

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

DIAMOND NATURAL RESOURCES
PROTECTION AND CONSERVATION
ASSOCIATION, et al.

vs.

TIMOTHY LEE BAILEY, et al.

No. 81224

DOCKETING STATEMENT
CIVIL APPEALS

Electronically Filed
Jun 24 2020 01:42 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Seventh Judicial Department 2

County Eureka Judge Honorable Gary D. Fairman

District Ct. Case No. CV-1902-348 (consolidated with CV-1902-349 & CV-1902-350)

2. Attorney filing this docketing statement:

Attorney KAREN A. PETERSON, Esq. Telephone (775) 687-0202

Firm ALLISON MacKENZIE, LTD.

Address 402 North Division Street, Carson City, NV 89703

THEODORE BEUTEL, Esq. Telephone: (775) 237-5315
EUREKA COUNTY DISTRICT ATTORNEY, P.O. 190, Eureka, NV 89316

Client(s) Eureka County, Respondent/Cross-Appellant. (See Attached)

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Please see attached. Telephone _____

Firm _____

Address _____

Client(s) _____

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Respondent, Sadler Ranch, LLC and Ira and Montira Renner indicated in their Response to the Docketing Statement filed by Diamond Natural Resources Protection and Conservation Association and its related entities and individuals ("DNRPCA Appellants") that they believe the Diamond Valley Groundwater Management Plan was discussed in the case docketed as Eureka County v. Sadler Ranch, LLC, Case No. 75736. The issues on appeal in Case No. 75736 and this case are different.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

The only prior proceedings in the district court related to this appeal were:

Timothy Lee Bailey, et al. v. Tim Wilson, P.E., Nevada State Engineer, et al., Seventh Judicial District Court of the State of Nevada in and for the County of Eureka, Case No. CV-1902-348 (consolidated with Case Nos. CV-1902-349 and CV-1902-350). The final disposition occurred on April 27, 2020 when the district court granted the petitions for judicial review.

8. Nature of the action. Briefly describe the nature of the action and the result below:

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

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Should the district court have affirmed the State Engineer's Order #1302 approving the Diamond Valley Groundwater Management Plan because Order #1302 was supported by substantial evidence in the record, constituted a proper exercise of the State Engineer's discretion and complied with Nevada law?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

This is the first appeal before this Court involving a Nevada State Engineer Order approving a groundwater management plan pursuant to NRS 533.037 for an area designated by the Nevada State Engineer as a critical management area pursuant to NRS 533.110(7).

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This appeal involves an administrative agency case involving water that is within the categories of cases the Supreme Court "shall hear and decide". NRAP 17(a)(8).

This appeal also involves a matter raising as a principal issue a question of statewide public importance. NRAP 17(a)(12).

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from April 27, 2020

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A

17. Date written notice of entry of judgment or order was served April 29, 2020

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed May 21, 2020 by Eureka County

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

DNRPCA Appellants filed their notice of appeal on May 14, 2020. The Nevada State Engineer filed his notice of appeal on May 15, 2020.

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input checked="" type="checkbox"/> Other (specify) | <u>NRS 533.450(9)</u> |
-

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The district court's Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review was a final appealable judgment. See NRAP 3A(b)(1). Written notices of entry of the district court's order were served April 29, 2020 by electronic mail. NRS 533.450 governs judicial review of State Engineer determinations and subsection 9 provides an appeal may be taken to the appellate court from the judgment of the district court in the same manner as other appeals.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Please see attachment.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Daniel S. Venturacci withdrew his Petition for Judicial Review on June 10, 2019. Intervenor below Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC, Blanco Ranch, LLC, and Beth Mills, Trustee Marshall Family Trust did not actively participate in the district court proceedings.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Respondents Ira Renner, Montira Renner, Sadler Ranch, LLC, Timothy Lee Bailey, Constance Maria Bailey, Fred Bailey and Carolyn Bailey brought petitions for judicial review of the State Engineer's January 11, 2019 "Order 1302 Granting Petition to Adopt a Groundwater Management Plan for the Diamond Valley Hydrographic Basin (07-153), Eureka County, State of Nevada," which were disposed on April 27, 2020 when the district court granted the petitions.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Eureka County
Name of appellant

KAREN A. PETERSON, Esq.
Name of counsel of record

June 24, 2020
Date

/s/ Karen A. Peterson
Signature of counsel of record

Nevada, Carson City
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 24th day of June, 2020, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Beth Mills, Trustee, Marshall Family Trust
HC 62 Box 62138
Eureka, NV 89316

John E. Marvel, Esq.
Marvel & Marvel, Ltd.
217 Idaho Street
Elko, NV 89801

(All other parties are served by the Supreme Court Clerk's Office electronic service.)

Dated this 24th day of June, 2020

/s/ Nancy Fontenot
Signature

Attachment to Docketing Statement
Diamond Natural Resources Protection and Conservation
Association, et al. vs. Bailey, et al.
Case No. 81224

2. Client(s):

Eureka County, Respondent/Cross-Appellant. Eureka County was one of the parties who filed an Unopposed Motion to Modify Caption and Redesignate Parties on June 11, 2020, so Eureka County will be aligned in this appeal as an Appellant.

3. Attorney(s) representing respondent(s):

Attorney: Don Springmeyer, Christopher W. Mixson
Telephone: (775) 853-6787
Firm: Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLC
Address: 5594-B Longley Lane
Reno, NV 89511
Client(s): Timothy Lee Bailey & Constance Marie Bailey, Fred Bailey & Carolyn Bailey

Attorney: Paul G. Taggart, David H. Rigdon
Telephone: (775) 882-9900
Firm: Taggart & Taggart, Ltd.
Address: 108 North Minnesota Street
Carson City, NV 89703
Client(s): Sadler Ranch, LLC, Ira R. & Montira Renner

Attorney: John E. Marvel
Telephone: (775) 237-5315
Firm: Marvel & Marvel, Ltd.
Address: 217 Idaho Street
Elko, NV 89801
Client(s): Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC and Blanco Ranch, LLC

Other Party: Beth Mills, Trustee, Marshall Family Trust (in Propria Persona)
Telephone: Unknown
Firm: None
Address: HC 62, Box 62138
Eureka, NV 89316
Client(s): Beth Mills, Trustee, Marshall Family Trust

///

///

Attorneys representing other appellants:

Attorney: Debbie Leonard, Esq.
Telephone: (775) 964-4656
Firm: Leonard Law, PC
Address: 955 S. Virginia Street, Ste. 220
Reno, NV 89502
Client(s): Diamond Natural Resources Protection & Conservation Association
J&T Farms, LLC
Gallagher Farms LLC
Jeff Lommori
M&C Hay
Conley Land & Livestock, LLC
James Etcheverry
Nick Etcheverry
Tim Halpin
Sandi Halpin
Diamond Valley Hay Company, Inc.
Mark Moyle Farms LLC
D.F. & E.M. Palmore Family Trust
William H. Norton
Patricia Norton
Sestanovich Hay & Cattle, LLC
Jerry Anderson
Bill Bauman
Darla Bauman

Attorney: James Bolotin, Senior Deputy Attorney General
Telephone: (775) 684-1231
Firm: Office of the Attorney General
Address: 100 North Carson Street
Carson City, NV 89701
Client(s): Tim Wilson, P.E., Nevada State Engineer
Division of Water Resources, Department of Conservation and Natural Resources

22. List all parties involved in the action or consolidated actions in the district court:

Appellants (Intervenor-Respondents below):
Diamond Natural Resources Protection & Conservation Association
J&T Farms, LLC
Gallagher Farms LLC
Jeff Lommori
M&C Hay
Conley Land & Livestock, LLC
James Etcheverry
Nick Etcheverry

Tim Halpin
Sandi Halpin
Diamond Valley Hay Company, Inc.
Mark Moyle Farms LLC
D.F. & E.M. Palmore Family Trust
William H. Norton
Patricia Norton
Sestanovich Hay & Cattle, LLC
Jerry Anderson
Bill Bauman
Darla Bauman

Other Appellants (Respondents below)

*Tim Wilson, P.E., Nevada State Engineer, Division of Water Resources,
Department of Conservation and Natural Resources

*Eureka County

* The Court has identified the State Engineer and Eureka County as “cross-appellants,” but they are more properly designated “appellants.” See Unopposed Motion to Modify Caption and Redesignate Parties filed June 11, 2020.

Respondents (Petitioners below):

Timothy Lee Bailey
Constance Marie Bailey
Fred Bailey
Carolyn Bailey
Sadler Ranch, LLC
Ira R. Renner
Montira Renner

Other Respondents (Intervenors who did not participate below):

Diamond Valley Ranch, LLC
American First Federal, Inc.
Berg Properties California, LLC
Blanco Ranch, LLC
Beth Mills, Trustee, Marshall Family Trust

List of Docketing Statement Attachments
Diamond Natural Resources Protection and Conservation
Association, et al. vs. Bailey, et al.
Case No. 81224

Attachment 1: Petition For Judicial Review filed by Sadler Ranch, LLC and Daniel S. Venturacci (filed February 11, 2019).

Attachment 2: Notice of Appeal and Petition for Review of Nevada State Engineer Order 1302 filed by Timothy Lee Bailey, Constance Marie Bailey, Fred Bailey and Carolyn Bailey (filed February 11, 2019).

Attachment 3: Petition for Judicial Review filed by Ira R. and Montira Renner (filed February 11, 2019).

Attachment 4: Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review (filed April 27, 2020).

Attachment 5: Notice of Entry of Order filed by Sadler Ranch, LLC and Ira R. and Montira Renner (filed April 30, 2020).

Attachment 6: Notice of Entry of Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review filed by Timothy Lee Bailey, Constance Marie Bailey, Fred Bailey and Carolyn Bailey (filed April 30, 2020).

Attachment 1

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

1 Case No.

NO. CV1902-349
FILED

2 Dept. No.

FEB 11 2019

By Eureka County Clerk
Kim Haele

3
4
5
6 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF EUREKA**
8

9 SADLER RANCH, LLC, a Nevada limited-
10 liability company, and DANIEL S.
11 VENTURACCI, an individual,

12 Petitioners,

13 vs.

PETITION FOR JUDICIAL REVIEW

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

Respondent.

18 COME NOW, Petitioners SADLER RANCH, LLC, a Nevada limited-liability company ("Sadler
19 Ranch"), and DANIEL S. VENTURACCI, an individual ("Venturacci"), by and through their counsel,
20 PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ., of the law firm of TAGGART &
21 TAGGART, LTD., and hereby petition the Court to reverse or remand Order 1302 issued by the Nevada
22 State Engineer on January 11, 2019, and attached hereto as Exhibit 1.¹ This Petition for Judicial Review,
23 as well as Notice of Appeal, is filed pursuant to NRS 533.450.

24 ///

25 ///

26 ///

RECEIVED

FEB 11 2019

Eureka County Clerk

27
28 ¹ Order 1302 was signed by former State Engineer Jason King, P.E., on his last day in office. Tim Wilson, P.E., assumed the office of State Engineer on January 14, 2019. As the successor in interest to Mr. King, Mr. Wilson is the proper party to name and serve in this action.

JURISDICTIONAL STATEMENT

The State Engineer is authorized under NRS 534.037 to consider the adoption of a groundwater management plan ("GMP") upon submission of a petition requesting the same signed by a majority of the holders of water rights within the basin. Upon receipt of such a petition, the State Engineer is required to hold a hearing to take testimony and consider evidence for and against the submitted GMP. Under NRS 534.037(4), a decision by the State Engineer to approve a submitted GMP "may be reviewed by the district court of the county pursuant to NRS 533.450."

The Diamond Valley GMP was submitted to the State Engineer on August 20, 2018. A nominal "hearing" on the plan was held in Eureka, Nevada, on October 30, 2018. On January 11, 2019, the State Engineer issued Order 1302 in which he approved and adopted the Diamond Valley GMP. The majority of the property and appurtenant water rights subject to the GMP are located within Eureka County. Accordingly, pursuant to NRS 533.450, this Court has jurisdiction over this matter and is the proper venue for hearing any petitions requesting judicial review of Order 1302.

STANDING

I. Sadler Ranch

Sadler Ranch is the owner and operator of one of the oldest continuously operated ranches in Diamond Valley. The ranch is located in the Diamond Valley hydrographic basin and was established by Reinhold Sadler, who served as governor of Nevada from 1896 to 1903. The ranch consists of more than 3,000 acres of privately held property. Over 2,000 acres of the ranch were historically irrigated with water from the Big Shipley and Indian Camp Springs. Sadler Ranch's right to this water was established prior to 1905 and cannot be impaired by any action of the State Engineer.² In prior legal proceedings, the State Engineer has acknowledged that the water from these springs is hydrologically connected to the groundwater aquifer in Diamond Valley.³ Because of this, groundwater pumping authorized under permits issued by the State Engineer in the 1950s and 1960s has detrimentally impacted the flow of Sadler Ranch's springs causing the springs to stop flowing entirely.⁴ The adopted GMP will

² NRS 533.085.

³ See State Engineer Ruling 6290.

⁴ See State Engineer Ruling 6290.

1 allow the over-pumping of the groundwater basin to continue indefinitely, thereby continuing and
2 exacerbating the harm suffered by Sadler Ranch to its pre-statutory vested water rights.

3 In addition to its pre-statutory vested rights Sadler Ranch owns groundwater permits issued by
4 the State Engineer that may be subject to the provisions of the GMP.⁵ These rights will be governed
5 under the provisions of the GMP, which restricts the use of these rights in an inequitable manner.
6 Because Order 1302 impairs Sadler Ranch's pre-statutory vested rights and treats its junior water rights
7 in an inequitable manner, Sadler Ranch is a party directly aggrieved by Order 1302. Accordingly, Sadler
8 Ranch has standing to file the instant petition pursuant to the provisions of NRS 534.037(4) and NRS
9 533.450.

10 **II. Daniel S. Venturacci**

11 Daniel S. Venturacci is the owner and operator of the Thompson, Cox, Willow, Rock, and Mau
12 ranches. These ranches are all located on the eastern side of the Diamond Valley hydrographic basin
13 and were established in the late 1800s. Together the ranches total over 2,500 acres of land that was
14 historically irrigated with water from various naturally occurring springs and seeps. Venturacci's right
15 to this water was established prior to 1905 and cannot be impaired by any action of the State Engineer.⁶
16 In prior legal proceedings, the State Engineer has acknowledged that the water from these springs is
17 hydrologically connected to the groundwater aquifer in Diamond Valley.⁷ Because of this, groundwater
18 pumping authorized under permits issued by the State Engineer in the 1950s and 1960s has detrimentally
19 impacted the flow of the springs causing them to stop flowing entirely.⁸ The adopted GMP will allow
20 the over-pumping of the groundwater basin to continue indefinitely thereby continuing and exacerbating
21 the harm suffered by Venturacci to its pre-statutory vested water rights. Accordingly, Venturacci has
22 standing to file the instant petition pursuant to the provisions of NRS 534.037(4) and NRS 533.450.

23 ///

24 ///

26 ⁵ The question of whether the proposed GMP can be involuntarily enforced against holders of permits who did not consent
27 to the plan is an open question of law. Sadler Ranch expressly reserves its right to challenge enforcement of the provisions
of the proposed GMP against its state-issued water rights permits.

28 ⁶ NRS 533.085.

⁷ See State Engineer Ruling 6290.

⁸ See State Engineer Ruling 6290.

FACTUAL BACKGROUND

Diamond Valley is a large basin located just north of Eureka, Nevada. Prior to 1905, settlers were attracted to the valley by the numerous springs and seeps that naturally occurred along the alluvial fans that occurred at the base of the eastern and western mountain ranges bounding the valley floor. These springs ranged in size with some being quite large. Big Shipley Spring, located on the Sadler Ranch, was by far the largest of these features flowing at a rate of somewhere between 11 and 15 cubic-feet/second (this flow rate would produce approximately 8,000 – 11,000 acre-feet/annually (“afa”)). Thompson Spring, located on the Thompson Ranch, was the next largest spring with an estimate flow rate of 6 cubic-feet/second (this flow rate would produce approximately 4,000 afa). These valley floor springs naturally supplied enough water to support the development of several large ranches including the Sadler Ranch and the Thompson Ranch.

In the 1950s and 1960s, the State Engineer began to issue a large number of permits authorizing the development of groundwater in Diamond Valley for irrigation purposes. These permits were issued despite the existence of reports indicating that the valley floor springs were hydrologically connected to the groundwater aquifer and that pumping of the groundwater rights would likely impact the flow of the springs.⁹ In all, the State Engineer issued permits allowing for the use of more than 130,000 afa despite the fact that the perennial yield of the basin (the amount of water estimated to be available for sustainable pumping) is just 30,000 afa. Since the mid-1960s pumping by junior-priority users has permanently removed 1,750,000 acre-feet more water than the basin could replenish.¹⁰ As a result, groundwater levels have dropped by more than 100 feet. Current pumping is in excess of 76,000 afa, more than twice the perennial yield.

The massive over-pumping of the groundwater basin has caused numerous environmental problems including the drying up of the valley floor springs. This was not an unexpected result. As early as 1962, and again in 1968, the State Engineer was alerted to the fact that the overpumping would

⁹ EAKIN, THOMAS E., GROUNDWATER RESOURCES – RECONNAISSANCE SERIES REPORT 6 – GROUND-WATER APPRAISAL OF DIAMOND VALLEY EUREKA AND ELKO COUNTIES, NEVADA, (United States Geological Survey, February 1962); HARRILL, J.P., STATE OF NEVADA WATER RESOURCES BULLETIN NO. 35 – HYDROLOGIC RESPONSE TO IRRIGATION PUMPING IN DIAMOND VALLEY, EUREKA AND ELKO COUNTIES, NEVADA, 1950-65, (United States Geological Survey, 1968).

¹⁰ HILLIS, DAVID G., P.E., REVIEW AND EVALUATION OF THE DIAMOND VALLEY GROUND WATER MANAGEMENT PLAN, Turnipseed Engineering (October 30, 2018).

1 result in serious impacts.¹¹ Rather than take action to prevent it, the State Engineer chose to disregard
2 the warnings. As a result, holders of the most senior water rights in the basin have had their springs dry
3 up. These senior users have been denied access to the water needed to operate their ranches and farms
4 while junior-priority users continue to prosper by exploiting what is left of the basin's groundwater.

5 In 2011, facing an imminent threat of curtailment from the vested senior rights holders like
6 Sadler Ranch and Venturacci, the junior-priority users were able to convince the Legislature to pass a
7 bill authorizing them to develop a GMP as an alternative to regulation by strict priority. The main
8 provisions of the bill were codified as NRS 534.037 and NRS 534.110(7). While the bill did not prohibit
9 the State Engineer from issuing an order curtailing water use by priority, it provided him an excuse not
10 to do so.

11 The criteria for approval of a GMP is set under NRS 534.037. Under the statute the State
12 Engineer cannot approve a GMP unless substantial evidence demonstrates that the plan includes "the
13 necessary steps for removal of the basin's designation as a critical management area."¹² Under NRS
14 534.110(7) a Critical Management Area ("CMA") designation is applied when "withdrawals of
15 groundwater consistently exceed the perennial yield of the basin." Accordingly, to approve a GMP the
16 State Engineer must have substantial evidence showing that the plan will restrict groundwater use to
17 such an extent that total withdrawals of water from the aquifer (not just withdrawals related to pumping
18 of junior priority rights) will be less than the perennial yield of the basin.

19 Pursuant to the provisions of NRS 534.110(7), on August 25, 2015, the State Engineer issued
20 Order 1264 designating Diamond Valley as a CMA. This began a 10-year clock during which a GMP
21 must be approved. If a GMP is not approved in that timeframe, the State Engineer is required to
22 immediately curtail pumping according to strict priority.

23 As noted above, the Diamond Valley GMP was submitted to the State Engineer on August 20,
24 2018. Under NRS 534.037(3), the State Engineer is required to hold a hearing on a submitted plan, and
25 a hearing was scheduled for October 30, 2018. Despite his duty to preside over the hearing as a neutral
26 arbiter, the State Engineer opened the hearing by giving an impassioned speech in which he praised the
27

28 ¹¹ See fn 9, supra.

¹² NRS 534.037.

1 proponents of the plan for their efforts. He made similar statements at the close of the proceeding. The
2 remainder of the hearing consisted of nothing more than having the participants make public statements
3 for or against approval. The proponents made no presentation regarding the GMP, no sworn testimony
4 was taken from any witness, no cross-examinations were performed, no expert witnesses were called in
5 support of the plan, and no documentary evidence was presented in its support. With few exceptions,
6 individuals making statements were not questioned and had no opportunity to challenge witnesses for
7 the opposing side. In short, the "hearing" met none of the typical requirements for an evidentiary
8 proceeding. The hearing merely served as a public forum for participants to provide oral comments.

9 After the hearing participants were given three days to provide written objections to the GMP.
10 On November 2, 2018, Sadler Ranch timely filed written objections to the GMP. These written
11 objections identified numerous legal and technical problems with the proposed GMP.¹³ Several other
12 parties, including Venturacci, filed similar written objections.¹⁴ The State Engineer ignored these
13 objections and on January 11, 2019, issued Order 1302 approving and adopting the Diamond Valley
14 GMP.

15 **GROUNDS FOR PETITION**

16 Petitioners seek judicial review of Order 1302 on the following grounds: (1) the process the State
17 Engineer used to review and adopt the GMP violated the requirements of NRS 534.037(3) and
18 constitutional due process standards established by the Nevada Supreme Court, (2) the GMP is not
19 supported by substantial evidence showing that its adoption and implementation will result in the
20 removal of the CMA designation from the basin as required under NRS 534.037(1), (3) the GMP
21 authorizes continued over-pumping of water in the basin, (4) the GMP fails to include a monitoring plan
22 to measure whether pumping reductions will actually result in a stabilization of groundwater levels in
23 the basin, (5) the GMP fails to provide any mitigation for past or future harms to holders of vested senior
24 groundwater rights, (6) the GMP does not contain objective thresholds or triggers to determine whether
25 more aggressive reductions in pumping will be required in the future, (7) the GMP improperly limits the
26 State Engineer's discretion and authority to order accelerated pumping reductions, (8) the GMP ignores
27

28 ¹³ Exhibit 2 (Sadler Ranch objections).

¹⁴ Exhibit 3 (Venturacci objections).

1 the impacts to holders of vested senior water rights that will result from allowing over-pumping in the
2 basin to continue indefinitely, (9) the governance provisions of the GMP violate constitutional due
3 process safeguards, (10) the GMP violates statutorily mandated provisions of Nevada's water laws, (11)
4 the GMP violates the provisions of NRS 534.250 - 534.350, inclusive, in that it authorizes an aquifer
5 storage and recovery program without complying with statutorily mandated permitting requirements,
6 (12) the GMP unlawfully allows water right holders to change the point of diversion, manner of use,
7 and place of use of their permits without submitting an application to do so with the State Engineer, (13)
8 the GMP unlawfully authorizes the State Engineer to exempt wells from the well abandonment
9 requirements of NRS 534 and NAC 534, (14) the GMP unlawfully places time limits on the State
10 Engineer to perform certain actions and deems regulated activity automatically approved if the State
11 Engineer fails to meet the time limits, (15) the GMP treats similarly situated persons differently based
12 on arbitrary and capricious factors in violation of the equal protection clauses of the Nevada and United
13 States Constitutions, (16) the GMP unlawfully takes private property without just compensation in
14 violation of the Nevada and United States Constitutions, (17) the GMP violates the non-impairment
15 doctrine enshrined in NRS 533.085, (18) the State Engineer has stated that he intends to enforce the
16 GMP against holders of water rights who did not consent to its adoption, (19) the factual determinations
17 made by the State Engineer in Order 1302 are not supported by substantial evidence in the record, (20)
18 the State Engineer acted arbitrarily and capriciously when he adopted Order 1302, (21) the State
19 Engineer abused his discretion when he adopted Order 1302, (22) the legal conclusions the State
20 Engineer made in Order 1302 are erroneous and without merit, and (23) the State Engineer's actions in
21 this matter were biased, inequitable, violated his duty to act as a neutral arbiter in water rights
22 proceedings, and exhibited prejudice towards holders of pre-statutory water rights in the basin.

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CONCLUSION

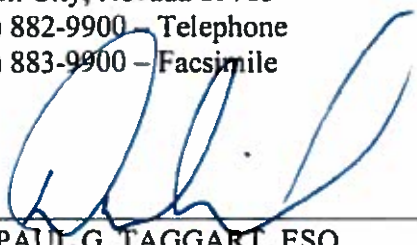
For the reasons stated above, and for others that may be raised during the pendency of this appeal, Petitioners respectfully request that the Court overturn Order 1302 in its entirety. In the alternative, Petitioners request that Order 1302 be stayed and this matter remanded to the State Engineer with instructions to hold a properly noticed and structured evidentiary hearing to address the issues raised in this petition.

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 this 8th day of February, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document as follows:

[X] By HAND-DELIVERY, addressed as follows:

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Nevada State Engineer
Division of Water Resources
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Carson City, NV 89701

Tori N. Sundheim, Esq.
Deputy Attorney General
Nevada Attorney General's Office
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[X] By U.S. POSTAL SERVICE, CERTIFIED, RETURN RECEIPT REQUESTED, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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DATED this 8th day of February, 2019.



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EXHIBIT INDEX

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<u>Exhibit</u>	<u>Description</u>	<u>Pages</u>
1.	State Engineer Order 1302	18
2.	Sadler Ranch, LLC's Objections to the Diamond Valley Groundwater Management Plan	46
3.	Daniel Venturacci Objections to Diamond Valley Groundwater Management Plan	11

EXHIBIT 1

EXHIBIT 1

C

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

#1302

ORDER

**GRANTING PETITION TO ADOPT A GROUNDWATER MANAGEMENT PLAN FOR
THE DIAMOND VALLEY HYDROGRAPHIC BASIN (07-153), EUREKA COUNTY,
STATE OF NEVADA.**

WHEREAS, decades of declining water levels in the Diamond Valley Hydrographic Basin is due to the simple fact that groundwater pumping has consistently exceeded the perennial yield of the basin. An obvious solution to the problem caused by *over* pumping is to *reduce* groundwater pumping. Designating Diamond Valley a Critical Management Area (CMA) (the first and only basin thus far in Nevada), provided water right users within the Diamond Valley basin the opportunity to develop a customized groundwater management plan (GMP) that does in fact reduce groundwater pumping to a level that satisfies the State Engineer that the water levels will reach an equilibrium. The CMA and GMP process became law in 2011 specifically to allow those that truly have skin-in-the-game (the water right holders in the basin), to create a means to the same end as curtailment by priority, but without the dire and sudden impacts.

Years before the State Engineer declared the basin a CMA in 2015, the GMP process was initiated by the local community and stakeholders. Work on the GMP continued for an additional three years after the CMA designation with numerous meetings of the community and stakeholders, ultimately arriving at the version presented to the State Engineer in 2018. The testimony, written public comment and background of Appendix C of the GMP demonstrate that this process was emotional and difficult for the participants—yet they persisted in forging a plan in an effort to avoid curtailment by priority to save their community and the established agricultural way of life in Diamond Valley. It is significant that the participants are not professional water right managers, but are ordinary citizens who made a Herculean effort to craft their own plan in response to a complex problem.

WHEREAS, this matter came before the State Engineer on a Petition to Adopt a Groundwater Management Plan (Petition), pursuant to Nevada Revised Statute (NRS) § 534.037 filed on August 20, 2018.

WHEREAS, the history leading up to the subject Petition is as follows:

Diamond Valley is a major groundwater farming area in the Diamond Valley Hydrographic Basin, Basin 153.¹ There are approximately 26,000 acres of irrigated land, which primarily produce premium quality alfalfa and grass hay. In 2013, it was estimated that approximately 110,000 tons of hay were produced annually for a total farming income of approximately \$22.4

¹ GMP, p. 8.

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million.² Approximately 126,000 acre-feet annually (afa) of irrigation groundwater rights are appropriated in Diamond Valley, and as of 2016, groundwater pumping for irrigation was estimated to be 76,000 afa. The perennial yield of Diamond Valley is 30,000 acre-feet (af).³

For over 40 years, annual groundwater pumping has exceeded the perennial yield of Diamond Valley.⁴ In the years that groundwater pumping has exceeded the perennial yield, groundwater levels in Diamond Valley have consistently declined at a rate of up to 2 feet per year. Prior to declaring Diamond Valley a CMA pursuant to NRS § 534.110(7), the State Engineer held public meetings on numerous occasions in Diamond Valley to discuss over-appropriation of the basin and to encourage water rights holders to formulate solutions or a plan at the local level to address declining water levels.

Because withdrawals have consistently exceeded the perennial yield of the basin, on August 25, 2015, the State Engineer declared Diamond Valley a CMA pursuant to NRS § 534.110(7).⁵ Once declared a CMA, holders of water rights within the basin have 10 years to create and present to the State Engineer a groundwater management plan; otherwise, the State Engineer is required to curtail the basin by priority.⁶

WHEREAS, the process for approval of a GMP by the State Engineer is as follows:

Nevada Revised Statute § 534.037(1) requires that a petition for the approval of a GMP that is submitted to the State Engineer 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.

At the time of filing the petition, there were 419 water right permits or certificates in the Diamond Valley Hydrographic Basin. Of these, 257 are represented by at least one signature in the petition. Comparing the signatories with the confirmed owner of record in the files of the Office of the State Engineer demonstrates that 223 water right permits or certificates are represented by the owner of record. If accepting the affirmation made on each page of the signed petition, then 257 rights of 419 rights is 61%. If limiting only to those signatures by a confirmed owner of record, then 223 of 419 is 53.2%. In either case, a majority of permits and certificates in the Diamond Valley Hydrographic Basin are represented in the petition; therefore, the State Engineer finds that the petition satisfies the requirement of NRS § 534.037(1).⁷

The total duty of groundwater rights in Diamond Valley is 130,625 afa. Of these, 126,188 afa are subject to the plan and 4,437 afa are not subject to the plan. The estimated amount of

² GMP, p. 8.

³ GMP, p. 8.; J.R. Harrill, *Hydrologic Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada, 1950-65*, Water Resources Bulletin No. 35, (Department of Conservation and Natural Resources, Division of Water Resources and U.S. Department of the Interior, Geological Survey), 1968.

⁴ GMP, p. 8.

⁵ Order 1264, official records in the Office of the State Engineer; GMP, p. 8.

⁶ NRS § 534.110(7).

⁷ Exhibit 1, public administrative hearing before the State Engineer October 30, 2018, official records in the Office of the State Engineer. Hereinafter the exhibits and transcript will be referred to solely by the exhibit number or transcript page.

groundwater committed to domestic wells at the statutory maximum of 2 afa per domestic well is 234 afa. By duty, over 96% of the total groundwater commitments are subject to the plan. It is reasonable that the focus of the plan to reduce the groundwater pumping be focused on those manners of use that have the greatest potential effect on the pumping in the groundwater basin.

The GMP assumes that the dividing line between senior and junior water rights holders is where the consumptive use of the water rights is estimated at 30,000 af, which is equal to the perennial yield of Diamond Valley; therefore, those rights with a priority date of May 12, 1960, or earlier are referred to in this Order as the senior rights (with a duty totaling 29,325 afa) and those rights with a priority date after May 12, 1960, are referred to as the junior rights. At the time of filing the petition, there were 77 senior water right permits or certificates, and 36, or 46.8%, of these were represented by at least one signature on the petition. The remaining 342 water right permits or certificate were junior, and 221, or 64.6%, of these were represented by at least one signature on the petition. Of the 29,325 afa of senior water rights, 18,700 afa, or about 64%, is represented by signatories of the petition. The State Engineer finds that significant portions of both senior and junior rights are represented in the petition.

Nevada Revised Statute § 534.037(3) requires that before approving or disapproving a groundwater management plan the State Engineer shall hold a public hearing to take testimony on the plan in the county where the basin lies or, if the basin lies in more than one county, within the county where the major portion of the basin lies. The State Engineer shall cause notice of the hearing to be:

- a. Given once each week for two consecutive weeks before the hearing in a newspaper of general circulation in the county or counties in which the basin lies.
- b. Posted on the Internet website of the State Engineer for at least two consecutive weeks immediately preceding the date of the hearing.

Notice of a public hearing to be held on October 30, 2018, was published in the *Eureka County Sentinel*, the *Elko Daily Free Press*, and the *Ely Times* during the weeks of the 15th and 22nd of October.⁸ Also, notice of the hearing was posted on the Internet website of the Nevada Division of Water Resources commencing on October 1, 2018.⁹ Additional notice was also sent by certified mail directly to the boards of county commissioners for the counties of Eureka, Elko, and White Pine.¹⁰ The GMP was made available through the Internet website of the Nevada Division of Water Resources commencing on October 1, 2018, and was also available by request.¹¹

A public hearing to take testimony on the proposed GMP was held in Eureka, Nevada, on October 30, 2018, during which testimony in favor of and in opposition to the GMP was received. In addition, the State Engineer held open the period for written public comment for an additional three working days following the hearing, during which time additional public comments were

⁸ Exhibit 4.

⁹ http://water.nv.gov/documents/Hearing_Notice-Diamond_Valley_GMP.pdf

¹⁰ Exhibit 3.

¹¹ <http://water.nv.gov/documents/Final%20DV%20GMP%20for%20Petition.pdf>

received. This Order evaluates the testimony and written comments and other elements required for approval of the Petition.

Nevada Revised Statute § 534.037(1) requires that in a determination whether to approve a groundwater management plan, the State Engineer shall consider, without limitation:

- 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, without limitation, domestic wells;
- f. Whether a groundwater management plan already exists for the basin; and
- g. Any other factor deemed relevant by the State Engineer.

WHEREAS, the Diamond Valley Groundwater Management Plan is summarized as follows:¹²

The predominant manner of use of existing rights in Diamond Valley is irrigation, where groundwater is pumped and used to produce primarily alfalfa and grass hay. Consequently, the GMP applies to irrigation rights and mining and milling rights with an irrigation base right, while vested rights, other manners of use and domestic wells are excluded from the plan. The GMP requires annual reductions in pumping with a goal of stabilizing groundwater levels and reducing consumptive use to the perennial yield. The GMP applies a formula to calculate the annual duty a rights holder can pump after required reductions, where the formula is based upon the original water right duty and priority of the right to arrive at a number of shares. The formula is defined as:

$$WR * PF = SA$$

Where:

WR = Total groundwater right volume as recognized by DWR, accounting for total combined duty (i.e., overlapping places of use) (measured in acre feet)

PF = Priority Factor based on seniority

SA = Total groundwater Shares

An annual amount of water that can be pumped per share is allocated to a rights holder (i.e., the annual allocation), and the reductions in pumping are accomplished by annually reducing the amount of water each share is allocated. In the initial year of the GMP, the total amount of water that can be pumped is equal to the amount of water currently in use. Unused allocations

¹² Specific components of the GMP are discussed in greater detail below with reference to the public comments received; accordingly, an overview of the major GMP structure is introduced here.

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may be banked, traded, leased or sold; thus, the GMP employs a market-based approach. The GMP also contains penalty provisions for pumping in excess of allocations. The GMP is governed by an Advisory Board of elected representatives that are charged with making recommendations to the State Engineer, who ultimately oversees and administers the Plan. The GMP is funded through annual assessments, which, in part, will be used to also fund a water manager employed by the Nevada Division of Water Resources, whose role is expected to involve implementation and management of the GMP.

WHEREAS, the comments made at the October 30, 2018, hearing on the Diamond Valley Groundwater Management Plan and the State Engineer's response are as follows¹³:

I. COMMENTS RELATED TO LEGAL SUFFICIENCY

Several comments were received challenging the legal sufficiency of the GMP as being in violation of established Nevada water law or that the GMP waives existing mandatory provisions required by the NRS including the prior appropriation doctrine, movement of allocations, well abandonment and a banking component without adequate permitting.¹⁴

Prior Appropriation

First, several commenters asserted that the GMP violates the doctrine of prior appropriation by eliminating the bedrock principle of "first in time, first in right." The violation, they allege, occurs because all water rights—both senior and junior—have their allocations reduced annually, rather than reductions being imposed solely on junior rights.¹⁵

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. Nevada Revised Statute § 534.037(1) provides that a groundwater management plan "must set forth the necessary steps for removal from the basin's designation as a [CMA]." Other prior appropriation states have addressed whether a

¹³ The following analysis is intended to address written and public comments received concerning the GMP. In large part, all of the comments made in opposition to the GMP in writing or at the hearing raised issues that were considered during the GMP drafting process. These issues, and many more, are succinctly summarized in a "comment and answer format" in Appendix C at pp. 241-255, entitled *GMP Issues and Concerns Identified Through the Process*.

¹⁴ Written comments of Ira and Montira Renner, Timothy and Constance Marie Bailey, Sadler Ranch, LLC, and Great Basin Resource Watch.

¹⁵ Appendix F to the GMP contains the preliminary table of all rights subject to the GMP and the share calculation for each right. The relative priority dates of all rights subject to the Plan are shown in the table. Notwithstanding the share calculations shown in Appendix F, one commenter acknowledged that if a GMP is not adopted and curtailment is ordered on all rights, that rights junior to about May 1960 would be curtailed. This would include a significant number of irrigation rights, all mining rights, and some municipal rights. See Written Comment of Great Basin Resource Watch, p. 5. In addition, the majority of domestic wells in the basin are junior and would also be completely curtailed. See NRS § 534.110(6) (the State Engineer may order that withdrawals, including withdrawals from domestic wells, be restricted to conform to priority rights).

shortage sharing plan violates the prior appropriation doctrine. For example, in *State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006), the New Mexico Supreme Court examined whether a settlement agreement entered into by the Interstate Stream Commission, the United States and three irrigation districts, upon which a partial final decree was entered in an adjudication proceeding, violated the New Mexico Constitution, which codified the prior appropriation doctrine.

