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

JOINT APPENDIX
VOLUME VII

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AFFIRMATION

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

Date: September 23, 2020

/s/ Debbie Leonard

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Attorney for DNRPCA Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on September 23, 2020, 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

Case No.: CV1902-348 (consolidated with Case Nos. CV1902-349 and CV1902-350)

Dept. No.: 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioners,

vs.

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

Respondent, and

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

Intervenors.

OPENING BRIEF OF PETITIONERS SADLER RANCH, LLC AND IRA R. & MONTIRA RENNER

COME NOW, Petitioners SADLER RANCH, LLC, a Nevada limited-liability company ("Sadler Ranch"), and IRA R. & MONTIRA RENNER, husband and wife ("Renner"), by and through their counsel, DAVID H. RIGDON, ESQ. and PAUL G. TAGGART, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby file its Opening Brief in this matter. This opening brief is based on all papers and pleadings relating to this matter currently on file with the Court and any oral argument the Court may entertain.

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TABLE OF AUTHORITIES

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Legislative Materials

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INTRODUCTION

"Democracy has been described as four wolves and a lamb voting on what to have for lunch."[1] In Diamond Valley the holders of junior-priority water rights (the "wolves") far outnumber the holders of senior-priority rights (the "lambs"). Therefore, it is not surprising that the Diamond Valley Groundwater Management Plan ("GMP"), a plan approved by a simple majority vote, benefits the junior-priority right holders at the expense of the seniors.

The GMP violates foundational doctrines of Nevada's water law. In 2016 the State Engineer acknowledged this in a presentation he gave on the GMP. In the presentation he admitted that the central concept of the GMP – the share allocation system – required a "statutory change to make legal."[2] That statutory change never happened, but State Engineer approved the GMP anyway.

The GMP approved by the State Engineer authorizes persistent, non-stop groundwater mining of the Diamond Valley aquifer. Over 1,750,000 acre-feet of water has already been *permanently* removed from the aquifer as a result of over-pumping in the southern sub-basin.[3] This is 87% of the sub-basin's total volume of transitional storage.[4] The removal of this water has caused groundwater levels to drop by more than 100 feet in some areas over the past forty years – a rate of over 2 feet per year.[5] Loss of flow in valley floor springs, damage to structures from land subsidence, and increased pumping costs are just some of the negative effects resulting from these declines. Despite this, the GMP authorizes the mining of an additional 760,000 acre-feet of aquifer water over the next thirty-five years.[6] This will result in complete depletion of transitional storage, continued groundwater level declines, and ongoing harm to senior water rights.

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[1] Charles Flatt & Sheila Allen, *Mainstream Values vs. Campus Pluralism: Campus Correspondence: The Privileged Classes Must Yield in the Name of Equality*, L.A. TIMES, Nov. 25, 1990.

[2] Exhibit 1 at Slide 21. On September 4, 2019, this Court issued its Order Granting Motion in Limine. The order states that for the purpose of determining whether substantial evidence supports the State Engineer's issuance of Order 1302, "all evidence in this matter shall be limited to the State Engineer's record on appeal." Exhibit 1 is not being offered as evidence supporting or opposing the factual determinations contained in Order 1302. Rather, it is being offered to support Petitioners' claim that the GMP violates Nevada's doctrine of prior appropriation – a purely legal issue subject to de novo review.

[3] SE ROA 624.

[4] *Id.* (the Diamond Valley aquifer holds 2,000,000 acre-feet of water in its transitional storage aquifer. 1,750,000 acre-feet is 87% of that total).

[5] SE ROA 490; SE ROA 770; *see also* State Engineer Ruling 6290 at 23 ("groundwater pumping in southern Diamond Valley has caused basin-wide groundwater level declines reaching drawdowns of 100 feet or more in portions of southern Diamond Valley.").

[6] SE ROA 624-26.

The relatively moderate reductions in pumping outlined in the GMP will never bring the basin back into balance as required by NRS 534.037. At the end of the GMP, withdrawals of water in the basin will continue to exceed the perennial yield, meaning that even more water will be permanently removed from the aquifer. There is simply no credible, scientific evidence in the State Engineer's record demonstrating that the proposed pumping reductions will support the removal of Diamond Valley's Critical Management Area ("CMA") designation.

The State Engineer's adoption of the GMP in Order 1302 must be overturned because: (1) the GMP does not meet the requirements of NRS 534.037 and thus the State Engineer had no authority to approve the GMP nor does substantial evidence support his determination, (2) approval of the GMP violates the prior appropriation doctrine that has governed water use in Nevada for more than 150 years, (3) approval of the GMP fails to protect vested rights, (4) approval of the GMP violates mandatory provisions of Nevada's statutory water laws, (5) substantial evidence does not support the State Engineer's approval of depreciation rates of banked shares, and (6) the State Engineer violated Petitioners' due process rights when he issued Order 1302. Accordingly, Petitioners respectfully request this Court overturn Order 1302.

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FACTUAL AND PROCEDURAL BACKGROUND

I. The Over-Pumping Problem In Diamond Valley Was Created And Exacerbated By The State Engineer Failing To Effectively Enforce Prior Appropriation Law.

The Office of the State Engineer created the water problems in Diamond Valley. His office issued the permits that allowed irrigators to pump more than four times the amount of water that was legally available. As early as 1968, the State Engineer was warned by scientists from the United States Geological Survey ("USGS") that over-appropriation of the basin's groundwater would diminish the flow of valley floor springs.[7] This warning went unheeded. Now, the USGS's prediction has come true – most of the valley floor springs no longer flow.[8]

The primary cause of the harm to senior-priority spring rights is groundwater pumping by junior-priority irrigators in the southern part of the valley. In 1982, State Engineer Morros acknowledged that

[7] SE ROA 63 ("Eventually, a gradual decrease of spring discharge in the North Diamond subarea should occur in response to pumping in the South Diamond subarea.").
[8] SE ROA 771.

"what is happening right now in Diamond Valley [declining groundwater levels affecting spring flows] was predicted. . . . It was predicted in 1968 . . . almost to the 'T.'"[9] He also indicated that water management decisions in Diamond Valley had been driven by politics, not science.[10]

State Engineer Morros also expressly acknowledged that the over-pumping in the southern portion of the basin was directly harming senior rights. He noted that in 1965 the springs on the Thompson Ranch (the ranch closest to the concentrated pumping area in the southern part of the valley) flowed at a sustained rate of approximately 1,050 gallons/minute (1,695 acre-feet/year).[11] By October of 1981 that flow had diminished to a mere 30 gallons/minute (48 acre-feet/year).[12] State Engineer Morros referenced a 1982 USGS field investigation which definitively concluded that the cause of this decline was "sustained pumpage from irrigation wells in the south Diamond Valley."[13] State Engineer Morros agreed with the USGS determination, stating that "the water table is declining because of pumpage in excess of the perennial yield."[14]

State Engineer King later adopted this assessment in Ruling 6290 which included an entire section discussing the causes of spring flow declines.[15] This analysis concluded that "groundwater pumping in southern Diamond Valley is the main cause of stress on groundwater levels in the valley."[16] State Engineer King also made a key factual determination that "there is no significant dispute that Diamond Valley is significantly over-appropriated, and pumping has been greater than the defined perennial yield for the basin *for over 4 decades*."[17] In other words, this is not a new problem. Since 1982, the people in Diamond Valley have known that they are over-pumping the basin, and that their over-pumping is directly responsible for drying up the valley floor springs.

Despite the overwhelming evidence that junior priority pumping in the southern portion of the basin has materially interfered with senior priority rights, for forty years the State Engineer failed to take

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[9] Transcript of Proceedings at 42:17-22, *In the Matter of Evidence and Testimony Concerning Possible Curtailment of Pumpage of Ground Water in Diamond Valley*, Eureka County, Nevada (May 24, 1982).
[10] *Id.* at 41:6-10 (acknowledging that "there was a tremendous amount of [political] pressure put on the State Engineer's office to issue permits, far in excess of what we had identified at the time was the perennial yield.").
[11] *Id.* at 26:2-4.
[12] *Id.* at 26:5-7.
[13] *Id.* at 30:5-10.
[14] *Id.* at 45:7-10.
[15] State Engineer Ruling 6290 at 23-31.
[16] *Id.* at 31.
[17] *Id.* at 30 (emphasis added).

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effective action to resolve the issue. After the 1982 curtailment hearing State Engineer Morros took no action to reduce pumping or otherwise protect senior-priority rights. He cavalierly justified his inaction on the basis that "at this point, everybody seems to be quite content and happy with the situation in Diamond Valley *with the exception of Mr. Thompson whose spring has diminished considerably.*"[18]

After the 1982 hearing, State Engineer Morros issued two orders requiring meters to be installed and opening an adjudication proceeding.[19] But these orders only gave the appearance of taking action – they did nothing to actually halt or reduce the over-pumping of the aquifer. In addition, neither order was ever enforced. Instead, the junior irrigators were allowed to continue mining the aquifer while the rights of senior priority users were ignored. From 1982 to 2017, irrigation pumping consistently withdrew water from the aquifer at two to three times the rate of annual replenishment.[20]

II. The State Engineer Continues To Refuse To Enforce Prior Appropriation Law.

Sadler Ranch owns pre-statutory rights to the waters of springs that are senior in priority to all of the permits issued by the State Engineer.[21] By 2012, the flow in the springs on Sadler Ranch had diminished considerably as a result of the over-pumping in the south. Likewise, Renner owns vested rights to springs that are senior in priority to all of the groundwater permits. The Renners are also experiencing impacts to their springs due to the continual groundwater declines. As the most northern ranch, they are one of the last vested water right owners to be affected by the over-pumping in the southern sub-basin. Each of the State Engineer-issued permits include an express condition that they not interfere with senior-priority rights.[22] Accordingly, Sadler Ranch and Renner are entitled to an immediate cessation of all junior-priority pumping until such time as flow to their vested springs is restored.

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[18] Transcript of Proceedings at 123:3-6 *In the Matter of Evidence and Testimony Concerning Possible Curtailment of Pumpage of Ground Water in Diamond Valley*, Eureka County, Nevada (May 24, 1982) (emphasis added). To understand the full ramifications of Mr. Morros' statement, consider the following hypothetical: John Doe is a homeowner who keeps a large inventory of tools in his garage. Mr. Doe finds out that several of his neighbors have "borrowed" his tools without permission and refuse to give them back. Mr. Doe contacts the police who send an officer to investigate. After a full investigation reveals that the neighbors have, in fact, taken the tools, the officer tells Mr. Doe that he is not going to take any action to remedy the situation because "everyone in the neighborhood except Mr. Doe seems to be quite content and happy with the arrangement."

[19] State Engineer Orders 800 & 809.

[20] SE ROA 626.

[21] Preliminary Order of Determination at 139-47, *In the Matter of the Determination of the Relative Rights in and to all Waters of Diamond Valley, Hydrographic Basin No. 10-153, Elko and Eureka Counties, Nevada* (August 30, 2018).

[22] *See, e.g.*, Permit 19378, Certificate 7235 ("This permit is issued subject to all existing rights on the source").

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In 2012, Sadler Ranch filed a change application and filed applications for replacement water to mitigate its lost spring flows.[23] Eureka County, together with several of the junior-priority irrigators, protested Sadler Ranch's applications along with similar applications filed by other pre-statutory right holders.[24] The protestants argued that pre-statutory right holders were not entitled to any mitigation for the harm they were suffering.[25]

Rather than fully enforce prior appropriation principles, and provide an adequate source of replacement water, the State Engineer issued a ruling giving Sadler Ranch a mere fraction of the water it was entitled to.[26] On appeal, this Court determined that the State Engineer's actions were "unconscionable" and a clear violation of Nevada law and the prior appropriation doctrine.[27] Eureka County has appealed the Court's final ruling on Sadler Ranch's mitigation rights to the Nevada Supreme Court.[28]

As a result of Eureka County's vehement opposition to Sadler Ranch's attempt to replace its lost spring flows, in 2014 Sadler Ranch was forced to file a petition requesting a basin-wide curtailment of junior priority pumping. Once again, instead of enforcing prior appropriation and protecting senior right holders, the State Engineer joined Eureka County in aggressively opposing the petition. Eureka County and the State Engineer argued that curtailment is unnecessary since the GMP will accomplish the same goals and make strict priority curtailment unnecessary. That litigation is on hold pending the outcome of the current case.

Renner has not filed any applications under Order 1226, and instead is relying on its existing groundwater rights to mitigate its current losses to senior surface water rights. Renner reserves the right to file mitigation applications in the future as conditions warrant.

The Renners, the owners of the most northerly ranch in the valley, are also experiencing impacts to their springs due to the continual groundwater declines. As the most northern ranch, they were the

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[23] Application Nos. 81719, 81720, 82268.
[24] State Engineer Ruling 6290 at 2-5.
[25] *Id.* at 5.
[26] *Id.* at 61-62.
[27] Findings of Fact, Conclusions of Law, and Order Partially Granting Petition for Judicial Review at 17:19, *Sadler Ranch v. Jason King, P.E.* (Case No. CV-1409-204, February 12, 2016).
[28] *Eureka County v. Sadler Ranch*, Case No. 75736 (Nev. 2018).

last to be affected by the over-pumping in the southern sub-basin. To date, the Renners have not received any mitigation water under Order 1226.

III. The State Engineer Advocated For And Assisted With The Drafting And Development Of The GMP.

In 2015, the State Engineer began coordinating with Eureka County and the junior priority irrigators to develop a groundwater management plan in order to blunt Sadler Ranch's efforts to enforce its pre-statutory rights via curtailment. As part of this effort, on August 25, 2015, the State Engineer, with Eureka County's support, issued Order 1264 designating Diamond Valley as a CMA. This began the process for the development of the GMP.

The State Engineer's active involvement in the development and drafting of the GMP is documented in GMP Appendix C.[29] Appendix C indicates that it was State Engineer King who urged the junior irrigators to begin the process of developing a GMP.[30] Appendix C also documents that Deputy State Engineer Felling attended most of the GMP meetings and personally introduced and advocated for the "share allocation" concept that became the basis for the GMP.[31] Both Mr. Felling and Mr. King also actively reviewed and provided comments and edits on early drafts.[32] In other words, the GMP was as much a creation of the State Engineer as it was of the water users.

In addition to providing significant assistance with drafting the GMP, the State Engineer submitted two bills to the Legislature that would have authorized him to adopt a plan similar to the one being advocated.[33] These bills ultimately failed to pass. State Engineer King took further ownership of the GMP when, in 2016, he personally presented the plan at the Western State Engineer's Annual Conference. In his presentation, State Engineer King informed the audience that proposed legislation (the same legislation that failed to pass) would be required to make the plan legal.[34]

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[29] *See generally* SE ROA 277-475.

[30] SE ROA 288 (stating that at a workshop in February 2014 the State Engineer "ask[ed] users to move forward with a GMP").

[31] SE ROA 295 (stating that "conversion [from permits to shares] should follow the allocation regime *suggested by the State Engineer*.") (emphasis added).

[32] SE ROA 440 ("The State Engineer's office completed their review of the Draft GMP."); SE ROA 444 ("There were some relatively significant changes to the GMP discussed at the last meeting based on the State Engineer's review of the GMP."); SE ROA 451 ("The State Engineer's office completed their review of the most recent draft and it is attached."); SE ROA 453 (noting that the version of the draft GMP being circulated "incorporates all of the edits based on the State Engineer's previous review.");

[33] *See* S.B. 81, 2015 Leg., 78th Sess. (Nev. 2015); S.B. 73, 2017 Leg., 79th Sess. (Nev. 2017).

[34] Exhibit 1 at Slide 21.

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IV. The State Engineer's Process For Reviewing The Final GMP Was Flawed.

On August 20, 2018, the proponents of the GMP submitted it to the State Engineer for approval. On October 1, 2018, the State Engineer issued a Notice of Hearing to water users in the basin. The notice informed recipients that the GMP was available for viewing and a public meeting would be held on October 30, 2018. The notice did not provide any information regarding the procedural format of the hearing, instructions or rules for the introduction of evidence at the hearing, or what evidence and standards the State Engineer would use to make his decision.[35] The notice also stated that the public meeting was the *beginning* of the approval process, inferring that further opportunities to provide evidence and input would be forthcoming.[36]

The State Engineer's public meeting was held on October 30, 2018. At the beginning of the meeting the State Engineer made clear that the purpose of the meeting was solely to hear public comments.[37] No commenter was sworn under oath or subjected to cross-examination. In addition, neither the State Engineer nor any proponent of the GMP was required to make a formal presentation explaining the GMP and its various provisions. And no expert testimony or report was offered in support of the GMP.[38] Instead, the State Engineer began by lauding the work of the GMP's proponents and then invited attendees to make comments for or against it without any structure or context.[39] At the end of the meeting, participants were given just three days to submit additional written comments.[40]

Numerous concerns and issues were raised by participants at the public meeting. A professional engineer and licensed water rights surveyor who has been previously recognized by the State Engineer as an expert provided a written analysis of the plan and stated that, in his expert opinion, the plan will not bring the basin back into balance as required by the statute.[41] The GMP proponents did not provide a single piece of evidence or expert analysis contradicting that claim. Despite this, on January 11, 2019,

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[35] The State Engineer had seven years from the time the Legislature adopted NRS 534.037 to develop formal procedures, rules, and policies governing the submittal, consideration, and approval of groundwater management plans but failed to do so. Accordingly, interested parties who desired to participate at the public meeting had no notice of the hearing procedures that would be followed or the proper process for submitting evidence for consideration.

[36] SE ROA 528 ("The State Engineer has *begun* the public hearing process . . . .") (emphasis added).

[37] SE ROA 654-55.

[38] SE ROA 662.

[39] SE ROA 655-56.

[40] SE ROA 656.

[41] SE ROA 674.

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the State Engineer issued Order 1302 adopting the GMP without a single amendment or condition. On February 11, 2019, Sadler Ranch and the Renners timely filed their respective petitions seeking judicial review of that decision.

STANDARD OF REVIEW

"Any person feeling aggrieved by an order or decision of the State Engineer . . . affecting the person's interests" may seek judicial review of that decision.[42] Judicial review is "in the nature of an appeal."[43] The role of the reviewing court is to determine if the decision was arbitrary or capricios and an abuse of discretion, or if it was otherwise affected by prejudicial legal error.[44] Here, Order 1302 must be reversed because it does not meet the three fundamental requirements that all State Engineer actions must adhere to. First, the GMP approved by the State Engineer does not comply with Nevada's water law statutes and doctrines.[45] Second, Order 1302 was not supported by substantial evidence showing that the GMP will accomplish its required purpose – stopping the groundwater declines that have harmed senior-priority right holders.[46] Third, Petitioners' due process rights were violated when the State Engineer failed to provide Petitioners an opportunity to challenge the evidence the State Engineer relied on.[47]

The Nevada Supreme Court has repeatedly stated that courts must not blindly defer to State Engineer interpretations of Nevada's water law.[48] Such interpretations are "not entitled to deference"[49] and a district court must "review purely legal questions *de novo*."[50] Accordingly, Petitioners have a

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[42] NRS 533.450(1).
[43] NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).
[44] *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996) (citing *Jim L. Shetakis Distrib. Co. v. State, Dep't of Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).
[45] *See Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 194, 234 P.3d 912, 916 (2010) (State Engineer must comply with mandatory provisions of the statutory water law).
[46] *Eureka County v. State Eng'r*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015) (State Engineer decisions "must be made upon presently known substantial evidence.").
[47] *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.
[48] *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019) (A State Engineer ruling on a question of law is "not entitled to deference."); *see also King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018) (courts "review purely legal questions de novo."); *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (court must "review purely legal questions *without deference* to the State Engineer's ruling.") (emphasis added); *Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (courts have "authority to undertake an independent review of the State Engineer's statutory construction, *without deference* to the State Engineer's determination.") (emphasis added); *Town of Eureka v. Office of State Eng'r of State of Nev, Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992) (State Engineer's interpretation of a statute is "not controlling.");
[49] *Sierra Pac. Indus.*, 135 Nev. Adv. Op. 13, 440 P.3d at 40.
[50] *St. Clair*, 134 Nev. at 139, 414 P.3d at 316 (emphasis added).

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right to a de novo review by this Court of whether the approved GMP: (1) violates Nevada's doctrine of prior appropriation, (2) fails to comply with the requirements of NRS 534.037 and 534.110(7), and (3) conflicts with other mandatory provisions in the statutory water laws.

With regard to factual findings, the Court must determine whether substantial evidence exists in the record to support the State Engineer's decision.[51] Also, when "the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion," a district court should not hesitate to intervene.[52] While a "reviewing court must limit itself to a determination of whether substantial evidence in the record supports the State Engineer's decision,"[53] this deference is predicated on the fullness and fairness of the administrative proceedings.[54] For a proceeding to be considered "full and fair" witnesses must be sworn under oath, subjected to cross-examination, and there must be an adequate opportunity to provide rebuttal evidence.[55] If these procedures are not followed, the veracity and authenticity of the evidence relied on is naturally called into question and the Court need not defer to any factual determinations based on such evidence.

ARGUMENT

I. The Groundwater Management Plan Does Not Meet The Requirements Of NRS 534.037.

The State Engineer's consideration and approval of a groundwater management plan is governed under NRS 534.037. The State Engineer is without authority to approve a plan that fails to meet these requirements. The primary requirement is that a GMP must include "the necessary steps for removal of the basin's designation as a critical management area."[56]

The State Engineer's decision to approve the GMP cannot be upheld because there is no analysis or substantial evidence to support that the GMP accomplishes this legislative mandate. First, the GMP as submitted did not include any analysis of how the pumping reductions will result in stabilized groundwater levels or a balanced water budget. Instead, evidence presented at the public meeting clearly shows that at the end of the thirty-five-year planning period withdrawals in the basin will continue to

[51] *Office of State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert*, 95 Nev. at 786, 603 P.2d at 264.
[52] *Revert*, 95 Nev. at 787, 603 P.2d at 265.
[53] *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949.
[54] *Revert*, 95 Nev. at 787, 603 P.2d at 264 ("The applicable standard of review of decisions of the State Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings.").
[55] *See Bing Constr. Co. of Nev. v. County of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 771 (1991) (affected parties must be given adequate opportunity to prepare to oppose administrative order).
[56] NRS 534.037(1).

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exceed the established perennial yield. Second, granting junior priority users the right to mine the aquifer for an additional thirty-five years violates the clear legislative intent of NRS 534.037. Legislative history demonstrates that the Legislature intended over-pumping problems to be resolved in ten years or less. Third, the record is devoid of evidence showing that GMP implementation will result in the removal of the CMA designation. For these reasons, the State Engineer's issuance of Order 1302 was arbitrary, capricious, and an abuse of discretion.

A. Under NRS 534.037, a groundwater management plan is required to include "necessary steps" to ensure groundwater levels are stabilized.

The Legislature identified the primary problem that a GMP is intended resolve. Assemblyman Goicoechea, the primary sponsor of AB 419 (the 2011 bill that was codified as NRS 534.037), made clear that the problem he was attempting to fix was declining groundwater levels in over-pumped basins.[57] He testified that "[i]f gradient declines in groundwater basins are established and a loss of two feet occurs each year without spikes back up, these basins are critical management areas and need to be addressed" because "[i]t cannot be a race to the bottom, and whoever has the deepest pockets pumps the most water."[58] Yet that is precisely what will result from implementation of the GMP. The GMP authorizes continued pumping above the perennial yield, while at the same time monetizing water rights permits by converting them to tradeable shares. Accordingly, those irrigators with the deepest pockets will be the ones pumping the most water. Meanwhile, groundwater levels will continue to decline resulting in direct and ongoing harm to holders of senior-priority rights.

Before approving a proposed groundwater management plan the State Engineer must make an evidentiary finding that the GMP contains the "necessary steps for removal of the basin's designation as a critical management area."[59] The use of the word "must" makes the requirement mandatory.[60] A

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[57] *Minutes of the Assemb. Comm. on Gov't Affairs* (March 30, 2011) at 66 (stating that AB 419 "allows the State Engineer to designate a critical management area in a basin *that has shown significant water declines*.") (emphasis added).

[58] *Id.* at 71.

[59] NRS 534.037(1). NRS 534.037(2) also lists six factors the State Engineer must consider when reviewing a GMP. The State Engineer failed to address several of these factors in Order 1302. An agency's action is deemed arbitrary and capricious if it was not based on a full consideration of all the relevant statutory factors. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 30-31, 103 S. Ct. 2856, 2860-61 (1983).

[60] *See* NRS 0.025(1)(c) ("Must expresses a requirement when . . . [t]he subject is a thing." Here the subject in the relevant statutory provision is a clearly thing and not a person – the groundwater management plan. Accordingly, the use of the term must in the statute denotes an absolute requirement.).

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basin is designated as a CMA when "withdrawals of groundwater consistently exceed the perennial yield of the basin."[61] Accordingly, to remove a CMA designation the State Engineer must determine that withdrawals of groundwater are consistently below the perennial yield. Assemblyman Goicoechea made clear what this means:

> Perennial yield, typically, is the amount of usable water from a groundwater aquifer that can be economically withdrawn and consumed each year for an indefinite period of time *without impacting the water table in that basin*. That is perennial yield. That is what we are striving for.[62]

Therefore, to approve a GMP, the State Engineer must make a determination that the plan will bring withdrawals below the basin's perennial yield *so that groundwater levels will stabilize.*

The State Engineer acknowledges this standard in Order 1302 when he states that the purpose of the GMP "is to progressively reduce groundwater pumping until the perennial yield is not consistently exceeded, *and the measure of that ultimate outcome is a stabilization of groundwater levels.*"[63] However, the State Engineer provided no analysis or conclusions on whether the GMP accomplishes this goal. Further, neither Order 1302 nor the GMP reference any technical or expert evidence analyzing how water levels in the basin will respond to the proposed pumping reductions. There is nothing in the record to support a determination that the GMP contains the steps required to remove the CMA designation. As such, the decision to approve the GMP was arbitrary, capricious, and an abuse of discretion.

B. <u>The Diamond Valley GMP violates NRS 534.037 because it authorizes continued groundwater mining of an already depleted basin.</u>

There is no question that the Diamond Valley aquifer has been depleted as a result of over-pumping. In 1968, James Harrill, an engineer with the USGS, determined that the perennial yield of the entire basin was up to 30,000 acre-feet/annually.[64] But the State Engineer issued 150,000 acre-feet worth of pumping permits, mostly in the southern half of the basin.[65] In 1968, pumping totaled only

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[61] NRS 534.110(7).
[62] *Minutes of the Assemb. Comm. on Gov't Affairs* (March 30, 2011) at 68 (emphasis added).
[63] SE ROA 16.
[64] SE ROA 27.
[65] SE ROA 27.

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12,000 acre-feet/year (less than half the perennial yield). However, because that pumping was taking place primarily in the southern part of the basin, far from areas of natural discharge, depletion of the aquifer was already occurring.[66]

Harrill estimated that the total amount of water in the upper 100 feet of saturated alluvium (i.e., the water available to be pumped as "transitional storage") was approximately 2,000,000 acre-feet in the southern sub basin.[67] He further determined that if long-term pumping in the sub basin was capped and limited to the then-existing 12,000 acre-feet/year, equilibrium (the stabilization of groundwater levels) could theoretically be achieved after 300 to 400 years, but only after 3,000,000 acre-feet was permanently withdrawn from storage with a resulting groundwater decline of 200 feet.[68] Harrill further warned that if pumping in the southern portion of the basin increased beyond 12,000 acre-feet/annually, equilibrium would never be achieved (i.e., groundwater levels would never stabilize).[69]

Harrill's predictions were prophetic. The State Engineer allowed pumping in the southern part of the valley to increase to levels far beyond the perennial yield for the entire basin. According to the State Engineer, pumping peaked in the 1980s at 125,000 acre-feet/year and as of 2014 was still exceeding 90,000 acre-feet/year.[70] This resulted in groundwater declines of more than 100 feet over forty years and the permanent depletion of over 1,750,000 acre-feet of water from the aquifer.[71]

Instead of stopping the over-pumping, the GMP allows it to continue indefinitely. During the thirty-five-year planning horizon, the GMP allows for permanent removal of an additional 750,000 acre-feet of water from the aquifer – 500,000 acre-feet more than what Harrill estimated was available as transitional storage.[72] In fact, in the very last year of the planning period, pumping of just the water rights subject to the GMP (34,200 acre-feet) will still be higher than the basin's perennial yield (30,000 acre-feet).[73] When other pumping not subject to the GMP is added to this amount, well over 40,000

[66] SE ROA 27 (indicating that 60,000 acre-feet of water had already been permanently depleted from the aquifer).
[67] SE ROA 27.
[68] SE ROA 27.
[69] SE ROA 27.
[70] State Engineer Ruling 6290 at 30.
[71] SE ROA 624.
[72] SE ROA 624.
[73] SE ROA 510.

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acre-feet will be taken out of the basin in the final year of the GMP – 33% more than the available perennial yield.[74] This accounting does not consider the use and any "banked" water pumping.

In addition, most of this pumping will remain concentrated in the southern sub basin where Harrill determined that equilibrium can never be reached if pumping exceeds 12,000 acre-feet/year.[75] Accordingly, even if the GMP is fully implemented and strictly enforced, water levels will not stabilize. Simply put, the GMP does not fix the problem and will not result in removal of the CMA designation.

C. The GMP's thirty-five-year timeframe is unreasonable and violates legislative intent.

When considering AB 419, the Legislature determined that a GMP should accomplish its goals within ten years, not thirty-five. Assemblyman Goicoechea repeatedly told his fellow legislators that water users in a CMA would have no more than ten years to fix the problem.[76] He unambiguously stated that "[a]gain, you have ten years to *accomplish your road to recovery.*"[77] Such urgency was required because "the bottom line is we are just not getting it done. We continue to see these groundwater basins decline."[78] This sense of urgency was affirmed by State Engineer King who testified that the situation in basins like Diamond Valley was dire. State Engineer King noted that the designation of a basin as a CMA is akin to a "red alert" requiring immediate action to bring such basins "back into balance."[79]

The GMP's proposal to gradually reduce pumping over a thirty-five-year period is in direct conflict with the sentiments expressed by both Assemblyman Goicoechea and State Engineer King. Diamond Valley is currently the only basin in Nevada that has received the "red alert" CMA designation indicating that the water situation has reached a crisis level. Eureka County, and the irrigators in the

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[74] SE ROA 675.
[75] SE ROA 27.
[76] *Minutes of the Assemb. Comm. on Gov't Affairs* (March 30, 2011) at 67 ("you have a ten-year window to address the issues in an over-appropriated basin); *Id.* at 79 ("we cannot wait ten years until we start working on it."); *Minutes of the Assemb. Ways and Means Comm.* (May 11, 2011) at 9 (AB 419 "would require the operators of those basins to conduct a *ten-year conservation plan* to bring the basins into balance.") (emphasis added); *Minutes of the S. Comm. on Gov't Affairs* (May 23, 2011) at 12 ("*If the water management plan results are not achieved in ten years*, it requires the State Engineer to start regulating the basin by priority.") (emphasis added); *Id.* at 13 (Assembly Bill 419 requires that, after a ten-year period *with a water management plan in place*, the State Engineer regulates by priority.") (emphasis added); *Id.* at 16 ("This bill allows people in over appropriated basins *ten years to implement* a water management plan to get basins back into balance.") (emphasis added).
[77] *Minutes of the Assemb. Comm. on Gov't Affairs* (March 30, 2011) at 69.
[78] *Minutes of the Assemb. Comm. on Gov't Affairs* (March 30, 2011) at 69.
[79] *Minutes of the Assemb. Ways and Means Comm.* (May 11, 2011) at 9.

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basin have known a problem exists for more than forty years and have done nothing to effectively resolve it. Allowing over pumping to continue for another thirty-five years is unconscionable and in direct conflict with the NRS 534.037's legislative intent.

D. Order 1302 is not supported by substantial evidence showing that the pumping reductions will result in the removal of the CMA designation.

All decisions of the State Engineer must be based on substantial evidence in the record.[80] Substantial evidence is "that which a 'reasonable mind might accept as adequate to support a conclusion.'"[81] Where the factual findings of the State Engineer are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" the resulting action "constitutes an arbitrary and capricious abuse of discretion."[82] Furthermore the evidence the State Engineer relies on in making his determination must be "presently known" and made available to the public in such a manner that members of the public have a full opportunity "to challenge the evidence."[83] Finally, the State Engineer may not use *post hoc* rationalizations to justify his action.[84]

Here, the proponents of the GMP provided no evidence showing that the GMP contains the necessary steps to halt groundwater declines and thereby remove the CMA designation. Meanwhile, Sadler Ranch retained an expert who thoroughly analyzed the GMP and determined that the pumping reductions will neither stem the ongoing groundwater level declines nor result in removal of the CMA designation.[85] The proponents of the GMP provided no evidence refuting this determination. Finally, despite having the tools to do so, the State Engineer failed to perform any independent technical analysis regarding what effect the pumping reductions in the GMP will have on future groundwater levels. In short, the only scientific evidence related to whether the proposed pumping reductions are adequate was Sadler Ranch's undisputed expert report stating that they are not. Because of this, the State Engineer's approval of the GMP was not supported by substantial evidence.

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[80] *Morris*, 107 Nev. at 701, 819 P.2d at 205 (stating that a reviewing court must "determine whether the evidence upon which the State Engineer based his decision supports the order.").
[81] *Bacher v. Office of State Eng'r of State of Nev.*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State Emp't Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).
[82] *Morris*, 107 Nev. at 702, 819 P.2d at 205.
[83] *Eureka County*, 131 Nev. at 856, 359 P.3d 1121.
[84] *Revert*, 95 Nev. at 787, 603 P.2d at 265.
[85] SE ROA 674-77; SE ROA 620-31.

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1. The proponents of the GMP provided no evidence showing that groundwater levels will stabilize as a result of plan implementation.

"The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof."[86] Accordingly, the proponents of the GMP bore the burden of proving that implementation of the GMP will result in stabilized groundwater levels. They completely failed to meet this burden. At the October 30, 2018 meeting, the proponents gave no presentation describing the elements of the GMP or how it will be implemented. They also did not have a single expert witness review the GMP and testify as to its scientific soundness. In addition, the GMP, itself, does not include any scientific or hydrologic analysis regarding how the proposed reductions in pumping will affect the basin's long-term water budget. While the GMP does state that its primary goal is removal of the CMA designation,[87] there is nothing to show that the GMP will actually meet that goal. In short, the record is devoid of evidence supporting the GMP.

In Order 1302, the State Engineer excuses this lack of evidence because the pumping reductions were established by "agreement of the GMP authors" and "selected from existing published values." No mention is made of what published sources were used or why certain values were chosen over others. Nor is any independent water budget analysis included in either the GMP or Order 1302. Given the uncertainty and disagreement regarding how much water can safely be pumped from each of the sub basins, or the valley as a whole,[88] the lack of any discussion or analysis in Order 1302 regarding how the pumping levels were established or whether they will result in stabilization of groundwater levels is disturbing. Absent such evidence and analysis, the State Engineer's decision to approve the GMP was both arbitrary and capricious.

2. Sadler Ranch provided expert evidence showing that the plan will not stop groundwater declines.

Unlike the proponents of the GMP, Sadler Ranch retained a recognized expert who fully analyzed the GMP – Mr. David Hillis, a licensed professional engineer and water rights surveyor. At

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[86] *JM v. Dep't of Family Servs.*, 922 P.2d 219, 221 (Wyo. 1996) (citing BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 7.8 (2d ed. 1984)).

[87] SE ROA 228.

[88] The GMP acknowledges this uncertainty. *See* SE ROA 480 (noting various estimates of perennial yield that differ by as much as 60%); SE ROA 486 (noting the uncertainty associated with estimating how much water is being pumped in the basin); SE ROA 488 & 493 (noting that pumping of stockwater and mitigation rights is unknown which contributes the uncertainty in knowing how much water is being pumped overall).

Sadler Ranch's request, Mr. Hillis reviewed the GMP and produced a report of his conclusions.[89] Mr. Hillis concluded that the GMP: (1) provides insufficient hydrogeological evidence, (2) favors junior priority water rights holders at the expense of seniors, (3) allows continued exploitation of the groundwater resource, and (4) "will not sufficiently reduce groundwater pumping to remove the CMA designation."[90] Mr. Hillis' report was the only expert analysis of the GMP submitted during the administrative proceedings and was undisputed.

In addition to his expert report, Mr. Hillis was present and provided comments at the October 30, 2018 meeting.[91] Mr. Hillis informed the State Engineer that "[t]here is no substantial technical evidence to show that the pumping levels, although they will be reduced over time, will actually result in the balance coming back – the basin coming back within balance."[92]

He also noted that the GMP does not contain any objective triggers or thresholds to guide future management decisions.[93] In Order 1302 the State Engineer responds by stating that "the plan to reduce pumping, monitor the effects on water levels, and then adjust pumping reductions is a sound approach to achieving the goal of stabilizing water levels."[94] But the GMP does not do that. The GMP contains no description of the monitoring network that will be used to measure groundwater levels, no definitions or objective standards to compare the results to, and no identified management actions that will be triggered based on those results. In fact, contrary to the State Engineer's assertion, the GMP does not give him flexibility to adjust pumping levels in response to monitoring data. Instead, the plan affirmatively prohibits the State Engineer from deviating from the listed pumping reductions during the first ten years of the plan (meaning he can't respond to monitoring data at all), and then severely limits his ability to adjust pumping reductions thereafter.[95] Accordingly, even if the data shows that the pumping reductions are not working, the State Engineer is handcuffed in how he can respond.

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[89] SE ROA 620-31.
[90] SE ROA 622-23.
[91] SE ROA 674-77.
[92] SE ROA 674.
[93] SE ROA 675.
[94] SE ROA 17.
[95] SE ROA 235 (GMP Section 13.13 – "Allocations shall be firmly set for the first ten years of the GMP . . . after Year 10, annual Allocations cannot exceed a cumulative adjustment of plus or minus (+/-) two (2) percent (%).").

Finally, Mr. Hillis indicated that he reviewed the prior USGS reports in the basin and stated that those reports "show that even with the reduction that groundwater mining will still be occurring *even at the end of the plan*."[96] Mr. Hillis based this conclusion, in part, on the fact that the GMP exempts a significant amount of groundwater pumping from the GMP. When this pumping is added to the pumping authorized in the GMP, Mr. Hillis estimated that total authorized pumping in year 35 would exceed 40,000 acre-feet.[97] Mr. Hillis further stated that the permanent removal of 2,500,000 acre-feet of water from the aquifer (as proposed by the GMP) represents "an extreme volume of water."[98] Mr. Hillis informed the State Engineer that "[a]t the conclusion, the plan will also not reduce the withdrawals below the perennial yield in the basin."[99] These conclusions were undisputed. Accordingly, the only expert evidence in the record indicates that the GMP will *not* bring the basin back into balance or stop groundwater declines.

3. The State Engineer failed to use the existing Diamond Valley groundwater model to analyze the effects of the plan.

The Nevada Legislature directs the State Engineer to "consider the best available science in rendering decisions concerning the available surface and underground sources in Nevada."[100] The term "best available science" is a legal term that describes the quality and the availability of science that can be considered by an administrative agency. "An agency complies with the best available science standard so long as it does not ignore available studies, even if it disagrees with or discredits them."[101] An agency cannot disregard available scientific evidence that is in some way better than other scientific evidence the agency relies upon.[102]

To meet this requirement, the State Engineer has regularly required applicants to conduct groundwater modeling studies before approving their applications. Because the GMP allows water to

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[96] SE ROA 675.

[97] SE ROA 675. These exempt water rights include, without limitation, mitigation permits issued to holders of pre-statutory spring rights that dried up as a result of pumping (Sadler, Venturacci, and Bailey), municipal permits held by Eureka County, pumping from domestic wells, and mining permits that did not have an irrigation base right. These permits have a combined total duty in excess of 9,500 acre-feet annually.

[98] SE ROA 675. To put this number into perspective, in 2015 groundwater pumping for *all* uses in the State totaled just 1,400,000 acre-feet. Nevada Division of Water Resources, 2015 Statewide Groundwater Pumpage Inventory at 1.

[99] SE ROA 676.

[100] NRS 533.024(1)(c).

[101] *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014).

[102] *Id.*

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be freely moved around the basin, and to be used for different purposes,[103] it should have been treated in the same manner, and held to the same standards, as proposed water rights change applications. With change applications of this magnitude, the State Engineer's practice is to require groundwater model simulations showing that the proposed pumping will not negatively impact other water right holders.[104]

This is especially true in cases like Diamond Valley, where a peer-reviewed regional groundwater model has already been developed. The Diamond Valley regional model was used to evaluate, among other things, the effects of proposed pumping under change applications filed by Kobeh Valley Ranch for the Mt. Hope mining project.[105] The model was designed to be used for the very purpose needed here – to simulate how various pumping scenarios will affect groundwater levels.

Both the proponents of the GMP and the State Engineer had access to this groundwater model but chose not to use it. The only reasonable inference that can be drawn from this failure to use the best and most accurate scientific analysis tool available is that the proponents know that any model simulations will confirm: (1) Harrill's 1968 conclusion that equilibrium will never be reached if pumping exceeds 12,000 acre-feet/annually in the southern sub basin, and (2) Hillis' conclusions that the GMP "will not sufficiently reduce groundwater pumping to remove the CMA designation."[106] By not using the available groundwater model to evaluate the GMP, the State Engineer violated the express requirement to use the best available scientific tools at his disposal. Accordingly, Order 1302 is not supported by substantial evidence and must be overturned.

II. The Approved GMP Violates Nevada's Prior Appropriation Doctrine.

Water use in Nevada is governed by the doctrine of prior appropriation. This doctrine is based on the principle of "first in time first in right."[107] Accordingly, a senior right holder has an absolute right to withdraw and use *all* of the water he or she is entitled to before any junior priority rights are satisfied. This doctrine has served Nevada well for over 150 years. The GMP turns the prior

[103] *See* SE ROA 234 (Section 13.8 states that "[g]roundwater subject to this GMP may be withdrawn from Diamond Valley for any beneficial purpose under Nevada law.")
[104] State Engineer Ruling 6464 at 18; State Engineer Ruling 6446 at 9-10.
[105] State Engineer Ruling 6464 at 18.
[106] *See Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006) ("When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced.").
[107] *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803, 820 (1914).

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appropriation system on its head by allowing continued over-pumping of the basin by junior priority right holders to the detriment of those holding senior priority rights.

A. The GMP benefits holders of junior-priority rights at the expense of holders of senior-priority rights.

There are two types of senior-priority users in Diamond Valley – those who hold pre-statutory (i.e., "vested") rights established prior to 1905 ("senior vested rights"), and those who hold water rights permits issued by the State Engineer which have an older priority date that will allow them to pump water during a priority-based curtailment ("senior permits"). The senior vested rights are fully protected by the non-impairment doctrine of NRS 533.085 which prohibits the State Engineer from taking any action that would diminish or otherwise impair such rights. In accordance with NRS 533.085, all state-issued water rights permits, both senior and junior, were issued "subject to" the existing senior vested rights in the basin.[108] This means that the right to use water under such a permit is expressly conditioned upon the senior vested right holders first receiving all the water they are entitled to. If the use of a permitted right interferes with a senior vested right in any manner, the right to use water under the junior-priority permit ceases. Holders of senior permits have similar protections against junior permits.

The GMP turns this system upside down. Junior-priority permits are authorized to continue pumping water despite the fact that such pumping is causing ongoing damage to the aquifer and the senior water rights that rely on it. Holders of senior vested rights have already borne the brunt of the over-pumping problem. Many of the senior vested rights were rights to spring water sources that have a direct hydrologic connection with the groundwater aquifer.[109] Prior to the pumping in the southern sub basin, these springs flowed freely and were used to flood irrigate the adjacent ranches. Now, most of these springs have dried up while those that remain have significant reductions in flow. The owners of these ranches have been required to construct and operate, at significant additional cost, replacement groundwater wells.

Meanwhile, the junior-priority users in the southern sub basin have benefitted tremendously. They have been able to grow, harvest, and sell large volumes of alfalfa and other cash crops using the

[108] *See, e.g.*, Permit 19378, Certificate 7235.
[109] *See* State Engineer Ruling 6290.

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water illegally captured from the senior right holders' springs. None of the junior priority pumpers, either individually or collectively, has ever provided compensation for either the captured water or the damage done to the springs, directly contradicting the most fundamental tenet of prior appropriation.

In Order 1302 the State Engineer explicitly acknowledges that the GMP deviates from the "first in time, first in right" rule.[110] He then attempts to justify this by asserting that when the Legislature adopted NRS 534.037 it impliedly abrogated the prior appropriation doctrine. Conversely, he also states that the GMP's share allocation formula somehow "honors" prior appropriation doctrine because it gives senior permit holders a slightly larger share allocation. Both of these assertions are false.

