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**

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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.

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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.

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' 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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Dated: July 13, 2020

By: /s/ *Christie Rehfeld*
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO,
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EXHIBIT “1”

May 15, 2020 Notice of Entry of Findings of Fact, Conclusions of Law and Order Granting Petitions for Judicial Review (“Final Order”)”

EXHIBIT “1”

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioners,

vs.

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

Respondent.

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

Intervenors.

Case No. CV1902-348

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

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

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

Affirmation Pursuant to NRS 239B.030(4)

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

DATED April 21, 2020.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: _____

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CERTIFICATE OF SERVICE

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

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

Dept No. 2

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

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

* * * * * *

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

Petitioners,

vs.

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

Respondent,

and

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

Intervenors.

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

I

RELEVANT PROCEDURAL HISTORY

On January 11, 2019, Jason King, P.E., Nevada State Engineer[1] ("State Engineer"), entered Order #1302 ("Order 1302"). On February 11, 2019, Timothy Lee Bailey and Constance Marie Bailey, husband and wife, and Fred Bailey and Carolyn Bailey, husband and wife ("Bailey" or "Baileys" or "petitioners" where referenced collectively with the Sadler Ranch and Renner petitioners) filed a notice of appeal and petition for review of Nevada State Engineer Order no. 1302 in case no. CV-1902-350. On February 11, 2019, Sadler Ranch, LLC, a Nevada limited liability company, and Daniel S. Venturacci,[2] an individual ("Sadler Ranch" or "petitioners" when used collectively with the Bailey and Renner petitioners) filed a petition for judicial review in case no. CV-1902-349. On February 11, 2019. Ira R. Renner, an individual, and Montira Renner, an individual, ("Renner" or "Renners" or "petitioners" when used collectively with Sadler Ranch and Bailey petitioners) filed a petition for judicial review in case no. CV-1902-348. On February 25, 2019, the State Engineer filed a notice of appearance in the three cases. On March 27, 2019, petitioners and respondent, Tim Wilson, P.E., acting State Engineer, Division of Water Resources, Department of Conservation and Natural Resources ("State Engineer") filed a stipulation and order to consolidate cases whereby case no. CV-1902-348 (Renner) was consolidated with case no. CV-1902-349 (Sadler Ranch) and with case no. CV-1902-350 (Bailey). On June 7, 2019, the State Engineer filed a summary of record on appeal ("SE ROA"). On September 16, 2019, Sadler Ranch and Renners filed opening brief of petitioners' Sadler Ranch, LLC and Ira R. and Montira Renner ("Sadler Ranch opening brief"). On September 4, 2019, the court entered an order granting motion in limine limiting

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

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

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

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

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[3]On September 6, 2019, the court entered an order granting motion to intervene to Diamond Valley Ranch, LLC, a Nevada limited liability company, American First Federal, Inc., a Nevada Corporation, Berg Properties California, LLC, a Nevada limited liability company, and Blanco Ranch, LLC., a Nevada limited liability company. On July 3, 2019, Beth Mills, trustee of the Marshall Family Trust, filed a motion to intervene. The court never entered an order egranting her motion to intervene. The motion was timely filed without opposition. The court thus grants Beth Mills' motion to intervene. None of these intervenors filed briefs in this case.

the following findings of fact and conclusions of law.

II

FACTUAL HISTORY

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

The unbridled pumping in Diamond Valley has caused the groundwater level to decline approximately 2 feet annually since 1960.[8] The over pumping by junior irrigators has caused senior claimed vested water rights holders' naturally flowing springs to dry up in northern DiamondValley. Big Shipley Springs, to which Sadler Ranch has a claim of

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[4]SEROA 3.

[5]*Id.*

[6]*Id.*

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

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

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

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

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[9]SEROA 328.

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

[11]NRS 534.110(7).

[12]NRS 534.037.

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

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

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

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

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

[16]SEROA 226.

[17]SEROA 226, 277-475.

[18]SEROA 227 N8, 294.

[19]Bailey reply addendum 2, SEROA 294.

[20]Bailey reply addendum 3.

