IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

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

Appellants,

v.

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

Respondents.

Appeal From Order Granting Petitions for Judicial Review
Seventh Judicial District Court of Nevada Case No. CV-1902-348

APPELLANTS' MOTION TO EXCEED PAGE LIMIT

LEONARD LAW, PC
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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, "Appellants") move to exceed the five-page limit imposed by NRAP 27(d)(2) for its Reply in Support of Emergency Motion for Stay ("Reply") filed concurrently herewith. This motion is supported by the following points and authorities and declaration of Debbie Leonard that follows. A copy of the Reply in Support of Motion for Stay is attached hereto as Ex. 1.

MEMORANDUM OF POINTS AND AUTHORITIES

NRAP 27(d)(2) states "[a] reply to a response shall not exceed 5 pages." NRAP 32(a)(7)(D) authorizes the filing of a motion to file a brief that exceeds the applicable page limit "on a showing of diligence and good cause." Appellants cite NRAP 32(a)(7)(D) by analogy here and comply with its requirements.

Appellants respectfully request leave to exceed the page limit because replying to the arguments raised in the two oppositions required more pages than the rule allows. This case involves matters of first impression and of statewide public importance. In their respective oppositions, Sadler, Renner and the Baileys (collectively, "the GMP Opponents") provided extensive argument that Appellants would not succeed on the merits. In response, the DNRPCA Appellants felt compelled to draw the Court's attention to a full range of legal errors in the district court's Order to show that Appellants will likely succeed on the merits. The DNRPCA Appellants also provided an in-depth analysis of the other NRAP 8(c) factors in response to the GMP Opponents' arguments.

For the Court's convenience and expediency, the DNRPCA Appellants are filing just one reply in response to two oppositions. Respondents Sadler Ranch, LLC and Ira & Montira Renner filed a 28-page opposition, and the Bailey Respondents filed a 27-page Opposition. In support of their "merits" arguments, the GMP Opponents referenced considerable extra-record material, which violates the scope of review and the district court's order in limine. The DNRPCA Appellants had to address this point as well.

Counsel for the DNRPCA Appellants worked diligently to present the Reply in a concise manner. Nevertheless, The Reply is 23 pages, so Appellants seek leave

to file an extra 18 pages than allowed under NRAP 27(d)(2) in order to respond to the cumulative 56 pages of oppositions.

The DNRPCA Appellants respectfully submit that they have exercised diligence and demonstrated good cause to exceed the 5-page limit in NRAP 27(d)(2) and request leave to do so.

AFFIRMATION

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

Date: July 15, 2020

/s/ Debbie Leonard
Debbie Leonard (Nevada Bar No. 8260)
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Attorney for Appellants

DECLARATION OF DEBBIE LEONARD IN SUPPORT OF MOTION TO EXCEED THE PAGE LIMIT

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

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

2. I am the owner of Leonard Law, PC and counsel of record for DNRPCA Appellants in this case.

3. This declaration is offered in support of the DNRPCA Appellants' Motion to Exceed the Page Limit to file their Reply in Support of Motion for Stay ("Reply") and in compliance with NRAP 32(a)(7)(D).

4. Appellants respectfully request leave to exceed the page limit because replying to the arguments raised in the two oppositions required more pages than the rule allows.

5. This case involves matters of first impression and of statewide public importance. In their oppositions, the GMP Opponents argued that Appellants would not succeed on the merits. In response, I felt compelled to draw the Court's attention to a full range of legal errors in the district court's Order to show that Appellants will likely succeed on the merits. I also provided an in-depth analysis of the other NRAP 8(c) factors in response to the GMP Opponents' arguments.

6. In support of their "merits" argument, the Respondents referenced considerable extra-record material, which violates the scope of review and the district court's order in limine. I had to address this point as well.

7. For the Court's convenience and expediency, I decided to file just one reply in response to the two oppositions. Respondents Sadler Ranch, LLC and Ira & Montira Renner filed a 28-page opposition, and the Bailey Respondents filed a 27-page Opposition.

8. I worked diligently to present the Reply in a concise manner. Nevertheless, the Reply is 23 pages, so Appellants seek leave to file an extra 18 pages than allowed under NRAP 27(d)(2) in order to respond to the cumulative 56 pages of opposition.

9. I respectfully submit that I exercised diligence and believe good cause exists to exceed the 5-page limit in NRAP 27(d)(2) and request leave to do so.

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

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

DATED: this 15th day of July, 2020.

/s/ Debbie Leonard
DEBBIE LEONARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on July 15, 2020, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system. All others will be served by first-class mail.

