IN THE SUPREME COURT OF THE STATE OF NEVADA

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; J&T FARMS, LLC; GALLAGHER FARMS LLC; JEFF LOMMORI; M&C HAY; CONLEY LAND & LIVESTOCK, LLC; JAMES ETCHEVERRY; NICK ETCHEVERRY; TIM HALPIN; SANDI HALPIN; DIAMOND VALLEY HAY COMPANY, INC.; MARK MOYLE FARMS LLC; D.F. & E.M. PALMORE FAMILY TRUST; WILLIAM H. NORTON; PATRICIA NORTON; SESTANOVICH HAY & CATTLE, LLC; JERRY ANDERSON; BILL BAUMAN; AND DARLA BAUMAN; TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; AND EUREKA COUNTY,

Appellants,

vs.

DIAMOND VALLEY RANCH, LLC; AMERICAN FIRST FEDERAL, INC.; BERG PROPERTIES CALIFORNIA, LLC; BLANCO RANCH, LLC; BETH MILLS, TRUSTEE OF THE MARSHALL FAMILY TRUST;

Electronically Filed
Sep 23 2020 08:14 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 81224

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

Respondents.

APPELLANT STATE ENGINEER'S OPENING BRIEF

AARON D. FORD
Attorney General
JAMES N. BOLOTIN
Senior Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: JBolotin@ag.nv.gov
Attorney for Appellant,
State Engineer

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES CITED iii

I. JURISDICTIONAL STATEMENT 1

II. ROUTING STATEMENT 2

III. ISSUES PRESENTED FOR REVIEW 3

IV. STATEMENT OF THE CASE 3

V. STATEMENT OF FACTS 4

VI. SUMMARY OF THE ARGUMENT 15

VII. ARGUMENT 20

A. Standard of Review 20

B. Order 1302 Approving the DV GMP is Supported by Substantial Evidence and Complies with Nevada Water Law and Therefore is Not Arbitrary and Capricious 25

1. Order No. 1302 does not violate the doctrine of beneficial use or NRS 533.035 33

2. Order No. 1302 does not impair vested rights or otherwise violate NRS 533.085(1) 37

3. Order No. 1302 complies with the plain language of NRS 534.037 and 534.110(7), which authorize a departure from the doctrine of prior appropriation 40

a. If the NRS 534.037 and NRS 534.110(7) are deemed ambiguous, the legislative history supports an interpretation that allows the DV GMP to deviate from prior appropriation 47

b. The district court erred by finding evidence of legislative intent in unpassed legislation 50

4. Order 1302 retains the State Engineer's ability to manage the basin and therefore does not violate NRS 533.325 or NRS 533.345 53

5. Despite granting the State Engineer's Motion in Limine, the district court erred by considering evidence outside of the State Engineer's Record on Appeal 61

VIII. CONCLUSION 65

CERTIFICATE OF COMPLIANCE 68

CERTIFICATE OF SERVICE 70

TABLE OF CASES AND AUTHORITIES CITED

CASES

Andersen Family Assoc. v. Ricci,
124 Nev. 182, 179 P.3d 1201 (2008) 22

Apple Inc. v. Super. Ct.,
56 Cal.4th 128, 292 P.3d 883 (2013) 51, 52

Application of Filippini,
66 Nev. 17, 202 P.2d 535 (1949) 21

Bacher v. State Eng'r,
122 Nev. 1110, 146 P.3d 793 (2006) 21, 33

Dyna-Med, Inc. v. Fair Emp't & Housing Comm'n,
43 Cal.3d 1379, 743 P.2d 1323 (1987) 51

Good Samaritan Hosp. v. Shalala,
508 U.S. 402 (1993) 64

Hunt v. Warden, Nev. State Prison,
111 Nev. 1284, 903 P.2d 826 (1995) 48

Ingersoll v. Palmer,
43 Cal.3d 1321, 743 P.2d 1299 (1987) 51

King v. St. Clair,
134 Nev. 137, 414 P.3d 314 (2018) 36

Oakley v. State,
105 Nev. 700, 782 P.2d 1321 (1989) 48

Office of State Eng'r v. Curtis Park Manor Water User's Ass'n,
101 Nev. 30, 692 P.2d 495 (1985) 61

Paramount Ins. v. Rayson & Smitley,
86 Nev. 644, 472 P.2d 530 (1970) 44

Pyramid Lake Paiute Tribe of Indians v. Ricci,
126 Nev. 521, 245 P.3d 1145 (2010) 23

Pyramid Lake Paiute Tribe v. Washoe Cty.,
112 Nev. 743, 918 P.2d 697 (1996) 22

Revert v. Ray,
95 Nev. 782, 603 P.2d 262 (1979) 21, 22, 60, 61

TABLE OF CASES AND AUTHORITIES CITED

CASES

Sierra Pac. Indus. v. Wilson,
135 Nev. 105, 440 P.3d 37 (2019) 23

Speer v. State,
116 Nev. 677, 5 P.3d 1063 (2000) 44

State v. Lucero,
127 Nev. 92, 249 P.3d 1226 (2011) 48

State v. Morros,
104 Nev. 709, 766 P.2d 263 (1988) 22, 33

STATUTES

NRS 30.130 32

NRS Chapter 533 ..... 18, 55

NRS 533.035 ..... 32, 33

NRS 533.085(1) 4, 32, 37, 39

NRS 533.325 ..... 4, 32, 54, 57, 61

NRS 533.345 ..... 4, 32, 54, 57, 58, 61

NRS 533.345(2) 56

NRS 533.345(2)–(4) 55

NRS 533.345(3) 56

NRS 533.370 60

NRS 533.450 ..... 10, 20, 21, 22, 23, 57

NRS 533.450(1) 61

NRS 533.450(10) 21

NRS 533.450(9) 1

NRS Chapter 534 ..... 49, 55

NRS 534.037 ..... 3, 5, 6, 8, 9, 10, 13, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 30, 32, 34, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 52, 53, 54, 60, 62, 65, 66

TABLE OF CASES AND AUTHORITIES CITED

STATUTES

NRS 534.037(1)..... 9, 19, 20, 24, 26, 27, 30, 31, 36, 41, 43, 60

NRS 534.037(1)–(3) 25

NRS 534.037(2)..... 27, 31, 41, 42

NRS 534.037(3)..... 27, 31, 61

NRS 534.037(5)..... 19

NRS 534.090..... 36

NRS 534.110..... 6

NRS 534.110(6)..... 45

NRS 534.110(7)..... 5, 6, 16, 17, 18, 19, 23, 25, 26, 27, 29, 32, 40, 41, 42, 43, 45, 47, 49, 50, 52, 53, 65

NRS 534.110(7)(a) 25, 26

NRS 534.110(7)(b) 25

NRS 534.110(8)..... 24

NRS 534.110(9)..... 6, 16

NRS 534.120(1)..... 17, 24, 31

NRS 534.250–NRS 534.340..... 31

OTHER AUTHORITIES

Minutes of Assemb. Comm. on Gov't Affairs (March 30, 2011), pp. 66–69..... 49

Minutes of Assemb. Comm. on Gov't Affairs (May 4, 2011), p. 23 48

Minutes of S. Comm. on Gov't Affairs (May 23, 2011), p. 16 48

Minutes of S. Comm. on Nat. Res. *(*Feb. 28, 2017) 52

TABLE OF CASES AND AUTHORITIES CITED

RULES

NRAP 3A(a) 1
NRAP 3A(b)(1) 1
NRAP 4(a)(1) 2
NRAP 8(a)(1) 14
NRAP 8(c) 15
NRAP 17(a)(8) 2

I. JURISDICTIONAL STATEMENT

This is an appeal from the final order of the Seventh Judicial District Court of the State of Nevada in and for the County of Eureka, granting three Petitions for Judicial Review filed by Respondents Timothy Lee Bailey, Constance Marie Bailey, Fred Bailey, and Carolyn Bailey ("the Baileys"), Respondent Sadler Ranch, LLC, and Respondents Ira R. Renner and Montira Renner.[1] Joint Appendix (JA) Vol. XI at JA2381–2420.

The district court filed its final order on April 27, 2020, with Notices of Entry of Order being served by both the Baileys and Sadler/Renner on April 30, 2020. JA Vol. XII at JA2421–2464. Jurisdiction is proper pursuant to Nevada Rule of Appellate Procedure (NRAP) 3A(a), NRAP 3A(b)(1), and NRS 533.450(9). Appellant Tim Wilson, P.E., in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer") timely filed his Notice of Appeal with the district court on

/ / /

[1] Sadler Ranch, LLC, Ira R. Renner, and Montira Renner are represented by the same counsel and are collectively referred to as "Sadler/Renner."

May 15, 2020. JA Vol. XIII at JA2704–2797. Accordingly, the State Engineer's appeal is timely pursuant to NRAP 4(a)(1).

Additionally, 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") filed their Notice of Appeal on May 14, 2020, and Appellant Eureka County filed its Notice of Appeal on May 21, 2020. JA Vol. XII at JA2508–2554; JA Vol. XIV JA2808–2811. Therefore, the appeals filed by the DNRPCA Appellants and Eureka County are also timely pursuant to NRAP 4(a)(1).

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(8) as this is an administrative agency case involving water and an order of the State Engineer.

/ / /

III. ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in granting the petitions for judicial review by finding that the State Engineer's Order No. 1302 approving the Diamond Valley Groundwater Management Plan ("DV GMP") violates Nevada water law and is therefore arbitrary and capricious?

