302 46.8 of 77 of senior water rights signed the order.

Statement that some water rights holders are taking more water than the senior holders and there is no proof of that. There is no Math, that proves the water consumption by perennial yield.

5/29/19 Mountain Falls Acquisition Corp V State. Unpublished disposition cited for its persuasive value. Regarding water rights definition.

NRS 534.110 Rules and regulations of State Engineer

Arguments by Sadler/Renner as to what the GMP should have "Mandated" Peterson says that these points are irrelevant as they were not put forth to the Engineers office for Statues.

Peterson continues discussing the bullet points. Petitioners are arguing on things from the past that did not go through and were not imputed into the plan.

The document SE ROA 297 was never brought forward for the plan. The Young blueprint was not part of the GMP Plan. Peterson brings forward the differences between the Young blueprint and the GMP.

Vested water rights, Bailey's mitigation rights since 1990s, Sadler settled with st. eng. Appeal pending for the inter mitigation litigation rights, Venturracci settled with Eu. And St. Eng. For mitigation rights. Renner has applied for mitigation applications. Renner has chosen their remedy to that. There is no need for any further remedies for rights.

St 1302 pg 12-13, Petitioner's don't address this. Mitigation regarding ground water pumping that was not included in the GMP.

Pg 54 and 55 an addendum 5/25/11 hearing for eureka county.

Petitioners are asking to revise legislature, to match their concerns to be addressed in the statute. AB 419 was already in effect when venturracies bought their property.

Peterson states "what could have happened" during this case and what did actually happen regarding the GMP.

Peterson talks about what could happen if the plan isn't fallowed. Petitioners could bring forward and addendum to the plan.

Discussion about section 13.13 regarding comments

Judge discusses with Ms. Mackenzie regarding continuing on tomorrow morning.

Court will recess for 5 min and will reconvene to continue with arguments.

Court is in session 4:52

Peterson brings up pumping duty argument. Majority of senior water right holders did not support the plan. General Molly did support the plan. SB 73 2017 priority regarding domestic wells. SB 267 statemnt made that legislature said "NO". Chairman of the committee did not let that bill go forward. Statements made not knowing who did appendix D. Issue about votes per certificate. Assembly man goicoechea put on the record. Pumping of water rights that are not subject to the plan, many recommendations made on how to decrease water right usage that are not subject to the GMP. Statement made SEROA 526 what the compromise was.

Court will reconvene at 9:00 am tomorrow morning

12/11/19 Ashley

Court is in session 9:01am.

Time and Place CV 1902-348,349,350

Present Baileys, St. engineer. Karen Peterson-Eureka County, Debbie Leonard-DNRPCA

Debbie Leonard, DNRPCA starts off oral Arguments. Ms. Leonard explains her presentation and a copy of that has been given to the deputy for the Court. Ms. Leonard discusses the applications that the Bailey family has made throughout the history. The Baileys have Senior Water rights by a couple days or weeks.

The court asks whether to pump waters with electricity or diesel generators, Ms. Leonard responds.

Ms. Leonard continues, on the history of water usage.

Ms. Leonard states that the petitioners could have done something beforehand to fix the issues.

Ms. Leonard brings up the statute and the mentality of "use it or lose it".

With the GMP legislature, they made sure that prior appropriation could be changed a little bit so there a negative result wouldn't happen.

Ms. Leonard states that the GMP does exactly what it was meant to do. It prevents waste, the water gets put to the most productive use.

NRS 534.240 authorizes St. en. To make authorities to designate preferred uses when its appropriate.

Ms. Leonard brings up some Mischaracterizations regarding the GMP.

Ms. Leonard discusses the petitioner's arguments regarding what should be in the GMP but in all reality is incorporated into the GMP.

Ms. Leonard discusses unbundling with the Mike Young paper and was adopted in the GMP.

Ms. Leonard discusses the petitioner's issue of votes on the tally regarding ground water and surface water.

Ms. Leonard brings up the math regarding water usage and the basin/aquaphor water level over a set number of years. Benchmark reduction table of usage does not include the recharge level.

