IN THE SUPREME COURT OF THE STATE OF NEVADA

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION, et al.,

Appellants,

vs.

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

Respondents.

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Case No. 81224

BAILEY RESPONDENTS' MOTION TO EXCEED PAGE LIMIT FOR OPPOSITION TO DNRPCA APPELLANTS' MOTION FOR STAY PENDING APPEAL

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Attorneys for Bailey Respondents

Respondents Timothy Lee Bailey & Constance Marie Bailey and Fred Bailey & Carolyn Bailey (collectively, the "Baileys"), by and through their undersigned counsel of record, hereby move to exceed the page limit imposed by NRAP 27(d)(2) for their Opposition to the Emergency Motion Under NRAP 27(e) for Stay Pending Appeal, filed by Appellants Diamond Natural Resources Protection and Conservation Association, et al., on July 6, 2020. This motion is supported by the following points and authorities and the Declaration of Christopher Mixson that follows. A copy of the Opposition (without exhibits) is attached hereto as Exhibit 1.

MEMORANDUM OF POINTS AND AUTHORITIES

NRAP 27(d)(2) states, "a response to a motion shall not exceed 10 pages, unless the court permits or directs otherwise." NRAP 32(a)(7)(D) authorizes the filing of a motion to file a brief that exceeds the applicable page limit on a showing of diligence and good cause, so this Motion adopts that standard.

The Baileys respectfully request leave to exceed the page limit pursuant to NRAP 27(d)(2) because the DNRPCA Appellants were granted leave to exceed the same applicable page limits for their 28-page Motion to Stay, and undersigned counsel for the Baileys worked diligently to present the Opposition in as concise a manner as possible under the circumstances. The Opposition is also 27 pages, and

required a detailed description of the Diamond Valley Groundwater Management Plan, which was invalidated and overturned by the district court's 40-page order.

The Baileys respectfully submit that good cause exists to exceed the 10-page limit for their Opposition, and request leave to do so.

Respectfully submitted July 13, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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DECLARATION OF CHRISTOPHER MIXSON IN SUPPORT OF BAILEY RESPONDENTS' MOTION TO EXCEED PAGE LIMITS

I, Christopher Mixson, Esq., do hereby swear under penalty of perjury that the foregoing is true and correct.

1. I am over the age of 18 years. I have personal knowledge of the facts and other matters stated within this Declaration. If called as a witness, I would be competent to testify as to the facts and other matters set forth herein.

2. I am a partner at the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, counsel of record for the Bailey Respondents in this matter.

3. This Declaration is offered in support of the Bailey Respondents' Opposition to the DNRPCA Appellants' Emergency Motion Under NRAP 27(e) for Stay Pending Appeal, filed herein on July 6, 2020.

4. The Bailey Respondents respectfully request leave to exceed the applicable 10-page limit of their Opposition pursuant to NRAP 27(d)(2) because the DNRPCA Appellants were granted leave to exceed the same applicable page limits for their 28-page Motion to Stay, and I worked diligently to present the Opposition in as concise a manner as possible under the circumstances. The Bailey Respondents' Opposition is also 27 pages, and required a detailed description of the Diamond Valley Groundwater Management Plan, which was invalidated and overturned by the district court's 40-page order.

5. I believe I have demonstrated diligence, and good cause exists to grant the Bailey Respondents' Motion to Exceed Page Limits.

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

Dated: July 13, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on July 13, 2020, a true and correct copy of the foregoing **BAILEY RESPONDENTS' MOTION TO EXCEED PAGE LIMIT FOR OPPOSITION TO DNRPCA APPELLANTS' MOTION FOR STAY PENDING APPEAL** and **DECLARATION OF CHRISTOPHER MIXSON IN SUPPORT OF BAILEY RESPONDENTS' MOTION TO EXCEED PAGE LIMITS** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system.

I FURTHER CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, to the following:

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Dated: July 13, 2020

By: /s/ *Christie Rehfeld*
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION, et al., Appellants, vs. TIMOTHY LEE BAILEY; CONSTANCE MARIE BAILEY; FRED BAILEY; CAROLYN BAILEY; SADLER RANCH, LLC; IRA R. RENNER AND MONTIRA RENNER, Respondents.	**Case No. 81224**

BAILEY RESPONDENTS' OPPOSITION TO DNRPCA APPELLANTS' EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY PENDING APPEAL

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Respondents TIMOTHY LEE BAILEY & CONSTANCE MARIE BAILEY and FRED BAILEY & CAROLYN BAILEY (collectively, the "Baileys"), by and through their undersigned counsel of record, hereby file this Opposition to the Emergency Motion of Appellants 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; and Darla Bauman (collectively "DNRPCA") Under NRAP 27(e) for Stay Pending Appeal, and any joinders thereto.

NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Nevada Rules of Appellate Procedure, the undersigned counsel of record certifies that the Respondents Timothy Lee & Constance Marie Bailey and Fred & Carolyn Bailey are natural persons and thus none of them have a parent corporation and no publicly held corporation owns 10% or more of the stock of them. The Baileys were represented by Don Springmeyer and Christopher Mixson in the district court and are represented by them in this appeal. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respectfully submitted July 13, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

/s/ *Chris Mixson*
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I. INTRODUCTION

DNRPCA's Motion for Stay is based entirely on irreparable harms and/or serious injuries they allege will befall them *in the future at the conclusion of this appeal* if they lose, and not on immediate and irreparable harms that would result in the absence of a stay during the pendency of the appeal. In other words, even if the Court were to grant a stay pending appeal so that the Diamond Valley Groundwater Management Plan ("GMP") is reinstated during the pendency of the appeal, DNRPCA's alleged harms would still only come to pass, if at all, if they did not prevail *at the conclusion of the appeal*. *See e.g.* Motion at 9 ("the State Engineer has no obligation to order curtailment by priority until 2025."); *id*. at 2 ("There is also great uncertainty as to whether stakeholders must engage in yet another *multi-year process to develop a new groundwater management plan* when they believe the existing one complies with the law.") (emphasis added).

There is no need to grant a stay pending appeal because the district court's invalidation of the GMP has already reinstated the status quo: implementation of the GMP for a single irrigation season prior to its invalidation was the disruption of the status quo. Now that it is not in effect, Nevada water law that has applied to groundwater use in Diamond Valley for 150 years once again applies, instead of the patently illegal free-market scheme created by the GMP that was implemented in 2019.

As a threshold matter, the only ground argued by DNRPCA that any actual emergency exists requiring expedited consideration by the Court is based on their erroneous interpretation of NRCP 62(a)'s automatic 30-day stay of execution of final judgments. Here, there was no final judgment; there is a an order reversing the decision of an administrative agency. There is no judgment to execute. The district court's order simply invalidated the illegal GMP.[1]

Finally, DNRPCA fails to satisfy any of the factors under NRAP 8(c) necessary for the issuance of a stay pending appeal. The object of the appeal—reinstatement of the GMP and its 35-year groundwater "stabilization" process—will not be defeated absent a stay. It is the Baileys, not DNRPCA, who are sure to suffer irreparable harm to their property during the pendency of the appeal if a stay is granted.[2] As evidenced by the thorough and lengthy final decision of the district

[1] Furthermore, even if NRCP 62(a) applies, DNRPCA has not established that the 30-day period has not already run—notice of entry of the district court's final order overturning the GMP was served on April 28, 2020, so the 30-day period would have run on approximately May 28, 2020. The DNRPCA Appellants make the summary statement that the 30-day period automatic stay was "equitably tolled" between the time of the district court's May 19, 2020, temporary stay and its June 30, 2020, order denying a stay pending appeal, but they provide no authority in support.

[2] As the district court found in denying a stay pending appeal, crafting a stay that excludes the Baileys from the GMP's illegal pumping reductions would not fully ameliorate the irreparable harm to their property from numerous other illegal aspects of the GMP.

court, which was reiterated in its order denying a stay pending appeal, the DNRPCA Appellants are not likely to prevail on the merits of their appeal.

II. BACKGROUND

Brothers Elwood and Robert Bailey homesteaded in the west side of Diamond Valley, in southern Eureka County, Nevada, starting in the early 1860s. Today, the Baileys own six senior irrigation groundwater rights for their farming operations, which would be subject to the GMP's annual reductions. In addition, the Baileys hold several other vested and/or permitted water rights for their ranching operations, stockwatering, and other uses.

The State Engineer has estimated that the perennial yield from the Diamond Valley groundwater aquifer (i.e., the amount of groundwater available to be safely pumped each year as estimated by natural replenishment from precipitation) is 30,000 acre-feet ("af") per year. April 23, 2020, Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review ("Final Order") at 4 (attached hereto as Exhibit 1). However, the State of Nevada, through the State Engineer, has approved water rights permits to pump approximately 126,000 af per year for irrigation. *Id*. This amount does not include other groundwater rights such as domestic use, mining, stockwater, etc. *Id*. When all groundwater uses are considered, the annual demand on the aquifer climbs to approximately 130,625

af—more than four times the estimated annual perennial yield. Final Order at 4.[3] In addition to the total duty of 130,625 af annual demand from irrigation groundwater rights in Diamond Valley, there are also numerous water rights that historically depended on springs that naturally flowed in the Northern Diamond Valley area, which supported vested surface water rights, and which have dried up because of over-pumping of the groundwater aquifer. *Id*. at 5. Unfortunately, the Bailey Ranch Spring has also ceased to flow altogether. Due to the State's historic mismanagement of the groundwater basin, which resulted in extreme over-pumping of the aquifer for at least 40 years, the groundwater level has declined and continues to decline approximately two feet each year since 1960. *Id*. at 4.