B. Whether the district court rendered NRS 534.037 meaningless by invalidating the DV GMP for not strictly adhering to other aspects of the water law, including curtailment under the prior appropriation doctrine, despite finding that the State Engineer complied with NRS 534.037?

IV. STATEMENT OF THE CASE

This appeal arises from the district court's April 27, 2020, Order granting the Petitions for Judicial Review whereby the district court found that the State Engineer's Order No. 1302 approving the DV GMP was arbitrary and capricious because it violated aspects of Nevada water law. JA Vol. XI at JA2381–2420. While the district court found that the State Engineer took the necessary steps under NRS 534.037 to approve the DV GMP, and that substantial evidence supports that conclusion, the

district court found Order No. 1302 to be arbitrary and capricious for violating other aspects of water law, including the doctrine of beneficial use, NRS 533.085(1)'s ban on the impairment of vested rights, the doctrine of prior appropriation, and NRS 533.325 and NRS 533.345. JA Vol. XI at JA2381–2420. The State Engineer appeals these findings and respectfully requests that the Court reverse these portions of the district court's order and reinstate Order No. 1302 and the DV GMP.

V. STATEMENT OF FACTS

Diamond Valley is one of Nevada's most problematic groundwater basins. On the one hand, Diamond Valley has a rich history as a major farming area consisting of approximately 26,000 acres of irrigated land producing primarily premium quality alfalfa and grass hay. JA Vol. II at JA0315; JA Vol. III at JA0538. Through their hard work and struggle, the farmers in Diamond Valley have established a prosperous farming industry in this area, which in 2013 produced approximately 110,000 tons of hay and alfalfa resulting in a farming income of approximately $22.4 million. *Id.* On the other hand, Diamond Valley is severely over-appropriated and over-pumped. The State Engineer has established

the perennial yield[2] of Diamond Valley as 30,000 acre-feet annually ("afa"). JA Vol. II at JA0316. Meanwhile, there are approximately 126,000 afa of irrigation groundwater rights appropriated in Diamond Valley, "and as of 2016, groundwater pumping for irrigation was estimated to be 76,000 afa." *Id*. Over-pumping in Diamond Valley has existed for over 40 years, resulting in declining groundwater levels of more than 100 feet at a rate of up to 2 feet per year in some areas of the basin. JA Vol. II at JA0316; JA Vol. III at JA0627; JA Vol. IV at JA0802. The water issues are well known and have been at the center of meetings held by the State Engineer in Diamond Valley for a number of years. JA Vol. II at JA0316.

Due to these water issues in Diamond Valley, and utilizing the new statutory provisions in NRS 534.037 and NRS 534.110(7) as adopted by the Legislature in 2011, on August 25, 2015, the State Engineer issued Order No. 1264 designating Diamond Valley a Critical Management Area ("CMA") pursuant to NRS 534.110(7). JA Vol. II at JA0316, JA0447–0451. Diamond Valley is the first, and presently the only, groundwater

[2] Perennial yield is the maximum amount of groundwater than can be developed each year over the long term without depleting the groundwater reservoir.

basin in Nevada designated as a CMA. JA Vol. III at JA0539. Pursuant to statute, this CMA designation started a 10-year clock. *See* NRS 534.110(7). So long as Diamond Valley remained a CMA for 10 consecutive years, the State Engineer would be required to order that withdrawals, "including, without limitation, withdrawals from domestic wells,[3] be restricted in that basin to conform to priority rights" (*i.e.*, curtailment) **unless** the State Engineer approved a groundwater management plan ("GMP") pursuant to NRS 534.037. *Id.*; JA Vol. III at JA0538. Although groundwater users in Diamond Valley started meeting to potentially create a GMP as early as March of 2014, in anticipation of a CMA designation, not until August 25, 2015, did the official CMA designation exist, thereby starting the 10-year clock. JA Vol. III at JA0539.

[3] During the Nevada Legislature's 80th (2019) session, the Legislature passed, and the Governor signed into law, AB 95. In doing so, NRS 534.110 was amended to include subsection (9), whereby domestic wells now retain the ability to withdraw up to 0.5 afa of water, which must be recorded by a water meter, where withdrawals are restricted to conform to priority rights by either a court order or pursuant to State Engineer order. At the time of the State Engineer's public hearing on October 30, 2018, and the issuance of Order No. 1302 on January 11, 2019, domestic wells with a junior priority date would have been fully curtailed where withdrawals were restricted to conform to priority rights.

Over the course of the next three years, water right holders in Diamond Valley met regularly, where they considered options for and assembled the DV GMP, aiming to reduce pumping and stabilize groundwater levels in the basin to avoid curtailment by priority. JA Vol. III at JA0539–0540, JA0590–0730; JA Vol. IV at JA0731–0788. Steps were taken to ensure that all groundwater right holders in Diamond Valley were informed of meetings and provided opportunities to be involved in the process. JA Vol. III at JA0539. Early in the process, Diamond Valley water users attended workshops where they developed major portions of the DV GMP. JA Vol. III at JA0540. In February 2016, the water users elected an Advisory Board, consisting of different types of water right holders[4] in Diamond Valley, to do the heavy lifting on the GMP and bring their progress to the larger community-wide workshops for input and decision-making. JA Vol. III at JA0539–0540, JA0590.

[4] At the time of the DV GMP's submission to the State Engineer, the Advisory Board consisted of eight seats: one person representing mining groundwater rights holders, one person representing groundwater rights holders with primary interests in ranching in Diamond Valley and representing claimants with vested spring rights claims on the valley floor, four farmers with both senior and junior rights, and two farmers with all of their groundwater rights being within the first 30,000 afa to have been appropriated in Diamond Valley (*i.e.*, senior rights). JA Vol. III at JA0543.

At all times, the goal was to create a plan that was adapted to "local needs, desires, and constraints." *Id.*; *see also* JA Vol. III at JA0628 (July 2, 2015, Eureka Sentinel article regarding a "community-based approach to addressing water resource management."). An overarching concept of the DV GMP was the idea that the DV GMP was not designed to, nor does it, address inequities of the past or old decisions; rather, the DV GMP "starts with current pumping levels and current water rights in good standing and works forward to reduce pumping to sustainable levels."[5] JA Vol. IV at JA0784.

Pursuant to NRS 534.037, water right holders in Diamond Valley filed a Petition to Adopt a Groundwater Management Plan with the State Engineer on August 20, 2018. JA Vol. II at JA0315, JA0461. In accordance with the statute, this is where the State Engineer's consideration of the DV GMP began. While the water users assembling the DV GMP occasionally requested input from the State Engineer and staff at the Division of Water Resources ("DWR") and DWR staff

[5] Reduction of pumping to sustainable levels (*i.e.*, withdrawals not causing continued groundwater decline) would demonstrate that conditions were appropriate for the State Engineer to consider removal of the CMA designation.

members often attended the DV GMP workshops to serve as a resource, the DV GMP was ultimately assembled by the water users in Diamond Valley and was submitted as a community-based approach to resolving the groundwater issues. *See* JA Vol. III at JA0590–0730, JA Vol. IV at JA0731–0788.

In accordance with NRS 534.037, after adhering to the mandatory notice provisions, the State Engineer held a public hearing on October 30, 2018, during which he took public testimony in favor of and in opposition to the DV GMP submitted to his office. JA Vol. II at JA0316–0317; JA Vol. V at JA0966. Following the hearing, the State Engineer held open the period for written public comment for three working days after the hearing. JA Vol. II at JA0317; JA Vol. V at JA1054. Following the hearing, and based upon the DV GMP as submitted with the petition to the State Engineer, the State Engineer considered the required statutory factors and determined that a majority of the holders of permits or certificates to appropriate water in Diamond Valley signed the Petition. JA Vol. II at JA0315–0332. Based upon these considerations, and a determination that the DV GMP set forth the necessary steps for removal of Diamond Valley's CMA designation per NRS 534.037(1), the

State Engineer approved the DV GMP via Order No. 1302 on January 11, 2019. *Id.*

As provided for in NRS 534.037, Respondents[6] timely filed Petitions for Judicial Review challenging Order No. 1302 pursuant to NRS 533.450. JA Vol. I at JA0001–0144. Upon stipulation of the parties, on March 27, 2019, the district court entered an order consolidating all Petitions for Judicial Review into a single case, Case No. CV1902-348. JA Vol. I at JA0162–0182. On April 3, 2019, Eureka County filed its Motion to Intervene in the consolidated cases. JA Vol. I at JA0145–0161. The district court held a telephone status conference on April 9, 2019, with the parties and Eureka County to discuss briefing and other procedural matters. JA Vol. I at JA0183–0186. During the conference, the parties discussed the State Engineer's Record on Appeal ("SE ROA"). The State Engineer objected to Respondents' proposed use of extra-record evidence or to judicial supplementation of the SE ROA, but agreed to meet and confer for the limited purpose of considering for inclusion in the

[6] Daniel S. Venturacci was also originally named as a joint Petitioner in Sadler Ranch's Petition for Judicial Review, but Mr. Venturacci withdrew himself from this matter via the Notice of Withdrawal filed on or about June 10, 2019. JA Vol. VI at JA1269–1271.

SE ROA any clerical errors or inadvertent omissions Respondents might identify. Thereafter, the district court ordered the State Engineer to file the SE ROA on April 30, 2019. JA Vol. I at JA0185. Further, the district court ordered that "legal counsel for the parties shall meet and confer by telephone . . . for the purpose of discussing the contents of the [SE ROA], as filed, [and] any proposed supplemental exhibits to the [SE ROA]." *Id*.