[21]*Id.* at 1.

occurs."[22]

The DVGMP, a hybrid[23] of Professor Young's blueprint, excludes and does not apply to vested water rights, including spring vested rights, that have been mitigated with groundwater rights by the State Engineer, court order, ruling or decree.[24] Also excluded from the DVGMP are domestic wells, stock water, municipal, commercial groundwater rights and mining groundwater rights without an irrigation source permit.[25] The DVGMP applies to permit or certificated underground irrigation permits and underground irrigation rights that have an agricultural base right in Diamond Valley.[26]

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

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[22] *Id.*

[23] SEROA 313.

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

[25] SEROA 240-241.

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

[27] SEROA 5, 218, 232.

[28] SEROA 232.

[29] SEROA 218, 234-235.

share.[30] Using a "priority factor" applied to each acre foot of a water right in a permit or certificate, the most senior water right receives a priority factor of 1.0 and the most junior right receives a priority factor of 0.80.This formula results in a reduction in the ultimate shares allocated based on an arbitrary range of a 1% reduction for the most senior water right to a 20% reduction for the most junior water right.[31] With the "priority factor" always being less than 1, the share conversion always results in less than 1 share for each former acre foot of water as illustrated in Appendix F to the DVGMP.[32] The priority factor causes junior water rights to be converted to fewer shares per acre-foot than senior water rights' holders. Significantly, the formula of taking priority as a basis to reduce the shares awarded to senior rights' holders by using a designated percentage less than the shares granted to the junior rights' holders does not give the senior rights' holders all of the water to which their priority permit/certificate entitles the holders to use for irrigation purposes. The result of the DVGMP formula is that senior water rights' holders receive fewer shares than one per acre foot. Thus, senior water rights' holders cannot beneficially use all of the water which their permit/certificate entitles them to use. The DVGMP reduces the senior water rights by annually reducing their allocation of water for each share.[33] Ultimately, for the most senior user, the acre-feet per share allocations are reduced from 67 acre-feet per share in year 1 to 30 acre feet per share in year 35 of the DVGMP[34] and for the most junior user, allocations are reduced from 54 acre feet in year 1 to 24 acre feet in year 35 of the

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[30]SEROA 232.

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

[32]SEROA 499-509.

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

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

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

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

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

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

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

[37] *Id.*

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

[39] *Id.*

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

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

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

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

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

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

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

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

[45]NRS 534.020.

[46]SEROA 6.

case agree that the DVGMP deviates from the prior appropriation doctrine.[47]

III

DISCUSSION

STANDARD OF REVIEW

A party aggrieved by any order or decision of the State Engineer may have the order or decision reviewed in a proceeding for that purpose in the nature of an appeal.[48] The proceedings must be informal and summary.[49] On appeal, the State Engineer's decision or ruling is prima facie correct, and the burden of proof is upon the person challenging the decision.[50] The court will not pass upon the credibility of witnesses or reweigh the evidence, nor substitute its judgment for that of the State Engineer.[51] With respect to questions of fact, the reviewing court must limit its determination to whether substantial evidence in the record supports the State Engineer's decision.[52] When reviewing the State Engineer's findings, factual determinations will not be disturbed on appeal if supported by substantial evidence.[53] Substantial evidence has been defined as "that which a reasonable mind might accept as adequate to support a conclusion."[54] With

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[47] State Engineer's answering brief 26, DNRPCA intervenors' answering brief 11-13, Eureka County's answering brief 5, 11.

[48] NRS 533.450(1).

[49] NRS 533.450(2).

[50] NRS 533.450(10).

[51] *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1974) (citing *N. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 279, 429 P.2d 66 (1967)).

[52] *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1997) (citing *Revert* at 786).

[53] *State Engineer v. Morris*, 107 Nev. 694, 701, 819 P.2d 203, 205 (1991).

[54] *Bacher v. State Engineer*, 122, Nev. 1110, 1121, 146 P.3d 793, 800 (2006). (internal citations omitted).

regard to purely legal questions, the standard of review is de novo.[55] Findings of an administrative agency will not be set aside unless they are arbitrary and capricious.[56] The court must review the evidence in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion.[57] A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by rules or procedure."[58] A decision is capricious if it is "contrary to the evidence or established rules of law."[59]

"The State Engineer's ruling on questions of law is persuasive, but not entitled to deference."[60] The presumption of correctness accorded to a State Engineer's decision "does not extend to 'purely legal questions, such as 'the construction of a statute, as to which the reviewing court may undertake independent review.'"[61]

A. THE STATE ENGINEER'S PUBLIC HEARING AFFORDED PETITIONERS DUE PROCESS

On October 30, 2018, the State Engineer, after giving notice required by statute,[62] held a public hearing in Eureka, Nevada. The public hearing was followed by a written public comment period ending November 2, 2018. On June 11, 2019, the State Engineer filed a motion in limine which was briefed by all parties. Sadler Ranch, the Renners, and

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[55] *In re Nevada State Engineer Ruling No.* 5823, 128 Nev. 232, 238, 277 P.3d 449 (2012.)