In 2011, the Nevada legislature passed what became codified as NRS 534.110(7) and NRS 534.037. Combined, these statutes created a process whereby, after designating a groundwater basin as a Critical Management Area ("CMA") under NRS 534.110(7), the local stakeholders would have 10 years to obtain the State Engineer's approval of a groundwater management plan under NRS 534.037. If they fail, the State Engineer "shall order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights…." NRS 534.110(7).

[3] Although the total demand, on paper, for groundwater pumping from the aquifer is approximately 130,000 acre-feet, the actual groundwater use in 2016 was estimated to be approximately 76,000 acre-feet.

The Diamond Valley GMP was the result of this statutory mechanism. But instead of the local groundwater users putting their collective heads together to plot their own future, the GMP was crafted by DNRPCA and Eureka County to implement a free-market scheme developed by Australian Professor Michael Young, *Unbundling Water Rights: A Blueprint for Development of Robust Water Allocation Systems in the Western United States* (2015)[4]. *See e.g.* Final Order at 6; Young Paper at 1. Based on Young's ideas, the GMP was developed as "a water market-based system meant to provide ultimate flexibility in using water, while incentivizing conservation and allowing willing participants' quick sale, lease, trade, etc. of water in times when needed." GMP at 10. The GMP accomplishes this by converting each state-issued groundwater irrigation permit from the existing water right with a fixed annual pumping volume and priority date into a fixed number of "shares," and each year shares are assigned an "allocation" of total annual pumping. GMP at 15; Final Order at 7–8. However, the conversion of water rights into shares is not one-for-one, where each acre-foot of water under a permit is converted to one share. Final Order at 8. The GMP further reduces both senior and junior water rights by only allocating 66% of each water rights' permitted volume in Year 1 (i.e. a 34% reduction); and down to only 33% (i.e. a

[4] Final Order at 6; available at https://nicholasinstitute.duke.edu/sites/default/files/publications/ni_r_15-01.pdf (accessed July 13, 2020) ("Young Paper").

67% reduction) by Year 35. These drastic reductions apply to all irrigation groundwater rights, including senior water rights. *See generally* Final Order at 8–9. Had the GMP not allowed 50,000 acre-feet of unperfected "paper" water rights to receive shares, the 34% reduction in Year 1 would not have been necessary to keep pumping of certificated water rights at the 76,000 acre-foot benchmark, and the annual reduction for the subsequent 35 years would not have been as drastic either.

After the conversion of water rights to shares and reduction of senior water rights in favor of junior water rights, the use of groundwater in Diamond Valley under the GMP is no longer subject to Nevada's bedrock prior appropriation law. Final Order at 25–27. In the order approving the GMP, the Nevada State Engineer recognized this legal violation, but argued that the Nevada Legislature must have impliedly allowed it to happen when it passed NRS 534.037 and 534.110(7). *See e.g.* Final Order at 27–28. DNRPCA and the other Appellants made the same arguments in favor of the GMP's violations of Nevada law. The district court correctly rejected these arguments. *Id*. at 29–36.

According to the district court: "The DVGMP reduces the amount of water it allocates to senior rights' holders in the formula for shares *effectively ignoring 150 years of the principle of 'first in time, first in right'*…." Final Order at 26:16–18. Therefore, the district court ruled "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." Final Order at 27:2–4.

In addition to violating prior appropriation doctrine by reducing the amount of water for senior water rights, the GMP's scheme violates the beneficial use requirement because it allows "banking" of water allocations, which can be used in future years by either the owner or by unfettered transfer to another, and is yet another drastic departure from Nevada water law. Final Order at 21–23. This is the market-based approach, which is a completely new and untested scheme for managing the public's water resources in Nevada. The district court correctly determined that this novel trading scheme for water rights violates several provisions of Nevada water law. By allowing "banking" of unused water, the GMP automatically perfects previously unperfected "paper" water rights in violation of Nevada requirement that water rights must be actually put to use. Final Order at 21:14–15 ("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."); *id*. at 21–22 ("Under the DVGMP those permit holders who have never proved up their water by placing it to beneficial use could potentially receive more water than those holders who have placed their water to beneficial use.").