/s/ Tricia Trevino
An employee of Leonard Law, PC

EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

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

Appellants,

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

Respondents.

Appeal From Order Granting Petitions for Judicial Review
Seventh Judicial District Court of Nevada Case No. CV-1902-348

DNRPCA APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY

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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 Appellants")[1] file this Reply in Support of Emergency Motion Under NRAP 27(e) for Stay Pending Appeal (Relief Requested by July 10, 2020) ("Motion to Stay").

This reply is based on the following points and authorities, the exhibits attached hereto, and the exhibits attached to the Motion to Stay.

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[1] After the Motion to Stay was filed, the Court granted the motion to modify the caption so that the State Engineer and Eureka County are now correctly referenced as Appellants. As a result, movants now refer to themselves as "DNRPCA Appellants" to distinguish themselves from the other Appellants.

INTRODUCTION

In arguing against a stay, the GMP Opponents transform this administrative review case into an evidentiary free for all. The law is clear that, when reviewing the merits of the State Engineer's GMP approval, the Court must limit itself to the record. Only when analyzing the other NRAP 8(c) factors may the Court review outside evidence, such as the declarations submitted by the DNRPCA Appellants. By referencing extra-record materials for their "merits" arguments, the GMP Opponents acknowledge that the record alone – without their improper effort to augment it – supports the GMP. Their off-limits material also violates the district court's order in limine and has the sole purpose of misleading the Court.

For all their bluster and deception regarding the supposed evils of Diamond Valley's groundwater development, the GMP Opponents fail to demonstrate any harm should the GMP remain in effect during the appeal. Rather, as did the district court, they speculate about hypothetical scenarios that bear no causal connection to the GMP. Since the GMP requires pumping *reductions* (which absent the GMP, would not be mandated until 2025), the GMP *benefits* the aquifer and those using it. Although the GMP allows banking of water for use in a subsequent year, there still will be a net *decrease* over time in the amount of groundwater withdrawn.

The GMP Opponents' attacks on the GMP are therefore self-defeating. They ask the Court to revert to a time when the aquifer was being continuously depleted

by groundwater users being able to pump the full amount of their permitted rights. And the only groundwater management plan they deem acceptable is one that requires 60% of groundwater permit holders to cease pumping entirely, terminate their farming operations, and find somewhere else to eke out a livelihood, while the other 40% change nothing. That is precisely what the Legislature sought to avoid when authorizing the groundwater management plan legislation.

Mimicking the district court's erroneous conclusions, the GMP Opponents render meaningless NRS 534.110(7) by arguing that anyone with a water right junior to May 12, 1960 must be cut off entirely. If the Legislature intended that result, it would not have created an exception to curtailment by strict priority. It would have done nothing. The statutory language expressly allows a GMP like the one adopted in Diamond Valley.

The Court should look beyond the GMP Opponents' distortion of the record and venomous attacks on the Appellants to keep the NRAP 8(c) factors in focus. The question for the Court is, given that this case requires the Court to decide issues of first impression and evaluate the GMP on an administrative record the Court has not yet seen, what irreparable harm would exist should the GMP remain in place for the next 18-36 months this appeal may be pending? Because the Baileys' "senior" permits can be carved out of the GMP as part of a stay, and no other senior has challenged the GMP, the answer is an emphatic "none."

ARGUMENT

A. The GMP Opponents Ask the Court to Judge the Merits by Looking Outside the Record

By improperly referencing extra-record material for their "merits" argument, the GMP Opponents underscore one of the district court's many errors. A court's review of a State Engineer's decision is limited to the administrative record. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). The district court repeatedly relied on extra-record information when reviewing the petitions for judicial review. Ex. 2 (notes 10, 19-22, 40, 166-168). Not only did this run afoul the most basic principle of judicial review, but it also contradicted the district court's own order in limine, which barred the GMP Opponents from presenting the exhibits attached to their opposition. Exs. 15, 16, 17, 18. These materials should be stricken. *See In re Discipline of Serota*, 129 Nev. 631, 637, 309 P.3d 1037, 1040 n.5 (2013).

Although extra-record materials should be summarily disregarded when looking at the merits, should the Court nevertheless consider them, the DNRPCA Appellants address two specific matters because, by including them, the GMP Opponents seek to seriously mislead the Court. First, the GMP Opponents' reference a power point presentation allegedly made by the former State Engineer at a 2016 conference, which in addition to being beyond the scope of the Court's review, is neither relevant, binding, nor a reliable statement of the law. The petition to adopt the GMP at issue in this appeal was not even presented to the State

Engineer until August 20, 2018, some two years after the 2016 presentation. Ex. 1 (ROA 2). The State Engineer could not have made a definitive legal assessment of a final document that was not yet submitted. Moreover, the State Engineer is not a lawyer, and the presentation was not made in a legal or administrative proceeding to which judicial estoppel would apply. Finally, the State Engineer is not bound by *stare decisis*, much less an informal statement made at a conference. *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997).