B. The Legislature never intended to overturn the prior appropriation system.

The prior appropriation doctrine has been a fundamental element of Nevada's common law since 1864.[111] Any statute deviating from that doctrine must be strictly construed because "[t]he Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute."[112] Therefore, "if a statute is ambiguous or its meaning uncertain, it should be construed in connection with the common law in force when the statute was enacted."[113]

There is nothing in the express language of NRS 534.037 that indicates an intent on the part of the Legislature to overturn the prior appropriation doctrine in CMAs. In fact, the State Engineer readily admits that "the legislative history contains scarce direction concerning how a plan must be created or what the confines of any plan must be."[114] Accordingly, to support his conclusion that the *Nevada* Legislature intended to deviate from prior appropriation, he relies exclusively on a *New Mexico* judicial opinion approving settlement agreement between New Mexico, the United States, and several irrigation districts in an adjudication proceeding.[115]

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[110] Order 1302 at 5.

[111] *See Lobdell v. Simpson*, 2 Nev. 274 (1864) (recognizing and defining prior appropriative rights); *see also* JAMES H. DAVENPORT, NEVADA WATER LAW 6-12 (Colo. River Comm'n 2003) (describing the common law development of the prior appropriations doctrine in Nevada).

[112] *Wilson v. Happy Creek, Inc.*, No. 74266, 2019 WL 4383395, at *5 (Nev. 2019) (citing *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016) (internal quotations and citations omitted)). *See also Orr Ditch & Water Co. v. Justice Court of Reno TP., Washoe Cty.*, 64 Nev. 138, 164, 178 P.2d 558, 570 (1947).

[113] *Orr Ditch & Water Co.*, 64 Nev. at 164, 178 P.2d at 570-71.

[114] Order 1302 at 6.

[115] Order 1302 at 6.

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1. Prior appropriation is not abrogated under NRS 534.037.

The State Engineer's legal interpretation of NRS 534.037 conflicts with legislative history and with his own prior statements. In 2016, State Engineer King gave a presentation describing the proposed GMP at the Western State Engineer's Annual Conference.[116] In the presentation he described the share allocation system that was being proposed.[117] He concluded that such an approach will "[n]eed statutory change to make [it] legal" and indicated that his office submitted a bill draft to the 2017 Legislature "to do just that."[118] That bill draft referred to was Senate Bill 73 from the 2017 legislative session.

Senate Bill 73 proposed significant changes to NRS 534.037. Among these was the addition of a provision that would give the State Engineer permission to approve a GMP that "[limits] the quantity of water that may be withdrawn under any permit or certificate or from a domestic well *on a basis other than priority*."[119] In effect, the bill would have granted the State Engineer the authority to approve a GMP that does not adhere to prior appropriation doctrine. A single hearing was held on the bill.[120] The minutes of that hearing clearly demonstrate that the State Engineer and the proponents of the GMP were asking the Legislature to allow them to implement a plan that deviates from prior appropriation doctrine.[121] However, the Legislature chose not to make such a change and Senate Bill 73 died in committee. Conveniently, and contrary to his previous assertions, the State Engineer now claims that the requested statutory changes were not needed. This raises the obvious question of why he would go through the trouble of presenting a bill to the Legislature that he believed was not needed.

The legislative history makes clear that prior to the issuance of Order 1302, State Engineer King understood that NRS 534.037 does not authorize him to replace strict priority with a share allocation system. State Engineer King attempted to resolve this problem by submitting proposed legislation asking for that authority. But the Legislature declined to give it to him. However, rather than advise the proponents of the GMP to draft a new plan that is consistent with prior appropriation, State Engineer King chose to approve the GMP anyway.

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[116] Exhibit 1.
[117] Exhibit 1, Slides 12-21.
[118] Exhibit 1, Slide 21.
[119] S.B. 73 at 3:34-40, 2017 Leg., 79th Sess. (Nev. 2017).
[120] *Minutes of the S. Comm. on Nat. Res.* (February 28, 2017).
[121] *Id.* at 9 (Testimony of Jake Tibbitts, Eureka County's Natural Resource Manager, "The time to fix this problem through strict prior appropriation was 60 years ago when there was a flood of applications. Now 60 years later, the State Engineer is saying we are going to use strict prior appropriation. This is unworkable for a community.").

If the Legislature intended to supplant the well-established doctrine of prior appropriation it would have adopted clear language expressing that intent. When such language was proposed, the Legislature rejected it. Accordingly, the State Engineer lacked authority to approve a GMP that deviates from prior appropriation doctrine and Order 1302 is invalid.

2. The *New Mexico* case cited by the State Engineer as authority for overturning *Nevada's* prior appropriation system is inapplicable.

In Order 1302, the State Engineer relies solely on a New Mexico case – *State Engineer v. Lewis*[122] – to support his claim that the Nevada Legislature impliedly authorized a GMP to disregard prior appropriation doctrine. However, in the *Lewis* case, the water management plan upheld by the Court was presented to, and expressly ratified by, the New Mexico Legislature.[123] Here, the GMP has never been presented to, or ratified by, the Nevada Legislature. Furthermore, as noted above, when legislation was introduced that was specifically designed to authorize the provisions contained in the GMP, that legislation was rejected.

Article 3, Section 1 of the Nevada Constitution establishes three separate and distinct branches of government: the Legislative, the Executive, and the Judicial. Furthermore, "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to any of the others. . . ."[124] Article 4, Section 1 vests the Nevada Legislature with all legislative authority.[125] The State Engineer is a member of the Executive department.[126] Accordingly, absent express Legislative authorization, the State Engineer has no authority to approve a GMP that alters or amends the law of prior appropriation in any manner. Here, unlike in the *Lewis* case, no such authority exists. Because Order 1302 presumes to administratively legislate away Nevada's prior appropriation doctrine, it is invalid and should be overturned.

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[122] *State Office of State Eng'r v. Lewis*, 150 P.3d 375 (N.M. 2006).
[123] *Id.*, 150 P.3d at 379.
[124] NEV. CONST. art. 3 § 1.
[125] NEV. CONST. art. 4 § 1.
[126] *See* NRS 532.010 et seq.

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C. The GMP's share allocation system is not compatible with the prior appropriation doctrine.

The State Engineer asserts that the GMP's share allocation system is compatible with prior appropriation because it "allocat[es] senior rights a higher priority factor than junior rights."[127] But this ignores how the prior appropriation system actually works. Under strict prior appropriations a senior permit holder will receive 100% of their water allocation during a curtailment. Meanwhile, junior permit holders receive nothing because their permits were conditionally issued subject to the senior rights. This outcome is not as harsh as it sounds because junior users always have the option of purchasing or leasing water from the senior – thereby fairly compensating the senior for the relative value of the water.

Under the GMP however, in the thirty-fifth year of the plan (when the greatest reduction in pumping is enforced) the most senior permit holder will receive just 30% of their permitted duty.[128] Meanwhile the most junior permit holder will continue to receive 24% of their duty without providing any compensation to the senior.[129] A mere 6% difference in water allocation cannot be considered adequate compensation for the loss of 70% of the duty of a water right. Put another way, if the senior permit holder has a duty of 100 acre-feet/annually, the GMP confiscates 70 acre-feet of that water in year 35 and then gives 24 acre-feet to the junior without any compensation. The State Engineer contends that this confiscation is justified because the senior gets to receive 6 acre-feet more water than the junior. The absurdity of this is reflected in the fact that less than half of the senior permit holders agreed with this scheme.[130]

If Eureka County and the State Engineer desire to confiscate the rights of senior permit holders to benefit juniors, they should invoke the powers of eminent domain and provide just compensation for the senior's loss. Water rights are property rights that are protected by both the Nevada and United

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[127] Order 1302 at 7.

[128] The most senior water user receives 0.99 shares for each acre-foot of permitted water. In Year 35 of the GMP each share receives 0.301 acre-feet of water per share. Accordingly, the most senior water user will receive just 30% of their permitted duty. SE ROA 499-510 (GMP Appendix F & G).

[129] The most junior water user receives 0.80 shares for each acre-foot of permitted water. In Year 35 of the GMP each share receives 0.301 acre-feet of water per share. Accordingly, the most junior water user will receive 24% of their permitted duty. SE ROA 499-510 (GMP Appendix F & G).

[130] Order 1302 at 3 (indicating that only 46% of the seventy-seven senior water right permits and certificates were represented on the petition submitted by the proponents of the GMP).

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States Constitutions.[131] Any regulation that confiscates a portion of the duty of a senior right for the benefit of a junior right holder constitutes an unlawful taking of private property for public use.[132]

The Nevada Supreme Court recently affirmed that "the priority of a water rights is . . . its most important . . . feature."[133] The Supreme Court acknowledged that "a loss of priority . . . certainly affects the rights' value and can amount to a de facto loss of rights."[134] The GMP confiscates the priority date of senior permit holders without providing them any compensation for their loss.

III. The GMP Fails To Provide Adequate Mitigation To Holders Of Pre-Statutory Rights.

In Order 1302, the State Engineer asserts that holders of senior vested rights are not entitled to mitigation for ongoing harm to their rights because they have already availed themselves of the benefits of Order 1226 – authorizing applications for groundwater mitigation permits to replace spring water that has been lost due to over-pumping. This is factually incorrect. While Sadler Ranch and the Baileys have applied for and received mitigation permits, the Renners have not. The Renners own the most northerly ranch in the basin and, therefore, have been the last to be affected by the over-pumping in the southern sub-basin. Their springs are still flowing, albeit at an increasingly diminished rate. The GMP's allowance of an additional 35-years of continued over-pumping will result in even more harm to the Renners vested spring rights and may, like the Sadler, Thompson, and Bailey springs, result in the Renner springs drying up completely.

The State Engineer's statement also directly contradicts and ignores this Court's previous determination that the mitigation rights that have been issued "are meaningless if the water source from which [the] mitigation rights [are] received is depleted through over-pumping by junior appropriators."[135] The GMP as approved authorizes continued over-pumping and depletion of the basin's water resources with no end in sight. As a result, water levels will continue to decline. In addition, while mitigation water rights have been provided to replace captured water, the owners of those

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[131] *In re Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949) (water rights "will be regarded and protected as real property.").
[132] U.S. CONST. amend. V; NEV. CONST. art. 1 § 8.
[133] *Happy Creek Inc.*, No. 74266, 2019 WL 4383395, at *9 (quoting Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 Envtl. L. 37, 43 (2002)).
[134] *Happy Creek, Inc.*, No. 74266, 2019 WL 4383395, at *9 (internal citations and quotations omitted).
[135] Order Granting in Part and Denying in Part Motion to Dismiss First Amended Petition for Curtailment in Diamond Valley at 5 (Seventh Judicial Dist. Court, Case No. CV-1409-204).

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rights have received no compensation for the costs incurred in drilling new wells, installing well pumps, maintaining the wells and pumps, or ongoing electricity needed to operate them.

Under the prior appropriation doctrine, when a junior user captures water from a senior they can provide replacement water as mitigation.[136] However, that water must be of similar quality and quantity and it must be made available to the senior *at no additional cost*.[137] In other words, the senior user must be made *whole*. That has never happened in Diamond Valley. To date, none of the senior vested right holders have been made whole for their losses. The GMP could provide such compensation. The GMP establishes an assessment on water users to pay for the costs of administering the GMP. This assessment should include monies to compensate senior vested right holders past and future losses. Because the GMP authorizes additional permanent depletions of water from the aquifer without providing compensation to senior vested right holders who are being harmed by such depletions, Order 1302 must be overturned.

IV. The Groundwater Management Plan Violates Mandatory Provisions Of Nevada's Statutory Water Law.

The Legislature's invitation to allow water users to develop a GMP in lieu of curtailment does not give such users, or the State Engineer, carte blanche authority to write their own water law or ignore mandatory requirements of other water statutes. Here, the GMP violates multiple provision of Nevada's statutory water law. First, the GMP authorizes water users to change their permitted points of diversion, manner of use, and place of use without filing a change application. Second, the water banking provisions of the GMP do not comply with the requirements of NRS 534.250 – 534.350. Third, the GMP unlawfully circumscribes the State Engineer's authority to manage the basin. Finally, the issuance of Order 1305, which is inextricably linked to Order 1302 and the implementation of the GMP, unlawfully exempts water right holders from the requirement to file a proof of beneficial use.

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[136] *Dry Gulch Ditch Co. v. Hutton*, 133 P.2d 601, 613 (Or. 1943).
[137] *Id.*

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A. The GMP allows water right holders to change their permitted point of diversion, place of use, and manner of use of their permits without filing a change application.

An essential component of the GMP is the ability of water shareholders to freely transfer and sell their water allocations to other users. The GMP states that these allocations can be used for "any beneficial purpose under Nevada law"[138] despite the fact that the underlying permits expressly limit use of the water to irrigation. In effect, this illegally converts state-issued water rights permits, with well-defined places and manners of use, into "super" permits whose water can be used anywhere in the basin for any purpose whatsoever.

Under NRS 533.325 "any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, *shall* . . . apply to the State Engineer for a permit to do so."[139] Under NRS 533.345 an application requesting to change an existing water right "*must* contain such information as may be necessary to a full understanding of the proposed change."[140] The purpose for requiring an applicant to submit a change application is to ensure that the changes being proposed will not negatively impact other water users in the basin. Both statutes use the mandatory language "shall" and "must."[141] Because these requirements are mandatory, the State Engineer has no authority to waive them. In addition, NRS 533.330 provides that "[n]o application shall be for the water of more than one source *to be used for more than one purpose*."[142] In other words, each particular use of water must be authorized by a separate permit. Again, the statute uses the mandatory language "shall."

Here, the permits being converted into "shares" clearly identify the authorized use (irrigation). The GMP cannot violate these express permit terms by authorizing different manners of use. Water permits for irrigation differ from other permits because the use is not fully consumptive. Instead, a portion of the water filters back through the soil and thereby recharges the basin.[143] By contrast, other beneficial uses, like industrial, mining, and municipal, generally consume the full duty of the appropriated water. Allowing irrigation water to be used for these other purposes without any

[138] SE ROA 234 (Section 13.8).
[139] Emphasis added.
[140] Emphasis added.
[141] *See* NRS 0.025(1)(c) & (d) (" 'Must' expresses a requirement"; " 'Shall' imposes a duty to act.").
[142] Emphasis added.
[143] SE ROA 486.

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adjustment to the duty to account for consumptive use violates existing water management practice and could result in even greater impacts to the aquifer.

The State Engineer does not have the authority to waive the statutory requirement that a water user must submit an application before making a change to the place of diversion, place of use, or manner of use of an existing water right.[144] Nor does he have the authority to allow permit holders to use their allocated water for anything other than the use for which the permit was approved. Accordingly, the State Engineer lacked the authority to approve the GMP as submitted.

B. The water banking provisions of the GMP violate the express requirements of NRS 534.250 – 534.350.

The GMP establishes an aquifer storage and recovery ("ASR") program under which water users in Diamond Valley can "bank" their unused water allocations from one year and use them in subsequent years.[145] In Appendix I of the GMP, Mr. Bugenig, a consulting hydrogeologist, acknowledges that this program falls under the regulatory purview of Nevada's ASR statutes:

> Water banking, or saving un-pumped groundwater for use in a subsequent year or years, is a type of aquifer storage of recovery (ASR) program regulated by the Nevada State Engineer.[146]

Under Nevada law, an ASR project must: (1) be properly permitted, (2) demonstrate that the water being stored is available for appropriation, and (3) be hydrologically feasible. The ASR banking program proposed in the draft GMP fails to meet any of these criteria.

1. Banking water in the aquifer for use in later years requires a valid ASR permit.

Under NRS 534.250(1) "[a]ny person desiring to operate a [ASR] project must first make an application to, and obtain from, the State Engineer a permit to operate such a project." The permit application must include, among other things, evidence of technical and financial feasibility, an identification of the source, quality, and quantity of water to be banked, the legal basis for acquiring and using the water in the project, and a hydrologic study demonstrating that the project is feasible and will

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[144] *Preferred Equities Corp. v. State Eng'r, State of Nev.*, 119 Nev. 384, 388, 75 P.3d 380, 383 (2003) (The State Engineer's authority is strictly limited by the water law's express provisions).
[145] SE ROA 234 (Section 13.9).
[146] SE ROA 522 (emphasis added).

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not cause harm to other users of water in the basin.[147] To approve any such application, the State Engineer must make factual determinations that: (1) the applicant has the technical and financial capability to operate the project, (2) the applicant has a right to use the proposed source of water for recharge, (3) the project is hydrologically feasible, and (4) the project will not cause harm to other users of water.[148]

The submission of the GMP to the State Engineer did not relieve the proponents of the requirement to file an application to operate an ASR project. First and foremost, the GMP did not include the mandatory information required by NRS 534.260. Second, the GMP was not noticed and published pursuant to the requirements of NRS 534.270. Finally, Mr. Bugenig's "Memo," that is described in the GMP as a "Groundwater Flow Modeling Report," addresses only one specific issue related to the ASR banking program – the depreciation factors used in the GMP. The Memo does not include any analysis showing that the banking program is hydrologically feasible.

Because the proper procedures have not been followed to establish an ASR banking program under Nevada law, and because this program is an "essential" component of the proposed GMP,[149] Order 1302 must be overturned.

2. Water above the perennial yield is not available for appropriation and cannot be used to support an ASR banking program.

Before the State Engineer can approve an ASR banking program, he must determine that the water to be stored is otherwise available for appropriation.[150] Here, the water is from permits that were issued above the basin's perennial yield. By definition, this is not water available for appropriation. In other words, the banking program relies on water that should never have been pumped in the first place.

The State Engineer admits this when he states that the banking program does not identify a source of water "for the purpose of accumulating storage for future use."[151] This statement identifies the

[147] NRS 534.260.
[148] NRS 534.250(2).
[149] SE ROA 522 ("The ability to "bank" the unused portion of an Annual Groundwater Allocation is an essential part of the Diamond Valley Groundwater Management Plan.").
[150] NRS 534.250(2)(b).
[151] Order 1302 at 9.

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fundamental flaw of the "banking" program – there are no deposits, only withdrawals. As most bankers know, to be able to withdraw money from a bank, you must first make a deposit.

The perennial yield of a groundwater basin is the "maximum amount of groundwater that can be salvaged each year over the long-term *without depleting the groundwater reservoir*."[152] Harrill determined that for the southern part of Diamond Valley this is 12,000 acre-feet/annually.[153] Hence, once withdrawals from the southern portion of the basin reach 12,000 acre-feet, no water remains available for use. The only way an unused water allocation would be available to be "banked" would be if withdrawals from the southern portion of the basin in any given year were less than 12,000 acre-feet. And the total quantity of water available to be stored that year would be limited to the difference between the quantity of the withdrawals and the total water available.[154]

Because neither the State Engineer nor the proponents of the GMP have shown that the "unused" water allocations consist of water that is actually available for appropriation, the GMP violates NRS 534.250 and Order 1302 must be overturned.

C. The GMP unlawfully limits the State Engineer's authority to manage the basin.

1. The GMP limits the authority of future State Engineers to order greater reductions in pumping or curtail pumping altogether if evidence indicates that the plan is not working.

The GMP artificially limits the State Engineer's discretion regarding how much of an accelerated reduction in pumping can be ordered. Under the GMP, the State Engineer is strictly prohibited from deviating from the benchmark reductions during the first ten years of the plan.[155] Then, after the ten-year period expires, the State Engineer is only authorized to increase or decrease pumping reductions by a maximum of 2% each year.[156] This means that even if groundwater levels continue to decline, and even if such declines have catastrophic results, the State Engineer will be prohibited from taking action to correct the problem. Such provisions represent an unlawful intrusion on the State Engineer's authority

[152] SE ROA 224 (emphasis added).
[153] SE ROA 27.
[154] For example, if withdrawals in the southern basin were only 10,000 acre-feet in a particular year, a maximum of 2,000 acre-feet would be available to be "banked".
[155] SE ROA 235 (Section 13.13).
[156] *Id.*

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to regulate the groundwater basin in a manner that protects both the environment and vested water right holders.

The Legislature has granted the State Engineer the power to "supervise" all groundwater wells within a basin (except domestic wells)[157] and "make such rules, regulations and orders as are deemed necessary essential for the welfare of the area involved."[158] In addition, the Legislature has authorized the State Engineer to curtail pumping in basins when "average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees."[159] The State Engineer cannot relinquish, through approval of a GMP, his authority under these provisions. A current State Engineer also cannot limit the scope of authority of future State Engineers.

With the adoption of NRS 534.037 and NRS 534.110(7), the Legislature permissively allowed the State Engineer to consider approving a GMP in lieu of regulation by priority. However, the Legislature did not, either expressly or impliedly, state that a GMP can excuse the State Engineer from exercising his general regulatory authority or limit the manner in which he may do so. The purpose of a GMP is to provide water right holders the opportunity to take voluntary, collective action to limit *their own* pumping in a manner that benefits everyone.[160] The Legislature did not authorize proponents of a GMP to create an entirely new regulatory scheme whereby they exempt themselves from State Engineer regulation or mandatory provisions of the water law.

2. The GMP sets artificial deadlines on future State Engineers to review applications and deems regulated activity automatically approved if the State Engineer fails to meet those deadlines.

The GMP attempts to set up an alternative process for the approval of new, temporary wells.[161] Under this process, the State Engineer has just fourteen days to evaluate an application for a new well, or an increased diversion from an existing well. If the State Engineer fails to meet this deadline, the new well is deemed to be automatically approved.

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[157] NRS 534.030(4).
[158] NRS 534.120(1).
[159] NRS 534.110(6).
[160] *Minutes of the S. Comm. on Gov't Affairs* (May 23, 2011) at 16 (Testimony of Assemblyman Goicoechea) ("This bill allows people in overappropriated basins ten years to implement a water management plan to get basins back into balance. *People with junior right will try and figure out how to conserve enough water under these plans.*") (emphasis added).
[161] SE ROA 237.

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However, the State Engineer is required to carefully consider all requests and applications submitted to him. This is a duty that cannot be abdicated to placate the proponents of the GMP. While timely action on applications should always be a goal, there are circumstances where extra time is required to fully evaluate the effects of a proposal. Only the Legislature has authority amend the water law and declare that applications not acted upon within a certain timeframe will be automatically approved. Until it does so, the State Engineer is without authority to approve such a provision in the GMP. Accordingly, Order 1302 must be overturned.

D. The GMP unlawfully exempts water right holders from the requirement to file a proof of beneficial use of their water.

Water rights are a usufructuary right – the right to use a particular commodity in a particular way. Such rights are contingent on the holder actually using the commodity. With respect to water, this principle is reflected in NRS 533.035 which declares that beneficial use is "the basis, the measure *and the limit* of the right to the use of water."[162] Accordingly, NRS 533.380(1)(b) requires a permit holder to prove that they have actually placed the water to beneficial use. This requirement is not optional. The permit holder must comply with it or face cancelation of their permit. Under NRS 533.380(3) a request for an extension of time to file such a proof may be granted if the permit holder demonstrates good cause. However, any single extension of time cannot exceed five years. Again, these are mandatory requirements.

In implementing the GMP, the State Engineer desires to relieve permit holders of these requirements. On July 31, 2019, in conjunction with the implementation of the GMP, the State Engineer issued Order 1305 granting a blanket five-year extension of time to file a proof of beneficial use to all water rights subject to the GMP.[163] The State Engineer references no statutory provision that grants him authority to issue such an extension.[164] He only states that because the Legislature did not consider a situation where water rights are subject to a GMP when drafting NRS 533.380, he has the authority to rewrite the legislation to provide such an exemption.

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[162] Emphasis added.
[163] Order 1305 at 2.
[164] Sadler Ranch has timely appealed Order 1305 to this issue is properly before this Court.

Under NRS 533.380(3), each permit holder must *individually* request an extension of time and such request *must* be "[a]ccompanied by proof and evidence of the good faith and reasonable diligence with which the applicant is pursuing the perfection of the application." Likewise, in reviewing such an application, the State Engineer must make a particularized finding that the *individual* applicant has shown good cause for the extension. Making *individualized* determinations about *particular* applications is an important due process protection because any water users who may object to the extension have appeal rights under NRS 533.450.[165]

Order 1305 was issued without any individual permit holder providing the proof and evidence required by NRS 533.380(3). Likewise, the State Engineer made no particularized findings with respect to whether individual permit holders proved a good faith reason why their particular extension should be granted. Order 1305 merely states that because the GMP is in place, all permit holders subject to the GMP are granted an extension, regardless of whether they have made an effort to use their water.

Because Orders 1302 and 1305 violate express and mandatory provisions of Nevada's water law, they should be overturned.

V. The GMP's Depreciation Rates Are Arbitrary, Capricious, And Not Supported By Substantial Evidence.

The GMP establishes an arbitrary and capricious "depreciation" factor that it applies to unused "banked" allocations. For share allocations held by irrigators in the southern portion of the basin, banked allocations depreciate at a rate of just 1% annually. Meanwhile, the banked allocations for northern shareholders depreciate at a whopping 17% annually. This provision improperly discriminates against the very northern ranches that have led the push to have junior-pumping regulated.

The difference in depreciation factors is ostensibly based on the existence of an east-west groundwater divide that runs through the center of the valley and was identified by Harrill in 1968. Because there is relatively little phreatophytic discharge that can be captured in the southern portion of the basin, Harrill recommended that pumping in this area be limited to 12,000 acre-feet/annually. The State Engineer ignored this recommendation and has actually allowed the majority of the pumping in the basin to occur there. Now, he wants to use this same lack of phreatophytic discharge in the southern

[165] *Sierra Pac. Indus.*, 135 Nev. Adv. Op. 13, 440 P.3d 37.

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sub basin as the excuse for discriminating against the northern irrigators – all of whom had their springs dry up from the over-pumping.

The State Engineer cannot have it both ways. He cannot ignore the groundwater divide and Harrill's recommendation that pumping in the south be limited to 12,000 acre-feet/annually because of a lack of phreatophytic discharge in that area, but then turn around and use that same basis to treat northern irrigators in a discriminatory manner with respect to depreciation rates. Such a stance is, by definition, arbitrary and capricious.

In addition, the only evidence provided to support the different depreciation rates is a memo provided by Dale Bugenig and included as GMP Appendix I. The basis for Mr. Bugenig's analysis is a simulation he claims to have run using the Mt. Hope groundwater model (this is the same groundwater model that the State Engineer refused to use to evaluate whether the pumping reductions in the GMP will bring the basin back into balance). The memo is a summary analysis and Mr. Bugenig failed to provide a peer-reviewed groundwater model report or the simulation data files that would allow his results to be independently verified. In addition, the proponents of the GMP failed to produce Mr. Bugenig as a witness at the public meeting to introduce the memo into evidence, present his findings, and be subject to cross-examination by opposing parties. The State Engineer glosses over this lack of supporting evidence by claiming that "[t]he accuracy of the model and appropriateness of assigning [evapotranspiration ("ET")] depreciation rates based on model interpretation was discussed at GMP planning meetings."[166] However, the record on appeal submitted by the State Engineer contains none of the supporting information presented at those meeting or transcripts of them. Because the record lacks any evidence supporting Mr. Bugenig's summary conclusions, his memo cannot be relied on as substantial evidence supporting the State Engineer's decision.

In the memo, Mr. Bugenig states that "[w]ater not pumped in these areas [the northern sub basin] is lost to phreatophyte ET." Yet nowhere else in the GMP are phreatophytic ET withdrawals considered. The same amount of phreatophytic ET discharge will occur in the basin regardless of whether water is pumped or banked. And, imposing a high rate of depreciation is contrary to the stated goal of the

[166] SE ROA 18.

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banking program – to encourage conservation.[167] The depreciation rate is effectively a 17% tax on users who choose to conserve and pump less than their allotted quantity.

Finally, the GMP authorizes share allotments to be moved around and pumped anywhere in the basin. Allotments held by irrigators in the north sub basin can be sold to irrigators in the south and vice versa. If the southern irrigator chooses not to pump a portion of an allotment he purchased from a northern irrigator, and thereby "bank" the unused water, the banking is occurring in the south but the allotment is depreciated at the northern rate. This is non-sensical. We already know that water pumped in the south is causing groundwater levels in the north to decline. In other words, the sub-basins are connected, and water pumped in the south is actually being drawn from the north. Therefore, there is no rational basis for applying different depreciation factors to the respective share allotments.

Because the depreciation rates contained in the GMP are discriminatory, and because the record lacks substantial evidence to support them, Order 1302 should be overturned.

VI. The State Engineer Violated Petitioners' Due Process Rights By Failing To Hold A Proper Administrative Hearing.

All State Engineer administrative proceedings must comply with the due process clauses of both the Nevada and United States Constitutions. The Nevada Supreme Court has ruled that due process requires not just notice of a hearing but also enough information regarding the subjects to be considered at the hearing to give those participating an adequate opportunity to respond.[168] In water cases, the Nevada Supreme Court has further indicated that a participant's right to be heard in an administrative proceeding includes "the ability to challenge the evidence upon which the State Engineer's decision may be based."[169] This is because "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."[170]

The State Engineer's public meeting was not structured in a manner that provided participants with the opportunity to challenge the evidence relied on by the State Engineer or offer contrary presentations. Furthermore, the entire structure of the public meeting prevented the effective

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[167] SE ROA 10 ("The State Engineer finds that banking . . . is a mechanism . . . to encourage water conservation practices.").
[168] *Bing Constr. Co. of Nev.*, 107 Nev. at 266, 810 P.2d at 771.
[169] *Eureka County*, 131 Nev. at 855, 359 P.3d at 1120.
[170] *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4, 95 S. Ct. 438 (1974) (cited favorably by the Nevada Supreme Court in *Eureka County v. State Eng'r*, 131 Nev. at 855, 359 P.3d 1120).

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presentation of evidence contrary to the GMP. Rather than conduct a normal hearing, where project proponents present their evidence and then opponents provide a rebuttable, the State Engineer ordered the public comments based solely on when individuals signed in to the meeting. This meant that many of the opponents were required to speak first and then had no opportunity to rebut later statements made by proponents. Because the entire hearing was conducted in a manner intended to limit the ability of opponents to mount an effective challenge to the plan, Order 1302 should be overturned.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that Order 1302 be overturned.

AFFIRMATION
Pursuant to NRS 239B.030(4)

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

DATED this 13th day of September, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document, which applies to Case Nos. CV1902-348, -349, and -350, as follows:

[X] By **ELECTRONIC SERVICE**, addressed as follows:

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[X] By **UNITED STATES POSTAL SERVICE**, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

The Honorable Gary D. Fairman
801 Clark Street, Suite 7
Ely, Nevada 89301

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

DATED this 13th day of September, 2019.

Employee of TAGGART & TAGGART, LTD.

EXHIBIT INDEX

Exhibit	Description	Pages
1.	The Australian Approach to Water Management: A Pilot Project in Diamond Valley, Nevada, Jason King, P.E., September 26, 2016	24

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EXHIBIT 1

EXHIBIT 1

The Australian Approach to Water Management
A Pilot Project in Diamond Valley, Nevada

2016 Western State Engineer's Annual Conference
Zion National Park, Utah

Jason King, P.E.
Nevada State Engineer
Monday, September 26, 2016

Diamond Valley

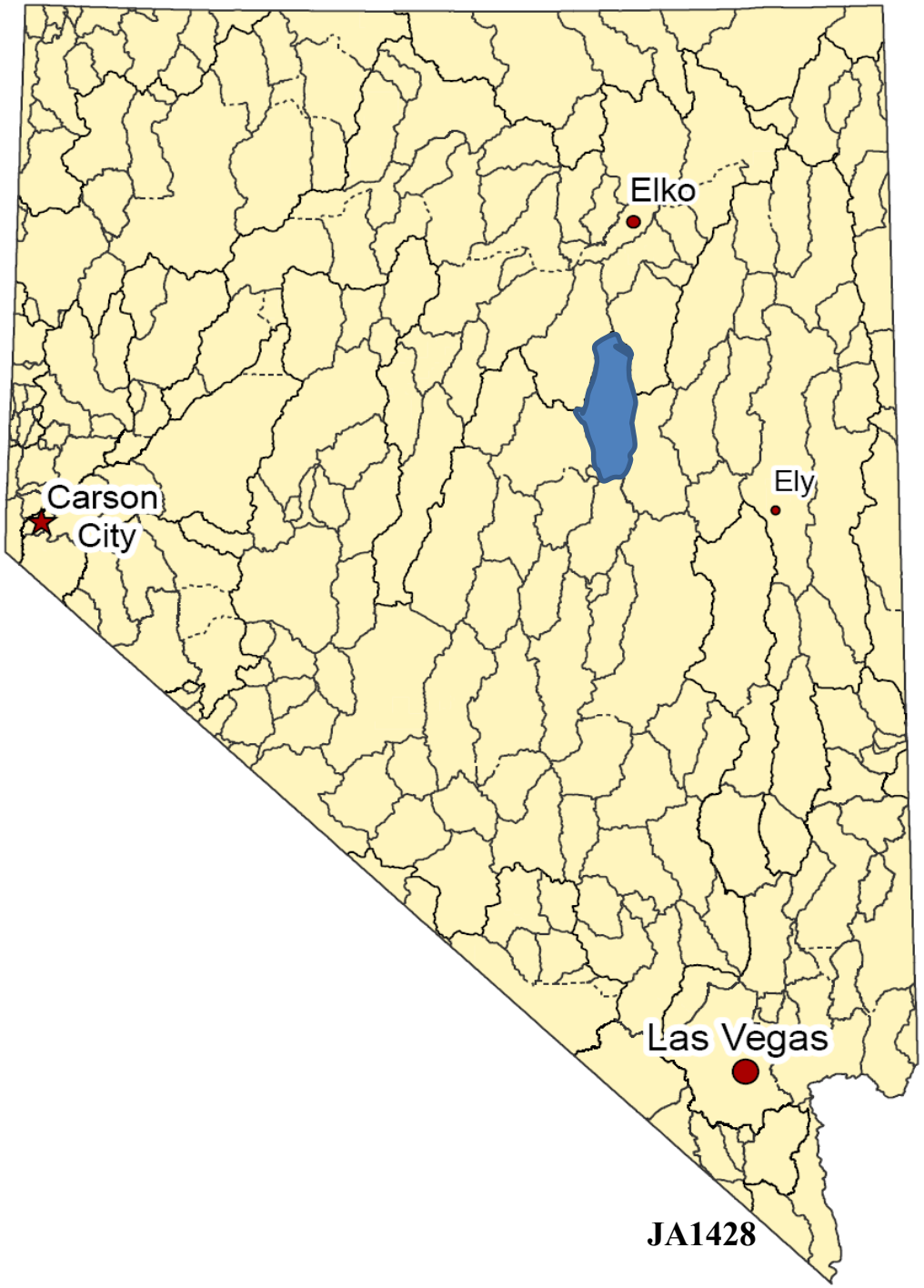
Perennial Yield:

30,000 – 35,000 AF

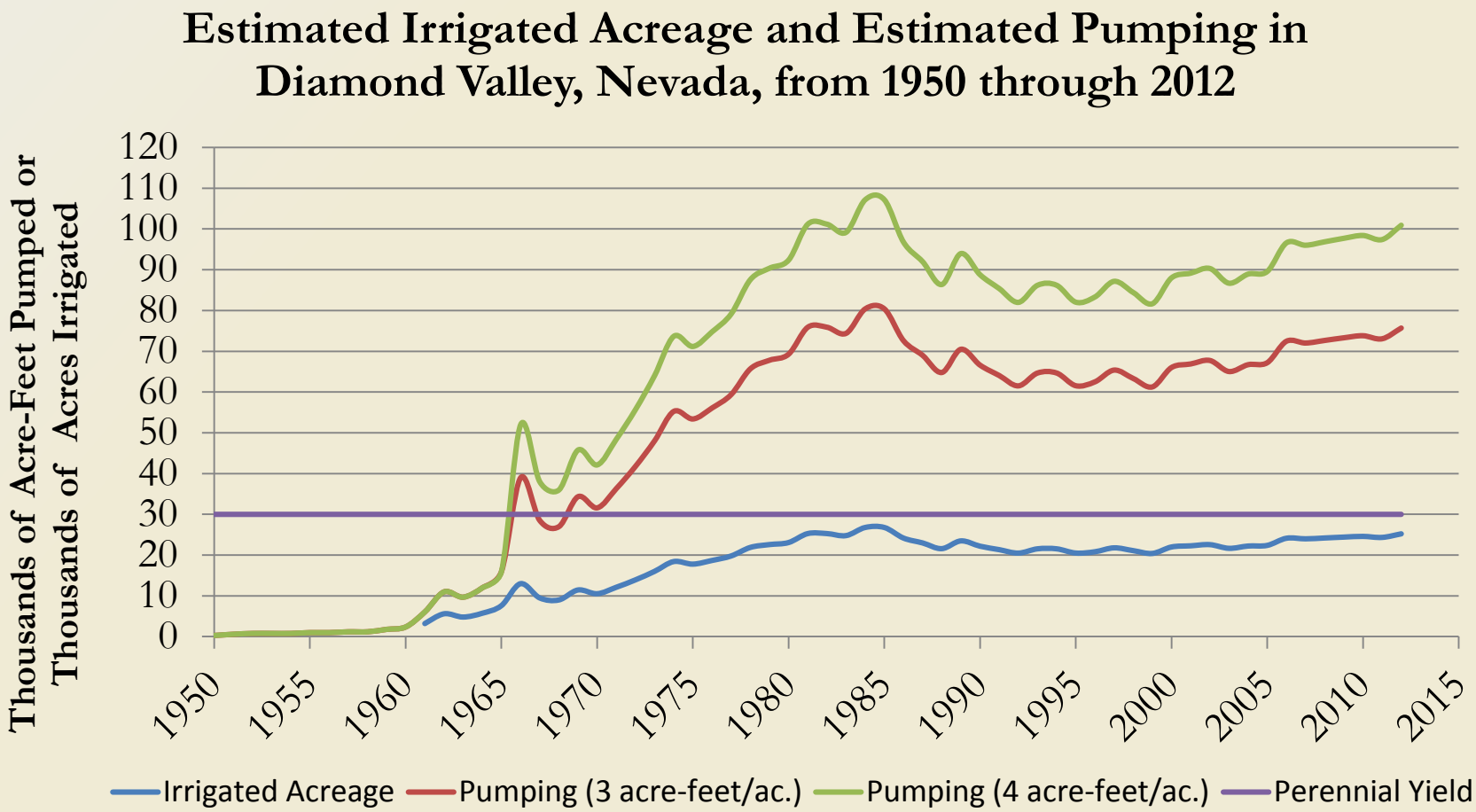
Committed:

131,000 AF

(125,000 AF in AG at 4 AFA)



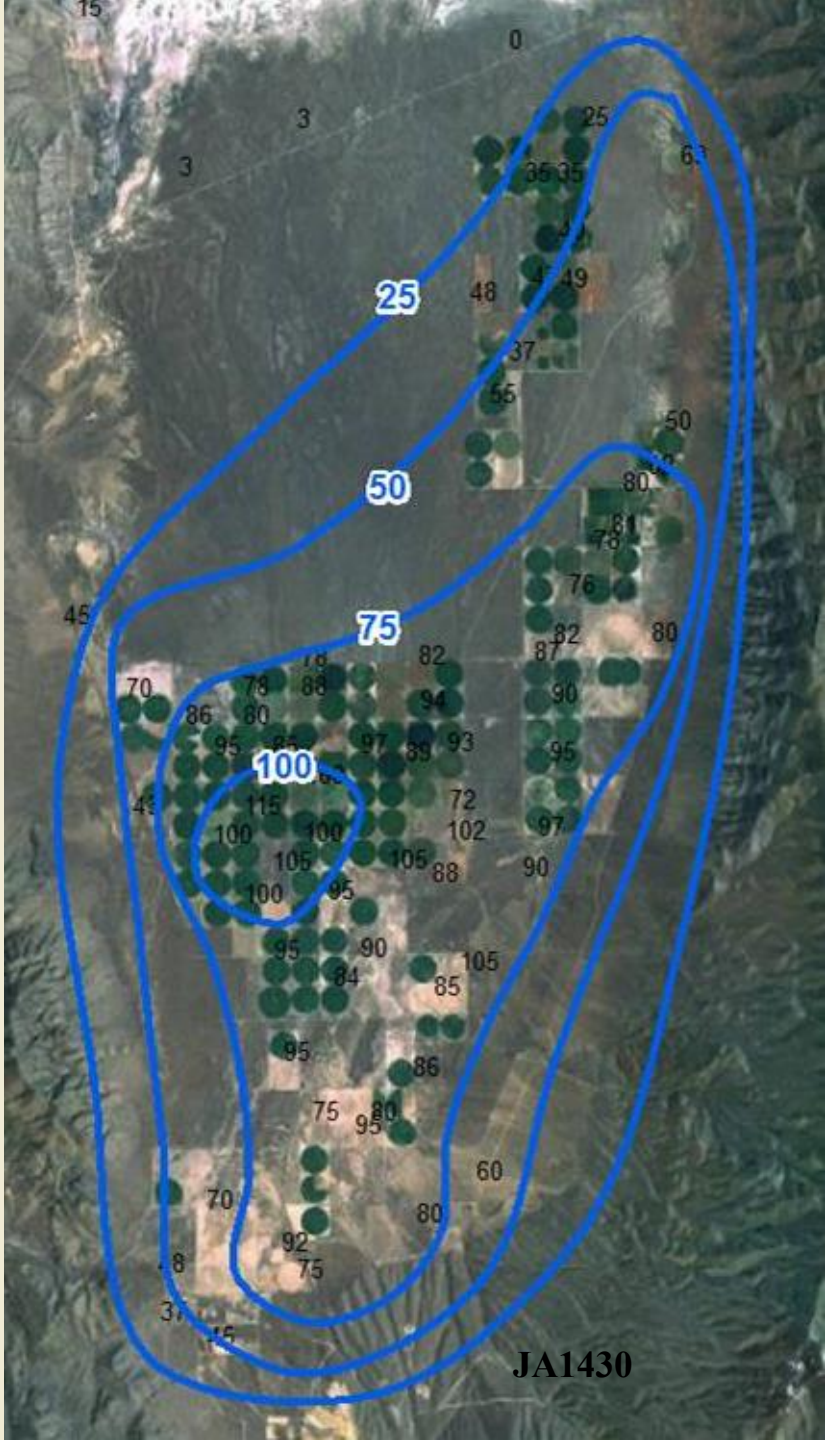
Historical Agricultural Use



Data for 1950-65 are from Bulletin 35 (Harrill, 1968), data for 1966-89 and 1991-2012 are from files of NDWR, and data for 1990 are based on a field inventory by U.S. Geological Survey (Arteaga et al, 1995).

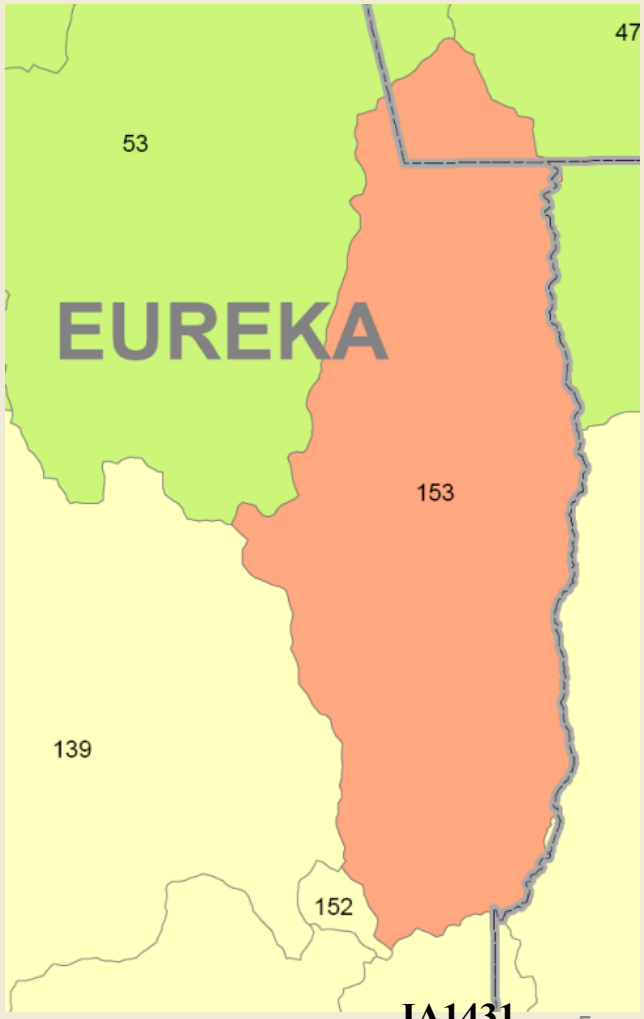
JA1429

Approximate Groundwater Level Decline Due to Agricultural Pumping



Diamond Valley

Order No.	Order Date	Type
277	08-05-1964	Designation (portion)
280	08-28-1964	Amended Designation
541	12-22-1975	Notice of Curtailment
717	07-10-1978	Notice of Curtailment
809	12-01-1982	Totalizing Meter
813	02-07-1983	Amendment of Order 809
815	04-04-1983	Amended Designation
1226	03-26-2013	Further Curtailment



Urgency

- Groundwater depletion will affect ability to economically irrigate.
- Unsustainable in the long term, and may even be *unsustainable in the short term*.
- Concerned about *irreversible harm* from continued over-draught.