The district court also correctly found that the GMP's unfettered trading of banked water shares and allocations violates NRS 533.325 and 533.245, which require that anyone wishing to change the point of diversion, place of use or manner of use of their water right must apply to the Nevada State Engineer for a permit to do so. Final Order at 36–37. As the district court explained, under the GMP's novel water banking and trading scheme, "[t]he 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*." Final Order at 38:1–3 (emphasis added).

Finally, the district court agreed with the Baileys' argument that the GMP does nothing to address the adverse impact of the over-pumping of the Diamond Valley groundwater aquifer on their groundwater-dependent vested surface water rights. As found by the district court, the GMP actually exacerbates the adverse impacts to vested surface water rights in violation of law by extending the time of the adverse impacts. Order Denying Stay at 3–4.

Despite these very clear deviations and violations of Nevada law, DNRPCA requested that the district court stay its Final Order and reinstate the patently illegal GMP pending the outcome of this appeal. However, because DNRPCA failed to satisfy the NRAP 8(c) factors required for granting a stay, the district court denied

their motion, resulting in the instant Emergency Motion. June 20, 2020, Order Denying Stay (attached hereto as Exhibit 2).

III. LEGAL ARGUMENT

The district court's invalidation of the State Engineer's approval of the GMP returned Diamond Valley to the status quo after only one irrigation season of GMP implementation, so there is no emergency requiring immediate reinstatement of the GMP. The groundwater aquifer has been over-pumped for over 40 years, and as the district court found, the GMP could actually *exacerbate* the over-pumping because of its illegal water banking and trading scheme. DNRPCA fails to explain why the return of the decades-long status quo for a couple more years during the pendency of the appeal will cause them irreparable or serious harm during that time. The harms they allege are not irreparable and the majority of them will not even occur during the pendency of the appeal, whether or not the GMP is reinstated during that time.

Further, the DNRPCA's alleged harms are entirely of their own making, as further explained below, and do not warrant the relief requested. In fact, as the district court found, reinstating the GMP would irreparably harm the Baileys. Finally, the Movants are unlikely to prevail on the merits of their appeal of the Final Order. Therefore, the Court should deny their Motion to Stay Pending Appeal.

A. Standard For A Stay Pending Appeal.

For issuance of a stay pending appeal pursuant to NRAP 8(c), the Court will generally consider the following factors: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether appellant will suffer irreparable or serious injury if the stay is denied; (3) whether respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits of the appeal. NRAP 8(c). Further, appellate courts will consider, as one factor, "where the public interest lies," when deciding to issue a stay pending appeal. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724, (1987). Finally, the movant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982 (2000).

B. The Object Of The Appeal Will Not Be Defeated If The Stay Is Denied

In the Motion, DNRPCA never succinctly defines the object of its appeal. Instead, there is 28 pages describing an apocalypse that awaits Diamond Valley should the Court deny a stay pending appeal. The Motion includes a section, at p.8–11, nominally centered around this required factor. But, again, there is no specific description of the actual object of DNRPCA's appeal, so it is difficult to

analyze whether that unstated object may be defeated during the pendency of the appeal absent a stay.

In its order denying a stay, the district court correctly identified the object of DNRPCA's appeal as attempting "to overturn [the district court's] order granting petitions for judicial review which reversed State Engineer's order 1302 approving the DVGMP." Order Denying Stay at 3:13–15. Therefore, the district court correctly denied the motion to stay because "if [DNRPCA and others] prevail on appeal, the DVGMP can be reinstated at that time," so that the object of the appeal would not be defeated during the pendency of the appeal. *Id*. at 15. That is the correct analysis.[5]

DNRPCA's Motion sets forth multiple, vague purported objects of its appeal, such as preventing immediate curtailment through "stabilization" of the groundwater aquifer, preserving the economic health of Eureka County, saving the "tax base," etc. It is not clear from the Motion how these vague concepts will be defeated during the pendency of the appeal unless the GMP is immediately reinstated. These lofty goals are shared by all parties, but there is no immediate

[5] DNRPCA alleges that the district court failed to consider DNRPCA's argument, in reliance on *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004), that for various reasons the first NRAP 8(c) factor should take on added significance. Motion at 7. However, because the district court correctly determined that DNRPCA failed to show that the object of its appeal would be defeated absent a stay, *Mikohn Gaming* is inapposite.

threat that they could be forever defeated unless the GMP can be implemented during the pendency of the appeal. With respect to the economic arguments, it is the status quo without the GMP that will best preserve the historic economic activity in Diamond Valley by allowing farmers to pump groundwater according to their permitted amounts instead of the arbitrary and illegal reductions required by the GMP. And any alleged "stabilization" of the groundwater aquifer that may be halted during the pendency of the appeal would be re-initiated at the conclusion of the appeal if DNRPCA prevails and the GMP is reinstated.