[56] *Pyramid Lake Paiute Tribe v. Washoe County,* 112 Nev. 743, 751, 918 P.2d 697, 702 (1991).

[57] *Shetakis v. State, Dep't Taxation,* 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992).

[58] Black's Law Dictionary, Arbitrary (10th ed. 2014).

[59] Black's Law Dictionary, Capricious (10th ed 2014).

[60] *Sierra Pac. Indus. v. Wilson,* 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019)

[61] *In Re State Engineer Ruling no. 5823 at 239,* (internal citations omitted).

[62] NRS 534.037(3).

the Baileys argued that their due process rights were violated, alleging the State Engineer failed to hold a proper evidentiary hearing where witnesses could be subject to cross-examination and evidence challenged.[63] This Court entered an order granting motion in limine on September 4, 2019. In its order, the court specifically found that "the public hearing process to consider the GMP under NRS 534.035 provided notice and the opportunity for anyone to be heard and to offer evidence, thus satisfying due process standards."[64] The court's position has not changed. The court incorporates the entirety of the order granting motion in limine in these findings of fact and conclusions of law. The court finds that petitioners were afforded due process in the public hearing held on October 18, 2018, pursuant to NRS 534.037(3).

B. THE STATE ENGINEER CONSIDERED APPLICABLE NRS 534.037(2) FACTORS PRIOR TO APPROVING THE DVGMP

In determining whether to approve a GMP, NRS 534.037(2) requires the State Engineer to consider: (a) the hydrology of the basin; (b) the physical characteristics of the basin; (c) the geographic spacing and location of the withdrawals of groundwater in the basin; (d) the quality of the water in the basin; (e) the wells located in the basin, including domestic wells; (f) whether a groundwater management plan already exists to the basin; (g) any other factors deemed relevant by the State Engineer. The State Engineer must ultimately decide whether a proposed GMP "sets forth the necessary steps for removal of the basin's designation as a CMA.[65] Petitioners argue that (1) the State Engineer failed to consider the NRS 534.037(2) factors, and (2) that the DVGMP failed to demonstrate that decreased pumping over the 35 year life of the plan will result in "stabilized groundwater

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[63]Sadler Ranch opening brief 34; Sadler Ranch opposition to motion in limine filed June 24, 2019; Bailey opposition to motion in limine filed June 24, 2019.

[64]Order granting motion in limine 10.

[65]NRS 534.037(1).

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

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

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

[67]*Id.*

[68]SEROA 14-17.

[69]SEROA 17-18.

[70]SEROA 17-18, 223, 227-28, 476-496.

Petitioners' contention that "the Legislature determined that a GMP should accomplish its goals within ten years, not thirty-five" is misplaced.[71] First, NRS 534.110(7) states that if a basin has been designated as a CMA for 10 consecutive years, the State Engineer shall order withdrawals based on priority, **unless** a GMP has been approved pursuant to NRS 534.037 (emphasis added). NRS 534.110(7) does not state a GMP must accomplish the goal of equilibrium in a CMA basin within 10 years from the GMP approval. An undertaking as immense as bringing a depleted acquifer into balance could easily surpass 10 years depending on the extent of harm to the acquifer. Sadler Ranch misconstrues Assemblyman Goicoechea's statement to the Legislature that, "[again] you have ten years to accomplish your road to recovery."[72] The court views Assemblyman Goicoechea's words as meaning that once a basin is designated as a CMA, a 10 year clock starts wherein a GMP must be approved within the 10 year period, and if not, curtailment by priority must be initiated by the State Engineer. A GMP "must set forth the necessary steps for removal of the basin's designation as a critical management area"[73] not that equilibrium in the CMA basin must be accomplished within 10 years. If the State Engineer finds, which he did here, that the DVGMP sets forth the necessary steps for removal of the basin as a CMA, he may approve a GMP even if the DVGMP exceeds a 10 year period.