Declared
Diamond Valley
a Critical Management Area

August 25, 2015

Critical Management Area (CMA)

- NRS 534.110(7) - The State Engineer:
  - (a) **May** designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.
  - (b) **Shall** designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin upon receipt of 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.

Critical Management Area (CMA)

- NRS 534.110(7) - The State Engineer:
  - 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, ***unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037***.

Groundwater Management Plan (GMP)

- A petition signed by a **majority of the holders of permits or certificates** in the basin for the approval of a groundwater management plan.
- The petition must be accompanied by the groundwater management plan, which must set forth **the necessary steps for removal of the basin's designation as a critical management area**.

Unbundling of Water Rights The Australian Framework

Unbundling Water Rights

Diamond Valley

- January 1, 2017 proposed start date
- The plan shall be reviewed after 3 years for possible amendments
- ONLY groundwater irrigation rights (including valley floor springs) and those rights that began as irrigation, are subject to the GMP
  - Represents 97% of the rights in the basin

Unbundling Water Rights

- ALL irrigation right holders agreed to begin the GMP with a 25% reduction of their paper rights by 25% (3 AFA instead of 4AFA)
- Begun installation of smart meters on all irrigation rights
  - Stringent meter installation requiring certification
- Smart meters will report to a database via telemetry (cell router), and will debit diversions from account

Unbundling Water Rights

- Diamond Valley Groundwater Authority
  - SE, as Chair, establishes the Board of 5 members
    - No member shall have a direct interest in businesses that uses > 5AF in Diamond Valley
    - No member shall hold or have an interest in any share in Diamond Valley
    - There is a CEO on the Board who is the point contact to the SE.
    - Each term is for no more than 5 years.

Unbundling Water Rights

- Diamond Valley Water Resource Advisory Panel
  - Eight (8) member panel
  - Made up of irrigators and mining interests (base rights were irrigations) within Diamond Valley
  - Makes recommendations to the Management Board

Unbundling Water Rights

- Every water user must have a ***Use Approval***
- Each ***Use Approval*** is linked to a Water Account
- Online "Share Register" that shows all the Water Accounts
  - Google "Waterfind Australia"
- Throughout the irrigation season, all diversion of irrigation water will be deducted from the Water Account

Unbundling Water Rights

- The GMP
  - 2017, Total Assigned Volume of water is 74,000 AF and converted to shares. After the initial 25% across the board reduction:
    - Junior users are reduced by an additional 20%
    - Senior users not reduced in 1st year
  - Goals:
    - 30% pumping reduction after 10 years
      - Locked in for the 1st 10 years
    - 50% pumping reduction after 30 years
      - Maximum 2% deviation from previous year

Unbundling Water Rights

- Banking of water is allowed
  - Can be leased or sold

- Funding the program
  - Basin assessments
  - Penalties
  - Annual well charge (to keep account active and linked to register)
  - Transaction fees within the share register

Unbundling Water Rights

- Exit Ramp - after 5 years (2022), if more then 20% of the stakeholders don't believe the GMP is working, a meeting will be held to vote on its future.
  - If more than 30% (prorated by shares) vote for discontinuation of the GMP, it shall cease to exist.
  - Shares are converted to water right equivalents.

Unbundling Water Rights

State Engineer retains authority under GMP for conflict/impairment analysis!

Unbundling Water Rights

- Need statutory change to make legal
- Several Bill Draft Requests in the queue for 2017 legislative session to do just that!

Train Wreck Or Panacea?

Nicholas Institute for
Environmental Policy Solutions

Unbundling Water Rights: A Blueprint for Development of Robust Water Allocation Systems in the Western United States

Michael Young*

with assistance from
Peter Culp†
Disque Deane, Jr.‡
Martin Doyle§
Christine Esau**
Tim Profeta§
Sam Routson**
David Sunding**

Duke
NICHOLAS INSTITUTE

Report
NI R 15-01

September 2015

Questions?

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

TIMOTHY LEE BAILEY & CONSTANCE MARIE BAILEY, FRED BAILEY & CAROLYN BAILEY, IRA R. RENNER & MONTIRA RENNER, and SADLER RANCH, LLC, Petitioners, vs. TIME WILSON, P.E., Acting State Engineer, DIVISION OF WATER RESOURCES, NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No. CV1902-348 (Consolidated with Case Nos. CV1902-349 and CV-1902-350) **OPENING BRIEF OF BAILEY PETITIONERS**
EUREKA COUNTY, NEVADA, DNRPCA INTERVENORS, et al., Intervenors.	

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CASES

STATUTES

INTRODUCTION

The vagaries of Nevada water law can become complicated. But its two basic foundations are quite simple: prior appropriation and beneficial use.

Under the prior appropriation system, as the Court well knows, water rights are assigned a "priority date," and senior priority water rights are entitled to fully exercise their water right before a junior water right may take water from the same source. Thus, a junior water right may only begin diverting water when all those senior to it are satisfied. It's that simple. First in time is first in right.

In addition to the prior appropriation doctrine, Nevada's water law is built upon the equally important beneficial use doctrine. In Nevada, water may only be appropriated for a recognized beneficial use. All water rights holders must demonstrate that they are using the water beneficially, and they must file a proof of beneficial use with the State Engineer in order to perfect, or "prove up," their use of water.

The prior appropriation and beneficial use doctrines are the foundations upon which Nevada's water law was built and upon which it continues to rest. In Order 1302 approving the Diamond Valley Groundwater Management Plan ("GMP"), the State Engineer admits that the GMP does not conform to the doctrine of prior appropriation. So this case, although it concerns the often complicated world of Nevada water law, is about a simple question: may a localized groundwater management plan violate Nevada's foundational doctrines of prior appropriation and beneficial use, or any other existing law?

There is no doubt that the aquifer in Diamond Valley is severely over appropriated. Under the prior appropriation system used in Nevada since before statehood, the solution to over use of a water resources is to restrict use by priority. Instead, the GMP ignores the prior appropriation system in favor of a novel "water market" or "cap-and-trade" approach that seeks to reduce pumping by allocating less water to all users, notwithstanding their relative priorities. Make no mistake: this water marketing scheme was not designed simply to reduce pumping in Diamond Valley, it was designed to change the entire nature of water use in the valley using the free market to wrest water resources from their historic use by senior agricultural water rights holders.

The GMP is death by a thousand cuts. It converts all irrigation groundwater rights in Diamond Valley to "shares," and then each share is "allocated" a reduced number of acre-feet each year. Starting in Year 1 (this year, 2019) allocations are at least 35% less than the permit, and by Year 35 allocations are 70% less than the permit. For the Baileys, this means that of their five senior irrigation groundwater permits totaling 1,934.116 acre-feet, the GMP reduces their allowed pumping in Year 1 by 25% to 1,250.4649 acre-feet, in Year 15 they only get 820.5690 acre-feet (68% of their permits), and by Year 35 they only get 567.7960 acre-feet (29% of their permits). Absent the GMP's violation of prior appropriation, these senior rights would be entitled to pump their full 1,934.116 acre-feet annually before junior water rights could begin pumping.

The apparent reason for jettisoning prior appropriation in favor of a novel water marketing and "shortage sharing" scheme is to lessen the drastic impacts of reducing pumping by spreading the impacts across all users, not just junior water rights holders. But neither the GMP nor the State Engineer in Order 1302 provide any evidence to support the notion that reducing everyone's pumping instead of only the junior users would actually stave off the tough choices that lie ahead for this community. For a family like the Baileys, it just draws out the drastic impact from one generation to a later generation. As the Baileys have said, they are a generational farming family, and they have every intention that their children and grandchildren will continue that proud tradition. So, while the 35 year extended reduction of their senior water rights may be intended to lessen the impact, in reality it only delays the impact. There are no studies in the record that demonstrate the relative impacts of priority administration versus the novel water marketing approach. But obviously for the Bailey's reducing them to only 29% of their senior water rights after 35 years will severely impact their ability to continue their operations.

The GMP proponents knew, from nearly the very beginning, that their water marketing scheme would violate Nevada's foundational prior appropriation and beneficial use doctrines. *See e.g.* ROA 254[1] (early scoping results recognized law would need to be "modified … to allow non-use without losing water right"); ROA 295 ("Do we maintain the priority rights system or go to a

[1] Citations to the Record on Appeal, filed herein on June 7, 2019, will use "ROA."

shares system?"); ROA 295 (recognizing need to "[a]bolish or re-write 'use or lose' rule as separate requirement to use water in a manner that is consistent with plan an administrative requirements," and need to "[r]edefine conservation as a beneficial use"). They even tried to convince the Nevada Legislature to pass a new statute that would provide the necessary authority for the State Engineer to approve the GMP. *See e.g.* ROA 401. Even though they knew it would violate the law, and they failed to change the law, they proceeded with this novel plan nonetheless. Often in Ruling 1302, the State Engineer explains that although there may be problems, legal or otherwise, with the GMP, at the end of the day it was approved by a slim majority of local water rights holders, so the State Engineer was satisfied that it was the appropriate method. But popularity of a plan does not overrule priority of right.

In addition to violating the prior appropriation and beneficial use doctrines, the GMP violates other provisions of Nevada law, such as statutes requiring approval of permits for water storage and changing the point of diversion or place or manner of use of water.

Finally, the State Engineer's approval of the GMP is not based on any substantial evidence in the record demonstrating that it will actually work. The GMP includes a novel "water banking" scheme that was not subject to any analysis or scrutiny by the State Engineer. Had he analyzed it, it would have been clear that water banking actually hinders the purpose of the GMP, stabilization of pumping of the Diamond Valley groundwater aquifer.

The GMP represents a significant departure from the foundations of Nevada water law, which cannot have been the intent of the Legislature when passing the general groundwater management statute. Furthermore, the State Engineer's approval of the GMP was not based on any analysis of whether the novel market based approaches would actually achieve the goals of Legislature or were otherwise necessary. Because the GMP so clearly violates Nevada law, the Baileys request that this Court reverse the State Engineer's approval in Order 1302.

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BACKGROUND

I. THE BAILEY FAMILY HAS FARMED AND RANCHED IN DIAMOND VALLEY FOR SEVEN GENERATIONS

Brothers Elwood and Robert Bailey homesteaded in the west side of Diamond Valley starting in the early 1860s. The Bailey Ranch has been in continuous operation in Diamond Valley since 1863, a year prior to Nevada's statehood. In addition to the original ranch, the Baileys have farmed other parcels in Diamond Valley using groundwater for many decades. This is over a century and a half—spanning seven generations—of ranching and farming by the same family. The Bailey Home Ranch has been recognized as the sixth oldest business operating in the State of Nevada. The Baileys have worked their lands every day for 150 years using Mother Nature as their business partner, and in that period of time they have developed unquantifiable personal and institutional knowledge of their ranch, farms and the Diamond Valley area.

The Bailey's senior irrigation groundwater rights for their farming operations, which are subject to the GMP's annual reductions, include Permit No. 22194 (Cert. 6182) for 537.04 acre-feet annually with a March 7, 1960 priority; Permit 22194 (Cert. 6183) for 622.0 acre-feet annually with a March 7, 1960 priority; Permit 55727 (Cert. 15957) for 20.556 acre-feet annually with a March 7, 1960 priority; Permit 28036 (Cert. 8415) for 277.0 acre-feet annually with a May 3, 1960 priority; Permit 48948 (Cert. 13361) for 478.56 acre-feet with a May 3, 1960 priority; and Permit 28035 (Cert. 8414) for 201.56 acre-feet annually with a January 23, 1974 priority. In addition, the Baileys hold several other permitted and/or vested water rights for their ranching operations, stockwatering and other uses which are impacted by the mismanagement of the aquifer but are not subject to the reductions and water-marketing scheme in the GMP.

II. DIAMOND VALLEY AND THE GROUNDWATER MANAGEMENT PLAN

A. State of the Aquifer

As explained in the Diamond Valley Groundwater Management Plan ("GMP"), the State Engineer has estimated that the perennial yield from the Diamond Valley groundwater aquifer (i.e. the amount of groundwater available to be safely pumped each year as estimated by natural replenishment from precipitation) is 30,000 acre-feet ("af") per year. ROA 003. However, the

State of Nevada, through the State Engineer, has approved water rights permits to pump approximately 126,000 acre-feet per year for irrigation, which does not include other groundwater rights such as domestic use, mining, stockwater, etc.. *Id.* When all groundwater permits are considered, the annual demand on the aquifer climbs to approximately 130,625 acre-feet. ROA 003. Of the 126,000 af approved to be pumped every year for irrigation, the State Engineer estimates that approximately 76,000 af were pumped in 2016, and that annual pumping has exceeded the 30,000 af perennial yield for at least 40 years. *Id.* But the State Engineer's figures do not tell the whole story—in addition to the total duty of 130,625 acre-feet annual demand from irrigation groundwater rights in Diamond Valley, there are also numerous water rights that historically depended on springs that naturally flowed in the Northern Diamond Valley area that supported vested surface water rights. *See e.g.* Water Resources Bulletin No. 35 at 26 (ROA 059). The State Engineer should have further limited the perennial yield available to groundwater pumping in order to protect groundwater-dependent surface waters.

The extreme over-pumping of the aquifer because of the State's historic mismanagement of the groundwater basin has resulted in the groundwater level declining approximately 2 feet each year since 1960. *Id.*; *see also* ROA 288 (describing consensus among interested parties that "over allocation by State Engineer has resulted in situation we're in."); ROA 314 (Eureka Sentinel July 2, 2015 article describing "the massive over-appropriation of Diamond Valley's groundwater resources under the oversight of the office of the Nevada State Engineer [because] more than 50 years ago predecessors to the current State Engineer approved applications for permits to appropriate groundwater totaling more than 180,000 acre-feet per year … in a basin that is estimated to safely yield only about 30,000 acre-feet per year."). In addition to impacting the approximately 66% of residents who depend on domestic wells for their water, as opposed to municipal groundwater demand (*id.*), this extreme over-pumping of the aquifer has dried up many springs and groundwater-dependent senior surface water sources in Diamond Valley. For example, "Big Shipley Hot Springs west of the playa and Diamond Springs (a.k.a. Thompson Springs) east of the playa both of which are located below the range front, historically flowed at significant rates, perhaps as much as 6,000 to 7,000 af/yr. Groundwater exploitation in the basin

has caused the discharge from many springs to decline or cease to flow altogether. The discharge from Big Shipley Hot Springs declined to about 1,500 af/yr and Thompson Spring has ceased to flow." ROA 328. The Bailey Ranch Spring has also ceased to flow altogether.

B. Development of the GMP

Intervenor Eureka County (through the Eureka Conservation District) developed "major portions" of the GMP, after which a so-called 'management plan advisory board' was formed which "took over much of the responsibility" for finishing development of the GMP. ROA 227. The GMP is based on the water marketing paper written by Professor Michael Young, *Unbundling Water Rights: A Blueprint for Development of Robust Water Allocation Systems in the Western United States* (2015)[2]. The Young Paper was developed specifically to provide the blueprint and underpinnings of the entire market-based approach taken by the GMP. *See e.g.* Young Paper at 1 (explaining it was "developed in consultation with water users, administrators and community leaders in the Diamond Valley"); *see also* ROA 294 (Eureka Co.'s notes from June 11, 2015 meeting explaining that its "recommendations have been influenced significantly by a Blueprint for Western Water Management that builds upon the Australian water sharing & permit unbundling and was presented to us by Prof. Mike Young" in June 2015).

The record herein does not explain why Eureka County decided to employ Mr. Young's water marketing scheme and refuse to consider other alternative methods of reducing pumping in Diamond Valley, or who paid for Mr. Young's travel and time. *See e.g.* ROA 332–34 (Feb. 24, 2016 Eureka Conservation District letter describing that "[i]t *has been proposed* that Diamond Valley test a new system of water use which is being referred to as the Shares System or 'Unbundling' of water rights."); *see also id.* (informing that Mr. Young would be in attendance at a Feb. 29, 2016 meeting in Eureka); *but see* ROA 295 (notes from June 11, 2015 meeting, including remark that "[i]t was suggested that conversion should follow the allocation regime

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[2] Cited at ROA 227, and available at https://nicholasinstitute.duke.edu/sites/default/files/publications/ni_r_15-01.pdf (accessed Sept. 9, 2019) ("Young Paper"). In citing to the Young Paper, which was excluded from the ROA, undersigned counsel is mindful of the Court's Sept. 4, 2019 Order regarding the adequacy of the record. The Young Paper is cited not for or against substantial evidence as to any finding of fact in Order 1302, but rather because of its peculiar role in the history and development of the GMP that is the subject of this appeal.

suggested by the State Engineer."). But what is clear from the record of meetings of Eureka County and others is that by the time they formed the so-called advisory board in February 2016, the dye was cast and Mr. Young's Australian water marketing scheme had already been chosen as the sole blueprint for the GMP at least 8 months prior. *See e.g.* ROA 277 (summarizing June 11, 2015 meeting where the preliminary GMP "outline/working model" was developed, and the February 29, 2016 meeting where the advisory board was "elected.").

C. Overview of the GMP's Changes to Water Rights and Nevada Water Law

As described in the GMP, it strives to be "a water market-based system meant to provide ultimate flexibility in using water, while incentivizing conservation and allowing willing participants' quick sale, lease, trade, etc. of water in times when needed." ROA 227. Chapters 12 and 13 of the GMP (ROA 232–36) set forth the core of the water marketing approach taken by Eureka County. Chapter 12 describes the conversion of water rights to "shares," and Chapter 13 describes the annual determinations for the amount of water allocated to each share.

1. The GMP Reduces Water Rights to "Shares"

In Chapter 12 of the GMP, each state-issued water permit subject to the scheme is converted from the existing water right with a fixed annual pumping volume and priority date to a fixed number of "shares" which are assigned each year an "allocation" of total annual pumping. ROA 232 ("All groundwater rights … shall receive groundwater Shares according to the formula specified in this Section."). After this conversion of water rights to shares, the use of groundwater in Diamond Valley under the GMP is no longer subject to Nevada's bedrock prior appropriation law.

But the conversion of water volumes is not 1-for-1 where each acre-foot of water under a permit is converted to one share. Instead, a so-called "priority factor" is applied to each acre-foot of a water rights permit to reduce the ultimate shares awarded, based on an arbitrary range of 1% reduction for the most senior water right to 20% reduction for the most junior water right. ROA 232 (providing formula for converting water right to shares, where Total Volume Water Right x Priority Factor = Total Shares). However, because the "priority factor" is always less than 1, the conversion to shares always results in less than 1 share for each former acre-foot of water. *See*

e.g. ROA 499–509 (GMP Appx. F, Table of Groundwater Rights and Associated Shares). In Appendix F, even the most senior water right subject to the GMP is only awarded 69.1024 shares based upon the groundwater permit which provided 69.120 acre-feet. ROA 499. One of the most junior water rights, Permit 77695 to take one example, is only awarded 376.4221 shares based upon the groundwater permit which provided 469.92 acre-feet. ROA 509.[3]

Employing the arbitrary priority factor such that junior water rights are converted to fewer shares per acre-foot than senior water rights is the GMP's attempt to "take into account" Nevada's bedrock doctrine of prior appropriation. GMP Sec. 12.4 (ROA 232). But that attempt has spectacularly failed because merely taking seniority into account by reducing shares granted to senior rights by an arbitrary percentage less than shares granted to junior rights is not good enough to mitigate the reduced pumping required of senior water rights holders described in subsection 2, below. Instead, the GMP must fully comply with prior appropriation, which the State Engineer admits it does not do. ROA 006 (State Engineer's admission in Ruling 1302 "that the GMP does deviate from the strict application of the prior appropriation doctrine with respect to 'first in time, first in right'").

After the conversion of water rights to shares, the pumping and use of groundwater in Diamond Valley under the GMP is no longer subject to Nevada's prior appropriation system. Every share is entitled to pump each year the entire total amount of water allocated to it without regard to seniority, as described below.

2. The Shares Are Reduced Via Annual "Allocations" of Water

In addition to reducing senior water rights to fewer shares than one per acre-foot, Chapter 13 of the GMP also reduces senior water rights in violation of prior appropriation by annually reducing the "allocation" of water to each share. ROA 234–36 (Chapter 13, "Annual Groundwater Allocations and Groundwater Account"); *see also* ROA 510 (GMP Appx. G, Groundwater

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[3] Although the GMP and Order 1302 use May 12, 1960 as the dividing line between senior and junior water rights, that distinction is meaningless in the GMP. *See e.g.* ROA 004. The "priority factor" is not applied differently to senior water rights than it is to junior rights; the water rights are simply placed into a table in order of priority, and reduced by either 0.003% down to 20% when converted to shares, depending on where any specific water right happens to land in the 20% range. ROA 499 (GMP Appx. F).

Allocation and Pumping Reduction Table, which shows that acre-feet per share allocations are reduced annually, starting at 0.67 acre-feet per share in Year 1 of the GMP to 0.301 acre-feet per share in Year 35 of the GMP). So, in addition to reducing senior water rights to less than one acre-foot per share, the GMP further reduces the water rights by only allocating 66% of the permitted volume to each share in Year 1, down to only 33% of the permitted volume by Year 35. These drastic reductions apply to all water rights, including senior water rights.

3. The GMP Creates a "Water Banking" Scheme to Store Unused "Allocations"

Under the GMP, this new market based water allocation scheme is managed by placing each annual allocation into an account for each water user. Sec. 13.2 (ROA 234). Another drastic departure from Nevada water law is that the GMP scheme allows "banking" of unused water allocations, which can be used in future years. Sec. 13.9(*Id.*). The only restriction the GMP places on the volume of unused water that can be banked is the annual "ET Depreciation" of banked water to account for natural losses (i.e. evapotranspiration, or ET) that may be incurred while the water is stored in the underground aquifer. *Id.* The GMP assigns two separate depreciation factors: in the Southern Diamond Valley the depreciation factor applied annually to banked water is 1%, while in the Northern Diamond Valley the depreciation factor applied annually to banked water is 17%. *Id.* (citing GMP Appx. I (ROA 522), memo re "analysis of water banking depreciation"). Notably, the ET Depreciation memo relies exclusively upon complicated groundwater modeling to determine the ET Depreciation factors, but the modeling itself is not described or analyzed in either the GMP or Order 1302, and the modeling files were not provided to the public during development of the GMP or to the State Engineer with the petition for approval of the GMP. *See* Order 1302 at 17 (ROA 018). There is no substantial evidence in the record to support dividing the Diamond Valley Basin into two sub-basins for the purpose of the ET Depreciation factor for banked water; instead, the State Engineer simply approved this portion of the GMP because the majority supported it. *See* Ruling 1302 at 17 (ROA 018) ("The ET depreciation rates in the final GMP were a compromise and there was never a consensus.").

4. The GMP Institutes a Novel Trading Scheme for Allocations

Finally, after reducing groundwater rights when converting to shares, and further severely reducing them when limiting the annual allocation of water to each share, and then further reducing any banked allocations when applying the ET Depreciation factor (17% for the northern portion of Diamond Valley and 1% for the southern portion), the GMP allows for the unfettered transfer of allocations, both present allocations and banked allocations. Sec. 13.10 (ROA 235). This is the market-based approach, which is a completely new and untested scheme for managing the public's water resources in Nevada.

The only limitations on moving groundwater allocations from one well to another well in Diamond Valley, or changing them from one manner of use to another manner of use, is the provision of Sec. 14.7 providing that "[t]he State Engineer may disallow additional withdrawals from an existing well that exceeds the volume and flow rate that was initially approved" for that well. ROA 237. However, this provision is only applicable "if the State Engineer determines that the additional withdrawal would create a conflict with existing water rights...." *Id.* Furthermore, the GMP limits the time in which the State Engineer may review such water allocation transfers by deeming the transfer approved if it is not denied by the State Engineer within 14 days. Sec. 14.8 (ROA 237).

As set forth below in Part II, this novel trading scheme for water rights violates several provisions of Nevada water law.

D. The Nevada State Engineer Approves the GMP in Order 1302

The Petition for Approval of the GMP was presented to the State Engineer on August 20, 2018 (ROA 148), and the State Engineer held a public hearing to take comments on the GMP on October 30, 2018 (Transc., ROA 653). The State Engineer allowed additional written comments to be submitted through November 2, 2018. ROA 535. Thereafter, on January 11, 2019, the State Engineer issued Ruling 1302 approving the GMP. ROA 002.

In Ruling 1302, the State Engineer determined that because the "obvious solution to the problem caused by *over* pumping is to *reduce* groundwater pumping," the GMP "satisfies the State Engineer that the water levels will reach an equilibrium." ROA 002. While the Baileys do

not dispute that reducing groundwater use to the estimated perennial yield may eventually allow for an equilibrium to be reached between aquifer recharge and groundwater pumping, it is the *method* of the GMP's pumping reductions as applied to senior water rights that violates Nevada law, among other legal violations described more fully below.

The State Engineer was aware of the legal concerns raised by the Baileys and others, but approved the GMP over their objections. The Baileys' primary concern is the GMP's failure to adhere to Nevada's prior appropriation doctrine. In Order 1302, the State Engineer admits that "the GMP *does deviate from the strict application of the prior appropriation doctrine*," but goes on to argue that on the one hand the Nevada Legislature must have intended to allow for a GMP to violate prior appropriation despite no such provision in the relevant statutes, and on the other hand the application of the arbitrary priority factor when converting water rights to shares allows the GMP to "still honor prior appropriation." ROA 006–07 (emphasis added).

The Baileys also raised their concern that the GMP violates Nevada water law because it converts unperfected water rights (i.e. "paper" water rights that have never been exercised) to shares without requiring the unperfected paper water rights to show the statutorily mandated "proof of beneficial use." Under Nevada law, a water right must be actually used and a proof of beneficial use filed in order to formally "perfect" the water right. But under the GMP, unperfected paper water rights are simply converted to shares, which can then be pumped, banked and/or conveyed to others, effectively causing them to be automatically perfected without complying with the statutory mandate that the water right holder file a proof of beneficial use. In Order 1302, the State Engineer argues that there is "not sufficient time" to follow the existing statutory procedures for sorting out unperfected paper water rights, and therefore "the requests to eliminate paper water does not warrant halting this [GMP] process...." ROA 010–11. As discussed further below, in Order 1302 the State Engineer fails to explain why he would permit a GMP to violate the prior appropriation and beneficial use doctrines of Nevada law, but will not permit a GMP to violate the statutory forfeiture and/or abandonment procedures of Nevada law.

The Baileys also expressed their concerns that the GMP does nothing to address the adverse impact of the over pumping of the Diamond Valley groundwater aquifer on their

groundwater-dependent vested surface water rights. To this, the State Engineer simply argues that "[n]either the plain language nor the legislative history indicate that mitigation of senior surface water rights that have allegedly been adversely affected by groundwater pumping must be mitigated by a GMP." ROA 012. As discussed below, the State Engineer's Order 1302 fails to address the fact that the GMP actually exacerbates the adverse impacts to vested surface water rights in violation of law by extending the time of the adverse impacts.

The State Engineer also approved the GMP's provisions that allow groundwater shares or allocations to be transferred among different wells without any of the statutory safeguards that protect others from potential adverse effects of changing the point of diversion or place or manner of use of water rights. The State Engineer argued in Order 1302 that these safeguards were not necessary because only temporary (for one year or less) transfers of shares and/or allocations are permitted under the GMP. ROA 008–09. However, the State Engineer failed to analyze the potential adverse effect of a perpetual temporary transfer of the same shares to the same changed point of diversion, place of use and/or manner of use, which is possible under the GMP without any further notice or review, in violation of law. Additionally, the State Engineer approved the provision of the GMP that alters Nevada law by providing that any application for a permanent change in point of diversion or place or manner of use of a groundwater appropriation in Diamond Valley is deemed approved by the State Engineer if not denied within fourteen days. ROA 008.

Finally, Order 1302 approves the GMP without any particularized scientific or hydrologic analysis. ROA 015–17. The State Engineer explains that "[t]he GMP is based on the simple fact that groundwater pumping is the cause of declining water levels, and therefore pumping must be reduced to solve the problem [and] the measure of that ultimate outcome is a stabilization of water levels." ROA 015. The State Engineer admits that groundwater modeling would be "helpful and informative," but concludes that it "would not change the fact that the cause of groundwater decline is due to pumping groundwater...." ROA 016.

The upshot of Order 1302 is that the State Engineer determined that, despite any such express provisions in the relevant GMP statute, the Nevada Legislature intended that a GMP could violate prior appropriation and other aspects of Nevada water law, and as long as a sufficient

number of affected water rights holders were willing to vote for a GMP it could violate law—and all of this without any specific or particularized hydrologic or scientific analysis to confirm the assumptions of the plan or analyze the impacts.

ARGUMENT

I. STANDARD OF REVIEW

The State Engineer is empowered to designate a groundwater basin as a "critical management area" ("CMA") when "withdrawals of groundwater consistently exceed the perennial yield of the basin." NRS 534.110(7). This designation is left to the discretion of the State Engineer pursuant to subsection 7(a), unless the majority of holders of water rights in the groundwater basin petition for the designation, in which case the State Engineer "shall designate" the basin as a CMA pursuant to subsection 7(b). *Id.* Once a basin has been designated as a CMA, if it remains so designated for 10 consecutive years, the State Engineer "shall order withdrawals … 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." *Id.*

Pursuant to NRS 534.037(1), there is only one procedure by which a GMP may be approved: submission to the State Engineer by petition "signed by a majority of the holders of permits or certificates to appropriate water in the basin," which must be accompanied by the GMP that sets forth "the necessary steps for removal of the basin's designation" as a CMA. NRS 534.037(2)(a)–(g) provides a list of mandatory, but not exclusive, factors for the State Engineer to consider when determine whether to approve a GMP, including the hydrology of the basin, the physical characteristics of the basin, the spacing and location of the groundwater withdrawals, water quality, the wells–including domestic wells, whether a GMP already exists, and any other factor deemed relevant by the State Engineer. NRS 534.037(4) provides that the State Engineer's decision to approve or reject a GMP is subject to judicial review pursuant to NRS 533.450.

None of these statutory provisions governing CMAs and GMPs sets forth any express statement that a GMP may ignore other parts of Nevada law, be it water law or any other law.

Every finding of fact of the State Engineer must be supported by substantial evidence. *Revert v. Ray*, 95 Nev. 782, 786 (1979). Among other procedural requirements, the substantial

evidence standard requires the State Engineer to clearly resolve all objections and provide detailed findings with respect to all objections. *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525 (2010). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1121 (2006)).

On appeal, a reviewing court must "determine whether the evidence upon which the engineer based his decision supports the order." *State Engineer v. Morris*, 107 Nev. 699, 701 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32 (1985)). Nonetheless, "[w]ith respect to questions of law ... the State Engineer's ruling is persuasive but not controlling. Therefore, [courts] review purely legal questions without deference to the State Engineer's ruling." *Pyramid Lake* at 525 (quoting *Town of Eureka v. State Engineer*, 108 Nev. 163, 165–66 (1992)). A "court has the authority to undertake an independent review of the State Engineer's statutory construction, without deference to the State Engineer's determination." *Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 188 (2008).

II. THE GMP VIOLATES THE TWO FOUNDATIONS OF NEVADA WATER LAW

The GMP violates many provisions of Nevada's water law, including its clear violation of Nevada's foundational prior appropriation and beneficial use doctrines.

A. The Doctrines of Prior Appropriation and Beneficial Use

Nevada, like most Western states, is a prior appropriation state. This unique prior appropriation doctrine has its origins in the Gold Rush of 1849. When miners came west in search of gold, their greatest need was to establish rules governing access in territories that effectively lacked governance. The miners adopted the "first come, first served" principle for their gold claims. *See generally In Re Water of Hallett Creek Stream System*, 749 P.2d 324, 330–34 (Cal. 1988), cert. denied 488 U.S. 824 (1988) (discussing the development of water rights in the West). These western miners also needed rules to govern the allocation of water. Because water was scarce, riparian principles from the eastern United States were of little use to them. Accordingly, the miners applied rules to water rights similar to those governing their access to mining claims, staking hierarchical claims to water by physically taking or diverting what they needed and putting it to use. *See e.g. Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163 (1931) (discussing origins of

Nevada water law); *Jones v. Adams*, 19 Nev. 78 (1885). This appropriation of water by being the first to physically divert it and put it to beneficial use became known as the "Prior Appropriation Doctrine." Miners could "stake a claim" to water, just as they had done for gold.

Thus, from its inception, the prior appropriation doctrine incorporated "first in time, first in right" with regard to water rights, with a preference for senior appropriators' rights compared to subsequently acquired junior interests. *See Steptoe*, 53 Nev. at 171–72. Fundamentally, the prior appropriation system allocates water, particularly in times of scarcity, in relation to one's seniority over another. Seniority of water rights is based upon the priority date of the water right, which is assigned at the time the water is first put to beneficial use. This means that the first person to beneficially use water has a senior right to all those who came after them, i.e. "first in time is first in right." The State Engineer's own website recognizes this foundation of our water law:

> Nevada water law is based on two fundamental concepts: prior appropriation and beneficial use. Prior appropriation (also known as 'first in time, first in right') allows for the orderly use of the state's water resources by granting priority to senior water rights. *This concept ensures the senior uses are protected, even as new uses for water are allocated.*

Div. of Water Resources, *Water Law Overview*, available at http://water.nv.gov/waterlaw.aspx (accessed Aug. 29, 2019) (emphasis added).

The prior appropriation doctrine also includes a "use it or lose it" principle, so that users who are not making beneficial use of their water rights should lose them in order to free the scarce water for use by others. *See generally Hallett Creek*, 749 P.2d at 467.

The central tenets of the historic prior appropriation doctrine therefore include: 1) the right to use water is obtained by a physical taking of it, i.e. diverting it from its natural course, and putting it to use elsewhere ("diversion" requirement); 2) the scope of water rights are limited to the amount of water put to a beneficial use ("beneficial use" requirement); 3) the priority of senior in time rights ("first in time, first in right" principle); and 4) the water has to in fact be used, or the right was lost ("use it or lose it" principle). *See Jones v. Adams*, 19 Nev. 78 (1885).

Nevada's prior appropriation doctrine and statutory water rights permitting scheme are embodied in NRS Chapters 533 (primarily governing surface water) and 534 (primarily governing groundwater), which authorize the State Engineer to approve water rights applications for

recognized beneficial uses.

> The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many western states. In fact, the principle of beneficial use is so well entrenched in our legal lexicon that the Nevada Legislature declared almost a century ago that "beneficial use shall be basis, the measure and the limit of the right to the use of water."

Desert Irrig. Ltd. v. State of Nevada, 113 Nev. 1049, 1059 (1997) (quoting NRS 533.035). Water appropriated pursuant to a permit must be put to beneficial use within ten years. NRS 533.380(1). Thus, as in all prior appropriation states, proof of a legally cognizable beneficial use and actual use are the *sine qua non* for obtaining a water right permit in Nevada. NRS 533.035 (beneficial use is the overarching standard for allocation of water rights); NRS 533.070 (quantity of water appropriated limited to that which is reasonably required for the beneficial use to be served).

Finally, undergirding Nevada's statutory water rights scheme is the recognition that water belongs to the public, and the state holds title to it in trust for the benefit of its citizens. NRS 533.025 ("The water of all sources of water supply within the boundaries of the State . . . belongs to the public."). Thus, Nevada law also requires such beneficial uses to be consistent with the public interest. *See* NRS 533.370 (directing the State Engineer to determine whether a use of water may threaten to prove detrimental to the public interest).

These are the bedrock, fundamental tenets of Nevada's prior appropriation doctrine, and they have remained so since outside settlers first arrived to the Nevada territory.

B. The GMP Violates the Doctrine of Prior Appropriation

1. Under the GMP, Junior Water Rights Are Permitted To Continue Pumping While Senior Water Rights Are Not Satisfied

The GMP violates the fundamental tenets of Nevada's water law because it allows junior groundwater users to continue pumping groundwater even though senior groundwater rights are not satisfied first. As explained above, the GMP's annual allocation scheme reduces the Baileys' senior groundwater rights each year, starting at roughly 30% in Year 1 and ending at roughly 60% in Year 35, while at the same time allowing groundwater rights junior to the Baileys to continue to be exercised. The State Engineer admits as much in Order 1302: "it is acknowledged that the GMP does deviate from the strict application of the prior appropriation doctrine…." ROA 006.

The so-called "priority factor" used for the conversion of water rights to shares does nothing to alleviate or solve the abject violation of prior appropriation when reducing the allowable pumping of senior groundwater right holders by limiting their "allocations" of water each year.

Nonetheless, the State Engineer approved the GMP on the unsupported basis that, as a so-called "shortage sharing plan," the GMP does not run afoul of the Nevada Legislature's intent in passing the GMP statutory provisions of NRS 534.037. ROA 006–008. In Order 1302, the State argues that because the Nevada legislature provided "scarce direction concerning how a plan must be created or what the confines of any plan must be," it must be the case that the Legislature intended to allow a GMP to "create a solution other than a priority call as the first and only response." ROA 007. In other words, the GMP proponents and State Engineer argue that the Legislature must have intended to allow a GMP to violate prior appropriation because to interpret the statutes otherwise would mean no GMP could ever be legal. This argument presents a false choice by claiming that the only options available were to either curtail by priority or abolish prior appropriation entirely for Diamond Valley. There is no substantial evidence in the record that either the GMP proponents or the State Engineer ever considered whether there could have been another method to reduce demand on the aquifer to the perennial yield while also complying with prior appropriation. From the very beginning of the development of the GMP, its proponents were determined to exclusively use Mr. Young's free-market, "cap-and-trade" scheme, and the State Engineer went along with that approach without giving it a second thought.

However, it takes little imagination to consider a hypothetical GMP that would both meet the statutory goal of a GMP to balance groundwater withdrawals and remain in compliance with the prior appropriation doctrine. For example, and without committing the Baileys to any specific approach, a GMP could establish a basin-wide fee to raise funds in order to pay water rights holders to forego diversions, which would both reduce pumping and not involuntarily deprive senior water rights holders of their rights in violation of prior appropriation. Or a GMP could establish a water market for the trade of groundwater rights that only subjected the junior appropriators to the annual reductions in pumping, incentivizing senior water rights holders to conserve water that they could voluntarily sell to junior water rights users, instead of the

mandatory cutbacks to both junior *and senior* rights as established in this GMP. It was arbitrary and capricious for the State Engineer to approve the GMP without considering whether its goals could be achieved via other methods that would not violate the foundations of Nevada water law.

As a legal matter, the State Engineer relies on the New Mexico case *State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006) for an alleged example of a court upholding a water management plan that does not adhere to the prior appropriation doctrine. ROA 007. As shown below, the State Engineer's arguments fall apart under scrutiny and should be rejected by this Court.

2. Neither NRS 534.037 nor NRS 534.110(7) Exclude a GMP From the Following State Law

Neither of the GMP provisions of state law provide any indication that the Legislature intended to provide a pathway to avoid the prior appropriation doctrine, or any other provision of Nevada law. First, neither NRS 534.037 nor 534.110(7) contain any express provisions that would allow a GMP to violate applicable law. The State Engineer, in approving the GMP, argued that it must have therefore been implied by the Legislature that a GMP could violate Nevada law.

"Statutory interpretation is a question of law which this Court reviews *de novo*." *In re Orpheus Trust*, 124 Nev. 170, 174 (2008) (quoting *City of Henderson v. Kilgore*, 122 Nev. 331, 334 (2006)). When the language of a statute is unambiguous, courts are not to look beyond the statute itself when determining its meaning. *Orpheus Trust* at 174 (citing *Erwin v. Nevada*, 111 Nev. 1535, 1538–39 (1995)). However, when "the [L]egislature has failed to address a matter or . . . addressed it with imperfect clarity, [it becomes the responsibility of the courts] to discern the law." *Orpheus Trust* at 174 (citing *Baron v. Dist. Ct.*, 95 Nev. 646, 648 (1979)). When a statute is susceptible to more than one reasonable but inconsistent interpretations, the statute is ambiguous, and this Court will resort to statutory interpretation in order to discern the intent of the Legislature. *Orpheus Trust* at 174 (citing *Gallagher v. Las Vegas*, 114 Nev. 595, 599 (1998)).

Courts must also interpret the statute "in light of the policy and spirit of the law, and the interpretation should avoid absurd results." *Orpheus Trust* at 174 (quoting *Hunt v. Warden*, 111 Nev. 1284, 1285 (1995)). Finally, this Court will resolve any doubt as to the Legislature's intent

in favor of what is reasonable. *Id.*

The statutes at issue and which require interpretation are, in relevant part, as follows:

> NRS 534.037
> 1. In a basin that has been designated as a critical management area by the State Engineer pursuant to subsection 7 of NRS 534.110, a petition for the approval of a groundwater management plan for the basin may be submitted to the State Engineer. The petition must be signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer and must be accompanied by a groundwater management plan which must set forth the necessary steps for removal of the basin's designation as a critical management area.
> 2. In determining whether to approve a groundwater management plan submitted pursuant to subsection 1, the State Engineer shall consider, without limitation:
> (a) The hydrology of the basin;
> (b) The physical characteristics of the basin;
> (c) The geographic spacing and location of the withdrawals of groundwater in the basin;
> (d) The quality of the water in the basin;
> (e) The wells located in the basin, including, 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 534.110(7) The State Engineer:
> (a) May designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.
> [***]
> ➥ The designation of a basin as a critical management area pursuant to this subsection may be appealed pursuant to NRS 533.450. 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, unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037.

While the local stakeholder process for development of a GMP is obviously meant to provide for some flexibility, that flexibility is based on a recognition that each groundwater basin will have different, localized conditions and challenges. But that does not mean the solution to those challenges can be so flexible as to violate the law. There is nothing in the text of either NRS 534.037 or NRS 534.110(7) that could possibly lead to an interpretation that a GMP may violate Nevada law. While admitting "deviations" from the prior appropriation doctrine, neither the GMP itself nor State Engineer Order 1302 provide any textual statutory support for the deviations. The GMP's Achilles Heel is that it fails to comport with the foundational prior appropriation doctrine. By permanently curtailing senior water rights while at the same time allowing junior water rights

to continue pumping, the GMP fails to honor prior appropriation.

The State Engineer's argument that a GMP is impliedly allowed to violate the prior appropriation doctrine leads to an absurd result, namely that a GMP could be permitted to violate any other provision of Nevada's water law, or potentially any other provision of Nevada law generally. The State Engineer's position as set forth in Order 1302 is circular: the Legislature must have intended, despite the statute's silence, for a GMP to violate prior appropriation because such a violation is necessary for a GMP to function. *See e.g.* ROA at 007–08 (arguing that because NRS 534.037 does *not* suggest reductions in pumping have to be borne only by junior users, the legislature must have intended to allow a GMP to ignore prior appropriation). The State Engineer's position means that a GMP should be able to violate any other provision of Nevada law if such a violation is necessary for the GMP to function as designed. As discussed below, there are, in fact, other provisions of law that the GMP violates.

This argument is absurd because it is impossible to determine where it would end. Under the State Engineer's interpretation of the GMP statute, he could argue that a GMP should allow farmers to trespass on each other's private property. Or that a GMP could require that farmers dedicate some portion of their groundwater rights to municipal and industrial purposes, or some other use that is otherwise not recognized under Nevada law. Or that a GMP can require water rights holders to dedicate a portion of their water rights to a neighbor with less productive land. There is no end—according to the State Engineer's logic, as long as NRS 534.037 does not expressly *preclude* some provision, a GMP can include it. That, of course, cannot be what the Legislature intended.

3. The New Mexico Case Does Not Provide Cover for the GMP to Violate Nevada Prior Appropriation Law

In Order 1302, the State Engineer relies on the New Mexico *Lewis* case for the alleged proposition that other prior appropriation states have been allowed to ignore the prior appropriation doctrine, and it must therefore follow, according to the State Engineer's logic, that Nevada may do so as well. Order 1302 at 5–7 (ROA 006–08) (citing *State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006)). But the New Mexico *Lewis* Case does not apply to this Nevada situation,

either on its facts or on the law.

First, the *Lewis* case was a challenge to a U.S. Supreme Court-mandated settlement agreement over an interstate stream, the Pecos River in New Mexico and Texas, that would use public funds to resolve interstate water rights conflicts. One stated goal of the settlement agreement was to stay true to the Western prior appropriation doctrine. *Lewis* at 376 ("The present case involves the attempt by the State of New Mexico, the United States, and irrigation entities through a settlement agreement to resolve difficult long-pending water rights issues through public funding, without offending New Mexico's bedrock doctrine of prior appropriation, and without resorting to a priority call."). Therefore, *Lewis*, unlike the GMP, found a way to *both* comply with the prior appropriation doctrine *and* avoid curtailment by priority.