Ms. Leonard discusses the objection she made yesterday regarding new information that was presented. She also discusses past cases.

Ms. Leonard gives her conclusion at 9:52. Make a point on the approval percentages. GMP accounts for priorities. If the Petitioners didn't like this legislature they should have done something about it. She brings up that the court cannot give a different

Court is in recess 9:56

Court is in session 10:04

All parties are present

Mr. Higgins gives his oral argument.

He has 9 reasons of why 1302 should be overturned.

Math argument regarding withdraw levels and who is included in the GMP. 2016 USGS report. Discusses the withdrawal and recharge. GMP forcibly takes water from senior rights holders who didn't agree to the GMP.

Mr. Higgins states that there should be exact language in the statute.

Mr. Higgins discusses what ideas and alternatives the legislative minutes discussed. In 2009-2015.

Mr. Higgins states that the GMP suggests an unbundling which he considers is deregulation.

Sites NRS 533.330 regarding single use. NRS533.325 says that notification must be made. The GMP gets rid of both of these statutes.

Brings up the issue of Legislation passing and not passing.

GMP does not provide mitigation rights for Senior right holders.

Mr. Higgins discusses Saddler Ranch appeal settlement.

Discusses the possibility of moving forward and what will happen financially if the water levels don't rise.

Mr. Higgins brings up the 5 out of 6 factors that were not addressed by the State Engineer.

ROA 318, ch 1 was offered by these people. Regarding appendix D. which was sent in 2016 that correlates when chap 1 was drafted.

Mr. Higgins says the State Engineer did not use the best available scientific data, sites NRS533.024 sub 1 sub d. State Engineer just used the Ground water data.

Mr. Higgins discusses the Irregularities in the Plan regarding the simple majorities and the water right holder's votes.

Mr. Higgins brings up his analysis and tally of petitions that were submitted. On page 150. States that 5 votes turned into 15 votes regarding Diamond Valley Hay Comp.

Sites a James Madison quote regarding rule of law.

Mr. Higgins states that the record on appeal is deficient due to information not included on the record. Pg 7 my consideration only started when a petition was given to me. There is no independent hydroponic analysis. There is no ability to check the accuracy of the information regarding the modeling data and simulation.

Mr. Higgins addresses misc. issues brought up by respondents

Sec 26.2 of ROA 246 regarding 6 year meeting.

Lewis case VS this case

Mr. Higgins states that the respondents say that petitioners have not senior rights, but these people had rights, Saddler 1860 Renner 1875.

Mr. Higgins brings forward that Renner was a part of the GMP plan.

Mr. Higgins makes his closing statement at 10:53.

Court is in session 11:02

Mr. Nixon, provides a brief rebuttal regarding the Michael Young paper compared to the GMP.

2/24/16 Eureka conservation sent a letter to the water users. Stating they were going to use Eureka County as an unbundling pilot program.

Discusses the Bailey senior vested water rights.

States what the Bailey's are asking for.

Mr. Nixon concludes at 11:13

Court addresses the parties regarding what they presented.

Court will issue a written decision.

May 21, 2020

LINDA HAMILTON
Clerk of the Supreme Court
Capitol Complex
201 S. Carson Street
Carson City, NV 89701

RE: CV-1902-348, Dept. 02

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

Petitioners,

vs.

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

Respondent,

EUREKA COUNTY; and DIAMOND NATURAL RESOURCES PROTECTION AND
CONSERVATION ASSOCIATION, J&T FARMS, GALLAGHER FARMS, JEFF
LOMMORI, M&C HAY, CONLEY LAND & LIVESTOCK, LLC, JIM 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, and BILL AND
DARLA BAUMANN,

Intervenors.

Dear Ms. Hamilton,

Please see appeal packet that was filed by the Respondent in District Court on May 15, 2020. There IS a check for the \$250.00 Supreme Court Filing Fee included and will be sent out in the mail today, Check #1107 from Leonard Law PC. Also, please note that the following documents are not included:

- Exhibit List

Please contact me if you have any questions or concerns. Thank you and have a nice day.

Sincerely,



Ashley Farris
Deputy Clerk Recorder