Case No. 81224

IN THE SUPREME COURT OF THE STATE OF NEVADA

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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; TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; AND EUREKA COUNTY,

Appellants,

vs.

DIAMOND VALLEY RANCH, LLC; AMERICAN FIRST FEDERAL, INC.; BERG PROPERTIES CALIFORNIA, LLC; BLANCO RANCH, LLC; BETH MILLS, TRUSTEE OF THE MARSHALL FAMILY TRUST; TIMOTHY LEE BAILEY; CONSTANCE MARIE BAILEY; FRED BAILEY; CAROLYN BAILEY; SADLER RANCH, LLC; IRA R. RENNER; AND MONTIRA RENNER,

Respondents.

RESPONDENTS SADLER RANCH, LLC AND IRA & MONTIRA RENNER'S MOTION TO EXCEED PAGE LIMITATION FOR RESPONSE TO DNRCPA'S EMERGENCY MOTION FOR STAY

Under NRAP 27(d)(2), a response to a motion is limited to 10 pages unless this Court grants leave to file a longer response. Respondents Sadler Ranch, LLC and Ira & Montira Renner (hereinafter collectively referred to as "Respondents") respectfully request leave to exceed NRAP 27(d)(2)'s page limit for their Response to the Emergency Motion for Stay filed by Diamond Natural Resources Protection and Conservation Association, et al. ("DNRCPA") (hereafter referred to as "Response"). The Response is attached and filed simultaneously with this motion.

The Response contains 28 pages of text, which is 18 pages more than that allowed under NRAP 27(d)(2). Good cause exists to allow Respondents to exceed the page limit by 18 pages for the following reasons.

On July 8, 2020, this Court granted a similar motion filed by DNRCPA motion and authorized them to file a motion consisting of 28 pages. DNRCPA's Motion for contains a host of factual and legal inaccuracies. Additionally, DNRCPA attached fourteen main exhibits and twenty-one sub-exhibits, consisting of hundreds of pages

of material, to its Emergency Motion for Stay. Respondents need additional pages to fully address the legal and factual issues raised in DNRCPA's 28-page motion.

Respondents sought to be concise in their Response. However, because of the sheer volume of issues raised, the additional evidence introduced as exhibits to the motion for emergency stay, and the large number of factual inaccuracies, Respondents were required to respond and inform this Court of the accurate history and context of water issues in Diamond Valley. This necessitated exceeding the 10-page limit.

Under NRAP 27(d)(2), movants and respondents are granted an equal number of pages. In keeping with the equity of this rule, Respondents respectfully request to be given the same number of pages to respond to the Motion as Appellants were given to draft the Motion.

Therefore, for diligence and good cause shown, and according to NRAP 32(a)(7), Respondents respectfully request this Court accept and file the Response consisting of 28 pages.

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AFFIRMATION

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

DATED this 13th day of July, 2020.

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

By: /s/ David H. Rigdon
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567

DECLARATION OF DAVID RIGDON IN SUPPORT OF MOTION TO EXCEED THE PAGE LIMIT

I, David Rigdon, do hereby swear under penalty of perjury that the assertions of this declaration are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this declaration. If called as a witness, I would be competent to testify to these facts.

2. I am an associate at Taggart and Taggart, Ltd, and counsel of record for Sadler Ranch, LLC, and Ira and Montira Renner ("Respondents") in this case.

3. This declaration is offered in support of Respondents' Response to Emergency Motion for Stay ("Response") and in compliance with NRAP 32(a)(7)(D).

4. Respondents respectfully request leave to exceed the page limit pursuant to NRAP 27(d)(2) because on July 8, 2020, this Court granted DNRCPA's motion for leave to file excess pages for their emergency motion for stay. DNRCPA's Emergency Motion for Stay is 28 pages in length, or almost 3 times the length allowed under NRAP 27(d)(2), and contains a host of factual and legal

inaccuracies. Additionally, DNRCPA attached fourteen main exhibits and twenty-one sub-exhibits, consisting of hundreds of pages of material, to its Emergency Motion for Stay.

5. Respondents need additional pages to fully analyze the numerous issues and legal arguments raised in DNRCPA's motion. Accordingly, in order to fully inform this Court of the accurate history and context of water issues in Diamond Valley. This necessitated exceeding the 10-page limit.

5. As a result, I could not condense the response to the Emergency Motion for Stay into just 10 pages. The Response to the Emergency Motion to Stay is 28 pages, a copy of which (without exhibits) is attached hereto as Ex. 1. Respondents request leave to file an additional 18 pages.

6. I worked diligently to present the Response to Motion to Stay in a concise manner. However, due to the excessive factual background, multiple issues, and extrinsic evidence provided in the Emergency Motion for State, the response exceeds the page limit set forth in NRAP 27(d)(2).

7. I believe diligence and good cause exist to grant the Motion to Exceed the Page Limit.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED: this 13th day of July, 2020.

By: */s/ David Rigdon*
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I 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 Respondent's Answering Brief by U.S. Mail to:

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 counsel in this case are registered E-Flex users and were served electronically through the E-Flex Court system.

DATED this 18th day of June, 2020.

/s/ TJ Carpitcher
Employee of TAGGART & TAGGART, LTD.