Second, the GMP Opponents' reference to failed legislative efforts in 2017 (adopted by the district court) cannot be considered when interpreting the Legislature's intent in 2011. This Court "proscribes the use of a legislator's [subsequent] statement of opinion as a means of divining legislative intent." *A-NLV-Cab Co. v. State, Taxicab Auth.*, 108 Nev. 92, 95, 825 P.2d 585, 587 (1992), *citing Cal. Teachers Ass'n v. San Diego Com. Coll. Dist.*, 621 P.2d 856 (Cal. 1981). "Statutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here." *United States v. Wise*, 370 U.S. 405, 411, (1962). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered

change." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

The Court's task is to interpret the intent of the Legislature as a whole at the time NRS 534.110(7) and NRS 534.037 were enacted. Sadler and Renner's Ex. 7 says nothing about the Legislature's intent in 2011 and should be disregarded.

B. Extra-Record Information Can Only Be Considered to Determine Whether the Object of the Appeal Will be Frustrated and Irreparable Harm Exists

Ironically, given their flouting of the scope of review, Sadler and Renner take issue with the "extra-record" evidence submitted in support of the Motion to Stay. Although the Court's review of the merits should be limited to the State Engineer's record, its review of the other NRAP 8(c) factors must be based on "specific facts and affidavits supporting assertions that these factors exist." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991); *see Holtzman v. Schlesinger*, 414 U.S. 1304, 1309 and n.10 (1973) (denying application to vacate stay pending writ of certiorari "in light of respondents' failure to produce affidavits" to show irreparable harm "in conjunction with stay application"). In another case, the Court recently granted a motion to stay based on a supporting declaration that attested to matters that post-dated the State Engineer's record. *See* Case No. 77722. It should so here as well.

C. Appellants Have Made a Substantial Case on the Merits

At this stage, the Appellants need only "present a substantial case on the merits when a serious legal question is involved…." *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000). Where the Court cannot determine the merits "[w]ithout full appellate review of the record," a stay is warranted. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 254, 89 P.3d 36, 40 (2004). The GMP's merits cannot be fully analyzed through a cursory review, particularly where: (1) the full State Engineer's record has not been submitted; (2) the GMP Opponents poison the Court's consideration of the merits by referencing improper materials; (3) this case presents matters of first impression with considerable statewide importance; and (4) the DNRPCA Appellants have pointed out numerous legal errors in the district court's analysis. Under these circumstances, the Court should maintain the GMP while it fully reviews the merits.

1. By Enacting NRS 534.110(7), The Legislature Authorized And Contemplated A Groundwater Management Plan With Exactly The Characteristics Of The GMP

a. NRS 534.110(7) Authorized The State Engineer To Adopt A Groundwater Management Plan That Departs From The Prior Appropriation Doctrine

With NRS 534.110(7), the Legislature made a policy decision to expressly authorize the State Engineer to not "conform to priority rights" where, as here, the community has developed a groundwater management plan that complies with

NRS 534.037. Statutes should be "construed with a view to promoting, rather than defeating, legislative policy behind them." *Dep't Motor Vehicles & Pub. Safety v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1250 (1994). The Legislature would not have allowed the State Engineer to avoid curtailment by priority only to limit the State Engineer's approval of a GMP to one that strictly enforces priorities.

To the extent this is not clear from the statutory language, it is demonstrated in the legislative history. The bill that is codified in NRS 534.110(7), AB 419, was enacted in 2011 to address the fact that neither the Legislature, nor the State Engineer, wished to curtail by priority in overappropriated basins. The bill's sponsor, Assemblyman Pete Goicoechea, noted that the bill was designed to address a growing "number of groundwater basins in the state that are overappropriated" and to avoid the devastating effects of curtailment by priority, which in addition to other rights, could also cut off domestic wells:

> The State Engineer does not want to be heavy-handed and have to go into these basins and regulate by priority, which means junior permits, where the pumping is curtailed or suspended.
>
> * * *
>
> NRS Chapter 534, and I want to make sure the Committee understands, when he moves into a groundwater basin, he is required to regulate by priority. We do have priority numbers assigned to domestic wells. They also will be regulated with the language in this bill [that requires curtailment if no GMP is approved]. I want to make sure everyone understands that. I know that will be a big issue in some areas.