DNRPCA makes sweeping claims, relying on extra-record declarations of purported expert witnesses who have not been subject to cross-examination and were not designated as experts by either the State Engineer or the district court, that the GMP was responsible for estimated reductions in groundwater pumping going back several years *before* the GMP was even in effect, and therefore argues that these alleged positive effects will be lost forever if the GMP is not immediately reinstated. The district court correctly rejected these purported expert opinions for the obvious reason that "[i]t is *premature to confirm that the DVGMP is actually resulting in less impact* on the Diamond Valley aquifer based only on the 2019 growing season." Order Denying Stay at 3:18–20.

It defies reality to claim that the initial implementation of the GMP during the 2019 irrigation season—when there were no penalties for non-compliance—

could have the retroactive effect of reducing pumping in 2016, 2017 and 2018, before the GMP was in effect. Any observed stabilization in the aquifer water level after 2019 more likely reflects the hydrologic reality that Mother Nature provided substantial precipitation in 2019. It is the natural precipitation, not the GMP, that should be credited with the reduced demand on the aquifer in 2019. In years when Mother Nature provides water from the sky, farmers pump less from the ground. These high precipitation years recharge the aquifer, and combined with the reduced demand for irrigation pumping, contribute to the stabilization of aquifer water levels.

Further, DNRPCA wrongly assumes that failure to reinstate the GMP will result in more pumping. Under the drought conditions of 2016—when demand for groundwater was at its peak, pumping for irrigation was approximately 76,000 acre-feet, which served as the baseline pumping for the GMP. Under the GMP, the combination of the water "banked" during the 2019 season and the 2020 share allocations would allow as much as 99,316 acre-feet to be pumped—for any purpose, from any place and at any time in the future—23,000 acre-feet more than in the drought year GMP baseline of 76,000 acre-feet. In other words, it is the GMP, not the status quo, that threatens to allow increased pumping. *See e.g.* District Court Order Denying Stay at 3–4 ("Currently 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 pumping in Diamond Valley that was used for the DVGMP. Evidence exists that *the DVGMP is actually increasing the volume of water removed from the aquifer rather than reducing at this time*.") (emphasis added).

DNRPCA's Motion makes wide-ranging claims about the devastation of the entire way of life in Diamond Valley should the Court not reinstate the GMP while the appeal is pending. In this regard, the Motion lacks perspective: the Diamond Valley aquifer, as the district court found, has experienced extreme over-pumping for at least four decades. That over-pumping is the result of the State Engineer's original sin of granting too many groundwater permits and the failure to properly manage the basin under its existing authorities for decades. Now, DNRPCA asks the Court to believe that maintaining this multi-decade status quo for the relatively short time it will take for this appeal to run its course will somehow devastate the Diamond Valley economy and way of life. That argument is a red herring—it relies entirely on DNRPCA's fundamentally flawed assumption that if the GMP is not reinstated, then immediate curtailment by priority will ensue. First, DNRPCA admits that there is no *immediate* threat of curtailment during the pendency of the appeal. Motion at 9 ("[T]he State Engineer has no obligation to order curtailment by priority until 2025."). It is simply not the case that, unless the GMP is

reinstated pending appeal, there will be immediate curtailment of junior groundwater rights.

Second, DNRPCA's claims about immediate destruction and chaos in Diamond Valley ignores the perspective of the long horizon of the GMP itself. Under the GMP, annual allocations are not reduced all the way down to the final amount of 34,000 acre-feet, which the GMP proponents allege is required for the groundwater basin to stabilize, for over three more decades. And even then, as described above, that is only a reduction of *new* allocations, but it does not account for the pumping of *banked* water that would also be taking place each and every year over and above the new allocations. The GMP, therefore, does not automatically reduce pumping such that failure to reinstate it during appeal risks any immediate damage to the aquifer. The only immediate damage would be experienced by senior water rights holders should the GMP be reinstated.

The object of DNRPCA's appeal is to overturn the district court's Order so that the GMP can go into effect to gradually and incrementally reduce demand on the groundwater aquifer over three decades or more by immediately and permanently redistributing water from senior water rights holders and providing it to junior water rights holders. The absence of the GMP's illegal reduction of senior water rights and illegal water marketing scheme during the appeal will not defeat the long-term purpose of the GMP should DNRPCA prevail. The GMP can

simply be reinstated at that time. Additionally, DNRPCA's Motion fails entirely to address the much more likely scenario that this Court upholds the district court's final order: unlike the present situation where there has been only one trial year of the GMP, there would have been multiple years of banking and trading—resulting in multiple years of violation of fundamental water laws—that would have to be somehow unraveled; and then of course a new GMP would need to be developed and approved to avoid statutory curtailment under NRS 534.110(7). Instead, if the Court denies the Motion, the pre-GMP status quo of the last four decades would not result in any complicated water marketing transactions during the pendency of DNRPCA's appeal.