The appellants, senior rights holders, contended that the settlement agreement violated the New Mexico Constitution, and that due to chronic water shortages for senior rights, the negotiating parties were duty-bound to adhere to the prior appropriation doctrine as it was traditionally understood and enforced, through a priority call. *Id.*

The court's examination focused on a statute that was enacted for the express purpose of achieving compliance with New Mexico's obligations under the Pecos River Compact (the compliance statute). *See id.* at 150 P.3d at 379. In the words of the court, the parties to the settlement agreement sought to cut the water shortage "Gordian knot" through a process more flexible than strict priority enforcement, yet still comply with the prior appropriation doctrine.

In interpreting the legislative intent of the compliance statute, the *Lewis* court found that the intent and purpose of the legislation was beyond dispute—to take charge of resolving a critical situation created by an amended decree, while complying with the obligation of protecting existing rights. In determining that the statute was constitutional, the court assumed that the legislature was aware of the prior appropriation doctrine when it enacted the statute, and that the statute was to be read as a clear signal that the legislature and governmental players wanted to create a solution other than a priority call as the first and only response. *Id.* at 150 P.3d 385.¹⁶ Notwithstanding that the court found the statute constitutional and not violative of prior appropriation, the court found it important that the settlement agreement did not rule out a priority call if needed. *Id.* at 150 P.3d 386.

Nevada Revised Statute § 534.037(1) was enacted in 2011 by A.B. 419. Aside from the six specific and one general consideration codified in the statute, the State Engineer finds that the legislative history contains scarce direction concerning how a plan must be created or what the confines of any plan must be.

Like *Lewis*, in enacting NRS § 537.037, the Nevada legislature expressly authorized a procedure to resolve a shortage problem. And, like *Lewis*, the State Engineer assumes that the Legislature was aware of prior appropriation when it enacted NRS § 534.037,¹⁷ and the State Engineer interprets the statute as intending to create a solution other than a priority call as the first and only response. 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 junior rights holders alone—if that were

¹⁶ Although the prior appropriation doctrine is not codified in the Nevada Constitution, a similar analysis to *Lewis* is appropriate as prior appropriation is the law in Nevada.

¹⁷ The fact that NRS § 534.110(7) requires the State Engineer to regulate by priority after 10 years if no GMP is adopted makes clear that the Legislature was aware of prior appropriation. Also, the remarks of Assemblyman Goicoechea, the bill sponsor, reinforces the Legislature's awareness of prior appropriation when the Assemblyman described regulation by priority (*e.g.*, pumping is curtailed and the basin is brought back into balance with only senior water rights being held). *See Minutes on the Assembly Committee on Government Affairs, 76th Session, p. 66 (March 30, 2011).*

the case, the State Engineer could simply curtail junior rights—a power already granted by pre-existing water law in NRS § 534.110(6). Thus, the State Engineer concludes that NRS § 534.037 provides flexibility outside regulation by priority, and the manner in which the GMP proposes to reduce pumping is authorized by Nevada law.

Notwithstanding, even though NRS § 534.037(1) does not require a GMP to impose reductions solely against junior rights, the most senior rights in the GMP have a higher priority factor than junior rights when the share calculation is made. Thus, the State Engineer finds that the GMP still honors prior appropriation by allocating senior rights a higher priority factor than junior rights.¹⁸

Well Use Approvals

Second, commenters opposed to the GMP challenged the GMP's provision to allow temporary movement (less than 1 year) of allocations, alleging the GMP contravenes existing law by automatically granting such changes, that the temporary approval process diminishes State Engineer and public review and encourages trading on annual bases, rather than filing for a permanent change.¹⁹ On the other hand, other comments were received that supported the flexibility offered by the expedient temporary movement process.²⁰

Existing water law has provisions that deal with temporary changes to water rights²¹ and permanent changes to existing rights.²² Because the GMP unbundles allocations from the place of use where existing water rights are appurtenant, movement of allocations is controlled by a new or existing well serving as the point of diversion.²³ Thus, the GMP was (1) modeled after existing law regarding temporary changes²⁴ and (2) still requires application of NRS § 533.370 to new wells or increased withdrawals exceeding 1 year.²⁵

Section 14.8 of the GMP provides that any new wells or wells having withdrawals in excess of what was approved under the base right be submitted to the State Engineer. Such changes are approved after 14 days if not denied as impairing other rights or contrary to the public interest. The State Engineer finds that the existing law concerning temporary changes (NRS § 533.345(2))

¹⁸ The public comments during the hearing reiterated that the 20% spread of the priority factor likely received the greatest consideration and debate during the GMP process. Ultimately, a spread of priority factor between 0.9997 and 0.80 was what a majority of the plan proponents could agree to.

¹⁹ Written comments of Sadler Ranch, LLC and Great Basin Resource Watch.

²⁰ Written comment of Marty Plaskett; *and see* Transcript, pp. 80-81 (Matt Morrison) (providing an example that when annual reductions are implemented, an irrigator may not have enough water for one pivot, but would have flexibility to combine allocations to water a full crop, while also allowing some irrigation on former irrigation lands to keep them viable until farming on that pivot could resume).

²¹ NRS § 533.345(2).

²² NRS § 533.370.

²³ *See* GMP §§ 14.8 and 14.9.

²⁴ GMP, p. 20 at fn. 20.

²⁵ GMP § 14.9.

expresses a command to grant temporary changes (e.g., "shall approve") unless the State Engineer determined it impairs existing rights or is contrary to the public interest. Thus, the State Engineer finds that § 14.8 and § 533.345(2) to be entirely consistent. Further, the State Engineers agrees that allowing changes expediently up to the original duty at that well is permissible because the State Engineer already made such an affirmative analysis when the water right was granted. Additionally, the State Engineer finds that § 14.8 of the GMP is not a significant departure from existing law because temporary change applications do not undergo publication or hearing unless required by the State Engineer.²⁶ Thus, it is unpersuasive that § 14.8 diminishes State Engineer and public review. Finally, the potential of a rights holder to serially move allocations for less than 1 year to escape being subject to the procedures of NRS § 533.370, exists under current law, as there is no limitation in statute to the number of temporary applications to change. The State Engineer is mindful that when annual notices are given, to examine such notices to determine there is a motivation to avoid the statutory change process.

With respect to new wells, additional withdrawals exceeding 1 year, or where the State Engineer determined within the 14 calendar days may be not be in the public interest or may impair rights of other persons, the existing procedures under NRS chapters 533 and 534, including publication and protest provisions, still apply.²⁷

Well Plugging Provisions

One commenter asserted that the GMP waived existing law regarding exempting wells from NRS Chapters 533 and 534.²⁸

GMP §§ 14.2 and 14.3 direct when active, unused or inactive wells must be plugged and abandoned, or that a waiver of abandonment can be obtained. The State Engineer finds that these provisions are consistent with existing regulations found in NAC §§ 534.300 and 534.427. Additionally, GMP §§ 14.4 and 14.5 expressly require that well construction and maintenance must comply with the requirements of NRS and NAC Chapter 534. The State Engineer finds that the GMP does not waive or exempt wells from existing laws or regulations.

Banking and Aquifer Storage and Recovery

Lastly, one commenter stated that the banking component of the plan was an aquifer storage and recovery (ASR) project, which lacks a necessary permit required by NRS § 534.250, *et. seq.*²⁹

²⁶ NRS § 533.345(3).

²⁷ GMP § 14.9.

²⁸ Transcript, p. 19 (David Rigdon).

²⁹ Written comment of Sadler Ranch, LLC; Transcript, p. 14 (David Rigdon). The statement at the hearing was that this comment was based upon the report of the hydrogeologist in Appendix I that water banking is a type of aquifer storage and recovery project regulated by the State Engineer. As indicated by further findings, the State Engineer does not agree that the banking component of the GMP is an aquifer storage and recovery project.

Section 13.9 of the GMP allows unused allocations to be carried over and banked for use in a subsequent year to increase the amount of water the rights holder can use in the next year. The banked allocation is subject to depreciation in the amount that is carried over to account for natural losses over time.³⁰ In contrast to banking in the GMP, a typical aquifer storage and recovery project is operated by injecting or infiltrating water from a surface source into the aquifer for the purpose of accumulating storage for future use.³¹ These elements of project operation are not part of the GMP. The State Engineer finds that banking of unused allocations in the GMP is a mechanism to allow flexibility by users to determine when to use their limited allocation and to encourage water conservation practices. Consequently, the State Engineer finds that the banking allocations in the GMP is a reasonable means to facilitate conservation and water planning by water users, as provided for under NRS § 534.037, and that the GMP is not required to fulfill the statutory obligations of NRS §§ 534.250–340.

II. COMMENTS RELATED TO ABANDONMENT, FORFEITURE, AND PROVING BENEFICIAL USE

Some commenters stated that water rights that are currently unused should be abandoned or forfeited prior to reductions in pumping being imposed against existing water rights.³² The State Engineer finds that pursuing forfeiture or abandonment prior to implementing any GMP is ill-advised for several reasons.

First, time is of the essence for rights holders to get a GMP approved prior to August 25, 2025, or curtailment by priority will be ordered for all rights in Diamond Valley. Because forfeiture and abandonment must be shown by clear and convincing evidence, it is doubtful whether there is sufficient time to investigate and assemble evidence concerning abandoned rights, to conduct administrative hearings and engage in any appellate proceedings with time left to secure a final table of water rights to support the GMP. Pursuing abandonment at this moment would likely lead to lengthy administrative and/or appeal proceedings, delaying action on a GMP until a final listing of active groundwater rights would be known.³³

Second, a different problem is presented by forfeiture proceedings. Because the State Engineer conducts an annual inventory in Diamond Valley, information is available concerning those rights that may be subject to forfeiture. However, in 2017, NRS § 534.090 was amended to require that a notice of non-use be served prior to forfeiting unused water rights to provide one year to cure a forfeiture.³⁴ Serving notices of non-use at this stage would require that owners of water rights that are currently unused make efforts to resume beneficial use (*i.e.*, pumping). The

³⁰ Section 13.9 describes that Diamond Valley is divided between the main farming area (generally located in the southern half of the basin) and the groundwater discharge area (the northern half of the basin). Banked water north of the dividing line in the discharge area depreciates at 17% and banked water south of the line at 1%. The depreciation factors are based on numerical flowing modeling analysis to justify and support these amounts. See GMP, Appendix I.

³¹ See, e.g., NRS §§ 534.250–340.

³² Written comments of Sadler Ranch, LLC and Carolyn Bailey.

³³ See, e.g., GMP, Appendix F.

³⁴ See NRS § 534.090(2).

consequence of resuming pumping is contrary to the intent of the GMP to *reduce* pumping. Thus, the State Engineer finds that in addition to similar timing problems discussed above, initiating forfeiture proceedings could exacerbate conditions in the basin by increasing pumping, prior to reducing pumping pursuant to the GMP, thereby lessening the effectiveness of the plan.³⁵

Third, assuming *arguendo*, there are water rights existing only on paper (e.g., that could be abandoned or forfeited), reductions in pumping by the GMP start at the ceiling of *actual pumping* (76,000 afa), not at the ceiling of existing rights (126,000 afa). Stated otherwise, even if the State Engineer assumed that the difference between existing rights and actual pumping (50,000 afa) was paper water, the elimination of paper water rights to match active rights will not change that the reductions in *pumping* begin at the component of active rights. The issue of paper water was raised and considered during the GMP drafting process, and it was determined that the GMP contemplated that any valid right in good standing was to be issued shares.³⁶ The State Engineer believes there is a low probability of success for abandonment, and the preceding paragraph describes the likely unanticipated effect of pursuing forfeiture. Therefore, the State Engineer finds that requests to eliminate paper water does not warrant halting this process in order to initiate abandonment or forfeiture proceedings.

Additionally, one commenter stated that existing permitted rights should prove beneficial use and become certificated prior to implementing a GMP. For reasons discussed above, including timing and discouraging increases in pumping, the State Engineer finds that requiring proof of beneficial use prior to implementing a GMP is not in the best interest of taking immediate action to adopt and implement a basin-wide GMP. Further, the GMP petition process expressly applies to the holders of *permits* and *certificates*. Therefore, the GMP statute implicitly recognizes that permitted rights which have not fully proven beneficial use will participate in the GMP process.

III. COMMENTS RELATED TO APPLICABILITY OF PLAN TO ONLY CERTAIN WATER RIGHTS

Some comments were directed to the scope of GMP applying only to irrigation rights and mining and milling rights with a base irrigation right. Some expressed concern that it created a preference for certain manners of use, that there was no environmental component to the plan and it would result in water barons.³⁷ Many comments in favor of the plan described how they believed the plan would allow more irrigators or mines to stay in business, ultimately benefitting the greatest number of operators by providing more favorable conditions such as weed and rodent control.³⁸ The comments favored adoption of a GMP in lieu of curtailment, which many recognized would

³⁵ The issue of forfeiture in Diamond Valley, particularly of pivot corners, pre-dates the 2017 amendments to NRS § 534.090. In the 1980s, the State Engineer pursued forfeiture of unused pivot corners in Diamond Valley, which lead to the enactment of NRS § 534.090(3) (pre-2017 version). See Nev. Stat. ch 559 (1983), and see, A.B. 597 (1983).

³⁶ See GMP, Appendix C, p. 244.

³⁷ Written comments of Great Basin Resources Watch, and Ari Erickson.

³⁸ Written comments of James Gallagher, Mark Moyle and Donald Palmore; Transcript, p. 68 (Jim Gallagher); pp. 80-81 (Matt Morrison).

likely force many junior irrigators into bankruptcy, and as a result, the community would suffer.³⁹ In addition, many comments in favor of the GMP spoke positively about methods for increasing efficiency to continue operations while reducing pumping.⁴⁰

As discussed in the introductory paragraphs section, *supra*, over 96% of committed rights are represented in the plan; therefore, the State Engineer finds that given the overwhelming majority of irrigation rights and mining and milling rights having irrigation base rights, the application of the plan to those rights that will have the most impact and be most impacted, is appropriate. While one commenter opined that the GMP does not address environmental concerns, the State Engineer does not agree. The GMP may not contain express provisions for the environment, but allowing the greatest number of irrigators to remain in business and keep cultivated lands active, will prevent the incursion of weeds, and will provide dust and rodent control. And ultimately, the State Engineer finds that the objective to reduce the pumping of groundwater to stabilize groundwater levels is a benefit of the groundwater basin, the irrigators and other members of the community that rely upon it and live within it, and that it is not necessary to explicitly identify certain areas of environmental concern within the scope of the plan for the plan to have a generalized benefit to the environment.

Finally, the State Engineer finds that comments that the GMP will result in "water barons" or that it will create a preference for certain manners of use, are speculative. Existing water law provides that water rights are a form of real property that are freely alienable and transferrable independent of land where the water was formerly appurtenant. In that way, the ownership of water rights and the manners of use are currently determined by a market of real property transactions.

IV. COMMENTS RELATED TO PRACTICALITY OR REASONABLENESS OF THE PLAN IMPLEMENTATION

Mitigation Rights

Some commenters challenged the fact that the GMP does not provide for mitigation of senior surface water rights that have been negatively impacted by junior groundwater pumping.⁴¹

The requirement for the approval of a GMP is that it "must set forth the necessary steps for removal of the basin's designation as a critical management area." NRS § 534.037(1). Neither the plain language nor the legislative history indicate that mitigation of senior surface water rights that have allegedly been adversely affected by groundwater pumping must be mitigated by a GMP.⁴²

³⁹ Written comments of William Norton and Donald Palmore; Transcript, pp. 80-81 (Matt Morrison).

⁴⁰ Written comment of William Norton, Marty Plaskett, Robert Burnham and James Gallagher; Transcript, p. 81 (Matt Morrison).

⁴¹ Written comments of Sadler Ranch, LLC and Daniel Venturacci.

⁴² In fact the opposite appears to be true from the legislative history. As proposed, A.B. 419 would have required the State Engineer "to consider the relationship between surface water and groundwater in the basin," but this consideration was amended out of the bill after the First Reprint.

Of note is that the State Engineer entered Order 1226, entered on March 26, 2013, which provided a mechanism for mitigation of senior surface water rights allegedly impacted by junior groundwater pumping. Two of the commenters at the hearing who raised this issue have taken advantage of the provisions of Order 1226, by filing for mitigation groundwater rights, which were granted by the State Engineer. Consequently, the State Engineer finds that mitigation is not a required element of the GMP; and in any event, the commenters who raised this issue have already taken advantage of Order 1226.⁴³

Out-of-Basin Transfers

One commenter was concerned that unbundling water rights appurtenant to their place of use creates an incentive for out-of-basin transfers.⁴⁴ The commenter acknowledged that the current GMP prohibits out-of-basin transfers, but suggested the plan proponents may consider amending the plan to strengthen provisions to avoid incentivizing out-of-basin transfers. The State Engineer finds that NRS § 534.037 provides that once adopted, the GMP can be amended by the same procedure which allows for adoption of a plan.⁴⁵ Because the GMP currently prohibits out-of-basin transfers, there is currently no necessity to mandate changes to the GMP to strengthen provisions to disincentivize out-of-basin transfers. Some commenters involved the creation of the plan who spoke in favor of it acknowledged the plan may not be "perfect." Short of finding the current GMP cannot be approved as a matter of law, the State Engineer finds that denial of the Petition to require years of possible additional negotiations to merely better state existing plan provisions, to be unnecessary.⁴⁶

See A.B. 419 (First Reprint), Senate Committee on Government Affairs, 76th Sess. (May 25, 2011).

⁴³ See, e.g., Permits 81720, 82268, 81825 and 82572, official records in the Office of the State Engineer.

⁴⁴ Written comment of Great Basin Resource Watch.

⁴⁵ NRS § 534.037(5).

⁴⁶ The State Engineer values all comments and testimony received concerning the GMP. While it is clear the *Public Interest Review of the Proposed Diamond Valley Groundwater Management Plan* prepared for Great Basin Resource Watch was thorough in its analysis, the State Engineer gives great weight to comments and testimony from water rights holders in Diamond Valley, senior or junior whom are for or against approval of the GMP. Great Basin Resource Watch does not own water rights in Diamond Valley and it does not appear it was involved in the years of public meetings held in Eureka to negotiate the details of the GMP. See, e.g., GMP Appendix C at pp. 121-240. Indeed, its own written comment appears to recognize it is appropriate to afford great weight to those that created and are affected by the plan. See Written comment of Great Basin Resource Watch at p. 8 (a groundwater management plan should address the varied objectives or goals of water users and residents in the basin, and a worthwhile consideration is whether the GMP promotes bottom-up collaboration to promote broad buy-in from affected individuals and to provide flexibility in decision-making); and see also, Transcript, p. 65 (Mark Moyle) (responding to comments at the hearing, stating that the GMP was developed by the people who live in Diamond Valley and will be most affected and that everyone was making sacrifices).

Public and Local Community Interest

The same commenter stated that the public interest component was not adequately represented and that the description of local community interests could be strengthened.⁴⁷

The State Engineer disagrees that the public interest is not adequately represented. As already discussed under well use approvals, new wells, additional withdrawals exceeding one year, or where the State Engineer rejected a request under § 14.8, is subject to the procedures of NRS § 533.370—including the public interest review for change applications.

Many comments in support of the GMP reflect the reality that it took years for the participants to negotiate an agreement that was able to attain majority support required to petition the State Engineer for approval. Years before the State Engineer declared the basin a CMA in 2015, the GMP process was initiated by the local community and stakeholders.⁴⁸ Work on the GMP continued for an additional three years after the CMA designation with numerous meetings of the community and stakeholders, ultimately arriving at the version presented to the State Engineer in 2018.⁴⁹ Appendix C of the GMP demonstrates that this process was emotional and difficult for the participants—yet they persisted in forging a plan in an effort to avoid curtailment. The written comments overwhelmingly demonstrate the public and local community interests to be preserved by the approval of the plan, which are best stated by the following irrigator:⁵⁰

The irrigators that support this plan understand that we all need to sacrifice for the long term benefit of the community and the long-term continued success of the farming industry. Diamond Valley is the heart of southern Eureka County's economy. . . . Strong, willing, and giving people who understand that it takes community effort to sustain and survive built Diamond Valley. . . . The purpose of the DVGMP is to continue the ongoing success of the entire southern Eureka County area and the enterprises that exists [sic] there.

This sentiment was repeated in all written comments submitted in support of the plan.⁵¹ In addition, many stirring accounts were given at the public hearing about living and growing up in Diamond Valley, the desire to preserve the established way of life, the hardscrabble efforts made over decades to create the farms that exist in the valley today, and the determination of the community to work together to solve issues, both past and present, which challenged their continued existence.⁵² The State Engineer finds that the GMP materials, written comments and testimony at the public hearing overwhelmingly describe and support the public and local

⁴⁷ Written comment of Great Basin Resource Watch.

⁴⁸ GMP, Appendix B.

⁴⁹ See GMP, Appendices A, C.

⁵⁰ Written comment of Mark Moyle.

⁵¹ See written comments of Robert Burnham, Russell Conley, Jim Etcheverry, James Gallagher, Andrew Goettle, William Norton, Donald Palmore, Marty Plaskett and Ruby Hill Mining Company; and see Transcript, pp. 52-53 (D'Mark Mick).

⁵² Transcript, pp. 57-59 (James Moyle); pp. 75-77 (Vickie Buchanan); pp. 79-82 (Matt Morrison); pp. 84-85 (Lloyd Morrison); pp. 85-88 (Alberta "Birdie" Morrison).

community interests, which weigh heavily in the determination at hand. While many comments in the *Public Interest Review*⁵³ reflect aspirational components of what a plan *may* contain or how it could be best stated, the State Engineer finds that the GMP is acceptable in these areas.

Protections for Domestic Wells

One commenter suggested that domestic wells were not protected because pumping will continue to exceed the perennial yield while the GMP is carried out. The State Engineer finds that NRS § 534.110(7), states that unless at GMP has been approved for a basin pursuant to NRS § 534.037, "withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights." And that pursuant to NRS § 534.080, domestic wells are assigned the date of priority of the date the well was drilled. Thus, the GMP is protective of domestic wells because it specifically excludes the domestic wells from pro-rata reductions in use and allows for their continued use to the full statutory permitted amount, compared to the alternative that (a) the domestic wells in Diamond Valley are junior in priority to the 30,000 af PY, and (b) since, absent an approved GMP, domestic wells are subject to curtailment based upon their priority.

Advisory Board Makeup

Commenters had differing issues with the makeup of the Advisory Board.⁵⁴ One commenter stated that the GMP favors junior appropriators on the Advisory Board. Alternatively, another commenter posited that after a period of years, the makeup of the Advisory Board could favor non-irrigators over irrigators. The State Engineer finds that the plan was created by the individuals that will be subject to the plan, and the State Engineer accepts that a majority of the rights holders agreed that the makeup and voting structure of the participants agreed this to be a fair manner of representation on the Board.

V. COMMENTS RELATED TO SCIENTIFIC SOUNDNESS

Some commenters challenged the GMP, asserting that the GMP is not supported by science and hydrologic analysis, with the following observations:⁵⁵

- a. The scheduled reduction in pumping would exceed the perennial yield for the life of the GMP and in the process it would deplete aquifer storage in excess of the transitional storage volume.
- b. The GMP is not supported by a hydrogeologic analysis or a groundwater model to provide information on the effects of the plan.
- c. Some commenters had questions about the accuracy of the ET depreciation rate, and whether this rate may change over time because

⁵³ Written comment of Great Basin Resource Watch.

⁵⁴ Written comments of Sadler Ranch, LLC and Great Basin Resource Watch.

⁵⁵ Written comments of Ira and Montira Renner and Sadler Ranch, LLC; Transcript, p. 19 (David Rigdon); pp. 23-24 (David Hillis).

of groundwater recovery and corresponding changes in groundwater ET.

- d. One commenter raised the lack of thresholds or triggers in the GMP.

The GMP is based on the simple fact that groundwater pumping is the cause of declining water levels, and therefore pumping must be reduced to solve the problem. The reduction in pumping is set at 3% per year for the first 10 years, and may be adjusted up or down thereafter as informed by groundwater level monitoring data. The goal of this approach is to progressively reduce groundwater pumping until the perennial yield is not consistently exceeded, and the measure of that ultimate outcome is a stabilization of water levels.

Perennial yield is based on the principle of conservation of mass, which dictates that water levels will stabilize when recharge equals discharge. Before any groundwater development occurs, an undeveloped basin is considered to be in equilibrium between natural groundwater recharge and discharge. When wells are developed, groundwater is initially drawn from aquifer storage in the vicinity of the well, but over time that groundwater removal is replaced by a decrease in natural discharge or increase in recharge until a new equilibrium is reached and the discharge by pumping is part of the basin water balance. Water drawn from storage in the period of time between the pre-development equilibrium and the post-developed equilibrium is defined as the transitional storage. The amount of transitional storage consumed before a new equilibrium state is reached may affect the depth to water at a new equilibrium condition, but as long as recharge and discharge are ultimately balanced then an equilibrium condition can be reached and the goal of the GMP to stabilize water levels can be achieved. The amount of storage consumed in the transitional period will not prevent equilibrium from being reached.

Groundwater modeling and hydrogeologic analysis are not the basis for the GMP's determination of pumping reduction rates and target pumping totals at the end of the plan. Instead, the pumping reduction rate was selected by agreement of the GMP authors, and the target for total pumping at the end of the GMP was selected from existing published values. Upon implementation, the real effects of the plan will be monitored and observed by measuring the change in groundwater levels throughout the basin. Those measurements will be the basis for plan review and any modifications of pumping reduction rates that the GMP requires after an observation period of 10 years.

Groundwater modeling is a helpful and informative tool for projecting the effects of pumping reduction and planning accordingly, but modeling is not necessary to conclude that reductions in pumping will lead to reductions in water level drawdown. Groundwater modeling and hydrogeologic analysis beyond what is publicly available in existing published reports would not change the fact that the cause of groundwater decline is due to pumping groundwater and that the stakeholder-authored plan seeks to reduce pumping. Modeling could be a useful tool for future evaluation of the plan and modifications to pumping reduction rates, but it is not required.

One commenter questioned whether the reductions in pumping under the plan combined with rights not subject to plan would bring withdrawals to the perennial yield based on his calculation of rights able to be pumped being excess of 42,000 afa.⁵⁶ As explained, the goal of the

⁵⁶ See written comment of Ari Erickson.

GMP is to reduce consumptive use to the current perennial yield; and, as indicated in the introductory paragraphs, there are 4,437 af of groundwater rights in the basin not subject to the plan. Thus, the State Engineer does not find that there could be total pumping in excess of 42,000 afa in the basin at the end of 35 years under the GMP. Assuming, *arguendo*, that rights subject to the plan and those not subject to the plan were estimated to be 34,437 af, existing evidence used by the State Engineer to designate the basin a CMA demonstrates that there are wide variations in annual pumping—in some years, by several thousand acre-feet more or less than the prior year.⁵⁷ Because the designation of a CMA is based on withdrawals *consistently* exceeding the perennial yield, the State Engineer finds that existing law suggests some tolerance of variations on the annual amount of pumping. In addition, the State Engineer is mindful that perennial yield is an *estimate* of water availability and is only one-half of the equation of GMP success.⁵⁸ Actual observations of water levels are the most direct and reliable means of determining GMP success. The plan to reduce pumping, monitor the effects on water levels, and then adjust pumping reductions is a sound approach to achieving the goal of stabilizing water levels. The lack of a groundwater model or detailed hydrogeologic analysis does not preclude approval of the GMP as written.

One commenter raised the lack of thresholds or triggers in the GMP. The State Engineer finds that there is no express requirement in NRS § 534.037 for thresholds or triggers, and that a reference to thresholds or triggers is commonly in reference to a "Monitoring, Management and Mitigation (3M)" Plan. The State Engineer has historically utilized 3M Plans as a tool in approving new appropriations when impacts to existing rights are unknown. Consequently, the State Engineer finds that a 3M Plan having thresholds and triggers is different than the GMP now pending before the State Engineer, and that the two types of plans serve different functions. Nevertheless, the State Engineer finds that there has been robust monitoring of irrigation groundwater use in Diamond Valley by the State Engineer's office for many decades and that monitoring groundwater use and groundwater levels is ongoing. Moreover, the GMP requires irrigators to install a smart meter, which will provide increased accuracy and nearly real-time knowledge of groundwater use.⁵⁹ Finally, the GMP incorporates the State Engineer's enforcement authority concerning over-pumping of a user's allocation, and contains penalties to be paid in water for over-pumping and stiff administrative fines for meter tampering.⁶⁰

Finally, some commenters had questions about the accuracy of the ET depreciation rate, and whether this rate may change over time because of groundwater recovery and corresponding

⁵⁷ See Order 1264, official records in the Office of the State Engineer.

⁵⁸ Both the GMP and the commenter acknowledged the release of a 2016 report by the U.S. Geological Survey, which estimated the perennial yield may be 35,000 af. GMP, p. 8 at fn. 2; Transcript, p. 37 (Ari Erickson). As part of a different administrative hearing proceeding, the State Engineer was requested to accept the USGS Report as the perennial yield in Diamond Valley. That matter is currently under submission, and no determination has been made by the State Engineer whether to accept this number. Consequently, the GMP was based on the current estimate of perennial yield of 30,000 af.

⁵⁹ See GMP § 15. The most recent groundwater inventory conducted by the State Engineer in 2018 revealed that there was nearly 100% compliance with smart meter installation already. This further affirms that rights holders have already made financial commitments of purchasing and installing smart meters to ensure success of the GMP.

⁶⁰ GMP §§ 16, 17.

changes in groundwater ET. The selection of these rates was the only component of the GMP expressly based on groundwater model simulations. The accuracy of the model and appropriateness of assigning ET depreciation rates based on model interpretation was discussed at GMP planning meetings. The ET depreciation rates in the final GMP were a compromise and there was never a consensus. Adjustments to these rates is provided for under the provisions to amend the GMP, as warranted by the data.

VI. COMMENTS RELATED TO PRECEDENCE

Several commenters were concerned that any GMP adopted in Diamond Valley creates a precedent for other areas in the state that may be designated Critical Management Areas. The proposed GMP under consideration is the first plan in the state adopted through the process required by NRS § 534.037. As with most decisions involving water, the conditions and issues facing Diamond Valley are unique to Diamond Valley, and therefore the requirements of this plan may not be suitable for any other area in the state. Many individuals speaking in support of the plan made this observation, and the State Engineer concurs that the Diamond Valley GMP does not limit the possible solutions that may be employed by other groundwater management plans.

WHEREAS, based upon the foregoing, the State Engineer makes the following findings of fact, conclusions of law and order:

The State Engineer finds that Appendix D to the GMP sufficiently describes (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; and (e) the wells located in the basin, including, without limitation, domestic wells.

The State Engineer finds that there is currently no groundwater management plan in existence for Diamond Valley.

The State Engineer finds that the GMP is analogous to the settlement agreement at the center of the *Lewis* case, *i.e.*, an agreement supported by at least a majority of the permit and certificate holders in Diamond Valley to protect existing rights while cutting the Gordian knot of basin over-appropriation. Thus, the State Engineer concludes that adoption of the GMP is expressly authorized by statute and does not violate the prior appropriation doctrine because the statute provides flexibility outside strict regulation by priority.

The State Engineer finds that the GMP is not legally deficient nor waives any authority of the State Engineer to enforce Nevada water law.

The State Engineer finds that due to the length of time required, initiating abandonment or forfeiture proceedings or requiring proof of beneficial use prior to implementing a GMP is not in the best interest of reducing pumping and would only serve to delay such reductions.

As discussed in the introductory paragraphs, over 96% of committed rights are represented in the plan; therefore, the State Engineer finds that given the overwhelming majority of irrigation rights and mining and milling rights having irrigation base rights, and that the application of the plan to those rights that will have the most impact, and that will be the most impacted, is appropriate.

The State Engineer finds that public and local community interests have been considered, and that such interests are a cornerstone of the plan by retaining the greatest number of farms or mines as economically viable, which will provide social, economic, and environmental benefits.

The State Engineer finds that the standard for determining success of the plan by stabilizing water levels is sound.

The State Engineer finds that groundwater modeling is an informative tool for projecting the effects of pumping reduction, and that future model results could add confidence to decisions on any changes to pumping reductions, but that the lack of a groundwater model or hydrogeologic analysis does not preclude approval of the GMP as written.

The State Engineer finds that the GMP's annual reductions in pumping will lead to the entire basin's groundwater pumping approaching the perennial yield and stabilization of groundwater levels.

The State Engineer finds that the GMP is a groundwater management plan and is not a monitoring, management and mitigation plan; therefore, not only is there no requirement that there be a mitigation component or thresholds and triggers for activation of mitigation actions, but also such components would cloud the plan's goal and objectives.

The State Engineer finds that 1 acre-foot is equal to 325,851 gallons pursuant to practice and policy of the Office of the State Engineer, and that this conversion rate will be used.

In light of the foregoing findings, having considered the comments for and against the GMP, the State Engineer concludes that the petitioning parties have met the requirements for the adoption of the Diamond Valley Groundwater Management Plan, and the Petition is accordingly granted.

ORDER

NOW THEREFORE, it is ordered that the Petition to Adopt the Groundwater Management Plan for the Diamond Valley Hydrographic Basin is hereby GRANTED.



JASON KING, P.E.
State Engineer

Dated at Carson City, Nevada this

11TH day of JANUARY, 2019.

EXHIBIT 2

EXHIBIT 2

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

IN THE MATTER OF THE PETITION FOR
APPROVAL OF THE PROPOSED DIAMOND
VALLEY GROUNDWATER MANAGEMENT
PLAN.

**SADLER RANCH, LLC'S OBJECTIONS TO
THE DIAMOND VALLEY GROUNDWATER MANAGEMENT PLAN**

COMES NOW, Sadler Ranch, LLC ("Sadler Ranch") by and through its attorneys of record, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby respectfully submits its objections to the proposed Diamond Valley Groundwater Management Plan ("GMP").

INTRODUCTION

The proposed GMP fails to adequately protect the Diamond Valley groundwater aquifer and the vested, domestic, and other water rights holders who rely on it. The proposed GMP also fails to meet the requirements of NRS 534.037 because it is not supported by substantial evidence showing that its implementation will result in the removal of the basin's designation as a critical management area ("CMA"). The proposed reductions in pumping would allow perpetual drawdown of water levels in the basin, beyond the life of the plan, without providing any mitigation for the harm done to pre-statutory vested water rights holders.

The proposed GMP violates other important provisions of Nevada's water laws. For example, the proposed GMP improperly allows water users to "bank" unused water in the aquifer for use in later years despite the fact that no application for an Aquifer Storage and Recovery ("ASR") project has ever been applied for or approved by the State Engineer and that this water is not available for storage because it is water allocated in excess of the basin's perennial yield. The proposed GMP also improperly limits the State Engineer's ability to make and enforce needed regulations for the basin.

Because the GMP fails to meet the statutory criteria for approval and violates important provisions of Nevada's existing water law, it should not be approved.

JURISDICTION AND STANDING

The State Engineer is authorized under NRS 534.037 to consider the adoption of a groundwater management plan upon submission of a petition requesting the same signed by a majority of the holders of water rights within the basin. Upon receipt of such a petition, the State Engineer is required to hold a hearing to take testimony and consider evidence for and against the plan. On October 1, 2018, the State Engineer issued a notice indicating that he had received a petition requesting approval of the proposed GMP and setting a date for a hearing. Accordingly, the State Engineer has jurisdiction to consider Sadler Ranch's objections to the proposed GMP.

Sadler Ranch is the owner and operator of one of the oldest continuously operated ranches in Nevada. The ranch is located in the Diamond Valley hydrographic basin and was established by Reinhold Sadler who served as governor of Nevada from 1896 to 1903. The ranch consists of more than 3,000 acres of privately held property. Over 2,000 acres of the ranch was historically irrigated with water from the Big Shipley and Indian Camp Springs. The State Engineer has previously determined that the water from these springs is hydrologically connected to the groundwater aquifer in Diamond Valley and that pumping in the aquifer by holders of junior priority permits has detrimentally impacted the flow of Sadler Ranch's springs.¹ In addition to its pre-statutory vested rights Sadler Ranch owns groundwater permits issued by the State Engineer that may be subject to the provisions of the GMP.² Accordingly, Sadler Ranch has standing to file the instant objections, provide testimony and evidence at the GMP hearing, and appeal any approval of the GMP pursuant to the provisions of NRS 534.037(4) and NRS 533.450.

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¹ See State Engineer Ruling 6290.

² The question of whether the proposed GMP can be involuntarily enforced against holders of permits who did not consent to the plan is an open question of law. Sadler Ranch expressly reserves its right to challenge enforcement of the provisions of the proposed GMP against its state-issued water rights permits.

STANDARD OF REVIEW

Under NRS 534.037(1) a groundwater management plan is required to include "the necessary steps for removal of the basin's designation as a critical management area." A basin is designated as a CMA when "withdrawals of groundwater consistently exceed the perennial yield of the basin."³ Accordingly, to approve a groundwater management plan, the State Engineer must determine that the plan will result in withdrawals of groundwater from the basin being less than the basin's perennial yield.

All State Engineer determinations must be supported by substantial evidence in the record.⁴ Substantial evidence is evidence that a reasonable person would accept as adequate to support a conclusion."⁵ The Nevada Supreme Court has ruled that the substantial evidence standard of review is reliant on the fullness and fairness of the proceedings in front of the State Engineer and includes a requirement that the State Engineer clearly resolve all objections raised and provide detailed findings regarding those objections.⁶

Therefore, to approve the proposed GMP, the State Engineer must specifically reference substantial evidence in the record demonstrating that the implementation of the GMP will result in withdrawals of water in the basin consistently remaining below the 30,000 acre-feet/year ("afy") perennial yield of the basin previously established by the State Engineer.⁷ Any proposed groundwater management plan must also comply with the existing water law statutes.

In these proceedings the State Engineer is acting in a quasi-judicial capacity. Quasi-judicial proceedings "are those proceedings having a judicial character that are performed by administrative agencies."⁸ The functions of a quasi-judicial proceeding include "hearing the parties in open forum, taking the matter under advisement, deliberating, writing a written decision,

³ NRS 534.110(7).