The State Engineer prepared the SE ROA for filing and shared the Draft Summary of the Record (index) with all parties on April 16, 2019. Upon reviewing the State Engineer's Draft Summary of the Record, Respondents did not send any "proposed supplemental exhibits" that were inadvertently omitted, in accordance with the district court's prior order and the State Engineer's expectations. Instead, on April 23, 2019, Respondents submitted a "meet and confer letter," seeking to include in the SE ROA a list of documents, which were not part of the record relied upon in the issuance of Order No. 1302; in reality, the letter was more similar to a public records request seeking some 50 years of records relating to the Diamond Valley Hydrographic Basin.

On or about May 10, 2019, Real Parties-in-Interest DNRPCA Appellants filed a Motion to Intervene to defend the DV GMP. JA Vol. I

at JA0191–0224. The district court held another telephonic status conference on June 4, 2019, where the SE ROA issue was again raised. *See* JA Vol. VI at JA1266–1268. The district court formally granted Eureka County's Motion to Intervene on April 30, 2019, and formally granted the DNRPCA Appellants' Motion to Intervene on May 29, 2019. JA Vol. I at JA0189–0190, JA0233–0234.

In order for the State Engineer to consider the full scope of the requests listed in the meet and confer letter, the parties stipulated to an extension of time to file the SE ROA on April 26, 2019. JA Vol. I at JA0187–0188. The State Engineer filed a subsequent Request for Extension of Time to file the Record on June 7, 2019, which the district court granted. JA Vol. I at JA0235. Unable to reach an agreement with Respondents regarding the contents of the SE ROA, on June 11, 2019, the State Engineer filed the SE ROA with the district court accompanied by a Motion in Limine seeking to limit the evidence considered in this matter to the SE ROA. JA Vol. II–VI at JA0236–1265. The Motion in Limine received a full briefing, with the Baileys and Sadler/Renner opposing the Motion in Limine and Eureka County and the DNRPCA Appellants filing joinders to the Motion in Limine. JA Vol. VI at

JA1272–1317, JA1331–1353. On or about July 31, 2019, the Marshall Family Trust filed a Motion to Intervene, and on August 1, 2019, Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC, and Blanco Ranch, LLC, filed a Motion to Intervene to file an answering brief and participate in the proceedings as respondents. JA Vol. VI at JA1354–1368.

On September 4, 2019, the district court issued its Order Granting Motion in Limine, making two key findings. JA Vol. VI at JA1369–1378. First, the district court ordered that all evidence in the case shall be limited to the SE ROA, as filed by the State Engineer on June 7, 2019. JA Vol. VI at JA1378. Second, the district court found that "the public hearing process to consider the GMP under NRS 534.037 provided notice and the opportunity for anyone to be heard and to offer evidence, thus satisfying due process standards." *Id.* Therefore, in making its determination whether there is substantial evidence in the record to support the State Engineer's Order No. 1302, the district court held that it would "only consider that which was presented at the public hearing held October 30, 2018, or the comments and evidence submitted before November 2, 2018, at 5:00 p.m." JA Vol. VI at JA1377–1378.

The parties timely submitted their briefs[7] to the district court, and the district court held oral argument at the Eureka Opera House in Eureka, Nevada, on December 10–11, 2019. JA Vol. VII–XI at JA1838–2380; *see also* JA Vol. XI at JA2382–2383. On April 27, 2020, the district court filed its order entitled "Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review." JA Vol. XI at JA2381–2420. Notice of Entry of Order was served by both the Baileys and Sadler/Renner on April 29, 2020. JA Vol. XII at JA2421–2507. Appellants in this matter timely filed notices of appeal, with the DNRPCA Appellants filing their Notice of Appeal on May 14, 2020, the State Engineer filing his Notice of Appeal on May 15, 2020, and Eureka County filing its Notice of Appeal on May 21, 2020. JA Vol. XII at JA2508–2554; JA Vol. XIII at JA2704–2797; JA Vol. XIV at JA2803–2807.

Pursuant to NRAP 8(a)(1), the DNRPCA Appellants simultaneously filed a motion for stay pending appeal with the district

[7] Despite requesting, and being granted, intervention, Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC, Blanco Ranch, LLC, and Beth Mills, Trustee of The Marshall Family Trust, did not ultimately participate in either the briefing or the oral argument at the district court.

court on May 14, 2020, that was subsequently joined by the State Engineer and Eureka County. JA Vol. XIII at JA2555–2703, JA2798–2802; JA Vol. XIV at JA2812–2815. After this motion was fully briefed, the district court issued an order denying the motion for stay pending appeal on June 30, 2020. JA Vol. XIV at JA3009–3013.

Following the district court's denial, the DNRPCA Appellants filed an Emergency Motion for Stay Pending Appeal with this Court on July 6, 2020. This Motion was once again joined by the State Engineer and Eureka County. After the Motion was fully briefed, the Supreme Court denied the Emergency Motion for Stay on August 18, 2020, finding that the NRAP 8(c) factors do not militate in favor of a stay. *See* Order Denying Stay.

The State Engineer now timely submits this Opening Brief.

VI. SUMMARY OF THE ARGUMENT

The State Engineer respectfully requests that this Court reverse the portions of the district court's order holding that Order No. 1302 and the DV GMP are arbitrary and capricious for violating aspects of Nevada water law. The State Engineer further requests reinstatement of Order No. 1302 and the DV GMP.

The district court ultimately found that substantial evidence in the State Engineer's Record on Appeal supported a finding that the State Engineer complied with the GMP statute, NRS 534.037, in approving the DV GMP. JA Vol. XI at JA2392–2400. However, the district court deemed Order No. 1302 arbitrary and capricious for violating other aspects of Nevada water law existing outside of NRS 534.037 and NRS 534.110(7). The State Engineer's compliance with NRS 534.037 in approving the DV GMP was sufficient for Order No. 1302 to be upheld. The community-driven GMP option established by NRS 534.037 provides an unambiguous exception to other aspects of Nevada water law so long as the requirements within that statute are met. This is made clear by the statutory consequence of a community failing to adopt a GMP within 10 years of a basin's CMA designation: strict application of the prior appropriation doctrine resulting in curtailment by priority rights, including domestic wells.[8] NRS 534.110(7).

/ / /

[8] Pursuant to NRS 534.110(9) adopted by the Legislature in 2019, domestic wells can no longer be fully curtailed but must be allowed to continue to withdraw 0.5 acre-feet of water per year, "which must be recorded by a water meter."

The district court's order makes clear that, in its opinion, a proper GMP is one that adheres strictly to all other provisions of existing water law. Respectfully, this finding was an error by the district court. The purpose of the GMP statute is to provide a last resort for those basins in the most dire of straits to work together as a community to create a plan that reduces groundwater pumping to levels acceptable to the State Engineer to avoid curtailment. *See* NRS 534.037; NRS 534.110(7). NRS 534.037 provides appropriators in a basin designated as a CMA the ability to adopt a majority-approved plan for reducing groundwater use that, if approved by the State Engineer, will spare the basin's water users from mandatory curtailment and the deleterious fallout to the local community that comes with it.

If the State Engineer is persuaded that a GMP includes the necessary steps for removal of a basin's CMA designation after considering the necessary factors and holding a public hearing, then that is sufficient for the State Engineer to approve the GMP. While the State Engineer retains his authority pursuant to NRS 534.120(1) if a GMP is not working as planned, the goal of a GMP adopted pursuant to NRS 534.037 is to allow the community to make the tough decisions and

impose on itself new ground rules for groundwater withdrawals in an effort to remove a CMA designation and avoid curtailment.

That is exactly what happened in Diamond Valley with the DV GMP, and the district court actually agreed that the State Engineer fully complied with NRS 534.037. JA Vol. XI at JA2392–2400. However, the district court nonetheless overturned Order No. 1302 and invalidated the DV GMP based upon violations of other aspects of Nevada water law in NRS Chapter 533 and common law that are not required by the plain language of NRS 534.037. These findings by the district court were erroneous, and the district court's ultimate overturning of Order No. 1302 should be reversed.

The district court's interpretation of NRS 534.037 effectively renders the statute and the GMP process meaningless. NRS 534.037 includes specific factors and procedures that must be followed for approval of a GMP. These are adequate safeguards intended to allow the GMP process to exist as a substitute for other remedies in prior existing law. Why would a GMP need to adhere to strict principles of prior appropriation if such principles are an explicit consequence of failing to adopt a GMP in a CMA? *See* NRS 534.110(7). Such interpretations are

antithetical to the intent of NRS 534.037 as illustrated by the statute's plain, unambiguous language.

NRS 534.037(1) requires any GMP to first be approved by a majority of holders of permits or certificates in the applicable CMA basin before subsequently being approved by the State Engineer. This majority vote, combined with the State Engineer's review, is a significant safeguard that allows a community to try out-of-the-box solutions before the State Engineer is required to implement prior existing law and curtailment by priority. Similar safeguards are in place to the extent that amendments to the GMP are determined to be necessary later. NRS 534.037(5). By interpreting the GMP statute in a fashion that nonetheless mandates that water users in a CMA comply with all other aspects of Nevada water law, even with a GMP in place, the district court is essentially mandating curtailment by another name. This interpretation leads to an absurd result considering that curtailment is already required where the water users in a CMA fail to adopt a GMP within 10 years. NRS 534.110(7).

Ultimately, the district court was persuaded by the Baileys and Sadler/Renner, who were in the minority of water users in Diamond

Valley who did not vote to approve the DV GMP. In fact, even a majority of **senior** water users in Diamond Valley voted to approve the DV GMP. JA Vol. II at JA0317. NRS 534.037(1) requires a simple majority, and that is what the DV GMP received. This minority of water users who did not want to approve the DV GMP were outvoted by a majority that spent years crafting a plan to save their community's way of life. The State Engineer respectfully requests that this Court reverse the district court's order on those points regarding violations of Nevada water law and reinstate Order No. 1302 and the DV GMP.