Petitioners claim the DVGMP will allow for continued depletion of the Diamond Valley acquifer.[74] The court agrees with petitioners. However, the State Engineer, using his knowledge and experience, and based on the evidence presented at the public hearing,

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[71]Sadler Ranch opening brief 13.

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

[73]NRS 534.037(1).

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

including the DVGMP and appendices, rejected petitioners' arguments that the DVGMP would not enable the basin to be removed as a CMA. Again, this Court will not reweigh the evidence presented nor substitute its judgment for that of the State Engineer. The court finds that there is substantial evidence in the record to support the State Engineer's approval of the DVGMP as achieving the goal of removing the Diamond Valley basin from CMA status. The court finds that there is substantial evidence in the record to support the State Engineer's findings that the DVGMP contained the necessary relevant factors in NRS 534.037(2) to approve the DVGMP.[75]

C. THE STATE ENGINEER RETAINS HIS AUTHORITY TO MANAGE THE DIAMOND VALLEY BASIN

Notwithstanding his approval of the DVGMP, the State Engineer is not precluded from taking any necessary steps in his discretion to protect the Diamond Valley acquifer, including, ordering curtailment by priority, at any time during the life of the DVGMP if he finds that the acquifer is being further damaged. NRS 534.120(1) gives the State Engineer discretion to "make such rules, regulations and orders as are deemed essential for the welfare of the area involved." Order 1302 specifically found the DVGMP did not waive "any authority of the State Engineer to enforce Nevada water law."[76] It would be ludicrous to find that the State Engineer was prohibited from taking whatever action was necessary to prevent a catastrophic result in Diamond Valley during the life of the DVGMP, including curtailment, regardless of the provisions built into the DVGMP that otherwise trigger his plan review.[77] The court finds the DVGMP does not limit the State Engineer's authority to

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[75]This finding is narrowly limited to the State Engineer's fact finding only in relation to the NRS 534.037(2) factors and that he found the DVGMP would allow the basin to be removed as a CMA after 35 years, not whether the DVGMP and Order 1302 violates Nevada law in other respects..

[76]SEROA 18.

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

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

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

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

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[78]NRS 534.250-534.340.

[79]*Id.*

[80]SEROA 8, 9.

[81]*Id.*

[82]SEROA 234, sec. 13.9.

E. PETITIONERS FAILED TO SHOW THAT A VIOLATION OF NRS 534.037(1) WHEN SEEKING PETITION APPROVAL AFFECTED THE VOTE RESULT

A GMP petition submitted to the State Engineer for approval ". . . must be signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer . . ."[83] The DVGMP petition was thus required to be signed by a majority of the holders of permits or certificates for surface rights, stock water rights, and underground rights in the Diamond Valley basin.

Order 1302 found there were 419 water right permits or certificates in the Diamond Valley basin at the time the DVGMP petition was filed.[84] By limiting the computation to those signatures from a confirmed owner of record, the State Engineer found 223 of 419 permits or certificates,[85] or 53.2 percent, was a majority of the permits or certificates in the basin.[86] The DVGMP petition was only sent to groundwater permit holders to be considered and voted upon.[87] The State Engineer argues that since the procedure for approving a GMP is found in Chapter 534 related to underground water that only permit/certificate holders for underground irrigation were required to vote.[88] This position misconstrues the clear language of NRS 534.037(1) . The Baileys assert that the DVGMP petition should have been submitted to all vested and surface right or other permit and certificate holders for consideration and vote.[89] The court agrees that all certificate and

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[83]NRS 534.037(1).

[84]SEROA 3.

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

[86]SEROA 3.

[87]SEROA 148.

[88]State Engineer's answering brief 25, ". . . surface water rights and vested rights were properly omitted from the State Engineer's calculation for majority approval under NRS 534.037(1) . . ."

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

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

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

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[90]SEROA 3.

[91]SEROA 3.

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

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

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[93]SEROA 3-4.