⁴ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

⁵ *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010).

⁶ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

⁷ See Nevada Division of Water Resources, Hydrographic Area Summary for Basin 153 (Diamond Valley).

⁸ *Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 122 Nev. 384, 390, 135 P.3d 220, 223 (2006).

and making that decision available to the parties and to the public.”⁹ Like a judge in a court of law, the agency’s function in a quasi-judicial proceeding is *not* to act as an advocate for one party, but to judge the request before it in a neutral and impartial manner.

In State Engineer proceedings, the burden of proof is on the party requesting approval of its application or plan.¹⁰ Accordingly, the proponents of the GMP bear the burden of providing evidence demonstrating that the GMP will reduce withdrawals of water in the basin below the established perennial yield. The proponents cannot rely on the State Engineer to provide this evidence for them, or to fill in evidentiary gaps. Instead, they, themselves, must provide all the evidence required to meet the burden. In addition, such evidence must be relevant, authenticated, and credible. Based on the evidence included with the proposed GMP, the proponents have failed to meet their burden.¹¹

OBJECTIONS

The proposed GMP, as submitted, does not contain the necessary steps for removal of the CMA designation from Diamond Valley. First, the proposed pumping reductions are inadequate and authorize continued groundwater mining. Second, the proposed GMP continues to harm holders of senior vested rights in the basin. Third, several provisions of the proposed GMP violate Nevada’s existing water laws.

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⁹ *Ariz. P.C., Inc. v. Ariz. Bd. of Tax App., Div. 1*, 558 P.2d 697, 699 (Ariz. 1978).

¹⁰ *JM v. Dep’t of Family Servs.*, 922 P.2d 219, 221 (Wyo. 1996) (“The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof.”) (citing BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 7.8 (2d ed. 1984)).

¹¹ The State Engineer has not established a formal evidence exchange prior to the hearing or required pre-hearing briefs from the parties. Accordingly, the only evidence that Sadler Ranch has had the opportunity to review is the proposed GMP and the appendices attached thereto.

I. The GMP's proposed pumping reductions are inadequate because they will not cause withdrawals in the basin to be reduced below the established perennial yield, were not developed using the groundwater model, and have no monitoring plan or triggers and thresholds to guide future management decisions.

For over 45 years pumping in Diamond Valley has consistently exceeded the basin's perennial yield.¹² Even under the most aggressive pumping reduction schedule provided in the GMP, at the end of the plan (35 years from now) withdrawals in the basin will still exceed the available water. This continuing deficit means that the proposed GMP does not meet the statutory mandate requiring withdrawals be less than the perennial yield. The purpose for the requirement that a proposed GMP bring withdrawals in a basin below the perennial yield is to ensure that groundwater levels will stabilize as a result of the implementation of the plan. Otherwise, groundwater mining of the aquifer will continue indefinitely and senior water right holders will continue to be harmed.

The proposed GMP states that the plan "must set forth the necessary steps for removal of the basin's designation as a critical management area" and that the standard for designating a critical management area is whether "withdrawals of groundwater consistently exceed the perennial yield of the basin."¹³ In addition the proponents state that one of their goals is to "stabilize groundwater levels of the aquifer."¹⁴ However, the proposed GMP lacks any scientific analysis describing how the pumping reduction goals relate to the characteristics of the Diamond Valley aquifer or whether these goals will actually result in a stabilization of groundwater levels. Absent credible scientific evidence showing that the proposed pumping reductions will correct the current basin deficit, and thereby meet the statutory goal of achieving a stabilization of groundwater levels, the State Engineer lacks substantial evidence to approve the plan.

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¹² The State Engineer has determined that the perennial yield of the basin is 30,000 afa. See Nevada Division of Water Resources, Hydrographic Area Summary for Basin 153 (Diamond Valley). Since 1971, pumping has consistently exceeded this level. See GMP at 169 (Figure 6).

¹³ GMP at 10 (quoting NRS 534.037(1) and NRS 534.110(7)(a)).

¹⁴ GMP at 18.

A. The GMP contains no groundwater modeling or other evidence demonstrating that the reductions in pumping will result in a stabilization of groundwater levels.

The only way to determine whether the proposed pumping reductions will result in a stabilization of groundwater levels is to retain a groundwater modeling expert and have them perform groundwater model simulations using various pumping reduction scenarios. This has not been done. The groundwater model that was used to determine the evapotranspiration depreciation percentages used in Section 13.9 of the plan¹⁵ should also be used to determine the effect of the proposed pumping reductions on the aquifer.

The State Engineer has regularly required groundwater modeling of this type when reviewing permits requesting both new appropriations of groundwater and changes to existing appropriations. Because the proposed GMP allows water to be freely moved around the basin, and to be used for different purposes,¹⁶ it should be treated in the same manner, and held to the same standards, as a change application. Since the State Engineer would require individuals submitting change applications of this magnitude to engage in some form of groundwater modeling to demonstrate that the pumping associated with such applications will not result in groundwater mining, he should do the same here.

Given that a groundwater model has already been developed for the Diamond Valley basin, it is unclear why this model was not used to evaluate the proposed GMP. The only reasonable inference that can be drawn from the failure to do so is that the proponents of the GMP instinctively know what such modeling will show – that the reductions in pumping proposed in the plan are inadequate to stem the existing groundwater declines and bring the basin back into balance.¹⁷ Without a groundwater model simulation showing that the proposed reductions in pumping will balance the water budget in the basin and thereby halt the continuing decline in

¹⁵ GMP Appendix I.

¹⁶ See GMP at 17 (Section 13.8 states that “[g]roundwater subject to this GMP may be withdrawn from Diamond Valley for any beneficial purpose under Nevada law.”)

¹⁷ See *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006) (“When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced.”).

groundwater levels, the State Engineer lacks the substantial evidence needed to support approval of the proposed GMP.

B. The proposed GMP does not include a monitoring plan to measure its effectiveness in stabilizing water levels in the basin.

The proposed GMP includes an appendix with two proposed pumping reduction schedules – a “Benchmark” schedule and a “Most Aggressive” schedule.¹⁸ The plan states that, after an initial 10-year period, the State Engineer may adjust the benchmark pumping reduction schedule based on “groundwater level monitoring data multi-year trends.”¹⁹ However, there is no description in the proposed GMP of the number or locations of the groundwater monitoring wells, the devices that will be used to measure groundwater levels, the frequency of observation, or the party responsible for taking measurements. There is also a lack of analysis regarding the placement of the monitoring wells and devices and a description of why such locations were chosen. In short, the proposed GMP fails to include a monitoring plan that can be used to guide the State Engineer in his decision-making process.

The Hydrologic Setting report included with the proposed GMP states that “[g]roundwater exploitation in the basin has caused the discharge from many springs to decline or cease to flow altogether.”²⁰ To be effective, any monitoring plan must provide for monitoring wells and devices that can specifically track the spread of the cone of depression from the southern pumping into these sensitive areas. Other natural resources that are being affected by the over-pumping of the basin must be identified and monitored as well. As the water table drops because of the continued over-pumping authorized by the plan, there should be system of tracking the effects of these declines on irrigation domestic, municipal, mining and stockwater wells in the basin. Without an effective monitoring plan, there will be no evidentiary basis the State Engineer can rely on in making the decision whether to attenuate or accelerate future pumping reductions.

¹⁸ GMP at 293.

¹⁹ GMP at 18 (Section 13.13).

²⁰ GMP at 276.

C. **The proposed GMP does not include objective thresholds and triggers to determine whether more aggressive reductions in pumping will be required.**

The Nevada Supreme Court has determined that any decision made by the State Engineer regarding future water withdrawals in a basin must be based on “presently known substantial evidence, rather than information to be determined in the future.”²¹ Accordingly, if a plan requires the State Engineer to make future determinations it must include objective triggers and thresholds to guide the State Engineer in making his decision.

As noted above, under the proposed GMP the State Engineer has the authority to increase pumping reductions beyond those provided in the benchmark schedule.²² However, there are no objective standards guiding such a decision. Instead, the State Engineer is merely directed to consult with the Advisory Board and review multi-year groundwater data. Nothing in the plan lists factors or considerations that the Advisory Board and State Engineer must consider in making their decision. There are also no objective triggers or thresholds which, if crossed, require additional action be taken (i.e., if groundwater monitoring and modeling shows X, then the Advisory Board and the State Engineer must do Y).

Because the proposed GMP does not include any objective triggers and thresholds to guide the Advisory Board and State Engineer in making required future determinations, it does not provide substantial evidence showing that it includes the necessary steps to bring the basin back into balance.

D. **The proposed GMP improperly limits the State Engineer’s discretion to order accelerated pumping reductions.**

In addition to not providing objective triggers and thresholds to guide the determination of whether more aggressive pumping reductions are needed, the proposed GMP also artificially limits the State Engineer’s discretion regarding how much of an accelerated reduction can be ordered. Under the plan, the State Engineer is strictly prohibited from deviating from the

²¹ *Eureka Cnty. v. State Engineer*, 131 Nev. Ad. Op. 84, 359 P.3d 1114, 1120 (2015).

²² GMP at 18 (Section 13.13).

benchmark reductions during the first 10-years of the plan.²³ Then, after the 10-year period expires, the State Engineer is only authorized to increase or decrease pumping reductions by a maximum of two percent per year.²⁴ This means that even if groundwater levels continue to decline, and even if such declines have catastrophic results, the State Engineer will be prohibited from taking action to correct the problem. Such provisions represent an unlawful intrusion on the State Engineer's authority to regulate the groundwater basin in a manner that protects both the environment and vested water right holders.

The Legislature has granted the State Engineer the power to "supervise" all groundwater wells within a basin (except domestic wells)²⁵ and "make such rules, regulations and orders as are deemed necessary essential for the welfare of the area involved."²⁶ In addition, the Legislature has authorized the State Engineer to order a curtailment of pumping in basins where evidence indicates that "average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees."²⁷ The State Engineer's authority under these provisions may not be limited or waived by the approval of a GMP.

With the adoption of NRS 534.037 and NRS 534.110(7) the Legislature permissively allowed the State Engineer to consider approving a GMP in lieu of regulation by priority. However, the Legislature did not, either expressly or impliedly, state that a GMP can excuse the State Engineer from exercising his general regulatory authority or limit the manner in which he may do so. The purpose of a GMP is to provide water right holders the opportunity to take collective action to limit their own appropriations in a manner that benefits everyone. The Legislature did not authorize a GMP to create an entirely new regulatory scheme that exempts water users from the State Engineer's general regulatory authority or from other mandatory provisions of the water law.

²³ GMP at 18 (Section 13.13).

²⁴ *Id.*

²⁵ NRS 534.030(4).

²⁶ NRS 534.120(1).

²⁷ NRS 534.110(6).

Because the proposed GMP unlawfully restricts the State Engineer's ability to adopt future regulations if such regulations are needed to protect the groundwater resource in Diamond Valley, the GMP cannot be approved in its current form.

II. The GMP does not protect holders of senior vested rights.

A basic principle of Nevada's water laws is that vested rights to water (i.e., groundwater rights established before 1939²⁸ and artesian surface water rights established before 1913²⁹) cannot be impaired by any action of the State Engineer. Adopting a groundwater management plan that authorizes continued water level declines, where such declines will continue to impact vested rights, would violate this non-impairment principle.

A. The GMP ignores the impacts to senior vested rights holders of allowing for 35 more years of over-pumping of the basin aquifer.

In 1968, J.R. Harrill, a USGS scientist, estimated that the top 100 feet of alluvium in the Diamond Valley basin holds approximately two million acre-feet of water.³⁰ This is commonly understood to be the quantity of water that can be removed from a basin during the time it transitions to a new equilibrium in response to groundwater development (i.e., transitional storage) as long as such withdrawals do not impact existing water users. Since the late 1960s, groundwater pumping in Diamond Valley has already captured 1.75 million acre-feet, or 87.5% of this water.³¹ Despite this, the proposed GMP allows the over-pumping to continue for another 35 years³² By the end of this 35-year period, it is estimated that more than 2.5 million acre-feet will have been removed from basin storage with no equilibrium in sight.³³ This means that not only will the irrigators in Diamond Valley have mined the entire quantity of transitional storage in the basin,

²⁸ NRS 534.100(1).

²⁹ NRS 533.085(1).

³⁰ Exhibit 1.

³¹ *Id.*

³² As noted above, even after the 35-year period has expired, withdrawals of water from the basin will continue to exceed recharge by a significant amount.

³³ Exhibit 1.

they will have also mined an additional 500,000 acre-feet of water from the permanent aquifer with no end in sight.

Holders of senior-priority vested rights have already borne the brunt of this recklessness. Most of the artesian springs in the basin have stopped flowing or had their flows significantly reduced. In addition, land subsidence associated with groundwater declines has damaged property.³⁴ The subsidence has also resulted in uneven terrain on the ranch that has eliminated the ability to flood irrigate certain fields that were historically irrigated in this manner.³⁵ Continued over-pumping in the basin will only worsen the problem. As the USGS predicted, even with the pumping reductions in the proposed GMP, water levels in the basin will continue to decline thereby furthering the harm done to the vested right holders.

B. The GMP fails to provide adequate mitigation for the existing and future harms senior vested rights holders have suffered and will continue to suffer.

The proponents of the GMP claim that its purpose is not to address the inequities of the past, but to try and provide a path forward.³⁶ Assuming, *arguendo*, that this is an appropriate response to property owners who have suffered significant losses as a result of past over-pumping, if the plan authorizes continued pumping that harms such individuals it must also include mitigation measures to offset those harms.

While several vested right holders have been issued mitigation rights to replace lost spring flows, these rights do not provide the full measure of mitigation they are entitled to by law.³⁷ A senior water right holder who has been harmed by a junior right holder has the right to demand the full delivery of his water, at his customary headgate, *at no additional cost*.³⁸ Vested right

³⁴ Exhibit 2.

³⁵ For additional information regarding the land subsidence problem in Diamond Valley see generally REI ARAI, APPLICATION OF SYNTHETIC APERTURE RADAR INTERFEROMETRY (INSAR) IN DEFINING GROUNDWATER-WITHDRAWAL-RELATED SUBSIDENCE, DIAMOND VALLEY, NEVADA (August 2009).

³⁶ GMP at 241 ("This GMP does not address the inequities of the past.").

³⁷ Sadler Ranch continues to dispute whether the quantity of its mitigation rights provide the same quantity of water as was historically used on the ranch.

³⁸ See *Pima Farms Co. v Proctor*, 245 P. 369, 372-73 (Ariz. 1926) ("An appropriator of water from a running stream is entitled to have it flow down the natural channel to his point of diversion undiminished in quantity and quality or, if diverted from the natural channel by other appropriators for their convenience, to have it delivered to him at available points by other means provided by subsequent appropriators and *at their expense*.") (emphasis added).

holders like Sadler Ranch historically received their water from free-flowing groundwater springs. To access this water, they did not incur any expenses associated with drilling a well, installing and maintaining well pumps, or paying for electricity to run the pumps.

The mitigation rights the State Engineer issued do not provide any mitigation for the costs of diverting and using the water. Because of this, Sadler Ranch and other senior vested right holders have not received full mitigation for past and future damages to their water rights. This problem could be resolved in a properly formulated groundwater management plan. Such a plan would impose an assessment on junior water right holders and place the money in a fund that could be used to pay the additional costs incurred by the senior vested right holders. Unfortunately, the proposed GMP does no such thing, choosing instead to ignore vested rights holders altogether.

Because the proposed GMP does not provide adequate mitigation for the continued harm that will be inflicted on vested right holders as a result of continued over-pumping of the basin, substantial evidence does not exist to support its approval.

C. The governance portions of the GMP must be changed to allow adequate representation by senior rights holders.

The proposed GMP sets up an Advisory Board that will make recommendations to the State Engineer regarding plan management. The governance structure of this Advisory Board is heavily weighted in favor of junior water right holders who will have the ability to effectively silence the concerns of vested right holders.³⁹ To resolve this issue, and ensure that the Advisory Board operates in a fair and impartial manner, holders of vested senior water rights should be afforded equal representation on the Advisory Board. For example, if the Advisory Board has eight seats, four seats should be allocated to senior vested right holders, and four seats allocated to the permit holders. As the GMP is currently written, junior water right holders will be able to select the person who represents vested right holders on the Advisory Board. Instead, the plan

³⁹ Exhibit 1.

should require that members of the Advisory Board representing specific water rights holders should be chosen only by those individuals.

III. Several provisions of the proposed GMP violate existing provisions of Nevada water law.

As noted above, the adoption of a GMP does not exempt water users in a basin from compliance with mandatory provisions of the statutory water law. Despite this, several provisions in the proposed GMP directly violate Nevada's water laws and water permitting requirements.

A. Allowing water users to store unused water in the aquifer for use in later years without an approved aquifer storage and recovery permit violates the NRS 534.250 and other provisions of Nevada's water law.

Nevada's statutory water law authorizes the State Engineer to approve ASR projects if those projects meet certain requirements. The proposed GMP sets up an ASR banking program that authorizes water users in Diamond Valley to "bank" their unused water allocations from one year and use or sell them in subsequent years.⁴⁰ In Appendix I of the proposed GMP Mr. Bugenig, a consulting hydrogeologist, states that:

The ability to "bank" the unused portion of an Annual Groundwater Allocation is an essential part of the Diamond Valley Groundwater Management Plan (Plan). Water banking, or saving un-pumped groundwater for use in a subsequent year or years, *is a type of aquifer storage of recovery (ASR) program regulated by the Nevada State Engineer.*⁴¹

Therefore, the banking program outlined in the proposed GMP falls within the definition of an ASR project under Nevada law and is required to comply with the statutes governing such projects.

Under Nevada law an ASR project must be properly permitted, the water being stored must be available for appropriation, and the plan must be hydrologically feasible. The ASR banking program proposed in the draft GMP does not meet any of these criteria.

⁴⁰ GMP at 17 (Section 13.9).

⁴¹ GMP at 305 (emphasis added).

1. **Banking water in the aquifer for use in later years requires a valid ASR permit.**

Under NRS.250(1) “[a]ny person desiring to operate a[n ASR] project must first make an application to, and obtain from, the State Engineer a permit to operate such a project.” The permit application must include, among other things, evidence of technical and financial feasibility, an identification of the source, quality, and quantity of water to be banked, the legal basis for acquiring and using the water in the project, and a hydrologic study demonstrating that the project is hydrologically feasible and will not cause harm to other users of water in the basin.⁴² Before approving such an application, the State Engineer must determine that: (1) the applicant has the technical and financial capability to operate the project, (2) the applicant has a right to use the proposed source of water for recharge, (3) the project is hydrologically feasible, and (4) the project will not cause harm to other users of water.⁴³ The State Engineer must also require the applicant to monitor the operation of the project and the project’s effect on other water users.

The submission of a proposed groundwater management plan is not a substitute for the filing of an application to operate an ASR project. First and foremost, the proposed GMP does not include the mandatory information required for an ASR application to be deemed complete. Second, the proposed GMP was not noticed and published pursuant to the requirements of NRS 534.270. Finally, the “Memo” from Mr. Bugenig that is described in the proposed GMP as a “Groundwater Flow Modeling Report” addresses only one specific issue related to the ASR banking program – the depreciation factors used in the proposed GMP. The Memo does not demonstrate that the ASR banking program is hydrologically feasible and that it will not harm other water users.

Because the proper procedures have not been followed to establish an ASR banking program under Nevada law, and because this program has been deemed an “essential” component of the proposed GMP, the State Engineer lacks the substantial evidence needed to approve the GMP.

⁴² NRS 534.260.

⁴³ NRS 534.250(2).

2. Because water above the perennial yield is not available for appropriation, it cannot be used to support an ASR banking program.

As noted above, before the State Engineer can approve an ASR banking program he must determine that the water to be stored is otherwise available for appropriation.⁴⁴ Here the water proposed to be stored is from water rights permits that were issued above the basin's perennial yield. By definition, this is not water that is available for appropriation. Rather, it is water that is being unlawfully mined from the aquifer.

As defined in the proposed GMP, the perennial yield of the basin represents the "maximum amount of groundwater that can be salvaged each year."⁴⁵ This is the only water that is actually available for appropriation in Diamond Valley. In any given year, once withdrawals hit 30,000 acre-feet no other water remains available for use. The only way unused water allocations would be theoretically available to be stored in an ASR banking program would be if total withdrawals from the basin in a given year were less than 30,000 acre-feet. In that case, the total quantity of water available to be stored would be limited to the difference between the quantity of the withdrawals and the perennial yield (i.e., if total withdrawals in a given year were only 28,000 acre-feet, and the perennial yield is 30,000 acre-feet, then a maximum of 2,000 acre-feet would be available for banking).

Because the proposed GMP cannot demonstrate that the "unused" water that will be placed in the ASR banking program is available for appropriation the GMP violates Nevada's water laws governing ASR projects and cannot be approved in its current form.

3. The storage loss coefficients proposed in the GMP are not supported by substantial evidence in the record.

Section 13.9 of the proposed GMP states that "[b]anked groundwater shall be reduced at seventeen percent (17%) annually for water banked north of the dividing line and one percent (1%) annually for water banked south of the dividing line."⁴⁶ This division is supposedly justified

⁴⁴ NRS 534.250(2)(b).

⁴⁵ GMP at 7.

⁴⁶ GMP at 17.

based on Mr. Bugenig's memo that is included in Appendix I.⁴⁷ In the memo Mr. Bugenig presents the results of a groundwater model simulation he performed. However, neither the memo, nor the proposed GMP, contain the numerical model, the modeling report, or an analysis of model calibrations and fit. Without this information there is no way to replicate Mr. Bugenig's findings.

Mr. Bugenig states that a depreciation rate was calculated by dividing the basin along an east/west line that follows a topographic divide.⁴⁸ Model simulations were then used to calculate the rate of groundwater loss to evapotranspiration for each of the sub-basins and this figure was determined to be the depreciation rate that should be applied within each sub-basin.⁴⁹ This approach ignores the fact that, according to the USGS, the groundwater divide in the basin is actively propagating northward as a result of the expanding cone of depression created by the over-pumping in the south. Therefore, groundwater lost to evapotranspiration in the north will continue to decline.

Mr. Bugenig also ignores the fact that no additional water will actually be stored in the basin as a result of the ASR banking program. Since the banking of a share allocation does not actually place additional water into the aquifer for storage, there is no stored water on either side of the groundwater divide that will actually be lost to evapotranspiration. Accordingly, applying a depreciation factor to any of the banked water, and applying different depreciation factors in different parts of the basin, is nonsensical.

Because Mr. Bugenig's memo is not accompanied by the numerical groundwater model, the modeling report, or an evaluation of model calibration and fit, his conclusions are unsupported and the memo should not be used as evidence to support the adoption of the proposed GMP.

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⁴⁷ GMP at 305.

⁴⁸ GMP at 306.

⁴⁹ GMP at 309.

B. The proposed GMP cannot waive mandatory provisions of the existing water law.

The provisions of the water law statute that allows for the designation of CMAs and the development of groundwater management plans contemplated changes in the management of water rights based on the consent of the property owners. Property owners can voluntarily choose to enter into a groundwater management plan whereby the pain of pumping reductions is shared between them, rather than seek strict enforcement of their priority rights. In providing this option, however, the Legislature did not contemplate changes to the State Engineer's statutory authority or authorize deviations from other mandatory provisions of the water law. Following are some examples of provisions in the proposed GMP that violate this principle.

1. The proposed GMP unlawfully allows water right holders to change the point of diversion, manner of use, and place of use of their permits without submitting an application to do so with the State Engineer.

Another essential component of the proposed GMP is the ability of water right shareholders to freely transfer and sell their water allocations to other users. In addition, while all the permits that are being converted into transferrable shares have a designated manner of use of irrigation, the GMP provides that shareholders may use their allocations for "any beneficial purpose under Nevada law."⁵⁰ This, in effect, converts the state-issued water rights permits, with well-defined places and manners of use, into a type of super-permit whose water can be diverted and used anywhere in the basin for any purpose whatsoever without complying with the permitting statutes.

Pursuant to NRS 533.325 "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 . . . apply to the State Engineer for a permit to do so." Under NRS 533.345 any application requesting to change an existing water right "must contain such information as may be necessary to a full understanding of the proposed change." The purpose for requiring an applicant to submit a change application is to ensure that the changes being proposed will not have a negative impact

⁵⁰ GMP at 17 (Section 13.8).

on other water users in the basin. Both statutes contain the mandatory language – “shall” and “must.”⁵¹ Because these provisions are mandatory, the State Engineer has no authority, either through approval of a GMP or otherwise, to waive them.

In addition, NRS 533.330 provides that “[n]o application shall be for the water of more than one source *to be used for more than one purpose.*”⁵² Accordingly, no water right permit may authorize water to be placed to more than one use and each beneficial use of water must be authorized by a separate permit. Again, the statute uses the mandatory language “shall” indicating that this is a non-waivable requirement. Because the permits underlying the shares distributed under the proposed GMP specify a particular beneficial use (irrigation), the GMP cannot authorize water users to place the water to some other use. As noted in the proposed GMP, water used for irrigation is not fully consumed by crops and a portion of the water ends up recharging the basin.⁵³ This is not the case with other beneficial uses, which generally consume the full duty of the appropriated water. Therefore, the proposed GMP will allow irrigation water users to convert their water to other higher consumptive uses without considering the lost recharge to the aquifer from the non-consumptive portion of their original permits. This violates standard water management practices that allow only the consumptively used portion of an irrigation permit to be transferred to another use.

Because the State Engineer is without authority to waive the requirement that a water user must submit an application before making any change in a place of diversion, place of use, or manner of use of an existing water right, and because no water right permit can be authorized for more than one beneficial use, the proposed GMP cannot be approved as submitted.

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⁵¹ See NRS 0.025(c) & (d) (“ ‘Must’ expresses a requirement”; “ ‘Shall’ imposes a duty to act.”).

⁵² Emphasis added.

⁵³ GMP at 269.

2. **The proposed GMP unlawfully authorizes the State Engineer to exempt wells from the well abandonment requirements of NRS 534 and NAC 534.**

The proposed GMP states that “[w]ells kept active and linked to a Groundwater Allocation Account shall be exempt from well abandonment requirements of NRS 534 and NAC 534.”⁵⁴ However, as discussed above, a GMP simply cannot exempt owners of wells from the existing statutes and regulations governing those wells. The Legislature established the well abandonment requirements of NRS 534. The State Engineer does not have any authority to override the Legislature and waive those mandates. Accordingly, this provision of the proposed GMP is unlawful and should be removed.

3. **The proposed GMP unlawfully places time limits on the State Engineer to perform certain actions and deems regulated activity automatically approved if the State Engineer fails to meet the time limits.**

Section 14.8 of the proposed GMP attempts to set up an alternative process for the approval of new, temporary wells.⁵⁵ Under this process, the State Engineer has just 14 days to evaluate an application for a new well, or increased diversions from an existing well. If the State Engineer fails to meet this deadline, the new well is deemed to be automatically approved.

The State Engineer must carefully consider all requests and applications submitted to him. This is a duty that cannot be waived. Where the circumstances of a particular request require additional study or evaluation, the State Engineer would be remiss to ignore these facts and instead act on the request simply to meet some artificial deadline.

As noted above, in administrative law the burden of proof rests with the party making a request or application unless a legislative statute provides otherwise. Only the Legislature, not the State Engineer or the proponents of the GMP, can shift the burden of proof to the State Engineer and declare that applications not acted upon within a certain timeframe will be automatically approved. Because the State Engineer does not have the authority to authorize a

⁵⁴ GMP at 19 (Section 14.2)

⁵⁵ GMP at 20.

permitting scheme whereby requests are deemed approved unless acted upon within a certain timeframe, Section 14.8 must be eliminated from the proposed GMP.

IV. Prior to approving and implementing the GMP, the State Engineer should require permits to be proven up and bring proceedings to forfeit unused permits.

As noted in the proposed GMP, committed groundwater rights (not including vested claims) total more than 131,000 acre-feet/annually.⁵⁶ However, the proponents of the proposed GMP admit that “[a] significant amount of these water rights are currently not being exercised, such that approximately 76,000 acre-feet per year are being pumped at present.”⁵⁷ Under NRS 534.090, water rights that have not been used for five consecutive years are subject to forfeiture pursuant to a statutory process. Prior to approving any groundwater management plan for Diamond Valley, the State Engineer should pursue forfeiture of all unused water rights in the basin.

To do otherwise would be to provide a financial windfall to the holders of the unused permits. Under the proposed GMP every permit holder, including holders who have consistently failed to put their water to beneficial use, will have their water rights permits converted into allocated water shares.⁵⁸ As noted above, these shares are freely transferable throughout the basin and can be sold to other parties.⁵⁹ Accordingly, under the GMP, a water permit holder whose rights would otherwise be subject to forfeiture will be given new, transferable water right shares. Water permit holders with these rights will be able to trade these inactive paper rights as shares which can then become active and be used to gain the right to pump water. The proposed GMP should fully quantify and account for these inactive water rights and evaluate how their conversion to shares will impact other water rights in the basin.

The proposed GMP also provides that annual water allocations for each shareholder will be determined by dividing the total allowed pumping for that year by the total number of issued

⁵⁶ GMP at 263.

⁵⁷ *Id.*

⁵⁸ GMP at 15.

⁵⁹ GMP at 17.

shares.⁶⁰ Because of this, holders of unused water permits will receive their share allocations at the expense of permit holders who properly maintained and used their permits. This is patently unfair.

When the statute authorizing GMPs was before the Legislature, Assemblyman Goicoechea, the bill's sponsor, raised this very issue. He stated that "[w]e have paper water rights and we have wet water rights in all these basins. Some of them are a water right that is being held and really does not have any proof of beneficial use attached to it."⁶¹ Assemblyman Goicoechea stated that to resolve this issue a proposed GMP "will clearly have to require some people to surrender those paper rights [i.e., the perpetually unused rights]."⁶² Nowhere, was it stated that holders of unused rights will be allowed to profit from their failure to use the water by converting their rights to tradeable shares.

Therefore, approval of the proposed GMP should be delayed until after the State Engineer first initiates proceedings to forfeit the significant quantity of unused water rights in Diamond Valley.

CONCLUSION

For the reasons stated above, and others that may be raised in these proceedings,⁶³ Sadler Ranch respectfully requests the State Engineer reject the proposed GMP as submitted. However, Sadler Ranch also respectfully requests that, in doing so, the State Engineer provide specific guidance to the proponents of the GMP regarding how a future groundwater management plan should be developed and what it must include. Sadler Ranch has strongly supported the designation of Diamond Valley as a CMA and believes that approval and implementation of a properly designed GMP could be beneficial. Such a GMP should include the following elements:

⁶⁰ *Id.*

⁶¹ Minutes of the March 30, 2011, Assembly Committee of Government Affairs at 70.

⁶² *Id.* at 71.

⁶³ Because there has been no formal briefing or evidence exchange prior to the October 30, 2018, hearing, Sadler Ranch reserves the right to raise additional issues or arguments in response to testimony or evidence presented by other participants (including, without limitation, the State Engineer or his staff) during or after the hearing.

(1) pumping reductions based on groundwater modeling demonstrating that such reductions will halt continued water level declines in the basin over a 10-year period, (2) a monitoring plan that measures the actual effectiveness of the pumping reductions and that will operate as a positive feedback mechanism to guide future management decisions, (3) triggers and thresholds tying future management decisions to objective criteria (like specific groundwater levels), (4) a mitigation plan that includes compensation to vested right holders for costs associated with drilling, installing, maintaining, and operating their mitigation wells, and (5) a governance structure that provides equal representation for the vested right holders.

Respectfully submitted this 2nd day of November, 2018.

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

By: 

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
Attorneys for Sadler Ranch, LLC

EXHIBIT INDEX

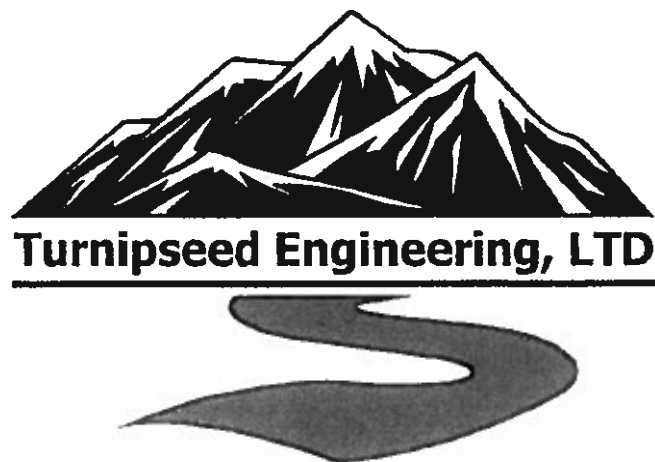
<u>Exhibit</u>	<u>Description</u>
1.	Expert Report by David Hillis, P.E.
2.	Photographs of damage from land subsidence.

EXHIBIT 1

EXHIBIT 1

Review and Evaluation of the Diamond Valley Ground Water Management Plan

October 30, 2018



Nevada's Premier Water Rights Engineering Company

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1.0 INTRODUCTION

Since some time in the 1960's the amount of water appropriated in Hydrographic Area - 153 Diamond Valley, commonly known as Diamond Valley, has exceeded the estimates of the perennial yield. This over allocation of the groundwater resource has resulted in adverse effects throughout the basin. Some examples of these adverse effects include increasing depths of pumping, drying of wells, reduction of spring flows, and in some cases "dry" or inadequate wells being drilled. These impacts are the result of an over allocation and utilization of the resource. The current and former residents of Diamond Valley have been aware of the groundwater issues some time. Fearing corrective action without input to the State Engineer, who is the head of NDWR, a portion of the permit holders in Diamond Valley petitioned the State engineer to designate Diamond Valley as a Critical Management Area [CMA]. Additionally, legal action which requested basin curtailment was taken against the State Engineer. As a result of these actions on August 25, 2015 Diamond Valley became the first and only CMA in the state of Nevada. As required by NRS 534.037 holders of groundwater permits in a basin with a CMA designation must submit a groundwater management plan [GMP] to the State Engineer, and have the plan approved, or face an automatic curtailment by priority. For the plan to be approved, it must set forth the necessary steps for the removal of the basin's designation as a critical management area as further stated in NRS 534.037. When the State Engineer considers whether to approve a groundwater management plan he must 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, without limitation, domestic wells;
- (f) Whether a groundwater management plan already exists for the basin; and
- (g) Any other factor deemed relevant by the State Engineer.

The Diamond Valley Ground Water Management Plan was submitted to NDWR on October 1, 2018 for consideration. After this submission Turnipseed Engineering, LTD was retained to review the plan, and provide feedback on any concerns with the possible implementation. After performing this review, it is my opinion that the GMP as written provides insufficient hydrogeological evidence to support the GMP's goals, appears to favor the junior priority water

appropriators, will continue to allow for the exploitation of the groundwater resource for the plans duration, and will not sufficiently reduce groundwater pumping to remove the CMA designation.

2.0 GROUNDWATER STORAGE DEPLETION

The over pumping in Diamond Valley has been documented numerous times. In 1968 J. R. Harrill discussed the overdraft of groundwater in, *Hydrologic Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada 1950-1965*,¹ and explains that the upper 100ft of alluvium throughout the entire basin holds 2 million acre-ft of storage (this is commonly considered the quantity of storage that can be safely removed from a basin during the time it transitions to a new equilibrium in response to pumping). Although this is a tremendous volume of water the reality is approximately 1,750,000 acre-ft of storage water has already been removed from storage due to over-pumping. In addition, if the proposed reductions described in Appendix F and G are implemented the exploitation of storage water will continue beyond the life of the proposed GMP.

Figure 1 below shows the historical irrigation pumping and the future pumping under the GMP. This figure displays the information from Figure 6 in Appendix D of the GMP with the proposed pumping described in Appendix F and G. From observation of the figure the withdrawals of groundwater only from water rights that are to be administered by the GMP will never fall below the perennial yield. If water rights which are not subject to the GMP are included the storage depletion would be much higher. The volume of water removed from storage since the perennial yield was exceeded can be calculated by determining the difference in estimated annual pumpage from the perennial yield. If this calculation is completed for timeline depicted in Figure 1 the result is 2,517,155 acre-ft of water will be permanently removed from storage. Figure 2 shows this depleted volume of storage water which, according to Harrill (1968), would completely remove all storage water from the first 100' of saturated alluvium and mine an additional approximately 500,000 acre-feet of water from the deeper aquifer.

Based on my review of the proposed GMP, the proposed pumping reduction regime will not result in the removal of the CMA designation.

¹ This issue was also discussed in DAVID L. BERGER, ET AL., BUDGETS AND CHEMICAL CHARACTERIZATION OF GROUNDWATER FOR THE DIAMOND VALLEY FLOW SYSTEM, CENTRAL NEVADA 2011-12 72 (USGS Scientific Investigations Report 2016-5055, United States Department of Interior).