Lastly, the district court erred in allowing the introduction of certain evidence outside of the SE ROA, despite previously granting the State Engineer's Motion in Limine, and erred by determining legislative intent based upon unpassed legislation.

VII. ARGUMENT

A. Standard of Review

Water law proceedings, like this, are special in character and the provisions of NRS 533.450 establish the boundaries of the court's review and strictly limits the review to the narrow confines established under the statute and as interpreted by the Nevada Supreme Court.

See Application of Filippini, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) ("It is also well settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but **strictly limits** it to that provided." (emphasis added)). All proceedings to review a decision of the State Engineer are subject to the provisions of NRS 533.450, which explicitly provides in part that such proceedings are "in the nature of an appeal" and are "informal and summary."

The court's review of a decision brought under NRS 533.450 is limited to deciding whether the State Engineer's decision is supported by substantial evidence. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.* When reviewing a decision or order of the State Engineer, the court may not "pass upon the credibility of the witness nor reweigh the evidence." *Id.*; *see also Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006).

The Legislature has specified that "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(10); *see also Revert*,

95 Nev. at 786, 603 P.2d at 264. Generally, the State Engineer's "factual determinations will not be disturbed" by the reviewing court on a petition for judicial review pursuant to NRS 533.450 so long as they are "supported by substantial evidence." *Pyramid Lake Paiute Tribe v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (internal citations omitted). However, if the court determines that the State Engineer's decision was "arbitrary and capricious," and therefore an abuse of discretion, the court may then overrule the State Engineer's conclusions. *Id.*

Further, the Nevada Supreme Court has explained that "an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action," and therefore "great deference should be given to the agency's interpretation when it is within the language of the statute." *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (internal citations omitted); *see also Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) ("[B]ecause the appropriation of water in Nevada is governed by statute, and the State Engineer is authorized to regulate water appropriations, that office has the implied power to

construe the state's water law provisions and great deference should be given to the State Engineer's interpretation when it is within the language of those provisions."). However, where a court is reviewing the State Engineer's decision on a pure question of law, the State Engineer's ruling is persuasive, but not entitled to deference. *Sierra Pac. Indus. v. Wilson*, 135 Nev. 105, 108, 440 P.3d 37, 40 (2019) (citing *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (Stating that the Nevada Supreme Court "review[s] purely legal questions without deference to the State Engineer's ruling.")).

Therefore, NRS 533.450 provides the basis and the limit for challenging decisions of the State Engineer. Accordingly, this Court's review is limited to whether substantial evidence in the record on appeal supports the State Engineer's decision and whether that decision is therefore arbitrary and capricious.

However, this is the first case challenging a groundwater management plan created by the community members in a basin pursuant to NRS 534.110(7) and approved pursuant to NRS 534.037, as the State Engineer was persuaded that the GMP includes the necessary steps for removal of the CMA designation by the end of the GMP's

planning horizon. Thus, this case is dissimilar to other cases reviewing State Engineer orders, such as those issued pursuant to NRS 534.110(8) or NRS 534.120(1), where the State Engineer, with the assistance of DWR staff, generates his own order as he deems necessary for the welfare of an area. Rather, under NRS 534.037, the State Engineer's role is to **approve** a GMP submitted to him with a petition "signed by a majority of the holders of permits and certificates to appropriate water in the basin that are on file in the Office of the State Engineer" that "set[s] forth the necessary steps for removal of the basin's designation as a [CMA]." NRS 534.037(1).

The State Engineer is not provided with an opportunity to make edits, changes, or suggestions to a submitted groundwater management plan; such changes would not be appropriate as a groundwater management plan is a community-driven solution, and there is no guarantee that such edits would receive the majority support required by NRS 534.037(1). Instead, the State Engineer is charged with approving or disapproving a groundwater management plan on the basis of whether it includes the steps necessary for removal of a basin's designation as a CMA after considering the hydrology of the basin, the physical

characteristics of the basin, the geographic spacing and location of the withdrawals of groundwater in the basin, the quality of the water in the basin, the wells located in the basin, whether a groundwater management plan already exists for the basin, and any other factor he deems relevant, and holding a public hearing. NRS 534.037(1)–(3). Therefore, the abuse of discretion standard of review in this case should be applied to the State Engineer's determination made pursuant to NRS 534.037 after following the statutory requirements.

B. Order 1302 Approving the DV GMP is Supported by Substantial Evidence and Complies with Nevada Water Law and Therefore is Not Arbitrary and Capricious

The State Engineer's role in the process outlined in both NRS 534.110(7) and NRS 534.037 is unique, and his role cannot be conflated with that of the water right holders who develop and petition for approval of a groundwater management plan. Per NRS 534.110(7)(a), the State Engineer "[m]ay designate as a [CMA] any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin." This differs from the mandatory CMA designation provision in NRS 534.110(7)(b) where he receives "a petition for such a designation which is signed by a majority of the holders of certificates or permits to

appropriate water in the basin that are on file in the Office of the State Engineer." Under the permissive CMA designation statute, NRS 534.110(7)(a), the State Engineer used his discretion to designate Diamond Valley as a CMA in Order No. 1264 on August 25, 2015. *See* JA Vol. II at JA0316.

If a basin has been designated as a CMA for at least 10 consecutive years, the State Engineer is required to "order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights, **unless** a groundwater management plan has been **approved** for the basin pursuant to NRS 534.037." NRS 534.110(7) (emphasis added). NRS 534.037 provides groundwater users in a basin designated as a CMA with an opportunity to come together and create a groundwater management plan and petition the State Engineer for approval of the groundwater management plan. *See* NRS 534.037(1). In deciding whether to approve a GMP, the State Engineer must consider, without limitation:

(a) The hydrology of the basin;
(b) The physical characteristics of the basin;
(c) The geographical spacing and location of the withdrawals of groundwater in the basin;

(d) The quality of the water in the basin;
(e) The wells located in the basin, including, without limitation, domestic wells;
(f) Whether a groundwater management plan already exists for the basin; and
(g) Any other factor deemed relevant by the State Engineer.

NRS 534.037(2). Lastly, "[b]efore **approving or disapproving** a groundwater management plan submitted pursuant to [NRS 534.037(1)], the State Engineer shall hold a public hearing to take testimony on the plan in the county where the basin lies or, if the basin lies in more than one county, within the county where the major portion of the basin lies." NRS 534.037(3) (emphasis added). The public hearing must be properly noticed for two consecutive weeks preceding the hearing. *See id*.

It is clear from the plain language of NRS 534.037 and NRS 534.110(7) that the State Engineer has two options when presented with a petition for approval of a GMP: approve or disapprove. Despite the district court's order and Respondents' arguments below that the State Engineer could have considered other methods of reducing pumping for the DV GMP, NRS 534.037 does not empower the State Engineer to consider alternatives to majority approved groundwater

management plans submitted for his review and approval. *See* JA Vol. VII at JA1418, JA1472–1473.

The State Engineer's role in the GMP process is statutorily limited to a thumbs-up or thumbs-down determination on a plan assembled and agreed to by a majority of the water right holders in a CMA basin. *See* NRS 534.037. It is not arbitrary and capricious for the State Engineer to limit his focus to the majority approved groundwater management plan he receives rather than looking to alternatives that the water users could have used. Rather, the State Engineer is neither required, nor permitted under the statutes, to consider alternatives to supplant the work done by the community members in assembling a given groundwater management plan and agreed to by a majority via the signed petition.

GMPs under NRS 534.037 are ultimately designed, assembled, and agreed upon by the community they affect, and that is the case with the GMP submitted and approved for Diamond Valley in Order No. 1302. JA Vol. III–IV at JA0530–0840. Respondents Sadler/Renner, however, made the unsubstantiated allegation at the district court that the DV GMP is actually "as much a creation of the State Engineer as it was

of the water users." JA Vol. VII at JA1394. This baseless allegation profoundly misstates the State Engineer's and DWR's role in this process.

The State Engineer and DWR staff are public servants, tasked with the important job of conserving, protecting, managing and enhancing the State's water resources for Nevada's citizens through the appropriation of the public waters. In this role of serving Nevada's citizens, DWR prides itself on being a customer-service oriented agency frequently serving in an advisory role. Rather than acting as a black box, and requiring water users to submit a GMP blindly, the State Engineer and DWR staff were willing to provide expertise when requested. This is especially important with the DV GMP that requires significant oversight and included having a staff member on hand at workshops. *See* JA Vol. III–IV at JA0530–0560, JA0590–0788.

The fact that former-State Engineer Jason King informed water users in Diamond Valley that it would be a good idea "to begin the process of developing a GMP" does not illustrate some nefarious intent as alleged by Sadler/Renner. *See* JA Vol. VII at JA1394. Rather, this is an example of the State Engineer providing sound advice to the citizens of Diamond Valley, given that NRS 534.110(7) had been enacted into law and the

well-known fact that Diamond Valley had severe and consistent over-pumping issues.

None of this changes the fact that this GMP is the community's plan, and a majority of water right holders in Diamond Valley, as required by NRS 534.037(1), petitioned for its approval. Once this petition reached the State Engineer's desk, and after consideration of the necessary factors and a public hearing, the State Engineer's role was limited to one thing: approval or disapproval. *See* NRS 534.037. The State Engineer properly adhered to his statutory role in ultimately approving the DV GMP after consideration of all comments from the public hearing in issuing Order No. 1302, and substantial evidence supports this decision.