Case No. 81224

IN THE SUPREME COURT OF THE STATE OF NEVADA

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; TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; AND EUREKA COUNTY,

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DIAMOND VALLEY RANCH, LLC; AMERICAN FIRST FEDERAL, INC.; BERG PROPERTIES CALIFORNIA, LLC; BLANCO RANCH, LLC; BETH MILLS, TRUSTEE OF THE MARSHALL FAMILY TRUST; TIMOTHY LEE BAILEY; CONSTANCE MARIE BAILEY; FRED BAILEY; CAROLYN BAILEY; SADLER RANCH, LLC; IRA R. RENNER; AND MONTIRA RENNER,

Respondents.

SADLER RANCH, LLC AND IRA AND MONTIRA RENNER'S RESPONSE TO EMERGENCY MOTION FOR STAY

Pursuant to NRAP 14(f), Respondents Sadler Ranch, LLC and Ira & Montira Renner hereby respond to the Emergency Motion for Stay filed by Diamond Natural Resources Protection and Conservation Association, et al. ("DNRCPA").

INTRODUCTION

Appellants' emergency motion is nothing more than an attempt to re-litigate the merits of the case using unsubstantiated and unverified extra-record information about the efficacy of the Diamond Valley Groundwater Management Plan ("DVGMP"). But this information has nothing to do with the key point at issue in this case – that the State Engineer's approval of the DVGMP violated Nevada's long-standing doctrine of prior appropriation. As the district court correctly noted, this key fact was not just undisputed during the course of the litigation, it was openly and explicitly acknowledged by the State Engineer himself.[1]

In 2016, the State Engineer presented the draft DVGMP to his peers from other western states and expressly admitted that the plan would require "a statutory change to make [it] legal."[2] But the desired statutory change never happened. Thus, to succeed on appeal, Appellants bear the heavy burden of convincing this Court to overturn a 150 year-old foundational doctrine of Nevada's water law.

[1] DNRCPA Motion, Exhibit 1 at SE ROA 6 ("it is acknowledged that the GMP does deviate from the strict application of the prior appropriation doctrine.").
[2] Exhibit 1 at Slide 21.

Appellants allege that the Court's April 2020 Order has created an emergency in the basin which justifies staying the order during the pendency of the appeal. But, as the district court was well aware, the junior priority irrigators in Diamond Valley have had decades to correct the over-pumping problem and resisted all efforts to do so.[3] What they claim as grounds for an emergency are, in fact, nothing more than the consequences of their own knowing refusal to use water properly. They have unclean hands by having actively resisting the efforts of holders of pre-statutory rights to valley springs, like Respondents, to restore their senior priority water rights. This has been done with the full support of Eureka County, who has used taxpayer money to advance the interests of one group of county citizens over another.[4] On several occasions, the district court warned Respondents that the ongoing impairment of senior water rights cannot continue.[5] Yet they ignored those warnings. To now argue an emergency exists, when they knew all along that the DVGMP was not legal and did nothing to address the problems the district court has

[3] DNRCPA Motion, Exhibit 2 at 4-5 (Exhibit 2 is hereinafter referred to as "Order Granting Petitions for Judicial Review").

[4] *See* Respondent's Answering Brief at 4-18, *Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736).

[5] *See e.g,*. Appellant's Appendix at AA05256, *Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736) ("Nevada water law provides that vested water rights shall not be impaired" and the statute "requires the State Engineer to protect senior water rights holders from applications or requests for permits when there is no unappropriated water in the proposed source of supply or if the proposed use or change conflicts with existing rights.").

articulated over and over, rings hollow. The emergency started decades ago when the junior priority irrigators, with the implicit permission of the State Engineer, pumped so much groundwater that they dried up the naturally flowing springs.

If the Court desires to keep the status quo ante during the course of this appeal, Appellants' motion for stay must be denied. The current irrigation season is the first one in which the provisions of the DVGMP will be enforced on a mandatory basis. Accordingly, granting the stay, and allowing the plan to be implemented during this appeal, will radically change the previous status quo and result in irreparable harm to senior priority rights holders.

A fatal flaw of the DVGMP is that it forcibly seizes the private property of one group of individuals (senior rights holders), for the express purpose of transferring that property to another group of private individuals (junior rights holders). This scheme, on its face, violates both prior appropriation doctrine and the express provisions of Article 1, Sections 8 and 22 of the Nevada Constitution.

Appellants main argument in this appeal is that the Legislature impliedly authorized groundwater management plans to abrogate prior appropriation doctrine when it adopted NRS 534.037. As the district court noted, however, the statute contains no express language to that effect and the legislative history of the statute is devoid of any indication that legislators intended it to have that effect.

Because Appellants cannot meet the high burden required to justify issuing a stay, the request should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

The district court was already acutely aware of the following history and background of water issues in Diamond Valley when this case came before it.[6] Over the last seven years, the district court has presided over numerous cases related to the Diamond Valley groundwater dispute. These include cases regarding mitigation rights awarded to senior right holders to make up for their lost spring flows, a writ petition seeking immediate curtailment of pumping, and various proceedings and appeals related to the adjudication of pre-statutory rights under NRS 533.087-533.320. In each of these cases, members of DNRCPA and/or Eureka County have resisted every attempt by senior pre-statutory rights holders to protect their historic ranches and bring pumping in the basin to a sustainable level.