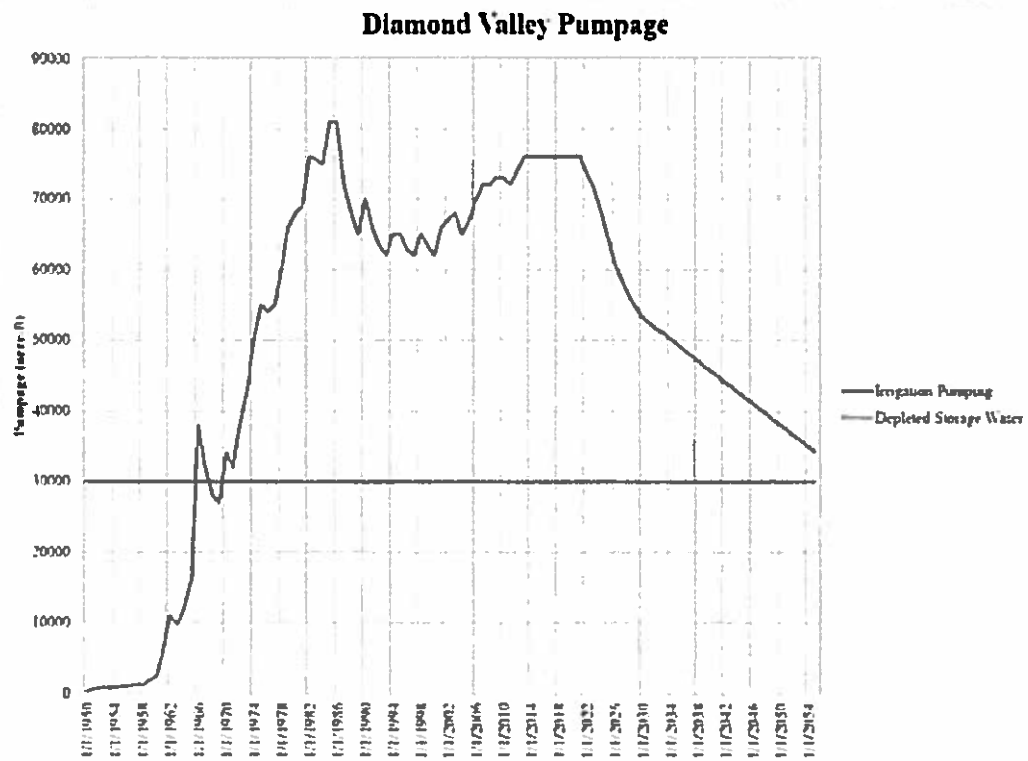


Figure 1 – Historical and Proposed Future Diamond Valley Pumpage

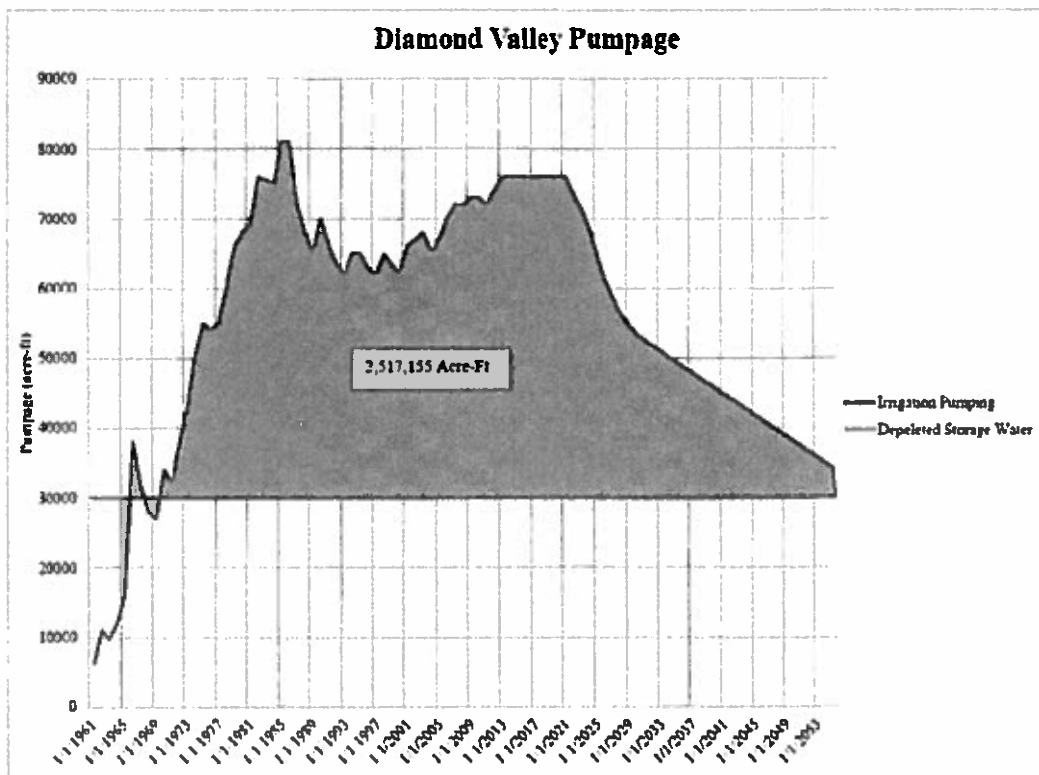


Figure 2 – Diamond Valley Historical Pumpage with Storage Depletion at Conclusion of GMP

3.0 INSUFFICIENT HYDROGEOLOGICAL EVIDENCE

The GMP states that it “must set forth the necessary steps for removal of the basin’s designation as a critical management area” and that the criterion for removal of this designation is whether “withdrawals of groundwater consistently exceed the perennial yield of the basin.” Further the GMP states that one of its goals is to “stabilize groundwater levels of the aquifer.” However, there is no hydrogeologic based analysis in the GMP that which provides information on the ground water level status upon the GMP’s conclusion. In fact there is no discussion of the hydrogeological impacts of the plan, the anticipated groundwater level recovery, impacts to existing spring flows, description of the monitoring plan, and the mitigation measures to modify groundwater withdraw reductions. Also, the GMP states that in year 1 the “Benchmark Water Allocation” is 0.670 acre-ft per share. This value appears to be arbitrary as no discussion is presented on how this value was determined. These benchmark values should have been determined from groundwater modeling and groundwater level targets.

The plan does include Appendix D – Hydrologic Setting of Diamond Valley, which provides general information about the hydrologic conditions, and Appendix I – Groundwater Flow Modeling Report Supporting Banking Depreciation, which focuses on the degradation of “banked” water within the aquifer. This document states a calibrated numerical groundwater model from the time period of 1956 to 2006, which was used in support of the Mount Hope Project (Montgomery & Associates, et al., 2010), was used to analyze the depreciation.

Appendix I therefore raises many concerns as the model, the modeling report, model calibration with included modifications, and another report discussed in Appendix I, “Bugenig, 2017”, were not included, or available for review. Therefore, no interpretation and analysis can be conducted on the proposed depreciation values discussed in the GMP. In addition, this model could have been used to simulate and convey the effects of ground water levels for the GMP’s duration. Unfortunately, the recent USGS Berger, 2016 report appears to be disregarded or underutilized when evaluating the hydrogeologic conditions in Diamond Valley. As an example, Appendix I states that the depreciation of banked water will be 1% for the South Diamond Valley Sub-Area, and 17% for the North Diamond Valley Sub-Area which follows a groundwater divide. The USGS report clearly states this groundwater divide has moved to the north as a result of the

rapidly expanding cone of depression from over pumping in the south. This means that the position of the divide will continue to migrate to the north. As there is no discussion of this fact and it is possible that irrigators who may currently be south of the divide could have a different depreciation values in the future.

4.0 SENIORITY VARIATIONS

The GMP continuously shows bias toward junior water right holders throughout the document. This is evident in many cases including the purported 20% share allocation difference between senior and junior water right holders, the number of seats on the advisory board held by senior water right holders, the elimination of a senior water right holder seat from the advisory board, and the manner in how elections votes will be tallied. These items will be discussed in more detail in the section below.

Junior water right holder bias can be seen in Section 11 – GMP Advisory Board [AB] in the GMP document. This section describes the how the seats on the AB will be distributed, how AB members are elected, and how votes will be tallied. The GMP proposes an 8 members board: 1 mining water right holder seat, 1 vested water right holder seat, 4 agriculture water right seats with both senior and junior water rights, and 2 senior water right holder seats. If we assume that the 30,000 acre-ft perennial yield value was exceeded on 5/16/1960 with the issuance of current Permit 70587 this means that 30,008 acre-ft of water are senior appropriations. This 30,008 acre-ft of appropriations make up just 23.8% of the total 126,207.182 acre-ft of allocated permits within the basin. Therefore, the senior water right holders will represent 23.8% of the water rights governed by the AB and can be easily outvoted by the junior water right holders. In addition, as stated in Section 11.3 once the GMP is approved one of the two senior water right holder seats will expire, this will further bias the board distribution to the junior water right holders.

The issues described are a major concern because Nevada Water Law is based on the Prior Appropriation Doctrine, which is understood as “first in time, first in right.” When this doctrine is applied to a groundwater system the appropriations which occurred before the perennial yield was exceeded are the senior right holders. If the State Engineer were to regulate the basin by priority all junior appropriations would be prohibited from pumping. By contrast, the senior water right holders would receive no reduction in duty.

In section 12 - Groundwater Shares and Share Register the GMP claims there is a 20% share allotment spread from the most senior to the most junior water right holders in order to compensate the senior holders for their loss of priority. Unfortunately, when one reviews the volume of water a water right holder will actually receive under the GMP it demonstrates how misleading this statement is. For example: the most senior water right discussed in Appendix F in

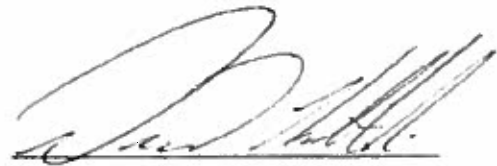
the GMP is Permit 30927 and this permit will receive 69.1024 shares from an original duty of 69.12 acre-ft. Therefor this reduction due to "Priority Factor" is .03%, which is essentially no reduction. The most junior water right discussed is Permit 80881 and this permit will receive 35.2455 shares from an original duty of 44.00 acre-ft. Therefore, this reduction in shares due to Priority Factor is 19.9%, which is essentially 20%. However, at the end of the proposed 35-year period described in Appendix G Permit 30927 will receive approximately 20.8 acre-ft of water which is 30.09% of the original duty granted. Permit 80881 will receive approximately 10.6 acre-ft of water which is 24.11% of the original duty granted. Accordingly, the difference in the percent of water duty actually received from the original allocation is not 20% but only 5.98% (30.09% - 24.11%). This means from the most senior water right holder to the most junior water right holder there is only approximately a 6% difference in acre-ft of water from their original allocations.

Also, the GMP states that in year 1 the "Benchmark Water Allocation" is 0.670 acre-ft per share. This value appears to be arbitrary as no discussion is presented on how this value was determined. These benchmark values should have been determined from groundwater modeling and groundwater level targets.

5.0 CONCLUSION

As discussed in the preceding pages the Nevada State Engineer must consider many aspects when considering the approval of a GMP. One of the most important aspects is the hydrology of the basin. This GMP will continue the over pumping of the groundwater resource for an unreasonable timeframe. The plan also provides insufficient hydrogeological evidence to support the GMP's goals. Although the GMP states a numerical groundwater model was available it appears as though it was only utilized for the determination of banking depreciation. Finally this model appears to favor the junior priority water appropriators for the many reasons discussed in Section 4.0.

It is my professional opinion that the GMP as written will continue to allow for the exploitation of the groundwater resource for the plans duration, and will not sufficiently reduce groundwater pumping to remove the CMA designation.

A handwritten signature in dark ink, appearing to read 'D. Hillis, Jr.', written over a horizontal line.

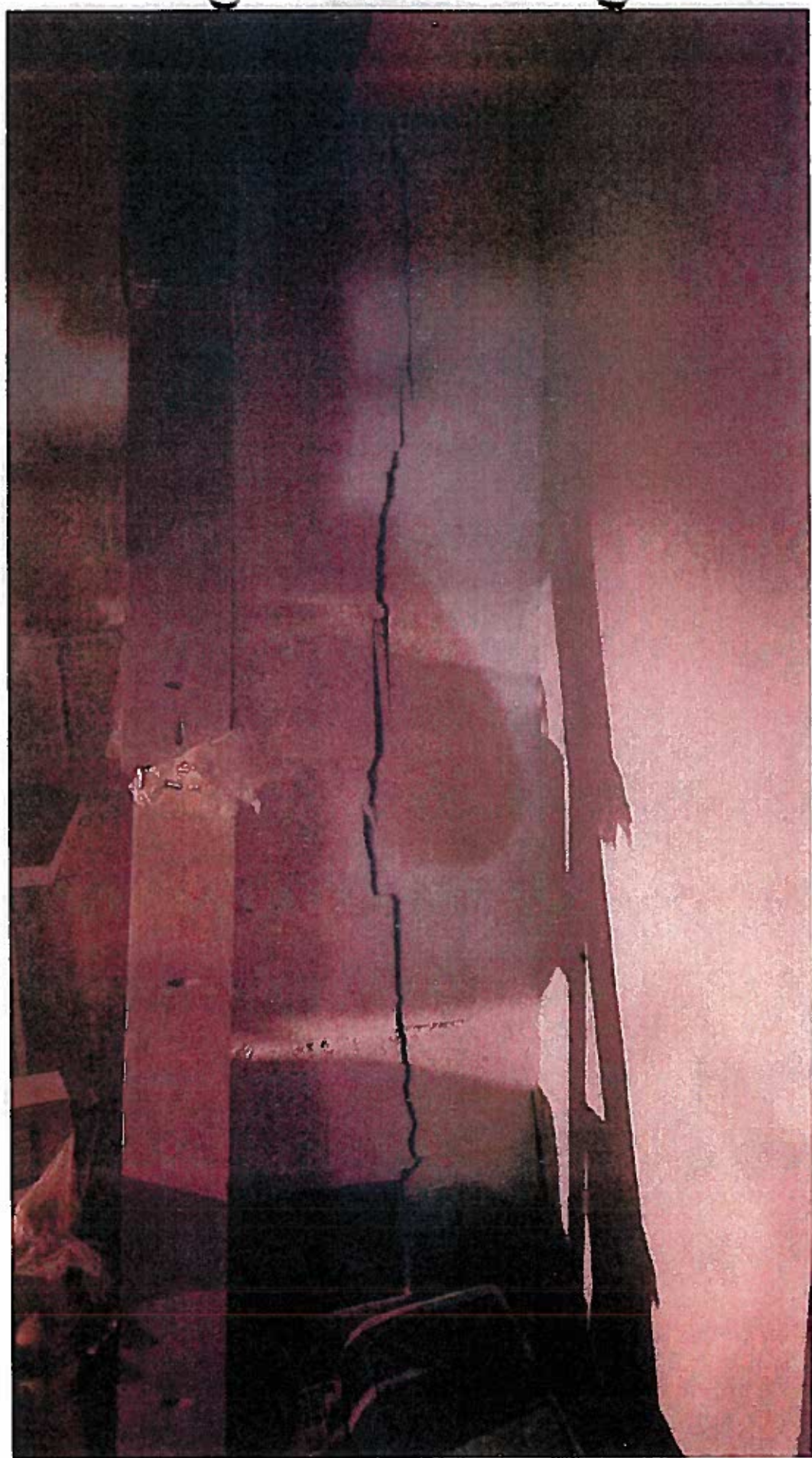
David G. Hillis, Jr., P.E., W.R.S.

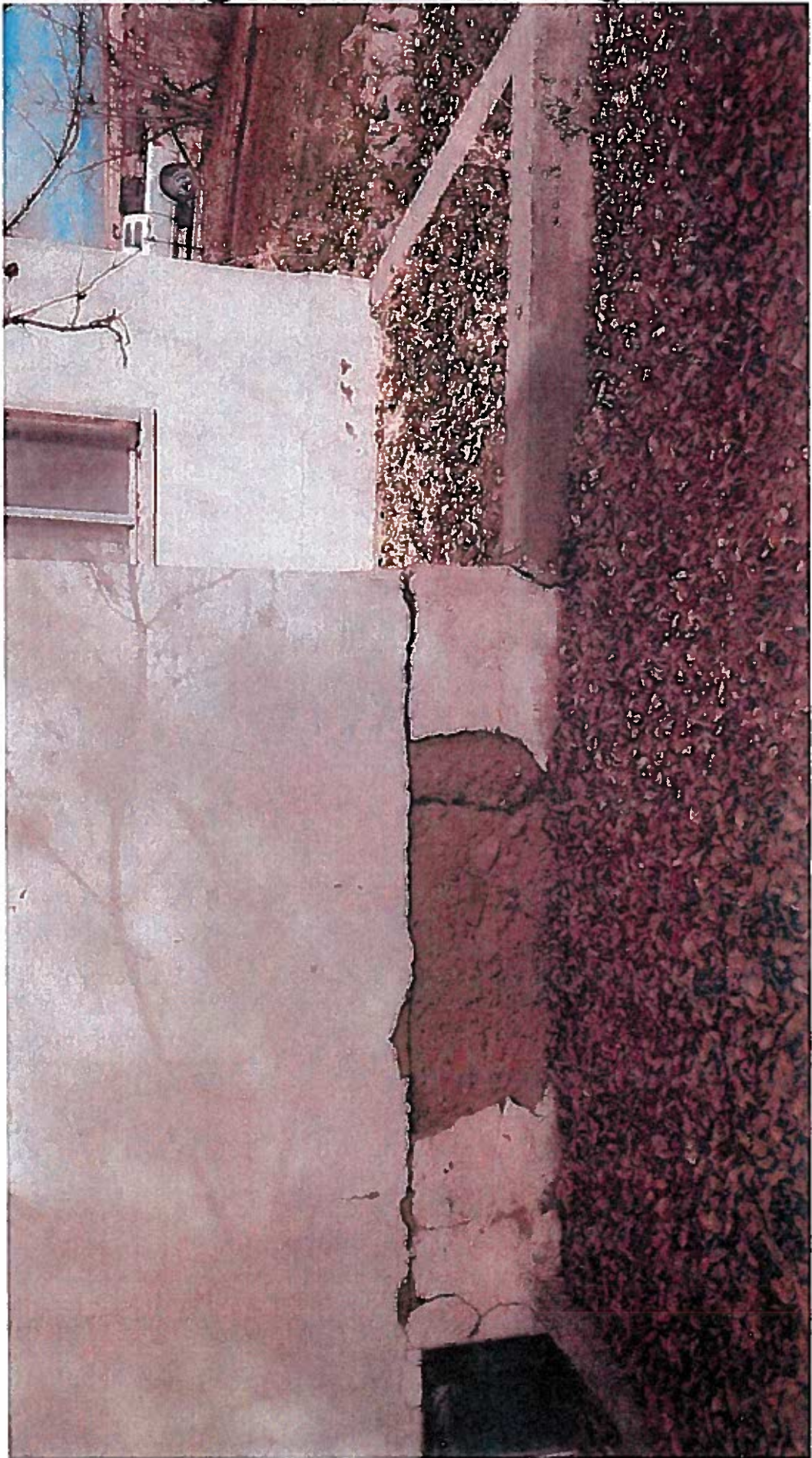
EXHIBIT 2

EXHIBIT 2

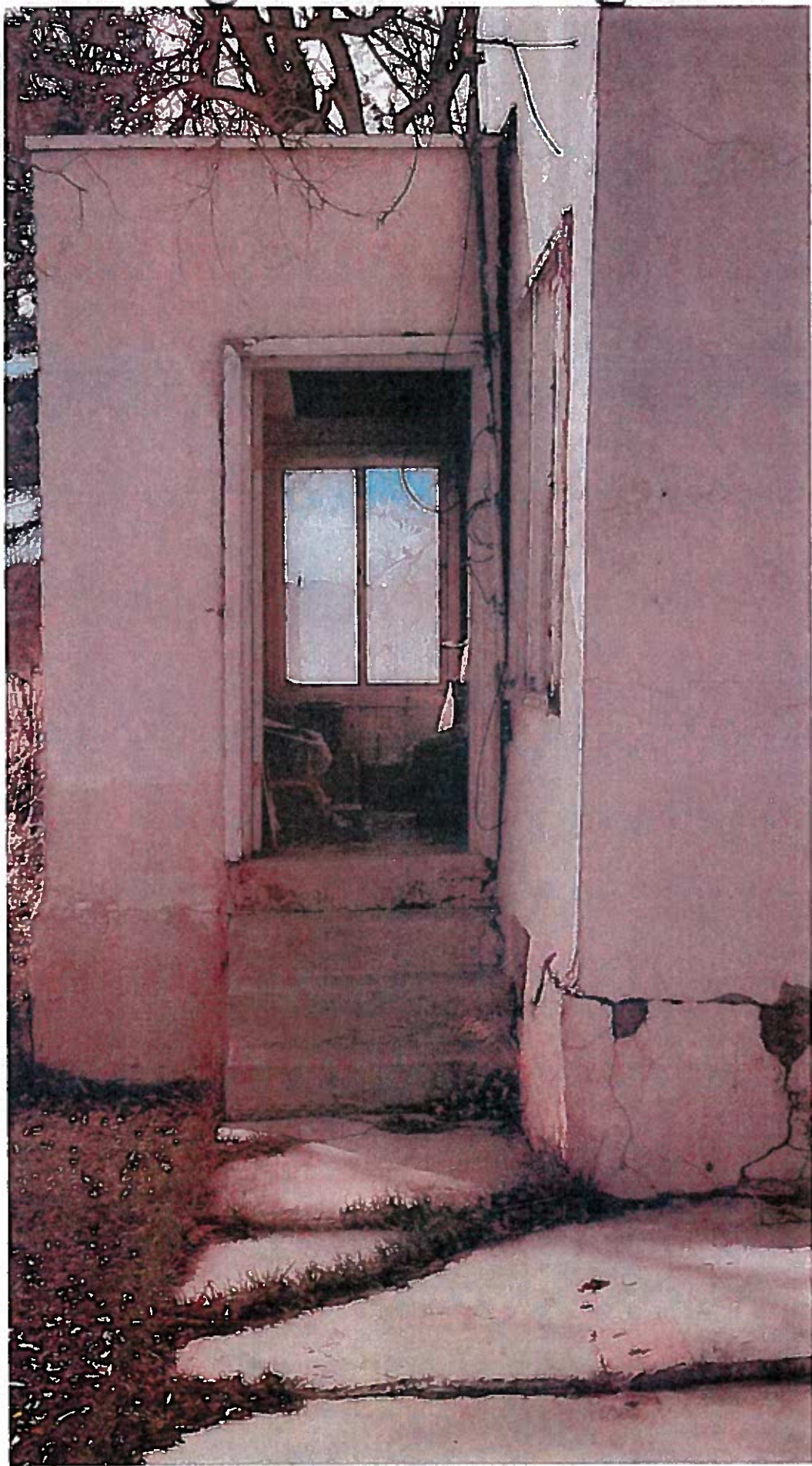
















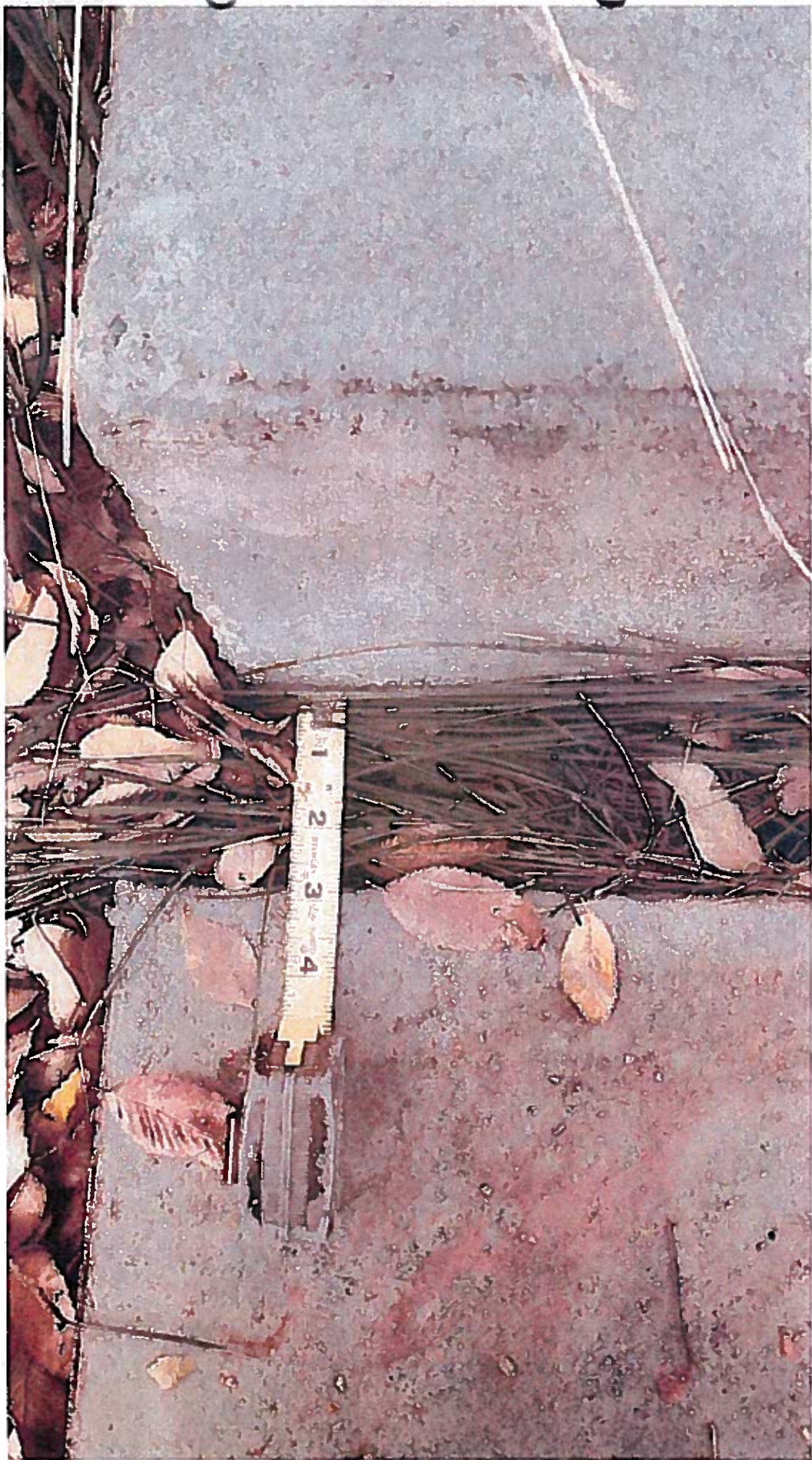


EXHIBIT 3

EXHIBIT 3

October 30, 2018

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

Re: Diamond Valley Groundwater Management Plan

Dear Mr. King,

My name is Daniel Venturacci, my wife and I own the Thompson Ranch located on the North End of Diamond Valley. The ranch consists of the deeded acres of the Home Ranch, Cox Ranch, Willow Field, Rock Field, Box Springs Ranch (Mau place), and Davis Canyon. In addition we also have the Diamond Springs BLM grazing permit which surrounds our deeded ground.

Due to the over allocation of pumping that has been allowed to continue to occur in Diamond Valley, all of the vested surface water irrigated and sub irrigated meadows located on the valley floor of the Thompson Ranch have been destroyed. The Thompson Ranch has been begging the State Engineer for help to restore its impaired vested water rights since 1982, the State Engineer has continued to let the over pumping impair the vested surface water rights on our ranch as well as others in Diamond Valley.

The current proposed Diamond Valley Groundwater Management Plan (GMP) allows Junior Water Right holders to continue to pump water in excess of the perennial yield, which in turn drops the water table and continues to impair vested surface water rights. Not only has the over allocation of Diamond Valley caused us to lose our vested surface water on the valley floor; our vested mountain runoff water is also being impaired. The over pumping has resulted in subsidence on the valley floor which creates large fissures; these fissures prevent the vested mountain runoff water from reaching the existing meadows therefore impairing our vested right even more (see attached pictures). As long as the over pumping is allowed to continue, these fissures will continue to increase both in number and size and cause us financial harm as well as impair our vested right.

We feel that the GMP is in violation of statute NRS 533.085 which states:

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

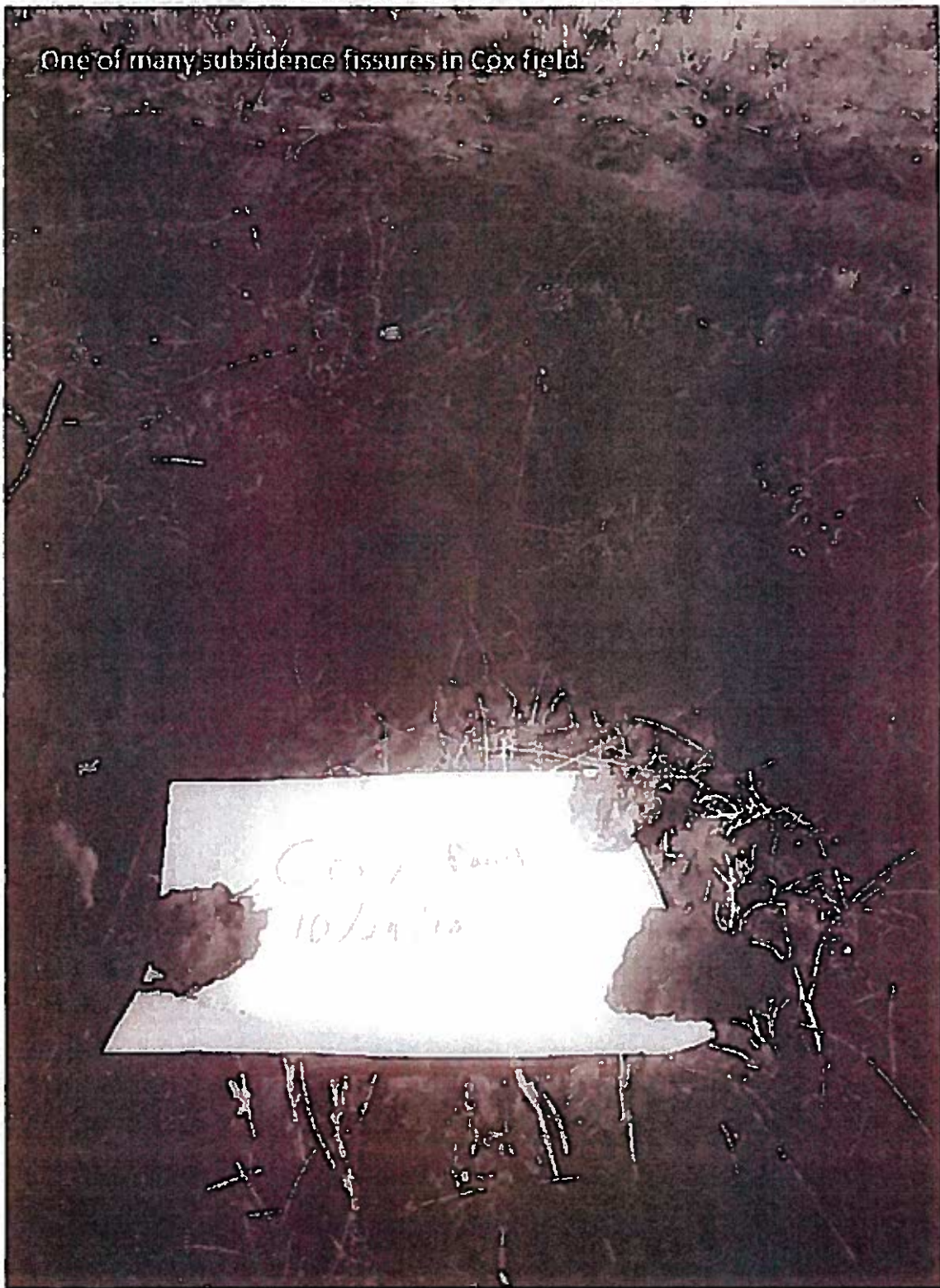
2. Any and all appropriations based upon applications and permits on file in the Office of the State Engineer on March 22, 1913, shall be perfected in accordance with the laws in force at the time of their filing.

Due to the fact that vested surface water rights are continuing to be impaired and no mitigation plan is addressed in the GMP we will not support the GMP as written. We feel that before the GMP is signed by you Mr. King, our concerns need to be addressed and resolved immediately so that our vested surface water rights do not continue to be impaired.

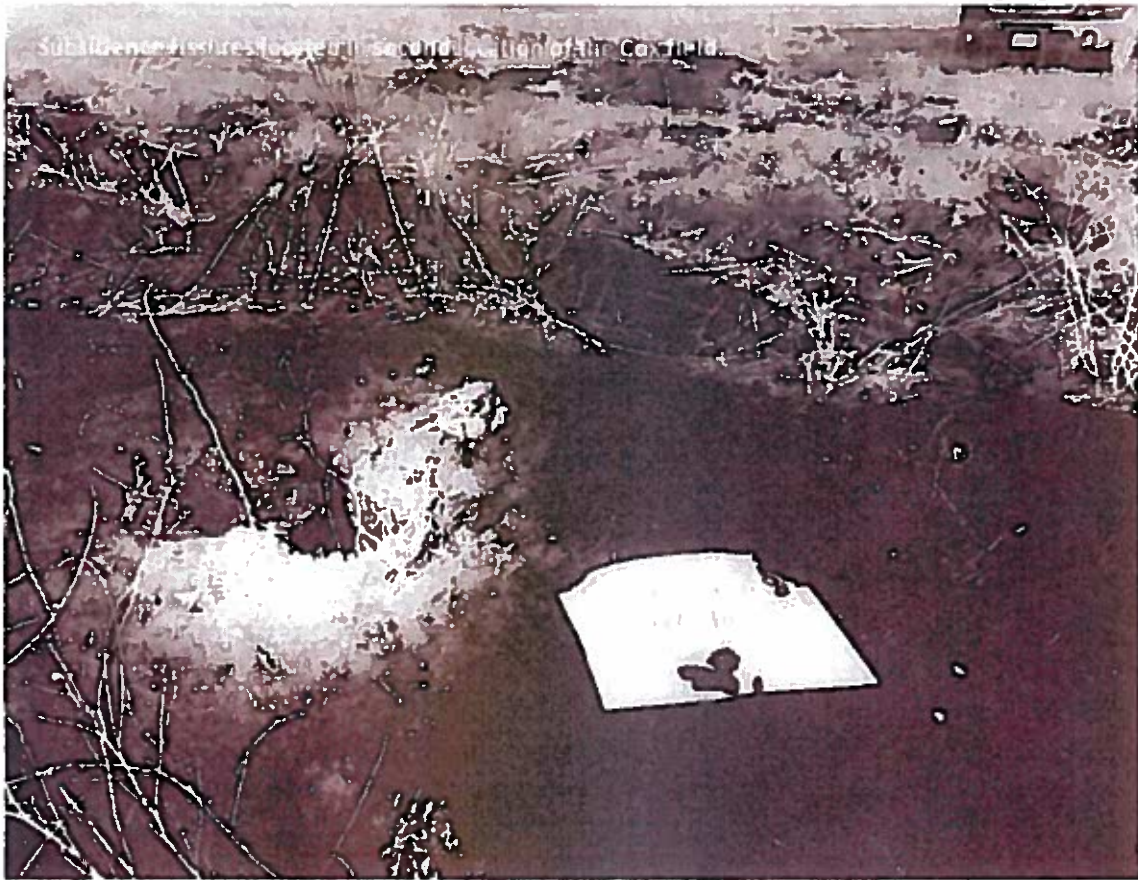
Sincerely,

Daniel Venturacci

One of many subsidence fissures in Cox field.



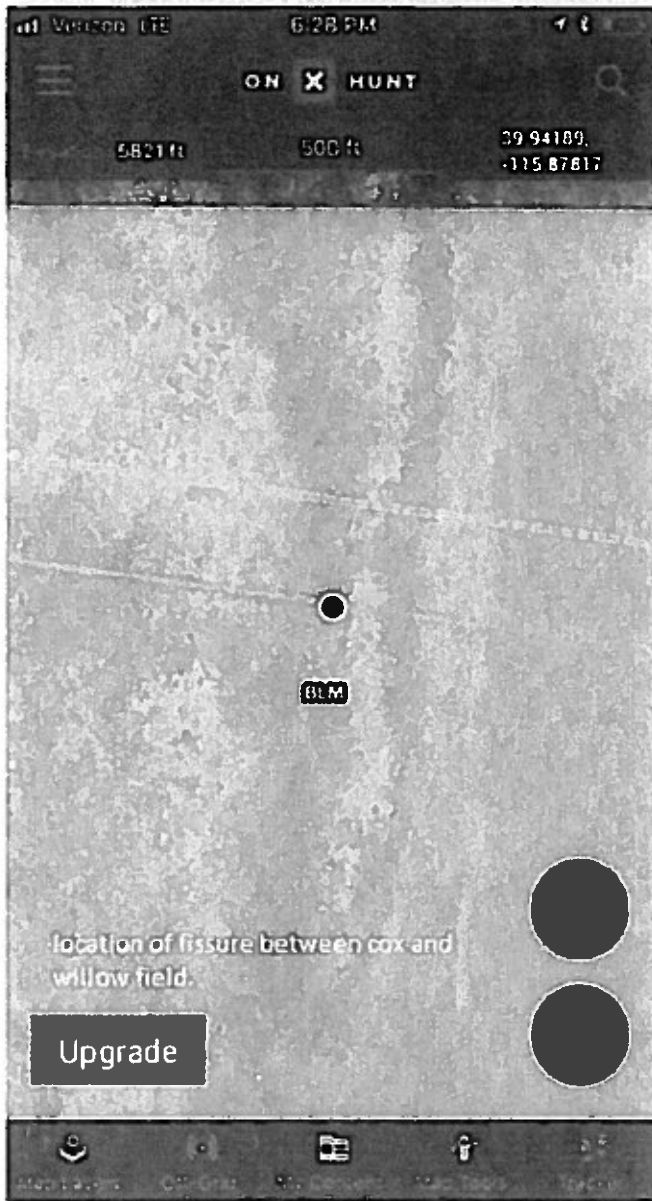


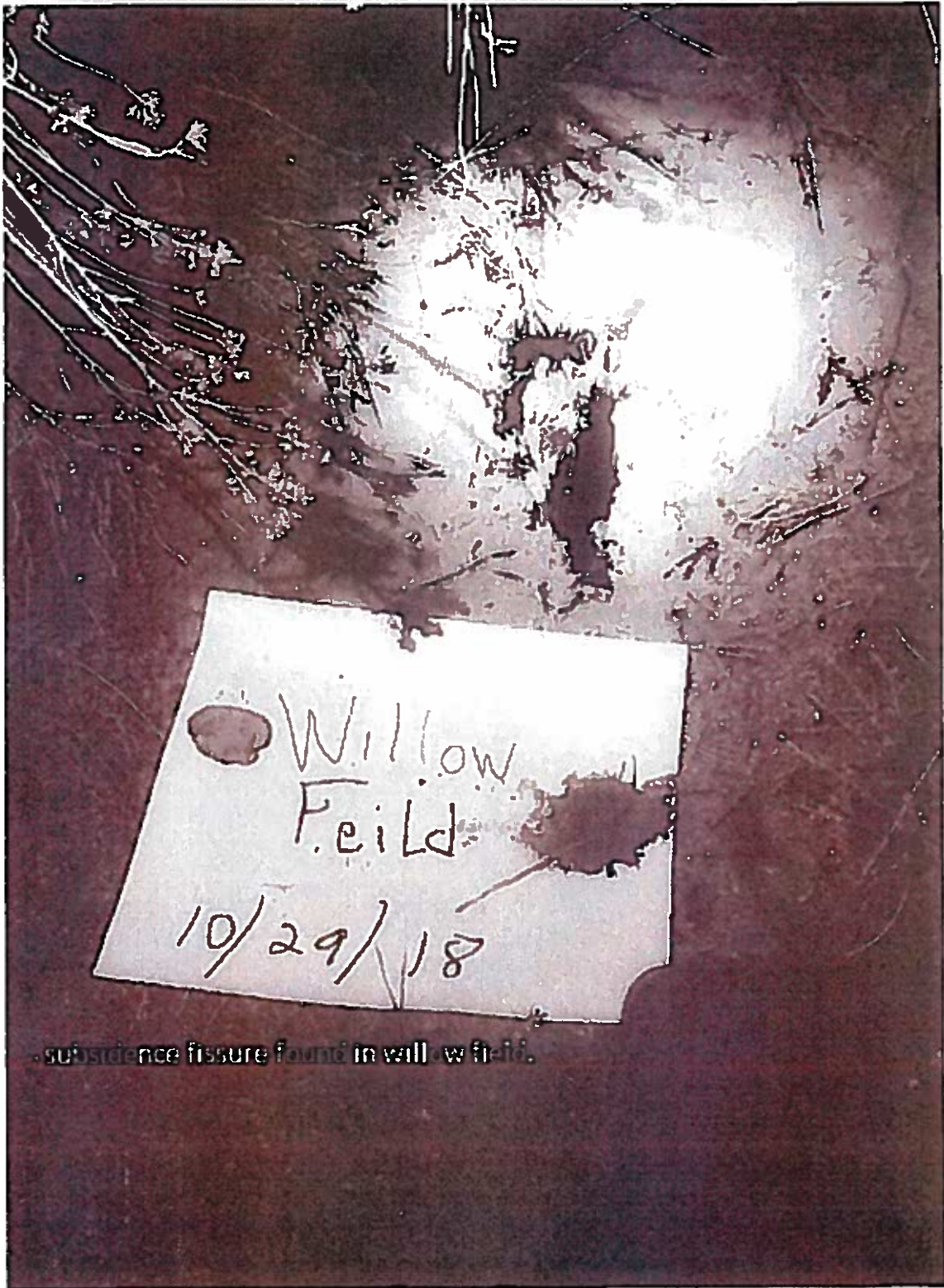




picture of subsidence fissure
between cox and willow field.