Importantly, the district court actually found that substantial evidence supported the finding the State Engineer followed NRS 534.037 in approving the DV GMP in Order No. 1302. *See* JA Vol. XI at JA2392–2400. In the district court proceedings, the Baileys and Sadler/Renner attacked the procedure that the State Engineer used to approve the DV GMP pursuant to NRS 534.037 in Order No. 1302, including allegations that: the public hearing process was improper

under NRS 534.037(3), the State Engineer failed to consider the necessary factors under NRS 534.037(2), the State Engineer improperly delegated his authority to manage the Diamond Valley basin under the GMP, Order 1302 violates Nevada's aquifer storage and recovery statutes ("ASR") (NRS 534.250 to NRS 534.340), and the State Engineer improperly counted the signatures, or votes, and therefore there was no true majority as required by NRS 534.037(1). *See* JA Vol. XI at JA2392–2400; *see also* JA Vol. I at JA0001–0144, JA Vol. VII at JA1383–1490, JA Vol. IX at JA1786–1945.

The district court rejected these arguments from Respondents and found that substantial evidence supported the State Engineer on these issues. *See* JA Vol. XI at JA2392–2400. Specifically, the district court found that the State Engineer's public hearing afforded Respondents due process, that the State Engineer considered the applicable NRS 534.037(2) factors prior to approving the DV GMP, that the State Engineer retains his authority to manage the Diamond Valley basin pursuant to NRS 534.120(1), that Order No. 1302 does not violate Nevada's ASR statutes, and that Respondents failed to show that the State Engineer violated NRS 534.037(1) when he compiled the

signature/vote count. *See* JA Vol. XI at JA2392–2400. Thus, the district court held that the State Engineer followed the GMP statute in approving the DV GMP, and that substantial evidence supports this conclusion. *Id*. Respondents did not appeal these findings.

The district court nonetheless invalidated Order No. 1302 by finding that the State Engineer's approval of the DV GMP violated other tenets of Nevada's water law outside of NRS 534.037 and NRS 534.110(7). *See* JA Vol. XI at JA2401–2420. Specifically, the district court found that Order No. 1302 violates the doctrine of beneficial use and NRS 533.035, impairs vested rights in violation of NRS 533.085(1), violates the doctrine of prior appropriation, and violates NRS 533.325 and NRS 533.345. *Id*. By holding that the State Engineer followed NRS 534.037, but nonetheless invalidating Order No. 1302 based on other alleged violations of the law, the district court essentially invalidates NRS 534.037 altogether. However, no party requested declaratory relief of this nature or followed the proper procedure to deem the GMP statute(s) unconstitutional. *See* NRS 30.130. These conclusions were erroneous, and the district court erred in granting the petitions for judicial review and invalidating Order No. 1302 and the DV GMP on

these bases. The State Engineer addresses each of these findings in turn below.

1. Order No. 1302 does not violate the doctrine of beneficial use or NRS 533.035

Beneficial use is the basis, the measure, and the limit of the right to use Nevada's water resources. NRS 533.035; *see also Bacher v. State Eng'r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006). Types of beneficial uses can be established by practical necessity and decisions of the Nevada Supreme Court, in addition to longstanding custom and statutes. *State v. Morros*, 104 Nev. 709, 714, 766 P.2d 263, 267 (1988).

The district court erred in finding that the DV GMP violates beneficial use. At the district court, both sets of Respondents challenged the GMP's treatment of proofs of beneficial use ("PBUs"), albeit in different ways. The Baileys challenged the fact that, under the DV GMP, unperfected permitted water rights (those that have not filed PBUs to be certificated) are converted into shares that can be banked. JA Vol. VII at JA1478–1481. The Baileys alleged that in doing so, the GMP unlawfully "automatically perfected" permitted rights through no actual beneficial use, and that the banking system itself is a new, unsupported form of beneficial use. *Id.* Sadler/Renner, on the other hand, challenged

the DV GMP's freezing of abandonment and forfeiture proceedings and the subsequent automatic grant of extensions of time by virtue of Order Nos. 1305 and 1305A. JA Vol. VII at JA1419–1420.

The district court ultimately found that Order No. 1302 violates the doctrine of beneficial use and NRS 533.035 because shares of water are provided to those with permits that have not proven up beneficial use. JA Vol. XI at JA2401–2403. This finding was an error and should not have invalidated the DV GMP. When a permit is issued to a water right holder, the holder of that permit is entitled to the use of the public's water within the confines of the permit terms as long as the permit is in good standing. Pumping is not contingent on holding a certificate as contended by the Baileys. This is the crux of the issue in Diamond Valley and the DV GMP is the community-based solution offered in accordance with NRS 534.037.

Specifically, not all permits and certificates are currently being pumped. Additionally, there are senior permitted water rights, which exist as changes to previously certificated rights where the PBU has not

/ / /

/ / /

been filed.[9] Rather, the key to the GMP is that "reductions in pumping by the GMP start at the ceiling of *actual pumping* (76,000 afa), not at the ceiling of existing rights (126,000 afa)." JA Vol. II at JA0324. Thus, pumping will never exceed the levels in the years preceding the adoption of the DV GMP and will drop over the course of the DV GMP to eventually lead to removal of Diamond Valley's CMA designation.

While the DV GMP approved in Order No. 1302 does suspend the "use it or lose it" provisions of Nevada water law (as further clarified in Order Nos. 1305 and 1305A), this is because the entire purpose of the DV GMP is to reduce groundwater pumping in Diamond Valley. Strict enforcement, such as pursuing forfeiture or abandonment, would contravene the intent of the DV GMP and negatively affect the basin. Specifically, these processes would slow down the recovery of the basin and the finalization of the DV GMP, as the State Engineer would have to go through various administrative processes and likely end up in court on each one of these decisions. JA Vol. II at JA0323–0324. Further, it would incentivize **more** pumping, as those users facing forfeiture would

[9] *See e.g.* Permit No. 85133 (owned by the Renners), http://water.nv.gov/permitinformation.aspx? app=85133; *see also e.g.* Permit No.72370, http://water.nv.gov/permitinformation.aspx?app=72370.

receive statutorily mandated notice of non-use pursuant to NRS 534.090 and would then likely try to make full use of their water to prove up their actual use of water for a PBU and certificate. *Id*.

The GMP process outlined in NRS 534.037 specifically and expressly applies to the holders of **permits** and **certificates**. Hence, the voting requirement includes permits. *See* NRS 534.037(1). Therefore, both stages of water rights in Diamond Valley that were valid and in good standing at the time of the DV GMP approval are treated as water rights in good standing for purposes of the DV GMP. There is a low probability of success for abandonment proceedings given the necessary elements[10] and it is likely that forfeiture proceedings would actually lead to increased pumping. Therefore, substantial evidence supports the State Engineer's approval on this portion of the DV GMP, as it is a necessary step to reduce pumping and move towards the removal of the CMA designation. The district court erred in finding that these provisions

/ / /

[10] An extended period of nonuse alone is insufficient to prove abandonment of a water right, but rather the State Engineer must show clear and convincing evidence "indicating an intent to abandon." *King v. St. Clair*, 134 Nev. 137, 141, 414 P.3d 314, 317 (2018).

violated water law and erred by invalidating Order No. 1302 and the DV GMP on this basis.

2. Order No. 1302 does not impair vested rights or otherwise violate NRS 533.085(1)

In the district court, Respondents alleged that the DV GMP improperly impacts pre-statutory vested rights, both by failing to mitigate effects to these vested rights caused by junior groundwater pumping and by allowing continued pumping and lowering of the water table. JA Vol. VII at JA1412–1413, JA1485–1487. The district court erred by agreeing with Respondents when it found that the DV GMP impairs vested rights and therefore violates NRS 533.085(1). JA Vol. XI at JA2403–2405. This holding ignores the purpose of the DV GMP and Order No. 1302, again mandating that provisions be included in a GMP that are not required by NRS 534.037 and that Respondents failed to successfully advocate for during the GMP assembly process.

The DV GMP is the community-based, forward-looking solution to addressing over-pumping while protecting Diamond Valley's community and economy to the greatest extent possible. JA Vol. II at JA0315–0332, JA Vol. III–V at JA0530–1055. The entire purpose of the DV GMP (per NRS 534.037), is to reduce pumping to the point where the

State Engineer will remove Diamond Valley's CMA designation. The DV GMP will steadily reduce groundwater withdrawals, thereby improving rather than exacerbating potential impacts to vested rights.

A groundwater management plan 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. The GMP takes steps (albeit more slowly than Respondents desire) to bring groundwater withdrawals in Diamond Valley towards a sustainable level, which will ultimately provide the benefit of protecting senior surface rights. The approval criteria set out in statute are unambiguous and attempts by the Respondents to expand the DV GMP to mitigation of their vested surface water rights is inappropriate. Those are already, or can be, mitigated with groundwater permits. This is the plan with which the majority of holders of permits or certificates in Diamond Valley agreed as the solution to over-pumping and the State Engineer, in following NRS 534.037 and based upon substantial evidence, approved.

It defies logic that a GMP, like this one in Diamond Valley, could impair vested rights. The DV GMP does nothing to exacerbate the

existing pumping, but rather takes steps to reduce that pumping over time, thus reducing the rate of groundwater level declines that has resulted in the impacts to springs within the basin. If anything, the DV GMP will actually benefit vested rights over time. Simply stated, maintaining the status quo prior to the adoption of the DV GMP would only result in the continued groundwater declines, and only lead to further alleged injury to vested rights. And if, as advocated by Respondents, the State Engineer were to order immediate curtailment of all junior rights, the social, economic, and ecological impact would be outright devastating, in contravention of the legislative intent. The DV GMP establishes a structured approach for the reduction of pumping to achieve the ultimate goal—stabilization and equilibrium.