Excerpts from March 30, 2011 Minutes of Assembly Comm. on Gov't Affairs at pp. 66-69, Ex. 19-2 at 0079, 0081.

The Legislature could have maintained the status quo regarding over-appropriated basins, which would have kept the prior appropriation doctrine intact and left the State Engineer to curtail by priority. Instead, the Legislature established a whole new statutory structure regarding Critical Management Area designation and groundwater management plan approval. Under the authority granted by NRS 534.110(7) to deviate from strict prior appropriation principles, approval of the GMP was well within the State Engineer's discretion. *See Checker, Inc. v. Pub. Serv. Comm'n*, 84 Nev. 623, 629–30, 446 P.2d 981, 985 (1968) ("It is the universal rule of statutory construction that wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied."). The Legislature recognized that not everyone would be on board with any particular proposed plan, which is why it required that only 51% of permit holders approve a GMP. *See* NRS 534.037.

b. There Are Numerous Other Examples Where The Legislature Has Rejected Prior Appropriation Principles

Notwithstanding the GMP Opponents' efforts to confuse the Court, the legal framework that NRS 534.110(7) modified is statutory, not constitutional, and is consistent with the Legislature's past modifications to the prior appropriation doctrine. Nevada did not fully embrace prior appropriation until 1885, some

twenty-one years after enactment of its Constitution. *See Reno Smelting, Milling and Reduction Works v. Stevenson*, 20 Nev. 269, 21 P. 317 (1889) (acknowledged in *Application of Filippini*, 66 Nev. 17, 30, 202 P.2d 535, 541 (1949). Although rights that vested prior to enactment of the water code must be recognized, prior appropriation is not a constitutional requirement in Nevada. *See* NRS 533.085.

Since it is statutory, the Legislature may modify the prior appropriation doctrine. "Water rights are subject to regulation under the police power as is necessary for the general welfare." *Town of Eureka v. State Eng'r*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992), *citing V.L. & S. Co. v. Dist. Ct.*, 42 Nev. 1, 171 P. 166 (1918). "As the owner of all water in Nevada, the State has the right to prescribe how water may be used." *Id.*, *citing In re Waters of Manse Spring*, 60 Nev. 280, 287, 108 P.2d 311, 315 (1940). While the legislature cannot enact laws that impair rights that vested prior to enactment of Nevada's water code, "it can properly … set up other methods of control." *Filippini*, 66 Nev. at 30, 202 P.2d at 541. "Water law seeks to balance a water rights holder's property rights with the State's police power to regulate water rights, and the State may therefore prescribe how water may be used." *Mountain Falls Acquisition Corp. v. State*, No. 74130, 441 P.3d 548, 2019 WL 2305720 at *3 (Nev. 2019) (unpublished disposition), *citing Town of Eureka*, 108 Nev. at 167, 826 P.2d at 950. The district court ignored these authorities.

The bill codified as NRS 534.037 and 534.110(7) was not the first time the Legislature acted to alleviate the draconian effects of the prior appropriation doctrine. For example, in 1999, the Legislature completely eliminated forfeiture of surface water rights and drastically altered the principle of abandonment. *See* Act of June 8, 1999, 1999 Nev. Stat. 515; NRS 533.060(2) (2000). Specifically, the Legislature modified NRS 533.060 by deleting subsection (2) and substituting a new section, which provided: "Rights to the use of surface water shall not be deemed to be lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose." *See id.*; AB 380 (1999). Similarly, discarding a century's worth of common law, the Legislature severely restricted the conditions under which one could abandon a surface water right and set guidelines relating to a presumption of non-abandonment. *See* NRS 533.060(3) and (4) (2000). These changes were a radical departure from the prior appropriation doctrine and gave surface water users unprecedented latitude that did not previously exist in the law. *Compare id.* to *Manse Spring*, 60 Nev. 280, 108 P.2d at 315.

The 1999 Legislature did not hide its purpose. The bill's sponsor, Assemblywoman Marcia de Braga, expressly stated that "the intent of the measure was to take forfeiture out of Nevada's state surface water law," a change from the prior appropriation doctrine that she considered to be "very important to the people of Nevada." March 10, 1999 Minutes of the Assembly Comm. on Natural Res.,

Agric., and Mining, Ex. 19-1 at 0006. One speaker at the hearing expressed, "It was difficult to promote agriculture as a viable industry when concerns about forfeiture and abandonment of surface water rights continued to appear." Ex. 19-1 at 0010. By passing AB 380 and altering existing law, the Legislature elevated the concerns of farmers over adherence to the prior appropriation doctrine.