For Diamond Valley there is no settlement agreement, mandated by the U.S. Supreme Court or otherwise. There is no public funding to mitigate impacts to senior groundwater rights, or to otherwise help to resolve the challenges. And there is no attempt by the GMP proponents or the State Engineer to avoid offending the bedrock prior appropriation doctrine. Both the GMP and Order 1302 expressly admit that the GMP does not follow the prior appropriation doctrine. The underlying facts and context of the *Lewis* case therefore show that it is not applicable to the present circumstances surrounding the Diamond Valley GMP.

Furthermore, the shortage plan at issue in *Lewis* had a much stronger legal basis because *the plan itself* was codified into law by the New Mexico legislature. *Lewis* at 379 ("A consensus plan was submitted to the New Mexico Legislature, resulting in a substantial appropriation of funds for implementing the key elements of the plan. The plan was essentially endorsed when the legislature enacted [the compliance statute] for the express purpose of achieving compliance with New Mexico's obligations under the compact."). Here, of course, the GMP has not been endorsed or ratified by the Nevada Legislature, so even if there was a deviation from the prior appropriation doctrine in the *Lewis* case (which there was not) that may be fairly determined to have been approved by the New Mexico legislature upon passage, there is no fair interpretation that the Nevada Legislature has intended or ratified the severe departures from Nevada law.

The legal posture of the *Lewis* case is also different than the Diamond Valley GMP

because of the fact that *Lewis* was ultimately an *adjudication* of water rights, i.e. a determination in the first instance of each party's individual water rights. Here, while there is a pending adjudication of Diamond Valley water rights, the State Engineer deliberately refused to wait for it to conclude before approving the GMP. Furthermore, in *Lewis* the individual irrigators who objected to the settlement agreement were not the fee owners of the water rights—those irrigators were part of the Carlsbad Irrigation District, which actually owned the water rights and distributed the water to the individual irrigators. *Lewis* at 388 ("As an irrigation district, the CID's board can act as it, in the exercise of its discretion and judgment, believes best for all members of the CID. Although [the individual objecting irrigators] demand a priority call to shut down junior users until senior users' water entitlements are assured and satisfied, they nowhere provide authority stating that individual CID members are authorized to request and obtain such priority enforcement.") (internal quotations and citations omitted). That is obviously a significant legal difference than Diamond Valley, where the Baileys as senior water rights owners are not subject to or dependent upon delivery of their water by an irrigation district with global ownership of the water rights. That difference is highly relevant because, in *Lewis*, it meant that the irrigation district was able to enter the settlement agreement, even if it may have had an adverse impact on one or more individual members' water use.

Although the court in *Lewis* framed the settlement at issue as "a process more flexible than strict priority enforcement," the State Engineer's reliance on that phrase in Order 1302 is misplaced. *See Lewis* at 385; Order 1302 at 6 (ROA at 7). The *Lewis* court's discussion of the flexibility afforded under the settlement agreement was based entirely upon the fact that New Mexico had appropriated substantial funds to purchase water rights to address the shortage:

> By its silence as to strict priority enforcement *and its express intent to attempt resolution through land and water rights purchases through public funding*, we also read the compliance statute as intending the land and water rights purchases, and perhaps other actions, to be a first response to the shortage and Compact compliance concerns, rather than resort to a priority call as a first or exclusive response.

Lewis at 385 (emphasis added). In other words, before curtailing by priority, they would purchase water rights to reduce demand. In that way, strict priority enforcement was not the only option.

Here, of course, any notion of a resort to public funding as a primary response to the extreme overappropriation of the Diamond Valley aquifer is conspicuously absent from the GMP. Such public funding was obviously the primary driver of the New Mexico court's determination that the *Lewis* settlement agreement did not violate the prior appropriation doctrine.

There are other significant and important differences between the *Lewis* settlement agreement and the Diamond Valley GMP. The New Mexico court was satisfied that senior water rights holders were protected because of mitigation measures included in the settlement agreement. *Lewis* at 286 ("The relevant provisions [of the New Mexico statutory water law] do not by their terms require strict priority enforcement through a priority call *when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods*.") (emphasis added); *see also id.* ("such a fixed and strict administration is not designated in the constitution or law of New Mexico … where senior users can be protected by other means."). There is additional protection of senior water rights in the *Lewis* settlement agreement because the relevant provisions complained of by the senior water rights users were not automatically and permanently invoked, rather they would only have been invoked if the downstream users in Texas did not receive their water under the interstate compact. *Id.* at 286.

None of the protections of senior rights in the *Lewis* settlement agreement are present in the Diamond Valley GMP. To the contrary, upon the State Engineer's approval of the GMP by Order 1302, the Baileys are subject to immediate and increasingly drastic restrictions in their rights to pump groundwater pursuant to their senior priority rights.

C. The GMP Violates the Doctrine of Beneficial Use

1. The GMP Violates the Beneficial Use Requirement Because It Automatically Perfects Previously Unperfected Water Rights Permits to the Detriment of All Perfected Water Rights in Diamond Valley

Like prior appropriation generally, the included doctrine of beneficial use is also foundational to Nevada's water law. "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035; *see also Application of Filippini,* 66 Nev. 17, 21–22 (1949) ("The term 'water right' means generally the right to divert water by artificial means *for beneficial use* from a natural spring or stream. When we speak of the owner of a 'water right' we

use the term in its accepted sense; that is to say, that the owner of a water right does not acquire a property in the water as such, at least while flowing naturally, but a right gained *to use water beneficially* which will be regarded and protected as real property." (emphasis added) (citing *Boyceet ux. v. Killip et ux.*, 184 Ore. 424, 198 P.2d 613 (Ore. 1948); *Nenzel et al. v. Rochester Silver Corp.*, 50 Nev. 352 (1927)). The notion of beneficial use, of course, contains within it the notion of *actual use* of the water right. Thus, a water right permit gives the holder the right to develop his use of the water, but for a water right to become fixed and permanent, the holder must demonstrate that she has actually beneficially used the water right. *See generally* NRS 533.380. Once the proof of beneficial use is filed, the water right is "perfected" and a final water right certificate is issued by the State Engineer. NRS 533.425.

Often, a water right permit is issued but the owner never actually develops the water right and water under the permit is never put to beneficial use, and thus is never perfected. This is known colloquially as a "paper" water right. In Diamond Valley in 2016, for example, there were approximately 50,000 acre-feet worth of water rights that may not have been exercised. Order 1302 at 2 (ROA 003) ("Approximately 126,000 acre-feet annually (afa) of irrigation groundwater rights are appropriated in Diamond Valley, and as of 2016, groundwater pumping was estimated to be 76,000 afa."). Although not all 50,000 acre-feet water rights are correctly referred to as "paper water rights," some amount of the groundwater irrigation water rights in Diamond Valley are paper water rights that are not actually being beneficially used. The GMP and the State Engineer failed to quantify the amount of paper water rights subject to the GMP.

The GMP converts all irrigation groundwater rights, *including unperfected paper water rights* that have never been put to beneficial use, into shares and assigns them annual pumping allocations. GMP Sec. 18.1 (ROA 240–41) (expressly excluding vested irrigation, stockwater, municipal, commercial, and mining water rights from the GMP); *see also* Order 1302 at 9–10 (ROA 10–11). By converting paper groundwater rights to shares and assigning them annual allocations, the GMP allows the holders of paper water rights to exercise the newly created "water banking" provisions of the GMP. As explained above, once an allocation is banked, it is available to be freely transferred to any other account-holder to be withdrawn from the aquifer at any point

in the future and from any other well in Diamond Valley. Therefore, upon conversion to shares and banking allocations, an unperfected paper water right has now been exercised and stored for later use. In other words, water banking itself has become a beneficial use of water, without any statutory amendment by the Legislature or other necessary legal act to confirm a new beneficial use, and without actually diverting and *using* the water.

This is an extraordinary and fundamental change to Nevada water law, and is a violation of the beneficial use doctrine. As set forth above, "proving up" a water right to convert it from a permit to a certificate requires actually beneficially using the water granted under the permit. *See also* NRS 533.045 ("Right to divert ceases when necessity for use does not exist. When the necessity for the use of water does not exist, the right to divert it ceases, and *no person shall be permitted to divert or use the waters of this State except at such times as the water is required for a beneficial purpose*.") (emphasis added). Except that now, under the GMP in Diamond Valley, that is no longer the case. Under the GMP, shares and allocations to the aquifer can now be "banked" in the aquifer itself instead of being pumped and beneficially used. When an unperfected paper water right is converted to shares and the allocations are banked, it is *theoretically* put to beneficial use without ever having *actually* been put to beneficial use. This violates a bedrock principal of prior appropriation law.

The GMP proponents claimed that they had to allow paper water rights to participate in the water-marketing scheme because such rights are "in good standing." *See e.g.* ROA 313 (notes of Eureka Co.'s Jan. 11, 2016 meeting: "All existing groundwater permits/certificates/vested rights in good standing … will be converted to shares, regardless of varying levels of extensions of times to put the water to use. If they are in good standing with DWR, they are legal water rights that must be converted to shares."). But, of course, that begs the question: if the GMP can employ the "flexibility" to violate prior appropriation law and ignore the statutory process for changes in point of diversion, place of use and manner of use of water rights, then it ought to also be able to apply that same approach to unperfected paper water rights by precluding them entirely from pumping from the already over pumped aquifer. In addition to violating the beneficial use requirement of Nevada law by allowing unperfected paper water rights to be "banked" and then freely conveyed

to another user, the GMP also unfairly allows a previously unused and unperfected groundwater right to be automatically perfected through no actual beneficial use.

It was arbitrary and capricious for the State Engineer to approve the GMP without even attempting to quantify the effects on perfected water certificate holders through the allowance of water banking for unperfected paper water rights. For example, the State Engineer should have determined how quickly the GMP's goal of basin equilibrium could have been reached had the GMP refused to allow any future banking of unperfected paper water rights. Similarly, the State Engineer should have analyzed whether perfected, certificated water right holders could have been granted additional shares for their water rights, while achieving the same aquifer equilibrium in the same 35 year period, by reducing the shares granted to unperfected water rights. Instead, the State Engineer approved the GMP's punishment of certificated water rights holders by awarding paper water rights holders shares for water rights that have never been put to beneficial use.

2. The GMP's Water Banking Scheme Violates Nevada's Beneficial Use Requirement

As set forth above, the GMP allows banking of unused annual water allocations. This banking scheme violates Nevada's beneficial use doctrine because it allows for water rights to be used for water banking, which is not a recognized beneficial use under Nevada law.

Acceptable and recognized beneficial uses are defined both by statute and by "longstanding custom." *See State v. Morros*, 104 Nev. 709, 716 (1988). Water banking, being a novel concept in Nevada, enjoys neither statutory support nor longstanding custom as a beneficial use of water. While Nevada law recognizes water storage, including underground aquifer storage, as a beneficial use of water, in all cases such water storage requires a separate permit from the State Engineer. *See e.g.* NRS 533.335(3)(a); NRS 533.340(6).

However, in Order 1302 the State Engineer expressly found that the water banking scheme of the GMP is not the same as aquifer storage and recovery under NRS 534.290. Order 1302 at 8–9 and fn 29 (ROA 009–10). Based on that finding, the State Engineer determined that an aquifer storage permit was not necessary for the water banking scheme of the GMP. In other words, the State Engineer through Order 1302 has either approved a use of water that is not a beneficial use,

or he has condoned the creation of an entirely new beneficial use of water which is based neither on longstanding custom nor on creation by the legislature via statute. This is a violation of the doctrine of beneficial use, and therefore a violation of a bedrock principal of Nevada's water law.

Furthermore, the State Engineer failed to make any finding with respect to the scientific or practical necessity of this novel water banking scheme. For example, the purpose of the GMP is to reduce the stress on the aquifer to allow an equilibrium to be reached between groundwater pumping and natural recharge. But it is not at all clear, and certainly no argument has heretofore been presented, that the water banking scheme is necessary or helpful for reaching this goal. To the contrary, the water banking scheme unnecessarily extends the time it will take to restore the equilibrium because it will result in *additional* water being pumped each year in excess of the annual allocations when banked water is pumped. Order 1302 arbitrarily, and with no factual findings, approves the water banking scheme of the GMP despite this obvious shortcoming.

III. THE GMP VIOLATES OTHER PROVISIONS OF STATE LAW

A. The GMP Automatically Permits Changes in Points of Diversion and Places and Manners of Use of Water Rights in Violation of Nevada Statute

The GMP deviates from Nevada water law by allowing changes in the point of diversion, place of use and/or manner of use without complying with the provisions of Nevada law. Specifically, GMP Sec. 13.10 provides that "[a]ll or part of any Allocation in any individual Groundwater Account may be transferred to any other individual groundwater account" (ROA 235), and GMP Sec. 13.8 provides that "[g]roundwater subject to this GMP may be withdrawn from Diamond Valley for any beneficial purpose under Nevada law as long as the groundwater use is linked to and withdrawn from a Groundwater Account with a positive balance" (ROA 234). Once groundwater rights are converted to shares and allocated, those allocations are freely transferrable to any other well, any other place of use, and/or any other purpose within Diamond Valley, and the State Engineer's authority to enforce existing laws meant to protect against adverse impacts of such changes is drastically hamstrung.

Under current law, specifically NRS 533.325 and 533.370(2), before changing the well location, place of use or manner of use of a water right, the owner must file a formal change

application for the State Engineer's approval of the proposed change: "any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so." A change application is required so that the State Engineer can analyze the potential effects of changing the location of the well, changing the location of the use of the water, and/or changing the manner of use of the water. *See e.g.* NRS 533.370(2) ("where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit.").

None of this information is required under the GMP in order to convey groundwater allocations or shares from the owner to someone else who may pump it from another well anywhere else in Diamond Valley, use it at any other location in Diamond Valley, and use it for any other purpose. *See e.g.* GMP Sec. 9 (ROA 229) (limiting State Engineer's ability to analyze potential impacts of moving groundwater pumping and use around Diamond Valley to only those procedures provided for in Sec. 14 of the GMP). Pursuant to Sec. 14 of the GMP, the State Engineer is prohibited from interfering with the transfer of shares or allocations to a new well or new place or manner of use unless it would *both* a) cause the new well to exceed the pumping volume of the original water right permitted for the well, *and* b) that exceedance of the original well volume "would conflict with existing rights." GMP Sec. 14.7 (ROA 237). But the GMP requires the State Engineer to complete any review and analysis within 14 days, after which the transfer of the allocation or share to the new well location, place of use or manner of use is "deemed approved." *Id.* (GMP Sec. 14.8). Only if the State Engineer is able to act within this 14 day arbitrary deadline does the GMP then allow the State Engineer to proceed with the statutory change application process. *Id.* (GMP Sec. 14.9). The State Engineer's approval of the GMP claims that this is "not a *significant departure* from existing law...." ROA 009 (emphasis added).

The purpose of the State Engineer's review of an application to change the point of diversion or manner or purpose of use of a water right is to determine whether the proposed

change will have an adverse impact on any other user of water. NRS 533.370(2). That is true of temporary water rights changes as well as permanent changes. For example, moving groundwater pumping to a new well can cause the localized groundwater level to drop because of the new or additional pumping from the well, which can impact other nearby wells. This is precisely the type of impact typically analyzed by the State Engineer when presented with a groundwater change application, whether temporary or permanent. Under the GMP, these potential impacts are not intended to be considered, which is precisely the point of the "unbundling" scheme adopted by the GMP and approved by the State Engineer:

> In many cases [under the existing statutes], the decisions associated with the trade get locked up in expensive legal proceedings that run for many years. As a general rule, water markets in the western United States have high transaction costs. The driving concept of this blueprint is that existing water rights be unbundled into their component parts. Among other things, unbundling increases the fungibility of each component. As fungibility increases, each component becomes easier to value, monitor, and trade.

Young Paper at 10–11; *see also id.* at 7 ("The challenges of water management in arid landscapes … [include] the inability of current water governance to allow transfers of water to those who value it most."); *id.* at 1 ("the blueprint's reforms would convert prior appropriation water rights into systems that … allow rapid adjustment to changing water supply conditions"); *id.* ("willing buyers and sellers are able to trade with one another with dramatically reduced transaction costs. 'Liquid markets' emerge."); *id.* ("low-cost trading … is possible only when existing water right arrangements are converted into ones that are designed to achieve these goals."); *id.* at 9 (one of six "core concepts" of the blueprint is "administratively efficient processes designed to speed adjustment and keep transaction costs low."); *id.* at 13 ("Once a plan has been finalized, third parties … cannot stop trades or allocations made in a manner consistent with plan rules.").

It is obvious that the potential to overlook impacts to other water users when undertaking the immediate and "low-cost" conveyance of shares and allocations is not a bug in the GMP, it is part of the grand design. The GMP's ease of water trading is specifically designed to reduce the potential for the State Engineer to make a determination that a trade could impact another water user. This is all in direct violation of the letter, spirit and intent of the requirements of NRS 533.325 and NRS 533.370(2) that the State Engineer analyze all proposed changes in the point of

diversion or place or manner of use for potential impacts and conflict with existing water rights.

Interestingly, the Young Paper suggests that water be freely tradeable without having to rely on subsequent "conflicts analysis" for each trade. *See generally* Young Paper at 13. However, Mr. Young's proposal in this regard is based upon his suggestion that before allowing for the unfettered trade of water shares or allocations, there must first be an advance analysis and final determination made with respect to the potential impact of such trades on other water rights:

> For an unbundled water rights system to operate, water resource management plans need to be prescriptive and dictate outcomes. If, for example, a plan prescribes that the exchange rate for the transfer of water from one location to another is 0.8, there should be no opportunity for a third party to oppose a transfer *provided that the exchange rate used is 0.8*. If, however, a plan simply states that transfers should cause no harm to third parties, there is opportunity for the transfer process to hold up a transfer due to the vagueness of language about the exchange rate that need to be made and so on."

Young Paper at 13 (emphasis added). Of course, the Diamond Valley GMP and the State Engineer's consideration and approval of it in Order 1302 fail to take this advice from Mr. Young for setting up the newly created water-marketing scheme. They take the simple part of Mr. Young's scheme—allowing for essentially unfettered transfer of water pumping around Diamond Valley with little oversight—but refuse to undertake the more complicated task required by Nevada statute of analyzing how such transfers may impact other users. Mr. Young's free and easy water transfer scheme relies on undertaking the hard work of determining in advance how much to restrict future transfers to account for potential adverse impacts of changing the point of diversion or place or manner of use of the water appropriations, but the GMP failed to do that, instead simply allowing all temporary transfers unless the State Engineer can determine the potential for harm within the 14-day review period. Allowing changes in water rights without analyzing potential impacts violates Nevada law. It is not clear that Mr. Young's approach of a basin-wide pre-transfer impacts analysis would comply with law, but it is very clear that the GMP's process of not analyzing impacts for temporary changes certainly does not.

B. The GMP Exacerbates Adverse Impacts to Senior Vested Surface Water Rights in Diamond Valley

In addition to the impacts to the Baileys' senior groundwater rights, the GMP also allows the adverse impacts to Fred and Carolyn Bailey's vested surface water rights to continue. The

GMP, and the State Engineer's approval in Order 1302, simply ignore the impacts to senior vested groundwater-dependent surface water rights in Diamond Valley.

The Bailey Ranch operations historically relied on surface water springs in and around the ranch, which springs depended on the groundwater conditions of the Diamond Valley aquifer at the time Elwood and Robert Bailey made their homestead in the early 1860s. The Bailey Ranch also has relied on other groundwater-dependent surface water sources, which are set forth in the Bailey's vested water rights on file with the Office of the State Engineer.

But those surface water rights have been adversely impacted to the point that they are no longer satisfied because of the over pumping of the groundwater aquifer in Diamond Valley. Not only does the GMP not resolve the adverse impacts to the Baileys senior vested surface water rights, it will protract them because it countenances the continued lowering of the water table for at least the next 35 years. This violates NRS 533.085(1) ("Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913") and NRS 534.100(1) ("Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913").

At the end of the 35 years of annual reductions of allocations of water awarded per share (i.e. after all water rights have been forced to reduce pumping by roughly two-thirds), the total annual allocations—not including carried-over banked water allocations—will provide for 34,200 acre-feet to be pumped annually. GMP, Appx. G (ROA 510). This is 4,200 acre-feet more than the estimated perennial yield of 30,000 acre-feet for the Diamond Valley aquifer. There is, then, no dispute that the GMP permits the continued draw down of the aquifer because it permits pumping to exceed natural annual recharge. *See e.g.* Order 1302 at 15 (ROA at 16) ("water levels will stabilize when recharge equals discharge," but "the amount of transitional storage consumed before a new equilibrium state is reached may affect the depth to water"). The stated goal of the GMP is "stabilization of water levels," and not recovery of the historic depth of the aquifer

necessary to restore and serve vested senior surface water rights. *Id.*

Therefore, not only does the GMP fail to protect vested senior surface water rights, it also allows the groundwater to continue to be mined during the 35 year process, which the State Engineer determines is simply going to have to be accepted as the new normal. The State Engineer admits this decision is not based on science or proper resources management: "Groundwater modeling and hydrogeologic analysis are not the basis for the GMP's determination of pumping reduction rates and target pumping totals at the end of the plan. Instead, the pumping reduction rate was selected by agreement of the GMP authors...." *Id.*

The State Engineer's approval of the arbitrary groundwater pumping reductions that do nothing to address the adverse impacts of groundwater pumping on senior vested surface water rights, in addition to violating the doctrine of prior appropriation, is not based on substantial evidence in the record and is arbitrary and capricious.

C. The GMP's "Water Banking" Scheme Unnecessarily Extends the Time for the Diamond Valley Aquifer to Reach Equilibrium and/or Recovery

In addition to violating Nevada's doctrine of beneficial use, as described above, the GMP also unnecessarily extends the time it takes for the aquifer to reach equilibrium between recharge and pumping because it allows pumping more than the perennial yield in perpetuity. The annual allocation of pumping among the shares does not ever drop all the way down to the 30,000 acre-foot perennial yield. *See* GMP Appx. G (ROA 510) (under the "benchmark" pumping reductions, in the final Year 35 the total allocation is 34,200 acre-feet). But this number does not even account for the amount of "banked" allocations from prior years that could also be pumped in any year in addition to that year's benchmark pumping allocations. In other words, by allowing water banking, the GMP extends the time it will take for annual pumping to be reduced to the 30,000 acre-foot perennial yield. The State Engineer failed to consider and analyze whether the basin could achieve equilibrium more quickly had the GMP not included the novel and untested water banking provisions. Furthermore, the GMP proponents did not provide any evidence, much less the substantial evidence necessary for the State Engineer to have made a finding, that the water banking provisions were otherwise necessary to meet the stated goal of the GMP to reduce

pumping to perennial yield so that the CMA designation could be removed.

IV. THE VOTE TO APPROVE THE GMP VIOLATED NRS 534.110(7)

NRS 534.110(7) requires that, for the State Engineer to approve a GMP, it must have been approved by a majority of water rights permit holders in the basin: "The petition must be signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer...." Here, Order 1302 does not contain substantial evidence to support a finding that the GMP was approved by a petition signed by the majority of holders of water rights permits or certificates in the Diamond Valley Basin.

According to Eureka County's cover letter to the State Engineer transmitting the petition to approve the GMP, the only permits from the basin allowed to sign the petition to approve the GMP, i.e. allowed to vote for or against it, were "groundwater permits." ROA 148. On information and belief, and based upon the total number of groundwater permit holders to whom Eureka County provided a copy of the petition for the purpose of voting, the GMP proponents defined "groundwater permits" as only groundwater *irrigation* permits. *Id.* (explaining that 493 "total groundwater permits" were allowed to vote on the GMP). There are many types of permits and certificates on file with the Office of the State Engineer other than groundwater irrigation permits, such as surface water permits and stockwater permits (for both surface water and groundwater). Therefore, rather than providing the petition to all permit and certificate holders in the basin—whether surface water or groundwater or whether irrigation or some other use—the GMP proponents limited voting to only groundwater irrigation permit holders.

For example, the Baileys have several stockwater permits for Diamond Valley that should have been allowed to cast a vote for or against the petition to approve the GMP pursuant to NRS 534.110(7). The Baileys also have, as set forth in Part III.B above, several vested surface water right permits. On information and belief, and although not included in the State Engineer's final record on appeal in this matter, the State Engineer's August 30, 2018 Preliminary Order of Determination for the pending adjudication of the Diamond Valley Basin recognizes approximately 300 permits and/or certificates for vested groundwater rights for both irrigation and stockwater for the Diamond Valley Basin. These vested groundwater rights holders were not

allowed to vote on the GMP. In addition, there are also numerous non-vested stockwater permits for the Diamond Valley Basin, and the holders of those permits were also not permitted to vote.

NRS 534.110(7) does not differentiate or limit the types of permits or certificates that are eligible to vote for or against a petition for approval of a GMP—it simply says "the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer." In light of the fact that the petition for approval was not signed by majority of *all permits* on file with the State Engineer, but only a majority of groundwater irrigation permits, the State Engineer's approval of the GMP in Order 1302 was arbitrary and capricious and not based upon substantial evidence in the record.

CONCLUSION

Because the Diamond Valley Groundwater Management Plan violates Nevada law, including the two foundational doctrines of prior appropriation and beneficial use, the Baileys respectfully ask that this Court reverse Order 1302.

Affirmation Pursuant to NRS 239B.030(4)

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

DATED September 13, 2019.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on September 13th, 2019, pursuant to the Court's April 25, 2109 Order, a true and correct copy of **OPENING BRIEF OF BAILEY PETITIONERS** was sent via electronic mail to the following:

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CASE NO.: CV-1902-348 (consolidated with Case Nos. CV-1902-349 and CV-1902-350)

DEPT. NO.: 2

NO. _____
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Eureka County Clerk
By _____

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

* * *

TIMOTHY LEE & CONSTANCE MARIE BAILEY; FRED & CAROLYN BAILEY; IRA R. & MONIRA RENNER; SADLER RANCH, LLC; DANIEL S. VENTURACCI,

Petitioners,

vs.

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

Respondent.

EUREKA COUNTY; DIAMOND NATURAL RESOURCES PROTECTION AND CONSERVATION ASSOCIATION, J&T FARMS, GALLAGHER FARMS, JEFF LOMMORI, M&C HAY, CONLEY LAND & LIVESTOCK, LLC, JIM AND NICK ETCHEVERRY, TIM AND SANDIE HALPIN, DIAMOND VALLEY HAY CO., MARK MOYLE FARMS, LLC, D.F. AND E.M. PALMORE FAMILY TRUST, BILL AND PATRICIA NORTON, SESTANOVICH HAY & CATTLE, LLC, JERRY ANDERSON, BILL AND DARLA BAUMANN,

Respondents/Intervenors.

_____/

DNRPCA INTERVENORS' ANSWERING BRIEF

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INTRODUCTION

DIAMOND NATURAL RESOURCES PROTECTION AND CONSERVATION ASSOCIATION, J&T FARMS, GALLAGHER FARMS, JEFF LOMMORI, M&C HAY, CONLEY LAND & LIVESTOCK, LLC, JIM AND NICK ETCHEVERRY, TIM AND SANDIE HALPIN, DIAMOND VALLEY HAY CO., MARK MOYLE FARMS, LLC, D.F. AND E.M. PALMORE FAMILY TRUST, BILL AND PATRICIA NORTON, SESTANOVICH HAY & CATTLE, LLC, JERRY ANDERSON, and BILL AND DARLA BAUMANN (collectively, he "DNRPCA Intervenors") file this Answering Brief in support of the Diamond Valley Groundwater Management Plan ("DVGMP") approved by the State Engineer in Order #1302.

The DVGMP exemplifies exactly what the Legislature had in mind when, in 2011, it passed the legislation that is now codified in NRS 534.037 and NRS 534.110(7) to protect Nevada's communities from the harsh repercussions should curtailment ensue in overappropriated groundwater basins. The plain statutory language authorizes the State Engineer to **not** regulate by priority. To the extent the Petitioners do not like the Legislature's departure from the prior appropriation doctrine, they needed to attack the statutes themselves, not the State Engineer's exercise of his statutory authority.

The DVGMP represents a grassroots effort to bring the aquifer back into balance while preserving the social and economic fabric of Diamond Valley. It mandates significant and continuous reductions in pumping until withdrawals no longer exceed the basin's perennial yield, for the benefit of all surface and groundwater users. The Legislature contemplated that reducing groundwater withdrawals to a sustainable level would be a long-term prospect. If it wanted immediate results, the Legislature would not have changed the law to prohibit the enforcement of seniority where a GMP has been approved.

Substantial evidence in the record shows that the State Engineer adhered to the statutory requirements and properly exercised his discretion to approve Nevada's first-of-its-kind groundwater management plan. In mounting their challenge to the DVGMP, the Petitioners ask the Court to exceed the scope of its allowable review, consider prohibited extra-record

information and substitute its judgment for that of the State Engineer. To do so would constitute reversible error because, under the law, deference must be afforded the State Engineer's decision making. For that reason, the DNRPCA Intervenors respectfully request that the petitions for judicial review be denied and the State Engineer's approval of the DVGMP be affirmed.

ISSUE PRESENTED

Must the State Engineer's Order #1302 approving the DVGMP be affirmed because it is supported by substantial evidence in the record and constituted a proper exercise of the State Engineer's discretion?

STATEMENT OF FACTS

A. Overview Of The Diamond Valley Community

Diamond Valley is a groundwater-dependent farming community in the Diamond Valley Hydrographic Basin, located in southern Eureka County, Nevada ("Diamond Valley"). ROA 225. It is a major agricultural area for the state. ROA 2, 32. There are approximately 26,000 acres of irrigated land, which primarily produce premium-quality alfalfa and grass hay. ROA 2, 225. Based on a 2013 estimate, approximately 110,000 tons of hay are produced annually for a total farming income of approximately $22.4 million. ROA 2, 225.

Many of the Diamond Valley farmers are from families who settled the area and started to work the land in the 1950's and early 1960's. ROA 33, 83, 540, 541, 591, 737-738. During that time, the drilling and pumping of wells greatly expanded. ROA 33, 83. Hundreds of applications to appropriate groundwater were filed in that time period, most within weeks or months of one another. ROA 499-505.

Annual groundwater pumping has exceeded the perennial yield of Diamond Valley for over 40 years. ROA 3, 138, 225. Ground water levels have declined on average two feet per year since 1960. ROA 3, 138, 225. About 126,000 acre-feet of irrigation groundwater rights are appropriated in Diamond Valley while the perennial yield recognized by the State Engineer is 30,000 acre feet per year. ROA 3, 135, 225, Groundwater pumping as of 2016 was approximately 76,000 acre-feet per year. ROA 3, 225. If pumping were limited to 30,000 acre feet per year, any appropriations with priority dates more recent than May 12, 1960 would need

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to be curtailed. ROA 3-4, 6, 15, 218. That amounts to nearly 300 permits, many of which have priority dates within days, weeks or months of this cut off. ROA 499-509.

While the primary groundwater usage is irrigation, nearly two-thirds of Eureka County's residents receive their domestic water needs from groundwater in Diamond Valley, including most of the water needed by the town of Eureka to serve numerous businesses and the Eureka County schools, two General Improvement Districts, and domestic wells. ROA 225. Groundwater in Diamond Valley also supplies water needs for mines and other commercial and industrial uses. ROA 225. There are also multiple stockwatering wells that supply the water or many livestock production operations. ROA 225.

B. The Diamond Valley Community's Multi-Year Effort To Develop a Management Plan To Reduce Pumping and Stabilize Groundwater Levels

Recognizing the need to stabilize groundwater levels and reduce pumping, water users in Diamond Valley came together in 2010 to form DNRPCA to, among other things, protect, conserve and promote the harmonious use of groundwater in Diamond Valley. ROA 290, 315, 327, 365, 491, 588-589. Starting in March 2014, many groundwater rights holders, primarily irrigators, came together to start making progress towards developing a GMP. ROA 226. The group held a meeting and decided to request that the Eureka Conservation District ("ECD"), a locally elected, third-party, government entity, take the lead role in facilitating the process. ROA 226. Soon thereafter, the ECD officially accepted the role of facilitating the development of a GMP. ROA 226. DNRPCA and its members worked extensively with Eureka County, ECD, the Eureka Producers Cooperative and individual irrigators (collectively, "Planning Process Participants") on a GMP to address overdraft conditions in Diamond Valley. ROA 2, 14, 217-527. The GMP evolved out of the State Engineer's efforts to get stakeholder involvement in the Diamond Valley groundwater management process. ROA 226, 315. The State Engineer held workshops in March 2009 and again in February 2014 to engage in discussions with Diamond Valley irrigators regarding potential solutions to the overdraft conditions. ROA 226, 288.

In June 2013, Hansford Economic Consulting was engaged to conduct a study to assess the financial feasibility of developing a General Improvement District (GID) that could carry out

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a water management program to enhance the sustainability of the underground water supply and storage for the Diamond Valley Hydrographic Basin. ROA 288, 315. In May 2014, Hansford Economic Consulting was engaged to conduct a study of potential water use set-aside programs for Diamond Valley. ROA 288.

Additionally, ECD contracted with Walker & Associates ("Walker") in May 2014 to assist in scoping the GMP. ROA 226. ECD sent a letter to every groundwater right holder and all known domestic well holders in Diamond Valley to inform them that Walker would be hosting facilitated workshops and private meetings (if requested) to identify the issues, hurdles, and opportunities that stakeholders believed were relevant to development of a GMP in Diamond Valley, including potential strategies to reduce pumping. ROA 226. Walker held many facilitated public workshops and private meetings, collecting comments and ideas for what a successful GMP would look like. ROA 226, 249-276, 277-475.

Also in 2014, various Planning Process Representatives researched water plans, agreements, and programs that had been employed in other areas where overappropriation was an issue. ROA 252-253, 256, 294. These were also discussed in the scoping process. ROA 252-253, 256, 259, 265. In 2015, Steve Lewis of the University of Nevada Cooperative Extension began to facilitate sessions with stakeholders to develop a GMP. ROA 226, 277-475. At that time, the Planning Process Participants established a goal to have a draft GMP completed within 18 months. ROA 277. The Planning Process Participants formed a committee to keep the planning process moving forward and to communicate with stakeholders regarding the planning process. ROA 227, 316.

On August 25, 2015, the State Engineer designated Diamond Valley as a Critical Management Area ("CMA"). ROA 134-138. Pursuant to NRS 534.110, this designation started a ten-year time period for groundwater rights holders to develop a GMP. ROA 225. The Planning Process Participants met regularly since spring 2015 to develop the GMP, working to ensure the GMP included provisions for, among other things, governance, pumping reductions, recognition of vested rights, addressing overdraft conditions, metering, efficiency, funding and compliance. ROA 226-228, 277-475.

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In February 2016, the Planning Process Participants elected a Groundwater Management Plan Advisory Board ("AB") by nomination and majority vote. ROA 227, 230, 277. Thereafter, the AB took over much of the responsibility for facilitating GMP development from the professional facilitators. ROA 227. The AB made recommendations for consideration to the entire group of groundwater rights holders who were participating in the GMP process. ROA 227. From February 2016 until submittal of the GMP to the State Engineer, there were an additional twenty-three formal Advisory Board meetings and twenty formal full-group meetings. ROA 227, 277-475.

During this process, the groundwater rights holders entertained various possible solutions to the overdraft problem and received presentations on the potential development and implementation of a water market-based system meant to provide ultimate flexibility in using water, while incentivizing conservation and allowing willing participants' quick sale, lease, and trade of water in times when needed. ROA 227. The GMP was developed to adapt these concepts to local needs, desires, and constraints. ROA 227, 277-475.

In compliance with statutory requirements, the Diamond Valley GMP was submitted for approval to the State Engineer on August 20, 2018, accompanied by the majority-signed petition for approval and a detailed plan to reduce and regulate the groundwater basin to bring withdrawals below the perennial yield for removal as a CMA. ROA 148-216, 217-527. Importantly, significant portions of both senior and junior rights were represented in the petition. ROA 3-4, 148-216. At the time of filing the petition, there were 77 senior water right permits or certificates, 46.8%, of which were represented by at least one signature on the petition. ROA 4, 148-216. The remaining 342 water right permits or certificates were junior, 64.6% of which were represented by at least one signature on the petition. ROA 4, 148-216. Of the 29,325 afa of senior water rights, 18,700 afa, or about 64%, was represented by signatories on the petition. ROA 4, 148-216.

The GMP submitted to the State Engineer was the result of hundreds of hours of meetings and intense efforts over many years by the Planning Process Participants and the Advisory Board. ROA 2, 277-475, 713-715. As this history shows, the GMP process was

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initiated by the local community and stakeholders years before the State Engineer declared the basin a CMA in 2015, and then continued for an additional three years after the designation. ROA 14, 226, 277-475. On January 11, 2019, after receiving written public comments and conducting a public hearing as specified in NRS 534.037, the State Engineer approved the GMP ("the DVGMP"). ROA 2-19.

In approving the DVGMP, the State Engineer noted the extensive efforts that led to development of the GMP that was submitted for consideration:

> The testimony, written public comment and background of Appendix C of the GMP demonstrate that this process was emotional and difficult for the participants – yet they persisted in forging a plan in an effort to avoid curtailment by priority to save their community and the established agricultural way of life in Diamond Valley. It is significant that the participants are not professional water right managers, but are ordinary citizens who made a Herculean effort to craft their own plan in response to a complex problem.

ROA 2, *discussing* ROA 277-475.

C. Key Components of the DVGMP

The DVGMP was designed to ensure groundwater level stabilization and the sustainable health of the Eureka County community and economy, while maintaining the tax base and avoiding disruption to the population. ROA 5, 228, 592, 706. It provides all users with access to water while balancing the basin for the long-term health of the aquifer. ROA 217-247, 706. It provides flexibility through benchmark reductions with yearly allocations adjusted through well monitoring data, annual precipitation values, and conservation relief. ROA 217-247, 510, 706.

The core goals of the GMP reflect these objectives and are outlined in the Plan as follows: (1) Remove the basin's CMA designation within 35 years by stabilizing groundwater levels in Diamond Valley; (2) Reduce consumptive use to not exceed perennial yield; (3) Increase groundwater supply; (4) Maximize the number of groundwater users committed to achieving GMP goals; (5) Preserve economic outputs from Diamond Valley; (6) Maximize viable land uses of private land; (7) Avoid impairment of vested groundwater rights; and (8) Preserve the socio-economic structure of Diamond Valley and southern Eureka County. ROA 228.

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The DVGMP applies to groundwater rights that serve an irrigation purpose and mining or milling rights that have an irrigation base water right. ROA 218. The DVGMP does not apply to vested water rights (including mitigation rights), municipal, industrial, stockwater, or existing domestic wells. ROA 218. Under the DVGMP, existing water users may continue to use water in proportion to their water rights and seniority. ROA 218. Priority is factored into the GMP using a formula that converts the rights to a set amount of shares, as follows:

WR * PF = SA

Where:

WR = Total groundwater right volume as recognized by DWR, accounting for total combined duty (i.e., overlapping places of use) (measured in acre feet)

PF = Priority Factor based on seniority

SA = Total groundwater Shares

ROA 218. Using this formula, shares are set for each water right and do not change. ROA 218. The shares are used on a year-to-year basis to calculate the volume of water (annual allocation in acre-feet of water per share) allowed to be used, sold, traded and banked. ROA 218. Annual allocations are reduced each year to satisfy benchmark pumping reductions. ROA 218, 499-510.

There is already an extensive network of monitoring wells in Diamond Valley, including those of the State, Eureka County, and DNRPCA. ROA 477-478, 491. A key component of the DVGMP is the creation of an even more robust system for data collection and reporting to monitor water use and groundwater levels. ROA 237-239. The measures put in place by the DVGMP will provide the Advisory Board and State Engineer with considerable data to review and monitor the effects of DVGMP implementation. ROA 16-17, 237-239. As outlined in the Plan, "[a]ll groundwater pumped from Diamond Valley that is subject to this GMP shall be metered using an approved Smart-capable flow meter...before any groundwater subject to the GMP may be put to use." ROA 16-17, 237-239. This requirement promotes uniformity and standardization and ensures accurate and reliable data reporting. ROA 237-239. The installation of smart meters will provide increased accuracy and nearly real-time knowledge of groundwater use, creating even more data to monitor the effects of the Plan over time. ROA 17.

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D. Hardship To The Diamond Valley Community In The Event Of Seniority Based Curtailment

Absent an approved GMP, the State Engineer would have been mandated by NRS 534.110(7)(b) to regulate the groundwater basin by strict priority, prohibiting or severely restricting the pumping of junior groundwater rights and domestic wells appropriated after May 1960 (approximately two-thirds of water rights users), including the town of Eureka and the Eureka County schools. ROA 218, 225. The consequences of such an approach would be devastating to Diamond Valley and the town of Eureka, severely impacting businesses, individuals, family farming operations, and the agricultural livelihood of the community. ROA 11-12, 14-15, 547-548, 588-592, 594-595, 704-706, 734, 739-740.

Public comment provided in support of the GMP underscored the tremendous negative impact on the community if curtailment by strict priority were enforced, including financial hardship, bankruptcy, diminished population and economic downfall. ROA 536-652.

> "The plan was purposely designed to keep the community whole, allowing all users access to water and balancing the basin for ultimate health of the aquifer. The tax base is maintained and all the social economic units involved in the community are ***not disrupted by dwindling population that will occur with our alternative options, curtailment of pumping***." Marty Plaskett, Public Comment, ROA 592, 706.

> "[I]f we're forced to turn our water off...a lot of us are indebted to banks to a certain extent on the properties. A lot of us have to get loans. And so...all of a sudden ***you see bankruptcy coming possibly for a lot of people***." Matt Morrison, Public Comment, ROA 734.

> "***The downside and the thing that seems to concern us is that what's the impact on the community***, the greater community, of not only the irrigators of which would be impacted but by the people who invest in Raine's Market or for some of the other businesses here in place that ***if you see an impact of two-thirds of your water rights users disappear what is the ultimate impact on the greater community of Eureka. We're willing to take the hit as a senior water rights holder in order to support the greater good of the community***." D'Mark Mick (Sr. Water Rights Holder), Public Comment, ROA 704- 705.

> "***If we have to stop farming, we're going to have to leave our houses empty*** and stuff there, people won't be able to carefully transition from what we're doing to something else...Not everyone is debt-free. It would be very bad on this community. So ***bankruptcies, that will happen***...[O]ur domestic water rights are connected with other rights. You would have no water. ***You couldn't retire on your farm because you've got to have water for everything***." Alberta Morrison, Public Comment, ROA 739-740.

"If the GMP isn't made law and we end up being curtailed by priority, ***over half of the farms in Diamond Valley would dry up and many people would be forced to leave. This would devastate the community*** that I moved back to. It would also ***leave Diamond Valley as a dust, weed, and rodent bowl*** which would change what the remaining farmers would have to deal with." James Travis Gallagher, Written Public Comment. ROA 547.

"Strict curtailment by priority, as I see it, ***will leave the Eureka socioeconomic areas, including the Diamond Valley farming community, a bleak shell of its former self after just a few short years.***" Andrew Goettle, Written Public Comment. ROA 548.

"If the choice is curtailment, what will happen? ***Our power rates will increase. County revenue will decrease***; consequently, leaving roads to be poorly maintained. ***Farms with junior water rights will be overrun with rodents and weeds...I am very willing to share some water as outlined in the Diamond Valley Ground Water Management Plan. I applaud all of the senior water rights holders who are willing to share water in order for Diamond Valley to continue to prosper.*** Donald Frank Palmore (Sr. Water Rights Holder), Written Public Comment. ROA 591.

"If the GMP is not approved and curtailment were to take place ***I would lose everything that I have worked for these past 40 years.***" William Norton, Written Public Comment, ROA 590.

The public comments centered on a common theme: The "determination of the community to work together to solve issues, both past and present, which challenged their continued existence" and "desire to preserve the established way of life" in Diamond Valley. ROA 14, 653-742.

E. The State Engineer's Approval of the GMP Following Public Comment And A Public Hearing

The State Engineer's review and approval process followed the statutory requirements. NRS 534.037 requires the State Engineer to provide proper notice of public hearing, hold a public hearing, and take testimony before approving or disapproving a groundwater management plan. ROA 3. Following such notice, the State Engineer held a public hearing in Eureka, Nevada to take testimony on the proposed Diamond Valley GMP on October 30, 2018. ROA 4-5, 653-742.

During the hearing and public comment period, twenty (20) individuals, groups or entities comprising water rights holders and interested parties provided public comment on the proposed GMP. 535-652, 653-742. Notably, both junior and senior water rights holders provided

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public comment in favor of the GMP, acknowledging that implementation was essential for the greater good of the community. ROA 540-541, 546-548, 588-592, 594-595, 680-682, 703-721, 726-740. In addition to public comment at the hearing, interested parties and water rights holders submitted approximately 120 pages of supporting written comments to the State Engineer. ROA 535-652, 653-742. The State Engineer then held open the period for additional written public comment through November 2, 2018, during which time additional public comments were received. ROA 4-5.