The district court erred by finding that the DV GMP impairs vested rights, in violation of NRS 533.085(1). In reality, it is the current pumping levels that are negatively affecting water levels in Diamond Valley, including any effects to vested rights. The DV GMP does nothing to exacerbate these effects and does not cause impairment to vested rights, but rather will eventually improve the groundwater levels in Diamond Valley such that vested rights should ultimately see benefits

from the DV GMP. The district court's finding of impairment to vested rights should be reversed, and Order No. 1302 should be reinstated.

3. Order No. 1302 complies with the plain language of NRS 534.037 and 534.110(7), which authorize a departure from the doctrine of prior appropriation

One of Respondents' primary arguments for reversing Order No. 1302 was based on the allegation that the DV GMP improperly deviates from the doctrine of prior appropriation. *See* JA Vol. VII at JA1406–1412, JA1471–1478. The district court erred in granting the Petitions for Judicial Review on this basis. JA Vol. XI at JA2405–2407. This interpretation negates the intent of NRS 534.037 and NRS 534.110(7), and effectively renders the GMP process meaningless.

The prior appropriation doctrine is an important aspect of Nevada water law. The Legislature was aware of this when enacting NRS 534.037 and NRS 534.110(7). The plain language of these statutes 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 DV GMP.

In 2011, recognizing the issues surrounding over-appropriated and over-pumped groundwater basins in Nevada, the Legislature enacted

NRS 534.037 and NRS 534.110(7). NRS 534.110(7) shows the Legislature's clear recognition of the prior appropriation doctrine, requiring junior priority rights to be curtailed in favor of senior priority rights where a basin has been designated a CMA for at least 10 consecutive years. *See* NRS 534.110(7) ("If a basin has been designated as a critical management area for at least 10 consecutive years, the State Engineer shall order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights."). However, the Legislature provided an exception to this application of the prior appropriation doctrine where "a groundwater management plan has been approved for the basin pursuant to NRS 534.037." *Id*.

As discussed previously, NRS 534.037 provides that water users in a basin may assemble a GMP and then petition the State Engineer for approval. NRS 534.037(1). In deciding whether to approve or disapprove a GMP, the State Engineer must determine whether it sets forth the necessary steps for removal of the basin's CMA designation and must consider certain factors in reaching that determination. NRS 534.037(1); (2). Absent from this list of factors is any requirement

that the proposed groundwater management plan comply with the strict application of the prior appropriation doctrine. *See* NRS 534.037(2).

The State Engineer does not disagree with the observation that the DV GMP does not adhere strictly to prior appropriation; in fact, the State Engineer said this himself in Order No. 1302, acknowledging "that the [DV GMP] does deviate from the strict application of the prior appropriation doctrine with respect to 'first in time, first in right.'" JA Vol. II at JA0319. However, as noted in Order No. 1302, 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. In short, the statute authorizes the water users to consider out-of-the-box solutions to resolve the conditions leading to the CMA designation, and provides the State Engineer with authority to approve a GMP that includes these out-of-the-box solutions. This includes a GMP, like the DV GMP, that deviates from prior appropriation considering that prior appropriation is the default consequence where no GMP is adopted in a CMA. *See* NRS 534.110(7).

/ / /

The result is not absurd, as the Baileys alleged below, but rather provides necessary flexibility in an area of the law that was previously rigid and leaves only draconian options. Any plan would require the water users to come together and reach a consensus such that a majority of the holders of permits or certificates to appropriate water in the basin sign the petition for a GMP's approval. NRS 534.037(1). Thus, this process will ferret out any of infeasible ideas such as those examples provided by the Baileys at the district court. *See* JA Vol. VII at JA1475. Then, once this majority is reached, the GMP must still be approved by the State Engineer; if it does not include steps necessary for removal of a basin's CMA designation, the State Engineer cannot and will not approve it. *See* NRS 534.037.

Here, water users in Diamond Valley came up with a plan that garnered majority support, including support from a substantial amount of senior water rights holders. JA Vol. II–V at JA0461–1055. This type of community-based solution is exactly what the unambiguous language of NRS 534.037 and NRS 534.110(7) provide, and it is proper to allow the water users themselves to consider the type of solutions that are appropriate for their specific circumstances, community, and needs.

As discussed by the Baileys, "statutory language should be construed to avoid absurd results and 'no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can be properly avoided.'" *Speer v. State*, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000) (citing *Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)). As mentioned previously, the State Engineer can only consider a GMP submitted for approval, not potential alternative plans. *See* NRS 534.037. That being said, the Baileys provided some alternatives to the district court that they believe would have complied with the law. *See* JA Vol. VII at JA1472–1473. However, they failed to present these plans during the GMP development process and/or failed to persuade a majority of water right holders to agree to these alternatives. Presenting these ideas to the district court, as part of an appellate proceeding, circumvents the process available to the Baileys at the time the DV GMP was developed and violates the intent of NRS 534.037.

Conversely, Sadler/Renner argued that strict adherence to prior appropriation is the only way for the DV GMP to be legal, although there is no support for this in statute. JA Vol. VII at JA1406–1412. If the

Legislature intended strict adherence to prior appropriation then NRS 534.037 and NRS 534.110(7) are rendered useless, contrary to plain statutory interpretation. This cannot be the case as it leads to an absurd result.

Prior to the enactment of NRS 534.037 and NRS 534.110(7), the State Engineer already had the power to curtail junior rights in favor of senior rights via NRS 534.110(6). *See* JA Vol. II at JA0321. Furthermore, NRS 534.110(7) specifically mandates curtailment of junior rights where a basin is designated as a CMA for 10 years **unless** a GMP is approved. What would be the purpose of a GMP if it requires the same result as a 10-year CMA designation? The Legislature clearly intended to allow the water users in the basin to come up with a solution outside of this rigid application of prior appropriation. That is precisely what the water users did with the development of the DV GMP, as approved in Order No. 1302.

All of this being said, it is important to note that the DV GMP does not ignore prior appropriation. Throughout the DV GMP itself, as well as the documents in the SE ROA regarding the steps the water users took to assemble the DV GMP, and the public comments at the hearing, it is

clear that prior appropriation was a factor in the DV GMP's assembly. JA Vol. III–V at JA0530–1055. The central tenet of the DV GMP is a formula whereby the original duty and priority of a water right is converted into shares, and the amount of water allocated to each share is reduced annually. JA Vol. II–III at JA0318–0319, JA0531–0532, JA0545–0546. The DV GMP factors priority into the share allocation process by assigning a higher priority factor to more senior rights, thus resulting in more shares and more water for senior rights holders. *Id*. While the reductions are not borne solely by the junior rights holders in favor of the senior rights holders, the senior rights holders still retain an advantage over junior rights holders in the GMP, as agreed upon by a majority of the permit or certificate holders in Diamond Valley. A majority of senior rights holders in Diamond Valley agreed to this arrangement. JA Vol. II at JA0317.

As long as a GMP has majority support, this is the type of flexibility that the Legislature intended in enacting NRS 534.037. Substantial evidence supports the State Engineer's determination that the DV GMP includes the steps necessary to remove Diamond Valley's CMA designation.

The Legislature clearly envisioned a GMP process whereby a majority of groundwater users could create a plan to reduce pumping that exists outside of the other strict confines of water law. The district court contravened unambiguous legislative intent by finding that a GMP, adopted pursuant to NRS 534.037, must adhere strictly to the doctrine of prior appropriation. Rigid application of prior appropriation is the default if a community fails to create and get approval for a GMP within 10 years of CMA designation. NRS 534.110(7). Requiring a GMP to strictly comply with prior appropriation, when such compliance is mandated in the absence of a GMP, renders NRS 534.037 meaningless. The DV GMP complied with the plain statutory language of these statutes, as did Order No. 1302. The district court erred in finding otherwise.

a. If the NRS 534.037 and NRS 534.110(7) are deemed ambiguous, the legislative history supports an interpretation that allows the DV GMP to deviate from prior appropriation

Assuming *arguendo* that the Court finds that the language of NRS 534.037 and NRS 534.110(7) is ambiguous, such that it looks to legislative history, the limited legislative history supports the interpretation of the statutes advanced by the State Engineer and the

other Appellants. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). The district court erred in finding the opposite.

When interpreting statutes, the Court "resolves any doubt as to legislative intent in favor of what is reasonable, and against what is unreasonable." *Hunt v. Warden, Nev. State Prison*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) (citing *Oakley v. State,* 105 Nev. 700, 702, 782 P.2d 1321, 1322 (1989)). "A statute should be construed in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." *Id.*

Before the Assembly Committee on Government Affairs in 2011, former DWR Deputy Administrator Kelvin Hickenbottom stated that "[w]e do not want to go into a basin and strong-arm people into allowing certain priorities to put water to beneficial use. It would have a huge impact on the whole economy near those basins. We would rather work with the **individual right holders in the basin to figure out ways to bring the basin back into balance**. That is what [AB 419] is trying to address." *Minutes of Assemb. Comm. on Gov't Affairs* (May 4, 2011), p. 23 (emphasis added); *see also Minutes of S. Comm. on Gov't Affairs* (May 23, 2011), p. 16 (Testimony of Andy Belanger: "We understand the

need to manage groundwater basins and to give people a **soft landing** to get basins back into balance . . . We understand the process is critical to **giving local groundwater users say** in whether basins need to be defined as critical management areas and to the development of groundwater management plans.") (emphasis added).