Similarly, in 1955, the Legislature added language to what is now NRS 534.120 to afford the State Engineer wide discretion in managing groundwater basins that the State Engineer designates for special management. "In the interest of public welfare, the State Engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by the State Engineer and from which the groundwater is being depleted…." NRS 534.120(2). This means, for example, that the State Engineer may, in his discretion, deem uses other than irrigation to be preferred uses and deny irrigation applications, even when they have an earlier priority date. *See* Nevada Div. Water Res. Designated Basin Map, http://water.nv.gov/mapping/maps/designated_basinmap.pdf.

As with these examples, NRS 534.037 and NRS 534.110(7) implement the Legislature's policy to deviate from prior appropriation. "The existence of facts which would support the legislative judgment is presumed." *Allen v. State*, 100 Nev. 130, 134, 676 P.2d 792, 795 (1984). The record here contains numerous examples of the negative impacts on the Diamond Valley community should strict

enforcement of priorities occur, including bankruptcies, loan defaults, an exodus from Eureka County, increased burden on social services, potential collapse of the local economy, decreased tax base, and rodent infestation and weed problems arising from abandoned fields. Ex. 1 (ROA 11-12, 14-15, 225, 244, 288, 459); Ex. 20 (ROA 547-548, 588-592, 594-595, 704-706, 734, 738-740). The district court could not, under the guise of statutory interpretation, make a contrary policy decision. *See Vineyard Land & Stock Co. v. Fourth Jud. Dist. Ct.*, 42 Nev. 1, 171 P. 166, 168 (1918) ("It is also a well–known rule that the courts have nothing to do with the general policy of the law."); *see also Bacher v. State Eng'r*, 122, Nev. 1110, 1121, 146 P .3d 793, 800 (2006) (court may not substitute its judgment).

2. The GMP Does Not Impair Vested Rights

The district court reached the incongruous conclusion that the GMP's 35-year horizon for bringing the basin into balance complies with NRS 534.037 but impairs vested rights because it allows continued pumping above the perennial yield. Ex. 2 at 15:1-16:7, 23:5-25:6. Setting aside that there is no evidence that the GMP will impair vested rights, if the statute authorizes the GMP's implementation time frame, and none of the GMP Opponents contends the statute is unconstitutional, the district court's analysis necessarily fails. In opposing the stay, the GMP Opponents perpetuate the district court's faulty analysis yet fail to address its inherent inconsistency.

The district court's conclusion is also circular because the GMP reduces pumping and stabilizes the water table to benefit all water users in Diamond Valley, including vested rights. Ex. 1 (ROA 235). The only way to immediately reduce pumping to the perennial yield, as the GMP Opponents urge, is to curtail by priority, which is exactly what the Legislature sought to avoid.

The Legislature did not require the State Engineer to look at effects on vested rights as part of a GMP approval process, even though it understood that groundwater pumping in over-appropriated basins was affecting surface resources:

> Typically, that is a problem we are seeing out there with overappropriated basins. We are seeing declining surface water resources available. Unfortunately, in many [overappropriated basins], we have exceeded [the perennial yield] and we have declining water tables, which ultimately will impact both surface and groundwater levels.

Excerpts Mins. of March 30, 2011 Assembly Comm. on Gov't Affairs, Ex. 19-2 at 0080-0081. Yet, as the State Engineer noted, the statutory language and legislative history fail support the notion that vested rights must be mitigated by the GMP. Ex. 1 (ROA 12, note 42) (noting AB 419, as originally proposed, would have required the State Engineer "to consider the relationship between surface water and groundwater in the basin," but that language was amended out of the bill after the First Reprint). Finally, vested rights are not subject to the GMP. Ex. 1 (ROA 229, 240). Because the GMP Opponents fully exercise their vested rights through their

mitigation permits, there is simply no evidence that the GMP impairs vested rights. Ex. 3-10; Ex. 3-11; Ex. 10-14; Ex. 10-15.

3. The GMP Preserves The State Engineer's Authority To Manage The Basin And Complies With Nevada Law

The district court's conclusion that the GMP runs afoul of the statutory beneficial use and change application requirements disregards the State Engineer's broad authority to manage a designated groundwater basin. *See* NRS 534.120(2). By suspending deadlines for proving beneficial use, and declining to engage in forfeiture and abandonment proceedings prior to approval of the GMP, the State Engineer properly exercised his discretion to avoid the wasteful "use it, or lose it" incentives of prior appropriation that have contributed to the current overdraft situation in Diamond Valley. Ex. 1 (ROA 10-11, 18).