Following the public hearing, the State Engineer conducted a detailed analysis of the factors stated in NRS 534.037(a) and addressed the oral and written comments, ultimately issuing Order #1302 approving the DVGMP on January 11, 2019. ROA 2-19. The 18-page Order analyzes the legal sufficiency of the plan, addresses public comments for and against the plan, including by the Bailey, Sadler and Renner Petitioners, and speaks to the scientific soundness of the plan. ROA 2-19. Now that the DVGMP has been approved, the State Engineer is responsible for administering and managing the plan while being advised by the locally elected Advisory Board. ROA 6.

ARGUMENT

A. Standard Of Review

The State Engineer's approval of the DVGMP is subject to judicial review pursuant to NRS 533.450. *See* NRS 534.037(4). Such review is "in the nature of an appeal" and limited to the record before the State Engineer. NRS 533.450(1); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). "The decision of the State Engineer is prima facie correct, and the burden of proof is upon the party attacking the same." NRS 533.450(10).

In reviewing the State Engineer's decision, the Court's role is limited. The Court determines only whether the State Engineer's decision is supported by substantial evidence in the record.[1] *Revert*, 95 Nev. at 786, 603 P.2d at 264. Substantial evidence is "that which a

[1] In defiance of the Court's order granting the State Engineer's motion in limine, Sadler has improperly included materials that are not part of the record on review and therefore cannot be considered. (Sadler OB at n.2). The Court may not consider extra-record evidence to determine

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reasonable mind might accept as adequate to support a conclusion." *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006). The Court may not substitute its judgment for that of the State Engineer, "pass upon the credibility of the witness or reweigh the evidence." *Id.* The State Engineer's factual findings and interpretation of the statutes he is tasked with implementing are entitled to deference. *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citing *Clark Co. Sc. Dist. v. Local Gov't*, 90 Nev. 332, 446, 530 P.2d 114, 117 (1974)).

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

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

The State Engineer correctly interpreted NRS 534.110(7) to authorize his approval of a groundwater management plan that deviated from regulation by strict priority. That statute, enacted in 2011, embodies the Legislature's policy decision to **not** enforce the prior appropriation system in basins where, as here, the community has developed a groundwater management plan:

> [I]f 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, **unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037**.

NRS 534.110(7) (emphasis added). In other words, the Legislature deliberately enacted legislation that created **an exception** to the seniority system in exactly the circumstances that exist here. *See id.* The statute expressly authorized the State Engineer to not "conform to priority rights." *Id.*

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whether, when issuing Order #1302, the State Engineer properly interpreted his authority under the statute. It is the Court's job to interpret the law. The State Engineer's statements in other proceedings or presentations that are not within the record of review are irrelevant to the Court's responsibility here.

To the extent this is not clear from the plain language of the statute, the legislative history evinces the legislative intent to stray from prior appropriation.[2] 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 Minutes of March 30, 2011 Assembly Committee on Government Affairs at pp. 66-69, Addendum Ex. 2 at 0079, 0081.

The State Engineer correctly interpreted the statute to allow for a GMP that did not adhere to the devastating effects of prior appropriation because that is precisely what the statute sought to avoid. *See* NRS 534.110(7). The Legislature could have maintained the status quo regarding overappropriated basins, which would have kept the prior appropriation doctrine intact and left the State Engineer to curtail by priority. It made a policy decision, however, not to do so. *See id.* Instead, the Legislature established a whole new statutory structure regarding Critical Management Area designation and groundwater management plan approval. *See id.* Under the

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[2] In its opening brief, Sadler asks the Court (at 10) to review the legislative history yet does not identify any ambiguity in the statutory language. *See Kilgore v. Kilgore*, 135 Nev. Adv. Op. 47, _ P.3d _, 2019 WL 4896441 at *7, n.4 (2019), citing *Loomis v. Whitehead*, 124 Nev. 65, 69, 183 P.3d 890, 892 (2008). The DNRPCA Intervenors submit that NRS 534.110(7) and NRS 534.037 unambiguously conferred authority on the State Engineer to approve the DVGMP. Even if the Court believes an ambiguity exists, however, the DNRPCA Intervenors demonstrate that the legislative history favors their position.

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authority granted by NRS 534.110(7) to deviate from strict prior appropriation principles, approval of the DVGMP was well within the State Engineer's discretion.

The reading of the statute urged by Petitioners violates basic rules of statutory construction. "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." *Checker, Inc. v. Pub. Serv. Comm'n*, 84 Nev. 623, 629–30, 446 P.2d 981, 985 (1968). Statutes should be "construed with a view to promoting, rather than defeating, legislative policy behind them." *Dep't of Motor Vehicles & Pub. Safety v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1250 (1994). It would make no sense for the Legislature to have approved legislation that allowed the State Engineer to avoid curtailment by priority only to limit the State Engineer's approval of a GMP to one that strictly enforced priorities.

Moreover, in addition to NRS 534.110(7), the Legislature has authorized the State Engineer in any designated basin to, "in his or her administrative capacity ... make such rules, regulations and orders as are deemed essential **for the welfare of the area involved**" and, "[i]n the interest of public welfare, ... designate preferred uses...." NRS 534.120(1)-(2). Particularly because the DVGMP encourages water conservation and will reduce pumping, consistent with the legislative intent, the State Engineer has authority to manage the Diamond Valley basin according to the Plan's flexible approach. *See id.* The statutes should be read to empower the State Engineer to approve the DVGMP, not to undermine the legislative intent. *See Lovett*, 110 Nev. at 477, 874 P.2d at 1250.

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

The State Engineer's interpretation of the authority given him under NRS 534.037 and NRS 534.110 is consistent with the Legislature's numerous policy decisions to soften the draconian effects of prior appropriation. "Water rights are subject to regulation under the police power as is necessary for the general welfare." *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 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

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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." *Application of Filippini*, 66 Nev. 17, 30, 202 P.2d 535, 541 (1949). "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.

This is not the first time the Legislature has passed laws that alter the prior appropriation doctrine to meet policy objectives. For example, in 1999, the Legislature completely eliminated forfeiture for 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 also 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). Both of 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 *In re Waters of 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 that she considered to be "very important to the people of Nevada." March 10, 1999 Minutes of the Assembly Committee on Natural Resources, Agriculture, and Mining, Addendum Ex. 1 at 0006. She noted that "the legislation was meant to be beneficial to all concerned parties and not be detrimental in any way to water users." Addendum Ex. 1 at 0007. One speaker at the hearing expressed, "It was difficult to promote

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agriculture as a viable industry when concerns about forfeiture and abandonment of surface water rights continued to appear." Addendum Ex. 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. *See* NRS 533.060.

As with these examples, NRS 534.037 and NRS 534.110(7) implement the Legislature's policy to buffer the devastating effects of the prior appropriation doctrine. When reviewing the State Engineer's approval of the DVGMP, the Court cannot 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*, 122 Nev. 1110 at 1121, 146 P.3d 793 at 800 (court may not substitute its judgment). The Legislature recognized that strict enforcement of priorities in a basin such as Diamond Valley could devastate the livelihoods of many people, cripple Eureka County's economy, and destroy the fabric of the community. As the policy-making body of the State, it sought to avoid these results. The State Engineer's interpretation of NRS 534.110(7) and NRS 534.037 was consistent with the Legislature's policy goals.

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, *available at* http://water.nv.gov/mapping/maps/designated_basinmap.pdf. In short, the Legislature afforded the State Engineer considerable discretion to address overappropriated basins in a way that that focuses on the general welfare of the area, not just the rights of more senior appropriators.

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3. The State Engineer Appropriately Pointed To Persuasive Authority From New Mexico

The New Mexico case cited in Order #1302 lends further support for the notion that state legislatures do not deem the prior appropriation doctrine as sacrosanct as Petitioners urge. ROA 7, *citing State ex rel. Office of State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006). There, the New Mexico Supreme Court found that the New Mexico legislature's support and funding for a settlement agreement that provided some relief from strict priorities was consistent with the doctrine of prior appropriation embedded in the state's constitution. *Id.* at 385-89. The court saw "no reason to read" the constitutional and compact provision at issue "to require a priority call as the first and only, and thus exclusive, response to water shortage concerns. Rather, we think it reasonable to construe these provisions to permit a certain flexibility within the prior appropriation doctrine in attempting to resolve the longstanding Pecos River water issues." *Id.* at 386.

Since the legal framework that NRS 534.110(7) modified is statutory, not constitutional, the State Engineer's interpretation of what the Legislature authorized for a GMP is even more compelling here than the New Mexico case. Nevada did not fully embrace the prior appropriation doctrine 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), as acknowledged in *Application of Filippini*, 66 Nev. 17 at 30, 202 P.2d 535 at 541. Prior to that time, the Nevada Supreme Court recognized riparianism, finding that rights in water derive from rights in soil. *See Vansickle v. Haines*, 7 Nev. 249 (1872); *Covington v. Becker,* 5 Nev. 281 (1969). 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. The *Lewis* case from New Mexico is persuasive authority to support the State Engineer's decision.

4. The Legislature Wanted To Preserve The General Welfare Of Communities Such As Diamond Valley

The Legislature's authorization to the State Engineer to adopt groundwater management plans in overappropriated basins indicates a desire to protect the health and economies of those

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regions and avoid the detrimental effects on Nevada communities that would result from strict enforcement of priorities. Water belongs to the public, and the Legislature has directed the State Engineer to, within his discretion, institute water management policies that promote the general welfare. *See* NRS 533.025; NRS 534.120(1)-(2). "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).

Here, the record contains numerous examples of the negative impacts on the Diamond Valley community should strict enforcement of priorities occur. ROA 11-12, 14-15, 547-548, 588-592, 594-595, 704-706, 734, 739-740. If the State Engineer were to curtail all rights that cumulatively exceed 30,000 acre feet, approximately 81% of groundwater permits in the basin could not be exercised. ROA 499-509. Those permits represent the livelihoods of many people and would have a devastating impact on the community. ROA 11-12, 14-15, 547-548, 588-592, 594-595, 704-706, 734, 739-740. Bankruptcies and loan defaults would likely ensue. ROA 12, 734, 738-740. Many people would likely leave Eureka County, and those who could stay would place significant burdens on social services. ROA 11-12, 14-15, 547-548, 588-592, 594-595, 704-706, 734, 739-740. Because the agriculture industry is the major driver in Eureka County, the local economy could collapse, with devastating effects on the Eureka County tax base. ROA 225, 288, 547-548, 588-592, 594-595, 704-706, 734, 738-740. The abandoned fields would create rodent and weed problems for those senior water users who are able to keep exercising their water rights. ROA 244, 459, 547, 591.

The Legislature created an opportunity for communities to come together to generate a GMP that would avoid these tragic consequences. NRS 534.110(7). In so doing, it recognized that not everyone would be on board, which is why it required that only 51% of permit holders approve a GMP. *See* NRS 534.037. Because of the severe consequences of strict priority enforcement, the Legislature was willing to elevate the general welfare over the desires of a few. *See id.* The Diamond Valley community stepped up to meet the challenge it faced, giving all stakeholders an opportunity to participate. ROA 14, 277-475, 653-742. The State Engineer's

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approval of the DVGMP is consistent with this policy goal and within his authority to manage this designated basin for the benefit of the area as a whole. *See* NRS 534.120(1)-(2).

C. Substantial Evidence Supported The State Engineer's Approval Of The DVGMP

1. The Record Evidence Shows The State Engineer Complied With The Requirements Of NRS 534.037

Substantial evidence in the record indicates the State Engineer addressed every topic the Legislature required and properly exercised his discretion to consider other factors he deemed relevant. NRS 534.037 sets forth a non-exclusive list of the elements the State Engineer must address when considering a petition for approval of GMP:

(a) The hydrology of the basin;

(b) The physical characteristics of the basin;

(c) The geographic spacing and location of the withdrawals of groundwater in the basin;

(d) The quality of the water in the basin;

(e) The wells located in the basin, including, 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). These factors are to guide the State Engineer in determining whether the proposed GMP "set[s] forth the necessary steps for removal of the basin's designation as a critical management area." *Id.*

The Petitioners do not contest that State Engineer addressed each of these elements in Order #1302. ROA 18-19. Rather, they contend that the DVGMP does not demonstrate with certainty that the withdrawals will be reduced below the perennial yield of the basin, or they object to the 35-year time frame for achieving stability set out in the DVGMP. Sadler OB at 10-17; Bailey OB at 30-33. But that was not required. *See* NRS 534.037(2). The DVGMP needed only to demonstrate "steps" in that direction. *Id.* The Legislature did not demand – or even envision – that groundwater withdrawals would be immediately reduced below aquifer recharge. *See* NRS 534.037; NRS 534.110(7). To the extent the Court deems the statutory language unclear on this point, it is further demonstrated in the legislative history, which indicates the

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bill's sponsor wanted to see movement towards bringing a basin back into balance but recognized that complete aquifer recovery may not be possible. *See* Excerpts from Minutes of March 30, 2011 Assembly Committee on Government Affairs at pp. 66-69, Addendum Ex. 2 at 0080.

The DVGMP sets out precisely the recovery plan that the Legislature wanted. It starts reductions immediately and continues those reductions on an annual basis until withdrawals come within the State Engineer's current estimate of the perennial yield.[3] ROA 510. The benchmark reduction table anticipates that, over the GMP timeframe, irrigation consumptive use will be reduced by over 33,000 acre feet. ROA 510. The State Engineer correctly noted that water usage in the Diamond Valley basin can fluctuate, and the CMA designation is only warranted when withdrawals "consistently" exceed the perennial yield, not occasionally exceed the perennial yield. ROA 16-17. He also noted that the water uses that come within the ambit of the GMP (irrigation and mining rights that have an irrigation base right) consume the vast majority of the basin water and were appropriately the focus of the GMP. ROA 18. As a result, the State Engineer fully complied with the statutory requirements to bring the basin back into balance, and substantial evidence supports his decision.

2. The DVGMP Did Not Need To Result In The Basin Coming Into Balance Within 10 Years Of The CMA Designation

Contrary to the assertions of the Petitioners, the DVGMP's 35-year window for the basin to come back into balance fully complies with the legislative requirements. The only deadline set forth in the statute is for the State Engineer to **approve** a GMP within 10 years of CMA designation. *See* NRS 534.110(7). Nothing within the statutory language requires that withdrawals from the basin be reduced to the perennial or become balanced with recharge within any specific time frame. *See id.* In fact, by excusing the State Engineer from curtailing by priority, the statute specifically allows and anticipates that withdrawals may continue to exceed

[3] Moreover, the most recent perennial yield estimate by the United States Geologic Survey, although not yet adopted by the State Engineer, is 35,000 acre feet. ROA 464.

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recharge. *See id.* Nothing within the statutory language specifies a time frame within which the goals of a GMP must be achieved. *See id.*

Should the Court deem the statute to have any ambiguity on this point, the legislative history reinforces the DNRPCA Intervenors' position. The bill's sponsor, Assemblyman Goicoechea, recognized that actual recovery of a groundwater basin **may never** occur. *See* Excerpts from Minutes of March 30, 2011 Assembly Committee on Government Affairs at pp. 66-69, Addendum Ex. 2 at 0079-0082. As he explained, designation of the overappropriated basin as a critical management area:

> [S]tart[s] a ten-year clock ... [for] [t]he appropriators ... to develop a water conservation plan that actually brings that water basin back into **some** compliance.
>
> * * *
>
> **I am not saying they would ever get it completely back there. They surely would not get there in ten years**, but as long as it was **on its way to recovery**, I think the State Engineer would feel comfortable with that.
>
> * * *
>
> [Y]ou have a ten-year window to address the issues in an overappropriated basin, **started on its way to recovery**, or he would be required to regulate by priority.
>
> * * *
>
> The State Engineer would have to move forward and adopt a water management plan and start that ten-year clock. **Again, you have ten years to accomplish your road to recovery**.

Excerpts from Minutes of March 30, 2011 Assembly Committee on Government Affairs at pp. 66-69 (emphases added), Addendum Ex. 1 at 0079-0082. As these excerpts from the legislative history make clear, the Diamond Valley community needed only to create its **road to** recovery through adoption of a GMP, not achieve recovery itself, within ten years of CMA designation. *See id.*

Where the Legislature did not establish a deadline for complete aquifer recovery, it is not the place of the Court to determine whether or not the DVGMP timeline approved by the State Engineer is reasonable. *See Bacher*, 122 Nev. at 1121, 146 P.3d at 800. The State Engineer has discretion to decide whether a GMP appropriately addresses overpumping in a basin. *See* NRS 534.037. In properly exercising that discretion here, the State Engineer reviewed the benchmark

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reduction table and determined it was reasonable. ROA 25. The Court may not second guess the State Engineer's analysis or substitute its judgment for that of the State Engineer. *See Bacher*, 122 Nev. at 1121, 146 P.3d at 800.

3. The DVGMP Met The Statutory Minimum Number Of Signatories

By allowing the State Engineer to approve a GMP that only a majority of permit and certificate holders approved, the Legislature anticipated that there would be water users who did not support it. The petition for approval of a GMP "must be signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer." NRS 534.037(1). This indicates that the Legislature knew that buy-in to GMP would not be ubiquitous. The Legislature decided to draw that line at 51% of permit and certificate holders in order to overcome the obstructions posed by senior rights holders who had only their own interests in mind, rather than the general welfare of the community. The DVGMP met this minimum threshold. ROA 3, 18, 148-216.

In taking this approach, the Legislature sought to spread the hardship among all water users, not just those holding junior rights. "It is going to place a hardship on all of this to bring those basins back into compliance. We clearly have to." Minutes of March 30, 2011 Assembly Committee on Government Affairs at p.71, Addendum Ex. 2 at 0084. This is particularly compelling in Diamond Valley, where the difference between "senior" and "junior" status amounts to as little as one week. ROA 501.

Were the State Engineer to curtail by priority so that withdrawals do not exceed the currently established perennial yield of 30,000 acre feet, anyone with a priority date more recent than May 12, 1960 would be cut off. ROA 4. As Appendix F to the GMP indicates, 133 permit applications were filed in 1960 alone, with 47 of those being senior to what has now been deemed "the cut-off" and 86 being junior to "the cut off." ROA 499-503. As a practical matter, none of these "seniors" can really be deemed to have exercised so much more diligence in filing water applications that they deserve to survive a curtailment while their neighbors and fellow community members who filed their applications just a week later are forced to forego their livelihoods and face bankruptcy.

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Although the Baileys make much of characterizing themselves as "seniors," had they filed their applications just a few days later (Permits 28036 and 48948) or at most a couple of months later (Permit 22194 and 22195), they would be in the shoes of the very "juniors" they now castigate. ROA 499, 501. Notably, of the 62 groundwater permits that are more senior to the May 12, 1960 cut off, only the Baileys have challenged the GMP in court. ROA 499-501. And numerous senior right holders petitioned for approval of the GMP. *Compare* ROA 499-501 *to* ROA 149-216. Because more than a majority of permit and certificate holders signed onto the petition, it met the statutory requirements. NRS 534.037(1).

4. The Existence Of Other Evidence On Which Petitioners Rely Does Not Diminish The Validity Of The State Engineer's Decision

In an effort to overcome the State Engineer's proper exercise of his discretionary authority, Petitioners point to information both inside and outside the record that they believe help their cause. The evidence on which Petitioners rely is irrelevant to the question of whether the State Engineer's decision is based on substantial evidence. "[J]ust because there was conflicting evidence does not compel interference with the [decision maker's] decision so long as the decision was supported by substantial evidence." *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990). The Court's job is to evaluate whether substantial evidence supports the agency's decision, not whether there is substantial evidence to support a contrary decision. *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 836 n.36, 138 P.3d 486, 497 (2006). This is because the administrative body alone, not a reviewing court, is entitled to weigh the evidence for and against a decision. *Liquor & Gaming Licensing Bd.*, 106 Nev. at 99, 787 P.2d at 784.

Sadler places much weight on the testimony and report of its expert, but the record is clear that the State Engineer considered and rejected it. ROA 15-18, 620-631, 674-677. Similarly, the Baileys present hypothetical frameworks for other potential types of groundwater management plans to contest the framework of the DVGMP. Bailey OB at 17-18. The record is clear, however, that the DVGMP proponents explored other strategies to solve the overdraft problem in Diamond Valley and ultimately determined they were not feasible. ROA 262, 265,

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288, 315. These included "a study of the financial feasibility of a General improvement District (GID) to execute a water management program to enhance the sustainability of underground water supply and storage for Basin 153"; a "study of potential water use set-aside programs"; and a search for funding sources for a water "buy out" program. ROA 262, 265, 288, 315.

By pointing to other evidence in the record, or asking the Court to consider whether a different GMP should have been presented for approval, the Petitioners ask the Court to reweigh the evidence and substitute its judgment for that of the State Engineer, which is clearly outside the scope of its allowable review. *See Liquor & Gaming Licensing Bd.*, 106 Nev. at 99, 787 P.2d at 784. The Court's role is to look only at whether the State Engineer's decision to approve the GMP is supported by substantial evidence. Any evidence that Petitioners contend warranted disapproval of the DVGMP should not be considered by the Court because to do so would cause the Court to interfere with the State Engineer's discretionary decision-making process.

D. This Is Not The Proper Forum To Address Sadler's Arguments Regarding Vested Rights

Because NRS 534.037 did not require the State Engineer to consider vested rights as part of a GMP approval process, and in any event, the DVGMP expressly exempts vested rights from its management, Sadler's vested rights arguments fall flat. Vested rights, including spring vested rights that have been mitigated with groundwater rights, are not subject to the DVGMP. ROA 229, 240. Nothing in the DVGMP hinders the ability for vested rights holders or the State Engineer to take actions to protect vested rights, including approval of mitigation groundwater rights that would be outside the DVGMP's purview. ROA 463. Since Sadler has no groundwater rights that are subject to the DVGMP, it cannot complain that mere approval of the DVGMP in any way affects its rights.

To overcome this obstacle, Sadler argues that **implementation** of the DVGMP will not adequately protect its vested rights because the DVGMP projects continued pumping in excess of the perennial yield for the next 35 years. This is a circular argument because the DVGMP reduces pumping and stabilizes the water table to benefit all water uses in Diamond Valley, including vested rights. ROA 235. It does so over time. ROA 510. The only way to immediately

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reduce pumping to the perennial yield, as Sadler urges, is to curtail by priority, which is exactly what the Legislature sought to avoid. *See* NRS 534.110(7). Moreover, the Legislature did not require the State Engineer to look at effects on vested rights as part of a GMP approval process. *See* NRS 534.037.

This is true even through the legislative history is clear that the Legislature understood that groundwater pumping in overappropriated basins was already affecting surface water sources such as those claimed by Sadler. As explained by then Assemblyman Goicoechea:

> 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 from Minutes of March 30, 2011 Assembly Committee on Government Affairs at p. 67-68, Addendum Ex. 2 at 0080-0081.

Sadler has sought and obtained mitigation groundwater rights that it is exercising, thereby interfering with its own springs. ROA 145-46. As the State Engineer noted, these rights are being pumped too close to the springs to allow the springs to recover. ROA 464. Any alleged harm to Sadler's vested rights is therefore self inflicted. Ultimately, the DVGMP is designed to reduce pumping and conserve the water resource, whether underground or where it surfaces in springs. ROA 5, 218-219, 228, 240, 510. It is not – and is not required to be – a mitigation plan, as Sadler urges (at OB p. 24). ROA 19. In short, because enforcement of vested rights is not within the purview of the NRS 534.110(7) or the resulting DVGMP that was approved under that statutory authority, the Petitioners' arguments must be rejected.

E. Petitioners' Attacks Should Be Directed At The Legislature, Not The State Engineer

To the extent the Petitioners take issue with the effects of NRS 534.110(7) on their groundwater permits (the Baileys) or vested rights (Sadler/Renner), they needed to challenge the statute itself, not attack the State Engineer's implementation of the statute. NRS 534.110(7) clearly authorizes the State Engineer to not enforce priorities. It is axiomatic that, absent such

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enforcement, junior rights holders can continue to pump even where the source cannot sustainably satisfy everyone's rights.

Yet this is precisely what is targeted in Petitioners' briefs. Their core arguments contend that strict priorities must be enforced. Sadler OB at pp. 18-23; Bailey OB at 14-26. If the Petitioners believe their rights are not being adequately protected, however, they needed to mount a facial challenge to enactment of NRS 534.110(7). The statute, not the State Engineer's implementation of the statute, is the source of their alleged harm.

F. The DVGMP Preserves The State Engineer's Authority To Manage The Basin And Otherwise Complies With Nevada Law

Nothing in the DVGMP limits the State Engineer's authority to manage the basin and enforce the law. The flexibility the GMP provides to move water to different points of diversion and places of use is consistent with the statutory goals of conserving the resource. The DVGMP promotes water efficiency while reducing overall pumping amounts. ROA 5, 218-219, 228, 240, 510. Although water can be moved from one well to another, no well may exceed the existing duty already assigned by the State Engineer. ROA 236-237. By suspending deadlines for proving beneficial use, and declining to engage in forfeiture and abandonment proceedings prior to approval of the DVGMP, the State Engineer properly exercised his discretion to avoid the wasteful "use it, or loss it" incentives of prior appropriation that have contributed to the current overdraft situation in Diamond Valley. ROA 10-11, 18. The Court may not second guess the State Engineer's thinking.

The State Engineer correctly noted that the temporary movement of water allowed in the DVGMP closely tracks the existing law regarding temporary change applications in NRS 533.345(2) and still requires the application of NRS 533.370 for new wells or increased withdrawals that exceed one year. ROA 8-9. Importantly, the Petitioners fail to acknowledge that the DVGMP mandates metering and centralized data collection, which will be tracked by the on-site water manager. 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. ROA 16-17, 237-239, 463-464. The pumping

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reductions will be informed by robust groundwater monitoring to ensure that stabilization of the water table is occurring. ROA 16-17, 237-239, 464.

Should the Petitioners believe in the future that the State Engineer is not performing an adequate conflicts analysis, 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. (EME Homer)*, 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." The Petitioners' challenges to the DVGMP are based on speculative fears of potential outcomes, not actual harm. As a result, they should be rejected.

CONCLUSION

The State Engineer's approval of the DVGMP is supported by substantial evidence in the record was a proper exercise of the State Engineer's discretion. As a result, it should be affirmed and the petitions for judicial review denied.

AFFIRMATION

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

DATED: this 22nd day of October, 2019.

LEONARD LAW, PC

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of LEONARD LAW, PC and that on this date I caused the foregoing document to be served to all parties to this action by electronic transmission to:

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Dated: October 22, 2019

Tricia Trevino

CASE NO.: CV-1902-348 (consolidated with Case Nos. CV-1902-349 and CV-1902-350)

DEPT. NO.: 2

NO. _____

FILED

OCT 23 2019

Eureka County Clerk

By _____

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

* * *

TIMOTHY LEE & CONSTANCE MARIE BAILEY; FRED & CAROLYN BAILEY; IRA R. & MONIRA RENNER; SADLER RANCH, LLC; DANIEL S. VENTURACCI,

Petitioners,

vs.

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

Respondent.

EUREKA COUNTY; DIAMOND NATURAL RESOURCES PROTECTION AND CONSERVATION ASSOCIATION, J&T FARMS, GALLAGHER FARMS, JEFF LOMMORI, M&C HAY, CONLEY LAND & LIVESTOCK, LLC, JIM AND NICK ETCHEVERRY, TIM AND SANDIE HALPIN, DIAMOND VALLEY HAY CO., MARK MOYLE FARMS, LLC, D.F. AND E.M. PALMORE FAMILY TRUST, BILL AND PATRICIA NORTON, SESTANOVICH HAY & CATTLE, LLC, JERRY ANDERSON, BILL AND DARLA BAUMANN,

Respondents/Intervenors.

_____/

DNRPCA INTERVENORS' ADDENDUM TO ANSWERING BRIEF

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Pursuant to NRAP 28(f), DNRPCA Intervenors provide the Court with this addendum, which includes the following:

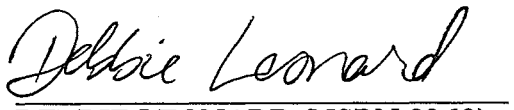
EXHIBIT	DOCUMENT DESCRIPTION	DATE	PAGE NUMBER
1	Minutes of the Assembly Committee on Natural Resources, Agriculture, and Mining	March 10, 1999	ADDENDUM 0001- 0012
2	Excerpts from Minutes of Assembly Committee on Government Affairs	March 30, 2011	ADDENDUM 0013- 0101

AFFIRMATION

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

DATED: this 22nd day of October, 2019.

LEONARD LAW, PC



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Dated: October 22, 2019

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Exhibit 1

March 10, 1999 Minutes of the Assembly Committee on Natural Resources, Agriculture, and Mining

MINUTES OF THE

ASSEMBLY Committee on Natural Resources, Agriculture, and Mining

Seventieth Session

March 10, 1999

The Committee on Natural Resources, Agriculture, and Mining was called to order at 1:42 p.m., on Wednesday, March 10, 1999. Chairman Marcia de Braga presided in Room 3161 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All Exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mrs. Marcia de Braga, Chairman

Mrs. Gene Segerblom, Vice Chairman

Mr. Douglas Bache

Mr. John Carpenter

Mr. Jerry Claborn

Mr. Lynn Hettrick

Mr. David Humke

Mr. John Jay Lee

Mr. John Marvel

Mr. Harry Mortenson

Mr. Roy Neighbors

Ms. Genie Ohrenschall

Ms. Bonnie Parnell

GUEST LEGISLATORS PRESENT:

Speaker Joseph Dini, District 38

Senator Lawrence Jacobsen, Western Nevada Senatorial District

STAFF MEMBERS PRESENT:

Linda Eissmann, Committee Policy Analyst

Sharon Spencer, Committee Secretary

OTHERS PRESENT:

Pamela Wilcox, Administrator, Division of State Lands

Pam Drum, Environmental Coordinator, Tahoe Regional Planning Agency

Wayne Perock, Administrator, Division of State Parks

Steve Teshara, Executive Director, Lake Tahoe Gaming Alliance

Michael Jabora, Representing Tahoe Citizens Committee

Amir Soltani, Chief Hydraulic Engineer, Department of Transportation

Mike Mackedon, Fallon City Attorney

George Benesch, Attorney at Law, Representing the City of Fallon

Michael Turnipseed, State Engineer, Division of Water Resources

Norman Frey, Chairman, Newlands Water Protective Association

Ross de Lipkau, Representing Las Vegas Valley Water District

William Isaeff, Deputy City Manager, City of Sparks

Bjorn Selinder, Churchill County Manager

After roll was called, the Chairman opened the hearing on A.B. 285.

Assembly Bill 285: Establishes program to protect Lake Tahoe Basin. (BDR S-459)

Senator Jacobsen, representing the Western Senatorial District, was the first to speak in support of the measure. He said he was originally opposed to the Tahoe Regional Planning Agency (TRPA), but found great satisfaction in serving as a member of the Tahoe Oversight Committee (TOC). He pointed out Chairman de Braga had served on the committee in the past interim, Assemblyman Hettrick was a past chairman of TRPA, and Assemblywoman Segerblom had also served on the committee.

Senator Jacobsen explained A.B. 285 was a joint proposal of TOC and Nevada's executive branch of government. The measure was developed as part of the hearings held in the Tahoe Basin, and was one of the most significant pieces of legislation on Lake Tahoe to be developed in the past 20-years. Four hearings were held in the Tahoe Basin during the interim, and members participated in an extensive on the ground survey of projects and issues concerning the Nevada side of the Tahoe Basin. Erosion, forest health, stream restoration, and issues pertaining to Highway 28 and Incline Village were some of the concerns studied by TOC. Many of the studies and much of the work performed by TOC was the result of the 1997 Presidential Forum at Lake Tahoe, one of the most significant events in the state's history.

Senator Jacobsen called Pamela Wilcox, Administrator of State Lands, to the podium to testify on the proposed legislation. She explained the measure was a direct result of the Tahoe Presidential Forum in July 1997. The message from that forum was one of hope as well as urgency. If the problem of turbidity of the water of Lake Tahoe was not seriously addressed in the immediate future, the quality of the lake could be lost forever. The State of California had appropriated more than $20 million to the California Tahoe Conservancy for 1999.

TRPA, in cooperation with local governments, was studying alternatives for raising the funds needed by local governments to contribute to the effort. Ms. Wilcox provided the committee with a handout entitled "Lake Tahoe Initiative: Environmental Improvement Program" (Exhibit C), which provided a financial breakdown of the various budgeted categories, project specifications, and allocated monetary contributions for Fiscal Years 1999 through 2001. She said voters had recently approved a $20 million bond act.

Mr. Marvel asked what efforts were planned to ensure mitigation of the pollution problems in the Lake Tahoe Basin. Ms. Wilcox said most of the work scheduled were erosion control projects, which primarily took the form of stabilizing cut and fill slopes along roads and highways. Sediment run-off needed to be captured and channeled into sediment basins for filtering before getting into the lake. Through the years, development at the lake had systematically eliminated natural sedimentation barriers that had prevented silt and sediment from damaging the quality and clarity of the water in Lake Tahoe. Stream restoration was another project that would remedy sedimentation problems, along with forest health and wildlife habitat restoration. The goal was to restore the Tahoe Basin and surrounding forests closer to the condition of the area prior to the mining activities of the Comstock a hundred years ago, which included clear cutting the forests. The forests around the lake were never healthy after clear cutting because the trees that replaced the original forests were monocultural stands, all the same age, and all the same species. Those were not healthy forests; they were prone to disease and wildfire. Those forests needed to be restored. Forest fires were a natural method of restoring forests health to those timber stands, but allowing the forests to burn was not an option due to the immense ramifications.

Mr. Marvel asked what was planned for the slash timber throughout the Tahoe Basin. Ms. Wilcox explained biomass projects were planned for the refuse timber, which was a natural byproduct developed from forest wastes that could be made into various products including mulching materials or for use as a cost effective fuel source. Studies were being conducted to find other potential uses

for biomass products. Presently, most of the slash was burned in controlled burns; however, that practice created other problems, including air pollution and human safety issues.

The Chairman said Assembly Committee on Ways and Means recently viewed a presentation that demonstrated beneficial uses for forest waste such as dead trees. Biomass products were useful, lucrative, and environmentally sound. She said using forest waste products in positive and productive ways had always been the position of the Assembly Committee on Natural Resources, Agriculture, and Mining.

Ms. Parnell asked why the Department of Motor Vehicles (DMV) was such a large funding source. Ms. Wilcox explained DMV had a funding source dedicated to air quality, which presently had a substantial reserve of approximately $7.5 million. During the budgeting process, state government agencies were not allowed to institute any new general fund programs, causing the agency to develop creative methods to fund Tahoe Basin programs. The budget office suggested using the reserve as a potential, short-term remedy. Ms. Parnell asked if the financing of Tahoe projects from the reserve source would affect only a portion of the DMV reserve. Ms. Wilcox responded in the affirmative, adding the balance of the fund would be approximately $3.5 million at the end of the present biennium.

Mr. Marvel asked if the money in the DMV reserve fund was from Washoe and Clark Counties. Ms. Wilcox replied in the affirmative. Mr. Marvel asked if those counties were displeased with the arrangement. She said representatives from those counties had expressed concern regarding the long-term effects of the policy. Those counties had not, however, made any official statements against the arrangement at any of the Tahoe Basin project hearings.

Upon reviewing the material presented, Mr. Carpenter said he noticed private funds were estimated to be $152.5 million. He asked from where were those funds going to come and what projects would the money fund. Ms. Wilcox explained the private component needed retrofitting, which meant many pieces of privately held property in the Tahoe Basin needed to be made environmentally sound. Many private parcels contained numerous impervious surfaces such as roofs, garages, walkways, and driveways. When rain hit those surfaces, it hit much harder than it hit dirt and trees. The volume of run off was greater and swifter as well. That was one way development around the lake negatively impacted the basin. A program had been developed called the Backyard

Conservation Program, a cooperative effort between private property owners at the lake and the Natural Resources Conservation Service NRCS. The federal agency offered technical assistance to homeowners and helped them minimize the impacts of their development at the lake. Some of those techniques included constructing infiltration trenches along the eaves of the buildings to interrupt the water coming off the roof, and stabilizing slopes that had been disturbed using vegetation or other stabilization treatments. Individual property owners would be responsible for doing the work on their parcel. She said Pam Drum of TRPA could provide more information on the subject because she worked on that particular project.

Mr. Carpenter asked if local governments would be responsible for passing ordinances to ensure members of the community did the work required. Ms. Wilcox said she was not certain, but most likely homeowners would take it upon themselves to do the required work. Education and encouragement, along with concern for the environment, should ensure individuals would do the right thing.

Ms. Wilcox briefly reviewed the proposed amendment prepared by Division of State Lands (Exhibit D). She explained section 1, subsection 1 would read *the administrator of Division of State Lands, in cooperation with other state agencies shall coordinate the development and implementation of a program of environmental improvement projects for the protection of Lake Tahoe Basin.* She said that was an important statement because her agency did not have regulatory authority in Tahoe Basin. Division of State Lands was tasked with coordinating a multi-agency effort. Section 1, subsection 2 explained the state's commitment was to provide $56.4 million during a 10-year period, and allowed general obligation bonds to be issued in order to provide the necessary funds.

Chairman de Braga asked if funding was provided on an as-needed basis or was it allocated by each individual project. Ms. Wilcox said the money was allocated each biennium after reviewing lists of proposed projects.

Mr. Carpenter said not long ago a statewide bond issue was passed, which raised approximately $26 million. Ms. Wilcox said 2 bond issues had been presented. The first bond issue was for $31 million and the second one was for $20 million. He asked if the next bond act did not have to be presented before the citizens. Ms. Wilcox agreed, adding state capital improvement bonds did not necessarily have to go to a vote of the people. The budget office suggested funding sources be sought elsewhere on a biennium to biennium basis.

Senator Jacobsen said Lake Tahoe was a world class recreational and tourist resource, which was capable of enhancing the state's economy in many ways. It was important to preserve and enhance that resource, including the air, water, forests, wetlands, wildlife, and all other aspects of the Tahoe Basin including commercial enterprises and private property. Inmate crews did much of the work around the lake, and were a vital resource in maintaining the park system in the region. Senator Jacobsen said it was important to remember work in the Tahoe Basin was a bi-state effort. He said it was important to hold a Nevada/California summit, something that had never occurred before but was needed.

Mr. Carpenter expressed concern regarding the probability of wildfires in the region due to the large number of standing dead and dying timber. Ms. Wilcox said it was a well known fact that wildfire in the Tahoe Basin was a real threat. It was another issue, which contributed to the feeling of urgency at the lake. The forests had to be returned to healthy conditions as soon as possible. For each issue there were pros and cons and many different opinions.

Pam Drum, Environmental Information Coordinator for TRPA, was the next speaker to testify in support of A.B. 285. She thanked Ms. Wilcox and other state agencies for their hard work in the Tahoe Basin. She emphasized the importance of enhancing recreational opportunities at Lake Tahoe and protecting the sensitive ecosystem for posterity. She presented the committee with a handout entitled "Continued Review of the Tahoe Regional Planning Agency 1997-1998" (Exhibit E). She explained her agency issued permits for all projects at Lake Tahoe including those on private property. As part of the permitting process, TRPA required best management practices be employed at all times.

Ms. Drum pointed out there was another organization at the lake, the South Lake Tahoe Redevelopment Project, which was responsible for developing and implementing private sector projects at South Lake Tahoe. The agency managed between $20 and $30 million in private sector investments, particularly for environmental projects. She stressed the need for urgency in order to preserve the quality of life and the environment around the lake, and urged the committee to support the measure.

The Chairman asked if there was a substantial volunteer force at the lake working on various projects. Ms. Drum said organizations such as the League to Save Lake Tahoe was instrumental in recruiting volunteers to work on projects and to assist in educating the public on the need for, and techniques of, environmental stabilization projects.

Wayne Perock, Administrator, Division of State Parks, spoke next in support of the proposed legislation. He said he was delighted the State of Nevada was coming forward to assist in resource management and working with TRPA to restore and preserve Lake Tahoe Basin in a healthy and productive standard. He reminded the committee Lake Tahoe State Park was one of the biggest, non-federal parks in the nation. He said he was most concerned about forest health and the need to prevent devastating wildfires from occurring, while managing erosion and sedimentation problems. He presented the committee with a handout from his agency entitled "Lake Tahoe Nevada State Park Tahoe Basin – Environmental Improvement 'Threshold' Projects" (Exhibit F).

Mrs. Segerblom asked if the beach at the park had been enlarged in recent years. Mr. Perock responded in the negative, adding it was a natural beach and would be left in a natural condition. Some boat docks may be expanded in time. Sand Harbor had been designed to accommodate a certain level. Over crowding of recreational areas was unproductive.

Rex Harold from Division of State Lands requested to be put on record as in support of the measure, but relinquished his turn to speak before the committee.

Steve Teshara, Executive Director of the Lake Tahoe Gaming Alliance at the south shore of the lake and a representative of Lake Tahoe Transportation and Water Quality Coalition, spoke in support of A.B. 285. He said the agencies he represented supported of the measure unanimously.

Mike Jabora, Chairman of the Tahoe Citizens Committee, supported the proposed legislation. He said his organization represented the private sector of the lake. Support of the measure was unanimous within the communities he represented. He said Lake Tahoe license plates were an important financial contribution to the health of the environment in the Tahoe Basin. The cooperative spirit between the gaming industry and the private sector was genuinely a working partnership. He urged the committee to support the measure.

Amir Soltani, Chief Hydrologic Engineer of the Nevada Department of Transportation (NDOT) was the last to testify in support of A.B. 285. He said $20 million of the $56 million requested would be used by NDOT. Controlling erosion coming off cut slopes along roads would improve roadway safety, and eliminate the danger of boulders falling from unstabilized hillsides.

The Chairman asked if there were any further questions or comments, and there were none. She closed the hearing on A.B. 285 and opened the hearing on A.B. 380.

Assembly Bill 380: Revises provisions governing priority, forfeiture and adjudication of water rights. (BDR 48-971)

Chairman de Braga was the first to speak in favor of the proposed legislation. She explained the measure was a work in progress, and very important to the people of Nevada. Several amendments would be presented and all would be reviewed and evaluated. Mrs. de Braga said the intent of the measure was to take forfeiture out of Nevada's state surface water law and established a priority date of 1902 for the Newlands Project. The goal of the measure was not to specifically benefit the Newlands Irrigation Project, but to benefit all Nevadans on the

Truckee and Carson River systems, and any other areas engaged in federal reclamation projects, including Humboldt and Pershing Counties. Also, the measure would redefine *place of use* in water law for reclamation projects to mean *the entire reclamation project as the place of use.* She suggested removing the entire language of section 5 of the measure, which pertained to court jurisdiction.

Chairman de Braga pointed out the measure would not change water law duty in any way by including the three provisions. It would not use more water than currently being used, nor would anyone receive more water than they were currently entitled to receive. They would, however, have more flexibility in the use of the water, and with that increased flexibility, and with establishing the entire reclamation project as the place of use, the measure would lessen the burden on the office of the state engineer for change of use applications. The proposed legislation was also expected to bring back into limited production some of the lands that had been stripped of water in the long-term. That provision would effectively benefit those areas where the purchase of water rights had occurred and removed water rights from the land.

Chairman de Braga called for input from all effected entities. She explained the legislation was meant to be beneficial to all concerned parties and not be detrimental in any way to water users.

Vice Chairman Segerblom asked what sections would be removed from the measure. Chairman de Braga said section 5 would be deleted.

Mike Mackedon, Fallon City Attorney, explained he was speaking as a representative of the City of Fallon due to the city's interest in state water rights laws as they affected Churchill County. He presented the committee with proposed amendments to A.B. 380 (Exhibit G). Mr. Mackedon presented an explanation of his proposed amendments, which was as follows:

Amendments to A.B. 380 suggested the following changes to existing statute:

> Section 1: Added a new section to Nevada Revised Statutes (NRS) Chapter 533 (proposed as 533.043), which would read as follows:
>
> *The priority of a water right granted to a person by the United States for use in a federal reclamation project is determined according to the date on which the United States appropriated water for initiation of a project and all such water rights so granted are governed by the law in place as of the priority date, notwithstanding the fact that the water right so appropriated may ultimately vest in the name of a person at a later date, except in the case of a water right which vests under the law of this state prior to the time the United States first appropriated or otherwise acquired the water for initiation of the project. If the water right vested under the law in this state before appropriation or acquisition by the United States, the date of initiation of the water right is determined according to the date water thereunder was first diverted.*
>
> Section 2: Amended NRS 533.040 to read as follows:
>
> All water used in this state for beneficial purposes shall remain appurtenant to the place of use; provided:
>
> > 1. That if for any reason it should at any time become impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from such place of use and simultaneously transferred and become appurtenant to other place or places of use, in the manner provided in this chapter, and not otherwise, without losing priority of right heretofore established; [~~and~~]

2. That the provisions of this section shall not apply in cases of ditch or canal companies ***or irrigation districts*** which have appropriated water for diversion and transmission to the lands of private persons at an annual charge***; and***

3. For the purposes of this section, water is appurtenant to the place of use if the water appropriated is used anywhere within an area set forth in an agreement that is evidence of the right.