F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

In Nevada, "beneficial use shall be the basis, the measure and the limit of the right to the use of the water"[94] "Beneficial use depends on a party actually using the water."[95] The DVGMP does not require prior beneficial use of water in order for a permit holder to receive shares under the DVGMP formula.[96] Petitioners contend that any permits or certificates that are in abandonment status should not be allowed water shares. The State Engineer found that because ". . . time is of the essence for rights holders to get a GMP approved" . . . "it would be a lengthy process to pursue abandonment."[97] The State Engineer also cites the notice of non-use provisions required by NRS 534.090 as potentially causing owners of unused water rights to resume beneficial use, and exacerbate the water conditions in Diamond Valley.[98] The court agrees such a situation could occur, however, the State Engineer's analysis fails to address that permit holders who have done nothing to beneficially use water will receive just as many, if not more, shares of water will as holders of water rights who have placed water to beneficial use. The GMP gifts to permit holders, who have done nothing to place their water to beneficial use, valuable water shares to trade, lease, or sell to others in Diamond Valley.

Of the 126,000 af of water rights in Diamond Valley, currently there is only 76,000 af of actual beneficial use.[99] Under the DVGMP those permit holders who have never proved up their water by placing it to beneficial use could potentially receive more water

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[94]NRS 533.035.

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

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

[97]SEROA 9.

[98]*Id.*

[99]SEROA 2.

than those holders who have placed their water to beneficial use. The DVGMP allocates the total amount of 76,000 af actually being pumped to 126,000 af of irrigation ground water rights in good standing in Diamond Valley all of which will receive shares under the DVGMP formula.[100] By example, a farmer with a center pivot on a 160 acre parcel at 4 af per acre would be permitted for 640 af. Upon prove up, if he actually watered less than the 160 acre parcel because watering by using a center pivot does not water the 4 corners of a parcel, he may only prove up the water right for 512 af and receives a certificate for this amount. Another farmer in Diamond Valley, who has a 160 acre parcel at 4 af per acre but who has never proved up the beneficial use of the water and stands in a forfeiture status, receives the full 640 af of water. In the 1st year of the DVGMP, the farmer who has a permit for 640 af, but never has proved it up through beneficial use, actually received 85 af more water than the farmer who proved up beneficial use on the same size parcel. When transferred into shares under the DVGMP, the farmer who has not proved up his permit receives windfall of water shares to sell or trade. The DVGMP acknowledges that some water rights in good standing have not been used and tied to corners of irrigation circles and that most, but not all, "paper water" is tied to currently used certificates or permits.[101] Even though the DVGMP caps the amount of water the first year of the plan at the "ceiling of actual pumping (76,000 afa)",[102] it remains that the 76,000 afa will be allocated to some permits who have not proved up beneficial use.

Under Nevada water law, a certificate, vested, or perfected water right holder enjoys the right to and must beneficially use all of the water it has proved up. The DVGMP rewards permit holders who have not placed water to beneficial use, of which there are

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

[101]SEROA 467.

[102]SEROA 12.

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

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

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

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[103]SEROA 2, 9, 10.

[104]SEROA 234; see sec. 13.2

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

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

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

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

A GMP developed under NRS 534.037 is not required to mitigate adversely affected surface water rights, but it cannot impair those rights.NRS 533.085(1) provides, "nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 2013." NRS 534.100 reads, "Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable acquifer prior to March 22, 1913."

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

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[108]SEROA 510.

[109]SEROA 3.

[110]*Id.*

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

the end of the plan"[112] but that "the pumping reduction rate was selected by agreement of the GMP authors, . . ."[113] The State Engineer's reasoning that NRS 534.037 does not require a GMP "to consider alleged effects on surface water rights" is a misunderstanding of Nevada's water law. The DVGMP's annual pumping allocation will certainly cause the acquifer groundwater level to decline with continuing adverse effects on vested surface rights. The court finds that the DVGMP and Order 1302 impair senior vested rights. The court finds that Order 1302 is arbitrary and capricious.

ESTOPPEL ISSUE

Contrary to the position of Eureka County, petitioners are not estopped from making claims that the DVGMP impacts their vested rights.[114] No facts are present in the ROA that any respondent relied to their detriment upon representations or any petitioners or that any other estoppal elements are present in the ROA.[115]

I. ORDER 1302 VIOLATES NEVADA'S DOCTRINE OF PRIOR APPROPRIATION

The history of prior appropriation in the Western states dates to the mid-1800's and has been well chronicled in case law. Notably, In *Re Water of Hallett Creek Stream System,*[116] discusses at length the development of the doctrine of prior appropriation, "first in time, first in right", with its genesis linked to the early California gold miners' use of water and a local rule of priority as to the use of water. Nevada has long recognized the law of prior appropriation.[117] The priority of a water right is the most important feature.[118] Court's

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[112]SEROA 16.