Although the GMP allows water to be moved from one well to another, no well may exceed the existing duty already assigned by the State Engineer. Ex. 1 (ROA 236-237). The State Engineer correctly noted that the temporary movement of water allowed in the GMP closely tracks the existing law regarding temporary change applications in NRS 533.345(2) (including notice and hearing if impairment is possible) and still requires the application of NRS 533.370 for new wells or increased withdrawals that exceed one year. Ex. 1 (ROA 8-9). Because the GMP mandates metering and centralized data collection, the State Engineer will have more information than ever at his disposal, allowing him to analyze and

mitigate any conflicts if they occur and make adjustments as needed based upon the best available data. Ex. 1 (ROA 16-17, 237-239, 463-464). The pumping reductions will be informed by robust groundwater monitoring to ensure that stabilization of the water table is occurring. Ex. 1 (ROA 16-17, 237-239, 464). The district court should not have second guessed the State Engineer's thinking and discretion to use his specialized knowledge and expertise with regard to these elements in the approved GMP. *See Bacher*, 122, Nev. at 1121, 146 P .3d at 800.

D. The GMP Opponents Offer Only Speculation – Not Evidence – of Alleged Harm

To support their irreparable harm argument, the GMP Opponents regurgitate the identical factually unsupported analysis embraced by the district court and mislead the Court regarding their "rights." The only rights held by Renner and Sadler that are subject to the GMP are junior to May 12, 1960 and would be 100% curtailed without the GMP. Ex. 1 (ROA 503-509) (showing Renner with November 2, 1960, September 27, 1977 and February 16, 1978 priority dates and Sadler with December 13, 1965 and December 22, 1976 priority dates).

Sadler and the Baileys have mitigation rights that are **not** subject to the GMP and that allow them to exercise their vested rights through wells. [2] Ex. 1 (ROA

[2] The Baileys falsely assert they have no mitigation rights. The face of their mitigation permit shows otherwise. Ex. 3-10. Moreover, Wilfred Bailey testified he is at least partially responsible for drying up his own springs, and his farm is more productive using his mitigation well. Ex. 10-14. That is help, not harm.

218); Ex. 3-10; Ex. 3-11; Ex. 10-14; Ex. 10-15. To that end, they have drilled wells in their spring complexes, so even if every groundwater permit more junior than May 12, 1960 were curtailed completely, Sadler's and the Baileys' springs would not discharge from the surface. Ex. 3-10; Ex. 3-11; Ex. 10-15. With or without the GMP, Sadler and the Baileys would continue to pump the same amount of water that their mitigation rights allow. *See id.* Renner only recently applied to the State Engineer to do the same thing. Ex. 3-12. None of the GMP Opponents can prove that their springs would start to run again if the GMP were not in place.

The only GMP Opponents who have senior groundwater permits that are subject to the GMP are the Baileys. Ex. 1 (ROA 499-501). Any alleged harm to those rights during the appeal can be addressed by exempting them from the GMP as part of the stay, a point the Baileys do not dispute. With this mitigable exception, there is no evidence that the GMP's continued existence while this appeal is pending will cause the GMP Opponents any harm.

Based on the Court's case load and aging cases report, this appeal could take 18-36 months to be resolved. During that time, the GMP will require pumping *reductions*. Ex. 1 (ROA 235, 510). If the Court does not decide the appeal until 2023, in the interim, the GMP would require that cumulative pumping be reduced by 10% of what was allowed in GMP Year 1 (2019). Ex. 1 (ROA 510). Even with the GMP's banking provisions that allow an unused portion of an annual allocation

to be carried over to a subsequent irrigation season, there will never be a net increase of water withdrawals from the aquifer compared to pre-GMP conditions. Ex. 1 (ROA 234, 510). Water can only be carried over because it was not withdrawn from the aquifer in a previous year. Ex. 1 (ROA 234).

The GMP Opponents' hypothetical examples of what *could* happen were the GMP to remain in effect while the appeal is pending are purely speculative and therefore are not proof of irreparable harm. *See In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm."); *Nevada v. United States*, 364 F. Supp. 3d 1146, 1156 (D. Nev. 2019) (alleged "harms, including environmental injury, are too speculative to rise to the level of the required likelihood of irreparable harm").