The entire purpose of adopting NRS 534.037 and NRS 534.110(7) was to avoid curtailment by priority in over-appropriated basins. *Minutes of Assemb. Comm. on Gov't Affairs* (March 30, 2011), pp. 66–69 (Testimony of Assemblyman Pete Goicoechea: "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."). An interpretation of NRS 534.037 and NRS 534.110(7) that requires a GMP to strictly comply with prior appropriation, despite

that being the default solution in the absence of a GMP, leads to an absurd result. The legislative history makes clear that the intent of the Legislature in adopting these statutes was to avoid the "heavy-handed" and draconian nature of prior appropriation that was already enshrined in law.

Thus, the legislative history supports the interpretation of NRS 534.037 and NRS 534.110(7) as advanced by the State Engineer and other Appellants, and a GMP need not strictly adhere to prior appropriation principles. The district court erred in finding otherwise.

b. The district court erred by finding evidence of legislative intent in unpassed legislation

Despite finding that the language of NRS 534.037 and NRS 534.110(7) is not ambiguous, the district court nonetheless turned to legislative history to support its finding that Order No. 1302 and the DV GMP violated the law. JA Vol. XI at JA2411–2416. In doing so, the district court found "compelling evidence" in the form of legislative history related to Senate Bill ("SB") 73, a bill that was introduced but failed to pass during the 2017 Legislative Session. JA Vol. XI at JA2416. The district court erred by deducing legislative intent from the failure of

/ / /

SB 73 and did so over the objection of the State Engineer. JA Vol. X at JA2109–2111.

To the best of counsel's knowledge, this issue has not been addressed in Nevada, however it has been the subject of multiple cases out of California. The California Supreme Court has held repeatedly that "[u]npassed bills, as evidences of legislative intent, have little value." *See Apple Inc. v. Super. Ct.*, 56 Cal.4th 128, 146, 292 P.3d 883, 893 (2013) (citing *Dyna-Med, Inc. v. Fair Emp't & Housing Comm'n*, 43 Cal.3d 1379, 1396, 743 P.2d 1323 (1987)). "Legislative silence is an unreliable indicator of legislative intent in the absence of other indicia. [The court] can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law." *Ingersoll v. Palmer*, 43 Cal.3d 1321, 1349, 743 P.2d 1299, 1318 (1987).

The district court erred in finding support for its holding that Order No. 1302 and the DV GMP improperly deviated from the prior appropriation doctrine by citing the failure of SB 73 as compelling evidence. The Legislature held a single hearing on SB 73 and declined to move it forward out of committee without holding a vote. JA Vol. IX

at JA1804–1806. The Legislators themselves provided no comments in the legislative history as to why SB 73 did not move forward. *See Minutes of S. Comm. on Nat. Res. (*Feb. 28, 2017). It was improper for the district court to interpret the failure of SB 73 as either legislative intent or acknowledgment from the State Engineer that NRS 534.037 and NRS 534.110(7) required complete compliance with the prior appropriation doctrine.

As the California Supreme Court held in *Apple Inc.*, unpassed bills can plausibly support an opposite inference. *See Apple Inc.*, 56 Cal.4th at 146, 292 P.3d at 893 ("Although plaintiff contends that the never-enacted provisions were premised on the Legislature's understanding that section 1747.08 applies to online transactions, the Legislature's decision not to enact those provisions plausibly supports the opposite inference: the Legislature may have concluded that it was unnecessary to remove online transactions from the statute's coverage because such transactions were never covered by the statute in the first place.").

Here, while Respondents and the district court contend that the failure of SB 73 illustrates the Legislature's intent to require GMPs

adopted pursuant to NRS 534.037 to strictly comply with prior appropriation, the Legislature's decision to not advance the bill could plausibly support the opposite inference: that the Legislature concluded that the plain language of NRS 534.037 and NRS 534.110(7) already allowed a GMP to deviate from prior appropriation and therefore additional legislation was unnecessary. Similarly, while the district court concluded that the State Engineer's introduction of SB 73 demonstrated knowledge that a legislative change was necessary to allow a GMP to deviate from prior appropriation, it is just as plausible that the State Engineer simply wanted to clarify the existing statute to avoid this exact fight that is now currently before the Court.

It was an error for the district court to rely on the failure of SB 73 as evidence of intent from the Legislature or evidence of the State Engineer's legal opinion.

4. Order 1302 retains the State Engineer's ability to manage the basin and therefore does not violate NRS 533.325 or NRS 533.345

At the district court, both sets of Respondents targeted the State Engineer's approval of the DV GMP based upon the DV GMP's provisions regarding temporary movement of water allocations as part of the water

market system. JA Vol. VII at JA1413–1415, JA1482–1485. These arguments were addressed head-on by the State Engineer in Order No. 1302. JA Vol. II at JA0321–0322. Nonetheless, the district court invalidated Order No. 1302 and the DV GMP, finding that it violated NRS 533.325 and NRS 533.345. JA Vol. XI at JA2416–2419. The district court's finding was an error, as the State Engineer retains his power under the DV GMP to manage the movement of water rights. Substantial evidence supports the State Engineer's approval of these provisions of the DV GMP as being in accordance with existing state law and acceptable under NRS 534.037.

Under the DV GMP, water rights are converted into shares that become freely transferrable, while the allocation of water given to each share is reduced each year. JA Vol. III at JA0531, JA0545–0550. While these shares are transferable, meaning that the water can be used at different wells or places of use than originally approved under the base right, any new wells or any additional withdrawals exceeding the volume or flow rate initially approved under the base right must be submitted to the State Engineer for approval. JA Vol. II at JA0321–0322, JA Vol. III at JA0549–0550. The State Engineer must act within 14 calendar days

to determine if the new well use or additional withdrawal is in the public interest and that it will not impair existing rights. *Id.* If the State Engineer does not deny such a change within 14 calendar days, it is deemed approved; however, only for a period not to exceed 1 year. *Id.* Specifically, those new wells or additional withdrawals that would exceed 1 year, or that the State Engineer has concerns about within 14 days, would be required to go through the standard procedures under NRS 533 and NRS 534, including the publication and protest processes. *Id.*

From the plain language of the DV GMP and Order No. 1302, the State Engineer clearly remains involved in the regulation of groundwater in Diamond Valley. This includes specific provisions that require the State Engineer's involvement in the process of moving water rights, including any proposed new well or withdrawal that would exceed the originally approved duty of a given well. These changes are akin to temporary changes under existing Nevada water law and were modelled after these existing statutes. JA Vol. II at JA0321, JA Vol. III at JA0550 ("Sections 14.8 and 14.9 follow a process consistent with NRS 533.345(2)–(4)."). Under existing law, temporary changes (less than 1 year) to place of diversion, manner of use, or place of use for water

already appropriated need not go through the standard publication and protest process and are approved so long as the temporary change is in the public interest and does not impair existing water rights. NRS 533.345(2). Additionally, the State Engineer has the power to invoke the standard publication and protest processes if he determines that the proposed change may run afoul of the public interest or existing rights. NRS 533.345(3).

These are the exact same provisions that exist within the DV GMP regarding the movement of shares, which are derived from previously appropriated water rights. JA Vol. III at JA0549–0550. Despite the district court's conclusion that the DV GMP's transfer system violates state law, it in fact comports with existing temporary change statutes.

The only real difference between the DV GMP and existing law on temporary changes is that the DV GMP includes a 14-day deadline for the State Engineer to act whereas existing law includes no deadline. However, simply because the State Engineer has agreed to take it upon himself to make these necessary decisions within 14 days does not mean that the DV GMP violates the law. Pursuant to the DV GMP, within 14 days, the State Engineer simply must decide whether the change

"**may** not be in the public interest or **may** impair the water rights held by other persons." JA Vol. III at JA0550 (emphasis added). If this determination is made in the affirmative, then the standard change application procedures are required. *Id*. Further, should someone feel aggrieved by the State Engineer's approval (or non-denial) of one of these proposed changes within 14 days, it is within their rights to challenge that decision under NRS 533.450.

NRS 533.325 on the other hand is the provision of Nevada water law that requires any person wishing to appropriate water, or change the place of diversion, place of use, or manner of use of existing appropriations, to apply to the State Engineer for a permit. While an overarching component of water law in Nevada, NRS 533.325 is not relevant to the DV GMP. The district court broadly found that the DV GMP and Order No. 1302 violated NRS 533.325 by seemingly conflating its provisions with those found in NRS 533.345. JA Vol. XI at JA2416–2419.

As discussed above, the temporary transfers under the DV GMP are akin to temporary changes made pursuant to NRS 533.345, with the only true difference being the 14-day time constraint. Those water users

receiving shares under the DV GMP already have permits; the DV GMP merely provides flexibility for temporary changes lasting less than 1 year, similar to temporary changes under existing law. *See* NRS 533.345. Like temporary changes, publication (and the subsequent publication, protests, hearing, etc.) of transfers under the DV GMP is not required unless the State Engineer determines that the change may impair other water rights or the public interest. JA Vol. II at JA0321, JA Vol. III at JA0550. The district court erred when it found the DV GMP violates water law by not including "protest and notice" provisions as these provisions are not required by existing law for temporary changes. *See* JA Vol. XI at JA2417.