OLL WELL RD
Between COX & Willow
Ranch
10/29/18





Willow
Field

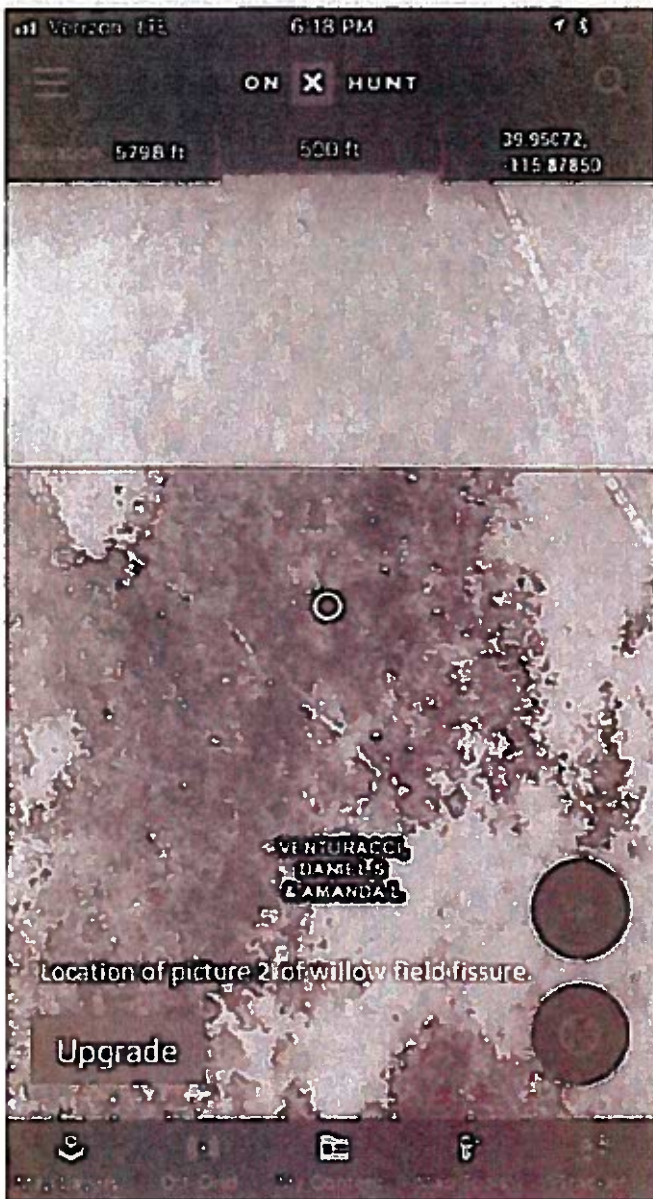
10/29/18

subsidence fissure found in willow field.



Picture 2 of subsidence fissure found in willow field.





Attachment 2

FEB 11 2019

Case No.

Dept. No.

Eureka County Clerk
By John H. H. H.

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, a husband and wife; and
FRED BAILEY and CAROLYN BAILEY, a
husband and wife,

Petitioners,

vs.

NEVADA STATE ENGINEER,
DEPARTMENT OF WATER RESOURCES,

Respondent.

**NOTICE OF APPEAL AND PETITION
FOR REVIEW OF NEVADA STATE
ENGINEER ORDER NO. 1302**

COME NOW, Petitioners TIMOTHY LEE BAILEY and CONSTANCE MARIE
BAILEY, a husband and wife, and FRED BAILEY and CAROLYN BAILEY, a husband and
wife, (collectively the "Baileys"), by and through their counsel, DON SPRINGMEYER, ESQ. and
CHRISTOPHER W. MIXSON, ESQ., of the law firm of WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP, and hereby appeal from, and petition the Court to reverse and/or
remand, Order No. 1302 Granting Petition to Adopt a Groundwater Management Plan for the
Diamond Valley Hydrographic Basin ("Order 1302"), issued by the Nevada State Engineer ("State
Engineer") on January 11, 2019, and attached hereto as Exhibit 1. This Petition for Judicial
Review, as well as Notice of Appeal, is filed pursuant to NRS 533.450.

In Order 1302, the State Engineer approved and adopted the Diamond Valley Groundwater
Management Plan ("GMP"). The specific grounds supporting the Baileys' request for reversal
and/or remand, and the manner in which Order 1302 injuriously affects the Baileys, are
enumerated below.

RECEIVED

FEB 11 2019

Eureka County Clerk

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1 is required to immediately curtail pumping according to strict priority.

2 As noted above, the Diamond Valley GMP was submitted to the State Engineer on August
3 20, 2018. Because NRS 534.037(3) requires the State Engineer to hold a hearing on a submitted
4 plan, a hearing was scheduled for October 30, 2018. The hearing consisted of nothing more than
5 the State Engineer praising the GMP proponents for their efforts and only allowing participants
6 make public comments for or against approval. The GMP proponents made no factual
7 presentation regarding the GMP, no sworn testimony was taken from any witnesses, no cross-
8 examinations were performed, no expert witnesses were called in support of the plan, and no
9 documentary evidence was presented in its support. The proceeding simply met none of the
10 typical requirements for an evidentiary proceeding. The hearing merely served as an opportunity
11 for participants to provide oral comments.

12 After the hearing, participants were given three days to provide written objections to the
13 GMP. The Baileys timely submitted written objections to the GMP, as did others. Despite the
14 serious objections raised by the Baileys and others, on January 11, 2019, the State Engineer issued
15 Order 1302 approving and adopting the Diamond Valley GMP.

16 **GROUND FOR PETITION**

17 Petitioners seek judicial review of Order 1302 on the following grounds:

18 1. The process adopted by the State Engineer to review and adopt the GMP violated
19 NRS 534.037(3) and violated constitutional due process standards established by the Nevada
20 Supreme Court;

21 2. The GMP is not supported by substantial evidence showing that it will result in the
22 removal of the CMA designation from the Diamond Valley Hydrographic Basin as required by
23 NRS 534.037(1);

24 3. The GMP authorizes continued over-pumping of water in the basin;

25 4. The GMP fails to include a monitoring plan to measure whether its mandated
26 pumping reductions will actually result in the stabilization of groundwater levels in the basin;

27 5. The GMP ignores the impacts to holders of senior groundwater rights that will
28 result from allowing over-pumping in the basin by junior groundwater users to continue

1 indefinitely;

2 6. The governance provisions of the GMP violate constitutional due process
3 safeguards;

4 7. The GMP violates statutorily mandated provisions of Nevada's water laws;

5 8. The GMP violates Nevada's prior appropriation doctrine;

6 9. The GMP unlawfully allows water right holders to change the point of diversion,
7 manner of use, and place of use of their permits without submitting an application to do so with
8 the State Engineer;

9 10. The GMP unlawfully authorizes the State Engineer to exempt wells from the well
10 abandonment requirements of NRS 534 and NAC 534;

11 11. The GMP unlawfully places time limits on the State Engineer to perform certain
12 actions and deems regulated activity automatically approved if the State Engineer fails to meet the
13 time limits;

14 12. The GMP treats similarly situated persons differently based on arbitrary and
15 capricious factors in violation of the equal protection clauses of the Nevada and United States
16 Constitutions;

17 13. The GMP unlawfully takes private property without just compensation in violation
18 of the Nevada and United States Constitutions;

19 14. The State Engineer has stated that he intends to enforce the GMP against holders of
20 water rights who did not consent to its adoption;

21 15. The factual determinations made by the State Engineer in Order 1302 are not
22 supported by substantial evidence in the record;

23 16. The State Engineer acted arbitrarily and capriciously when he reviewed, considered
24 and adopted Order 1302;

25 17. The State Engineer should have, at the least, postponed review and consideration of
26 the GMP until after the completion and final approval, including judicial review, of the pending
27 general adjudication of the Diamond Valley Hydrographic Basin.

28 18. The State Engineer abused his discretion by including water rights that have been,

1 or are likely to be found to have been, abandoned and/or forfeited in the GMP groundwater
2 allocation, shares, banking and trading scheme;

3 19. The State Engineer abused his discretion by failing to consider the effects of the
4 GMP on the environment;

5 20. The State Engineer abused his discretion when he adopted Order 1302; and

6 21. The legal conclusions the State Engineer made in Order 1302 are erroneous and
7 without merit.

8 **CONCLUSION**

9 For the reasons stated above, and for others that may be raised during the pendency of this
10 appeal, Petitioners respectfully request that the Court reverse and overturn Order 1302 in its
11 entirety. In the alternative, Petitioners request that Order 1302 be stayed and this matter remanded
12 to the State Engineer with instructions to hold a properly noticed and structured evidentiary
13 hearing to address the issues raised in this petition.

14 **AFFIRMATION**

15 **Pursuant to NRS 239B.030(4)**

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

18 DATED this 8th day of February, 2019

19 **WOLF, RIFKIN, SHAPIRO,**
20 **SCHULMAN & RABKIN, LLP**

21
22 By: 

23 DON SPRINGMEYER, ESQ.
24 Nevada Bar No. 1021
25 CHRISTOPHER W. MIXSON, ESQ.
26 Nevada Bar No. 10685
27 3556 E. Russell Road, Second Floor
28 Las Vegas, Nevada 89120
(702) 341-5200/Fax: (702) 341-5300
Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. and that on February 11, 2019, I served, or caused to be served, a true and correct copy of the foregoing document as follows:

By **HAND-DELIVERY** to:

Tim Wilson, P.E.
Nevada State Engineer
Division of Water Resources
901 S. Stewart Street, Suite 2002
Carson City, NV 89701

Tori N. Sundheim, Esq.
Deputy Attorney General
Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701

By U.S. POSTAL SERVICE, CERTIFIED, RETURN RECEIPT REQUESTED, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Las Vegas, Nevada, to:

Eureka County Board of Commissioners
P.O. Box 694
Eureka, NV 89316

William H. Norton
HC 62 Box 62150
Eureka, NV 89316

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c/o Debbie Leonard, Esq.
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Eureka County
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Allison MacKenzie, Ltd.
P.O. Box 646
Carson City, NV 89702-0646

Great Basin Resource Watch
c/o Simeon Herskovitz, Esq.
Iris Thornton, Esq.
Advocates for Community and Environment
P.O. Box 1075
El Prado, NM 87529

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2 HC 62 Box 62143A
3 Eureka, NV 89316

4 By Christie Rehfeld
5 Christie Rehfeld, an Employee of
6 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
7 RABKIN, LLP
8
9
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**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

#1302

ORDER

**GRANTING PETITION TO ADOPT A GROUNDWATER MANAGEMENT PLAN FOR
THE DIAMOND VALLEY HYDROGRAPHIC BASIN (07-153), EUREKA COUNTY,
STATE OF NEVADA.**

WHEREAS, decades of declining water levels in the Diamond Valley Hydrographic Basin is due to the simple fact that groundwater pumping has consistently exceeded the perennial yield of the basin. An obvious solution to the problem caused by *over* pumping is to *reduce* groundwater pumping. Designating Diamond Valley a Critical Management Area (CMA) (the first and only basin thus far in Nevada), provided water right users within the Diamond Valley basin the opportunity to develop a customized groundwater management plan (GMP) that does in fact reduce groundwater pumping to a level that satisfies the State Engineer that the water levels will reach an equilibrium. The CMA and GMP process became law in 2011 specifically to allow those that truly have skin-in-the-game (the water right holders in the basin), to create a means to the same end as curtailment by priority, but without the dire and sudden impacts.

Years before the State Engineer declared the basin a CMA in 2015, the GMP process was initiated by the local community and stakeholders. Work on the GMP continued for an additional three years after the CMA designation with numerous meetings of the community and stakeholders, ultimately arriving at the version presented to the State Engineer in 2018. The testimony, written public comment and background of Appendix C of the GMP demonstrate that this process was emotional and difficult for the participants—yet they persisted in forging a plan in an effort to avoid curtailment by priority to save their community and the established agricultural way of life in Diamond Valley. It is significant that the participants are not professional water right managers, but are ordinary citizens who made a Herculean effort to craft their own plan in response to a complex problem.

WHEREAS, this matter came before the State Engineer on a Petition to Adopt a Groundwater Management Plan (Petition), pursuant to Nevada Revised Statute (NRS) § 534.037 filed on August 20, 2018.

WHEREAS, the history leading up to the subject Petition is as follows:

Diamond Valley is a major groundwater farming area in the Diamond Valley Hydrographic Basin, Basin 153.¹ There are approximately 26,000 acres of irrigated land, which primarily produce premium quality alfalfa and grass hay. In 2013, it was estimated that approximately 110,000 tons of hay were produced annually for a total farming income of approximately \$22.4

¹ GMP, p. 8.

million.² Approximately 126,000 acre-feet annually (afa) of irrigation groundwater rights are appropriated in Diamond Valley, and as of 2016, groundwater pumping for irrigation was estimated to be 76,000 afa. The perennial yield of Diamond Valley is 30,000 acre-feet (af).³

For over 40 years, annual groundwater pumping has exceeded the perennial yield of Diamond Valley.⁴ In the years that groundwater pumping has exceeded the perennial yield, groundwater levels in Diamond Valley have consistently declined at a rate of up to 2 feet per year. Prior to declaring Diamond Valley a CMA pursuant to NRS § 534.110(7), the State Engineer held public meetings on numerous occasions in Diamond Valley to discuss over-appropriation of the basin and to encourage water rights holders to formulate solutions or a plan at the local level to address declining water levels.

Because withdrawals have consistently exceeded the perennial yield of the basin, on August 25, 2015, the State Engineer declared Diamond Valley a CMA pursuant to NRS § 534.110(7).⁵ Once declared a CMA, holders of water rights within the basin have 10 years to create and present to the State Engineer a groundwater management plan; otherwise, the State Engineer is required to curtail the basin by priority.⁶

WHEREAS, the process for approval of a GMP by the State Engineer is as follows:

Nevada Revised Statute § 534.037(1) requires that a petition for the approval of a GMP that is submitted to the State Engineer 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.

At the time of filing the petition, there were 419 water right permits or certificates in the Diamond Valley Hydrographic Basin. Of these, 257 are represented by at least one signature in the petition. Comparing the signatories with the confirmed owner of record in the files of the Office of the State Engineer demonstrates that 223 water right permits or certificates are represented by the owner of record. If accepting the affirmation made on each page of the signed petition, then 257 rights of 419 rights is 61%. If limiting only to those signatures by a confirmed owner of record, then 223 of 419 is 53.2%. In either case, a majority of permits and certificates in the Diamond Valley Hydrographic Basin are represented in the petition; therefore, the State Engineer finds that the petition satisfies the requirement of NRS § 534.037(1).⁷

The total duty of groundwater rights in Diamond Valley is 130,625 afa. Of these, 126,188 afa are subject to the plan and 4,437 afa are not subject to the plan. The estimated amount of

² GMP, p. 8.

³ GMP, p. 8.; J.R. Harrill, *Hydrologic Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada, 1950-65*, Water Resources Bulletin No. 35, (Department of Conservation and Natural Resources, Division of Water Resources and U.S. Department of the Interior, Geological Survey), 1968.

⁴ GMP, p. 8.

⁵ Order 1264, official records in the Office of the State Engineer; GMP, p. 8.

⁶ NRS § 534.110(7).

⁷ Exhibit 1, public administrative hearing before the State Engineer October 30, 2018, official records in the Office of the State Engineer. Hereinafter the exhibits and transcript will be referred to solely by the exhibit number or transcript page.

groundwater committed to domestic wells at the statutory maximum of 2 afa per domestic well is 234 afa. By duty, over 96% of the total groundwater commitments are subject to the plan. It is reasonable that the focus of the plan to reduce the groundwater pumping be focused on those manners of use that have the greatest potential effect on the pumping in the groundwater basin.

The GMP assumes that the dividing line between senior and junior water rights holders is where the consumptive use of the water rights is estimated at 30,000 af, which is equal to the perennial yield of Diamond Valley; therefore, those rights with a priority date of May 12, 1960, or earlier are referred to in this Order as the senior rights (with a duty totaling 29,325 afa) and those rights with a priority date after May 12, 1960, are referred to as the junior rights. At the time of filing the petition, there were 77 senior water right permits or certificates, and 36, or 46.8%, of these were represented by at least one signature on the petition. The remaining 342 water right permits or certificate were junior, and 221, or 64.6%, of these were represented by at least one signature on the petition. Of the 29,325 afa of senior water rights, 18,700 afa, or about 64%, is represented by signatories of the petition. The State Engineer finds that significant portions of both senior and junior rights are represented in the petition.

Nevada Revised Statute § 534.037(3) requires that before approving or disapproving a groundwater management plan the State Engineer shall hold a public hearing to take testimony on the plan in the county where the basin lies or, if the basin lies in more than one county, within the county where the major portion of the basin lies. The State Engineer shall cause notice of the hearing to be:

- a. Given once each week for two consecutive weeks before the hearing in a newspaper of general circulation in the county or counties in which the basin lies.
- b. Posted on the Internet website of the State Engineer for at least two consecutive weeks immediately preceding the date of the hearing.

Notice of a public hearing to be held on October 30, 2018, was published in the *Eureka County Sentinel*, the *Elko Daily Free Press*, and the *Ely Times* during the weeks of the 15th and 22nd of October.⁸ Also, notice of the hearing was posted on the Internet website of the Nevada Division of Water Resources commencing on October 1, 2018.⁹ Additional notice was also sent by certified mail directly to the boards of county commissioners for the counties of Eureka, Elko, and White Pine.¹⁰ The GMP was made available through the Internet website of the Nevada Division of Water Resources commencing on October 1, 2018, and was also available by request.¹¹

A public hearing to take testimony on the proposed GMP was held in Eureka, Nevada, on October 30, 2018, during which testimony in favor of and in opposition to the GMP was received. In addition, the State Engineer held open the period for written public comment for an additional three working days following the hearing, during which time additional public comments were

⁸ Exhibit 4.

⁹ http://water.nv.gov/documents/Hearing_Notice-Diamond_Valley_GMP.pdf

¹⁰ Exhibit 3.

¹¹ <http://water.nv.gov/documents/Final%20DV%20GMP%20for%20Petition.pdf>

received. This Order evaluates the testimony and written comments and other elements required for approval of the Petition.

Nevada Revised Statute § 534.037(1) requires that in a determination whether to approve a groundwater management plan, the State Engineer shall consider, without limitation:

- 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, without limitation, domestic wells;
- f. Whether a groundwater management plan already exists for the basin; and
- g. Any other factor deemed relevant by the State Engineer.

WHEREAS, the Diamond Valley Groundwater Management Plan is summarized as follows:¹²

The predominant manner of use of existing rights in Diamond Valley is irrigation, where groundwater is pumped and used to produce primarily alfalfa and grass hay. Consequently, the GMP applies to irrigation rights and mining and milling rights with an irrigation base right, while vested rights, other manners of use and domestic wells are excluded from the plan. The GMP requires annual reductions in pumping with a goal of stabilizing groundwater levels and reducing consumptive use to the perennial yield. The GMP applies a formula to calculate the annual duty a rights holder can pump after required reductions, where the formula is based upon the original water right duty and priority of the right to arrive at a number of shares. The formula is defined as:

$$WR * PF = SA$$

Where:

WR = Total groundwater right volume as recognized by DWR, accounting for total combined duty (i.e., overlapping places of use) (measured in acre feet)

PF = Priority Factor based on seniority

SA = Total groundwater Shares

An annual amount of water that can be pumped per share is allocated to a rights holder (i.e., the annual allocation), and the reductions in pumping are accomplished by annually reducing the amount of water each share is allocated. In the initial year of the GMP, the total amount of water that can be pumped is equal to the amount of water currently in use. Unused allocations

¹² Specific components of the GMP are discussed in greater detail below with reference to the public comments received; accordingly, an overview of the major GMP structure is introduced here.

may be banked, traded, leased or sold; thus, the GMP employs a market-based approach. The GMP also contains penalty provisions for pumping in excess of allocations. The GMP is governed by an Advisory Board of elected representatives that are charged with making recommendations to the State Engineer, who ultimately oversees and administers the Plan. The GMP is funded through annual assessments, which, in part, will be used to also fund a water manager employed by the Nevada Division of Water Resources, whose role is expected to involve implementation and management of the GMP.

WHEREAS, the comments made at the October 30, 2018, hearing on the Diamond Valley Groundwater Management Plan and the State Engineer's response are as follows¹³:

I. COMMENTS RELATED TO LEGAL SUFFICIENCY

Several comments were received challenging the legal sufficiency of the GMP as being in violation of established Nevada water law or that the GMP waives existing mandatory provisions required by the NRS including the prior appropriation doctrine, movement of allocations, well abandonment and a banking component without adequate permitting.¹⁴

Prior Appropriation

First, several commenters asserted that the GMP violates the doctrine of prior appropriation by eliminating the bedrock principle of "first in time, first in right." The violation, they allege, occurs because all water rights—both senior and junior—have their allocations reduced annually, rather than reductions being imposed solely on junior rights.¹⁵

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. Nevada Revised Statute § 534.037(1) provides that a groundwater management plan "must set forth the necessary steps for removal from the basin's designation as a [CMA]." Other prior appropriation states have addressed whether a

¹³ The following analysis is intended to address written and public comments received concerning the GMP. In large part, all of the comments made in opposition to the GMP in writing or at the hearing raised issues that were considered during the GMP drafting process. These issues, and many more, are succinctly summarized in a "comment and answer format" in Appendix C at pp. 241-255, entitled *GMP Issues and Concerns Identified Through the Process*.

¹⁴ Written comments of Ira and Montira Renner, Timothy and Constance Marie Bailey, Sadler Ranch, LLC, and Great Basin Resource Watch.

¹⁵ Appendix F to the GMP contains the preliminary table of all rights subject to the GMP and the share calculation for each right. The relative priority dates of all rights subject to the Plan are shown in the table. Notwithstanding the share calculations shown in Appendix F, one commenter acknowledged that if a GMP is not adopted and curtailment is ordered on all rights, that rights junior to about May 1960 would be curtailed. This would include a significant number of irrigation rights, all mining rights, and some municipal rights. See Written Comment of Great Basin Resource Watch, p. 5. In addition, the majority of domestic wells in the basin are junior and would also be completely curtailed. See NRS § 534.110(6) (the State Engineer may order that withdrawals, including withdrawals from domestic wells, be restricted to conform to priority rights).

shortage sharing plan violates the prior appropriation doctrine. For example, in *State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006), the New Mexico Supreme Court examined whether a settlement agreement entered into by the Interstate Stream Commission, the United States and three irrigation districts, upon which a partial final decree was entered in an adjudication proceeding, violated the New Mexico Constitution, which codified the prior appropriation doctrine.

The appellants, senior rights holders, contended that the settlement agreement violated the New Mexico Constitution, and that due to chronic water shortages for senior rights, the negotiating parties were duty-bound to adhere to the prior appropriation doctrine as it was traditionally understood and enforced, through a priority call. *Id.*

The court's examination focused on a statute that was enacted for the express purpose of achieving compliance with New Mexico's obligations under the Pecos River Compact (the compliance statute). *See id.* at 150 P.3d at 379. In the words of the court, the parties to the settlement agreement sought to cut the water shortage "Gordian knot" through a process more flexible than strict priority enforcement, yet still comply with the prior appropriation doctrine.

In interpreting the legislative intent of the compliance statute, the *Lewis* court found that the intent and purpose of the legislation was beyond dispute—to take charge of resolving a critical situation created by an amended decree, while complying with the obligation of protecting existing rights. In determining that the statute was constitutional, the court assumed that the legislature was aware of the prior appropriation doctrine when it enacted the statute, and that the statute was to be read as a clear signal that the legislature and governmental players wanted to create a solution other than a priority call as the first and only response. *Id.* at 150 P.3d 385.¹⁶ Notwithstanding that the court found the statute constitutional and not violative of prior appropriation, the court found it important that the settlement agreement did not rule out a priority call if needed. *Id.* at 150 P.3d 386.

Nevada Revised Statute § 534.037(1) was enacted in 2011 by A.B. 419. Aside from the six specific and one general consideration codified in the statute, the State Engineer finds that the legislative history contains scarce direction concerning how a plan must be created or what the confines of any plan must be.

Like *Lewis*, in enacting NRS § 537.037, the Nevada legislature expressly authorized a procedure to resolve a shortage problem. And, like *Lewis*, the State Engineer assumes that the Legislature was aware of prior appropriation when it enacted NRS § 534.037,¹⁷ and the State Engineer interprets the statute as intending to create a solution other than a priority call as the first and only response. 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 junior rights holders alone—if that were

¹⁶ Although the prior appropriation doctrine is not codified in the Nevada Constitution, a similar analysis to *Lewis* is appropriate as prior appropriation is the law in Nevada.

¹⁷ The fact that NRS § 534.110(7) requires the State Engineer to regulate by priority after 10 years if no GMP is adopted makes clear that the Legislature was aware of prior appropriation. Also, the remarks of Assemblyman Goicoechea, the bill sponsor, reinforces the Legislature's awareness of prior appropriation when the Assemblyman described regulation by priority (e.g., pumping is curtailed and the basin is brought back into balance with only senior water rights being held). *See Minutes on the Assembly Committee on Government Affairs, 76th Session, p. 66 (March 30, 2011).*

the case, the State Engineer could simply curtail junior rights—a power already granted by pre-existing water law in NRS § 534.110(6). Thus, the State Engineer concludes that NRS § 534.037 provides flexibility outside regulation by priority, and the manner in which the GMP proposes to reduce pumping is authorized by Nevada law.

Notwithstanding, even though NRS § 534.037(1) does not require a GMP to impose reductions solely against junior rights, the most senior rights in the GMP have a higher priority factor than junior rights when the share calculation is made. Thus, the State Engineer finds that the GMP still honors prior appropriation by allocating senior rights a higher priority factor than junior rights.¹⁸

Well Use Approvals

Second, commenters opposed to the GMP challenged the GMP's provision to allow temporary movement (less than 1 year) of allocations, alleging the GMP contravenes existing law by automatically granting such changes, that the temporary approval process diminishes State Engineer and public review and encourages trading on annual bases, rather than filing for a permanent change.¹⁹ On the other hand, other comments were received that supported the flexibility offered by the expedient temporary movement process.²⁰

Existing water law has provisions that deal with temporary changes to water rights²¹ and permanent changes to existing rights.²² Because the GMP unbundles allocations from the place of use where existing water rights are appurtenant, movement of allocations is controlled by a new or existing well serving as the point of diversion.²³ Thus, the GMP was (1) modeled after existing law regarding temporary changes²⁴ and (2) still requires application of NRS § 533.370 to new wells or increased withdrawals exceeding 1 year.²⁵

Section 14.8 of the GMP provides that any new wells or wells having withdrawals in excess of what was approved under the base right be submitted to the State Engineer. Such changes are approved after 14 days if not denied as impairing other rights or contrary to the public interest. The State Engineer finds that the existing law concerning temporary changes (NRS § 533.345(2))

¹⁸ The public comments during the hearing reiterated that the 20% spread of the priority factor likely received the greatest consideration and debate during the GMP process. Ultimately, a spread of priority factor between 0.9997 and 0.80 was what a majority of the plan proponents could agree to.

¹⁹ Written comments of Sadler Ranch, LLC and Great Basin Resource Watch.

²⁰ Written comment of Marty Plaskett; *and see* Transcript, pp. 80-81 (Matt Morrison) (providing an example that when annual reductions are implemented, an irrigator may not have enough water for one pivot, but would have flexibility to combine allocations to water a full crop, while also allowing some irrigation on former irrigation lands to keep them viable until farming on that pivot could resume).

²¹ NRS § 533.345(2).

²² NRS § 533.370.

²³ *See* GMP §§ 14.8 and 14.9.

²⁴ GMP, p. 20 at fn. 20.

²⁵ GMP § 14.9.

expresses a command to grant temporary changes (*e.g.*, "shall approve") unless the State Engineer determined it impairs existing rights or is contrary to the public interest. Thus, the State Engineer finds that § 14.8 and § 533.345(2) to be entirely consistent. Further, the State Engineers agrees that allowing changes expediently up to the original duty at that well is permissible because the State Engineer already made such an affirmative analysis when the water right was granted. Additionally, the State Engineer finds that § 14.8 of the GMP is not a significant departure from existing law because temporary change applications do not undergo publication or hearing unless required by the State Engineer.²⁶ Thus, it is unpersuasive that § 14.8 diminishes State Engineer and public review. Finally, the potential of a rights holder to serially move allocations for less than 1 year to escape being subject to the procedures of NRS § 533.370, exists under current law, as there is no limitation in statute to the number of temporary applications to change. The State Engineer is mindful that when annual notices are given, to examine such notices to determine there is a motivation to avoid the statutory change process.

With respect to new wells, additional withdrawals exceeding 1 year, or where the State Engineer determined within the 14 calendar days may be not be in the public interest or may impair rights of other persons, the existing procedures under NRS chapters 533 and 534, including publication and protest provisions, still apply.²⁷

Well Plugging Provisions

One commenter asserted that the GMP waived existing law regarding exempting wells from NRS Chapters 533 and 534.²⁸

GMP §§ 14.2 and 14.3 direct when active, unused or inactive wells must be plugged and abandoned, or that a waiver of abandonment can be obtained. The State Engineer finds that these provisions are consistent with existing regulations found in NAC §§ 534.300 and 534.427. Additionally, GMP §§ 14.4 and 14.5 expressly require that well construction and maintenance must comply with the requirements of NRS and NAC Chapter 534. The State Engineer finds that the GMP does not waive or exempt wells from existing laws or regulations.

Banking and Aquifer Storage and Recovery

Lastly, one commenter stated that the banking component of the plan was an aquifer storage and recovery (ASR) project, which lacks a necessary permit required by NRS § 534.250, *et. seq.*²⁹

²⁶ NRS § 533.345(3).

²⁷ GMP § 14.9.

²⁸ Transcript, p. 19 (David Rigdon).

²⁹ Written comment of Sadler Ranch, LLC; Transcript, p. 14 (David Rigdon). The statement at the hearing was that this comment was based upon the report of the hydrogeologist in Appendix I that water banking is a type of aquifer storage and recovery project regulated by the State Engineer. As indicated by further findings, the State Engineer does not agree that the banking component of the GMP is an aquifer storage and recovery project.

Section 13.9 of the GMP allows unused allocations to be carried over and banked for use in a subsequent year to increase the amount of water the rights holder can use in the next year. The banked allocation is subject to depreciation in the amount that is carried over to account for natural losses over time.³⁰ In contrast to banking in the GMP, a typical aquifer storage and recovery project is operated by injecting or infiltrating water from a surface source into the aquifer for the purpose of accumulating storage for future use.³¹ These elements of project operation are not part of the GMP. The State Engineer finds that banking of unused allocations in the GMP is a mechanism to allow flexibility by users to determine when to use their limited allocation and to encourage water conservation practices. Consequently, the State Engineer finds that the banking allocations in the GMP is a reasonable means to facilitate conservation and water planning by water users, as provided for under NRS § 534.037, and that the GMP is not required to fulfill the statutory obligations of NRS §§ 534.250–340.

II. COMMENTS RELATED TO ABANDONMENT, FORFEITURE, AND PROVING BENEFICIAL USE

Some commenters stated that water rights that are currently unused should be abandoned or forfeited prior to reductions in pumping being imposed against existing water rights.³² The State Engineer finds that pursuing forfeiture or abandonment prior to implementing any GMP is ill-advised for several reasons.

First, time is of the essence for rights holders to get a GMP approved prior to August 25, 2025, or curtailment by priority will be ordered for all rights in Diamond Valley. Because forfeiture and abandonment must be shown by clear and convincing evidence, it is doubtful whether there is sufficient time to investigate and assemble evidence concerning abandoned rights, to conduct administrative hearings and engage in any appellate proceedings with time left to secure a final table of water rights to support the GMP. Pursuing abandonment at this moment would likely lead to lengthy administrative and/or appeal proceedings, delaying action on a GMP until a final listing of active groundwater rights would be known.³³

Second, a different problem is presented by forfeiture proceedings. Because the State Engineer conducts an annual inventory in Diamond Valley, information is available concerning those rights that may be subject to forfeiture. However, in 2017, NRS § 534.090 was amended to require that a notice of non-use be served prior to forfeiting unused water rights to provide one year to cure a forfeiture.³⁴ Serving notices of non-use at this stage would require that owners of water rights that are currently unused make efforts to resume beneficial use (*i.e.*, pumping). The

³⁰ Section 13.9 describes that Diamond Valley is divided between the main farming area (generally located in the southern half of the basin) and the groundwater discharge area (the northern half of the basin). Banked water north of the dividing line in the discharge area depreciates at 17% and banked water south of the line at 1%. The depreciation factors are based on numerical flowing modeling analysis to justify and support these amounts. See GMP, Appendix I.

³¹ See, *e.g.*, NRS §§ 534.250–340.

³² Written comments of Sadler Ranch, LLC and Carolyn Bailey.

³³ See, *e.g.*, GMP, Appendix F.

³⁴ See NRS § 534.090(2).

consequence of resuming pumping is contrary to the intent of the GMP to *reduce* pumping. Thus, the State Engineer finds that in addition to similar timing problems discussed above, initiating forfeiture proceedings could exacerbate conditions in the basin by increasing pumping, prior to reducing pumping pursuant to the GMP, thereby lessening the effectiveness of the plan.³⁵

Third, assuming *arguendo*, there are water rights existing only on paper (e.g., that could be abandoned or forfeited), reductions in pumping by the GMP start at the ceiling of *actual pumping* (76,000 afa), not at the ceiling of existing rights (126,000 afa). Stated otherwise, even if the State Engineer assumed that the difference between existing rights and actual pumping (50,000 afa) was paper water, the elimination of paper water rights to match active rights will not change that the reductions in *pumping* begin at the component of active rights. The issue of paper water was raised and considered during the GMP drafting process, and it was determined that the GMP contemplated that any valid right in good standing was to be issued shares.³⁶ The State Engineer believes there is a low probability of success for abandonment, and the preceding paragraph describes the likely unanticipated effect of pursuing forfeiture. Therefore, the State Engineer finds that requests to eliminate paper water does not warrant halting this process in order to initiate abandonment or forfeiture proceedings.

Additionally, one commenter stated that existing permitted rights should prove beneficial use and become certificated prior to implementing a GMP. For reasons discussed above, including timing and discouraging increases in pumping, the State Engineer finds that requiring proof of beneficial use prior to implementing a GMP is not in the best interest of taking immediate action to adopt and implement a basin-wide GMP. Further, the GMP petition process expressly applies to the holders of *permits* and *certificates*. Therefore, the GMP statute implicitly recognizes that permitted rights which have not fully proven beneficial use will participate in the GMP process.