I. The State Engineer Purposefully Over-Appropriated Diamond Valley.

Diamond Valley is one of the most over-appropriated and over-pumped basins in Nevada. The groundwater basin has a perennial yield of just 30,000 acre-feet.[7] Permits have been issued totaling over 126,000 acre-feet.[8] Since the 1970s annual pumping has consistently exceeded 2-3 times the available supply.[9] To date, this

[6] Exhibit 2 at 80:1-5.
[7] Order Granting Petitions for Judicial Review at 4:1-3.
[8] *Id.*
[9] *Id.*

over-pumping has caused the groundwater level to decline more than 100 feet resulting in Respondents' naturally flowing springs drying up.[10]

Despite Appellants' assertions to the contrary,[11] over-appropriation of the basin was no accident. During the time when most permits to appropriate groundwater were issued, Mr. Hugh Shamberger served respectively as State Engineer and Director of the Department of Conservation and Natural Resources. Mr. Shamberger publicly advocated that Nevada should not limit groundwater use to the perennial yield but, instead, should implement "a program of orderly over-development" whereby aquifer storage could be exploited "over a period of thirty to forty years" to promote economic development.[12] He declared Diamond Valley to be a success story in this regard, one of "the most successful valleys in which desert land development has been done."[13]

However, just a year after Mr. Shamberger boasted about the success of his experiment in over-appropriation, scientists from the United States Geological Survey ("USGS") sounded the alarm. In 1968, when pumping was just 12,000 acre-feet/annually (afa), the USGS issued a report stating that if pumping in the southern portion of the basin increased beyond that amount groundwater levels would decline

[10] Order Granting Petitions for Judicial Review at 4.
[11] DNRCPA Motion at 4-5.
[12] *Hugh A. Shamberger: Memoirs of a Nevada Engineer and Conservationist* at 38, University of Nevada Oral History Project Catalog #019 (1967).
[13] *Id*.

precipitously, drying up the naturally flowing springs in the northern portion of the basin.[14] The vast majority of the junior priority permit holders pump their water in the southern portion of the basin.

The USGS report also noted that the water flowing from the northern springs was fully appropriated and being used by senior priority water rights holders.[15] The report stated that a program would need to be put in place to make these senior priority users whole for the eventual loss of their water.[16] Despite commissioning the report, the State Engineer failed to heed its warnings or develop any program to protect senior users. The USGS report was also a public document whose findings were well known to Appellants.

A consequence of the sheer number of permits issued by the State Engineer is that junior priority users far outnumber senior users. Of the permits the State Engineer has issued, more than 80% are junior in priority based on the 30,000 afa perennial yield.[17] This has created a significant political obstacle to proper management of the basin whereby attempts to reduce pumping and/or make senior

[14] Exhibit 3 at SE ROA 106 (warning that pumping in excess of 12,000 acre-feet/year in southern Diamond Valley will "decrease the natural discharge from the springs in the North Diamond subarea.").
[15] *Id*.
[16] *Id*.
[17] DNRCPA Motion, Exhibit 1 at SE ROA 3 – SE ROA 4.

water users whole is met with stiff political opposition from both the junior users and the county government they control.[18]

II. Over-Pumping By Junior Users Causes Valley Springs To Run Dry.

The USGS predictions proved prescient. By 1982, the northern valley springs began to run dry. The first of these was the Thompson spring, which was closest in proximity to the southern pumping area. In 1982, Mr. Thompson requested the State Engineer take action to protect his rights by enforcing prior appropriation law.[19] But, instead of protecting Mr. Thompson's rights, the State Engineer bowed to the wishes of the junior priority users and refused to stop the over-pumping.[20]

At the 1982 hearings regarding Mr. Thompson's request, State Engineer Morros referred to data in the record "which indicate that the pumpage in Diamond Valley is starting to - - is in fact affecting groundwater levels" and "will have adverse effects on the senior rights."[21] Despite this admission, he requested a vote of those present as to whether he should take any action.[22] He noted that "everybody seems to be quite content and happy with the situation in Diamond Valley with the

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[18] *See* Respondent's Answering Brief at 4-18, *Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736).
[19] *See* NRS 533.430 ("Every permit to appropriate water. . . shall be, and the same is hereby declared to be, subject to existing rights.").
[20] *See* Appellant's Appendix at AA01814 – AA02050, *Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736) (transcripts of 1982 State Engineer Hearings).
[21] *Id*. at AA01962:16-24.
[22] *Id*. at AA01963:1-4.

exception of Mr. Thompson whose spring has diminished considerably"[23] and, after the hearing, took no effective action to stop the over-pumping.