Additionally, the district court erred by finding that 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." JA Vol. XI at JA2418. The 14-day action period discussed above applies to **all** new wells to which individuals seek to use with water rights subject to the DV GMP as well as **all** additional withdrawals from existing wells that would

exceed the volume or flow rate that was initially approved under the base permit; any new wells that individuals seek to drill outside of the provisions of the GMP or seek to use for a period exceeding 1 year must adhere to the regular water law procedures. JA Vol. III at JA0550 (Secs. 14.8 and 14.9). The DV GMP also explicitly allows the State Engineer to deny any application to drill a new well if it will have detrimental effects. JA Vol. III at JA0550 (Sec. 14.6). Therefore, the State Engineer retains oversight over all new wells, and the district court erred in finding otherwise.

Lastly, it is appropriate that these provisions apply solely to new wells or withdrawals that exceed the volume and flow rate as initially approved by the State Engineer for existing wells. Any withdrawal that complies with these volume and flow rate provisions has already been deemed acceptable by the State Engineer. The district court accurately identified that shares may be temporarily transferred to other beneficial uses, including the possibility of transfers to uses other than irrigation that might consume the entirety of the water. JA Vol. XI at JA2418. However, the district court failed to identify how this is fatal to the DV GMP or otherwise violates Nevada water law.

Ultimately, any share transfers, and whether they occur, with whom they occur, and for what beneficial purposes they are made, will be left to the water users in Diamond Valley. The State Engineer was satisfied, after complying with the statute, that the DV GMP included the steps necessary to remove Diamond Valley's CMA designation pursuant to NRS 534.037. While the district court may be concerned about diminishing recharge through non-irrigation uses, the district court improperly substituted its judgment for the State Engineer by invalidating the DV GMP and Order No. 1302 based on this concern. *See Revert*, 95 Nev. at 786, 603 P.2d at 264. The DV GMP garnered majority support as required by NRS 534.037(1) and included steps satisfactory to the State Engineer to reduce pumping such that he would feel comfortable lifting the CMA designation at the end of the planning horizon. This is what was required by statute, and substantial evidence supports this conclusion.

As the State Engineer found, and substantial evidence supports, the DV GMP was modeled after existing law regarding temporary changes and still requires application of NRS 533.370 to changes exceeding 1 year. The State Engineer remains involved throughout this

process and retains his authority to enforce Nevada water law as necessary. The district court erred, and should be reversed, for its incorrect conclusion that Order No. 1302 violates NRS 533.325 and NRS 533.345.

5. Despite granting the State Engineer's Motion in Limine, the district court erred by considering evidence outside of the State Engineer's Record on Appeal

On September 4, 2019, prior to the filing of Respondents' opening briefs, the district court filed its Order Granting Motion in Limine. *See* JA Vol. VI at JA1369–1378. Therein, the district court acknowledged that the proceeding was in the nature of an appeal pursuant to NRS 533.450(1), and therefore the district court could not "pass upon the credibility of witnesses nor reweigh the evidence. JA Vol. VI at JA1374 (citing *Office of State Eng'r v. Curtis Park Manor Water User's Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)). The district court properly noted that its review "focuses on whether the record includes substantial evidence to support the State Engineer's decision." *Id.* (citing *Revert*, 95 Nev. at 786, 603 P.2d at 264). The district court also properly analyzed the public hearing requirement for GMPs, NRS 534.037(3). JA Vol. VI at JA1374–1375. The district court ultimately held that the

State Engineer's "public hearing process to consider the GMP under NRS 534.037 provided notice and the opportunity for anyone to be heard and to offer evidence, thus satisfying the due process standards." JA Vol. VI at JA1378. Further, in granting the State Engineer's Motion in Limine, the district court ordered "that all evidence in this matter shall be limited to the State Engineer's record on appeal, as filed by the State Engineer." *Id*. This was in spite of Sadler/Renner specifically expressing their intent to have presentation materials added to the SE ROA during briefing on the State Engineer's Motion in Limine. JA Vol. VI at JA1295–1297.

Despite this order, the district court nonetheless allowed Sadler/Renner to submit evidence outside of the State Engineer's record on appeal, over objections from Appellants. JA Vol. X at JA2028–2031; *see also* JA Vol. VIII at JA1671–1672. This evidence consisted of a PowerPoint presentation from former State Engineer Jason King from a presentation he gave at the 2016 Western State Engineer's Annual Conference. JA Vol. VII at JA1426–1450. Furthermore, the district court incorporated this extra-record evidence into its Order to support its

/ / /

finding that Order No. 1302 and the DV GMP unlawfully deviated from the prior appropriation doctrine. JA Vol. XI at JA2416.

As shown above, by considering this evidence and submitting it into the record, the district court contravened its own order granting the State Engineer's Motion in Limine. The district court also contravened its finding that the hearing and comment process afforded due process such that Respondents could have provided information they wished to be included in the SE ROA during that process. The district court did so without explanation, other than overruling the State Engineer's objection against the introduction of this evidence, as no party requested that the court reconsider or alter its prior order, nor did the district court issue an order doing so.

The district court utilized this extra-record evidence as alleged proof of "[t]he State Engineer's knowledge that the [DV GMP] violated the doctrine of prior appropriation." JA Vol. XI at JA2416. In addition to the plain language of the district court's prior order prohibiting the introduction of this type of evidence, it was erroneous to find this evidence probative of the State Engineer's alleged knowledge that the DV GMP was fatally flawed.

First, the DV GMP was approved by the State Engineer on January 11, 2019, after being submitted for approval on August 20, 2018. *See* JA Vol. II at JA0315, JA0461. The State Engineer gave the presentation to which the district court attributes the State Engineer's knowing violation of the law in 2016, some two years prior to his formal consideration of the DV GMP. Further, the State Engineer (whether it be former State Engineer Jason King or current State Engineer Tim Wilson) is not an attorney. Between this 2016 presentation and approval of the DV GMP in 2019, there were significant changes made to the DV GMP as well as changes in the leadership of DWR, including new deputy administrators working with and advising the State Engineer. An agency is not estopped from "changing a view [it] believes to have been grounded upon a mistaken legal interpretation [and] . . . an administrative agency is not disqualified from changing its mind . . . ." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (citations omitted).

It was an error for the district court to cite this extra-record evidence as proof that the State Engineer knowingly and improperly violated the prior appropriation doctrine. Rather, it is the State

Engineer's position that the plain language of NRS 534.037 and NRS 534.110(7) allow a GMP to deviate from the prior appropriation doctrine. The State Engineer made this clear in Order No. 1302, in the litigation before the district court, and again before this Court.

VIII. CONCLUSION

Order No. 1302, and the DV GMP approved therein, fully complies with NRS 534.037, is supported by substantial evidence, and is not arbitrary or capricious. The district court found that the State Engineer checked all the necessary boxes in NRS 534.037 to approve the DV GMP, but nonetheless invalidated Order No. 1302 based upon erroneous findings that Order No. 1302 violated other aspects of Nevada water law. The district court further erred by inferring legislative intent from unpassed legislation and considering evidence outside of the SE ROA.

Contrary to the district court's order, and the arguments of Respondents, the Legislature intended for the GMP process to be flexible. This allows water users in a CMA to come together and create a solution to groundwater problems outside the rigid contours of the water law statutes and common law so long as it receives majority support. NRS 534.110(7) requires curtailment after 10 years if the water users in

a CMA fail to get a GMP approved in that period. If a GMP is nonetheless required to comply with all the technicalities of water law, despite such draconian consequences already being required if water users fail to adopt a GMP, then there is no motivation for water users to put in the hard work of putting together a GMP that can garner majority support and the approval of the State Engineer. The district court's interpretation is erroneous as it renders the GMP process unworkable and meaningless.

The water users in Diamond Valley put forth a gargantuan effort to assemble the DV GMP over the course of multiple years. They did this to preserve Diamond Valley's local economy and way of life, which could be untenable under a curtailment order. As acknowledged by the district court, the State Engineer fully complied with NRS 534.037 as the DV GMP includes the steps necessary for removal of Diamond Valley's CMA designation. Order No. 1302 should therefore be reinstated and the DV GMP should be put back into effect.

Based on the foregoing, the State Engineer respectfully requests that this Court reverse the portions of the district court's order wherein the district court deemed Order No. 1302 arbitrary and capricious.

Further, the State Engineer respectfully requests that the Court reinstate Order No. 1302 and the DV GMP.

RESPECTFULLY SUBMITTED this 23rd day of September, 2020.

AARON D. FORD
Attorney General

By: */s/ James N. Bolotin*

JAMES N. BOLOTIN
Senior Deputy Attorney General
Nevada Bar No. 13829
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: jbolotin@ag.nv.gov
Attorney for Appellant,
State Engineer

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 pitch Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,675 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 23rd day of September, 2020.

AARON D. FORD
Attorney General

By: */s/ James N. Bolotin*
JAMES N. BOLOTIN
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 23rd day of September, 2020, I served a copy of the foregoing APPELLANT STATE ENGINEER'S OPENING BRIEF, by the Nevada Supreme Court's EFlex Electronic Filing System to:

Debbie Leonard, Esq.
LEONARD LAW, PC
debbie@leonardlawpc.com

John E. Marvel, Esq.
MARVEL & MARVEL, LTD.
johnmarvel@marvellawoffice.com

Don Springmeyer, Esq.
Christopher W. Mixson, Esq.
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
dspringmeyer@wrslawyers.com
cmixson@wrslawyers.com

Karen A. Peterson, Esq.
ALLISON MACKENZIE, LTD.
kpeterson@allisonmackenzie.com

Theodore Beutel
EUREKA COUNTY DISTRICT ATTORNEY
tbeutel@eurekacountynv.gov

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
paul@legaltnt.com
david@legaltnt.com

and via U.S. Mail to:

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

/s/ Dorene A. Wright