Section 3: Amended NRS 533.060 to read as follows:

1. Rights to use the water shall be limited and restricted to so much thereof as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch. All the balance of the water not so appropriated shall be allowed to flow in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby.

2. **[**~~Except as otherwise provided in subsection 4, if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir or other means of diversion had never been constructed an any qualified person may appropriate any such water for beneficial use.~~**]** *Rights to the use of surface water may not be lost or forfeited through non-use.*

3. Evidence including, but not limited to, the following may be considered to show that water has been applied to beneficial use and creates a presumption that the right to use the water has not been abandoned:

a. Records or other proof of:

(1) The delivery of water; or

(2) The payment of any costs of maintenance and other operational costs incurred in delivering the water; or

(3) The payment of any costs for capital improvements, including works of diversion and irrigation;

b. Data regarding production of crops;

c. Contracts for the construction or maintenance of works of diversion and irrigation.

Section 4: No prescriptive right to the use of such water or any of the public water appropriated or unappropriated can be acquired by adverse user or adverse possession for any period of time whatsoever, but any such right to appropriate any of such water shall be initiated by first making application to the state engineer for a permit to appropriate the same as provided in this chapter and not otherwise. No changes are proposed to NRS 533.365.

Section 5: The State of Nevada reserves for its own present and future use all rights to the use and diversion of water acquired pursuant to chapter 462, States of Nevada 1963, or otherwise existing within the watersheds of Marlette Lake, Franktown Creek and Hobart Creek and not lawfully appropriate on April 26, 1963, by any person other than the Marlette Lake Company. No such right may be appropriated by any person without the express consent of the legislature. No changes are proposed to NRS 533.370.

Section 6: No changes are proposed to NRS 533.435.

Section 7: No changes are proposed to NRS 233B.039

Mr. Mackedon said his amendment intended to state the right to use surface waters could not be lost or forfeited through nonuse. The language applied only to surface water and not to underground water.

Chairman de Braga commented it had previously been established under state law that users of underground water would be notified within 1-year of the date forfeiture of water rights would occur. That ability did not exist under surface water rights, which was another reason the water rights forfeiture statute should not apply.

Mr. Mackedon added currently there was litigation pending over whether water rights had been forfeited, and one of the most common arguments was the statute had never been applied to surface water, and should not apply now. The proposed legislation would settle the issue and end the debate.

Mr. Lee said he had a problem with prescriptive rights from other previous legal conflicts. He asked Mr. Mackedon to review his position on the issue. Mr. Mackedon said he had no recommendations to make on the issue of prescriptive rights. He recommended the law remain intact as it presently appeared in statute.

Mr. Mortenson asked if there was a reason for not including underground water. Mr. Mackedon explained the proposed legislation was intended to apply only to surface water, NRS Chapter 533.

George Benesch, Attorney representing the City of Fallon, added groundwater issues were contained in an entirely different chapter in the NRS than were laws pertaining to surface water. Those were contained in NRS Chapter 534. He said the amended version of A.B. 380 was an attempt to clean up the language of the statute relating to surface water, and to make it consistent with what the state engineer had been doing regarding the issue. It was not the intent of the measure to rewrite Nevada water laws. Federal courts were currently interpreting Nevada water laws, and the measure was an attempt to keep the interpretation of Nevada water laws in the state's courts, as well as following the administrative guidelines employed by the state's engineer.

Michael Turnipseed, State Engineer, Division of Water Resources, was the next speaker to address the proposed legislation. He explained his agency preferred the language in the proposed amendments to the original language in the measure. He said legislation governing forfeiture of surface water was needed because the issue had never been properly addressed since the original legislation was written in 1913. Surface waters did not always exist in some parts of the state, but appeared and disappeared for years at a time. Archaic and incomplete language needed to be clarified, and the specific issues of surface water right forfeiture and abandonment needed to be addressed in a

definitive form. A.B. 380 in its amended form should correct those issues. He explained much of the amendment changed the language back to existing water law.

Mr. Lee said he was still concerned about the issue of prescriptive rights. He asked if the word *no* could be inserted, so the proposed legislation would read *no prescriptive rights.* He asked if the proposed legislation would have to be re-referred to the Assembly Committee on Judiciary because prescriptive rights were a judicial matter. Chairman de Braga said adding *no* would return the issue back to the present language of the statute.

Mr. Carpenter said the amendments were hard to follow. He asked Mr. Turnipseed to explain the amendments. Mr. Turnipseed said the amendments were consistent with actions taken by state engineers for the past 95 years. The language stating *the place of use was the entire reclamation project* was consistent with water laws throughout the western United States.

Chairman de Braga recognized the presence of Joan Lambert and John Bonaventura, both lobbyists were previously legislators.

Norman Frey, Chairman of the Newlands Water Protective Association, explained the mission of his organization was to protect the water and hydropower rights of the people in the Newlands Reclamation Project. He agreed with others the language of the original legislation was unacceptable, but the amendments brought the legislation to an acceptable condition. In 1983, water rights were being shuffled around within the Newlands Project when many of the problems discussed today emerged. In an effort to resolve those problems, A.B. 380 emerged. It was difficult to promote agriculture as a viable industry when concerns about forfeiture and abandonment of surface water rights continued to appear.

Chairman de Braga asked Mr. Frey to explain how water rights had been reduced in some areas, such as corners of fields, beds, banks, and bench lands. Mr. Frey explained the use of aerial photography was routinely used by the Federal Government to spy on farmers and ranchers several times a year. The result had been the right to use water on rounded, or radius, cornered fields had been taken away, under the pretense water had been abandoned. The technique was a method of micro-managing reclamation projects. In 1985, a federal judge ruled in favor of the United States government when it stated water rights had changed along with the per acre water duty. The water rights change on his property went from 4.5-acre foot per acre down to 3.5-acre foot per acre. That decision adversely affected the use of agricultural bench lands. Approximately 3,300 acres of water rights, which were instantly and arbitrarily diminished by the Federal Government due to the ruling of the judge. Mr. Frey said it was imperative the State of Nevada get out from under federal intervention in water rights. If that could be accomplished through clarification of abandonment and forfeiture laws he would support the proposed legislation with its proposed amendments.

Ross de Lipkau, Attorney from Reno representing the Las Vegas Valley Water District LVVWD) and the Southern Nevada Water Agency (SNWA). He explained the proposed legislation was unacceptable without the proposed amendments. He said the proposed amendments as presented by Mr. Mackedon set forth the following 3 basic items, with which he agreed:

- Surface water could not be the subject of forfeiture, but must be the subject of abandonment.
- The priority date for Truckee Carson Irrigation District (TCID) was set at 1902, as established in both the Truckee and Carson River decrees.
- TCID was allowed to use its water any place within the confines of the district.

Mr. De Lipkau said he wanted to work with the power company, Mr. Mackedon, Mr. Benesch, and the Committee on Natural Resources, Agriculture, and Mining to refine the language of the proposed legislation, using the proposed amendments.

William Isaeff, Deputy City Manager for the city of Sparks, was the next speaker to address A.B. 380. He explained the city of Sparks, along with Reno and Washoe County, were water rights holders in the Truckee

Carson Irrigation District. He said he had intended to speak in opposition to the measure, because it was unacceptable in its original form as it appeared to over turn decades of state water law procedure. However, he pointed out Mr. Mackedon's proposed amendment changed his initial opinion.

Mr. Isaeff said he was not clear on some of the provisions included in the amendment, but agreed with the three main points Chairman de Braga explained was the purpose for A.B. 380. He added there was a fourth purpose for the proposed legislation the Chairman had not mentioned, which was explained on page 7 section 3 in the description of beneficial use. The fourth purpose was to create the presumption water rights had not been abandoned. The proposed language was new for both existing law and the first version of the measure. It was an important aspect and needed to be included as one of the designated reasons for the proposed legislation. However, there were several areas appropriate for including the concept of beneficial use, or presumption against abandonment. He pointed out people might be holding water and not putting it to immediate beneficial use because they were acting pursuant, or in accordance with, an officially adopted land use or water plan that governed their particular jurisdictional area. People held water for unspecified periods of time while watching changing market conditions, believing they would sell the water as market values changed. The water was not abandoned, but held for specific uses later.

Mr. Isaeff explained he had another concern regarding the proposed legislation and the proposed amendment. On page 6 of the proposed amendment, subsection 3, there was reference to an agreement. It was not clear what agreement was being considered, or if the reference was to a past arrangement, or some agreement to be negotiated after the measure became law. Extensive clarification was needed to explain the reference.

The Chairman said she agreed with Mr. Isaeff's point. She said on page 5, the reference to *all water used in the state for beneficial purposes shall remain appurtenant to the place of use;* section 1, *that if for any reason it should at any time become impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from such place of use and simultaneously transferred and become appurtenant to other place or places of use* was not the intent of the proposed legislation. She said she wanted the measure to state it was not required to sever that right. The owner should have the ability to move that right within the land he owned. Mr. Isaeff said he agreed with that concept, but had trouble with the language contained within the measure to explain the point.

Chairman de Braga asked if any aspect of Mr. Isaeff's suggestions were based on speculation, to which Mr. Isaeff responded in the negative. He added it was a legitimate basis for finding of non-abandonment of water rights and was appropriate for inclusion in the proposed legislation.

The Chairman asked if non-abandonment included water held by a municipality for future growth. Mr. Isaeff responded in the affirmative, adding it was acceptable for private property owners to hold water in accordance with approved land use or water planning according to local ordinances. He pointed out the proposed amendment attempted to put the measure back into current law without any other significant changes.

Bjorn Selinder, Churchill County Manager from Fallon, said he was pleased to hear A.B. 380 was a work in progress because, he too, had a problem with the measure as originally presented. Incorporating the language of the proposed amendment changed his attitude. He said he was satisfied the measure would do its intended work of clarifying the issue of abandonment of surface water. He urged the committee to vote in favor of the measure as amended.

Chairman de Braga said a subcommittee would be held to review the proposed amendments. She said she would act as chairman of the subcommittee, along with committee members Mr. Hettrick and Mr. Neighbors.

There being no other business before the committee, the meeting was adjourned at 4:05 p.m.

RESPECTFULLY SUBMITTED:

Sharon Spencer,

Committee Secretary

APPROVED BY:

Assemblywoman Marcia de Braga, Chairman

DATE:

Exhibit 2

Excerpts from Minutes of March 30, 2011 Assembly Committee on Government Affairs

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-Sixth Session
March 30, 2011

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 7:30 a.m. on Wednesday, March 30, 2011, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Marilyn K. Kirkpatrick, Chair
Assemblywoman Irene Bustamante Adams, Vice Chair
Assemblyman Elliot T. Anderson
Assemblywoman Teresa Benitez-Thompson
Assemblyman John Ellison
Assemblywoman Lucy Flores
Assemblyman Ed A. Goedhart
Assemblyman Pete Livermore
Assemblyman Harvey J. Munford
Assemblywoman Dina Neal
Assemblywoman Peggy Pierce
Assemblyman Lynn D. Stewart
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Marcus Conklin, Clark County Assembly District No. 37
Assemblyman Pete Goicoechea, Assembly District No. 35
Assemblyman James Ohrenschall, Clark County Assembly District No. 12

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst
Brenda Erdoes, Legislative Counsel
Cheryl Williams, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources
Andy Belanger, Manager, Management Services Division, Southern Nevada Water Authority
Steve Walker, representing Truckee Meadows Water Authority
Dean Baker, representing Baker Ranches, Inc.
Dorothy Nylen, Private Citizen, Dayton, Nevada
Susan Lynn, representing Great Basin Water Network
Kim Wallin, Nevada State Controller
Carrol Abel, President, Hidden Valley Wild Horse Protection Fund
Sheila Schwadel, Private Citizen, Fish Springs, Nevada
Bonnie Matton, President, Wild Horse Preservation League, Dayton, Nevada
Ron Cerri, President, Nevada Cattlemen's Association
J.J. Goicoechea, Private Citizen, Eureka, Nevada
Doug Busselman, Executive Vice President, Nevada Farm Bureau
Jake Tibbitts, Natural Resource Manager, Eureka County
Michael DeLee, DeLee and Associates, Amargosa Valley
Vahid Behmaram Water Rights Manager, Department of Water Resources, Washoe County
Bjorn Selinder, representing Churchill, Eureka, and Elko Counties
Randy Robison, representing Virgin Valley Water District

Chair Kirkpatrick:
[Roll called.] Good morning. We are going to go a little bit out of order, Mr. Goicoechea, because I had people waiting outside my door at 6:30 a.m. I am going to let Mr. Goedhart go first. Then you can go second. Good morning, Mr. Goedhart.

Assembly Bill 410: Revises provisions relating to the filing by a governmental entity of a protest against the granting of certain applications relating to water rights. (BDR 48-360)

Assemblyman Ed A. Goedhart, Assembly District No. 36:
Thank you, Madam Chair and fellow members of this hardest working committee in the building. This morning we are going to talk about something exciting for most of you folks on the Committee—water. Firstly, I will tell you what Assembly Bill 410 is not. It is not a bill to go ahead and change a large degree of Nevada water law. We all know how complicated that can be. What this bill aims to do is narrow or put a slightly higher burden on government agencies that are filing protests and preventing people from utilizing the water that they own.

For historical perspective, this is the third time I have brought this bill forward, and I really appreciate the Chair for letting me keep doing this bill every session, kind of like *Groundhog Day*. I appreciate your giving me the time and opportunity to present this bill yet one more time. I have made a few changes and I am also open to amendments, as well. Maybe a comma here or a period there . . . I might be okay with that.

In Nevada, we have property rights, not only as it relates to land and buildings, but also to water. The water belongs to the people of the state of Nevada. Imagine, if you will, that you had bought a house in a neighborhood and gotten through the financing. In this case, you had the keys; you paid all your taxes and signed the mortgage. When you went to open the door of the house, a government person came up to you and said, "Well, I know you own the house, but now you have to apply for an occupancy permit. We are going to protest your moving into this house. You are going to have to go to court and get permission to move into this house." That is, in effect, what is happening to water rights in certain areas of the state. Probably one of the areas where it happens the most is in Amargosa Valley. We have the National Park Service as it relates to Death Valley National Park, Ash Meadows National Wildlife Refuge, and there are a plethora of other federal agencies, as well.

What is happening is that you can actually buy a water right that is a preexisting, valid, certificated water right within Amargosa Valley and then you are going to have to go ahead and pay for it. You file an application, and out of the blue comes a protest from the National Park Service. It has a detrimental, if not devastating, impact upon the businesses and economic opportunity in rural Nevada. So I like to call this a jobs bill. It is a jobs bill that will not cost this august body any money. It is a jobs bill that will increase investment, economic opportunity, and tax revenue—without costing the

taxpayers a dime. What this bill strives to do is say that in Nevada you have an opportunity to protest a water right. Any person, individual, or government entity has a right to protest the movement or the change in a point of diversion, place of use, or manner of use—and that is fine. We are asking that, if a government entity decides to protest this water right, they actually have to go and have a peer review through the rank and file, brought up through the different levels within the organization, and signed off by their chief deputy or administrator. It is, in effect, an eminent domain taking, a de facto taking of a right that you own, that you are not able to now use because of a protest that has been launched by the Park Service.

Within my packet (Exhibit C), I can show you some of the impacts. We have a resolution within this packet which is from Nye County. It was signed off by all the commissioners. This one dates all the way back to 2004. The Nye County Board of Commissioners signed another one in 2006. It was a resolution that requested that the Nevada Division of Water Resources expeditiously dismiss the frivolous protests that had been issued by the Park Service. There is another one here by Lisle Lowe, who is a licensed water right surveyor within Nye County. He talked to this issue. There is another one from Horizon Academy, which was an interesting story.

Horizon Academy was an entity that took out a piece of property, a rundown strip mall, and decided to invest several million dollars and convert it into an academy for troubled teens. Today, it employs 60 people. As you read here in a letter dated April 2, 2007, I was helping this gentleman, Jade Robinson, bring jobs and bring economic investment to the Valley. He said, "Well, I have 15 acre-feet of water rights." I asked him, "How much are you going to use?" We converted it to gallons and all the rest, like how much grass did he want, how many kids was he going to have, et cetera. We figured out the different water flows for all the different fixtures within the anticipated Horizon Academy. He had 15 acre-feet of commercial water rights, and he bought another 20 acre-feet because I told him, "You might as well buy some extra water. You do not know how much you are going to use on an annual basis."

Halfway through the construction project, we had a gentleman from the Division of Water Resources come from southern Nevada. He is not there anymore, thank goodness; this has nothing to do with the current leadership. In the middle of this project, we had gotten maybe 60 or 80 people working on the ground, and this was one of the biggest construction projects in Amargosa Valley in the last several years. Not a lot happens out there. He came screaming up in his pickup truck and said, "Stop the project! Stop the project!" Mr. Robinson was looking at me like, "What is going on?" I told him,

"I do not know what is going on. Let us talk to him." The gentleman from the Division of Water Resources said, "I think you said you were going to use 30 acre-feet of water." I said, "Yeah. We have already got 15 acre-feet that are allocated to the property. Mr. Robinson bought 20 acre-feet. He is going to transfer the 20 acre-feet within six or nine months. By the time the whole thing has been redone, we are going to have the extra water rights necessary to go ahead and come into compliance." He said, "Well, I just know that Death Valley is going to protest these water rights, and you might as well all go home because Death Valley does not want to have anything to happen out in Amargosa Valley."

I thought the water belonged to the people of the state of Nevada. These are valid, certificated water rights. What was the problem? The problem was that Death Valley basically can take a template they have made and every time there is any water right moved within Amargosa Valley, they file this automatic protest using this template. It stops all economic development because, in certain cases, it can take two to six years before the protest is dismissed.

I can tell you another personal story. Everyone says I have a vested self-interest, and I probably do because this is one of the reasons why I ran for office a few years ago in the first place. I bought my first piece of property in Amargosa Valley several years ago. I was all excited about being a farmer. I did not realize at the time that how you make $1 million farming is by starting out with $2 million. The dirt out there is not all that good. But I am not playing the world's smallest violin. I wanted to go and do it. So I said to the wife, "Here is a piece of property. It looks like Sanford and Sons. We have to clean it all up. We are going to go ahead and put new irrigation systems in. We are going to go ahead and level the ground. We are going to get everything going perfectly. It is going to look great." Well, about two months into that next spring, the existing well on that property started to have problems. So we made an application to move the point of diversion. At first, it was 150 feet. But they said, "Well, you have three ranch houses and there are septic lines. There are new rules. You have to be so far from a septic line." So we ended up moving the point of diversion 1200 feet to the west. This was about eight or nine years ago, maybe ten years ago. And, all of a sudden, I got a call from the water rights surveyor and he said, "Well, your application to change your point of diversion has just been protested by the National Park Service." I said, "Well, it is on my own property. What is going on?" He said, "Well, that is what they do." At that point in time, I did not know much about water law. I was talking to people. I had to go ahead and drive by my fields and watch them literally dry up, turn brown, and blow away in the hot desert sun. I figured it cost me and the wife and the kids about $60,000, because we lost

our whole season, we lost all the alfalfa seed; we lost all the work that went into preparing the ground.

I talked to the Nye County Board of Commissioners. I talked to all sorts of people. And finally, in September or October of that year, the Park Service said, "Oh. Is that all you wanted to do? We are sorry. That was a mistake. We are going to withdraw our protest. Go ahead. Now you can drill your well." But I had to pay for all the court costs. I had to pay for all of the consultants. And I lost a whole year's product. At that point in time, I asked the kids if they wanted their dad to continue around this mad march, this mad dream. Could we go ahead and rob their college accounts? And that is what we did. My wife was working three jobs. I was working one job and trying to start a business. I saw this happen time and time again in Amargosa Valley. And I said, "You know what? It is our opportunity to go ahead and correct a wrong." We do not want to change Nevada water law and say no one has a right to protest. But what this does say is that if you are a governmental entity and if someone has a preexisting or certified or permitted water right within the same hydrographic basin, if the government entity wants to launch a protest, that is fine. But they have to have it peer reviewed, gone up through the rank and file, and signed off by their chief deputy or administrator. That is all that this bill seeks to do. So I would open it up for questions now.

Chair Kirkpatrick:
Are there any questions? Is the part that you changed a little bit of the diversion piece on section 1, from last session?

Assemblyman Goedhart:
Some people, like the conspiracy folks, said that last session we were trying to make it easy for Las Vegas to steal the water from the rurals. That was not the intent of the bill. What this does is that it only applies to intrabasin transfers of water and not interbasin. It is only water rights that are moved within a preexisting basin. Also, I think that the Division of Water Resources has done a great job in terms of working with the Park Service, proactively, to really preclude their necessity for launching all of these frivolous protests. Because it is part of some of the adjudicated decisions or rulings that have come down that say you cannot move any water in Amargosa Valley south or east because if you go south or east from where most of the water is, you get closer to Devil's Hole. So, even within the Nevada Division of Water Resources, they have specific rulings and conditions and terms upon how you can move the water. We are fine with that. But even within that context the Park Service is still launching protests, in some cases, for water amounts that are as little as five-acre feet, which is enough to go ahead and irrigate a one-acre horse pasture. We had a lady retire from Clark County. She moved to

Amargosa Valley with her horse, got a double-wide, and bought 5 acre-feet. It took her almost six years to get the water rights transferred. By that point in time, her horse had already passed away from old age. She never had a chance to put her horse on a one-acre pasture. It gets a little bit ridiculous. Look at another letter here, dated February 20, 2007. It talks about Nevada Water Rights application 72239 (Exhibit D). If you go to the last page, you can see "Coming soon, 747 Mini-Mall." This was a very successful developer. Well, after being run around for several years, trying to get his couple of acre-feet of water rights just for water for a strip mall, he gave up. To this day, nothing has been built on that piece of ground. When you are talking about economic development, I think there are a lot of people who want to develop and there are a lot of people who want to invest. We just have to give them the opportunity so that they can do so.

Assemblyman Livermore:
Thank you, Madam Chair. Mr. Goedhart, I had a similar thing happen on the Carson River. I am a member of the Carson Tahoe Hospital Board of Governors. We were attempting to build a small hospital in Dayton. We bought a 10-acre parcel of ground. We had to acquire water rights with that. No sooner did we acquire the water rights than it became protested downstream from Churchill County and the Indian tribe at Pyramid Lake. So I know exactly what you are referring to, and I am very supportive of your bill.

Assemblyman Goedhart:
Thank you, very much. As I said, we are not trying to diminish their ability to protest. I think we have excellent water law in the state of Nevada. I would just like to have an additional level placed upon them to have it peer reviewed and gone up through the rank and file and signed off by their chief deputy administrator or chief.

Assemblywoman Benitez-Thompson:
Thank you, Madam Chair. Mr. Goedhart, I read the bill and I hear you referencing the peer review and I see the need for signatures by the head of the departments in section 1 and in section 2, at the back of the bill. To me, getting a signature does not necessarily dictate a peer review process. Is that what you are looking for? Are you looking for internal discussions?

Assemblyman Goedhart:
I think if you are going to have the person at the top sign, you are going to have to have discussions. I am not mandating the peer review within this bill. Usually, I have found out that when you work with agencies and you hold that person accountable with his own signature on the paperwork that he has, basically, dictated policy to make that way, he is going to have some

discussions. I will give you an example. On the dairy farm that I manage, we have what is called a comprehensive nutrient management plan and we also have an effluent management plan. Well, in that case, they do not allow any one of those employees on the dairy farm to sign those annual reports. They want me, as the manager, to sign those reports. What they do not want to have happen is to have me hire a brand new person off the street, sign a report, and then a few years later the reports do not jive. I can say, "I did not sign those reports. Employee X, Y, or Z signed those reports." They can deny culpability. What this bill will do is that when their signature has to go on those water right protests, it is going to hold them accountable, those folks who basically dictate the policy. They are going to be the ones. I think it is a de facto way of having those peer-reviewed discussions or going up through the rank and file.

Assemblywoman Benitez-Thompson:
Can you tell me how many of these situations has the federal government been the only entity protesting or if there have been other protests?

Assemblyman Goedhart:
Since I have been there, about 14 years, I know personally there have been probably 20 times or better where the only person protesting has been the National Park Service. To give credit to our folks, in almost every single case those protests have eventually been overruled. There are a few cases where they just gave up and went away. They did not have enough money. They did not know the system. They did not know the attorney to hire and did not have enough money to fight it. A lot of dreams have been killed because of these frivolous protests.

Assemblywoman Flores:
Thank you, Madam Chair. So, you are basically saying that some of these agencies are almost filing these protests as a matter of default, and then you would require that an agency head review it instead, and that would bypass this whole rubberstamping them out.

Assemblyman Goedhart:
Yes. I think what would happen is that if the head of the agency that was filing a protest had to put his or her signature on there, he or she would say, "Hmm. I am going to have to have culpability for my actions." That might go ahead and reduce a few of the protests, which is kind of funny. In Amargosa Valley, if you look at the aerial picture on one of the handouts (Exhibit D), I do not know if you have seen this, with the little green dots on a brown background. If you look at that, on the west side of the valley, there are some areas within the state of California. So, to show you how odd this is, if I decide to go

ahead, within the same valley and access a piece of private property, and it happens to be on the California side of the line, I can call up a well driller, immediately drill wells, and start utilizing water. I like our system better in the state of Nevada. We have a limited amount of water. We have to have these processes to protect a limited resource. But I think what happens is, when you have folks like the Park Service, who I do not believe are playing fair, it basically puts us at a big disadvantage because the state of Nevada's being, basically, outmuscled, by the federal government with all the frivolous protests. The doctrine of water law in Nevada is that Nevada has sovereignty over the waters of the state of Nevada.

Chair Kirkpatrick:
Are there any other questions? Okay. Mr. Goedhart, was there anyone else you wanted to testify for you? I have a lot of folks signed in; they just do not want to speak. It is too early, I think. So, I will do this. If there is anyone here who would like to testify in support of A.B. 410, please come forward now. Is there anyone in support? If there is anyone who is neutral on A.B. 410, please come forward. Good morning, Mr. King.

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources:
Yes. That is my testimony, that we are neutral on this bill.

Chair Kirkpatrick:
Thank you. Is there anyone else who would like to testify as neutral on this bill?

Andy Belanger, Manager, Management Services Division, Southern Nevada Water Authority:
We are neutral on A.B. 410 this year. I think we have been neutral the last two sessions, as well. I would note that our standard practice has been, as a governmental agency, that if we protest applications, those are ratified by our board of directors. So, in that sense, we are already complying with the provisions of this bill that require that the government take action to file a protest. This bill says the general manager can do it, in our case. I just wanted to put that on the record that we are complying with the spirit of A.B. 410 even though, potentially, it is not binding on us, as of yet.

Chair Kirkpatrick:
Yet. That is a good choice of words.

Steve Walker, representing Truckee Meadows Water Authority:
I will somewhat echo what Andy said. At the top of page 5 of the bill, under subparagraph (1), that provides us an exception for going to the board. A director can file protests because we are a separate government entity. We are not part of another one. With that, we are neutral on the bill. Thank you.

Chair Kirkpatrick:
Thank you, Mr. Walker. Do you guys also do the same thing? Does your board of directors sign off on those?

Steve Walker:
To tell you the truth, Madam Chair, I think sometimes we do and sometimes we do not. It depends on the expediency that we need.

Chair Kirkpatrick:
Does anyone else have other questions? Okay. Thank you. Does anyone else wish to testify as neutral? Mr. Baker.

Dean Baker, representing Baker Ranches, Inc.:
We have had to deal with different government agencies protesting water rights. For instance, in the recent past we filed on springs that had never been filed on or that had been used historically, a long time. We probably should have filed maybe fewer rights. Maybe we did not file them perfectly, but both the Bureau of Land Management (BLM) and the Southern Nevada Water Authority filed protests against those. I am glad to hear that their board of directors did it, but I do not know why they did it. But this kind of bill has some reality because government agencies do that kind of thing. Thank you.

Chair Kirkpatrick:
Thank you. Does anyone have any questions? Is there anyone in opposition of A.B. 410? Please come forward.

Dorothy Nylen, Private Citizen, Dayton, Nevada:
I do not think I understood, exactly, the language of this bill. So, in part, I have a question. When you are requiring the signature it sounded like, in the case of the BLM, it would have to be Ken Salazar that would have to sign, in this case. It just seems to me that Nevada water law is already extremely complex. I think this would just add to the confusion and not help with relations with the different federal agencies that interact with people in the state. It seems like it would be better for citizens to interact with local offices of different agencies. So, I do have a question. Are you saying that you want Ken Salazar to sign?

Chair Kirkpatrick:
Mr. Goedhart, go ahead.

Assemblyman Goedhart:
Thank you, Madam Chair. If you look on page 2, it says the Secretary of Agriculture if the protest is filed by the United States Forest Service; and the Secretary of the Interior if the protest is filed by the BLM or the United States Fish and Wildlife Service. It is exactly right that it would be the Secretary of the Interior, Mr. Ken Salazar. And I believe that if we have the unusual cases where people are taking property that is already privately owned—private, real personal property rights—it is even worse than eminent domain because at least in eminent domain, when they seize your property or they say, "You have to get off your property," at least they pay you fair market value. In this case, these actions are taking away private, personal property rights with no compensation.

For example, in Amargosa Valley, the amount of money that has been spent by the federal government exceeds the value of the water rights. Had they gone up to all the landowners and said, "You know what. You have 500 acre-feet of water rights. I will pay you $1,000 an acre-foot." Had they taken half the money they have spent trying to seize the property through court actions, they would have already had willing and voluntary people selling their water rights to the federal government. So what they are doing is spending all the money on attorneys, seizing the property rights, the water, and not paying the landowners anything. I have seen folks that are approaching their retirement years, in their 80s, and all they have in the world is a piece of land and some water rights. In one case, we joined a class action suit and we actually funded it. It went to the Nevada State Supreme Court. But now we are having people who are literally having their life savings taken away from them by the government. I think, in that case, there could be a compelling case. But at least let us have the decision maker at the top, who is executing that policy, be accountable for that policy.

Assemblywoman Neal:
Thank you, Madam Chair. I just want to clarify something. And this is to Mr. Goedhart. Are you equating the protest to a taking under the Fifth Amendment? Is that what you are saying?

Assemblyman Goedhart:
I would say that it is because, in my case, I wanted to move a point of diversion on my property. If all of a sudden there is a protest, I cannot use the water or the land that I have because of that protest. It is basically a de facto taking. It is uncompensated. And you can go to court. In my case, they said,

"We were mistaken." It costs you all sorts of money. You do not even get an apology. You have to fight for the right to be able to utilize your property. I think that is plain wrong. I believe it is an injustice.

Chair Kirkpatrick:
Ms. Nylen, did you have anything else?

Dorothy Nylen:
Yes, Madam Chair. I just think, after hearing this, that I, again, am in opposition to this bill.

Chair Kirkpatrick:
Thank you, again. Does anyone have any questions for her? Ms. Lynn.

Susan Lynn, representing Great Basin Water Network:
Now, let me say to Mr. Goedhart, I completely empathize with his situation, because I know those things do happen. And I am very glad to see that he has shifted it from interbasin to intrabasin situations to make it more palatable. However, I still think it is extremely onerous to require the secretaries of the federal agencies to sign the bills. First of all, getting it in front of them within the 58 day required time: 28 days for publication and 30 days for public notice. We are responding to the public notice requirement. It seems to me like the regional directors, state directors, and forest supervisors ought to be the ones who sign it. I know Mr. Goedhart wants to go higher up because of public policy, and I totally understand that. But it seems to me, to fit within Nevada's state laws with the 58 days, it is asking way too much for federal agencies to go all the way to the top and get permission and a signature. I am not saying they are right. I guess I am speaking on their behalf, though they may not know it, that they do have the right to protest because they have federal laws that they need to uphold that are beneficial on the ground, to national parks, to state parks, and to counties. My sense is, whether it is the Forest Service or the Department of Agriculture, you have regional directors at the Forest Service, you have forest supervisors that oversee almost all the forests in the state. It is sufficient to have them take care of it. Thank you.

Assemblyman Goedhart:
Thank you, Madam Chair. To that point, there, if we have language from the opposition that would like to go ahead and bring that down a notch or two on the levels, I am more than willing to work with those folks on coming up with some acceptable language. I think that would be a big improvement where, today, you could literally have an employee one week on the job signing those protests at the order of someone else within the agency. I am just looking for

a little bit more accountability and a little bit higher level than is happening now. I realize that legislatively we have to move in tiny baby steps, sometimes.

Chair Kirkpatrick:
We do. Thank you. And maybe Ms. Lynn can get together with you and you guys can work on that. Is there anything else? Mr. Ellison.

Assemblyman Ellison:
Thank you, Madam Chair. Mr. Goedhart, I do not know. I think this is about the only way you can go. You said that last session you had the same bill in. You made some modifications in here. What was the reaction? Did it come out of Committee last time and then go to the floor?

Assemblyman Goedhart:
Last session, it was heard before the Committee but it was not brought up for a vote. I do not know if it had the support to get all the votes which it needed. But I am kind of a stubborn guy, so . . .

Chair Kirkpatrick:
I was the Committee person, Mr. Ellison.

Assemblyman Goedhart:
And the Chair has been kind enough to let me go ahead and re-present the bill this session, once again. And for that, I am very grateful.

Chair Kirkpatrick:
Mr. Ellison, I think we could use Mr. Segerblom as an example. He brought a bill back several times, since he has been here, on underground utilities. He had a piece in there regarding historical issues and it was all intertwined. Last session he got that historical piece approved. Sometimes when you make some changes after you hear the issues . . . at the end of the day, you have to have enough votes to get your bill out of committee.

Assemblyman Goedhart:
I would like to go forward on this. When I showed concrete examples, using Horizon Academy, which was almost put out of business before it was able to go and open its doors, or the lady with the horse and a lot of these other different cases, you might say, "Well that is only six jobs here or sixty jobs there or ten jobs there. It is not that big of a deal." What is happening now, though, in Amargosa Valley, is that there are actually a lot of solar companies which are looking at developing there. Even if they utilize what is called "the best water conservation technologies available," which is, basically, instead of being air cooled it is mechanically cooled; in some cases, they use 300 to

400 acre-feet of water. Well, what is happening now is that the Park Service is in negotiations with these folks from the solar companies and saying, "We do not care if you are buying preexisting valid, certificated water rights. Unless you buy three water rights and give us two and take one for yourself, we will launch a protest." So, just the very thought or the threat of this protest is gumming up the works. In all the years we have been trying to get solar projects into Amargosa Valley, to this day there has not been one that has been able to turn over a shovel full of dirt and start construction. I know the Solar Millennium Project alone is a $3 billion project, with 1200 full-time construction jobs at prevailing wages and 100 full-time jobs once it is open, and $15 million a year in tax revenue to the county. So these are big issues and we are not requesting that the whole system be changed; we are asking that it go up to a little bit higher level that puts accountability to the person within that agency who is making those policy decisions.

Assemblyman Ellison:
I agree. Thank you, Madam Chair.

Chair Kirkpatrick:
Assemblywoman Pierce.

Assemblywoman Pierce:
I have some sympathy for your frustration, but I do have to say that you seem to be arguing both sides of this at various moments here. On the one hand you say that water belongs to the people of Nevada, but if someone gets in the way of you using water then it is a taking. So that is sort of two sides to this. And the other thing I would say is that I am a big fan of solar and all that kind of stuff, but we have been telling natural gas power plants, for many years, in Nevada, that they had to be air cooled. They all say, "Oh, it is not as efficient." Well, you know, this is a desert. There is some loss in efficiency when things are air cooled as opposed to water cooled, but it is a desert. And so you have to air cool it, and we have been telling natural gas plants for years that they had to air cool when they wanted to water cool, instead. So, I just wanted to say a little bit about that.

Assemblyman Goedhart:
I appreciate those points, Madam Chair. Of the projects that have been planned in Amargosa Valley, one of the projects which has been approved has actually gone towards air cooling. It is about 90 percent water efficiency savings. Instead of 4,000 acre-feet, they are only going to be using 400 acre-feet. But even in these cases, just the threat of a protest can halt an entire project, even if you are using the best available water conservation technology. You are right, the water belongs to the people of the state of Nevada, but, ultimately,

that water, once it has been signed over to a person, it becomes a real property right, just like a piece of land or a house. Once you own those water rights, it is just like a piece of property. So we have both real property, personal property, and we have water rights.

Chair Kirkpatrick:
How about you two take this conversation offline so we can get going.

Assemblyman Goedhart:
I am sorry for taking so much of your time.

Chair Kirkpatrick:
This is Ms. Pierce's last comment. Go ahead, Ms. Pierce. But then I would like you two to take it outside.

Assemblywoman Pierce:
I think it is important to remember that in the wacky world of America, you know, corporations are people. So it all sounds very sort of warm and fuzzy when we are talking about water rights with a guy we like, like Mr. Goedhart, but the fact is Vidler Water Company, Inc. is a person.

Assemblyman Goedhart:
Thank you for that comment.

Chair Kirkpatrick:
We are going to close the hearing on A.B. 410.

Assemblyman Goedhart:
Once again, Madam Chair, thank you for allowing me the opportunity.

Chair Kirkpatrick:
Thank you. We are now going to open the hearing on A.B. 276. Mr. Conklin, please.

Assembly Bill 276: Requires the State Controller to make data concerning certain accounts available for public inspection on an Internet website established and maintained by the State Controller. (BDR 18-371)

Assemblyman Marcus Conklin, Clark County Assembly District No. 37:
Good morning, Madam Chair. You have before you Assembly Bill 276. Hopefully, last night, Ms. Scholley received a copy of the final amendment draft from Mr. Ziegler. Is that correct?

Chair Kirkpatrick:
I believe it is on the Nevada Electronic Legislative Information System (NELIS) for the Committee members (Exhibit E).

Assemblyman Conklin:
I think it is pretty straightforward; it is one page, which would be the bill in totality. Rather than go through the amendment, I think what I would like to do is give you my thoughts on why I brought this bill forward. Basically, this bill creates a website in the Office of the State Controller that allows for the presentation, and, over time, the expansion of available financial data from the state, in a format that is easy for the public to access and also easier for research and academic purposes.

For those of you who sat on the Assembly Committee on Taxation presentation and listened to Matt Murray from the University of Tennessee—he also gave that presentation to the Interim Finance Committee (IFC) a couple of months ago—one of the critical comments which he had about Nevada was that information is not readily available. It is very hard to find. As some of you know, in my private capacity I do some economic research from time to time. I have written some material on Nevada tax sources and whatnot. I can tell you from personal experience that finding good, usable, consumable data is very, very difficult. There are two reasons, really, why I brought this bill forward. One is that the public has a right to know. I think the Controller is here and can speak a little bit to this, but working through the Controller's Office allows real-time access to data. The data can be uploaded daily, weekly, or monthly, straight from cash flows. It is very simple and very easy to understand and up to the moment. From a consumer standpoint, people who have questions can go right to the website and not only see, in a visual format of graphing, but search, which is something that is not available, as far as I can tell, through any other website unless you want to go to some aggregated debt websites like the Census Bureau or the United States Bureau of Economic Analysis (BEA). But if you go there, what you are searching is the last recorded data which they have, which is usually one to four quarters prior, so it is not up to date.

The other side of this is that we are a growing state. Even though we have been around for a long time, we are still relatively young in terms of how we look at ourselves and how we analyze what we have. It would be my hope that in making data more available, you will get more Matt Murrays of the world, hopefully more students from UNR and UNLV who are getting their bachelor's and master's degrees, or whatever, in economics or government or public administration, who will be able to take that data and use good, sound empirical research. They would not only be advancing their degrees but also enriching our understanding of our own revenue structures and expenditure structures.

So, Madam Chair, that is really the nexus of this bill and why I brought it forward. I hope you can give it some consideration.

Chair Kirkpatrick:
Thank you, Mr. Conklin. Does anyone have any questions? I will start with Mrs. Benitez-Thompson and then Mr. Stewart.

Assemblywoman Benitez-Thompson:
Thank you, Madam Chair. I am reading over the amendment. I had read the bill earlier. Am I right, then, when you are talking about real-time data here? In this amendment you are looking for their ledgers to be uploaded at the end of each month for the previous month? Is that what you are talking about? Or are you talking about daily transactions?

Assemblyman Conklin:
I will leave that up to the State Controller. I think the language is drafted in such a way as to allow flexibility. Times are tough right now. We all recognize that. Budgets are tight. I specifically have been working with the Controller's Office to draft this amendment in such a way that it requires no resources. They can actually, as their technology advances, advance the website and consumer access along with it, but not by forcing them to do it a moment before that technology and ability comes to them. It is written in a broad sense. I certainly do not want to speak for her, but I think the Controller would indicate to you that some parts are going to be easier than others. Putting up revenue numbers is going to be very quick. Putting up expenditures takes a little bit longer because we do not have that many major revenue sources. We have a lot of different buckets of expenditures. It takes a little bit longer to get it organized and in a consumable fashion that is meaningfully to the public. This allows for that.

You will notice that the effective date is July 1, 2012. We have allowed for a full calendar year from passage for the Controller to manage the process and bring things online. I would imagine it is not something that happens all at once. Each time they get a chance to add some components to it, they will do so. From a functionality standpoint, and more directly to your question, they have the capacity because all their data is entered real time. It is cash accounting, right? Money comes in and gets accounted for. Money goes out and gets accounted for. It is just a matter of how often they want to upload that to their site or maybe they have the technology already to make it a direct link so anytime anyone searches it goes into their database, grabs the information, and pulls it up and it is just always available. But I would leave that to her to give you a definitive answer.

Chair Kirkpatrick:
Okay. Thank you. Does anyone else have any questions? Mr. Stewart's question was answered. I just have one question. It is like putting the state's checkbook on the website. Correct?

Assemblyman Conklin:
In essence, it is. From a budgetary standpoint we have hundreds and hundreds, if not thousands, of individual accounts. What we would do is aggregate some of those so that, instead of saying exactly how much money you spend on each individual item, you would roll that up into budget accounts that are consumable, with some definition, much like you see on a lot of search sites that do not have real-time data. The Census Bureau is one that comes to mind. All the information that is at the Census Bureau came from the Controller's Office. It is just a year behind. It is not really worth looking at, today, because what you are looking at is a year and half old. What this bill does is that it allows us to look at current numbers. We just need to put the data in a format that is meaningful. When you compare it to other data, it is relative. You may not be comparing apples to apples, but at least you are still comparing fruit instead of fruits and meats.

Chair Kirkpatrick:
That works. In section 3 and 4, of the amendment, you used the dollar figure of $100 million. Why was that particular dollar figure used?

Assemblyman Conklin:
Once you get down under $100 million, you are talking relative to the size of the budget of the state. You are talking about revenues that are not often looked at. They are revenues that do not bring in as much money relative to the total budget. You have to understand that over the biennium, our major revenue sources are bringing in anywhere between $300 million and $800 million. In order to keep the number of revenue sources from just expanding to the ridiculously small, because we do have some that probably are under $100,000, we would like to keep the number to the major sources that people traditionally want to look at, such as gaming and sales taxes and things like property taxes, if that is something which is included here, fees from the Office of the Secretary of State. Things like that. All these are the things that we talk about that are over $100 million. The stuff that is under $100 million is probably things that, for the most part, many of us do not know exist.

Chair Kirkpatrick:
Does anyone else have any questions? Ms. Flores.

Assemblywoman Flores:
Thank you, Madam Chair. This is a great bill. I see the purpose in trying to achieve accountability and transparency, and I share your frustration in trying to get information from different state agencies. My question is a little bit different, though. Yesterday, there was a comment made by Ms. Vilardo from the Nevada Taxpayers Association in terms of the different platforms that different agencies are using within the state. Your bill just says that "the State Controller shall, on an Internet website . . . ." It does not necessarily specify what type of website. Is there any thought about potentially creating something that everyone in the state can use, as far as the agencies go? I guess my thought process in this is thinking into the future, and my frustration has also been with the data sharing which is not necessarily a component of your bill, either. Florida, for example, has been doing amazing work in the realm of data sharing and data sharing has then created efficiencies and it has created ways in which agencies can be more accountable, obviously, and more transparent, but then they know the efficacy of the dollars they are actually spending on their programs. It makes things more fluid and makes things work better. Obviously, for Nevada, I would hope that we can start thinking in those terms and in terms of making everything more fluid and also more efficient within government agencies and states. As far as the website is concerned, have there been any thoughts to that in terms of making everyone be on the same page?

Assemblyman Conklin:
I am not sure there is a nexus with the website, itself, because the website is for public consumption. The reason the Controller's Office was chosen was because the Controller has the sole responsibility to account for all the money. For certain there is no doubt that we probably have some data sharing problems, but the fact of the matter is all the money had a single-source stop. That is at the Controller's Office. That is why I chose it there because there is not a data issue between the Controller's Office and the website. They have sole responsibility for accounting for the cash for those things for which they are responsible.