Regardless of whether a stay is granted pending appeal, when this Court ultimately affirms the district court's Final Order, a new GMP will have to be developed in order to avoid mandatory curtailment under NRS 534.110(7). If the object of DNRPCA's appeal is to avoid mandatory curtailment, a stay pending appeal does nothing to prevent it.

C. DNRPCA Will Not Suffer Serious or Irreparable Injury Should the Stay Pending Appeal Be Denied

The harms alleged to be faced by DNRPCA should the Court not reinstate the GMP are entirely of DRNPCA's own making and do not support the relief requested in the Motion. DNRPCA argues it will suffer irreparable injury should the GMP not be reinstated because of the threat of curtailment by priority, based

upon the purported irretrievable investments that are alleged to have been made in reliance on the GMP, and because of "great uncertainty" regarding what law applies to groundwater use in Diamond Valley. Motion at 11.

It is not at all clear that absent reinstatement of the GMP, immediate curtailment of groundwater use by priority in Diamond Valley will be ordered while the appeal is pending. As DNRPCA admits in its Motion, the State Engineer is not statutorily obligated to implement curtailment until 2025, if there is no GMP. There is still over 50% of the ten-year period under NRS 534.037 for the creation of a GMP that complies with law before the State Engineer is mandated to curtail by priority. There is no indication that the State Engineer would immediately order curtailment while the appeal of this Court's Order is underway, in light of the fact that the over-pumping of Diamond Valley has been occurring for decades without any curtailment by priority. DNRPCA's argument continues with the same logical fallacy that plagued its defense of the GMP before the district court: that the choice is a binary one between either the GMP and its violations of Nevada water law or immediate curtailment by priority. That is simply not the case, as the district court's Final Order determined. Final Order at 33.

DNRPCA also claims it will suffer irreparable harm if the GMP is not reinstated because many farmers in Diamond Valley made investments in their farming operations in reliance on the GMP. Motion at 15. That, however, is

neither irreparable harm nor is it sufficient to reinstate the GMP in light of its obvious legal shortcomings. Any investments or farming decisions solely made in order to increase banking of unused water under the GMP were done at the farmer's own risk. This is particularly true with respect to DNRPCA, who were very much aware of the risk that the GMP would be overturned upon judicial review because they were aware of valid claims about its obvious legal shortcomings. The Baileys' and others' opposition to the GMP was publicly known for many years before their legal challenge was ripe. Irrigators are, of course, always encouraged to upgrade their operations to be more efficient, and this Court's decision on the Motion to Stay would not affect that recommendation. DNRPCA's allegation that the district court created chaos because of the appropriate reversal of the GMP lays the blame upon the wrong feet.

Furthermore, none of the investments that may have been made in reliance on the GMP were in fact required to have been made. Except for the requirement to install a new meter (which also includes a process for securing a variance to exempt a farmer from that requirement), none of the investments described in the Motion were actually required by the GMP.

DNRPCA asserts that the Final Order has resulted in "considerable uncertainty" among Diamond Valley irrigators as to management of the basin and the rules that govern their water use. Motion at 18. There is no such uncertainty:

the GMP is not in effect because the district court reversed the State Engineer's approval of it. The basin is subject to the relevant provisions of Nevada statutes governing groundwater withdrawals, primarily Chapters 533 and 534. If DNRPCA has legal questions about the management of the Diamond Valley basin, those questions are more appropriately directed to their legal counsel and/or the State Engineer. To the extent any uncertainty exists, reinstatement of the patently illegal GMP is not the solution; instead, DNRPCA should simply ask the State Engineer to answer any questions it may have regarding applicable law.[6]

D. The Baileys Will Suffer Irreparable Injury To Their Property If The Groundwater Management Plan Is Reinstated

Due to the GMP's reduction in water rights to "shares," which are further reduced via annual reductions to "allocations" of water per share, the Baileys will suffer serious and irreparable injury to their senior water rights if the GMP is reinstated. As the district court found, the GMP results in the deprivation of property rights of senior water rights holders, and results in other harms to water rights and resources because of its myriad violations of Nevada law. *See e.g.* Final

[6] DNRPCA argues that it will suffer irreparable injury if the GMP is not reinstated because it may call into question whether State Engineer Order Nos. 1305 and 1305a are still in effect. Motion at 18. Again, that is a question for the State Engineer, not this Court; and it is certainly not a justification for reinstating the GMP. Orders 1305 and 1305a were issued by the State Engineer to clarify that unperfected groundwater rights would not be required to request extensions of time to prevent forfeiture in Diamond Valley through July 2024. Reversal of the GMP does not, on its face, alter the State Engineer's decision in Order 1305/1305a to pause forfeiture proceedings for unperfected water permits in Diamond Valley.