Inevitably, the massive cone of depression caused by the southern pumping worked its way north, first drying up the Bailey springs and then hitting the Sadler springs, which are now dry. Despite Appellants' attempt to blame the victims, by claiming the Bailey and Sadler springs ran dry due to self-inflicted harm, the State Engineer has definitively determined that "it is the use of water by the junior water right holders that has conflicted with [Sadler Ranch's] senior rights."[24]

III. Diamond Valley's Designation As A Critical Management Area

Throughout the more than thirty-year period between 1982 and 2013, the State Engineer took little action to reduce over-pumping in the basin. Then, in 2013, the State Engineer took the first steps to remedy the harm to senior vested right owners by issuing Order 1226. As State Engineer King noted at the time, "[w]hen we were here in 2009, again, it was made clear to me that everyone, it seemed, was happy where they were in terms of their crops and the declining water table."[25] But, in 2009, the State Engineer had also warned that if a senior water right owner asserted impairment, he could no longer avoid taking action.[26] Order 1226 specifically

[23] *Id*. at AA01942:4-6.
[24] State Engineer Ruling 6290 at 61.
[25] Exhibit at 4 at 28:1-3; *See also* Exhibit 2 at 81:5-15.
[26] Exhibit 4 at 28:4-10 ("It's an absolute came changer when we get a senior water right holder asserting impairment.")

authorized the issuance of mitigation rights to impacted spring owners.[27] However, the State Engineer still took no steps to reduce pumping. And, Eureka County, on behalf of the junior users, continues to litigate Sadler Ranch's mitigation rights.[28]

With no other remedy, in 2015, Sadler Ranch filed a writ petition to force the State Engineer to follow his mandate to protect senior rights and stop the over-pumping. In response, the State Engineer invoked NRS 534.110(7) and declared the basin a Critical Management Area ("CMA").[29] Declaring the basin a CMA was a defensive litigation move, designed to moot Sadler Ranch's writ petition while postponing any real action for at least another ten years.[30] However, the declaration did have the benefit of forcing the junior water users to develop a groundwater management plan or face being cut off completely.

IV. The Development Of The DVGMP

Water users formed a board to guide the development of a plan. Respondent Ira Renner, the owner of the northernmost ranch in the basin, agreed to serve as a representative for the senior pre-statutory rights holders. He did so in good faith,

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[27] State Engineer Order 1226 at 2.
[28] *See generally, Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736).
[29] State Engineer Order 1264 at 5.
[30] State Engineer Motion to Dismiss First Amended Petition for Curtailment in Diamond Valley at 3-5, *Sadler Ranch, LLC v. King*, Seventh Judicial District Court Case No. CV-1504-218 (arguing that designation of the basin as a CMA precludes curtailment).

believing that the impending threat of curtailment would finally force the junior users to take the concerns of the seniors seriously. This proved to be a false hope.

On June 11, 2015, at the State Engineer's urging, the board held a workshop where Mike Young, an Australian academic, presented a proposed scheme to use the groundwater management planning process to completely "chang[e] our water rights system."[31] This scheme involved stripping existing water rights of their priorities and instead allocating water based on a redistributionist 'share' system.

The scheme works as follows. Consider two hypothetical permit holders. One holds the most senior permit with a duty of 100 afa. The second holds the most junior permit, also with a duty of 100 afa. Only 30,000 afa of water is available to be pumped in any given year without depleting the resource (the perennial yield) but the State Engineer issued more than 100,000 afa of permits. So, absent the DVGMP, the senior holder is authorized to pump and use 100 afa of water. By contrast, the junior's permit does not give her a right to pump any water at all. This is because the terms of her permit only authorize pumping if water is available that is not already being used by a senior right holder and, in Diamond Valley, all the available water has already been allocated to, and is being used by, senior users.

This is true even though the State Engineer has refused to enforce the permit terms and, instead, allowed the junior users to pump the full amount of their permits.

[31] DNRCPA Motion, Exhibit 1 at SE ROA 294.

His refusal to properly enforce the rules does not give the juniors any legal entitlement to the water they are pumping. Rather, they pump and use that water at the State Engineer's sufferance which can be withdrawn at any time.

Under the DVGMP, both permit holders will have their permits converted to shares. The senior permit holder receives 100 shares. The junior permit holder receives 80 shares.[32] In the first year of the plan, the senior permit holder receives an allocation of 67 acre-feet ("af") of water, or 33 af less than she is entitled. Meanwhile, the junior permit holder, who is legally entitled to nothing, receives 54 af of water. By year 35 the senior receives only 30 af of her water, while the junior gets 24 af. In other words, the senior, who has a vested legal entitlement to her full 100 afa of water, is forcibly required to give up 70 afa of that entitlement so it can be divided among the junior users who have no legal right to it.[33]

Mr. Renner consistently warned his fellow board members that this scheme is illegal but his concerns were met with outright hostility and ignored. Other members of the public who raised issues with the proposed scheme were treated in similarly hostile manner.[34] Contrary to Appellants contentions, the record shows that there was no good faith effort to develop a consensus plan that would benefit everyone. Rather, because the junior users were assured that the State Engineer would approve

[32] *Id.* at SE ROA 232.
[33] Exhibit 5 at slide 14.
[34] Exhibit 6 at SE ROA 684:8-11; SE ROA 723:18-21.

any plan they put forward, and because they had an overwhelming voting advantage, they moved forward with developing a plan based on the Australian scheme.

The district court saw this effort for what it was, a naked attempt by junior right holders to steal water from seniors without paying for it. The district court correctly noted that "the result of the DVGMP formula is that senior water rights' holders receive fewer shares that one per acre foot. Thus, senior water rights' holders cannot beneficially use all of the water which their permit/certificate entitles them to use."[35] Accordingly, the district court struck down the DVGMP on the basis that it violates prior appropriation doctrine. This appeal followed. Appellants now ask this Court to stay the district court's order while this appeal is pending.