Let me be perfectly clear, there are some things that the state gets that the Controller does not have control over. Moving forward, if that is something you want to pick up as technology becomes available, I think we should do that. The problem we have, more specific to the whole data sharing idea, is that we recognize that not every department is on the same platform as every other department. We wished it were not so. As the state has grown and technology has grown, we have added new technologies with new departments but have not picked up the old ones. However, the cost to do that is more than we can bear right now, clearly, given our economic crisis. Part of the reason

the amendment is drafted the way it is, is so that we allow the Controller to put up what she can as it becomes available. As time goes on and as more technology becomes available, some of that data sharing you are talking about will become available. Sooner or later, we are going to have to get there. Then the richness of what they are able to put up will increase with it. If I put those specifics in there now, all that would happen is that I would add a fiscal note and it will be substantial. I sit on the Assembly Committee on Ways and Means and I have to tell you, it will probably die.

Chair Kirkpatrick:
Thank you, Ms. Flores. Ms. Pierce.

Assemblywoman Pierce:
I think this is good. Certainly, this session we are trying to move in the direction of transparency. I think that in the future we should look at making that $100 million a smaller amount because I think that is going to create some frustration. I think that a lot of folks who look at this kind of stuff all the time are really looking for the $10,000 we spent studying the love life of fish. They are looking for that kind of thing and not these sorts of big numbers. I think this is a good way to go.

Assemblyman Conklin:
If I may, Madam Chair, on that point, the $100 million is for revenue amounts, not necessarily for expenditures. It is over the biennium, so on average you are talking about $50 million per biennium. And just so that you understand, our total General Fund expenditure for this biennium is roughly $5.1 to $5.9 billion. We are talking a relatively small percentage of what we are looking at overall, relative to the budget.

Chair Kirkpatrick:
Thank you. I think that at some point we have all discussed that we have to start investing in long-term ways to make our process better for everyone. I think you have to invest a little bit.

Assemblyman Conklin:
You know as well as I do that, while we would like to do it all at once, it rarely ever happens that way. Maybe if we could take a good step forward this session and leave a platform for others to build on, I would be . . .

Chair Kirkpatrick:
I would just say, Mr. Majority Leader, that last session we had Assembly Bill No. 193 of the 75th Session, which gave us a little bit of a reporting mechanism. People tried to stick fiscal notes on there like there was

no tomorrow. At the end of the day, though, it gave us a very good idea per year the revenues that we were bringing in and when our strong quarters were. We just did it on the top seven. As much as everyone wanted to put a fiscal note on it, it ended up helping us make some better decisions going forward. Once they figured it out the first time, it was very easy to maintain after that. I think some of these reports do bring value to the taxpayers as well as tools for our staff and for ourselves to use.

Do you have anyone that you wish to call up specifically?

Assemblyman Conklin:
Madam Chair, if Controller Wallin wants to come up. I am not sure if there will be anyone else.

Chair Kirkpatrick:
We are taking a break from water, so it is all good. Ms. Wallin.

Kim Wallin, Nevada State Controller:
I want to tell you that the Controller's Office supports this bill. We have been working very closely with Assemblyman Conklin in going over this. We sat down and they said, "Well, we want you to do all this." We were hesitant. We would have had a huge fiscal note. We sat down and talked about what we could do with the resources that we had in our office, without having to go out and hire an outside consultant to help us. We can do all of this internally, which is a good thing.

For the revenue side, we actually have already started, in a sense. The Nevada Economic Forum came to us several years ago and said, "We cannot tell what revenues we have collected so far in the state, budget to actual, because we have to go to the gaming site, the taxation site, et cetera." We have actually put that on our website—the revenues. When we talk about the $100 million, if you go to my website, right now, it gets down into the nitty gritty, even down in the Motor Pool Division, which is only about $3 million in revenues a year. The only thing we need to do with that is add graphs, which is what we are going to do. Right now, it is just numbers. Now we are going to have graphs so you can have trends and see what we have collected in the last fiscal year and the current year, and then we are going to be able to start building on that. We will have three fiscal years at a time on there. Then we can build on it and we will keep adding to the data so people can come there and look to see what we did back in 2009, for example. If they are in 2015, they can go back and compare. It will give them information. It will paint a picture and be a checkbook online. If you look at your checkbook, it is just a bunch of numbers. Now you, personally, know what you wrote that check

for, but if you do not have that internal knowledge, it does not mean anything. If we could start showing the trends of our expenditures, I think that paints a better picture. For the expenditure side, that is going to take a little longer getting that started. With our limited resources, my Comprehensive Annual Financial Report (CAFR) accountants will be putting that together. They have to do that after CAFR season, which is at the end of December.

We should have the revenues up this summer, which is a great thing, I think. Assemblywoman Flores, you were asking about the platform and what have you. The state has a statewide accounting system. It is the Integrated Financial System (IFS). All of the agencies are on that statewide accounting system already. The ones that are not on that statewide accounting system are Higher Education; they are separate. They are a separate component unit in reporting to us as well. That is what we are talking about, maybe in the future, having a platform where they can submit the information to us, as well. I plan to enter into a dialogue with them after we get our site up and ask them, "Would you be interested in doing this?" Maybe they would send it to us on a quarterly basis or something like that.

I think that is it for my comments. Are there any questions?

Chair Kirkpatrick:
Does anyone have any comments? Mr. Stewart.

Assemblyman Stewart:
Thank you, Madam Chair. I have a comment, not a question. I applaud the intent of this bill, and I think the Controller's Office is a great place to put this. I know Ms. Wallin has a great track record in being innovative and providing individuals and legislators with all kinds of great information. Thank you.

Chair Kirkpatrick:
Thank you. Mr. Ellison.

Assemblyman Ellison:
Thank you, Madam Chair. The only thing I need to ask is about the software they are using. Apparently, it is pretty adequate for what you are doing right now. But what about in the near future? Is the software that you are using for all this data going to be comparable? You are going to be getting a lot of data and putting a lot of information in there. I do not know what kind of software you are using. Are you going to have to upgrade, eventually?

Kim Wallin:
Assemblyman Ellison, what we are using right now are spreadsheets. Excel is going to be around for a long time. That is it. Microsoft Office 2007 does some pretty amazing graphs and charts and all kinds of stuff. They are actually putting add-ons and macros underneath it so we can do even more stuff.

Chair Kirkpatrick:
Thank you. Is there anything else from the Committee? Mr. Conklin you might just want to hang out there. Thank you, Ms. Wallin, for coming. Is there anyone who would like to testify in support of A.B. 276? Is there anyone in opposition of A.B. 276? Is there anyone who is neutral on A.B. 276? [There was no response.] Mr. Conklin, do you have any final words? No? Okay, with that, we are going to close the hearing on A.B. 276.

While the Majority Leader is here, I will tell the Committee what our plans are for next week. We will be having a night meeting. We will meet next Thursday from 6 p.m. to 9 p.m., in Government Affairs. We were lucky enough to get 119 bills before this Committee, not counting the Senate bills. It is easy to say that they must be killed, but I look at this Committee and wonder which one of yours you want killed. If you do not want to hear your own bills, that is one thing. I have done that to many of my own, at this point. In order for us to keep on pace, we do need to start at 7:30 a.m. We do need to start on time. We do need to have a couple of night meetings. I promised you we would not be here at 9 p.m. on the Friday of the deadline because that is a very uncomfortable place to be, so you will feel relieved on Friday the 15th. We will work very hard until then. I appreciate the Committee. I have a good Committee, so I am fortunate. In order to make sure your colleagues' bills get heard, we have to work a little harder. Now that the leadership team knows we will be working that night, maybe they will give us a little bit of a reprieve on late floor sessions. With that, we are now going to open the hearing on Assembly Bill 329 and welcome up Mr. Goicoechea. I did that right because both leadership teams were here, so everyone knows now. Right?

Assembly Bill 329: Defines the term "wildlife" for certain provisions of law relating to water. (BDR 48-312)

Assemblyman Pete Goicoechea, Assembly District No. 35:
Thank you, Madam Chair and members of the Committee. This bill is only about policy, and I apologize. It is a very short bill but it is a complex question. I am not going to get into genus and species and whether wild horses are truly this or that or whether they are domesticated ferals. The real issue I have today is that the state of Nevada has primacy over both wildlife and water in this state. The Nevada Department of Wildlife (NDOW) clearly does not manage

wild horses and burros in this state. With the passage of the Wild Horse and Burro Act of 1971, clearly the jurisdiction over wild horses and burros went to the federal government. Over the last few years we have seen an increase in the number of filings by federal agencies. And they are filing those on behalf of wildlife and wild horses. Clearly, that is an erosion of Nevada's water law.

In the state of Nevada, as my colleague from Amargosa said, the waters in this state belong to the state of Nevada. Now, the next question you are going to have is, "If this is a federal issue, where do the wild horses and burros get their water?" Under the Federal Reserve Act, the federal government is entitled to the water they need, the difference being that it is an adjudicated right, very similar to a vested right in this state. They have to be adjudicated. So I am reinforcing the state of Nevada's primacy and confirming it by definition, that wild horses and burros are not to be considered wildlife for the application, permitting, and certification of water rights in the state of Nevada. Again, it is a very short bill, a complex issue. The bottom line is I think it meets all the needs. Firstly, it says that NDOW is not responsible for the management of wild horses and burros in this state. Clearly, it is held under the jurisdiction of the federal government with the passage of the Wild Horse and Burro Act. The second point that I want to clarify is that the state of Nevada needs to maintain its primacy over those water rights and those applications. At the point it is adjudicated, and it will be adjudicated in the court, it will only pertain to specific basins as the adjudication process is brought forward. I believe in water, and Nevada's water law, as my colleague from Amargosa said, is probably the best water law in the nation. I want to ensure that we maintain it. This would be very similar to my colleague, Mr. Livermore, using my cows to make a water application and filing for a water right. Clearly, it is not legal and it is not right. With that definition, I would stand for any questions.

Chair Kirkpatrick:
Mr. Anderson.

Assemblyman Anderson:
Thank you, Madam Chair, and thank you, Mr. Goicoechea. I just had a question regarding line 6 on page 1 of the bill text, specifically, "whether indigenous to Nevada or not." I have this question because I am sure, as many are aware, that some of the provisions of this title of NRS require some protection of wildlife. Under this definition of wildlife, I am concerned the clause "indigenous to Nevada or not" may put the NDOW or the State Engineer in the position of having to defend invasive species. *Nevada Revised Statutes* (NRS) 533.367, for example, has a requirement to ensure access for wildlife to water, that it customarily uses. We have heard things in the Assembly Committee on Natural Resources, Agriculture, and Mining about aquatic invasive species and

of the California-Nevada Interstate Compact which is in NRS Chapter 538, Article XIII, which recognizes wildlife as inseparable from the public interest. I was wondering if you could comment on that and see whether you would be willing to make it clear that aquatic invasive species would not be a part of that.

Assemblyman Goicoechea:
Clearly, this has no reflection on the duties of the Department of Wildlife. Now, again, when you are talking about indigenous species, we are talking about those species that may, ultimately, be introduced into the state of Nevada by NDOW. And, again, we do not believe that the Department of Wildlife is going to bring quagga mussels, which we already have in place, or any other invasive species. Clearly, when we are talking about invasive species, you are talking about a species that may or may not be indigenous to this state and they may be in some waters of this state. It does not mean we like them or we want them, but we have them. But again, this is existing language, for the most part. The only change in statute is "this term does not include any wild horses or burros." That is the only line that changes from existing law.

Chair Kirkpatrick:
Mr. Goedhart, and then Ms. Pierce.

Assemblyman Goedhart:
Thank you, Madam Chair. This is directed towards the gentleman presenting this bill. I definitely agree with the thought behind the bill. You said the only language that would be changed is the term "does not include any wild horses or burros." That is the only thing that has been changed?

Assemblyman Goicoechea:
That is correct. We are just trying to clarify by definition that you cannot use a wild horse or burro to establish beneficial use.

Assemblyman Goedhart:
I was going to ask about line 6 and line 7. Why did they put in "whether raised in captivity or not"? I am trying to figure that one out.

Assemblyman Goicoechea:
Clearly, there are species of wildlife that have been raised in captivity, such as chukars or probably some Himalayan snowcocks that were raised in captivity and then introduced into the state.

Chair Kirkpatrick:
Thank you, Mr. Goedhart. Mr. Goicoechea, I think NRS 501.097 is where wildlife is defined specifically and then there is this language in the bill.

It appears new to the Committee because it is not within this piece of current statute. It is identified in NRS Chapter 501.

Assemblyman Goicoechea:
Again, we went to NRS Chapter 532 just because that is the section used for definitions. It was my understanding this is the definition that was in place.

Chair Kirkpatrick:
Right. But as far as for some of the folks on this Committee, the language is italicized, so it looks like it is new language but it is currently already defined in NRS Chapter 501.

Assemblyman Goicoechea:
Yes. And I apologize for that. We probably should have only had the one line. Thank you.

Chair Kirkpatrick:
It is all good. Ms. Pierce.

Assemblywoman Pierce:
Thank you, Madam Chair. I am not exactly understanding the intersection between wildlife and water. Can you explain that?

Assemblyman Goicoechea:
Under existing law, there is a reservation for wildlife. Anytime you make an application or a certificated water right, there is a reservation that you have to leave enough water in place for wildlife.

Assemblywoman Pierce:
Okay. Thank you very much.

Chair Kirkpatrick:
Does anyone else have any questions? Mr. Munford.

Assemblyman Munford:
Thank you, Madam Chair. Just to follow up on the question by Assemblywoman Pierce. The water rights that you have, you have a well or water set aside for the other wildlife, but horses and burros are restricted. You do not want them to have access to that water for drinking? Is that what we are dealing with here?

Assemblyman Goicoechea:
No. It is clearly not an access issue as much as the ability, right now, for the federal agencies to file for a water right permit certificate, under Nevada water law. We are saying a federal agency does not have the right to use wild horses and burros. They have to use their federal reserve, which they have in law.

Assemblyman Munford:
Is that available?

Assemblyman Goicoechea:
Yes. Yes, it is. But the only thing is, that right is then established by adjudication, rather than the permit process. Our fear is we have a number of filings occurring all across the state of Nevada. There are lots of them in place. It is clearly an erosion of Nevada's water law when we, in fact, allow federal agencies to come and apply for water, as a person, which is how it is defined in statute. Rather, they need to be using their federal reserve right and adjudicating that to water those wild horses and burros. The change came with the passage of the Wild Horse and Burro Act 1971. That placed those horses under the jurisdiction of the federal government. And therefore, they have to use their federal reserve right.

Assemblyman Munford:
And that, basically, is the premise of this bill?

Assemblyman Goicoechea:
That is what this bill is all about. We want to make sure that we can clarify and that the State Engineer does not have that gray area there that says, "Okay, do I have to give them a permit or not?" Clearly, with this, they are not to be considered wildlife, therefore, they cannot, in fact, be issued a permit on the basis that they are wildlife.

Chair Kirkpatrick:
Thank you. Are there any other questions? Mr. Goicoechea, I am actually going to start with the opposition first and let me tell you why. I received well over 97 emails. Fifty of them asked to be entered into the record and we will determine whether they are put into the minutes, each and every one of these, or if we put them on NELIS. We have to see, physically, what our system can handle. I just want to let them know that they will be part of the record, one way or another. We will either do it the old school or new school way. But I do have 47 emails, as of last night, and an additional three emails this morning. I am sure the Committee has received lots of emails. So, don't worry, we are going to put them in the record.

Assemblyman Goicoechea:
And I thank you, Madam Chair, and I apologize for the workload it placed on you with this bill. Clearly, I think most of that argument is whether they are, in fact, looking for a definition of wild and free roaming and are they, in fact, wildlife, and that is not the intent of the bill. We are only talking about policy and state water law. Thank you.

Chair Kirkpatrick:
So, with that, I am going to start with the opposition and invite you up this morning. Ms. Nylen, did you want to come up and testify? Anyone else? Good morning. Just fill up the seats, as long as you state your name for the record before you speak. Those that are in opposition, just as one person leaves, we will ask some questions, then you can come back up. Okay. We will start with you, though, Ms. Nylen.

Dorothy Nylen, Private Citizen, Dayton, Nevada:
Thank you, Madam Chair. I am going to read my letter, if that is all right.

Chair Kirkpatrick:
Ms. Nylen, is it one that we have already received, by chance?

Dorothy Nylen:
Yes, it is.

Chair Kirkpatrick:
Would it be this one, which is a couple of pages long?

Dorothy Nylen:
It runs slightly over one page in length.

Chair Kirkpatrick:
What I would ask you, because we do have a copy of your letter, as opposed to reading it, word for word, summarize your thoughts on it because if we read all 50 of these into the record, we would not be out of here by 12:30 p.m. But we will put them in the record because they are important. If you want to handle it that way, it would be helpful.

Dorothy Nylen:
Okay, certainly. To me, this bill seeks to remove the water rights of wild horses and their very right to exist. Whereas I see and acknowledge from what Mr. Goicoechea said, that I do not even think this is about wild horses but the fact is that they have been singled out. I have been following this issue for a while and gone to meetings of the Feral Horse Committee, which developed

this. It really is something that they hope will be used to remove wild horses from the state of Nevada.

I think this is a very inhumane approach to a water issue. Assemblyman Goicoechea said he is not focusing on whether or not wild horses are wildlife, but they have been defined, by special status, by the Wild Horse and Burro Act of 1971, as such by the federal government. A lot of lawsuits have tried to challenge that and they have lost. Whatever status Nevada wants to use to define wild horses as having, these are living creatures and I think it is a very poor way to approach dealing with water law. Nevada water law is already complex. It is certainly the most difficult of all the western states, as I have been told by water experts with the Bureau of Land Management (BLM). I think the motivation, though, is ultimately not good. I would ask that A.B. 329 be tabled.

Chair Kirkpatrick:
Okay. Does anyone have any questions? I guess my only question and my concern is that most of these emails were different from what the intent of the bill was and you kind of reiterated that. That is my impression. I have heard about wild horses ever since I have been here in the Legislative Building. It is always an issue, every session. In Natural Resources, it always comes up. I guess I am having a hard time understanding what our other options are as far as the federal government giving up some of their water rights to help with the process. They are a natural beauty within our state, so what is the federal government's responsibility to help with some of the waters that are already very scarce?

Dorothy Nylen:
I guess I am trying to understand exactly what it is you just said. Certainly, Nevada does have scarce water resources and by Nevada state law, I think that Nevadans are claiming all or most of those water resources.

Chair Kirkpatrick:
I am trying to understand what your concern is. It is my understanding, based on the federal act that was passed, that the federal government sets aside water for the wild horses. We are just clarifying that so that they give us those water resources. I am trying to understand. I do not think they ever are going to leave our state because they are very beautiful animals that run wild. I believe that by doing this it puts more pressure on the federal government to give us additional water for those particular animals. Is that not your understanding?

Dorothy Nylen:
No. That is not my understanding.

Chair Kirkpatrick:
Okay. Maybe you could start over then, because I am way confused. Explain it to us because if I am not getting what the act does, and this definition, then I am sure the rest of my Committee is in the same boat.

Dorothy Nylen:
When I attended the various meetings of the Feral Horse Committee, the intent that those members had was in having wild horses removed. They were using this water language toward that end. At the first meeting, in Fallon, they would not share their information with us, and they were found guilty of breaking the public meeting law as a result. This language has been somewhat cleaned up, but the intent, to me, is clear.

Chair Kirkpatrick:
Ms. Nylen, it might be best if you did go ahead and read your letter, specifically. It is only about three paragraphs long. Maybe the Committee could get the gist of it.

Dorothy Nylen:
Okay.

> Honorable committee members, as a wild horse advocate and a Nevada citizen for a rural county, I want to voice my opposition to A.B. 329. This bill seeks to remove the water rights of wild horses and their very right to exist. It appears that the actual intent is to bring forward an issue of conflict between states' rights and federal rights regarding water. Wild horses and the ugly vision of inhumane treatment and suffering seems but a pawn in a larger game. The bill is ill conceived and should be tabled. A.B. 329 is not about horses, it is about a struggle for water in the West and no state in the West has wielded more power over water, on public lands, than Nevada. As such, the only purpose served would be to embroil an already economically struggling state in a lengthy and costly legal battle with the federal government.
>
> In 1971, the United States Congress mandated that wild horses have special status and protection. Today, public interest in wild horses is again very high. Recently, the House of Representatives voted to withhold funding to the Bureau of Land Management for continued roundups until the concerns of the American people and

the scientific community are addressed. More wild horses are in holding than in the wild, at great cost to taxpayers. Properly managing them here would not only be far more effective but would bring more jobs and money to Nevada.

Twice it has been proposed in the State Legislature to make wild horses the co-state animal of Nevada along with the bighorn sheep—in 1971 and most recently in 2001, when the bill passed the Nevada Assembly almost unanimously. The year 2006 saw the minting of the Nevada state quarter, which featured, by a vote of the citizens of the state, wild horses. The Nevada quarter received international awards and was voted the second best coin design of all the states and territories—a ranking that Nevadans can actually be proud of.

Regarding the proposal for a wild horse sanctuary in Elko County by Madeleine Pickens, who has purchased ranches there, I cannot understand the Wildlife Commission's continuing stance against it. Western independence and ingenuity? What happened to those values? While her original proposal lacked proper detail, I believe she has learned her lesson. If she can play by the same rules as other ranchers in Nevada, the project should be welcomed.

Chair Kirkpatrick:
Okay. Thank you. Mr. Anderson, you had a question.

Assemblyman Anderson:
Thank you, Madam Chair. I am glad you referenced the 1971 wild horse law. I think there is so much federal legislation out there on multiple use requirements, beneficial use requirements, including wildlife, that I do not see how, by us doing this, that wild horses would be affected. Would not the federal government have to use the water that it has appropriated? Would they not have to use that water for the horses, whether this change goes through?

Dorothy Nylen:
Because I did attend those meetings and heard the discussions by the Feral Horse Committee, I know that they made comments like, "the horses have to go." I asked questions, especially in that first meeting in Fallon . . .

Chair Kirkpatrick:
Can I just bring us back to where we are, though? None of us were at those meetings and it is "he said, she said." Can we get back to the merits of the bill? If it is me, the hard part that I have in understanding is that the federal

government owns 75 percent of our land. They have some water rights. I am confused. If you could maybe elaborate on that as opposed to going back through those particular meetings, that might be helpful.

Dorothy Nylen:
It was my impression that the federal government had no water rights in the state of Nevada because of Nevada water law.

Chair Kirkpatrick:
Okay. Does anyone else have any other questions? Mrs. Benitez-Thompson.

Assemblywoman Benitez-Thompson:
Thank you, Madam Chair. I do not know if my question is specific to Ms. Nylen, but it would help me just for clarification. When we talk about the federal water reserves, is that all the water on the federal land in the state? I need some background there.

Chair Kirkpatrick:
Why do we not do this? What I feel is happening here is that we are not getting our point across. So maybe we can hear from the other two ladies and see if that helps the Committee a little bit better. Here is what I am going to tell you. We are already working next Thursday night from 6 p.m. to 9 p.m. We can go from 6 p.m. to midnight. I have no problem with that. But if we do not get through these bills, we are going to be here for as long as it takes. I am not sure, Ms. Nylen, that we are getting specifically the points. What I did not want to point out is that out of all the emails we got, there are two separate form letters. Somebody copied and pasted and signed different names. I really would like to try and get to the points of the specifics. The deal in this Committee is that nothing moves the same day so that you have an opportunity to get with Committee members as we go forward. So if the other ladies would like to testify, that would be helpful.

Carrol Abel, President, Hidden Valley Wild Horse Protection Fund:
I also had a letter (Exhibit F) that I emailed in yesterday and I brought copies today. You may or may not have them. I do not know. I will go over my letter but prior to doing that, I would like to take a stab at answering some of the questions you were asking. In regards to the water that is available for the wild horses, the wild horses are kept in what is called herd management areas (HMAs). Virtually all of the lands on which these HMAs sit are on grazing allotments that are put out there for livestock production. These grazing allotments have the water rights, in most cases. I am no expert on water law, by any means. I am reviewing my understanding of the situation. In order to have water, in most cases, for the wild horses, the BLM needs to have the

water right. They need to get permission from the State Engineer to have water rights for them. I believe they currently have, as of yesterday, 28 water rights in which they actually have wild horses listed as the purpose for these water rights. At some point, they need to renew the water rights or reprove the beneficial use of this water for the wild horses that are listed. It is extremely important that the wild horses be allowed the water within the state. The federal government does not have blanket ownership of water rights within our state. Just because it is on federal land does not mean they have the water rights for that land.

I hope that answered some of the questions. Again, I am not a water expert, but you have had some questions that I am definitely going to find the answers to. In regards to my comments that I had prepared, I will review it rather than reading verbatim. My point that I was making is that we call the mustangs feral, wild, or free roaming. Those are the words that we use. Unfortunately, the laws that we have in this state pertinent to the wild horses are almost as varied as that. *Nevada Revised Statutes* Chapter 569 defines the wild horses as feral livestock. *Nevada Revised Statutes* Chapter 501 defines them as wildlife. Under that definition, they are "part of the natural resources belonging to the people of the state of Nevada." Yet, when you go back to NRS Chapter 569, the statute says that they are owned by the State Department of Agriculture. Our laws are a mess. They are a total mess when it comes to the wild horses.

To further confuse the matter, the wild horses which are on federal lands are not specifically livestock or wildlife. Now, someone looking to throw another inconsistency into the Nevada laws, if we add A.B. 329 to the statutes, then we are saying that wild horses can indeed be wildlife unless they want to drink water. Wild horses and burros need to be managed but how are we going to manage them if we cannot even decide what they are? We have so many inconsistencies in the law.

It seems to me that the details of all the bills that we have heard, need to have a very clear and succinct purpose. I propose to this Committee that A.B. 329 is nothing more than a magician's sleight of hand. It is incremental legislation furthering the agenda of a very select segment of our population—that segment being the holders of the numerous grazing allotments on public lands. Its purpose is to provide that fraction of Nevada's population the means with which to bring legal action against the federal government for those water rights. I would like to quote from a document entitled, "Nevada Water Rights Fact Sheet," published in 2001, by the Bureau of Land Management. It says, briefly, that the relationship between the BLM and the state of Nevada can be characterized as strained. And that was from 2001. That statement is relevant

today, as we speak. It most definitely is relevant. If we choose to allow our Attorney General's Office to wage a private war against the federal government, it could very well tie up that office for four or five years. And that is what could happen if litigation occurs. If this bill is passed, there will most definitely be litigation. I would bet my left arm on it. And there will be a lot of it because it basically means that the wild horses will have to be removed. I think what Ms. Nylen was trying to refer to when she was talking was the letter that came out at the beginning of this year by the Feral Horse Committee, which was speaking of the water rights also.

Chair Kirkpatrick:
That would be helpful if we, maybe, had a copy of that letter.

Carrol Abel:
I made a note on that. I will get a copy of that to everyone. It states very specifically, in regards to those water rights, that because of the fact that the wild horses are not classified as wildlife that the federal government needs to remove all the wild horses off of federal lands within the state of Nevada.

Chair Kirkpatrick:
Thank you. Does anyone have any questions? Mr. Munford.

Assemblyman Munford:
Thank you, Madam Chair. I must say that I feel you ladies are strong advocates and have a great deal of compassion for horses and maybe the wild horses, also. I agree with you on that score. I have compassion for them, also. You are talking about the federal government, the Department of Agriculture, and then the water rights for the individual, and making the water available for the horses. Is it possible for them to equally coexist? Is there something that can be worked out? Who is the good guy and who is the bad guy, sometimes? Is the federal government the good guy in this or is it the bad guy? The water rights guy who wants to protect his water, is he the good guy? I know it is hard to distinguish because they both seem to have a pretty good argument, to some degree. I do not know. I get confused a little bit on that. What do you think?

Carrol Abel:
In regards to the good guy, bad guy, I think all of the stakeholders involved in wild horses do agree on one thing and that is that the wild horses have been mismanaged horribly for a long time. In regards to the water rights issue, I do not know if there is a good guy or bad guy. I believe that everyone has a right to protect their livelihood, and I believe that this is what this is about. But when you are protecting your livelihood to the detriment of others, then that

is a point at which I believe it has to stop. I believe that some sort of compromise needs to be reached, and I also believe that this is not the method.

Assemblyman Munford:
You should be able to equally exist?

Carrol Abel:
I agree with you.

Chair Kirkpatrick:
Okay. What I want to do is keep this on the same page because the one thing I have learned in this state is that folks will fight over water all day long and agree to disagree. We have some offline time. We are going to take a 10-minute break once this bill is done, so I am more than happy for you to speak to Committee members. Mrs. Bustamante Adams.

Assemblywoman Bustamante Adams:
Yes. Thank you, Madam Chair. Can you repeat the NRS that you quoted on the definition for the horses and where you found the inconsistencies? You said it was Chapter 569.

Carrol Abel:
Nevada Revised Statutes Chapter 569 defines the horses as feral livestock. Within the state of Nevada, horses that are not on public lands are managed by the Department of Agriculture. The laws that govern that management are in NRS Chapter 569 and in that chapter they are considered livestock.

Assemblywoman Bustamante Adams:
I am looking at NRS 569.008 and it reads that the term does not include horses or burros that are subject to the jurisdiction of the federal government pursuant to the Wild Free-Roaming Horses and Burros Act of 1971. I got kind of confused when you said that because, to me, it defines that the jurisdiction for these horses, wild horses, are for the federal government. This is all new to me and so I am having a hard time understanding the bill. I am just trying to wrap my arms around it. To me, the way that the statute reads, it is very clear that horses and burros are not included. But that is just my understanding.

Carrol Abel:
I am not quite sure if you are asking a question.

Chair Kirkpatrick:
I am going to have my Policy Analyst do it. I think she will have an answer.

Susan Scholley, Committee Policy Analyst:
I think that perhaps the confusion here is because there are actually two classes of wild horses in Nevada. There are wild horses which are on federal land and there is a herd called estrays, which is managed by the State Department of Agriculture. Those are primarily around Virginia City, in Storey County. That, I think, is where the confusion is coming in terms of who is managing which herd. The Department of Agriculture, for the state, manages the estrays. The federal government is responsible for wild horses and burros on federal land, which, of course, is the vast majority.

Chair Kirkpatrick:
Thank you, Ms. Abel. We appreciate it. Would you like to go ahead?

Sheila Schwadel, Private Citizen, Fish Springs, Nevada:
I would like to mention that I am a real estate broker and I have been involved in sales of properties with water rights, and I fully respect and somewhat understand them, as they are quite complicated. I just wanted to mention that last month I happened to attend the Douglas County Wildlife Advisory Board Committee meeting, of which Mr. Michael Turnipseed, the former State Engineer, is a member. I brought to their attention a copy of the original Senate Joint Resolution 5 which was a precursor to this bill regarding . . .

Chair Kirkpatrick:
We have not seen that on this side yet. I honestly could not tell you what is even in it.

Sheila Schwadel:
Okay. Well, in a nutshell, it came down to the definition of wild horses and water rights and is very, very similar to what this proposed bill is (read from Exhibit G). Mr. Turnipseed actually stood up and said that the Wildlife Division really had very little business rewriting any type of definitions into the state water laws, and he thought it was purely a matter for the State Engineer's Office to take up if they so warranted it. He asked that the Douglas County Advisory Board put on record a letter opposing it. He felt that this was not an issue that should be brought by any type of wildlife commission, which was, originally, where this bill stemmed from.

We had a community meeting out in Fish Springs, which borders an HMA. I did explain that this was a matter of legalese between the federal government and water rights in the state of Nevada. Most people, the public, are seeing this as an attack on wild horses, rather than an issue between adjudicating water rights between the state and federal government. Maybe it would behoove the state to pick and choose their battles on this because this is going out nationally.

You are talking about 13,000 horses. That is not a lot of water. Let us pick and choose our battles and use them wisely. I think that is what Mr. Turnipseed was getting at. Thank you.

Chair Kirkpatrick:
Thank you. Could you have Mr. Turnipseed . . . is he here today? Can he testify to that fact?

Sheila Schwadel:
No. But I could probably get you a copy of their minutes, if you would like. I will submit those.

Chair Kirkpatrick:
If he could submit a letter based on what you said, that would be more helpful.

Sheila Schwadel:
Absolutely. I will ask him.

Chair Kirkpatrick:
I have more minutes than I need at this point. I do not need any more. Does anyone have any questions? Thank you, ladies, very much. We appreciate your coming forward. Is there anyone who would like to testify in opposition to A.B. 329?

Bonnie Matton, President, Wild Horse Preservation League, Dayton, Nevada:
I am going to have a show and tell to give you a little different feeling and aspect of this issue (Exhibit H). I have been asked about this from many people and they ask, "What will happen if this occurs?" I tell them, "You know, to not let wild horses or burros in Nevada's waters would mean that the opposition would have to fence out all the water, all rivers, all the streams, all the lakes from the wild horses." At the same time, they would be doing it for livestock. This is such a ludicrous bill. These horses mean so much to all of us. I know they are saying that the BLM has all that land, 85 percent. They do not have control over the water.

I just want to show how much these horses mean to people in the state and to other states and in the world. I am going to quote from Mr. Christian Passink, who is a rural programs manager for the Nevada Commission on Tourism, where we have gotten grants to publish our brochure, which you have. He said that the *Nevada Magazine* issue featuring the wild horses of Nevada had the highest sell-through rate of any *Nevada Magazine* issue. That issue had a record sell-through rate of 85.4 percent. Most magazines of this type usually see a sell-through rate of 25 to 30 percent. The magazine also received a top

placement on sales display shelves, something you cannot pay extra for, even if you wanted to. Out of 11,000 copies printed, they sold over 8,800. This is the most issues sold of any one magazine in 32 years.

The Nevada quarter, which I am sure you all know, was voted on by the citizens of Nevada to have the wild mustangs represent our state. At the same time a medallion was issued about the wild horse. Now, equine tourism is being used so much in other states.

Chair Kirkpatrick:
Ms. Matton? I love your accessories you brought but I do not think, and I do not want to speak on behalf of the Committee, but I do not think anyone is opposed to wild horses. I guess I am trying to understand. Using my own family, when we drive to Nye County, we specifically know where they are at when we are going to the fair they have for Harvest Day. I do not think anyone is opposed to wild horses.

Bonnie Matton:
Let me try to clarify. Basically, what I am saying is that there is no way to keep the wild horses and burros of this state from watering without removing them. That is the only thing that this bill will accomplish. They cannot fence off the wild horses from water because they would be fencing off livestock and wildlife. The only way to do it would be to remove all the wild horses and burros. What I am stating and showing with my examples is that these horses are extremely important to the welfare of the state of Nevada. Equine tourism is very strong in the world today. I get calls, emails, and letters from all over the world asking, "Where can we see the wild horses?"

This magazine is from Wyoming. They are showing how people can see the wild horses. Other states, such as South Dakota, are doing the same thing. Nevada is the only state—the Nevada Commission on Tourism is the only one—that has come through regarding this. We put out these brochures and we have gotten grants because they firmly believe that this can help the state of Nevada. With the passage of this bill, there will be no wild horses in the state of Nevada for us all to enjoy and where we could get income coming in from them.

Chair Kirkpatrick:
Mr. Goedhart.

Assemblyman Goedhart:
Thank you, Madam Chair. I think I would reiterate and kind of continue on along your path. I do not see how this bill is going to prevent wild horses from access to water. It just says they have to have an adjudicated right for that

purpose. I think if we talked to the bill's sponsor, he would also weigh in on that subject. This bill does not outlaw water for wild horses.

Chair Kirkpatrick:
Are there any other comments? Mr. Ellison.

Assemblyman Ellison:
I agree with my colleague. That is not what this bill is about. This bill is about the ranchers and everybody else having to stand by the letter of the law. So should the federal government. I think that is what this is all about. I think if you had a few minutes and sat down with the sponsor of the bill you would find out that all they want to do is bring everyone to the table. You might want to look at this. They are not trying to make horses die out there on the range. That is not what this is about.

Bonnie Matton:
I am sorry. But I do not agree because I think, in the long run, this is about water.

Chair Kirkpatrick:
That is why we have a legislative process, so folks can agree to disagree. Thank you, Ms. Matton. Is there anything else from the Committee? Okay. Is there anyone else who would like to testify in opposition? Mr. King, you probably will not be my friend anymore after I do this to you, however, can you come up, being that we heard from a former State Engineer? I would love to see that letter from him. Can you give me a perspective from the current position that the State Engineer's Office has? I get that it is a complicated issue, but I am having a hard time understanding when over 80 percent of our lands belong to the federal government why we would not want them to participate in making sure that these horses are taken care of, as well as keep our state going forward. If you could help me out a little bit, it would be most appreciated.

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources:
I will try. As you said, it is very complicated. First, to address the issue with Mr. Turnipseed, who I have the utmost respect for—I can see Mr. Turnipseed saying what he did simply because he does not believe the Department of Wildlife should be telling the Division of Water Resources what to do. So, in that context, I can understand him saying that. Having said that, much of the discussion is what water rights does the federal government have? And that is the complicated issue. I will tell you this. When the federal government sets aside public land—and as we have already discussed,

80 to 85 percent of the land in Nevada is public land—they also can and have, probably over 1,000 times, filed what is called a federal reserved right. Those are claims of water use. The idea is to establish that water right that they file on, and eventually it has to go to adjudication. Eventually, it has to get to a court. The short answer to much of this discussion is, it is an unanswered question. It still has to be resolved by the court. But, there are probably over 1,000 federal water reserved rights on public land and they can assert that the purpose of reserving that land, all those acres, can be for multiple uses. Now, I do not know if they will win in adjudication, saying that they have reserved all that land for support of wildlife. If they do, and they have the water, the surface water—because we are not talking about groundwater, we are talking about springs, creeks, and rivers—then they would have the ability to say that the wild horses are allowed to legally drink all that water, under this reserved right. That was kind of a complicated way of saying they have filed reserved rights and we know about them; until we adjudicate them and a court gives us a decision, we do not have a final answer on whether or not those wild horses are entitled to that surface water, under those reserved rights, until they are adjudicated they exist as a right, in our office. Practically speaking, we are not going to do anything about it. They are out there drinking the surface water rights and there is a claim by the federal government to do so and we are not going to do anything about that.

Chair Kirkpatrick:
Thank you, Mr. King. Are there any questions? Mr. Anderson.

Assemblyman Anderson:
Thank you, Madam Chair. Thank you, Mr. King. To be clear, if the federal government does have a water right, and we will say that everything is kosher and everything is legally fine, there is a requirement from the federal government's perspective, because of federal law, to take that into account for their decisions when they are managing the range. Correct?

Jason King:
If I followed your question, the answer is yes, that is true. Again, there has been some discussion here. Certainly the BLM has a large responsibility for the management of these horses. We are talking about the watering of horses, which, obviously, you have to have. But there are also other components to the wild horses. There are people in this audience who are much more versed in this topic than I am. But, I understand what the issues are. There is a set amount of water to support a set amount of horses and then, if all of a sudden, there are more wild horses, then perhaps water is not so much the issue but the management of that. I am trying to distance myself from that whole scenario,

but I am just telling you that there is X amount of water. It is incumbent on the federal agency overseeing those horses, which they do not over use the water.

Chair Kirkpatrick:
Are there any other questions? Mr. Stewart.

Assemblyman Stewart:
Thank you, Madam Chair. There would be no way that the state could keep wild horses from streams or rivers or watering holes at any time. Is that correct? It would be impractical to fence off access to free flowing water. Is that right?

Jason King:
Yes, Mr. Stewart, that is true. It would be impractical for us to do that.

Chair Kirkpatrick:
Are there any other questions? Mr. Goedhart.

Assemblyman Goedhart:
I have just a follow-up question to my colleague from District 22. The only time I have ever seen the government actually fence out horses or burros from watering areas has been in the Beatty area, where they were trying to go ahead and protect the habitat for the Amargosa toad. In that case they had seen that the wild horses and burros were actually disrupting that native environment for that protected species. That is the only time I have ever seen the government folks fence out the burros or horses.

Chair Kirkpatrick:
Thank you, Mr. Goedhart. Mr. Livermore.

Assemblyman Livermore:
Thank you, Madam Chair. Does not the Department of Wildlife manage springs and these . . . I cannot remember what they call it when they make these water and stock areas for wildlife. There is a common slang for what it is. In some cases, I have seen where they fence springs to protect them but do not fence it off to the extent that you cannot drink the water from the spring. I think there are efforts to make sure that wildlife, including horses, has access to water. I think that is something the Department of Wildlife is doing, which is not in your department. I have seen that before, myself, though. Can you respond to that?

Jason King:
I need to be clear. Certainly, springs have been fenced off, only for the purpose of preventing the animals from coming in and just tearing up that spring source right there. However, they will fence it off, but they will actually transport the water, whether it's in a pipe or a flume or whatever. They will transport it outside that fenced area, in order for the animals to get to the water. But, yes, they will fence it off just to protect the spring itself.

Chair Kirkpatrick:
Thank you. Does anyone else have any questions? Mr. Ellison.

Assemblyman Ellison:
Do you see anything in this bill that is damaging? I am looking at this and think it is a good bill. You have not said if you were neutral, for, or against. Do you see anything in this bill as damaging?

Jason King:
Thank you for the question, Mr. Ellison. My testimony is that we are neutral on this bill. I was further going to testify that it is my understanding that if it were to go forward, it would be prospective and it would not affect any of the 33 water rights that we have already issued to BLM for wild horses. And we offered one minor amendment.

That is just a tough question, Mr. Ellison. Both sides are so passionate about it. I really have to remain neutral.

Chair Kirkpatrick:
Is there anyone else who would like to testify as neutral on this bill? Is there anyone who is in favor of this bill and would like to come forward? Please come forward.

Ron Cerri, President, Nevada Cattlemen's Association:
I want to make it clear that the Nevada Cattlemen's Association believes and understands that wild horses do have a right out on our federal lands. The 1971 Wild Horse and Burro Act gave them that right. As far as access goes, since 1971, with wild horses, there has not been an issue or a problem. We support this bill. Specifically, just to give the State Engineer clarity on what wildlife is, I would say that, by the BLM's actions themselves, the BLM treats wild horses differently from wildlife. At the BLM office, we have a livestock specialist. We have wildlife specialists. We have wild horse specialists. Also, when the BLM is allocating an allotment, particularly if it is an HMA, in those HMAs there is a determination of the amount of forage for livestock, there is

a determination for the amount of forage for wildlife, and there is a determination for wild horses. They treat them in a special category.

Presently, when horses are kept within the appropriate numbers or appropriate management levels (AMLs) the water issue has not been an issue. As long as there is sufficient forage and there is sufficient water, there has not been an argument. With that, I will keep my comments short. Thank you, Madam Chair.

Chair Kirkpatrick:
Doe anyone have any questions? Thank you. Good morning.

J.J. Goicoechea, Private Citizen, Eureka, Nevada:
Good morning. I want to just go back and remind the Committee of what I believe the intent of this bill is. The way I interpret this is that it is to prevent the further erosion of Nevada water law. They do have a reserve water right, as Mr. King alluded to. I would like to expand on his stating that it is impractical to fence off water. It is not only impractical; it is not what is being sought after. For the last 40 years, the horses have done fine. They have multiplied. They have had the water. In fact, of the water rights that Mr. King alluded to, only one of those water rights has a priority date prior to 1992. So, for 20-plus years, they have had access to water and everything was fine.

I would like to testify in favor of this bill. I encourage the Committee to vote in favor. Thank you.

Chair Kirkpatrick:
Does anyone have any questions? Mr. Busselman.

Doug Busselman, Executive Vice President, Nevada Farm Bureau:
We are here today to speak in favor of this bill. While I understand that the consequences alluded to are very complicated, in our mind, the bill itself is very simple. The bill says that water, for beneficial use, should apply to the beneficial use. What you are talking about here is granting the federal government a property right to water for a purpose other than what they have the beneficial use for, to use. It is that simple. This bill clarifies that wild horses are not wildlife and therefore are not eligible for the ability to grant that water right to the federal government for that purpose. It does not say anything about not watering horses. There are horses today that are drinking water without water rights. They have been and they do and they will continue to do so. This is about whether the federal government should be granted a water right for something they have not classified as wildlife. Thank you.

Chair Kirkpatrick:
Thank you. Are there any questions or comments? Thank you, gentlemen. Is there anyone else who would like to testify in support, please come forward. Good morning.

Jake Tibbitts, Natural Resource Manager, Eureka County:
Thank you, Madam Chair. Eureka County is in support of this bill. I do not want to belabor the issues that the others in support have brought up, but I would like to point out just the sheer fact that wild horses have had their number set for appropriate management levels by the BLM. The state of Nevada recognized that there is a water resource available to those horses. The BLM determined—through public vetting, through need for processes, through resource management plans, through multiple use decisions—that there is an amount of forage and water available to these horses. So that fact alone shows that the horses have access to those areas or they would not be there.

Our experience in Eureka County has been that the BLM's applications for water rights, whether it is for wild horses or livestock or whatever it is, is not a wild horse issue, it is about protecting the primacy of the state's authority over the water resources in Nevada. That is our position. Also, it should be pointed out, from my experience in Eureka County, that I am very aware of all the horse management areas in our county and adjacent to our county. I am very aware of the primary water sources where these horses water. It should be pointed out that the areas that these horses are using are water sources that have been improved and developed because of other multiple uses, primarily livestock grazing. So the waters that these horses are able to access and use currently are available in the quantities they are and have been developed the way they are because of these other multiple uses.