Order at 26 ("The loss or reduction of any water associated with the senior right can *significantly harm the holder*.") (emphasis added). DNRPCA is simply wrong to allege in the Motion that the Baileys will suffer no harm should the GMP be reinstated. Water rights are property, and harm to property is generally irreparable per se. *Dermody v. City of Reno*, 113 Nev. 207, 212, 931 P.2d 1354, 1358 (1997) (water rights are real property); *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) ("Real property and its attributes are considered unique and *loss of real property rights generally results in irreparable harm*.") (emphasis added).

The GMP irreparably harms the Baileys because it irreparably harms their senior water rights. As the district court found, the GMP's formula for converting water rights to shares and annual reductions of allocations per share "does not give senior right holders all of the water to which their priority permit/certificate entitles [them.]" Final Order at 8:9–12. As the district court noted, "priority of a water right is the most important feature" and "priority in a water right is property in itself." *Id*. at 25, 26. Therefore, the Court found, "the loss or reduction of any water associated with the senior right can significantly harm the holder." *Id*. at 26 (emphasis added). The GMP's mandatory reduction of the amount of water allocated to senior water rights' holders "effectively ignore[s] 150 years of the principle of 'first in time, first in right'…." *Id.* To reinstate the GMP by granting DNRPCA's Motion would therefore reinstate this irreparable harm to the Baileys'

senior water rights by denying them the use of these valuable property rights in violation of law.

In addition to the irreparable harm to the Baileys' senior groundwater rights, the district court also found that the GMP impairs the Baileys senior vested water rights in violation of NRS 533.085(1). Order at 23–24. As the district court found, the GMP on its face fails to reduce the harm caused by over-pumping of the aquifer, and therefore aggravates the depleted groundwater basin to the detriment of senior vested surface water rights that depend on the groundwater aquifer. *Id*. DNRPCA claims the Baileys' vested rights are not harmed by the GMP because of the existence of the Baileys' Permit No. 63497, which DNRPCA incorrectly claims is a "mitigation" right. Motion at 21. But that water right is not a mitigation permit. It was not issued pursuant to the State Engineer's mitigation order, it does not fully replace the total amount of the Baileys' vested water right, and its priority date is roughly a century junior to the Baileys' vested water right. Therefore, it cannot mitigate the harm to the Baileys that this Court found would result from the GMP.

DNRPCA's offer to exclude the Baileys from the reinstatement of the GMP's illegal mandatory reduction of the Baileys' senior water rights does not address additional irreparable harm threatened by the GMP. In addition to the direct irreparable harm to the Baileys' water rights resulting from the reduction of

their senior rights to smaller shares and allocations, reinstatement of the GMP would also cause irreparable harm to the Baileys by allowing for unfettered trading of water shares, including by permitting traded shares to be pumped from areas that could harm the Baileys. As the district court found, continued pumping in excess of the perennial yield of the basin—the likely result of reinstating the GMP's banking and trading scheme—harms the Baileys' senior vested water rights. Excluding the Baileys from the GMP's immediate reductions to groundwater permits would not address this irreparable harm to the aquifer and to the Baileys' vested rights.

The district court also ruled that the GMP violates the fundamental doctrine of beneficial use. Final Order at 21–23. This violation of the beneficial use requirement also causes irreparable harm to the Baileys. The GMP's banking and trading scheme applies not only to certificated water rights that have been put to actual use, but also to permitted water rights that have not been "proved up" by actual use. The GMP therefore violates the fundamental principle of western water law that beneficial use requires, at the least, *actual use* of water. Final Order at 21 (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793 (2006)). The GMP violates the beneficial use requirement by allowing conversion and banking of shares derived from unperfected water rights by effectively perfected them through non-use. Banking of shares also violates the beneficial use requirement as

to perfected water rights. In both cases, banking of unused water violates the legal requirement that water must be *actually used*. Absent the GMP, water not pumped in one year is not allowed to be saved and pumped in the future. Should the Court grant the Motion and reinstate the GMP, the Baileys would be irreparably harmed because the owners of banked shares—particularly those shares derived from unused paper water rights—would be free to transfer them to others, increasing demand on the aquifer and continuing to harm the Baileys' senior water rights, all in violation of Nevada law. *See e.g.* Order Denying Stay at 3–4 (because of banking and unfettered trading, the GMP "could exceed the 2016 76,000 acre feet base line pumping in Diamond Valley").