In lieu of actual evidence, the GMP Opponents assert that simply because the district court concluded the GMP violated Nevada law and affected their property rights, they are harmed. The movant for a stay pending appeal is always the losing party, and the district court will have always construed the law against that party. That alone does not prohibit a stay or even suggest that a stay will irreparably harm the winning party. *See NAACP v. Trump*, 321 F.Supp.3d 143, 147 D.D.C. 2018). And simply because property rights may be at issue does not by itself constitute irreparable harm. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 901 (2008) (rejecting assertion of irreparable

harm from placement of lien on real property). The GMP Opponents must still prove irreparable harm, which they have not done. *See id.*

Should the GMP Opponents prove in the future that the GMP is causing them harm, they can bring an as-applied challenge at that time. "That the regulation may be invalid as applied in [certain] cases … does not mean that the regulation is facially invalid because it is without statutory authority." *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991). "[T]he fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule" facially invalid. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991); *see also EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 524 (2014) ("The possibility that the rule, in uncommon particular applications, might exceed [the agency]'s statutory authority does not warrant judicial condemnation of the rule in its entirety."). In the event some type of irreparable harm materializes from the GMP's continued existence, the State Engineer maintains his authority to "make such rules, regulations and orders as are deemed essential for the welfare of the area involved." NRS 534.120.

E. The DNRPCA Appellants Have Adequately Demonstrated Irreparable Harm Absent a Stay

Unlike the GMP Opponents, the DNRPCA Appellants provided actual evidence of irreparable harm should the GMP not remain in place. The declarations submitted in support of the Motion to Stay indicate that the DNRPCA Appellants

made farming decisions in reliance on the 2020 share allocations and made significant investments to reduce water use that are irretrievable should curtailment be required. Ex. 3-2 ¶¶34, 37; Ex. 3-4 ¶¶4-6, 8. These were made in reliance on the good-faith development of a GMP that they believed was consistent with what the Legislature expected when enacting NRS 534.110(7) and 534.037. Ex. 3-2 ¶37; Ex. 3-4 ¶7. The pumping reductions required by the GMP could not be achieved absent such investments, yet such investments are useless if curtailment is inevitable. Ex. 3-2 ¶37; Ex. 3-4 ¶8.

The GMP Opponents offer no evidence to dispute that the district court's Order essentially deems only two types of plans lawful: (1) one that involves voluntary actions by senior right holders (either sale of their water to juniors or implementation of water-efficient irrigation practices encouraged by payments from juniors); or (2) one that involves complete curtailment of rights that post-date May 12, 1960. Their flippant suggestions of other plan alternatives ignores the evidence that those elements either already exist in the GMP or were rejected as unworkable because, absent the senior right holders changing their practices, the juniors would have to reduce their use to zero, i.e. total curtailment. Ex. 3-2 ¶¶22-24. A GMP that involves complete or nearly complete curtailment of junior rights is no different than what could be achieved without a GMP and would not justify any investments in water-saving technologies. Ex. 3-2 ¶37; Ex. 3-4 ¶8.

The impending deadline in NRS 534.110(7) also constitutes irreparable harm. In cavalier disregard for the thousands of hours that were spent to develop the GMP, the district court and the GMP Opponents contend the DNRPCA Appellants should simply start working now on a new plan. To do so would deny them of the benefits afforded them by the Legislature and would be a monumental waste of time when the existing GMP complies with Nevada law. Ex. 3-2 ¶¶23-24.

Even should the DNRPCA Appellants be forced to restart the planning process, there is insufficient time to get a new plan approved within the time constraints of NRS 534.110(7). Ex. 3-2 ¶¶20, 38. The DNRPCA Appellants already explored numerous different plan options and rejected those that would require complete or near-complete curtailment. Yet the arguments of the GMP Opponents, if accepted, would lead to no other acceptable plan than one that allows the seniors to continue to pump the full amount of their permits and the juniors to pump nothing. This is irreparable harmed.

F. The Object of the Appeal – to Implement the GMP and Be Allowed to Achieve its Objectives – Will be Frustrated Absent a Stay

Notwithstanding the district court and the GMP Opponents' mischaracterization, the purpose of this appeal is to keep the GMP in place in order to achieve its objectives to reduce pumping, restore aquifer health, and maintain the economic and social vitality of Eureka County. Absent the continued implementation of the GMP, these objectives will be derailed. Pumping will

continue unabated, leading to the associated negative impacts on groundwater levels. And in 2025, the majority of groundwater users could be ordered to cease irrigating entirely.

The GMP Opponents do not dispute the evidence that a positive trend in groundwater levels has coincided with the water-saving measures employed in anticipation and implementation of the GMP. Ex. 3-2 ¶30; Ex. 3-3 ¶8; Ex. 3-4 ¶¶4-5. They also do not dispute that the holders of a majority of **senior** rights approved the GMP. Ex. 1 (ROA 4); Ex. 3-2 ¶19. In other words, most of those who, without a GMP, would not need to reduce their water use want to see the GMP get implemented for the benefit of Diamond Valley as a whole.