ARGUMENT

In deciding whether to grant a stay request, the Court considers four factors: (1) the likelihood of success on appeal, (2) whether the object of the appeal will be defeated if the stay is denied, (3) whether Respondents will suffer irreparable harm if the stay is granted, and (4) whether Appellants will suffer irreparable harm if the stay is denied.[36] Where, as here, a case raises a serious legal question a movant must present a substantial case on the merits as well as show that the balance of equities "weighs heavily" in favor of granting the stay.[37]

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[35] Order Granting Petition for Judicial Review at 8:12-15.
[36] NRAP 8(c); *Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982 (2000).
[37] *Id*. at 659 (citing *Ruiz v. Estelle*, 650 F.2d 535, 565 (5th Cir. 1981)).

The requested stay should be denied. Appellants are highly unlikely to succeed on appeal because the DVGMP indisputably violates long-standing prior appropriation doctrine as well as express constitutional provisions prohibiting the forcible redistribution of property from one private individual to another. Also, the purpose of the appeal will not be frustrated because denial of the stay will not make any of Appellants' claims moot or render this appeal meaningless. In addition, Respondents property rights will unquestionably be impaired if the stay is granted, constituting a de facto irreparable injury, while Appellants only allege theoretical, not actual, injuries if the stay is denied.[38] Finally, Appellants' approach this Court with unclean hands, having for forty years obstructed all efforts to bring pumping in the basin to a sustainable level and mitigate senior pre-statutory rights holders for the loss of their spring flows.

I. The Appeal Is Unlikely To Succeed Because Appellants Already Admitted That The DVGMP Violates Nevada's Well-Established Prior Appropriation Doctrine.

Appellants have not demonstrated that they are likely to prevail on the merits. This case involves a serious legal question of whether the plan approved under Order 1302 violates long standing water law, as found by the district court.[39] A well-established maxim of statutory construction is that "[t]he Legislature 'is presumed

[38] NRAP 8(c).
[39] DNRCPA Motion for Stay, Exhibit 13 at 5:8-11 (hereinafter referred to as "Order Denying Motion for Stay").

not to intend to overturn long-established principles of law' when enacting a statute."[40] But that is exactly what Appellants are asking this Court to do, presume that the Legislature *impliedly* overturned Nevada's 150-year-old doctrine of prior appropriation when it adopted NRS 534.037.

Few doctrines are as well established in Nevada law as prior appropriation. The doctrine has been used by this Court from its inception.[41] While there was a brief period between 1872 and 1885 when the court attempted to replace prior appropriation with riparian doctrine, this effort was short-lived and, since 1885, the prior appropriation doctrine has governed all water rights in the state.[42] As the district court correctly noted there has been a "steadfast commitment of Nevada's courts and legislation upholding the doctrine of prior appropriation."[43]

In Order 1302 the State Engineer admitted that the DVGMP deviates from prior appropriation doctrine.[44] This fact was universally agreed to by the parties in the proceedings below.[45] Yet the State Engineer approved the plan anyway based

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[40] *Wilson v. Happy Creek Inc.*, 135 Nev. Adv. Op. 41, 448 P.3d 1106, 1111 (quoting *Shadow Wood Homeowners Ass'n v. N.Y. Cnty. Bancorp, Inc.*, 132 Nev. 49, 59, 336 P.3d 1105, 1112 (2016))
[41] *See e.g.*, *Lobdell v. Simpson*, 2 Nev. 274 (1866).
[42] *Van Sickle v. Haines*, 7 Nev. 249 (1872) (overruled by *Jones v. Adams*, 18 Nev. 78, 84-88, 6 P. 442, 444-48 (1885)).
[43] Order Granting Petition for Judicial Review at 36:7-10.
[44] State Engineer Order 1302 at 5.
[45] Order Granting Petition for Judicial Review at 10:17-11:1 ("[t]he State Engineer and all intervenors who filed briefs and orally argued this case agree that the DVGMP deviates from the prior appropriation doctrine.").

on a claim that NRS 534.037 impliedly abrogated that doctrine in basins designated as a CMA. This determination contradicted his earlier public statement that the DVGMP needed "a statutory change to make [it] legal."[46]

As the district court noted, "nowhere in the Legislative history of AB 419 [the legislation that would become NRS 534.037] is one word spoken that the proposed legislation will allow for a GMP whereby [a] senior water right holder will have its rights 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 priority."[47] In fact, the bill sponsor expressly stated the burden is on junior priority users to conserve water or otherwise make cuts in usage.[48] The sponsor of the bill clearly understood the implications of prior appropriation doctrine where "water rights in Nevada are first in time; first in right" and stated that, because of this, GMPs needed to be most aggressive towards "the newer right holders."[49]

The district court also soundly rejected Appellants' arguments related to the plain language of NRS 534.037. The district court fully analyzed the statute and found "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

[46] Exhibit 1 at Slide 21.
[47] Order Granting Petition for Judicial Review at 34:6-10.
[48] *Id*.
[49] *Id*. at 35.