Reinstatement of the GMP would also threaten irreparable harm to the Baileys by allowing groundwater pumping to be transferred among wells, including brand new wells, without first requiring the completion of statutory procedures meant to protect water rights holders from potential harm from changes in pumping amounts and locations throughout Diamond Valley. *See* Final Order at 37:7–11 ("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. If a potential negative impact is found, the application could be rejected."). The GMP does away with these statutory review procedures, and the district court therefore correctly found the

GMP violates the law. Order at 39 ("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."). Reinstatement of the GMP's liberal transfer of water rights without the necessary statutory oversight of the State Engineer threatens to irreparably harm the Baileys.

E. DNRPCA Is Not Likely To Prevail On The Merits In The Appeal

The district court's final order found at least 5 major discrete legal violations within the GMP's senior water rights reduction and free-market trading scheme:

1) violation of the statutory beneficial use requirement and harm to senior water rights holders by automatically perfecting otherwise unperfected "paper" water rights (Final Order at p.21–23);

2) violation of the statutory beneficial use requirement by allowing banking of unused water rights (Final Order at p.23);

3) violation of NRS 533.085(1) for allowing impairment of vested water rights (Final Order at p.23–24);

4) violation of prior appropriation doctrine for reductions of senior water rights (Final Order at p.26–27); and

5) violation of NRS 533.325 and 533.345 for allowing unrestricted transfers of water rights (Final Order at p.36–39).

For DNRPCA or any Appellant to prevail on appeal, they must convince this Court that the district court erred *in each and every discrete legal findings*. Not just one of them, all of them have to be reversed by this Court in order to uphold the GMP. The Appellants are, to say the least, at the bottom of a very deep well.

It is even harder for the Appellants to show a likelihood of success on the merits because the district court's legal conclusions are based upon its exhaustive analysis of the GMP, the State Engineer's order approving the GMP, the entire record on appeal and the presentations and arguments of counsel during the 2-day oral argument. The district's court's final order is a 40 page, self-authored dissection of the GMP and analysis of its legal shortcomings. DNRPCA's argument that it is likely to prevail on the merits of its appeal is a three and a half page smattering of conclusory statements about vague legal errors, references to legislative intent, and complaints that the district court did not even give some of their arguments the light of day. Motion at 25–28.

The GMP's fundamental problem is that it is a complete departure from 150 years of Nevada's prior appropriation water law. As the district court recognized, that departure lacks any statutory support. As the Baileys will explain in further detail to this Court in due time, the Appellants admit that the GMP departs from fundamental tenets of Nevada water law, and the only defense they can mount is based upon a tortured interpretation of clear statutory language. But as the district

court correctly determined, "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." Final Order at 33:15–18.

Additionally, the district court's Order also makes crystal clear that the GMP's banking and trading scheme violates the beneficial use requirement and the statutory requirement that the State Engineer must review each and every proposed change in point of diversion, place of use or manner of use of a water right. Any of these legal deficiencies, by itself, is enough to invalidate the GMP.

F. The Public Interest and the Equities Favor the Status Quo and Not the GMP

The public interest weighs heavily in favor of denying the Motion. Because the GMP was found to violate various provisions of law, this Court reversed and overturned Order 1302, terminating the GMP. That determination was made in large part because of the district court's findings that the GMP's conversion of water rights to shares and allocations violates the prior appropriation doctrine and harms senior water rights held by the Baileys. DNRPCA now asks the Court to effectively reinstate a patently illegal water management scheme, but identifies no actual irreparable harm to it while the appeal is pending.

Just like the DNRPCA Appellants claim to have made "farm decisions" based on the GMP's validity, the Baileys have made their own farming decisions

based on the district court's complete invalidation of the GMP. They have spent funds on seed, fertilizer, pesticide, etc. in reliance on their knowledge—and the district court's confirmation—that the GMP cannot operate to force them to reduce pumping groundwater pursuant to their senior groundwater permits.

IV. CONCLUSION

For the foregoing reasons, the Bailey Respondents respectfully request that this Court deny DNRPCA's Motion based on DNRPCA's failure to meet its enormous burden for a stay pending appeal.

Respectfully submitted July 13, 2020.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on July 13, 2020, a true and correct copy of the foregoing **BAILEY RESPONDENTS' OPPOSITION TO DNRPCA APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the E-Flex system.

I FURTHER CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, to the following:

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