III. COMMENTS RELATED TO APPLICABILITY OF PLAN TO ONLY CERTAIN WATER RIGHTS

Some comments were directed to the scope of GMP applying only to irrigation rights and mining and milling rights with a base irrigation right. Some expressed concern that it created a preference for certain manners of use, that there was no environmental component to the plan and it would result in water barons.³⁷ Many comments in favor of the plan described how they believed the plan would allow more irrigators or mines to stay in business, ultimately benefitting the greatest number of operators by providing more favorable conditions such as weed and rodent control.³⁸ The comments favored adoption of a GMP in lieu of curtailment, which many recognized would

³⁵ The issue of forfeiture in Diamond Valley, particularly of pivot corners, pre-dates the 2017 amendments to NRS § 534.090. In the 1980s, the State Engineer pursued forfeiture of unused pivot corners in Diamond Valley, which lead to the enactment of NRS § 534.090(3) (pre-2017 version). See Nev. Stat. ch 559 (1983); and see, A.B. 597 (1983).

³⁶ See GMP, Appendix C, p. 244.

³⁷ Written comments of Great Basin Resources Watch, and Ari Erickson.

³⁸ Written comments of James Gallagher, Mark Moyle and Donald Palmore; Transcript, p. 68 (Jim Gallagher); pp. 80-81 (Matt Morrison).

likely force many junior irrigators into bankruptcy, and as a result, the community would suffer.³⁹ In addition, many comments in favor of the GMP spoke positively about methods for increasing efficiency to continue operations while reducing pumping.⁴⁰

As discussed in the introductory paragraphs section, *supra*, over 96% of committed rights are represented in the plan; therefore, the State Engineer finds that given the overwhelming majority of irrigation rights and mining and milling rights having irrigation base rights, the application of the plan to those rights that will have the most impact and be most impacted, is appropriate. While one commenter opined that the GMP does not address environmental concerns, the State Engineer does not agree. The GMP may not contain express provisions for the environment, but allowing the greatest number of irrigators to remain in business and keep cultivated lands active, will prevent the incursion of weeds, and will provide dust and rodent control. And ultimately, the State Engineer finds that the objective to reduce the pumping of groundwater to stabilize groundwater levels is a benefit of the groundwater basin, the irrigators and other members of the community that rely upon it and live within it, and that it is not necessary to explicitly identify certain areas of environmental concern within the scope of the plan for the plan to have a generalized benefit to the environment.

Finally, the State Engineer finds that comments that the GMP will result in "water barons" or that it will create a preference for certain manners of use, are speculative. Existing water law provides that water rights are a form of real property that are freely alienable and transferrable independent of land where the water was formerly appurtenant. In that way, the ownership of water rights and the manners of use are currently determined by a market of real property transactions.

IV. COMMENTS RELATED TO PRACTICALITY OR REASONABLENESS OF THE PLAN IMPLEMENTATION

Mitigation Rights

Some commenters challenged the fact that the GMP does not provide for mitigation of senior surface water rights that have been negatively impacted by junior groundwater pumping.⁴¹

The requirement for the approval of a GMP is that it "must set forth the necessary steps for removal of the basin's designation as a critical management area." NRS § 534.037(1). Neither the plain language nor the legislative history indicate that mitigation of senior surface water rights that have allegedly been adversely affected by groundwater pumping must be mitigated by a GMP.⁴²

³⁹ Written comments of William Norton and Donald Palmore; Transcript, pp. 80-81 (Matt Morrison).

⁴⁰ Written comment of William Norton, Marty Plaskett, Robert Burnham and James Gallagher; Transcript, p. 81 (Matt Morrison).

⁴¹ Written comments of Sadler Ranch, LLC and Daniel Venturacci.

⁴² In fact the opposite appears to be true from the legislative history. As proposed, A.B. 419 would have required the State Engineer "to consider the relationship between surface water and groundwater in the basin," but this consideration was amended out of the bill after the First Reprint.

Of note is that the State Engineer entered Order 1226, entered on March 26, 2013, which provided a mechanism for mitigation of senior surface water rights allegedly impacted by junior groundwater pumping. Two of the commenters at the hearing who raised this issue have taken advantage of the provisions of Order 1226, by filing for mitigation groundwater rights, which were granted by the State Engineer. Consequently, the State Engineer finds that mitigation is not a required element of the GMP; and in any event, the commenters who raised this issue have already taken advantage of Order 1226.⁴³

Out-of-Basin Transfers

One commenter was concerned that unbundling water rights appurtenant to their place of use creates an incentive for out-of-basin transfers.⁴⁴ The commenter acknowledged that the current GMP prohibits out-of-basin transfers, but suggested the plan proponents may consider amending the plan to strengthen provisions to avoid incentivizing out-of-basin transfers. The State Engineer finds that NRS § 534.037 provides that once adopted, the GMP can be amended by the same procedure which allows for adoption of a plan.⁴⁵ Because the GMP currently prohibits out-of-basin transfers, there is currently no necessity to mandate changes to the GMP to strengthen provisions to disincentivize out-of-basin transfers. Some commenters involved the creation of the plan who spoke in favor of it acknowledged the plan may not be "perfect." Short of finding the current GMP cannot be approved as a matter of law, the State Engineer finds that denial of the Petition to require years of possible additional negotiations to merely better state existing plan provisions, to be unnecessary.⁴⁶

See A.B. 419 (First Reprint), Senate Committee on Government Affairs, 76th Sess. (May 25, 2011).

⁴³ See, e.g., Permits 81720, 82268, 81825 and 82572, official records in the Office of the State Engineer.

⁴⁴ Written comment of Great Basin Resource Watch.

⁴⁵ NRS § 534.037(5).

⁴⁶ The State Engineer values all comments and testimony received concerning the GMP. While it is clear the *Public Interest Review of the Proposed Diamond Valley Groundwater Management Plan* prepared for Great Basin Resource Watch was thorough in its analysis, the State Engineer gives great weight to comments and testimony from water rights holders in Diamond Valley, senior or junior whom are for or against approval of the GMP. Great Basin Resource Watch does not own water rights in Diamond Valley and it does not appear it was involved in the years of public meetings held in Eureka to negotiate the details of the GMP. See, e.g., GMP Appendix C at pp. 121-240. Indeed, its own written comment appears to recognize it is appropriate to afford great weight to those that created and are affected by the plan. See Written comment of Great Basin Resource Watch at p. 8 (a groundwater management plan should address the varied objectives or goals of water users and residents in the basin, and a worthwhile consideration is whether the GMP promotes bottom-up collaboration to promote broad buy-in from affected individuals and to provide flexibility in decision-making); and see also, Transcript, p. 65 (Mark Moyle) (responding to comments at the hearing, stating that the GMP was developed by the people who live in Diamond Valley and will be most affected and that everyone was making sacrifices).

Public and Local Community Interest

The same commenter stated that the public interest component was not adequately represented and that the description of local community interests could be strengthened.⁴⁷

The State Engineer disagrees that the public interest is not adequately represented. As already discussed under well use approvals, new wells, additional withdrawals exceeding one year, or where the State Engineer rejected a request under § 14.8, is subject to the procedures of NRS § 533.370—including the public interest review for change applications.

Many comments in support of the GMP reflect the reality that it took years for the participants to negotiate an agreement that was able to attain majority support required to petition the State Engineer for approval. Years before the State Engineer declared the basin a CMA in 2015, the GMP process was initiated by the local community and stakeholders.⁴⁸ Work on the GMP continued for an additional three years after the CMA designation with numerous meetings of the community and stakeholders, ultimately arriving at the version presented to the State Engineer in 2018.⁴⁹ Appendix C of the GMP demonstrates that this process was emotional and difficult for the participants—yet they persisted in forging a plan in an effort to avoid curtailment. The written comments overwhelmingly demonstrate the public and local community interests to be preserved by the approval of the plan, which are best stated by the following irrigator:⁵⁰

The irrigators that support this plan understand that we all need to sacrifice for the long-term benefit of the community and the long-term continued success of the farming industry. Diamond Valley is the heart of southern Eureka County's economy. . . . Strong, willing, and giving people who understand that it takes community effort to sustain and survive built Diamond Valley. . . . The purpose of the DVGMP is to continue the ongoing success of the entire southern Eureka County area and the enterprises that exists [sic] there.

This sentiment was repeated in all written comments submitted in support of the plan.⁵¹ In addition, many stirring accounts were given at the public hearing about living and growing up in Diamond Valley, the desire to preserve the established way of life, the hardscrabble efforts made over decades to create the farms that exist in the valley today, and the determination of the community to work together to solve issues, both past and present, which challenged their continued existence.⁵² The State Engineer finds that the GMP materials, written comments and testimony at the public hearing overwhelmingly describe and support the public and local

⁴⁷ Written comment of Great Basin Resource Watch.

⁴⁸ GMP, Appendix B.

⁴⁹ See GMP, Appendices A, C.

⁵⁰ Written comment of Mark Moyle.

⁵¹ See written comments of Robert Burnham, Russell Conley, Jim Etcheverry, James Gallagher, Andrew Goettle, William Norton, Donald Palmore, Marty Plaskett and Ruby Hill Mining Company; and see Transcript, pp. 52-53 (D'Mark Mick).

⁵² Transcript, pp. 57-59 (James Moyle); pp. 75-77 (Vickie Buchanan); pp. 79-82 (Matt Morrison); pp. 84-85 (Lloyd Morrison); pp. 85-88 (Alberta "Birdie" Morrison).

community interests, which weigh heavily in the determination at hand. While many comments in the *Public Interest Review*⁵³ reflect aspirational components of what a plan *may* contain or how it could be best stated, the State Engineer finds that the GMP is acceptable in these areas.

Protections for Domestic Wells

One commenter suggested that domestic wells were not protected because pumping will continue to exceed the perennial yield while the GMP is carried out. The State Engineer finds that NRS § 534.110(7), states that unless a GMP has been approved for a basin pursuant to NRS § 534.037, "withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights." And that pursuant to NRS § 534.080, domestic wells are assigned the date of priority of the date the well was drilled. Thus, the GMP is protective of domestic wells because it specifically excludes the domestic wells from pro-rata reductions in use and allows for their continued use to the full statutory permitted amount, compared to the alternative that (a) the domestic wells in Diamond Valley are junior in priority to the 30,000 af PY, and (b) since, absent an approved GMP, domestic wells are subject to curtailment based upon their priority.

Advisory Board Makeup

Commenters had differing issues with the makeup of the Advisory Board.⁵⁴ One commenter stated that the GMP favors junior appropriators on the Advisory Board. Alternatively, another commenter posited that after a period of years, the makeup of the Advisory Board could favor non-irrigators over irrigators. The State Engineer finds that the plan was created by the individuals that will be subject to the plan, and the State Engineer accepts that a majority of the rights holders agreed that the makeup and voting structure of the participants agreed this to be a fair manner of representation on the Board.

V. COMMENTS RELATED TO SCIENTIFIC SOUNDNESS

Some commenters challenged the GMP, asserting that the GMP is not supported by science and hydrologic analysis, with the following observations:⁵⁵

- a. The scheduled reduction in pumping would exceed the perennial yield for the life of the GMP and in the process it would deplete aquifer storage in excess of the transitional storage volume.
- b. The GMP is not supported by a hydrogeologic analysis or a groundwater model to provide information on the effects of the plan.
- c. Some commenters had questions about the accuracy of the ET depreciation rate, and whether this rate may change over time because

⁵³ Written comment of Great Basin Resource Watch.

⁵⁴ Written comments of Sadler Ranch, LLC and Great Basin Resource Watch.

⁵⁵ Written comments of Ira and Montira Renner and Sadler Ranch, LLC; Transcript, p. 19 (David Rigdon); pp. 23-24 (David Hillis).

of groundwater recovery and corresponding changes in groundwater ET.

- d. One commenter raised the lack of thresholds or triggers in the GMP.

The GMP is based on the simple fact that groundwater pumping is the cause of declining water levels, and therefore pumping must be reduced to solve the problem. The reduction in pumping is set at 3% per year for the first 10 years, and may be adjusted up or down thereafter as informed by groundwater level monitoring data. The goal of this approach is to progressively reduce groundwater pumping until the perennial yield is not consistently exceeded, and the measure of that ultimate outcome is a stabilization of water levels.

Perennial yield is based on the principle of conservation of mass, which dictates that water levels will stabilize when recharge equals discharge. Before any groundwater development occurs, an undeveloped basin is considered to be in equilibrium between natural groundwater recharge and discharge. When wells are developed, groundwater is initially drawn from aquifer storage in the vicinity of the well, but over time that groundwater removal is replaced by a decrease in natural discharge or increase in recharge until a new equilibrium is reached and the discharge by pumping is part of the basin water balance. Water drawn from storage in the period of time between the pre-development equilibrium and the post-developed equilibrium is defined as the transitional storage. The amount of transitional storage consumed before a new equilibrium state is reached may affect the depth to water at a new equilibrium condition, but as long as recharge and discharge are ultimately balanced then an equilibrium condition can be reached and the goal of the GMP to stabilize water levels can be achieved. The amount of storage consumed in the transitional period will not prevent equilibrium from being reached.

Groundwater modeling and hydrogeologic analysis are not the basis for the GMP's determination of pumping reduction rates and target pumping totals at the end of the plan. Instead, the pumping reduction rate was selected by agreement of the GMP authors, and the target for total pumping at the end of the GMP was selected from existing published values. Upon implementation, the real effects of the plan will be monitored and observed by measuring the change in groundwater levels throughout the basin. Those measurements will be the basis for plan review and any modifications of pumping reduction rates that the GMP requires after an observation period of 10 years.

Groundwater modeling is a helpful and informative tool for projecting the effects of pumping reduction and planning accordingly, but modeling is not necessary to conclude that reductions in pumping will lead to reductions in water level drawdown. Groundwater modeling and hydrogeologic analysis beyond what is publicly available in existing published reports would not change the fact that the cause of groundwater decline is due to pumping groundwater and that the stakeholder-authored plan seeks to reduce pumping. Modeling could be a useful tool for future evaluation of the plan and modifications to pumping reduction rates, but it is not required.

One commenter questioned whether the reductions in pumping under the plan combined with rights not subject to plan would bring withdrawals to the perennial yield based on his calculation of rights able to be pumped being excess of 42,000 afa.⁵⁶ As explained, the goal of the

⁵⁶ See written comment of Ari Erickson.

GMP is to reduce consumptive use to the current perennial yield; and, as indicated in the introductory paragraphs, there are 4,437 af of groundwater rights in the basin not subject to the plan. Thus, the State Engineer does not find that there could be total pumping in excess of 42,000 afa in the basin at the end of 35 years under the GMP. Assuming, *arguendo*, that rights subject to the plan and those not subject to the plan were estimated to be 34,437 af, existing evidence used by the State Engineer to designate the basin a CMA demonstrates that there are wide variations in annual pumping—in some years, by several thousand acre-feet more or less than the prior year.⁵⁷ Because the designation of a CMA is based on withdrawals *consistently* exceeding the perennial yield, the State Engineer finds that existing law suggests some tolerance of variations on the annual amount of pumping. In addition, the State Engineer is mindful that perennial yield is an *estimate* of water availability and is only one-half of the equation of GMP success.⁵⁸ Actual observations of water levels are the most direct and reliable means of determining GMP success. The plan to reduce pumping, monitor the effects on water levels, and then adjust pumping reductions is a sound approach to achieving the goal of stabilizing water levels. The lack of a groundwater model or detailed hydrogeologic analysis does not preclude approval of the GMP as written.

One commenter raised the lack of thresholds or triggers in the GMP. The State Engineer finds that there is no express requirement in NRS § 534.037 for thresholds or triggers, and that a reference to thresholds or triggers is commonly in reference to a “Monitoring, Management and Mitigation (3M)” Plan. The State Engineer has historically utilized 3M Plans as a tool in approving new appropriations when impacts to existing rights are unknown. Consequently, the State Engineer finds that a 3M Plan having thresholds and triggers is different than the GMP now pending before the State Engineer, and that the two types of plans serve different functions. Nevertheless, the State Engineer finds that there has been robust monitoring of irrigation groundwater use in Diamond Valley by the State Engineer’s office for many decades and that monitoring groundwater use and groundwater levels is ongoing. Moreover, the GMP requires irrigators to install a smart meter, which will provide increased accuracy and nearly real-time knowledge of groundwater use.⁵⁹ Finally, the GMP incorporates the State Engineer’s enforcement authority concerning over-pumping of a user’s allocation, and contains penalties to be paid in water for over-pumping and stiff administrative fines for meter tampering.⁶⁰

Finally, some commenters had questions about the accuracy of the ET depreciation rate, and whether this rate may change over time because of groundwater recovery and corresponding

⁵⁷ See Order 1264, official records in the Office of the State Engineer.

⁵⁸ Both the GMP and the commenter acknowledged the release of a 2016 report by the U.S. Geological Survey, which estimated the perennial yield may be 35,000 af. GMP, p. 8 at fn. 2; Transcript, p. 37 (Ari Erickson). As part of a different administrative hearing proceeding, the State Engineer was requested to accept the USGS Report as the perennial yield in Diamond Valley. That matter is currently under submission, and no determination has been made by the State Engineer whether to accept this number. Consequently, the GMP was based on the current estimate of perennial yield of 30,000 af.

⁵⁹ See GMP § 15. The most recent groundwater inventory conducted by the State Engineer in 2018 revealed that there was nearly 100% compliance with smart meter installation already. This further affirms that rights holders have already made financial commitments of purchasing and installing smart meters to ensure success of the GMP.

⁶⁰ GMP §§ 16, 17.

changes in groundwater ET. The selection of these rates was the only component of the GMP expressly based on groundwater model simulations. The accuracy of the model and appropriateness of assigning ET depreciation rates based on model interpretation was discussed at GMP planning meetings. The ET depreciation rates in the final GMP were a compromise and there was never a consensus. Adjustments to these rates is provided for under the provisions to amend the GMP, as warranted by the data.

VI. COMMENTS RELATED TO PRECEDENCE

Several commenters were concerned that any GMP adopted in Diamond Valley creates a precedent for other areas in the state that may be designated Critical Management Areas. The proposed GMP under consideration is the first plan in the state adopted through the process required by NRS § 534.037. As with most decisions involving water, the conditions and issues facing Diamond Valley are unique to Diamond Valley, and therefore the requirements of this plan may not be suitable for any other area in the state. Many individuals speaking in support of the plan made this observation, and the State Engineer concurs that the Diamond Valley GMP does not limit the possible solutions that may be employed by other groundwater management plans.

WHEREAS, based upon the foregoing, the State Engineer makes the following findings of fact, conclusions of law and order:

The State Engineer finds that Appendix D to the GMP sufficiently describes (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; and (e) the wells located in the basin, including, without limitation, domestic wells.

The State Engineer finds that there is currently no groundwater management plan in existence for Diamond Valley.

The State Engineer finds that the GMP is analogous to the settlement agreement at the center of the *Lewis* case, *i.e.*, an agreement supported by at least a majority of the permit and certificate holders in Diamond Valley to protect existing rights while cutting the Gordian knot of basin over-appropriation. Thus, the State Engineer concludes that adoption of the GMP is expressly authorized by statute and does not violate the prior appropriation doctrine because the statute provides flexibility outside strict regulation by priority.

The State Engineer finds that the GMP is not legally deficient nor waives any authority of the State Engineer to enforce Nevada water law.

The State Engineer finds that due to the length of time required, initiating abandonment or forfeiture proceedings or requiring proof of beneficial use prior to implementing a GMP is not in the best interest of reducing pumping and would only serve to delay such reductions.

As discussed in the introductory paragraphs, over 96% of committed rights are represented in the plan; therefore, the State Engineer finds that given the overwhelming majority of irrigation rights and mining and milling rights having irrigation base rights, and that the application of the plan to those rights that will have the most impact, and that will be the most impacted, is appropriate.

The State Engineer finds that public and local community interests have been considered, and that such interests are a cornerstone of the plan by retaining the greatest number of farms or mines as economically viable, which will provide social, economic, and environmental benefits.

The State Engineer finds that the standard for determining success of the plan by stabilizing water levels is sound.

The State Engineer finds that groundwater modeling is an informative tool for projecting the effects of pumping reduction, and that future model results could add confidence to decisions on any changes to pumping reductions, but that the lack of a groundwater model or hydrogeologic analysis does not preclude approval of the GMP as written.

The State Engineer finds that the GMP's annual reductions in pumping will lead to the entire basin's groundwater pumping approaching the perennial yield and stabilization of groundwater levels.


The State Engineer finds that the GMP is a groundwater management plan and is not a monitoring, management and mitigation plan; therefore, not only is there no requirement that there be a mitigation component or thresholds and triggers for activation of mitigation actions, but also such components would cloud the plan's goal and objectives.

The State Engineer finds that 1 acre-foot is equal to 325,851 gallons pursuant to practice and policy of the Office of the State Engineer, and that this conversion rate will be used.

In light of the foregoing findings, having considered the comments for and against the GMP, the State Engineer concludes that the petitioning parties have met the requirements for the adoption of the Diamond Valley Groundwater Management Plan, and the Petition is accordingly granted.

ORDER

NOW THEREFORE, it is ordered that the Petition to Adopt the Groundwater Management Plan for the Diamond Valley Hydrographic Basin is hereby **GRANTED**.

 P.E.

JASON KING, P.E.
State Engineer

Dated at Carson City, Nevada this

11TH day of JANUARY, 2019.

Attachment 3

NO. CV1902-348
FILED

FEB 11 2019

By Eureka County Clerk
Lisa Haeberle

1 Case No.

2 Dept. No.

3
4
5
6 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF EUREKA**
8

9 IRA R. RENNER, an individual, and MONTIRA
10 RENNER, an individual,

11 Petitioners,

12 vs.

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

Respondent.

PETITION FOR JUDICIAL REVIEW

17 COME NOW, Petitioner IRA R. RENNER, an individual, and MONTIRA RENNER, an
18 individual ("Renner"), by and through their counsel, PAUL G. TAGGART, ESQ. and TIMOTHY D.
19 O'CONNOR, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby petition the Court
20 to reverse or remand Order 1302 issued by the Nevada State Engineer on January 11, 2019, and attached
21 hereto as Exhibit 1.¹ This Petition for Judicial Review, as well as Notice of Appeal, is filed pursuant to
22 NRS 533.450.

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RECEIVED

FEB 11 2019

Eureka County Clerk

27
28 ¹ Order 1302 was signed by former State Engineer Jason King, P.E., on his last day in office. Tim Wilson, P.E., assumed the office of State Engineer on January 14, 2019. As the successor in interest to Mr. King, Mr. Wilson is the proper party to name and serve in this action.

JURISDICTIONAL STATEMENT

The State Engineer is authorized under NRS 534.037 to consider the adoption of a groundwater management plan ("GMP") upon submission of a petition requesting the same signed by a majority of the holders of water rights within the basin. Upon receipt of such a petition, the State Engineer is required to hold a hearing to take testimony and consider evidence for and against the submitted GMP. Under NRS 534.037(4), a decision by the State Engineer to approve a submitted GMP "may be reviewed by the district court of the county pursuant to NRS 533.450."

The Diamond Valley GMP was submitted to the State Engineer on August 20, 2018. A "hearing" on the plan was held in Eureka, Nevada, on October 30, 2018. On January 11, 2019, the State Engineer issued Order 1302 in which he approved and adopted the Diamond Valley GMP. The majority of the property and appurtenant water rights subject to the GMP are located within Eureka County. Accordingly, pursuant to NRS 533.450, this Court has jurisdiction over this matter and is the proper venue for hearing any petitions requesting judicial review of Order 1302.

STANDING

Renner is the owner and operator of a ranch in Diamond Valley on the northwestern side of the Diamond Valley hydrographic basin that was established in the late 1800s. The ranch consists of hundreds of acres historically irrigated with water from various naturally occurring springs and seeps. The ranch also utilizes groundwater rights that are either comingled with or supplemental to the spring water to provide irrigation to about 300 acres of agricultural land. Renner's vested rights to the spring water were established prior to 1905 and cannot be impaired by any action of the State Engineer.² Further, as being in the northern portion of the basin, Renner's groundwater rights are treated more onerously than those in the southern portion of the basin, regardless of their priority. Renner did not sign the GMP and is treated differently than other groundwater right holders in the plan. The adopted GMP will (1) allow the over-pumping of the groundwater basin to continue indefinitely thereby continuing and exacerbating the harm to Renner's pre-statutory vested water rights, and (2) harm his groundwater rights that are subject to the plan without his permission. Accordingly, Renner has standing to file the instant petition pursuant to the provisions of NRS 534.037(4) and NRS 533.450.

² NRS 533.085.

FACTUAL BACKGROUND

Diamond Valley is a large basin located just north of Eureka, Nevada. Prior to 1905, settlers were attracted to the valley by the numerous springs and seeps that naturally occurred along the alluvial fans that occurred at the base of the eastern and western mountain ranges bounding the valley floor. Renner owns the most northerly of these ranches that were established prior to 1905 on the west side of the basin.

In the 1950s and 1960s, the State Engineer began to issue a large number of permits authorizing the development of groundwater in Diamond Valley for irrigation purposes. These permits were issued despite the existence of reports indicating that the valley floor springs were hydrologically connected to the groundwater aquifer and that pumping of the groundwater rights would likely impact the flow of the springs.³ In all, the State Engineer issued permits allowing for the use of more than 130,000 afa despite the fact that the perennial yield of the basin (the amount of water estimated to be available for sustainable pumping) is just 30,000 afa. The majority of these permits are issued in the southern half of the basin. This concentrated and extensive pumping has permanently removed 1,750,000 acre-feet more water than the basin could replenish.⁴ As a result, groundwater levels have dropped by more than 100 feet. Current pumping is in excess of 76,000 afa, more than twice the perennial yield. The harm and abuse of the aquifer has been concentrated in the southern half of the basin.

The massive over-pumping of the groundwater basin has caused numerous environmental problems including the drying up of the valley floor springs. This was not an unexpected result. As early as 1962, and again in 1968, the State Engineer was alerted to the fact that the overpumping would result in serious impacts.⁵ Rather than take action to prevent it, the State Engineer chose to disregard the warnings. As a result, holders of the most senior water rights in the basin have had their springs dry up. These senior users have been denied access to the water needed to operate their ranches and farms while junior-priority users continue to prosper by exploiting what is left of the basin's groundwater.

³ EAKIN, THOMAS E., GROUNDWATER RESOURCES – RECONNAISSANCE SERIES REPORT 6 – GROUND-WATER APPRAISAL OF DIAMOND VALLEY EUREKA AND ELKO COUNTIES, NEVADA, (United States Geological Survey, February 1962); HARRILL, J.P., STATE OF NEVADA WATER RESOURCES BULLETIN NO. 35 – HYDROLOGIC RESPONSE TO IRRIGATION PUMPING IN DIAMOND VALLEY, EUREKA AND ELKO COUNTIES, NEVADA, 1950-65, (United States Geological Survey, 1968).

⁴ HILLIS, DAVID G., P.E., REVIEW AND EVALUATION OF THE DIAMOND VALLEY GROUND WATER MANAGEMENT PLAN, Turnipseed Engineering (October 30, 2018).

⁵ See fn 9, supra.

1 The State Engineer's office has taken numerous actions to manage groundwater development in
2 Diamond Valley. In 1964, the State Engineer designated a portion of Diamond Valley as an area of
3 active management pursuant to NRS 534.101 to 534.190.⁶ Notably, the designation order related only
4 to the southern portion of the basin where over pumping was an issue. By 1975, groundwater pumping
5 in Diamond Valley did in fact exceed the estimated perennial yield of the basin and the State Engineer
6 began limiting groundwater development.⁷ In 1975, the State Engineer ordered that all applications to
7 irrigate new or additional lands in the southern Diamond Valley be denied and applications to irrigate
8 existing lands be considered on an individual basis.⁸ In 1978, the State Engineer ordered that all
9 applications filed after December 31, 1978, be denied in southern Diamond Valley.⁹ In 1982, the State
10 Engineer held a hearing to consider whether to curtail pumping in southern Diamond Valley. Instead of
11 curtailing pumping, the State Engineer ordered totalizing meters to be installed for permitted and
12 certificated groundwater rights and recognized that it might be necessary in the future to restrict
13 withdrawals in the area to conform to priority rights.¹⁰ In 1983, the State Engineer expanded the
14 designated area to include all of Diamond Valley, not just the southern portion.¹¹ Finally, in 2013, the
15 State Engineer ordered that all applications to appropriate groundwater in Diamond Valley be denied,
16 with four limited exceptions. In 2011, facing an imminent threat of curtailment from the vested senior
17 rights holders the junior-priority users were able to convince the Legislature to pass a bill authorizing
18 them to develop a GMP as an alternative to regulation by strict priority. The main provisions of the bill
19 were codified as NRS 534.037 and NRS 534.110(7).

20 The criteria for approval of a GMP is set under NRS 534.037. Under the statute the State
21 Engineer cannot approve a GMP unless substantial evidence demonstrates that the plan includes "the
22 necessary steps for removal of the basin's designation as a critical management area."¹² Under NRS
23 534.110(7) a Critical Management Area ("CMA") designation is applied when "withdrawals of

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25 ⁶ Order 277 dated August 5, 1964; Order 280 dated August 28, 1964.

26 ⁷ U.S. Geological Survey, Irrigated Croplands, Estimated Pumpage, and Water-Level Changes in Diamond Valley, Eureka
27 and Elko Counties, Nevada, through 1990, Open-File Report 95-107.

28 ⁸ Order 541 dated December 22, 1975.

⁹ Order 717 dated July 10, 1978.

¹⁰ Order 809 dated December 12, 1982; Order 813 dated February 7, 1983 (State Engineer extended the deadline for installing
the meters by one year to May 1, 1984).

¹¹ Order 815 dated April 4, 1983.

¹² NRS 534.037.

Pursuant to the provisions of NRS 534.110(7), on August 25, 2015, the State Engineer issued Order 1264 designating Diamond Valley as a CMA. This began a 10-year clock during which a GMP must be approved. If a GMP is not approved in that timeframe, the State Engineer is required to immediately curtail pumping according to strict priority.

As noted above, the Diamond Valley GMP was submitted to the State Engineer on August 20, 2018. Under NRS 534.037(3), the State Engineer is required to hold a hearing on a submitted plan, and a hearing was scheduled for October 30, 2018. The hearing on October 30, 2018, was not a hearing in the normal definition of the word and instead served as a public forum for participants to provide oral comments, but not to offer testimony, cross examine witnesses, or exchange exhibits. At the hearing, Renner voiced objections to the GMP. The State Engineer ignored these objections and on January 11, 2019, issued Order 1302 approving and adopting the Diamond Valley GMP without any changes or edits, or new conditions thereon.

GROUNDS FOR PETITION

Petitioners seek judicial review of Order 1302 on the following grounds: (1) the process the State Engineer used to review and adopt the GMP violated the requirements of NRS 534.037(3) and constitutional due process standards established by the Nevada Supreme Court, (2) the GMP is not supported by substantial evidence showing that its adoption and implementation will result in the removal of the CMA designation from the basin as required under NRS 534.037(1), (3) the GMP authorizes continued over-pumping of water in the basin, (4) the GMP fails to include a monitoring plan to measure whether pumping reductions will actually result in a stabilization of groundwater levels in the basin, (5) the GMP fails to provide any mitigation for past or future harms to holders of vested senior groundwater rights, (6) the GMP does not contain objective thresholds or triggers to determine whether more aggressive reductions in pumping will be required in the future, (7) the GMP improperly limits the State Engineer's discretion and authority to order accelerated pumping reductions, (8) the GMP ignores

1 the impacts to holders of vested senior water rights that will result from allowing over-pumping in the
2 basin to continue indefinitely, (9) the governance provisions of the GMP violate constitutional due
3 process safeguards, (10) the GMP violates statutorily mandated provisions of Nevada's water laws, (11)
4 the GMP violates the provisions of NRS 534.250 – 534.350, inclusive, in that it authorizes an aquifer
5 storage and recovery program without complying with statutorily mandated permitting requirements,
6 (12) the GMP unlawfully allows water right holders to change the point of diversion, manner of use,
7 and place of use of their permits without submitting an application to do so with the State Engineer, (13)
8 the GMP unlawfully authorizes the State Engineer to exempt wells from the well abandonment
9 requirements of NRS 534 and NAC 534, (14) the GMP unlawfully places time limits on the State
10 Engineer to perform certain actions and deems regulated activity automatically approved if the State
11 Engineer fails to meet the time limits, (15) the GMP treats similarly situated persons differently based
12 on arbitrary and capricious factors in violation of the equal protection clauses of the Nevada and United
13 States Constitutions, (16) the GMP unlawfully takes private property without just compensation in
14 violation of the Nevada and United States Constitutions, (17) the GMP violates the non-impairment
15 doctrine enshrined in NRS 533.085, (18) the State Engineer has stated that he intends to enforce the
16 GMP against holders of water rights who did not consent to its adoption, (19) the factual determinations
17 made by the State Engineer in Order 1302 are not supported by substantial evidence in the record, (20)
18 the State Engineer acted arbitrarily and capriciously when he adopted Order 1302, (21) the State
19 Engineer abused his discretion when he adopted Order 1302, (22) the legal conclusions the State
20 Engineer made in Order 1302 are erroneous and without merit, and (23) the State Engineer's actions in
21 this matter were biased, inequitable, violated his duty to act as a neutral arbiter in water rights
22 proceedings, and exhibited prejudice towards holders of pre-statutory water rights in the basin.

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CONCLUSION

For the reasons stated above, and for others that may be raised during the pendency of this appeal, Petitioners respectfully request that the Court reverse or remand Order 1302.

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 this 8 day of February, 2019.

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

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document as follows:

[X] By HAND-DELIVERY, addressed as follows:

Tim Wilson, P.E.
Nevada State Engineer
Division of Water Resources
901 S. Stewart Street, Suite 2002
Carson City, NV 89701

Tori N. Sundheim, Esq.
Deputy Attorney General
Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701

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

Eureka County Board of Commissioners
P.O. Box 694
Eureka, NV 89316

William H. Norton
HC 62 Box 62150
Eureka, NV 89316

Ruby Hill Mining Company
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EXHIBIT 1

EXHIBIT 1

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

#1302

ORDER

**GRANTING PETITION TO ADOPT A GROUNDWATER MANAGEMENT PLAN FOR
THE DIAMOND VALLEY HYDROGRAPHIC BASIN (07-153), EUREKA COUNTY,
STATE OF NEVADA.**

WHEREAS, decades of declining water levels in the Diamond Valley Hydrographic Basin is due to the simple fact that groundwater pumping has consistently exceeded the perennial yield of the basin. An obvious solution to the problem caused by *over* pumping is to *reduce* groundwater pumping. Designating Diamond Valley a Critical Management Area (CMA) (the first and only basin thus far in Nevada), provided water right users within the Diamond Valley basin the opportunity to develop a customized groundwater management plan (GMP) that does in fact reduce groundwater pumping to a level that satisfies the State Engineer that the water levels will reach an equilibrium. The CMA and GMP process became law in 2011 specifically to allow those that truly have skin-in-the-game (the water right holders in the basin), to create a means to the same end as curtailment by priority, but without the dire and sudden impacts.

Years before the State Engineer declared the basin a CMA in 2015, the GMP process was initiated by the local community and stakeholders. Work on the GMP continued for an additional three years after the CMA designation with numerous meetings of the community and stakeholders, ultimately arriving at the version presented to the State Engineer in 2018. The testimony, written public comment and background of Appendix C of the GMP demonstrate that this process was emotional and difficult for the participants—yet they persisted in forging a plan in an effort to avoid curtailment by priority to save their community and the established agricultural way of life in Diamond Valley. It is significant that the participants are not professional water right managers, but are ordinary citizens who made a Herculean effort to craft their own plan in response to a complex problem.

WHEREAS, this matter came before the State Engineer on a Petition to Adopt a Groundwater Management Plan (Petition), pursuant to Nevada Revised Statute (NRS) § 534.037 filed on August 20, 2018.

WHEREAS, the history leading up to the subject Petition is as follows:

Diamond Valley is a major groundwater farming area in the Diamond Valley Hydrographic Basin, Basin 153.¹ There are approximately 26,000 acres of irrigated land, which primarily produce premium quality alfalfa and grass hay. In 2013, it was estimated that approximately 110,000 tons of hay were produced annually for a total farming income of approximately \$22.4

¹ GMP, p. 8.

million.² Approximately 126,000 acre-feet annually (afa) of irrigation groundwater rights are appropriated in Diamond Valley, and as of 2016, groundwater pumping for irrigation was estimated to be 76,000 afa. The perennial yield of Diamond Valley is 30,000 acre-feet (af).³

For over 40 years, annual groundwater pumping has exceeded the perennial yield of Diamond Valley.⁴ In the years that groundwater pumping has exceeded the perennial yield, groundwater levels in Diamond Valley have consistently declined at a rate of up to 2 feet per year. Prior to declaring Diamond Valley a CMA pursuant to NRS § 534.110(7), the State Engineer held public meetings on numerous occasions in Diamond Valley to discuss over-appropriation of the basin and to encourage water rights holders to formulate solutions or a plan at the local level to address declining water levels.

Because withdrawals have consistently exceeded the perennial yield of the basin, on August 25, 2015, the State Engineer declared Diamond Valley a CMA pursuant to NRS § 534.110(7).⁵ Once declared a CMA, holders of water rights within the basin have 10 years to create and present to the State Engineer a groundwater management plan; otherwise, the State Engineer is required to curtail the basin by priority.⁶

WHEREAS, the process for approval of a GMP by the State Engineer is as follows:

Nevada Revised Statute § 534.037(1) requires that a petition for the approval of a GMP that is submitted to the State Engineer 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.

At the time of filing the petition, there were 419 water right permits or certificates in the Diamond Valley Hydrographic Basin. Of these, 257 are represented by at least one signature in the petition. Comparing the signatories with the confirmed owner of record in the files of the Office of the State Engineer demonstrates that 223 water right permits or certificates are represented by the owner of record. If accepting the affirmation made on each page of the signed petition, then 257 rights of 419 rights is 61%. If limiting only to those signatures by a confirmed owner of record, then 223 of 419 is 53.2%. In either case, a majority of permits and certificates in the Diamond Valley Hydrographic Basin are represented in the petition; therefore, the State Engineer finds that the petition satisfies the requirement of NRS § 534.037(1).⁷

The total duty of groundwater rights in Diamond Valley is 130,625 afa. Of these, 126,188 afa are subject to the plan and 4,437 afa are not subject to the plan. The estimated amount of

² GMP, p. 8.