amount of water to which a senior right holder is entitled."[50] Further the district court found that under the Appellants' theory "a majority of junior rights 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 crises to continue to irrigate by using water which they were never entitled to use."[51]

The district court also noted the failed efforts in 2017 to modify NRS 534.037 to allow for a GMP that "limit[s] the quantity of water that may be withdrawn under any permit or certificate . . . on a basis other than priority."[52] The district court correctly found that this effort to amend the statute "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 doctrine."[53]

Appellants also argued below that NRS 534.037 must be interpreted as authorizing the State Engineer to abrogate prior appropriation because forcibly confiscating senior priority rights is the only possible way to develop a groundwater management plan. They claimed the proponents of the DVGMP faced a binary

[50] *Id*. at 30.
[51] *Id*. at 30.
[52] *Id*. at 36.
[53] *Id*. at 36.

choice: strict priority curtailment, or adopting a plan that abrogates prior appropriation. The district court properly rejected this false dichotomy.

As the district court noted, numerous alternative approaches were suggested that could reduce water use while remaining consistent with prior appropriation doctrine. These alternative included "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."[54] But Appellants rejected these strategies in favor of their redistributionist scheme.

Because Appellants own prior statements and admissions confirm the DVGMP violates prior appropriation doctrine, and because nothing in the text or the history of NRS 533.037 demonstrates a legislative intent to abrogate prior appropriation, they cannot show a reasonable likelihood of success on appeal and the stay should be denied.

II. The Purpose Of The Appeal Will Not Be Frustrated If The Stay Is Denied.

A. Denying the stay will preserve the existing status quo.

As the district court correctly pointed out, the object of the appeal is to overturn a grant of petitions for judicial review of State Engineer Order 1302

[54] *Id*. at 32.

adopting the DVGMP.[55] The primary basis for the district court's order is that the DVGMP violates prior appropriation doctrine. In the proceedings below, appellants agreed that the plan violates prior appropriation doctrine but argued that NRS 534.037 exempted them from that foundational law. The district court found this argument without merit based on the both plain language of the statute and its legislative history. If the stay is denied, this appeal will neither be mooted nor will Appellants be denied the opportunity to have this Court fully review their claims.[56]

Instead, denying the stay will merely keep the status quo in place while this appeal is litigated. If this Court determines that the district court was in error, Order 1302 can be reinstated, and the plan implemented on a going forward basis.[57] Accordingly, the requested stay should be denied.

B. Appellants' claim that denial of the stay will increase pumping is speculative and unsupported by the record.

Instead of focusing on the legality of the plan – the actual issue on appeal – Appellants motion attempts to shift the Court's focus to the plan's potential effectiveness, claiming that denial of the stay might result in increased pumping. Despite Appellants claim, there is no evidence in the record suggesting that pumping

[55] Order Denying Motion for Stay 3:13-16.
[56] *See e.g.*, *Hansen v. Dist. Ct.*, 116 Nev. 650. 657, 6 P.3d 982, 986 (2000) (denial of stay is proper where requesting party will not be barred from raising any claims or defenses during appeal).
[57] Order Denying Motion for Stay at 4:5-7.

will materially increase absent a stay, and it is just as likely that pumping will increase if the stay is granted. As the district court correctly held when denying Appellants' stay request, "the DVGMP is actually increasing the volume of water removed from the aquifer rather than reducing it at this time."[58]

For 2020, the DVGMP establishes an allocation of 73,720 acre-feet of water. This is 17,381 acre-feet *more* water than was pumped during the 2019 irrigation season.[59] Also, because 19,961 acre-feet of unused allocations from 2019 were illegally 'banked' under the DVGMP, if the stay is granted water users could pump as much as 93,681 acre-feet from the basin in 2020 – an amount three times greater than the basin's perennial yield. This is the basis for the district court's conclusion that "the banked water share provisions under the DVGMP combined with the 2020 water share allocations, if fully used, could exceed the 2016 76,000-acre feet base line [of] pumping."[60] In other words, continued implementation of the plan could result in more, not less, water being pumped from the basin.

Appellants state that water users have collectively invested millions of dollars in water conservation equipment in anticipation of plan implementation. However, they fail to mention that much of this equipment was funded by federal grants from

[58] *Id* at 4:3-4.
[59] DNRCPA Motion at 8.
[60] Order Denying Motion for Stay at 4:3-4; *See also Bailey v. State Engineer*, Seventh Dist. Ct. Case No. CV-1902-348 (June 30, 2020).

the National Resource Conservation Service. Under the terms of those grants, water users are required to continue conserving water regardless of whether the DVGMP exists or not. There is simply no evidence that any irrigator who installed this water saving technology will discard or fail to use it if the stay is denied. Accordingly, the requested stay should be denied.

C. Pure speculation about the potential waste of time and resources developing a new plan does not justify granting stay.

Appellants' claim that if the stay is denied, they will be required to waste time and resources developing a new plan while this appeal is pending.[61] However, speculation about the possible expenditure of time and resources does not constitute irreparable harm justifying a stay.[62]

The current plan is defective both because it is illegal and because it never achieves the goal of bringing pumping to a sustainable level, even after 35 years.[63] Therefore, additional planning will be needed, regardless of whether this Court affirms or reverses the district court, to develop a plan that will actually result in removing the CMA designation. Any additional time or effort spent on developing alternative approaches will, therefore, be not be wasted.