If no stay is issued, but the Court ultimately upholds the GMP, the intervening delay will have squandered the opportunity to ameliorate the over-pumping problem. The pre-GMP conditions signal that, absent the GMP, the groundwater levels will continue to decline. This Court's precedent indicates that a stay should issue under precisely these circumstances. *See Mikohn Gaming*, 120 Nev. at 251, 89 P.3d at 38. Neither the GMP Opponents nor the district court even addressed this binding authority.

G. The Equities Favor a Stay

The vitriolic tenor of the GMP Opponents' attacks on the DNRPCA Appellants has no justification and is unsupported by the record. Preliminarily,

Sadler and Renner's accusation that "junior priority irrigators" have "unclean hands" is odd because that is their status as well; they do not own any senior certificates and all their statutory permits post-date May 12, 1960. Ex. 1 (499-509). It's a strange case of the pot calling the kettle black.

The junior right holders towards whom the GMP Opponents spew so much venom have done nothing inequitable by exercising their duly approved groundwater appropriations. Just like the "seniors," the junior appropriators have been working their farms in good-faith reliance on, and in compliance with, permits issued by the State Engineer. Many of their permits have "junior" status only by happenstance; these appropriators would not learn until 60 years after they filed their applications with the State Engineer that the distinction between "seniors" who can exercise the full amount of their permits and "juniors" who could be cut off completely would be May 12, 1960. As to hundreds of junior appropriators, only a matter of days, weeks or months separate them from this dividing line. Ex. 1 (ROA 499-509). The good-faith exercise of duly issued groundwater permits for 60 years does not constitute "unclean hands."

Likewise, there is nothing inequitable about working in good faith to develop a groundwater management plan that the DNRPCA Appellants believe complied with NRS 534.037 and was consistent with the Legislature's intent in enacting NRS 534.110(7). The DNRPCA Appellants constitute junior ***and senior***

permit holders, and a majority of ***senior*** permit holders support the GMP. Indeed, the Baileys are *the only* senior permit holders to challenge the GMP.

The venomous tone of the GMP Opponents' attacks and their egregious mischaracterization of the DNRPCA Appellants are hardly what comes to mind when considering what is equitable.

> "[E]quity" is a synonym of right and justice; that fairness, justness and right dealing should dominate all … transactions and practices … It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. … Its compulsion is one of fair play.

Ortiz v. Lane, 590 P.2d 1168, 1171 (N.M. 1979) (citations and quotations omitted). If the GMP Opponents' water rights had a May 13, 1960 priority date, it is difficult to imagine them engaging in the same tactics they employ here. None of their caustic arguments alters the conclusion that equity favors a stay.

CONCLUSION

The GMP Opponents' efforts to demonize Appellants is misguided and misleading. A stay that keeps the GMP in place during the appeal is equitable in light of the demonstrated harms to the Appellants should a stay not issue and the absence of harm to the GMP Opponents were the Court to issue a stay. Given that this appeal presents an issue of first impression and has serious statewide implications, and the DNRPCA Appellants have identified numerous legal errors in the district court's Order, they respectfully request that their motion be granted.

AFFIRMATION

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

Date: July 15, 2020

/s/ Debbie Leonard

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on July 15, 2020, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system. All others will be served by first-class mail.

/s/ Tricia Trevino
An employee of Leonard Law, PC

INDEX OF EXHIBITS

Ex. #	Document Description
15.	June 11, 2019 State Engineer's Motion in Limine Exhibits: 1. Email re: Draft Summary of Record on Appeal and Draft Summary of Record on Appeal 2. April 23, 2019 Meet and Confer Letter re: Summary of Record on Appeal 3. First Judicial District Court Case No. 17 OC 00018 1B, Petition for Writ of Mandate and Notice of Voluntary Withdrawal
16.	June 24, 2019 Sadler Ranch, LLC and Ira R. & Montira Renner Opposition to Motion in Limine Exhibits: 1. May 20, 2019 Email from David Rigdon to Tori Sundheim 2. May 21, 2019 Email from Tori Sundheim to David Rigdon 3. April 23, 2019 Meet and Confer Letter from David Rigdon to Tori Sundheim
17.	June 24, 2019 Opposition of Baileys to Motion in Limine Exhibits: 1. May 21, 2019 Email from Chris Mixson to Tori Sundheim, David Rigdon
18.	September 4, 2019 Order Granting Motion in Limine
19.	October 23, 2019 DNRPCA Intervenors' Addendum to Answering Brief Exhibits: 1. March 10, 1999 Minutes of the Assembly Committee on Natural Resources, Agriculture, and Mining 2. March 30, 2011 Excerpts from Minutes of Assembly Committee on Government Affairs
20.	Excerpts from Record on Appeal filed by State Engineer in District Court