[113]*Id.*

[114]Eureka County answering brief 22-23.

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

[116]749 P.2d 324, 330-34 (Cal 1988) cert. denied 488 U.S. 834 (1988).

[117]*Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78, 87, (1885).

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

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

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

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

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

[121] *Town of Eureka*, 167.

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

[123] SEROA 8.

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

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

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

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

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

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

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

[127]SEROA 5.

[128]SEROA 6.

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

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

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

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[129]SEROA 6-7.

[130]State Engineer's answering brief 25.

[131]*Id.* 25-26.

[132]*Id.* 26.

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

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

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

[134]*Id.*

[135]*Id.* 12.

[136]DNRPCA answering brief 11-12.

[137]*Id.* 11.

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

[139]*Id.*

ratified by the New Mexico Legislature.[140] The DVGMP has never been presented to or ratified by the Nevada Legislature. The State Engineer now claims the *Lewis* case is an example "that shows another state has utilized an innovative solution in order to resolve water shortages." The State Engineer analyzes that, "NRS 534.037 was expressly ratified by the Nevada Legislature, and has a clear intent to allow local water users to agree to a solution other than curtailment by priority."[141] Critically, there is no language, either express or implied in NRS 534.037, that allows for a GMP to be approved by a majority of right holders in a CMA that reduces the amount of water to which a senior right holder is entitled to beneficially use. The State Engineer amazingly argues that "Baileys, Sadler Ranch, and the Renners provide no authority for someone in the minority (*i.e. someone who did not want the GMP approved)* in a basin where a groundwater management plan is approved to act outside of the plan that was agreed to, per statute, by a majority of the holders of water permits and certificates, nor do they legitimately challenge the language of the statute providing for a simple majority to create a basin-wide groundwater management plan."[142] By the State Engineer's analysis of the legislative intent of NRS 534.037, a majority of junior right holders, who, by their collective knowing over appropriation of a water basin, combined with the State Engineer's neglectful acquiescence, can vote to deprive a senior right holder's use of all of its water, thus enabling the junior holders who created the crisis to continue to irrigate by using water which they were never entitled to use.[143] This is simply wrong.

The Nevada Supreme court has noted, "our adherence to long-statutory precedent provides stability on which those subject to this State's law are entitled to rely."[144] Every

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[140] *Lewis*, 376.

[141] State Engineer's answering brief 29.

[142] *Id.* 30.

[143] 53.2percent of the senior priority water right owners did not support the DVGMP.

[144] *Happy Creek*, 1116.

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

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

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

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

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

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

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

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

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

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

[149]SEROA 244-245.

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

[151]*Id.* 175.

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

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

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[152] *Id.*

[153] *Id.*

[154] State Engineer's answering brief 26.

[155] SEROA 7.

[156] SEROA 8.

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

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

Assemblyman Goicoechea further stated:

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

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

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[157]SEROA 7.

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

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

[160]*Id.*

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

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

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

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

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

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[161] *Id.*

[162] *Id.* at 13.

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

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

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

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

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

I. THE DVGMP VIOLATES NRS 533.325 and NRS 533.345

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

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[166]Sadler Ranch addendum to reply brief, 001

[167]*Id.* 003.

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

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

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

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[169]NRS 533.330

[170]NRS 533.345(1).

[171]NRS 533.345(2).

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

[173]See NRS 533.370(2).

[174]NRS 533.360.

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

[176]SEROA 237, sec. 14.7.