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[61] DNRCPA Motion at 14.

[62] *Excellence Cmty. Mgmt. v. Wilmore*, 131 Nev. 347, 353, 351 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555,565 (5th Cir. 1981)) ("Irreparable harm is an injury for which compensatory damages is an inadequate remedy.").

[63] *See* NRS 534.037(1) (a plan "must set forth the necessary steps for removal of the basin's designation as a critical management area.").

As the district court noted, Appellants still have 5 years remaining to develop a plan that conforms with Nevada water law.[64] If a stay is granted, Appellants will be disinclined to begin developing a proper plan. By contrast, denial of the stay will incentivize them to start developing an alternative now so that when this Court affirms the district court, a replacement plan will be ready for consideration.

III. Respondent's Will Be Irreparably Harmed If A Stay Is Granted.

The district court correctly found that respondents will suffer serious or irreparable harm if the stay is granted.[65] "Any act which destroys or results in a substantial change in property, either physically *or in the character in which it has been held or enjoyed*, does irreparable injury."[66] The DVGMP forcibly restricts pumping by senior priority water users and then redistributes that water to junior priority users. This is a *de facto* impairment of the senior users' rights that, by itself, justifies denial of the stay. As the district court noted, citing this Court's precedent, a loss of priority can amount to a de facto loss of the right itself.[67]

The DVGMP only required voluntary participation during its first year of implementation. Therefore, during the 2019 irrigation season, the plan did not

[64] Order Denying Motion for Stay at 4:20-24.
[65] Order Denying Motion for Stay at 4:24-26.
[66] *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 125 (1972) (emphasis added).
[67] Order Granting Petition for Judicial Review at 26:4-6 (citing *Wilson v. Happy Creek*, 135 Nev. Adv. Op. 41, 448 P.3d 1106, 1115 (2019).

impair senior priority water rights because senior users could still pump their full duty of water. However, starting with the 2020 irrigation season compliance with the plan is mandatory. This change from voluntary to mandated compliance means that the status quo will be changed, not preserved, by a stay.

Nevertheless, Appellants incorrectly contend that senior pre-statutory rights are not harmed by the DVGMP and that any harm done to Sadler's springs is self-inflicted. Although Appellants have raised these contentions numerous times in various administrative and judicial proceedings, both the State Engineer and the courts have rejected them as unfounded.[68] While Sadler Ranch and the Baileys did, in fact, need to drill wells that intercepted their spring complexes, this was done only *after* the springs ran dry and was a mitigation measure to *replace* the lost flows.

Also, Appellants are wrong that "Sadler and Renner's groundwater permits are junior not senior."[69] Sadler's mitigation groundwater permit is senior to all other permits in the basin and is considered "in-priority" based on the priority dates of the associated pre-statutory rights.[70] In addition, the district court correctly held that the

[68] State Engineer Ruling 6290 at 26 ("There is a distinct declining trend from 1965 to 2012, and the State Engineer finds that this decrease in discharge is caused by the decline in the groundwater table due to agricultural pumping . . . in the southern portion of the valley.")
[69] DNRCPA Motion at 22.
[70] *See* State Engineer Permit 81720 ("Permit 81720 may be exercised in conformity with the priority dates of Claim of Vested Right V03289.").

continued over pumping authorized by Order 1302 will have "an adverse impact on senior certificated rights, as well as, their vested rights."[71]

Because Respondents will suffer an irreparable injury from mandatory enforcement of the DVGMP during the 2020 irrigation season and beyond, the requested stay should be denied.

IV. Appellant's Will Not Be Harmed If A Stay Is Denied.

The district court correctly found that appellants have not proved irreparable or serious harm.[72] Parties seeking a stay must show that they will suffer "irreparable or serious injury" without the stay.[73] An irreparable injury is one that is "incapable of being rectified, restored, remedied, cured, regained, or repaired."[74] The party seeking the stay bears the burden of providing evidence showing a "reasonable probability that *real* injury will occur if the injunction does not issue."[75] In other words, "the injury must be both certain and great; it must be actual and not theoretical."[76] "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."[77]

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[71] Order Denying Motion for Stay at 5:1-4.
[72] Order Denying Motion for Stay at 4:20-24.
[73] *Hansen v. Dist. Ct.*, 116 Nev. 650, 658, 6 P.3d 982, 987-88 (2000).
[74] BLACK'S LAW DICTIONARY 958 (10th Ed, 2014) (definition of "irreparable").
[75] *Berryman v. Int'l Bhd. Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966) (emphasis added).
[76] *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C.Cir. 1985).
[77] *Id*.

Non-enforcement of the DVGMP during the course of this appeal will not damage the liberty or property interests of any party in Diamond Valley. Every water user in the basin will continue to be authorized to pump water in accordance with the provisions of the water law and the terms of their respective water rights permits. The only harm present here is the harm Appellants will be prevented from inflicting on senior users if the stay is denied.

Appellants also allege that "rejection of the GMP creates great uncertainty for Diamond Valley groundwater users."[78] However, there is no uncertainty regarding which rules will govern the use of water in the basin absent a stay. Nevada has a long-standing and well-developed water law. That law remains in effect and, together with the terms of individual water permits, governs the use of water in the basin. In fact, denial of the stay will actually serve to decrease uncertainty by removing a set of complex and poorly drafted rules that directly conflict with and contradict Nevada's other water law statutes.