³ GMP, p. 8.; J.R. Harrill, *Hydrologic Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada, 1950-65*, Water Resources Bulletin No. 35, (Department of Conservation and Natural Resources, Division of Water Resources and U.S. Department of the Interior, Geological Survey), 1968.

⁴ GMP, p. 8.

⁵ Order 1264, official records in the Office of the State Engineer; GMP, p. 8.

⁶ NRS § 534.110(7).

⁷ Exhibit 1, public administrative hearing before the State Engineer October 30, 2018, official records in the Office of the State Engineer. Hereinafter the exhibits and transcript will be referred to solely by the exhibit number or transcript page.

groundwater committed to domestic wells at the statutory maximum of 2 afa per domestic well is 234 afa. By duty, over 96% of the total groundwater commitments are subject to the plan. It is reasonable that the focus of the plan to reduce the groundwater pumping be focused on those manners of use that have the greatest potential effect on the pumping in the groundwater basin.

The GMP assumes that the dividing line between senior and junior water rights holders is where the consumptive use of the water rights is estimated at 30,000 af, which is equal to the perennial yield of Diamond Valley; therefore, those rights with a priority date of May 12, 1960, or earlier are referred to in this Order as the senior rights (with a duty totaling 29,325 afa) and those rights with a priority date after May 12, 1960, are referred to as the junior rights. At the time of filing the petition, there were 77 senior water right permits or certificates, and 36, or 46.8%, of these were represented by at least one signature on the petition. The remaining 342 water right permits or certificate were junior, and 221, or 64.6%, of these were represented by at least one signature on the petition. Of the 29,325 afa of senior water rights, 18,700 afa, or about 64%, is represented by signatories of the petition. The State Engineer finds that significant portions of both senior and junior rights are represented in the petition.

Nevada Revised Statute § 534.037(3) requires that before approving or disapproving a groundwater management plan the State Engineer shall hold a public hearing to take testimony on the plan in the county where the basin lies or, if the basin lies in more than one county, within the county where the major portion of the basin lies. The State Engineer shall cause notice of the hearing to be:

- a. Given once each week for two consecutive weeks before the hearing in a newspaper of general circulation in the county or counties in which the basin lies.
- b. Posted on the Internet website of the State Engineer for at least two consecutive weeks immediately preceding the date of the hearing.

Notice of a public hearing to be held on October 30, 2018, was published in the *Eureka County Sentinel*, the *Elko Daily Free Press*, and the *Ely Times* during the weeks of the 15th and 22nd of October.⁸ Also, notice of the hearing was posted on the Internet website of the Nevada Division of Water Resources commencing on October 1, 2018.⁹ Additional notice was also sent by certified mail directly to the boards of county commissioners for the counties of Eureka, Elko, and White Pine.¹⁰ The GMP was made available through the Internet website of the Nevada Division of Water Resources commencing on October 1, 2018, and was also available by request.¹¹

A public hearing to take testimony on the proposed GMP was held in Eureka, Nevada, on October 30, 2018, during which testimony in favor of and in opposition to the GMP was received. In addition, the State Engineer held open the period for written public comment for an additional three working days following the hearing, during which time additional public comments were

⁸ Exhibit 4.

⁹ http://water.nv.gov/documents/Hearing_Notice-Diamond_Valley_GMP.pdf

¹⁰ Exhibit 3.

¹¹ <http://water.nv.gov/documents/Final%20DV%20GMP%20for%20Petition.pdf>

received. This Order evaluates the testimony and written comments and other elements required for approval of the Petition.

Nevada Revised Statute § 534.037(1) requires that in a determination whether to approve a groundwater management plan, the State Engineer shall consider, without limitation:

- 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, without limitation, domestic wells;
- f. Whether a groundwater management plan already exists for the basin; and
- g. Any other factor deemed relevant by the State Engineer.

WHEREAS, the Diamond Valley Groundwater Management Plan is summarized as follows:¹²

The predominant manner of use of existing rights in Diamond Valley is irrigation, where groundwater is pumped and used to produce primarily alfalfa and grass hay. Consequently, the GMP applies to irrigation rights and mining and milling rights with an irrigation base right, while vested rights, other manners of use and domestic wells are excluded from the plan. The GMP requires annual reductions in pumping with a goal of stabilizing groundwater levels and reducing consumptive use to the perennial yield. The GMP applies a formula to calculate the annual duty a rights holder can pump after required reductions, where the formula is based upon the original water right duty and priority of the right to arrive at a number of shares. The formula is defined as:

$$WR * PF = SA$$

Where:

WR = Total groundwater right volume as recognized by DWR, accounting for total combined duty (i.e., overlapping places of use) (measured in acre feet)

PF = Priority Factor based on seniority

SA = Total groundwater Shares

An annual amount of water that can be pumped per share is allocated to a rights holder (i.e., the annual allocation), and the reductions in pumping are accomplished by annually reducing the amount of water each share is allocated. In the initial year of the GMP, the total amount of water that can be pumped is equal to the amount of water currently in use. Unused allocations

¹² Specific components of the GMP are discussed in greater detail below with reference to the public comments received; accordingly, an overview of the major GMP structure is introduced here.

may be banked, traded, leased or sold; thus, the GMP employs a market-based approach. The GMP also contains penalty provisions for pumping in excess of allocations. The GMP is governed by an Advisory Board of elected representatives that are charged with making recommendations to the State Engineer, who ultimately oversees and administers the Plan. The GMP is funded through annual assessments, which, in part, will be used to also fund a water manager employed by the Nevada Division of Water Resources, whose role is expected to involve implementation and management of the GMP.

WHEREAS, the comments made at the October 30, 2018, hearing on the Diamond Valley Groundwater Management Plan and the State Engineer's response are as follows¹³:

I. COMMENTS RELATED TO LEGAL SUFFICIENCY

Several comments were received challenging the legal sufficiency of the GMP as being in violation of established Nevada water law or that the GMP waives existing mandatory provisions required by the NRS including the prior appropriation doctrine, movement of allocations, well abandonment and a banking component without adequate permitting.¹⁴

Prior Appropriation

First, several commenters asserted that the GMP violates the doctrine of prior appropriation by eliminating the bedrock principle of "first in time, first in right." The violation, they allege, occurs because all water rights—both senior and junior—have their allocations reduced annually, rather than reductions being imposed solely on junior rights.¹⁵

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. Nevada Revised Statute § 534.037(1) provides that a groundwater management plan "must set forth the necessary steps for removal from the basin's designation as a [CMA]." Other prior appropriation states have addressed whether a

¹³ The following analysis is intended to address written and public comments received concerning the GMP. In large part, all of the comments made in opposition to the GMP in writing or at the hearing raised issues that were considered during the GMP drafting process. These issues, and many more, are succinctly summarized in a "comment and answer format" in Appendix C at pp. 241-255, entitled *GMP Issues and Concerns Identified Through the Process*.

¹⁴ Written comments of Ira and Montira Renner, Timothy and Constance Marie Bailey, Sadler Ranch, LLC, and Great Basin Resource Watch.

¹⁵ Appendix F to the GMP contains the preliminary table of all rights subject to the GMP and the share calculation for each right. The relative priority dates of all rights subject to the Plan are shown in the table. Notwithstanding the share calculations shown in Appendix F, one commenter acknowledged that if a GMP is not adopted and curtailment is ordered on all rights, that rights junior to about May 1960 would be curtailed. This would include a significant number of irrigation rights, all mining rights, and some municipal rights. See Written Comment of Great Basin Resource Watch, p. 5. In addition, the majority of domestic wells in the basin are junior and would also be completely curtailed. See NRS § 534.110(6) (the State Engineer may order that withdrawals, including withdrawals from domestic wells, be restricted to conform to priority rights).

shortage sharing plan violates the prior appropriation doctrine. For example, in *State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006), the New Mexico Supreme Court examined whether a settlement agreement entered into by the Interstate Stream Commission, the United States and three irrigation districts, upon which a partial final decree was entered in an adjudication proceeding, violated the New Mexico Constitution, which codified the prior appropriation doctrine.

The appellants, senior rights holders, contended that the settlement agreement violated the New Mexico Constitution, and that due to chronic water shortages for senior rights, the negotiating parties were duty-bound to adhere to the prior appropriation doctrine as it was traditionally understood and enforced, through a priority call. *Id.*

The court's examination focused on a statute that was enacted for the express purpose of achieving compliance with New Mexico's obligations under the Pecos River Compact (the compliance statute). *See id.* at 150 P.3d at 379. In the words of the court, the parties to the settlement agreement sought to cut the water shortage "Gordian knot" through a process more flexible than strict priority enforcement, yet still comply with the prior appropriation doctrine.

In interpreting the legislative intent of the compliance statute, the *Lewis* court found that the intent and purpose of the legislation was beyond dispute—to take charge of resolving a critical situation created by an amended decree, while complying with the obligation of protecting existing rights. In determining that the statute was constitutional, the court assumed that the legislature was aware of the prior appropriation doctrine when it enacted the statute, and that the statute was to be read as a clear signal that the legislature and governmental players wanted to create a solution other than a priority call as the first and only response. *Id.* at 150 P.3d 385.¹⁶ Notwithstanding that the court found the statute constitutional and not violative of prior appropriation, the court found it important that the settlement agreement did not rule out a priority call if needed. *Id.* at 150 P.3d 386.

Nevada Revised Statute § 534.037(1) was enacted in 2011 by A.B. 419. Aside from the six specific and one general consideration codified in the statute, the State Engineer finds that the legislative history contains scarce direction concerning how a plan must be created or what the confines of any plan must be.

Like *Lewis*, in enacting NRS § 537.037, the Nevada legislature expressly authorized a procedure to resolve a shortage problem. And, like *Lewis*, the State Engineer assumes that the Legislature was aware of prior appropriation when it enacted NRS § 534.037,¹⁷ and the State Engineer interprets the statute as intending to create a solution other than a priority call as the first and only response. 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 junior rights holders alone—if that were

¹⁶ Although the prior appropriation doctrine is not codified in the Nevada Constitution, a similar analysis to *Lewis* is appropriate as prior appropriation is the law in Nevada.

¹⁷ The fact that NRS § 534.110(7) requires the State Engineer to regulate by priority after 10 years if no GMP is adopted makes clear that the Legislature was aware of prior appropriation. Also, the remarks of Assemblyman Goicoechea, the bill sponsor, reinforces the Legislature's awareness of prior appropriation when the Assemblyman described regulation by priority (*e.g.*, pumping is curtailed and the basin is brought back into balance with only senior water rights being held). *See Minutes on the Assembly Committee on Government Affairs, 76th Session, p. 66 (March 30, 2011).*

the case, the State Engineer could simply curtail junior rights—a power already granted by pre-existing water law in NRS § 534.110(6). Thus, the State Engineer concludes that NRS § 534.037 provides flexibility outside regulation by priority, and the manner in which the GMP proposes to reduce pumping is authorized by Nevada law.

Notwithstanding, even though NRS § 534.037(1) does not require a GMP to impose reductions solely against junior rights, the most senior rights in the GMP have a higher priority factor than junior rights when the share calculation is made. Thus, the State Engineer finds that the GMP still honors prior appropriation by allocating senior rights a higher priority factor than junior rights.¹⁸

Well Use Approvals

Second, commenters opposed to the GMP challenged the GMP's provision to allow temporary movement (less than 1 year) of allocations, alleging the GMP contravenes existing law by automatically granting such changes, that the temporary approval process diminishes State Engineer and public review and encourages trading on annual bases, rather than filing for a permanent change.¹⁹ On the other hand, other comments were received that supported the flexibility offered by the expedient temporary movement process.²⁰

Existing water law has provisions that deal with temporary changes to water rights²¹ and permanent changes to existing rights.²² Because the GMP unbundles allocations from the place of use where existing water rights are appurtenant, movement of allocations is controlled by a new or existing well serving as the point of diversion.²³ Thus, the GMP was (1) modeled after existing law regarding temporary changes²⁴ and (2) still requires application of NRS § 533.370 to new wells or increased withdrawals exceeding 1 year.²⁵

Section 14.8 of the GMP provides that any new wells or wells having withdrawals in excess of what was approved under the base right be submitted to the State Engineer. Such changes are approved after 14 days if not denied as impairing other rights or contrary to the public interest. The State Engineer finds that the existing law concerning temporary changes (NRS § 533.345(2))

¹⁸ The public comments during the hearing reiterated that the 20% spread of the priority factor likely received the greatest consideration and debate during the GMP process. Ultimately, a spread of priority factor between 0.9997 and 0.80 was what a majority of the plan proponents could agree to.

¹⁹ Written comments of Sadler Ranch, LLC and Great Basin Resource Watch.

²⁰ Written comment of Marty Plaskett; *and see* Transcript, pp. 80-81 (Matt Morrison) (providing an example that when annual reductions are implemented, an irrigator may not have enough water for one pivot, but would have flexibility to combine allocations to water a full crop, while also allowing some irrigation on former irrigation lands to keep them viable until farming on that pivot could resume).

²¹ NRS § 533.345(2).

²² NRS § 533.370.

²³ *See* GMP §§ 14.8 and 14.9.

²⁴ GMP, p. 20 at fn. 20.

²⁵ GMP § 14.9.

expresses a command to grant temporary changes (e.g., "shall approve") unless the State Engineer determined it impairs existing rights or is contrary to the public interest. Thus, the State Engineer finds that § 14.8 and § 533.345(2) to be entirely consistent. Further, the State Engineers agrees that allowing changes expediently up to the original duty at that well is permissible because the State Engineer already made such an affirmative analysis when the water right was granted. Additionally, the State Engineer finds that § 14.8 of the GMP is not a significant departure from existing law because temporary change applications do not undergo publication or hearing unless required by the State Engineer.²⁶ Thus, it is unpersuasive that § 14.8 diminishes State Engineer and public review. Finally, the potential of a rights holder to serially move allocations for less than 1 year to escape being subject to the procedures of NRS § 533.370, exists under current law, as there is no limitation in statute to the number of temporary applications to change. The State Engineer is mindful that when annual notices are given, to examine such notices to determine there is a motivation to avoid the statutory change process.

With respect to new wells, additional withdrawals exceeding 1 year, or where the State Engineer determined within the 14 calendar days may be not be in the public interest or may impair rights of other persons, the existing procedures under NRS chapters 533 and 534, including publication and protest provisions, still apply.²⁷

Well Plugging Provisions

One commenter asserted that the GMP waived existing law regarding exempting wells from NRS Chapters 533 and 534.²⁸

GMP §§ 14.2 and 14.3 direct when active, unused or inactive wells must be plugged and abandoned, or that a waiver of abandonment can be obtained. The State Engineer finds that these provisions are consistent with existing regulations found in NAC §§ 534.300 and 534.427. Additionally, GMP §§ 14.4 and 14.5 expressly require that well construction and maintenance must comply with the requirements of NRS and NAC Chapter 534. The State Engineer finds that the GMP does not waive or exempt wells from existing laws or regulations.

Banking and Aquifer Storage and Recovery

Lastly, one commenter stated that the banking component of the plan was an aquifer storage and recovery (ASR) project, which lacks a necessary permit required by NRS § 534.250, *et. seq.*²⁹

²⁶ NRS § 533.345(3).

²⁷ GMP § 14.9.

²⁸ Transcript, p. 19 (David Rigdon).

²⁹ Written comment of Sadler Ranch, LLC; Transcript, p. 14 (David Rigdon). The statement at the hearing was that this comment was based upon the report of the hydrogeologist in Appendix I that water banking is a type of aquifer storage and recovery project regulated by the State Engineer. As indicated by further findings, the State Engineer does not agree that the banking component of the GMP is an aquifer storage and recovery project.

Section 13.9 of the GMP allows unused allocations to be carried over and banked for use in a subsequent year to increase the amount of water the rights holder can use in the next year. The banked allocation is subject to depreciation in the amount that is carried over to account for natural losses over time.³⁰ In contrast to banking in the GMP, a typical aquifer storage and recovery project is operated by injecting or infiltrating water from a surface source into the aquifer for the purpose of accumulating storage for future use.³¹ These elements of project operation are not part of the GMP. The State Engineer finds that banking of unused allocations in the GMP is a mechanism to allow flexibility by users to determine when to use their limited allocation and to encourage water conservation practices. Consequently, the State Engineer finds that the banking allocations in the GMP is a reasonable means to facilitate conservation and water planning by water users, as provided for under NRS § 534.037, and that the GMP is not required to fulfill the statutory obligations of NRS §§ 534.250–340.

II. COMMENTS RELATED TO ABANDONMENT, FORFEITURE, AND PROVING BENEFICIAL USE

Some commenters stated that water rights that are currently unused should be abandoned or forfeited prior to reductions in pumping being imposed against existing water rights.³² The State Engineer finds that pursuing forfeiture or abandonment prior to implementing any GMP is ill-advised for several reasons.

First, time is of the essence for rights holders to get a GMP approved prior to August 25, 2025, or curtailment by priority will be ordered for all rights in Diamond Valley. Because forfeiture and abandonment must be shown by clear and convincing evidence, it is doubtful whether there is sufficient time to investigate and assemble evidence concerning abandoned rights, to conduct administrative hearings and engage in any appellate proceedings with time left to secure a final table of water rights to support the GMP. Pursuing abandonment at this moment would likely lead to lengthy administrative and/or appeal proceedings, delaying action on a GMP until a final listing of active groundwater rights would be known.³³

Second, a different problem is presented by forfeiture proceedings. Because the State Engineer conducts an annual inventory in Diamond Valley, information is available concerning those rights that may be subject to forfeiture. However, in 2017, NRS § 534.090 was amended to require that a notice of non-use be served prior to forfeiting unused water rights to provide one year to cure a forfeiture.³⁴ Serving notices of non-use at this stage would require that owners of water rights that are currently unused make efforts to resume beneficial use (*i.e.*, pumping). The

³⁰ Section 13.9 describes that Diamond Valley is divided between the main farming area (generally located in the southern half of the basin) and the groundwater discharge area (the northern half of the basin). Banked water north of the dividing line in the discharge area depreciates at 17% and banked water south of the line at 1%. The depreciation factors are based on numerical flowing modeling analysis to justify and support these amounts. See GMP, Appendix I.

³¹ See, *e.g.*, NRS §§ 534.250–340.

³² Written comments of Sadler Ranch, LLC and Carolyn Bailey.

³³ See, *e.g.*, GMP, Appendix F.

³⁴ See NRS § 534.090(2).

consequence of resuming pumping is contrary to the intent of the GMP to *reduce* pumping. Thus, the State Engineer finds that in addition to similar timing problems discussed above, initiating forfeiture proceedings could exacerbate conditions in the basin by increasing pumping, prior to reducing pumping pursuant to the GMP, thereby lessening the effectiveness of the plan.³⁵

Third, assuming *arguendo*, there are water rights existing only on paper (e.g., that could be abandoned or forfeited), reductions in pumping by the GMP start at the ceiling of *actual pumping* (76,000 afa), not at the ceiling of existing rights (126,000 afa). Stated otherwise, even if the State Engineer assumed that the difference between existing rights and actual pumping (50,000 afa) was paper water, the elimination of paper water rights to match active rights will not change that the reductions in *pumping* begin at the component of active rights. The issue of paper water was raised and considered during the GMP drafting process, and it was determined that the GMP contemplated that any valid right in good standing was to be issued shares.³⁶ The State Engineer believes there is a low probability of success for abandonment, and the preceding paragraph describes the likely unanticipated effect of pursuing forfeiture. Therefore, the State Engineer finds that requests to eliminate paper water does not warrant halting this process in order to initiate abandonment or forfeiture proceedings.

Additionally, one commenter stated that existing permitted rights should prove beneficial use and become certificated prior to implementing a GMP. For reasons discussed above, including timing and discouraging increases in pumping, the State Engineer finds that requiring proof of beneficial use prior to implementing a GMP is not in the best interest of taking immediate action to adopt and implement a basin-wide GMP. Further, the GMP petition process expressly applies to the holders of *permits* and *certificates*. Therefore, the GMP statute implicitly recognizes that permitted rights which have not fully proven beneficial use will participate in the GMP process.

III. COMMENTS RELATED TO APPLICABILITY OF PLAN TO ONLY CERTAIN WATER RIGHTS

Some comments were directed to the scope of GMP applying only to irrigation rights and mining and milling rights with a base irrigation right. Some expressed concern that it created a preference for certain manners of use, that there was no environmental component to the plan and it would result in water barons.³⁷ Many comments in favor of the plan described how they believed the plan would allow more irrigators or mines to stay in business, ultimately benefitting the greatest number of operators by providing more favorable conditions such as weed and rodent control.³⁸ The comments favored adoption of a GMP in lieu of curtailment, which many recognized would

³⁵ The issue of forfeiture in Diamond Valley, particularly of pivot corners, pre-dates the 2017 amendments to NRS § 534.090. In the 1980s, the State Engineer pursued forfeiture of unused pivot corners in Diamond Valley, which lead to the enactment of NRS § 534.090(3) (pre-2017 version). See Nev. Stat. ch 559 (1983); and see, A.B. 597 (1983).

³⁶ See GMP, Appendix C, p. 244.

³⁷ Written comments of Great Basin Resources Watch, and Ari Erickson.

³⁸ Written comments of James Gallagher, Mark Moyle and Donald Palmore; Transcript, p. 68 (Jim Gallagher); pp. 80-81 (Matt Morrison).

likely force many junior irrigators into bankruptcy, and as a result, the community would suffer.³⁹ In addition, many comments in favor of the GMP spoke positively about methods for increasing efficiency to continue operations while reducing pumping.⁴⁰

As discussed in the introductory paragraphs section, *supra*, over 96% of committed rights are represented in the plan; therefore, the State Engineer finds that given the overwhelming majority of irrigation rights and mining and milling rights having irrigation base rights, the application of the plan to those rights that will have the most impact and be most impacted, is appropriate. While one commenter opined that the GMP does not address environmental concerns, the State Engineer does not agree. The GMP may not contain express provisions for the environment, but allowing the greatest number of irrigators to remain in business and keep cultivated lands active, will prevent the incursion of weeds, and will provide dust and rodent control. And ultimately, the State Engineer finds that the objective to reduce the pumping of groundwater to stabilize groundwater levels is a benefit of the groundwater basin, the irrigators and other members of the community that rely upon it and live within it, and that it is not necessary to explicitly identify certain areas of environmental concern within the scope of the plan for the plan to have a generalized benefit to the environment.

Finally, the State Engineer finds that comments that the GMP will result in "water barons" or that it will create a preference for certain manners of use, are speculative. Existing water law provides that water rights are a form of real property that are freely alienable and transferrable independent of land where the water was formerly appurtenant. In that way, the ownership of water rights and the manners of use are currently determined by a market of real property transactions.

IV. COMMENTS RELATED TO PRACTICALITY OR REASONABLENESS OF THE PLAN IMPLEMENTATION

Mitigation Rights

Some commenters challenged the fact that the GMP does not provide for mitigation of senior surface water rights that have been negatively impacted by junior groundwater pumping.⁴¹

The requirement for the approval of a GMP is that it "must set forth the necessary steps for removal of the basin's designation as a critical management area." NRS § 534.037(1). Neither the plain language nor the legislative history indicate that mitigation of senior surface water rights that have allegedly been adversely affected by groundwater pumping must be mitigated by a GMP.⁴²

³⁹ Written comments of William Norton and Donald Palmore; Transcript, pp. 80-81 (Matt Morrison).

⁴⁰ Written comment of William Norton, Marty Plaskett, Robert Burnham and James Gallagher; Transcript, p. 81 (Matt Morrison).

⁴¹ Written comments of Sadler Ranch, LLC and Daniel Venturacci.

⁴² In fact the opposite appears to be true from the legislative history. As proposed, A.B. 419 would have required the State Engineer "to consider the relationship between surface water and groundwater in the basin," but this consideration was amended out of the bill after the First Reprint.

Of note is that the State Engineer entered Order 1226, entered on March 26, 2013, which provided a mechanism for mitigation of senior surface water rights allegedly impacted by junior groundwater pumping. Two of the commenters at the hearing who raised this issue have taken advantage of the provisions of Order 1226, by filing for mitigation groundwater rights, which were granted by the State Engineer. Consequently, the State Engineer finds that mitigation is not a required element of the GMP; and in any event, the commenters who raised this issue have already taken advantage of Order 1226.⁴³

Out-of-Basin Transfers

One commenter was concerned that unbundling water rights appurtenant to their place of use creates an incentive for out-of-basin transfers.⁴⁴ The commenter acknowledged that the current GMP prohibits out-of-basin transfers, but suggested the plan proponents may consider amending the plan to strengthen provisions to avoid incentivizing out-of-basin transfers. The State Engineer finds that NRS § 534.037 provides that once adopted, the GMP can be amended by the same procedure which allows for adoption of a plan.⁴⁵ Because the GMP currently prohibits out-of-basin transfers, there is currently no necessity to mandate changes to the GMP to strengthen provisions to disincentivize out-of-basin transfers. Some commenters involved the creation of the plan who spoke in favor of it acknowledged the plan may not be "perfect." Short of finding the current GMP cannot be approved as a matter of law, the State Engineer finds that denial of the Petition to require years of possible additional negotiations to merely better state existing plan provisions, to be unnecessary.⁴⁶

See A.B. 419 (First Reprint), Senate Committee on Government Affairs, 76th Sess. (May 25, 2011).

⁴³ See, e.g., Permits 81720, 82268, 81825 and 82572, official records in the Office of the State Engineer.

⁴⁴ Written comment of Great Basin Resource Watch.

⁴⁵ NRS § 534.037(5).

⁴⁶ The State Engineer values all comments and testimony received concerning the GMP. While it is clear the *Public Interest Review of the Proposed Diamond Valley Groundwater Management Plan* prepared for Great Basin Resource Watch was thorough in its analysis, the State Engineer gives great weight to comments and testimony from water rights holders in Diamond Valley, senior or junior whom are for or against approval of the GMP. Great Basin Resource Watch does not own water rights in Diamond Valley and it does not appear it was involved in the years of public meetings held in Eureka to negotiate the details of the GMP. See, e.g., GMP Appendix C at pp. 121-240. Indeed, its own written comment appears to recognize it is appropriate to afford great weight to those that created and are affected by the plan. See Written comment of Great Basin Resource Watch at p. 8 (a groundwater management plan should address the varied objectives or goals of water users and residents in the basin, and a worthwhile consideration is whether the GMP promotes bottom-up collaboration to promote broad buy-in from affected individuals and to provide flexibility in decision-making); and see also, Transcript, p. 65 (Mark Moyle) (responding to comments at the hearing, stating that the GMP was developed by the people who live in Diamond Valley and will be most affected and that everyone was making sacrifices).

Public and Local Community Interest

The same commenter stated that the public interest component was not adequately represented and that the description of local community interests could be strengthened.⁴⁷

The State Engineer disagrees that the public interest is not adequately represented. As already discussed under well use approvals, new wells, additional withdrawals exceeding one year, or where the State Engineer rejected a request under § 14.8, is subject to the procedures of NRS § 533.370—including the public interest review for change applications.

Many comments in support of the GMP reflect the reality that it took years for the participants to negotiate an agreement that was able to attain majority support required to petition the State Engineer for approval. Years before the State Engineer declared the basin a CMA in 2015, the GMP process was initiated by the local community and stakeholders.⁴⁸ Work on the GMP continued for an additional three years after the CMA designation with numerous meetings of the community and stakeholders, ultimately arriving at the version presented to the State Engineer in 2018.⁴⁹ Appendix C of the GMP demonstrates that this process was emotional and difficult for the participants—yet they persisted in forging a plan in an effort to avoid curtailment. The written comments overwhelmingly demonstrate the public and local community interests to be preserved by the approval of the plan, which are best stated by the following irrigator:⁵⁰

The irrigators that support this plan understand that we all need to sacrifice for the long term benefit of the community and the long-term continued success of the farming industry. Diamond Valley is the heart of southern Eureka County's economy. . . . Strong, willing, and giving people who understand that it takes community effort to sustain and survive built Diamond Valley. . . . The purpose of the DVGMP is to continue the ongoing success of the entire southern Eureka County area and the enterprises that exists [sic] there.

This sentiment was repeated in all written comments submitted in support of the plan.⁵¹ In addition, many stirring accounts were given at the public hearing about living and growing up in Diamond Valley, the desire to preserve the established way of life, the hardscrabble efforts made over decades to create the farms that exist in the valley today, and the determination of the community to work together to solve issues, both past and present, which challenged their continued existence.⁵² The State Engineer finds that the GMP materials, written comments and testimony at the public hearing overwhelmingly describe and support the public and local

⁴⁷ Written comment of Great Basin Resource Watch.

⁴⁸ GMP, Appendix B.

⁴⁹ See GMP, Appendices A, C.

⁵⁰ Written comment of Mark Moyle.

⁵¹ See written comments of Robert Burnham, Russell Conley, Jim Etcheverry, James Gallagher, Andrew Goettle, William Norton, Donald Palmore, Marty Plaskett and Ruby Hill Mining Company; and see Transcript, pp. 52-53 (D'Mark Mick).

⁵² Transcript, pp. 57-59 (James Moyle); pp. 75-77 (Vickie Buchanan); pp. 79-82 (Matt Morrison); pp. 84-85 (Lloyd Morrison); pp. 85-88 (Alberta "Birdie" Morrison).

community interests, which weigh heavily in the determination at hand. While many comments in the *Public Interest Review*⁵³ reflect aspirational components of what a plan *may* contain or how it could be best stated, the State Engineer finds that the GMP is acceptable in these areas.

Protections for Domestic Wells

One commenter suggested that domestic wells were not protected because pumping will continue to exceed the perennial yield while the GMP is carried out. The State Engineer finds that NRS § 534.110(7), states that unless at GMP has been approved for a basin pursuant to NRS § 534.037, "withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights." And that pursuant to NRS § 534.080, domestic wells are assigned the date of priority of the date the well was drilled. Thus, the GMP is protective of domestic wells because it specifically excludes the domestic wells from pro-rata reductions in use and allows for their continued use to the full statutory permitted amount, compared to the alternative that (a) the domestic wells in Diamond Valley are junior in priority to the 30,000 af PY, and (b) since, absent an approved GMP, domestic wells are subject to curtailment based upon their priority.

Advisory Board Makeup

Commenters had differing issues with the makeup of the Advisory Board.⁵⁴ One commenter stated that the GMP favors junior appropriators on the Advisory Board. Alternatively, another commenter posited that after a period of years, the makeup of the Advisory Board could favor non-irrigators over irrigators. The State Engineer finds that the plan was created by the individuals that will be subject to the plan, and the State Engineer accepts that a majority of the rights holders agreed that the makeup and voting structure of the participants agreed this to be a fair manner of representation on the Board.

V. COMMENTS RELATED TO SCIENTIFIC SOUNDNESS

Some commenters challenged the GMP, asserting that the GMP is not supported by science and hydrologic analysis, with the following observations:⁵⁵

- a. The scheduled reduction in pumping would exceed the perennial yield for the life of the GMP and in the process it would deplete aquifer storage in excess of the transitional storage volume.
- b. The GMP is not supported by a hydrogeologic analysis or a groundwater model to provide information on the effects of the plan.
- c. Some commenters had questions about the accuracy of the ET depreciation rate, and whether this rate may change over time because

⁵³ Written comment of Great Basin Resource Watch.

⁵⁴ Written comments of Sadler Ranch, LLC and Great Basin Resource Watch.

⁵⁵ Written comments of Ira and Montira Renner and Sadler Ranch, LLC; Transcript, p. 19 (David Rigdon); pp. 23-24 (David Hillis).

of groundwater recovery and corresponding changes in groundwater ET.

d. One commenter raised the lack of thresholds or triggers in the GMP.

The GMP is based on the simple fact that groundwater pumping is the cause of declining water levels, and therefore pumping must be reduced to solve the problem. The reduction in pumping is set at 3% per year for the first 10 years, and may be adjusted up or down thereafter as informed by groundwater level monitoring data. The goal of this approach is to progressively reduce groundwater pumping until the perennial yield is not consistently exceeded, and the measure of that ultimate outcome is a stabilization of water levels.

Perennial yield is based on the principle of conservation of mass, which dictates that water levels will stabilize when recharge equals discharge. Before any groundwater development occurs, an undeveloped basin is considered to be in equilibrium between natural groundwater recharge and discharge. When wells are developed, groundwater is initially drawn from aquifer storage in the vicinity of the well, but over time that groundwater removal is replaced by a decrease in natural discharge or increase in recharge until a new equilibrium is reached and the discharge by pumping is part of the basin water balance. Water drawn from storage in the period of time between the pre-development equilibrium and the post-developed equilibrium is defined as the transitional storage. The amount of transitional storage consumed before a new equilibrium state is reached may affect the depth to water at a new equilibrium condition, but as long as recharge and discharge are ultimately balanced then an equilibrium condition can be reached and the goal of the GMP to stabilize water levels can be achieved. The amount of storage consumed in the transitional period will not prevent equilibrium from being reached.

Groundwater modeling and hydrogeologic analysis are not the basis for the GMP's determination of pumping reduction rates and target pumping totals at the end of the plan. Instead, the pumping reduction rate was selected by agreement of the GMP authors, and the target for total pumping at the end of the GMP was selected from existing published values. Upon implementation, the real effects of the plan will be monitored and observed by measuring the change in groundwater levels throughout the basin. Those measurements will be the basis for plan review and any modifications of pumping reduction rates that the GMP requires after an observation period of 10 years.

Groundwater modeling is a helpful and informative tool for projecting the effects of pumping reduction and planning accordingly, but modeling is not necessary to conclude that reductions in pumping will lead to reductions in water level drawdown. Groundwater modeling and hydrogeologic analysis beyond what is publicly available in existing published reports would not change the fact that the cause of groundwater decline is due to pumping groundwater and that the stakeholder-authored plan seeks to reduce pumping. Modeling could be a useful tool for future evaluation of the plan and modifications to pumping reduction rates, but it is not required.

One commenter questioned whether the reductions in pumping under the plan combined with rights not subject to plan would bring withdrawals to the perennial yield based on his calculation of rights able to be pumped being excess of 42,000 afa.⁵⁶ As explained, the goal of the

⁵⁶ See written comment of Ari Erickson.

GMP is to reduce consumptive use to the current perennial yield; and, as indicated in the introductory paragraphs, there are 4,437 af of groundwater rights in the basin not subject to the plan. Thus, the State Engineer does not find that there could be total pumping in excess of 42,000 afa in the basin at the end of 35 years under the GMP. Assuming, *arguendo*, that rights subject to the plan and those not subject to the plan were estimated to be 34,437 af, existing evidence used by the State Engineer to designate the basin a CMA demonstrates that there are wide variations in annual pumping—in some years, by several thousand acre-feet more or less than the prior year.⁵⁷ Because the designation of a CMA is based on withdrawals *consistently* exceeding the perennial yield, the State Engineer finds that existing law suggests some tolerance of variations on the annual amount of pumping. In addition, the State Engineer is mindful that perennial yield is an *estimate* of water availability and is only one-half of the equation of GMP success.⁵⁸ Actual observations of water levels are the most direct and reliable means of determining GMP success. The plan to reduce pumping, monitor the effects on water levels, and then adjust pumping reductions is a sound approach to achieving the goal of stabilizing water levels. The lack of a groundwater model or detailed hydrogeologic analysis does not preclude approval of the GMP as written.

One commenter raised the lack of thresholds or triggers in the GMP. The State Engineer finds that there is no express requirement in NRS § 534.037 for thresholds or triggers, and that a reference to thresholds or triggers is commonly in reference to a "Monitoring, Management and Mitigation (3M)" Plan. The State Engineer has historically utilized 3M Plans as a tool in approving new appropriations when impacts to existing rights are unknown. Consequently, the State Engineer finds that a 3M Plan having thresholds and triggers is different than the GMP now pending before the State Engineer, and that the two types of plans serve different functions. Nevertheless, the State Engineer finds that there has been robust monitoring of irrigation groundwater use in Diamond Valley by the State Engineer's office for many decades and that monitoring groundwater use and groundwater levels is ongoing. Moreover, the GMP requires irrigators to install a smart meter, which will provide increased accuracy and nearly real-time knowledge of groundwater use.⁵⁹ Finally, the GMP incorporates the State Engineer's enforcement authority concerning over-pumping of a user's allocation, and contains penalties to be paid in water for over-pumping and stiff administrative fines for meter tampering.⁶⁰

Finally, some commenters had questions about the accuracy of the ET depreciation rate, and whether this rate may change over time because of groundwater recovery and corresponding

⁵⁷ See Order 1264, official records in the Office of the State Engineer.

⁵⁸ Both the GMP and the commenter acknowledged the release of a 2016 report by the U.S. Geological Survey, which estimated the perennial yield may be 35,000 af. GMP, p. 8 at fn. 2; Transcript, p. 37 (Ari Erickson). As part of a different administrative hearing proceeding, the State Engineer was requested to accept the USGS Report as the perennial yield in Diamond Valley. That matter is currently under submission, and no determination has been made by the State Engineer whether to accept this number. Consequently, the GMP was based on the current estimate of perennial yield of 30,000 af.

⁵⁹ See GMP § 15. The most recent groundwater inventory conducted by the State Engineer in 2018 revealed that there was nearly 100% compliance with smart meter installation already. This further affirms that rights holders have already made financial commitments of purchasing and installing smart meters to ensure success of the GMP.

⁶⁰ GMP §§ 16, 17.

changes in groundwater ET. The selection of these rates was the only component of the GMP expressly based on groundwater model simulations. The accuracy of the model and appropriateness of assigning ET depreciation rates based on model interpretation was discussed at GMP planning meetings. The ET depreciation rates in the final GMP were a compromise and there was never a consensus. Adjustments to these rates is provided for under the provisions to amend the GMP, as warranted by the data.