Valley can be used "for any beneficial purpose under Nevada law . . ."[177] Under NRS 533.330, "No application shall be for the water of more than one source to be used for more than one purpose." The only Diamond Valley water subject to the DVGMP is that which is subject to permits or certificates issued for irrigation purposes.[178] The DVGMP allows for the irrigation sourced shares to be used for "any other beneficial purpose under Nevada water law".[179] The DVGMP fails to take into consideration that the transferee of the shares could use the water for other beneficial uses that may consume the entirety of the water being transferred under the shares without any return water or recharge to the Diamond Valley basin.[180] Water placed to beneficial use for irrigation results in some return or recharge to the acquifer. There is no State Engineer oversight on the impact of the transfer of water shares for the proposed new well or place or manner of use unless the new well or additional withdrawals from an existing well exceeds the volume or flow rate initially approved for the base permit.[181]

The DVGMP and Order 1302 state the DVGMP was modeled after NRS 533.345(2)(4).[182] The State Engineer is incorrect. Under the DVGMP, the State Engineer does not review a different use of the water shares transferred because the DVGMP allows water shares to be used for any beneficial purpose under Nevada law, not solely for irrigation purposes.[183] Under the DVGMP the State Engineer cannot deny the transfer of shares to an existing well, unless the transfer would exceed the well's flow rate and conflicts

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[177]SEROA 234, sec. 13.8.

[178]SEROA 228, sec. 8.1

[179]SEROA 234, see 13.8.

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

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

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

[183]SEROA 237, sec. 14.7.

with existing rights.[184] The State Engineer's vital statutory oversight authority to ensure the temporary change is in the public interest or that the change does not impair water rights held by other persons is otherwise lost. The court finds that the DVGMP and Order 1302. violate NRS 533.325 and NRS 533.345, The court finds Order 1302 is arbitrary and capricious.

CONCLUSION

The court has empathy for the plight of the ranchers and farmers in Diamond Valley given the distressed state of the basin's aquifer. It is unfortunate that the State Engineer and/or the Nevada Legislature did not vigorously intervene 40 years ago when effects of over appropriation were first readily apparent.[185] That being said, the DVGMP is contrary to Nevada water laws, laws that this Court will not change. The court is not bound by the State Engineer's interpretation of Nevada water law.

Order 1302 is arbitrary and capricious.

Good cause appearing,

IT IS HEREBY ORDERED that the petition for review of Nevada State Engineer's Order No. 1302 filed by Timothy Lee Bailey and Constance Marie Bailey and Fred Bailey and Carolyn Bailey in case No. CV-1902-350, is GRANTED.

IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by Sadler Ranch in case no. CV-1902-349, is GRANTED.

IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by Ira R. Renner and Montira Renner in Case No. CV-1902-348, is GRANTED.

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[184]SEROA 237, sec. 14.9.

[185]As noted by Sadler Ranch, in 1982, State Engineer Peter Morros recognized that "what is happening right now in Diamond Valley [declining groundwater levels affecting spring flows] was predicted . . . It was predicted in 1968 . . . almost to the 'T'". Transcript of proceedings at 42; 17-22, In the Matter of Evidence and Testimony Concerning Possible Curtailment of Pumpage of Groundwater in Diamond Valley, Eureka, Nevada (May 24, 1982). Morros also stated "there was a tremendous amount of pressure put on the State Engineer's Office to issue permits, far in excess of what we had identified at the time was their perennial yield." *Id.* at 41, 1.6-10. Sadler Ranch opening brief, 2-3.

DATED this 23rd day of April, 2020.

DISTRICT JUDGE

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

EXHIBIT “2”

June 30, 2020 Order Denying DNRPCA Intervenors’ Motion for Stay Pending Appeal (“Order Denying Stay”)”

EXHIBIT “2”

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

Dept No. 2

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

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

Petitioners,

vs.

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

Respondent,

and

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

Intervenors.

ORDER DENYING DNRPCA INTERVENORS' MOTION FOR STAY PENDING APPEAL

PROCEDURAL BACKGROUND

On April 27, 2020, this Court entered findings of fact, conclusions of law, and order granting petitions for judicial review ("order granting petitions for judicial review"). On May 14, 2020, the DNRPCA intervenors filed a notice of appeal of order to the Nevada Supreme Court ("appeal"). On May 14, 2020, DNRPCA intervenors filed a motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("DNRPCA motion for stay"), On May 19, 2020, the State Engineer filed his joinder to DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("State Engineer's joinder"). On May 21, 2020, Eureka County filed Eureka County's joinder to DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302. On May 26, 2020, Timothy Lee Bailey and Constance Marie Bailey and Fred Bailey and Carolyn Bailey ("Baileys") filed an opposition of Bailey petitioners to DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("Bailey's opposition"). On May 26, 2020, Sadler Ranch, LLC and Ira R. and Montira Renner filed Sadler Ranch and Ira R. and Montira Renner's opposition to motion for stay pending appeal ("Sadler Ranch and Renner opposition"). On June 1, 2020, DNRPCA intervenors filed DNRPCA intervenors' reply in support of motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("DNRPCA reply"). On June 1, 2020, the State Engineer filed State Engineer's reply in support of DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("State Engineer's reply"). On June 1, 2020, Eureka County filed Eureka County's reply in support of motion for stay pending appeal ("Eureka County's reply").