Moreover, to the extent Appellants may experience anxiety or uncertainty, it was not caused by the district court's decision. Rather, the State Engineer, himself, created this uncertainty when he helped draft and approve a plan that he knew was illegal and would invite a challenge. Appellants have been warned throughout this process that the DVGMP directly violates long-established prior appropriation

[78] DNRCPA Motion at 2.

doctrine. Appellants expressly asked the Legislature to change the law to make the plan legal, but the Legislature declined to act.[79] Undeterred, they moved forward with their illegal plan anyway. Therefore, any uncertainty that exists is Appellants' own fault.

The record also undercuts Appellants' assertion that "[t]he district court's reasoning would prohibit the approval of *any* groundwater management plan that does not involve total curtailment of 60% of the water rights in Diamond Valley."[80] As shown above, numerous options were presented that could be employed in the development of a plan that would both reduce water consumption and be consistent with prior appropriation doctrine. Appellants willingly and knowingly chose to ignore these options and instead support an illegal redistributionist plan.

Finally, Appellants' argument that the stay is needed to further asses the effectiveness of the DVGMP misunderstands and misrepresents the true issues in this appeal.[81] Whether the plan is effective is not at issue and has nothing to do with whether it is legal. Governments have always tried to muster evidence and arguments supporting a claim that their violations of individual rights are an efficient and effective means to achieve some noble end. But the law does not prioritize ends

[79] *See* Exhibit 7.
[80] DNRCPA Motion at 3 (emphasis in original).
[81] DNRCPA Motion at 10.

over means. Even if the DVGMP would be an effective way to reduce pumping, it must still comply with this State's long-standing and well-established water laws.

Because Appellants have failed to demonstrate they will personally suffer an actual, not theoretical, injury the request for the stay should be denied.

V. Appellants Have Unclean Hands Precluding Equitable Relief.

"The unclean hands doctrine generally 'bars a party from receiving equitable relief because of that party's own inequitable conduct.'"[82] Unclean hands exist when a party acts in an unjust manner or when their actions lack good faith.[83]

In the proceeding below, the district court lamented that "[i]t is unfortunate that the State Engineer and/or Nevada Legislature did not vigorously intervene 40 years ago when effects of over appropriation were first readily apparent."[84] However, as the history of Diamond Valley shows, this inaction was aided and abetted by the junior water users, who actively opposed any and all attempts to fix the problem and/or provide mitigation to affected seniors.

In the instant case the district court has found Appellants' actions to be "unreasonable."[85] The district court also found that Appellants willfully and consciously drafted and approved a plan that they knew violated prior appropriation

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[82] *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008).
[83] *Id*. (citing *Income Investors v. Shelton*, 3 Wash.2d 599, 101 P.2d 973, 974 (1940)).
[84] Order Granting Petition for Judicial Review at 39:7-12.
[85] Order Granting Petition for Judicial Review at 28:15.

doctrine and continued the more than 40-year impairment of senior water rights.[86] In other Diamond Valley litigation the district court has found that the State Engineer, at the express urging of Eureka County and the junior users, acted "unconscionably" towards Respondents.[87]

For 40-years Appellants have over-pumped the basin knowing that in doing so they were impacting spring flows and thereby taking water that rightfully belonged to others. They aggressively obstructed all attempts to correct the problem. When they finally had to develop a GMP, they knowingly implemented an illegal plan over the objections of, and without concern for, senior water right holders. The plan proposes to continue over-pumping the basin for another 35-years and, even then, does not achieve sustainability. As the district court found, "[t]he DVGMP on its face fails to reduce the harm caused by overpumping and aggravates the depleted water basin."[88]

Because Appellants come to this Court with unclean hands, the requested stay should be denied.

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[86] Order Granting Petition for Judicial Review at 27:2-6 (finding State Engineer Order 1302 approving the GMP "arbitrary and capricious").
[87] Findings of Fact, Conclusions of Law, and Order Partially Granting Petition for Judicial Review at 17:17-19, *Sadler Ranch, LLC v. King*, Seventh Judicial District Court Case No CV-1409-204 (2016).
[88] Order Granting Petition for Judicial Review at 24:2-3.

CONCLUSION

Appellants have failed to "show that the balance of equities weighs heavily in favor of granting the stay. Careful consideration of the NRAP 8(c) factors also indicates that (1) appellants are unlikely to succeed on the merits, (2) the purpose of the appeal will not be frustrated, (3) Respondent's will be irreparably harmed by a stay, and (4) no harm will come to Appellants if the stay is denied. Accordingly, Respondents respectfully request that the Motion for Stay be denied.

AFFIRMATION

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

Respectfully submitted this 18th day of June, 2020.

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

By: */s/ David H. Rigdon*
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I 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 Respondent's Answering Brief by U.S. Mail to:

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 counsel in this case are registered E-Flex users and were served electronically through the E-Flex Court system.

DATED this 18th day of June, 2020.

/s/ TJ Carpitcher
Employee of TAGGART & TAGGART, LTD.

TABLE OF EXHIBITS