VI. COMMENTS RELATED TO PRECEDENCE

Several commenters were concerned that any GMP adopted in Diamond Valley creates a precedent for other areas in the state that may be designated Critical Management Areas. The proposed GMP under consideration is the first plan in the state adopted through the process required by NRS § 534.037. As with most decisions involving water, the conditions and issues facing Diamond Valley are unique to Diamond Valley, and therefore the requirements of this plan may not be suitable for any other area in the state. Many individuals speaking in support of the plan made this observation, and the State Engineer concurs that the Diamond Valley GMP does not limit the possible solutions that may be employed by other groundwater management plans.

WHEREAS, based upon the foregoing, the State Engineer makes the following findings of fact, conclusions of law and order:

The State Engineer finds that Appendix D to the GMP sufficiently describes (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; and (e) the wells located in the basin, including, without limitation, domestic wells.

The State Engineer finds that there is currently no groundwater management plan in existence for Diamond Valley.

The State Engineer finds that the GMP is analogous to the settlement agreement at the center of the *Lewis* case, *i.e.*, an agreement supported by at least a majority of the permit and certificate holders in Diamond Valley to protect existing rights while cutting the Gordian knot of basin over-appropriation. Thus, the State Engineer concludes that adoption of the GMP is expressly authorized by statute and does not violate the prior appropriation doctrine because the statute provides flexibility outside strict regulation by priority.

The State Engineer finds that the GMP is not legally deficient nor waives any authority of the State Engineer to enforce Nevada water law.

The State Engineer finds that due to the length of time required, initiating abandonment or forfeiture proceedings or requiring proof of beneficial use prior to implementing a GMP is not in the best interest of reducing pumping and would only serve to delay such reductions.

As discussed in the introductory paragraphs, over 96% of committed rights are represented in the plan; therefore, the State Engineer finds that given the overwhelming majority of irrigation rights and mining and milling rights having irrigation base rights, and that the application of the plan to those rights that will have the most impact, and that will be the most impacted, is appropriate.

The State Engineer finds that public and local community interests have been considered, and that such interests are a cornerstone of the plan by retaining the greatest number of farms or mines as economically viable, which will provide social, economic, and environmental benefits.

The State Engineer finds that the standard for determining success of the plan by stabilizing water levels is sound.

The State Engineer finds that groundwater modeling is an informative tool for projecting the effects of pumping reduction, and that future model results could add confidence to decisions on any changes to pumping reductions, but that the lack of a groundwater model or hydrogeologic analysis does not preclude approval of the GMP as written.

The State Engineer finds that the GMP's annual reductions in pumping will lead to the entire basin's groundwater pumping approaching the perennial yield and stabilization of groundwater levels.

The State Engineer finds that the GMP is a groundwater management plan and is not a monitoring, management and mitigation plan; therefore, not only is there no requirement that there be a mitigation component or thresholds and triggers for activation of mitigation actions, but also such components would cloud the plan's goal and objectives.

The State Engineer finds that 1 acre-foot is equal to 325,851 gallons pursuant to practice and policy of the Office of the State Engineer, and that this conversion rate will be used.

In light of the foregoing findings, having considered the comments for and against the GMP, the State Engineer concludes that the petitioning parties have met the requirements for the adoption of the Diamond Valley Groundwater Management Plan, and the Petition is accordingly granted.

ORDER

NOW THEREFORE, it is ordered that the Petition to Adopt the Groundwater Management Plan for the Diamond Valley Hydrographic Basin is hereby **GRANTED**.



JASON KING, P.E.
State Engineer

Dated at Carson City, Nevada this

11TH day of JANUARY, 2019.

Attachment 4

No. _____ FILED

APR 27 2020

By: WV EUREKA COUNTY CLERK

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

Dept No. 2

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

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

Petitioners,

vs.

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

Respondent,

and

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

Intervenors.

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

RECEIVED

APR 27 2020

EUREKA COUNTY CLERK

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



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



RELEVANT PROCEDURAL HISTORY

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

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

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

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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 DNRPCA 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 as "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

³On 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 granting her motion to intervene. The motion was timely filed without opposition. The court thus grants Beth Mills' motion to intervene. None of these intervenors filed briefs in this case.

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1 the following findings of fact and conclusions of law.

2 II

3 **FACTUAL HISTORY**

4 It is a matter of accepted knowledge that Nevada currently has and at all relevant
5 times has always had an arid climate. Its also undisputed that the Diamond Valley aquifer
6 has been severely depleted through over appropriation of underground water for irrigation
7 which the State Engineer has allowed to occur for over 40 years without any cessation or
8 reduction. The State Engineer has issued permits and certificates that have allowed
9 irrigators the right to pump approximately 126,000 acre feet ("af") of water per year from
10 the Diamond Valley aquifer in Eureka County and Elko County which has an estimated
11 perennial yield of only 30,000 af of water that can be safely pumped each year.⁴ The
12 126,000 af exclude other groundwater rights such as domestic use, stock water, and
13 mining.⁵ The total duty of ground water rights that impact the acquifer is close to 130,265
14 af.⁶ Of the 126,000 af approved for irrigation pumping, the State Engineer estimates
15 approximately 76,000 af were pumped in 2016, with the annual Diamond Valley pumping
16 exceeding 30,000 af for over of 40 years.⁷

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

21 _____
22 ⁴SEROA 3.

23 ⁵*Id.*

24 ⁶*Id.*

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

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

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

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

19
 20 ⁹SEROA 328.

21 ¹⁰State Engineer ruling 6290, 23-31.

22 ¹¹NRS 534.110(7).

23 ¹²NRS 534.037.

24 ¹³SEROA 3, 134-138, 226.

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

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1 groundwater management plan has been approved for the basin pursuant to NRS
 2 534.037."¹⁵ This process is curtailment.

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

19
 20 ¹⁵NRS 534.110(7), SEROA 225.

21 ¹⁶SEROA 226.

22 ¹⁷SEROA 226, 277-475.

23 ¹⁸SEROA 227 N8, 294.

24 ¹⁹Bailey reply addendum 2, SEROA 294.

25 ²⁰Bailey reply addendum 3.

26 ²¹*Id.* at 1.

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occurs.²²

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

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

²²*Id.*

²³SEROA 313.

²⁴SEROA 5, 220, 229, 240-241.

²⁵SEROA 240-241.

²⁶SEROA 11-12, 218, 220, 228-229.

²⁷SEROA 5, 218, 232.

²⁸SEROA 232.

²⁹SEROA 218, 234-235.

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

³⁰SEROA 232.

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

³²SEROA 499-509.

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

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

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

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

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

19 ³⁵*Id.*, SEROA 5, 218.

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

21 ³⁷*Id.*

22 ³⁸SEROA 5, 218, 234-235.

23 ³⁹*Id.*

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

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

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

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

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

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

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

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

25 ⁴⁵NRS 534.020.

26 ⁴⁶SEROA 6.

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

III

DISCUSSION

STANDARD OF REVIEW

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

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

⁴⁸ NRS 533.450(1).

⁴⁹ NRS 533.450(2).

⁵⁰ NRS 533.450(10).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶² NRS 534.037(3).

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

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

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

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

⁶⁴Order granting motion in limine 10.

⁶⁵NRS 534.037(1).

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

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

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

23 ⁶⁷*Id.*

24 ⁶⁸SEROA 14-17.

25 ⁶⁹SEROA 17-18.

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

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

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

⁷¹Sadler Ranch opening brief 13.

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

⁷³NRS 534.037(1).

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

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1 including the DVGMP and appendices, rejected petitioners' arguments that the DVGMP
 2 would not enable the basin to be removed as a CMA. Again, this Court will not reweigh
 3 the evidence presented nor substitute its judgment for that of the State Engineer. The
 4 court finds that there is substantial evidence in the record to support the State Engineer's
 5 approval of the DVGMP as achieving the goal of removing the Diamond Valley basin from
 6 CMA status. The court finds that there is substantial evidence in the record to support the
 7 State Engineer's findings that the DVGMP contained the necessary relevant factors in NRS
 8 534.037(2) to approve the DVGMP.⁷⁵

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

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

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

25 ⁷⁶SEROA 18.

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

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

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

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

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 20
 21
 22 ⁷⁸NRS 534.250-534.340.

23 ⁷⁹*Id.*

24 ⁸⁰SEROA 8, 9.

25 ⁸¹*Id.*

26 ⁸²SEROA 234, sec. 13.9.

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

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

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

⁸³NRS 534.037(1).

⁸⁴SEROA 3.

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

⁸⁶SEROA 3.

⁸⁷SEROA 148.

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

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

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1 permit holders should have had the petition submitted to them. However, NRS 534.037(1)
 2 does not require a petition to be submitted to vested right holders. NRS 534.037(1) does
 3 not restrict petition approval to only underground permit or certificate holders. The
 4 exclusion of all surface permit and certificate holders or other certificate holders from
 5 considering whether to approve the DVGMP or not was incorrect and violated NRS
 6 534.037(1). The court so finds. But, petitioners have not shown that they or other holders
 7 of permits or certificates to appropriate water in the basin were not included in the State
 8 Engineer's count of 419 water right permits or certificates in the Diamond Valley basin.⁹⁰

9 There is no evidence in the ROA that the State Engineer excluded any holders of permits
 10 or certificates in the 419 count. Although petitioners and others similarly situated may not
 11 have been presented with the petition to approve the DVGMP, the fact that they would not
 12 have signed the petition is irrelevant as a majority of the holders of permits or certificates
 13 in the basin did sign the petition. The court finds substantial evidence in the record to
 14 support the State Engineer's determination that the petition was signed by a majority of the
 15 permit or certificate holders in the Diamond Valley basin.

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

23 ⁹⁰SEROA 3.

24 ⁹¹SEROA 3.

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

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

⁹³SEROA 3-4.

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F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

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

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

⁹⁴NRS 533.035.

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

⁹⁶SEROA 232-236, sec. 12,13

⁹⁷SEROA 9.

⁹⁸*Id.*

⁹⁹SEROA 2.

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1 than those holders who have placed their water to beneficial use. The DVGMP allocates
 2 the total amount of 76,000 af actually being pumped to 126,000 af of irrigation ground
 3 water rights in good standing in Diamond Valley all of which will receive shares under the
 4 DVGMP formula.¹⁰⁰ By example, a farmer with a center pivot on a 160 acre parcel at 4 af
 5 per acre would be permitted for 640 af. Upon prove up, if he actually watered less than the
 6 160 acre parcel because watering by using a center pivot does not water the 4 corners of
 7 a parcel, he may only prove up the water right for 512 af and receives a certificate for this
 8 amount. Another farmer in Diamond Valley, who has a 160 acre parcel at 4 af per acre but
 9 who has never proved up the beneficial use of the water and stands in a forfeiture status,
 10 receives the full 640 af of water. In the 1st year of the DVGMP, the farmer who has a
 11 permit for 640 af, but never has proved it up through beneficial use, actually received 85
 12 af more water than the farmer who proved up beneficial use on the same size parcel.
 13 When transferred into shares under the DVGMP, the farmer who has not proved up his
 14 permit receives windfall of water shares to sell or trade. The DVGMP acknowledges that
 15 some water rights in good standing have not been used and tied to corners of irrigation
 16 circles and that most, but not all, "paper water" is tied to currently used certificates or
 17 permits.¹⁰¹ Even though the DVGMP caps the amount of water the first year of the plan
 18 at the "ceiling of actual pumping (76,000 afa)",¹⁰² it remains that the 76,000 afa will be
 19 allocated to some permits who have not proved up beneficial use.

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

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

24 ¹⁰¹SEROA 467.

25 ¹⁰²SEROA 12.

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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 overpumping¹⁰⁵. Respondent and intervenors agree that the DVGMP was not developed for mitigation purposes, but to reduce pumping, bring equilibrium to the Diamond Valley aquifer 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

¹⁰³SEROA 2, 9, 10.

¹⁰⁴SEROA 234; see sec. 13.2

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

¹⁰⁶State 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.

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

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

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

22 _____
 23 ¹⁰⁸SEROA 510.

24 ¹⁰⁹SEROA 3.

25 ¹¹⁰*Id.*

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

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the end of the 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 aquifer groundwater level to decline with continuing adverse effects on vested surface rights. The court finds that the DVGMP and Order 1302 impair senior vested rights. The court finds that Order 1302 is arbitrary and capricious.

ESTOPPEL ISSUE

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

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

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

¹¹²SEROA 16.

¹¹³*Id.*

¹¹⁴Eureka County answering brief 22-23.

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

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

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

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

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

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

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

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

24 ¹²¹*Town of Eureka*, 167.

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

¹²³SEROA 8.

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

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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

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

¹²⁶150 P.3d 375 (N.M. 2006).

¹²⁷SEROA 5.

¹²⁸SEROA 6.

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

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

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

24 ¹²⁹SEROA 6-7.

25 ¹³⁰State Engineer's answering brief 25.

26 ¹³¹*Id.* 25-26.

¹³²*Id.* 26.

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

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

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

22 ¹³⁴*Id.*

23 ¹³⁵*Id.* 12.

24 ¹³⁶DNRPCA answering brief 11-12.

25 ¹³⁷*Id.* 11.

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

¹³⁹*Id.*

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

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

23 ¹⁴⁰*Lewis*, 376.

24 ¹⁴¹State Engineer's answering brief 29.

25 ¹⁴²*Id.* 30.

26 ¹⁴³53.2percent of the senior priority water right owners did not support the DVGMP.

¹⁴⁴*Happy Creek*, 1116.

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

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

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

24 ¹⁴⁵Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS
 25 534.020(1).

26 ¹⁴⁶*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 Orpheus Trust*, 124 Nev. 170, 174, 179 P.3d 562 (2008)

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

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

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

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

25 ¹⁴⁹SEROA 244-245.

26 ¹⁵⁰*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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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

¹⁶⁹NRS 533.330

¹⁷⁰NRS 533.345(1).

¹⁷¹NRS 533.345(2).

¹⁷²NRS 533.345(2)(3).

¹⁷³See NRS 533.370(2).

¹⁷⁴NRS 533.360.

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.


DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
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STATE OF NEVADA



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Attachment 5

Case No.: CV1902-348 (consolidated with Case Nos. CV1902-349 and CV-1902-350)

Dept. No.: 2

No. FILED

APR 30 2020

~~DE~~ EUREKA COUNTY CLERK

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

TIMOTHY LEE & CONSTANCE MARIE
BAILEY; FRED & CAROLYN BAILEY;
IRA R. & 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, and

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

Intervenors.

NOTICE OF ENTRY OF ORDER

TO: All Parties and their Counsel.

PLEASE TAKE NOTICE that on April 27, 2020, the above entitled court entered its Finding of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review in the above captioned action, a copy of which is attached hereto as Exhibit 1.

//

//

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EUREKA COUNTY CLERK

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 this 29th day of April, 2020.

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

By: 

DAVID H. RIGDON, ESQ.
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Nevada State Bar No. 6136
*Attorneys for Sadler Ranch, LLC and
Ira R. & Montira Renner*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document, which applies to Case Nos. CV1902-348, -349, and -350, as follows:

[X] By ELECTRONIC SERVICE, addressed as follows:

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[X] By UNITED STATES POSTAL SERVICE, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

The Honorable Gary D. Fairman
801 Clark Street, Suite 7
Ely, Nevada 89301

Beth Mills, Trustee
Marshall Family Trust
HC 62 Box 62138
Eureka, NV 89316

DATED this 29th day of April, 2020.


Employee of TAGGART & TAGGART, LTD.

EXHIBIT 1

EXHIBIT 1

No. _____ FILED

APR 27 2020

By: MAJ EUREKA COUNTY CLERK

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

Dept No. 2

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

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

Petitioners,

vs.

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

Respondent,

and

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

Intervenors.

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

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



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APR 27 2020

EUREKA COUNTY CLERK

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



I

RELEVANT PROCEDURAL HISTORY

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

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

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

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

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

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

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1 the following findings of fact and conclusions of law.

2 II

3 **FACTUAL HISTORY**

4 It is a matter of accepted knowledge that Nevada currently has and at all relevant
5 times has always had an arid climate. Its also undisputed that the Diamond Valley aquifer
6 has been severely depleted through over appropriation of underground water for irrigation
7 which the State Engineer has allowed to occur for over 40 years without any cessation or
8 reduction. The State Engineer has issued permits and certificates that have allowed
9 irrigators the right to pump approximately 126,000 acre feet ("af") of water per year from
10 the Diamond Valley aquifer in Eureka County and Elko County which has an estimated
11 perennial yield of only 30,000 af of water that can be safely pumped each year.⁴ The
12 126,000 af exclude other groundwater rights such as domestic use, stock water, and
13 mining.⁵ The total duty of ground water rights that impact the aquifer is close to 130,265
14 af.⁶ Of the 126,000 af approved for irrigation pumping, the State Engineer estimates
15 approximately 76,000 af were pumped in 2016, with the annual Diamond Valley pumping
16 exceeding 30,000 af for over of 40 years.⁷

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

21 _____
22 ⁴SEROA 3.

23 ⁵*Id.*

24 ⁶*Id.*

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

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

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

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

19 _____
 20 ⁹SEROA 328.

21 ¹⁰State Engineer ruling 6290, 23-31.

22 ¹¹NRS 534.110(7).

23 ¹²NRS 534.037.

24 ¹³SEROA 3, 134-138, 226.

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

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

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

19
 20 ¹⁵NRS 534.110(7), SEROA 225.

21 ¹⁶SEROA 226.

22 ¹⁷SEROA 226, 277-475.

23 ¹⁸SEROA 227 N8, 294.

24 ¹⁹Bailey reply addendum 2, SEROA 294.

25 ²⁰Bailey reply addendum 3.

26 ²¹*Id.* at 1.

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occurs.²²

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

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

²²*Id.*

²³SEROA 313.

²⁴SEROA 5, 220, 229, 240-241.

²⁵SEROA 240-241.

²⁶SEROA 11-12, 218, 220, 228-229.

²⁷SEROA 5, 218, 232.

²⁸SEROA 232.

²⁹SEROA 218, 234-235.

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

³⁰SEROA 232.

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

³²SEROA 499-509.

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

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

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

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

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

19
 20 ³⁵*Id.*, SEROA 5, 218.

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

22 ³⁷*Id.*

23 ³⁸SEROA 5, 218, 234-235.

24 ³⁹*Id.*

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

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

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

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

19
 20
 21 ⁴¹Sadler Ranch opening brief 4, *Id.* 152-164; SEROA 593.

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

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

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

25 ⁴⁵NRS 534.020.

26 ⁴⁶SEROA 6.

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

III

DISCUSSION

STANDARD OF REVIEW

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

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

⁴⁸ NRS 533.450(1).

⁴⁹ NRS 533.450(2).

⁵⁰ NRS 533.450(10).

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

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

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

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

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

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

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

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

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

19 ⁵⁶ *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702
 20 (1991).

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

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

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

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

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

26 ⁶² NRS 534.037(3).

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

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

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

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

⁶⁴Order granting motion in limine 10.

⁶⁵NRS 534.037(1).

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

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

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

23 ⁶⁷*Id.*

24 ⁶⁸SEROA 14-17.

25 ⁶⁹SEROA 17-18.

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

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

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

⁷¹Sadler Ranch opening brief 13.

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

⁷³NRS 534.037(1).

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

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1 Including the DVGMP and appendices, rejected petitioners' arguments that the DVGMP
 2 would not enable the basin to be removed as a CMA. Again, this Court will not reweigh
 3 the evidence presented nor substitute its judgment for that of the State Engineer. The
 4 court finds that there is substantial evidence in the record to support the State Engineer's
 5 approval of the DVGMP as achieving the goal of removing the Diamond Valley basin from
 6 CMA status. The court finds that there is substantial evidence in the record to support the
 7 State Engineer's findings that the DVGMP contained the necessary relevant factors in NRS
 8 534.037(2) to approve the DVGMP.⁷⁵

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

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

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

25 ⁷⁶SEROA 18.

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

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

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

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

19
 20
 21
 22 ⁷⁸NRS 534.250-534.340.

23 ⁷⁹*Id.*

24 ⁸⁰SEROA 8, 9.

25 ⁸¹*Id.*

26 ⁸²SEROA 234, sec. 13.9.

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

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

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

⁸³NRS 534.037(1).

⁸⁴SEROA 3.

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

⁸⁶SEROA 3.

⁸⁷SEROA 148.

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

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

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1 permit holders should have had the petition submitted to them. However, NRS 534.037(1)
 2 does not require a petition to be submitted to vested right holders. NRS 534.037(1) does
 3 not restrict petition approval to only underground permit or certificate holders. The
 4 exclusion of all surface permit and certificate holders or other certificate holders from
 5 considering whether to approve the DVGMP or not was incorrect and violated NRS
 6 534.037(1). The court so finds. But, petitioners have not shown that they or other holders
 7 of permits or certificates to appropriate water in the basin were not included in the State
 8 Engineer's count of 419 water right permits or certificates in the Diamond Valley basin.⁹⁰

9 There is no evidence in the ROA that the State Engineer excluded any holders of permits
 10 or certificates in the 419 count. Although petitioners and others similarly situated may not
 11 have been presented with the petition to approve the DVGMP, the fact that they would not
 12 have signed the petition is irrelevant as a majority of the holders of permits or certificates
 13 in the basin did sign the petition. The court finds substantial evidence in the record to
 14 support the State Engineer's determination that the petition was signed by a majority of the
 15 permit or certificate holders in the Diamond Valley basin.

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

23 ⁹⁰SEROA 3.

24 ⁹¹SEROA 3.

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

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1 should be 25 votes counted. This method of assigning votes improperly places the vote
2 calculation on the number of owners of certificates or permits rather than the number of
3 permits or certificates in the Diamond Valley basin. The court rejects Sadler Ranch's and
4 the Renner's interpretation of the method by which votes must be counted under NRS
5 534.037(1). Second, they contend the record fails to support how the State Engineer
6 verified petition signatures or what rights were counted as eligible to vote. The court is
7 satisfied that the State Engineer reviewed his office's records, confirmed the owner(s) of
8 record with the signatures on the petition as representing the owner(s) of record in his
9 office, and then counted the permits or certificates, not the owners of the certificates or
10 permits.⁸³ Third, Sadler Ranch and the Renners state some signatures were not by the
11 owner of record. There is no requirement under the NRS 534.037(1) that an individual
12 representing a permit or certificate holder could not sign the petition for the holder. No
13 challenges exist in the record by any permit or certificate holders claiming that their vote
14 was fraudulently cast by someone not authorized to vote on their behalf. Fourth, Sadler
15 Ranch and the Renners suggest that the permit or certificate should not have been
16 counted if only signed by 1 of the owners of record. Again, nothing in the statute requires
17 the petition be signed by each owner of a permit or certificate. Again, there are no
18 challenges in record from any co-owners alleging the vote of their certificate or permit was
19 invalid because not all of the record owners signed the petition. Last, they cite that the
20 DVGMP tally sheet had double and triple counted votes. This may be so, but the State
21 Engineer's method of calculation represented the true count of votes. Sadler Ranch's and
22 the Renner's objections are rejected. The court finds substantial evidence in the record
23 to support the State Engineer.
24
25
26

⁸³SEROA 3-4.

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F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

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

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

⁹⁴NRS 533.035.

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

⁹⁶SEROA 232-236, sec. 12,13

⁹⁷SEROA 9.

⁹⁸*Id.*

⁹⁹SEROA 2.

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1 than those holders who have placed their water to beneficial use. The DVGMP allocates
 2 the total amount of 76,000 af actually being pumped to 126,000 af of irrigation ground
 3 water rights in good standing in Diamond Valley all of which will receive shares under the
 4 DVGMP formula.¹⁰⁰ By example, a farmer with a center pivot on a 160 acre parcel at 4 af
 5 per acre would be permitted for 640 af. Upon prove up, if he actually watered less than the
 6 160 acre parcel because watering by using a center pivot does not water the 4 corners of
 7 a parcel, he may only prove up the water right for 512 af and receives a certificate for this
 8 amount. Another farmer in Diamond Valley, who has a 160 acre parcel at 4 af per acre but
 9 who has never proved up the beneficial use of the water and stands in a forfeiture status,
 10 receives the full 640 af of water. In the 1st year of the DVGMP, the farmer who has a
 11 permit for 640 af, but never has proved it up through beneficial use, actually received 85
 12 af more water than the farmer who proved up beneficial use on the same size parcel.
 13 When transferred into shares under the DVGMP, the farmer who has not proved up his
 14 permit receives windfall of water shares to sell or trade. The DVGMP acknowledges that
 15 some water rights in good standing have not been used and tied to corners of irrigation
 16 circles and that most, but not all, "paper water" is tied to currently used certificates or
 17 permits.¹⁰¹ Even though the DVGMP caps the amount of water the first year of the plan
 18 at the "ceiling of actual pumping (76,000 afa)",¹⁰² it remains that the 76,000 afa will be
 19 allocated to some permits who have not proved up beneficial use.

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

23
 24 ¹⁰⁰SEROA 218, 219, 221, 232-33 3m 461, 465.

25 ¹⁰¹SEROA 467.

26 ¹⁰²SEROA 12.

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

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

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

20
 21 ¹⁰³SEROA 2, 9, 10.

22 ¹⁰⁴SEROA 234; see sec. 13.2

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

25 ¹⁰⁶State Engineer's answering brief, 36.

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

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

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

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

22
 23 ¹⁰⁸SEROA 510.

24 ¹⁰⁹SEROA 3.

25 ¹¹⁰*Id.*

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

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the end of the 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 aquifer groundwater level to decline with continuing adverse effects on vested surface rights. The court finds that the DVGMP and Order 1302 impair senior vested rights. The court finds that Order 1302 is arbitrary and capricious.

ESTOPPEL ISSUE

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

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

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

¹¹²SEROA 16.

¹¹³*Id.*

¹¹⁴Eureka County answering brief 22-23.

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

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

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

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

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

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

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

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

24 ¹²¹*Town of Eureka*, 167.

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

¹²³SEROA 8.

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

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

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

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

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

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

25 ¹²⁶150 P.3d 375 (N.M. 2006).

26 ¹²⁷SEROA 5.

¹²⁸SEROA 6.

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

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

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

24 ¹²⁹SEROA 6-7.

25 ¹³⁰State Engineer's answering brief 25.

26 ¹³¹*Id.* 25-26.

¹³²*Id.* 26.

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

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

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

22 ¹³⁴*Id.*

23 ¹³⁵*Id.* 12.

24 ¹³⁶DNRPCA answering brief 11-12.

25 ¹³⁷*Id.* 11.

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

¹³⁹*Id.*

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

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

¹⁴⁰*Lewis*, 376.

¹⁴¹State Engineer's answering brief 29.

¹⁴²*Id.* 30.

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

¹⁴⁴*Happy Creek*, 1116.

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

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

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

24 ¹⁴⁵Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS
 25 534.020(1).

26 ¹⁴⁶*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 Orpheus Trust*, 124 Nev. 170, 174, 179 P.3d 562 (2008)

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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.*

¹⁵⁴State Engineer's answering brief 26.

¹⁵⁵SEROA 7.

¹⁵⁶SEROA 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 *Alblos v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).

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

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

18 1. THE DVGMP VIOLATES NRS 533.325 and NRS 533.345

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

24 ¹⁶⁶Sadler Ranch addendum to reply brief, 001

25 ¹⁶⁷*Id.* 003.

26 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.

SEVENTH JUDICIAL DISTRICT COURT
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 WHITE PINE, LINCOLN AND EUREKA COUNTIES
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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.


DISTRICT JUDGE

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GARY D. FAIRMAN
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Attachment 6

1 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP**
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No. _____ FILED

APR 30 2020

EUREKA COUNTY CLERK
By 21A

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

14 **TIMOTHY LEE BAILEY &**
15 **CONSTANCE MARIE BAILEY, FRED**
16 **BAILEY & CAROLYN BAILEY, IRA R.**
17 **RENNER & MONTIRA RENNER, and**
18 **SADLER RANCH, LLC,**

19 **Petitioners,**

20 **vs.**

21 **TIM WILSON, P.E., Acting State**
22 **Engineer, DIVISION OF WATER**
23 **RESOURCES, NEVADA**
24 **DEPARTMENT OF CONSERVATION**
25 **AND NATURAL RESOURCES,**

26 **Respondent.**

27 **EUREKA COUNTY, NEVADA,**
28 **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**

29 NOTICE IS HEREBY GIVEN that the **FINDINGS OF FACT, CONCLUSION OF**
30 **LAW, ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW** was entered in
31 the above-captioned matter on the 27th day of April, 2020. A true and correct copy is attached
32 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,
SCHULMAN & RABKIN, LLP**

By: 

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Ph: (702) 341-5200 / Fx: (702) 341-5300
Attorneys for Bailey Petitioners

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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/s/ Christie Rehfeld

Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN
& RABKIN, LLP

No. _____ FILED

APR 27 2020

By: EUREKA COUNTY CLERK

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

Dept No. 2

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

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

Petitioners,

vs.

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

Respondent,

and

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

Intervenors.

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

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



RECEIVED

APR 27 2020

EUREKA COUNTY CLERK

SEVENTH JUDICIAL DISTRICT COURT
 GARY D. FAIRMAN
 DISTRICT JUDGE
 DEPARTMENT 2
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
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RELEVANT PROCEDURAL HISTORY

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

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

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

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

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

22 ³On September 6, 2019, the court entered an order granting motion to intervene to
 23 Diamond Valley Ranch, LLC, a Nevada limited liability company, American First
 24 Federal, Inc., a Nevada Corporation, Berg Properties California, LLC, a Nevada limited
 25 liability company, and Blanco Ranch, LLC., a Nevada limited liability company. On July
 26 3, 2019, Beth Mills, trustee of the Marshall Family Trust, filed a motion to intervene.
 The court never entered an order 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 aquifer in Eureka County and Elko County which has an estimated perennial yield of only 30,000 af of water that can be safely pumped each year.⁴ The 126,000 af exclude other groundwater rights such as domestic use, stock water, and mining.⁵ The total duty of ground water rights that impact the aquifer is close to 130,265 af.⁶ Of the 126,000 af approved for irrigation pumping, the State Engineer estimates approximately 76,000 af were pumped in 2016, with the annual Diamond Valley pumping exceeding 30,000 af for over of 40 years.⁷

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

⁴SEROA 3.

⁵*Id.*

⁶*Id.*

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

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

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

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

19
 20 ⁹SEROA 328.

21 ¹⁰State Engineer ruling 6290, 23-31.

22 ¹¹NRS 534.110(7).

23 ¹²NRS 534.037.

24 ¹³SEROA 3, 134-138, 226.

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

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1 groundwater management plan has been approved for the basin pursuant to NRS
 2 534.037."¹⁵ This process is curtailment.

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

19
 20 ¹⁵NRS 534.110(7), SEROA 225.

21 ¹⁶SEROA 226.

22 ¹⁷SEROA 226, 277-475.

23 ¹⁸SEROA 227 N8, 294.

24 ¹⁹Bailey reply addendum 2, SEROA 294.

25 ²⁰Bailey reply addendum 3.

26 ²¹*Id.* at 1.

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occurs.²²

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

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

²²*Id.*

²³SEROA 313.

²⁴SEROA 5, 220, 229, 240-241.

²⁵SEROA 240-241.

²⁶SEROA 11-12, 218, 220, 228-229.

²⁷SEROA 5, 218, 232.

²⁸SEROA 232.

²⁹SEROA 218, 234-235.

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

³⁰SEROA 232.

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

³²SEROA 499-509.

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

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

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

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

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

19
 20 ³⁵*Id.*, SEROA 5, 218.

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

22 ³⁷*Id.*

23 ³⁸SEROA 5, 218, 234-235.

24 ³⁹*Id.*

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

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

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

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

19
 20
 21 ⁴¹Sadler Ranch opening brief 4, *Id.* 152-164; SEROA 593.

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

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

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

25 ⁴⁵NRS 534.020.

26 ⁴⁶SEROA 6.

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

III

DISCUSSION

STANDARD OF REVIEW

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

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

⁴⁸ NRS 533.450(1).

⁴⁹ NRS 533.450(2).

⁵⁰ NRS 533.450(10).

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

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

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

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

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

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

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

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

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

19 ⁵⁶ *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702
20 (1991).

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

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

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

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

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

26 ⁶² NRS 534.037(3).

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

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

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

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

⁶⁴Order granting motion in limine 10.

⁶⁵NRS 534.037(1).

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

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

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

23 ⁶⁷*Id.*

24 ⁶⁸SEROA 14-17.

25 ⁶⁹SEROA 17-18.

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

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

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

⁷¹Sadler Ranch opening brief 13.

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

⁷³NRS 534.037(1).

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

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1 including the DVGMP and appendices, rejected petitioners' arguments that the DVGMP
 2 would not enable the basin to be removed as a CMA. Again, this Court will not reweigh
 3 the evidence presented nor substitute its judgment for that of the State Engineer. The
 4 court finds that there is substantial evidence in the record to support the State Engineer's
 5 approval of the DVGMP as achieving the goal of removing the Diamond Valley basin from
 6 CMA status. The court finds that there is substantial evidence in the record to support the
 7 State Engineer's findings that the DVGMP contained the necessary relevant factors in NRS
 8 534.037(2) to approve the DVGMP.⁷⁵

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

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

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

25 ⁷⁶SEROA 18.

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

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

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

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

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 20
 21
 22 ⁷⁸NRS 534.250-534.340.

23 ⁷⁹*Id.*

24 ⁸⁰SEROA 8, 9.

25 ⁸¹*Id.*

26 ⁸²SEROA 234, sec. 13.9.

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

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

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

⁸³NRS 534.037(1).

⁸⁴SEROA 3.

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

⁸⁶SEROA 3.

⁸⁷SEROA 148.

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

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

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

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

23 ⁹⁰SEROA 3.

24 ⁹¹SEROA 3.

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

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1 should be 25 votes counted. This method of assigning votes improperly places the vote
2 calculation on the number of owners of certificates or permits rather than the number of
3 permits or certificates in the Diamond Valley basin. The court rejects Sadler Ranch's and
4 the Renner's interpretation of the method by which votes must be counted under NRS
5 534.037(1). Second, they contend the record fails to support how the State Engineer
6 verified petition signatures or what rights were counted as eligible to vote. The court is
7 satisfied that the State Engineer reviewed his office's records, confirmed the owner(s) of
8 record with the signatures on the petition as representing the owner(s) of record in his
9 office, and then counted the permits or certificates, not the owners of the certificates or
10 permits.⁸³ Third, Sadler Ranch and the Renners state some signatures were not by the
11 owner of record. There is no requirement under the NRS 534.037(1) that an individual
12 representing a permit or certificate holder could not sign the petition for the holder. No
13 challenges exist in the record by any permit or certificate holders claiming that their vote
14 was fraudulently cast by someone not authorized to vote on their behalf. Fourth, Sadler
15 Ranch and the Renners suggest that the permit or certificate should not have been
16 counted if only signed by 1 of the owners of record. Again, nothing in the statute requires
17 the petition be signed by each owner of a permit or certificate. Again, there are no
18 challenges in record from any co-owners alleging the vote of their certificate or permit was
19 invalid because not all of the record owners signed the petition. Last, they cite that the
20 DVGMP tally sheet had double and triple counted votes. This may be so, but the State
21 Engineer's method of calculation represented the true count of votes. Sadler Ranch's and
22 the Renner's objections are rejected. The court finds substantial evidence in the record
23 to support the State Engineer.
24
25
26

⁸³SEROA 3-4.

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F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

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

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

⁹⁴NRS 533.035.

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

⁹⁶SEROA 232-236, sec. 12,13

⁹⁷SEROA 9.

⁹⁸*Id.*

⁹⁹SEROA 2.

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

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

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

¹⁰¹SEROA 467.

¹⁰²SEROA 12.

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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 overpumping¹⁰⁵. Respondent and intervenors agree that the DVGMP was not developed for mitigation purposes, but to reduce pumping, bring equilibrium to the Diamond Valley aquifer 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

¹⁰³SEROA 2, 9, 10.

¹⁰⁴SEROA 234; see sec. 13.2

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

¹⁰⁶State 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.

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

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

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

22 _____
 23 ¹⁰⁸SEROA 510.

24 ¹⁰⁹SEROA 3.

25 ¹¹⁰*Id.*

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

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the end of the 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 aquifer groundwater level to decline with continuing adverse effects on vested surface rights. The court finds that the DVGMP and Order 1302 impair senior vested rights. The court finds that Order 1302 is arbitrary and capricious.

ESTOPPEL ISSUE

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

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

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

¹¹²SEROA 16.

¹¹³*Id.*

¹¹⁴Eureka County answering brief 22-23.

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

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

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

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

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

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

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

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

24 ¹²¹*Town of Eureka*, 167.

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

¹²³SEROA 8.

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

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

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

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

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

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

26 ¹²⁶150 P.3d 375 (N.M. 2006).

¹²⁷SEROA 5.

¹²⁸SEROA 6.

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

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

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

24 ¹²⁹SEROA 6-7.

25 ¹³⁰State Engineer's answering brief 25.

26 ¹³¹*Id.* 25-26.

¹³²*Id.* 26.

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

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

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

22 ¹³⁴*Id.*

23 ¹³⁵*Id.* 12.

24 ¹³⁶DNRPCA answering brief 11-12.

25 ¹³⁷*Id.* 11.

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

¹³⁹*Id.*

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

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

23 ¹⁴⁰*Lewis*, 376.

24 ¹⁴¹State Engineer's answering brief 29.

25 ¹⁴²*Id.* 30.

26 ¹⁴³53.2percent of the senior priority water right owners did not support the DVGMP.

¹⁴⁴*Happy Creek*, 1116.

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

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

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

24 ¹⁴⁵Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS
 25 534.020(1).

26 ¹⁴⁶*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 Orpheus Trust*, 124 Nev. 170, 174, 179 P.3d 562 (2008)

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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 *Albion v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).

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

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

18 I. THE DVGMP VIOLATES NRS 533.325 and NRS 533.345

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

24 ¹⁶⁶Sadler Ranch addendum to reply brief, 001

25 ¹⁶⁷*Id.* 003.

26 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.


DISTRICT JUDGE

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