The court has reviewed the pleadings and no further briefing or oral argument is

required.[1]

DISCUSSION

APPLICABLE LAW

In deciding whether to grant a motion to stay pending appeal the Nevada Supreme Court considers four factors which this Court must also consider, they being: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether appellants will suffer irreparable or serious injury if the stay is denied; (3) whether respondents will suffer irreparable harm or serious injury if the stay is granted; and (4) whether appellants are likely to prevail on the merits in the appeal.[2] A movant does not always have to show a probability of success on the merits, but 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.[3]

THE OBJECT OF THE APPEAL

The object of the appeal will not be defeated if the stay is denied. The object of the DNRPCA appeal is to overturn this Court's order granting petitions for judicial review which reversed State Engineer's order 1302 approving the DVGMP. DNRPCA, Eureka County, the State Engineer and the petitioners offer divergent reasons in support of and against the Diamond Valley ground water management plan's ("DVGMP") effective stabilization of the aquifer during the first year of the DVGMP. It is premature to confirm that the DVGMP is actually resulting in less impact on the Diamond Valley acquifer based only on the 2019 growing season. If this Court denied the DNRPCA motion for stay, DNRPCA's assumption that Diamond Valley pumping will increase without the DVGMP is misplaced. Currently the

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[1]7JDCR7(11).

[2]*Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982 (2000).

[3]*Id.* at 659, citing *Ruiz v. Estelle,* 650 F.2d 535, 565 (5th Cir. 1981).

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 acquifer rather than reducing at this time. If the respondent and intervenors prevail on appeal, the DVGMP can be reinstated at that time. The court finds the object of the appeal will not be defeated if the motion for stay is denied.

IRREPARABLE OR SERIOUS HARM

DNRPCA claims it will suffer irreparable or serious injury if the court does not reinstate the DVGMP pending an appellate decision because of possible curtailment by priority and that farm owners have made significant financial investments in reliance on the DVGMP. All irrigation water conservation investments incurred by any Diamond Valley farmers are clearly warranted considering the well known water deficiency in Diamond Valley stretching over 40 years. Any water and crop conservation improvements were necessary even if no GMP was in place. However, it was misguided for any farmers to make their water conservation investments as alleged solely on the validity of the DVGMP, particularly since the DVGMP has been the subject of opposition by the same senior water rights holders who prevailed to date in this action. As stated in the court's order granting petitions for judicial review, the junior irrigators have a variety of other alternatives available to them short of curtailment by priority in addition to the measures they have taken to date.

If this Courts's order granting petitions for judicial review is affirmed on appeal, there remains 5 years of the 10 year period during which another GMP consistent with Nevada law can be implemented. Irreparable or serious harm to appellants has not been demonstrated.

It appears that petitioners would suffer serious or irreparable harm if the stay were granted. Respondents have offered to exempt petitioners from the DVGMP during the

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appellate period. But continued trading of water shares, use of banked water shares, and continued over pumping of the Diamond Valley aquifer for up to an additional 30 years will have an adverse impact on petitioners' senior certificated rights, as well as, their vested rights.

LIKELIHOOD OF SUCCESS ON THE MERITS

The State Engineer, DNRPCA, Eureka County have not demonstrated that they are likely to prevail on the merits. Movants must "present a substantial case on the merits when a serious legal question is involved and show the balance of equities weighs heavily in favor of granting stay."[4] Movants have not presented a substantial case on the merits challenging the serious legal question that the DVGMP violated long standing Nevada law as found by this Court. The motion for stay pending appeal must be denied.

Good cause appearing,

IT IS HEREBY ORDERED that DNRPCA's motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302, and the joinder by Eureka County and the State Engineer are DENIED.

DATED this 30th day of June, 2020.

DISTRICT JUDGE

[4] *Id.* at 658-59.