There was some discussion about the strained relationship between the state of Nevada and the BLM, as far as water rights. I think that is very healthy. It is part of our democratic process. We have a dual-party system in this country. We have the opportunity for both sides to give their opinion—for all sides to give their opinion. That often causes strained relationships, but I believe it keeps everyone honest. I think we need to step forth and protect the state's authority over water rights by not eroding it any further by granting the federal government more.

Chair Kirkpatrick:
Thank you. Does anyone have any questions? Thank you. Andy?

Andy Belanger, Manager, Management Services Division, Southern Nevada Water Authority:
In the interest of time, we would just put on the record that we support this bill as well.

Chair Kirkpatrick:
Thank you. With that, is there anyone else who wants to testify in support? Mr. Goicoechea, do you have any final words?

Assemblyman Goicoechea:
Thank you, Madam Chair. I will keep this very brief. I would like to go back and reflect on the letter from former State Engineer Mike Turnipseed. I think he was talking about just what this bill does. Let us separate wild horses and wildlife.

Chair Kirkpatrick:
And we are going to receive a copy of that. I will make sure you get a copy, as well. With that, we are going to close the hearing on A.B. 329.

[Several letters in opposition to A.B. 329 were submitted but not discussed (Exhibit I).]

We are going to take a 15-minute break. I am telling you that if you do not come back on time, it is not going to be friendly. If everyone would be back by 9:50 a.m., we will start on time. We still have three bills. I will see you then.

[Committee recessed at 9:37 a.m.]

Chair Kirkpatrick:
I will call the Committee back to order [at 9:57 a.m.]. We are waiting for Mr. Ohrenschall. I do want to clarify for the Committee that we are meeting next Thursday and we are going to work from 6 p.m. to 9 p.m., if we are on time and start. Hopefully, we can get quite a few bills knocked out of the way.

Mr. Ohrenschall, thank you for coming back.

Assembly Bill 387: Revises provisions relating to certain domestic wells. (BDR 48-347)

Assemblyman James Ohrenschall, Clark County Assembly District No. 12:
Thank you, today, for hearing Assembly Bill 387. It is good to be here for my second time this week before the Assembly Committee on Government Affairs. Assembly Bill 387 is about promoting ecologically and environmentally

responsible development in our state while attempting to also recharge groundwater basins. The idea for this legislation came from Amargosa Valley attorney and realtor Michael DeLee, who has a long history in the development of land and water rights. Assembly Bill 387 did not come out of drafting exactly as it was supposed to, and for that reason you should have before you a copy of an amendment (Exhibit J) proposed by Mr. DeLee. He and I have worked with the Division of Water Resources on this amendment. Mr. DeLee is at the Grant Sawyer State Office Building in Las Vegas and is here to present the bill. I thank everyone for their time and encourage your support. I would be happy to work to resolve any concerns that may come before you today.

Chair Kirkpatrick:
Mr. Ohrenschall, you did give us the amendment ahead of time. I have a hard copy but I believe, for the Committee, it is on NELIS. Are you going to turn it over to Mr. DeLee in Las Vegas and let him explain the bill, with the amendment?

Assemblyman Ohrenschall:
That is my wish, Madam Chair.

Chair Kirkpatrick:
Good morning. There is about a 10-second delay. Go ahead and get started.

Michael DeLee, DeLee and Associates, Amargosa Valley:
Thank you, Madam Chair. This bill was actually the product of several discussions with the Division of Water Resources. We first began talking to them last session. They made it clear that last session was not a good time to discuss this so we deferred to this session. I want to thank the members of the Committee for your patience in reviewing this and also the amendments. This was a difficult concept. We are the first state to be trying something like this.

We have several water basins in the state of Nevada that are overappropriated and there are a lot of concerns about additional domestic wells in those basins. Let me start by saying that this bill does not change anything about existing domestic wells. They can continue to be drilled, just as they have been in the past. This bill does provide a new category, called a conservation domestic well, so that developers can opt in for this as an alternative when they are planning their subdivisions or parceling in the future. The 2007 Session provided, under Senate Bill No. 274 of the 74th Session, that the state Division of Water Resources should approve parcel maps as well as subdivisions so that we have a heightened level of scrutiny as it applies to water resources and, particularly, domestic wells.

Section 1 of this bill recognizes that the actual use of a domestic well, on average, is about half an acre-foot. And that is why we chose half an acre-foot for the limitation for the conservation domestic well. In order to achieve that, though, we are going to require the developer to purchase one acre-foot of water and then credit the difference, one half to the well and one half to the basin. You will see that reflected in the amendment proposed to you (Exhibit K). The original version of the bill mistakenly attributed that as a credit to the developer. That excess half acre-foot goes to the basin water budget to try and bring that water basin back into equilibrium. Additionally, there will be a metering requirement. When we visited the issue of domestic wells in the 2007 Session, we adopted the accessory requirement for ancillary building for a domestic well. Under those circumstances, it would have to be metered. This simply extends that so that conservation domestic wells will all be metered and that will encourage an awareness of conservation of water in the rural areas and some segments of the urbanized areas that still use domestic wells, which could take advantage of this because they are not within a zone of the public water system.

This bill also provides in section 1 a reporting requirement. The State Engineer's Office is very progressive and is working towards an online reporting system so that people, instead of sending in paperwork, can go online. They are still working on that. We want to provide for that, in this bill, so that they can work that into their plans, as they already have it. Unfortunately, that drew a fiscal note for us and, as you will see presented to you, it is not a big fiscal note. We hope we can work through that. As you can see from the amendments, we are trying to take that out of a need for regulation and put that under the existing powers of the State Engineer's Office so that they can come up with the fees that are needed to offset the cost. Again, the incentives are for the subdivision and parceling so that as each new lot is created for developers and homeowners who want to divide their property, they can opt into a much more economical well. It takes a lot of power to pump water. Because these wells are going to be limited to renewable resources only and not line power, it is going to encourage development of our renewable resources in the state of Nevada as it concerns pumping water.

I realize we have a time frame and have a lot of bills to do, so I would like to stop there and take any questions.

Chair Kirkpatrick:
Are there any questions? I have a couple of questions on the amendment that you suggested. First, you said that people use about 500 gallons of water per day, on the average.

Michael DeLee:
It is approximately 500 gallons per day for a family of four, so that works out to about half an acre-foot per year, which is the average for a state of Nevada domestic well.

Chair Kirkpatrick:
So let me ask this because I have a situation within my district where they are currently allotted 500 gallons a day and they are struggling to do that; where in the state would that number have come from?

Michael DeLee:
I remember a study done regarding the Sandy Valley water appropriation. I think the study was actually done in the Carson City area, but it was used in a case involving Sandy Valley and some water being moved to the Primm area, *Bacher v. State Engineer*. The Division of Water Resources might be able to provide you with more details but the question was: What is the average for domestic well use in the state of Nevada? I think, both in that study, and again, in the Spring Valley hearings, it has come up to be about half an acre-foot. We want to reiterate that we are not proposing to change the existing domestic well laws which provide for two acre-feet of water. Those will still be there and if developers want to have a regular domestic well, they can go out and buy two acre-feet for every new lot. This just provides an alternative to that so that they can get one acre-foot, help the basin, and help themselves.

Chair Kirkpatrick:
In your amendment, on No. 2, it says, "Is designed for a water flow of less than five (5) gallons per minute." I thought the code read that it was six gallons per minute. Where did that number come from? I only ask because my husband is a plumber, and I have heard that six gallons per minute for the last seven years, so I have never heard him talk about five gallons.

Michael DeLee:
The number we initially set was at one gallon per minute. I should describe a little bit how this system typically works. Most domestic wells pump directly into a pressure tank to serve the dwelling. The domestic wells which would be envisioned here operate, like some domestic wells do now, in that they pump into a cistern. It typically holds several thousand gallons or can be a large 2,500-gallon holding tank. A separate pressure pump pumps from that cistern. So the actual well pump has very low flow and takes water at a very low rate during the time that power is available. If it is solar, then power is available when the sun is shining or if it is wind-powered, when the wind is blowing. From that, a pressure pump would provide water at whatever rate is required in the system, which in some cases would likely exceed five gallons a minute.

We initially started with one gallon per minute, but there were some questions from people we were working with in northern Nevada who thought that was too low, because the sun does not shine all that much or the winds could be variable. I hope that answers your question.

Chair Kirkpatrick:
Do the Committee members have any other questions? Let me ask this question. This says, "A pump is installed." What happens in a current scenario where someone already has a domestic well and they have to replace the pump? Are they going to be required to follow these new guidelines? I know it says "may" in here, but it appears that we are trying to change the code. I am curious.

Michael DeLee:
I want to reiterate that this does not disturb or change any rules regarding domestic wells under NRS 534.180. It adds an entirely new category called a conservation domestic well for new wells. It envisions this applying to developers or homeowners who are dividing their properties to sell off their lots and then putting in new domestic wells. They can choose this if they want to. Some of them will not. Many of them will opt for the existing domestic well requirements which, in many cases now, because of S.B. No. 274 of the 74th Session, require two acre-feet or, in some cases, more in certain counties, to be purchased and then relinquished to the basin. This just provides an alternative to that. It does not disturb the existing domestic well regime at all.

Chair Kirkpatrick:
Let me go a little bit further because we are still on the first page of the amendment which you are talking about. The incentive for the developer is what, to do this?

Michael DeLee:
Right now, developers, as they split lots, either through a subdivision or a parcel map process, have to acquire water rights and dedicate them to the basin for each new lot which is developed. For example, if a parcel map is proposed to take one parcel of 10 acres and make two or four 2.5-acre lots, that would mean there are three additional parcels. Under the existing requirements, in most cases they would provide a total of 6 acre-feet of water in order to get those three new parcels. This would provide an alternative where they would be able to acquire 3 acre-feet of water for a conservation domestic well. Each well would only be allocated half an acre-foot, so 1.5 acre-feet total for the wells. And then the balance, 1.5 acre-feet, would go directly to the basin water budget to help bring the budget back into equilibrium in our overappropriated basins. The incentive for developers, to answer to your question, is that you

are getting those three extra lots for 3 acre-feet, not 6 acre-feet. For the same money that you would go out and buy water rights, you can do twice as much and hopefully put that money towards the equipment in the wells.

Chair Kirkpatrick:
So basically we are allowing for less water rights in order to get their project developed. Is that correct?

Michael DeLee:
That is correct. Less water, more land, but everyone wins.

Chair Kirkpatrick:
Okay. I do not want to monopolize the microphone for the Committee, so if anyone has any questions, just ask. Ms. Pierce and then Mr. Goedhart.

Assemblywoman Pierce:
I am a little confused, so let me see if I understand this. You have a basin that is overallocated. A developer wants to develop. What he is saying is that a conservation well gets created and gives back half the water to the basin and then what the developer develops, each house, uses less water. Do I have that right?

Chair Kirkpatrick:
Mr. DeLee, did you want to elaborate on that?

Michael DeLee:
Yes. That is exactly correct. We would be providing that, on an equal measure for each new well, under the conservation domestic well program, half the water goes to the basin and half goes to the well. So the more wells we get, and the more people that choose to opt into this, the better it is going to be for the water basin itself. It requires people to know in advance that they are going to have very low water use. They are going to be average. But they are going to have to commit to that and they are going to have to report to that. There will be people who do not want that. And we realize that. But there are probably a lot of people who are comfortable with that and we would like to have that as an option.

Chair Kirkpatrick:
Okay. Mr. Goedhart.

Assemblyman Goedhart:
To the bill's sponsor, Mr. DeLee. I appreciate what you are doing here but to also fall underneath that definition of conservation well, does it also have to be strictly only powered by renewable energy?

Michael DeLee:
The intent of the bill is to encourage use of renewable energy. One of the ways of doing that was to limit the power source for the well and the pumps in the well. Also, because of the sizing requirements and the expense for installing, for example the solar power system, it would not make sense for someone to install a pump that they knew was going to exceed half an acre-foot or be larger than 5 gallons per minute, at the very beginning. Whereas, if it were line powered, it would be easy for someone to just leave the power on and pump too much water. So we were hoping to get a double benefit. First of all, make it very difficult to exceed the half acre-foot because of the additional expense that would be required for a renewable energy system and, secondly, to encourage the use of renewable energy to pump water in Nevada.

Assemblyman Goedhart:
So, in other words, you are saying that, yes, to qualify as a conservation well, it has to derive its power solely from a renewable energy source. Is that correct?

Michael DeLee:
Yes. That is correct.

Chair Kirkpatrick:
Mr. DeLee, I have only ever seen one study and it was not from this state, and it said you could easily survive on 500 gallons a day; but within that study it said no lawns. You have to conserve a lot of different things. Where in other parts of the country do they do this?

Michael DeLee:
I did not look to other parts of the country for coming up with the half an acre-foot standard. That was a number which I used from the State Engineer's own rulings in both the Sandy Valley decision—that eventually became the Supreme Court *Bacher v. State Engineer* case—and the ruling in Spring Valley, which you may remember from the special session, that addressed some of those issues after the Supreme Court made a ruling. In both cases, the State Engineer had assigned an actual number of half an acre-foot for what domestic wells actually used in Nevada. As far as what happens with water rates in other states, certain states, such as Utah, require a water right for all wells, including domestic wells. In a sense, we are a little bit more forgiving than Utah. We can look and see what they have for their actual usage

requirements. This just builds upon that. To answer your question, the numbers actually come from Nevada, and I did not pull from other states.

Chair Kirkpatrick:
My other question would be, because most of our energy efficient water appliances are to the six-gallon standard, is it going to make a difference having the pump be at five gallons in order to get that water through someone's home?

Michael DeLee:
The pump would be pumping at a low rate, it could be five gallons. We certainly could change it to six. The number is not that important as long as it is a fairly low number and not the 20 or 30 gallons a minute that might be associated with the typical domestic well pump. The idea is that we want this to be a low flow pump and pump into a holding tank of some sort. Then a separate pump, which itself would be much more efficient for the purpose of providing pressure to the home, would pump at a higher rate just for that purpose. The two pumps would each have their maximum efficiencies, one for providing pressure to the home and one for lifting water out of the ground, instead of one pump that has to draw a middle ground to do both—the water lifting and the pressuring—and not achieving as much efficiency. We are going for maximum efficiency, as well as being renewable, on the well side only.

Chair Kirkpatrick:
If I am to induce here, I apologize, but I am just trying to understand. Remember, I am married to a plumber, so that is our topic at the dinner table, whether we want to hear it or not. But, what I do not want to happen is to have a pump that is set at one flow and then, as the homeowner uses the appliances within his house—which I think the current code is six gallons per minute and I will use a toilet as an example, of six gallons for the flush—that he does not have enough water pressure to actually utilize that. I just have never seen or heard the five gallons per minute. I can tell you that when Leadership in Energy and Environmental Design (LEED) was a big piece of discussion for this state and they went to the waterless toilets, they did not necessarily work. It sounded good. But it did not necessarily work for the people who were actually using them. I am just trying to clarify on some of these numbers because, in the past, we have picked numbers out of the sky and they did not necessarily work, and yet folks were then stuck into a situation. I just am trying to clarify some of that.

Michael DeLee:
Madam Chair, a six-gallon limit would be fine.

Chair Kirkpatrick:
Mr. Goedhart.

Assemblyman Goedhart:
Mr. DeLee, say you were a hypothetical developer and you have a 40-acre parcel, I do not think you are required to retire water rights to the state with a parcel map, unless it is under 4.5 acres. Is that correct?

Michael DeLee:
The requirements differ. The county has adopted certain requirements; the state has an overarching requirement for S.B. No. 274 of the 74th Session. Nye County, for example, has the 4.5 acre requirement that you are referring to, but that is different in other parts of the state. This bill proposes to allow a one acre-foot requirement for certain circumstances, and it would apply in the situations where you are required to retire water rights. If there are circumstances where you are not required to retire water rights, then, naturally, people would not go through that expense.

Assemblyman Goedhart:
I think that also. To get to the Chair's question about matching the output of the well to the flow rates of the different appliances, I think, in your case, what you are talking about is actually having that well pump into a large cistern and then from that cistern, which could be 1,000 or 2,000 gallons, you have your pressure pump there. Theoretically, you could have a well that only puts out 3 gallons a minute but you could be using 20 or 30 gallons a minute from your cistern. The output to the house could be different from the output of the well to the cistern. Is that correct?

Michael DeLee:
Yes. Thank you for the clarification. That is correct.

Chair Kirkpatrick:
Okay. Did you want to go through the rest of your amendments (Exhibit J)?

Michael DeLee:
I think we are on amendment No. 4. We did not want to saddle the Division of Water Resources with any additional work. We appreciate that they are already overstressed as it is. We wanted to allow them to set these fees, if and when they choose to. That also ties into amendment No. 5. We do not think we should be requiring them to do it through the regulatory process. They have some existing statutory authority under NRS 533.435, subsection 2, which allows them to recover costs that are not elsewhere specified in the statute. We thought that would be an easier and friendlier way to allow them to do this,

possibly minimizing the fiscal note, which you will probably hear about in the future. In amendment No. 6, we wanted to make sure the well credit programs are not disturbed as they relate to providing water rights credits for people that go off of a domestic well and into a public water system. That is a carefully balanced regulatory scheme that has taken a lot of work to figure out, and we did not want to put ourselves into that mix and wanted to just stand alone for the time being. Finally, on amendment No. 7, we wanted to clarify that this does not impact the Nevada Administrative Procedure Act because, in section 5 of the bill, we are not going to require regulations and we can say for another day whether we should be doing anything with the Administrative Procedure Act. We did not want to use it as part of this bill.

Chair Kirkpatrick:
Are there any questions from the Committee? Mr. Ellison.

Assemblyman Ellison:
I have a couple of small questions. Firstly, the added cost. Do you have a feel for how much this will run, to put in the domestic wells and the pumping and the energy saving pumps? Do you have any idea what this is going to run?

Michael DeLee:
I do not have any hard figures on that. I was hoping to have for you today an individual from Reno who actually has that information. He could talk about the specifics of that, but he was not available for us today.

Assemblyman Ellison:
The other thing was about fire protection. You might fill the bladder of the tank, but once that bladder is out, there is no way this pump can keep up with fire protection for a house or structural fire in a small area that might be on a 40-acre parcel. You want to address that?

Michael DeLee:
My understanding from talking with volunteer firemen is that the first thing they do when they approach a property that has a fire engaged is that they disconnect the electric power. This actually might work to benefit such residences because then there is a 2,500 gallon cistern there that they could pump from instead of taking 20 to 30 gallons a minute from a domestic well that might be disconnected from power. When it comes to fire protection, we think this is actually a benefit.

Assemblyman Ellison:
All rural areas are supposed to have a fire protection circuit breaker that goes on the opposite side of the meter that gives power. If you turn off the main power, you still have power going to the pump. That is part of the fire code.

Michael DeLee:
That is good thinking.

Chair Kirkpatrick:
Does anyone else have any questions? I have two more questions. I apologize, but I am the question queen today. Let me ask you this. I get that there are overappropriated basins. What happens if you put those water rights back into that basin? What is to guarantee that they will not get reallocated? My other concern is what happens if each homeowner is allocated 500 gallons a day and originally the homeowner moved intentionally into this neighborhood knowing that it is energy free and water efficient. I think you would have to have all those things in there in order for it to work, personally. What happens if they overuse the 500 gallons a day? How does the State Engineer enforce that, and is there a potential problem if someone else moves into it?

We can all admit that we do not read our deed restrictions very tightly. What happens in the future if you deteriorate the 500 gallons? What is the problem with that? I can see big problems. I am wondering how we enforce it and what happens if everyone uses more than that. On another note, I would tell you that at different times of the year, people use different amounts of water within their home. For instance, if I have all my kids home for spring break from college, I am going to use a lot more water than if it is just me and my husband. Is this an average for the day or is this an average for the year? How does that work?

Michael DeLee:
There are three questions and I will try to answer all of them. First of all, taking the last one first, back in 2007, the state clarified the difference between 1,800 gallons per day, for the domestic wells, that we have and still have and clarified that as two acre-feet per year, for exactly the reason you mention because it does vary with times of the year as to how much you are going to use. The draft is now annualized over two acre-feet a year. The same would apply here. It is half an acre-foot per year. The daily amount is not something that we would have in the statute.

The question about enforcement, as with any water right or anything relating to water resources, the State Engineer has the primary enforcement powers for that, and their powers were enhanced a few years ago when they adopted

some regulations to handle that. They are typically pretty gentle in reminding people that they need to follow the rules, but they do have the powers to get less than gentle, if they need to. This would be no different than anybody with a domestic well that would be exceeding the draft for domestic wells that exists now throughout the fee year or using water without a permit or any other matters relating to wells and water. It is the State Engineer's authority to handle that, and that is contemplated in a section of the bill towards the end.

Your first question was on the reallocation of water. I would point out that half an acre-foot per well is not going to do a lot for some of our water basins, but it might help and it will certainly move it in the right direction as that water is returned to the basin and the water budget is corrected. If we ever do reach equilibrium where additional water rights could be appropriated, they would be appropriated as they would under any other situation on a first come, first serve basis. It would not be tied to any particular water right which is relinquished; it just goes back to the basin to be managed with all other water in the basin.

Chair Kirkpatrick:
Okay. Let me ask one more question. I get that the State Engineer's Office does have that ability; we did that last session. We increased the fines for people that are overpumping. However, people are still overpumping. It is a process that we put into place that gave due process to the homeowner or the property right person, at the same time. It does not happen very quickly. It takes a couple of years. We also made sure that within the law that we could work with folks so that they would not be fined right away. They had to make strides to move forward to make these amendments. I just am having a hard time on the 500 gallons. Is that going to be within some covenants, conditions, and restrictions (CC&Rs), which we cannot really dictate? I am wondering. I will use my family as an example because they are a pretty good candidate for what I like to talk about. I have teenage daughters that think you have to wash your hair four times a day or the boys will not get close to them. That is a lot of water. It is the truth. I have a princess. So, as the demographics change within a neighborhood and it is no longer a young family neighborhood, which would tend to use a lot more water and the neighborhood gets older, how do you go back and enforce some of that? I do not understand how the residents know what they are getting into and how the State Engineer is supposed to go back.

I have a portion of constituents within my district, and back in the early 1980s they were under one assumption and the local government kept approving things and now they are under another assumption. They are overpumping, trying to make things right. Some of those people never had a chance to be in an ideal situation, but at the same time, they now have a chance to be fined

$10,000 for not doing the right thing. I am just not getting how we are going to enforce this for the long term. I believe that we have to be efficient with our water and use it right, but what I do not want to see is any unintended consequences where folks are just trying to live in their own home and be comfortable. If they go over this limit, does it really set us further back than where we are trying to get to today? We do not need any water cops.

Michael DeLee:
The system is actually designed to be self-policing. That is why we have provided for an online entry system, by the homeowner, to actually read his meters and put it in so the monthly readings already go in. The homeowner will be very much aware of what water is being used. We would envision examples—maybe not the household of seven with teenage daughters that use a lot of water—that they would opt into a system like this. There are a lot of people that come to Nevada for only certain times of the year. For example, there are snowbirds or retired people, and there is no landscaping in the yard and they are pretty happy with xeriscaping. Those are very low water impact families and having a standard domestic well with two acre-feet is, quite frankly, a waste. This pairs up with a number of people within the community now and, hopefully, an increasing number of people in the future. As they are aware of additional resource management, they can take it upon themselves to control water use. The monthly reporting requirements will certainly make them very well aware of what their water use is. I hope that clarifies.

Chair Kirkpatrick:
I will just get back to my point, though. Currently, with a lot of our codes, within appliances, we are already being forced to conserve, so this really does nothing more than say that the developer does not have to come up with more acre-feet. I just want to get to the crux of what the bill does. If that is the case, we should talk about the development portion of it. That is basically what I got out of the bill, but if it's something different, let me know. I think that, in itself, will create a firestorm. You will get higher density based on this, with less water. You will get some different things. But I could be way off base, so I am just wondering if I am close or . . .

Michael DeLee:
Madam Chair, if I may interpret the question, the concern is about the density of development. I think that the best answer to that is that it is actually a win-win. It is a lower cost for the same development. Water rights are typically not cheap, but do vary with market prices. Less water would be required for the same development that allows the developer to actually put that water that would ordinarily be required to purchase the water into what we are requiring, which is that the pump be installed at the time the well is drilled and

not just left as an open domestic hole. We are actually putting more improvements into the ground, bringing more development and taxable improvement to the property at the time of development, and just shifting that forward.

Assemblyman Anderson:
I think, in general, this is a good concept. I did have a few concerns dovetailing on what the Chair said. What happens if a developer comes in and he institutes a covenant between future homeowners to require these? Could you see an issue dovetailing with the concerns that not every family is going to be the same, et cetera?

Michael DeLee:
At the time of the subdivision or the parceling, it would have to be approved for a conservation domestic well. At the time it is put in, it would have to go in as a domestic well with a pump. Certainly, anyone buying a lot in that would be very much aware of it. If they wanted to improve the amount of water flow, they could always acquire water rights, as they could now with a domestic well and pump as much water as their water right allowed them to pump. More likely, they would simply buy a different lot somewhere else that did not have this. It would probably be less costly. It is a question of marketing. If the developers feel they can attract a particular market segment and save themselves cost, then they will opt for this. If they do not, they will take a different route. We do not expect that people are going to change over to a higher demand well by adding water rights in the future, but that certainly could happen.

Chair Kirkpatrick:
Are there any other questions? Is this only a problem in a couple of different basins within our state, or do you see this as a fix for all of the basins?

Michael DeLee:
It would be an option statewide. It would be most attractive where there is an acute shortage of water and the water rights prices are fairly high because it would allow someone to develop and save money on water rights and everyone would conserve water. Where water rights prices are low and there is plenty of water to go around, it is probably not something that people are going to opt into, but at least it is there.

Chair Kirkpatrick:
Does anyone else have any questions? Okay. Mr. Ohrenschall, are you ready to bring up those who might be in favor at this time?

Assemblyman Ohrenschall:
Yes, Madam Chair. Thank you. I believe I do have Kyle Davis and Joe Johnson, who said they were going to testify in favor. They had some other hearings, however.

Chair Kirkpatrick:
Let me do this. All those that are in favor of this bill, that would like to testify, please come forward.

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources:
Good morning, Madam Chair and members of the Committee. Thank you for the opportunity to provide testimony on A.B. 387. Our office is in support of the concept of having conservation domestic wells, and we applaud what Mr. Ohrenschall and Mr. DeLee are trying to do with the bill in terms of using green energy to power the pump and also requiring retirement of water rights for the domestic well subdivisions to benefit the basin.

As the bill was originally submitted, we had some concerns with some of the provisions and requirements in the bill. I received their amendment late yesterday, and I have looked through it quickly but have not really digested all of it. It certainly looks like it addresses some of the concerns that I had with the original language.

I would also like to point out, as Mr. DeLee said earlier, that we did attach a fiscal note. When we looked at the original bill, it talked about adopting regulations. You will see in our fiscal note that we have estimated $42,500 in the first year to adopt regulations and take care of some computer programming which would be necessary to allow people to go online and report their pumpage on a monthly basis. Every year thereafter, we were estimating a $20,000 annual fee for maintaining the license for the software that we would be using. However, depending on what amendments are taken into this bill and the fact that our office may be able to assess fees to the water users in the basin that it is used, there may be no fiscal impact to the General Fund. With that, I would be happy to answer any questions.

Chair Kirkpatrick:
Are there any questions from the Committee? Mr. King, can you talk about the third amendment, which is on our sheet (Exhibit J). Can you go over that for me? I am hearing some confusion, probably on my part. They still have to have a water right; they still have to be in good standing. Is that not something that can already be done through the State Engineer's Office, as far as letting them having less allocation? I am curious.

Jason King:
That is an excellent question. There is a provision, NRS 534.120, which has not been tested. Our office feels like we would be able to go into a basin that needs to be further regulated and issue an order saying, from this day forward or even retroactively, that because the basin is fully appropriated and that we have declining water tables, we can limit the withdrawal of water from a domestic well. That has not been tested. I know there are some people who do not believe we can do that.

What Mr. DeLee and Mr. Ohrenschall have done for those basins, and again, I always bring up Pahrump Valley, is that it would be an incentive to a developer who wants to do a domestic well subdivision. By the way, our office signs off on every subdivision in the state. There would be incentive to, instead of going out and having to purchase 200 acre-feet for a 100 lot subdivision, only having to purchase 100 acre-feet. I certainly see the incentive to do that. I see what Mr. Ohrenschall is trying to do. It is a good thing. I do question whether or not we can already do that under NRS 534.120. Obviously, it has nothing to do with using green energy to power the pump or anything like that. We may be able to do that already.

Assemblyman Ellison:
What about existing subdivisions that are out there? They have the water rights. They have the lots. But they have never been developed. I know a lot of these subdivisions are out there. How are you going to address that?

Jason King:
We would not. If they were created as a domestic well subdivision, especially in a fully appropriated basin, it was approved based on the fact that there would be a domestic well that would withdraw two acre-feet. This bill would not affect those at all. They would still be entitled to that withdrawal amount.

Chair Kirkpatrick:
Are there any other questions? Let me ask you this, Mr. King. Development is very slow right now. There is no doubt that this would not really help someone start developing tomorrow. But what will happen when development does come back and what happens to the people who had the existing water rights for their subdivisions approved? They would fall where within this? They could go for larger density and they could have multiple subdivisions with the water rights they had already purchased. I am just wondering if it is going to be equal and if the reason this has to apply to renewable energy is so that the folks who have already invested in the water rights . . . I can tell you that I am sure people bought them when they were $90,000 an acre-foot, as opposed to now, at $14,000. What is the equal footing for their subdivision maps?

Jason King:
I do not think there would be any effect. I think they would remain status quo. You do raise an interesting question, and I do not know how much further we want to pursue this. There could be a domestic well subdivision out there that was created based on two acre-feet per acre, and the lots could be ten acres in size. If, for some reason, no one built on them and they wanted to further break those down into five-acre sized lots, if they wanted to go with a conservation domestic well and marketed it as such, they may have a case for the fact that they have already committed two acre-feet for the ten acre lot. Can we now have no dedication requirement for the five-acre lots based on the fact that they are having to dedicate half as much. Frankly, I do not know how likely of a scenario that is, but it is a possibility. But again, none of that is a downside.

Chair Kirkpatrick:
I just want to make sure that we explore all options because I am thorough that way when it comes to water. Any other questions? Thank you. Is there anyone else who would like to testify in support of A.B. 387? Is there anyone who is in opposition of A.B. 387? Is there anyone who is neutral on A.B. 387?

Steve Walker, representing Truckee Meadows Water Authority:
The Truckee Meadows Water Authority is neutral on the bill, as amended. I, as a water planner, would like to make some comments. The standard assignment for domestic wells when you do water planning in northern Nevada is 1,000 gallons per day. The only time I have ever heard of it being 500 is when you consider that a portion of the water is indoor use, goes out into your septic system, into your leach line, and then is considered secondary recharge to the aquifer. Then you would say you had a consumptive use of 500 gallons. If that is the case, then there might be an unintended consequence with this bill. You heard of that consequence last Wednesday in A.B. 237, where government money has to be spent because one-acre parcels with individual septic tanks and wells have polluted the groundwater. When you are talking about this as a mechanism to increase densities because you are decreasing water use in one-acre parcels, then that is an unintended consequence. You are back creating one-acre parcels with individual wells, individual septic tanks, which is government approval of groundwater pollution. So I would say be aware of that and make sure that if it moves forward, I would definitely put an acre requirement, if you can, to make sure that you do not have those densities that cause groundwater pollution. That is my statement as a water planner.

Chair Kirkpatrick:
Thank you, Mr. Walker. Does anyone have any questions? Andy?

Andy Belanger, Manager, Management Services Division, Southern Nevada Water Authority:
Generally, we are supportive of the bill. We understand the need and why the bill was introduced, but I have just a couple of quick comments. I am not sure that I can see this provision being used in Clark County, particularly in the urban areas, for the reasons that Steve just mentioned. Firstly, you have to have an acre parcel to have a domestic well that is on a septic, based on health code regulations in Clark County. If you are on a sewer, the health code allows you to go to a half acre. A half acre's worth of land, with 500 gallons a day, is not going to have any landscaping. I can tell you, just based upon the history I have experienced in the 14 years I have been with the Water Authority; I have always been involved with the groundwater management program that was created the year I started. Since we have had that program, we have dealt with the 1955 Nevada law that allowed for the temporary permits in the Las Vegas Valley to allow for continued growth. No one who has bought a well or a home with a well on it understands whether they have a revocable right or whether they have an irrevocable right. That has created a very difficult situation in Clark County where we have to deal with people who do not have a permanent water right who thought that they did.

I am just cautioning the Legislature. I think if this bill moves forward, we need to make it explicit that this water right that we will be granting or this exemption for a conservation domestic well at half an acre-foot, will be different from what everyone else has, and at some point in the future we may have to deal with equity issues, people that just did not know what they got themselves into when they bought a property that has a conservation domestic well. That being said, we support the concept of the bill, but I would just have you consider those things as you consider processing it.

Chair Kirkpatrick:
Is there anyone else who is neutral? Good morning.

Vahid Behmaram, Water Rights Manager, Department of Water Resources, Washoe County:
Good morning. I have had the chance to look at some of the amendments. The fact that this proposed bill allows local government to apply more stringent requirements is a positive. That is why I am here as neutral. If it was not for that language, I would be against the proposed bill. I have a couple of points. If the objective is to help a basin in distress, an overallocated basin, and if you accept the data that domestic wells use between half an acre-foot and or an acre-foot, the current provision requiring two acre-feet and accepting that the consumption is one acre-foot benefits the basin more. You are, in fact, retiring one acre-foot per domestic well. The benefits are greater to the hydrographic

basin. The second point I would like to make is that I have worked for a water utility for nearly 20 years. Water meters fail. Water meters read inaccurate data. One of the reasons utilities can detect those is because the resident calls and says their water bill is through the roof. We go test it and we find out that, in fact, yes, there is a problem with the water meter. Or if it is the reverse, if the meter is reading low, we can look at the total production and balance it against total consumption based on individual meters. If there is a drastic imbalance, we know there are some faulty meters. What I am trying to say is that there is a system of checks and balances within municipal systems that can detect faulty meters. I do not see that here. If the meter is reading faulty readings, how is that going to be detected?

The other issue is an issue of implementation. If the resident is using more than a half acre-foot of water, there is an issue of fees and penalties. The State Engineer is not going to issue a cease and desist order. That equates to revoking someone's certificate of occupancy (CO). That is not going to work. That is going to be extremely difficult. My last point is that I noticed that the proposed bill makes these classes of domestic wells ineligible for the domestic well credit. We have a lot of experience with domestic well credits. Where they come into play is in areas that the domestic wells have failed or are failing and there are municipal water systems nearby or closely available to these homeowners. At a cost to the homeowner, they abandon their well and connect to the water system. This bill creates an environment for the utility to have to say, "No, sorry, you are not eligible for this. You have to go out and, in addition to the cost of plugging your well, you have to pay connection fees. You have to buy additional water rights if you want to connect to our water system." The way the amendment is written, this class of domestic well is not eligible for the domestic well credit. That will create a difficult environment where one resident is eligible, the other resident is not. I can answer any questions if you have them.

Chair Kirkpatrick:
Does anyone have any questions? Okay. Thank you very much. Is there anyone else who is neutral on A.B. 387? Mr. Ohrenschall, do you have any final words?

Assemblyman Ohrenschall:
I do, Madam Chair, but I wonder if Mr. DeLee might be able to address a couple of those concerns, with your indulgence.

Michael DeLee:
Thank you. I will try to answer the last question first. Regarding the requirements for keeping this off the domestic well credits system, we changed

that because we did not want to disturb something and essentially open up a new can of worms where there may be other unanticipated consequences. That is not something I am too concerned about if the parties feel that they could be part of it. That is fine. I did not want to start something that we could not finish within the confines of this legislative session and maybe leave that for the future, if we wanted to add that. As far as the implementation goes, this would be, I think, relatively easily implemented. As with other water rights and other meter readings, the errors between the readings should be relatively easy to detect. If they are way out of bounds, we will know because these are being reported by the homeowner. Absolutely, water meters fail, and we realize that there are problems and we can address that just as any other requirement would be, but that is not a reason to not do this. We can take a look at each one of those things. As far as the two acre-feet, one acre-foot mentioned earlier, that is not a requirement. That might be what is actually happening out there, in some cases, where there are two acre-feet allocated for a domestic well, but less than that is being pumped, or, in some cases, more than that is being pumped. What we are trying to do is actually put it on paper so that you cannot pump more than a half acre-foot. That way it can be attributed directly to the basin water budget.

Backing up to the Southern Nevada Water Authority's comments, I appreciate the support of the concept. There may be areas in Clark County that are not landscaped. I realize there has been a lot of effort to take out lawns and so forth, so certainly something like this would not have any lawns associated with it and you would see the more popular, nowadays, rock gardens and half-acre lots. Yes, those are rare, in most instances in the Las Vegas area, but I think they are still pretty popular in areas further out, such as Sandy Valley, where water resources are certainly at a premium. Backing up to Mr. Walker's comments, he mentioned A.B. 237. While I haven't reviewed the text of that bill, it sounds like that bill addresses using public money for an overdraft situation. This is actually using private money to do essentially the same thing. In other words, the developers are the ones that are funding this by buying one acre-foot when, previously, they need two, but donating half of what they buy to the basin. As this moves forward, we are actually anticipating using private money to accomplish what I understood, briefly, A.B. 237 to be doing.

Regarding density, this does not address the issue of density. That we feel is properly a matter for the Nevada Division of Environmental Protection. Whether you have a conservation domestic well or a regular domestic well, a water right, a public water system, water contamination, and water quality and density requirements, I think it would not be appropriate to put that into the Division of Water Resources and Chapter 534 of NRS. That is something that either goes through local planning, under NRS Chapter 278, and individual counties or

cities, or under the Nevada Division of Environmental Protection as it relates to individual septic systems, but not in this bill, though it certainly is a concern that the Legislature should be aware of. I do not think it is appropriate here. Hopefully that answers all the questions.

Chair Kirkpatrick:
Okay. Mr. Ohrenschall.

Assemblyman Ohrenschall:
Thank you very much, Madam Chair, for your time. I appreciate all the attention you have given to this bill. I think with A.B. 387, as Mr. DeLee stated, we have a bill that provides that every one wins. Developers will be able to develop land more affordably; water rights will be retired and overappropriated basins will be recharged. Water-smart xeriscape landscaping will be encouraged, and the use of renewable energy will increase through the use of these pumps to pump out the water that are powered by solar and wind. I am happy to work with all the parties concerned to try to resolve any concerns, but I think we have a very good concept here, and I hope that in the future we will have conservation domestic wells in this state.

Chair Kirkpatrick:
Thank you. Mr. Ohrenschall, is there a project that is waiting for this type of legislation that someone is interested in? Is there a pilot project? How big is the subdivision?

Assemblyman Ohrenschall:
That is a good question. I do not know. I could defer to Mr. DeLee down in Las Vegas. Perhaps he knows.

Michael DeLee:
Madam Chair, the issue came forward, actually, from 2007, when the Legislature weighed in on requiring the dedication of water rights for parcel maps in addition to subdivisions as part of S.B. No. 274 of the 74th Legislative Session. There were discussions at that time about not really needing two acre-feet per lot; no one was using that much. Was there some middle ground? We had some discussions, briefly, with the Division of Water Resources at the opening of the 2009 Session about this exact bill concept. In deference to the climate of that session, we just held off. There are no pending projects in mind; this was just a response on how to move things forward and getting a multi-win—encouraging renewable resources to be used, encouraging a lower water requirement, encouraging some sensitivity to water used for domestic wells under the two acre-foot requirements that we

have, and making that all happen as part of development at such time as development starts again in Nevada, which could be some years off.

Chair Kirkpatrick:
Okay. Thank you. I want to move on, but I was part of that subcommittee of S.B. No. 274 of the 74th Session, with Senator Amodei, along with Mr. Goicoechea. We amended A.B. No. 285 of the 74th Session in its entirety into the whole thing, so I am pretty familiar with it. I do not ever remember hearing, on the record, the concern of the two acre-feet. I remember that you could not use more than that, but I do not ever remember anyone complaining that they could not use less. I am just curious. I am sure Mr. Ohrenschall and I will have some working time on this. I just will go back and look at the record, but I never remember hearing that conservation. I just remember it being that they would like two acre-feet and the 1,800 gallons part of the discussion. I do not remember anyone ever saying they could live on 500 gallons.

Assemblyman Ohrenschall:
To the best of my recollection, I recall Mr. DeLee and some others bringing up these concerns to the Natural Resources Committee. I do not believe you sat on that back in 2007.

Chair Kirkpatrick:
Okay. I will look at the minutes. With that, we are going to close the hearing on A.B. 387 and open the hearing on Assembly Bill 419. Mr. Goicoechea, you just miss us in Government Affairs and want to spend the whole day with us.

Assembly Bill 419: Revises provisions relating to groundwater basins. (BDR 48-299)

Assemblyman Pete Goicoechea, Assembly District No. 35:
I am bringing you A.B. 419. It is a lengthier bill and not nearly as complex as the first one I brought this morning. It does deal, predominantly, with the same issues you heard with the last bill, overappropriated groundwater basins. We have a number of groundwater basins in this state that are overappropriated and I think that number is growing, probably quicker than we would like to see. 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. Ultimately, you bring that basin back into balance, with only the senior water rights being held.

Assembly Bill 419 does two things. It allows the State Engineer to designate a critical management area in a basin that has shown significant water declines. What that does it would start a ten-year clock at that point. The appropriators

in this critical management area would have to work forward and develop a water conservation plan that actually brings that water basin back into some compliance. I am not saying they would ever get it completely back there. They surely would not get there in ten years, but as long as it was on its way to recovery, I think the State Engineer would feel comfortable with that. With the Chair's permission, we did offer an amendment (Exhibit K). I think most of you have that handout—if we can just deal with that rather than the original version of the bill. We did have a meeting for a couple of hours with most of the people who were involved, trying to work through the language. This is what we have come up with. We think that is going to need some wordsmithing but it should be somewhat acceptable. I hope the Committee does have that handout.

Chair Kirkpatrick:
Let me make sure everyone has it.

Assemblyman Goicoechea:
I apologize for not getting it on the Nevada Electronic Legislative Information System (NELIS). Anyway, we can walk through it. I will quickly continue on. It also allows for 40 percent of the appropriators in the basin to petition the State Engineer to make the area a critical management area as well as file a conservation plan or water management plan. That plan must come forward in a public hearing. He would have to notice it for two weeks and bring it forward. At the end of the ten-year period, whether it was petitioned or brought forward by the State Engineer, you have a ten-year window to address the issues in an overappropriated basin, started on its way to recovery, or he would be required to regulate by priority.

So, with that, I will just quickly walk through the bill and take any questions. Hopefully we will not take too long with this. Again, we are amending Chapter 534 of NRS to include a basin that has been designated as a critical management area. It can be petitioned, and it says here must be signed by a majority of the appropriators of record. Again, we are talking about one certificate, which is one vote in a petition. That is the intent of the bill at this time. That might be something that needs to be in the flux. Also, I want to point out that it has to look at the relationship in a groundwater basin, that relationship between service and groundwater. Typically, that is a problem we are seeing out there with overappropriated basins. We are seeing declining surface water resources available. That gets back to my first bill, Assembly Bill 329, but we will not go there.

The State Engineer must hold a hearing on the management plan which is brought forward under NRS Chapter 534 and approve that groundwater management plan for a critical management area. Again, I am just walking

through this very rapidly. I think there is another point and it is on page 5, line 37 of the bill. I think it does something to reinforce what we heard in the last bill and that is that the State Engineer may order that withdrawal, including, without limitations, withdrawals from domestic wells. Technically, within 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. I want to make sure everyone understands that. I know that will be a big issue in some areas.

Again, the State Engineer shall designate any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin. We did not define perennial yield in this bill. It was amended out of it. I do know, though, that you have another bill coming forward, Assembly Bill 466, that I think is going to address environmental soundness and perennial yield and that is why we felt comfortable deleting this out. We did not want to get too heavy in this particular bill. Perennial yield, typically, is the amount of usable water from a groundwater aquifer that can be economically withdrawn and consumed each year for an indefinite period of time without impacting the water table in that basin. That is perennial yield. That is what we are striving for in all the groundwater basins. Unfortunately, in many of them, we have exceeded that amount and we have declining water tables, which ultimately will impact both surface and groundwater levels. Unfortunately, typically it ends up being what you can economically withdraw, therefore it starts impacting the state and the economy, whether you are agricultural or development. It becomes an issue. I know it is very quick, but I know you are tired and at some point it gets hard to absorb this stuff. I would stand for any questions.

Assemblywoman Benitez-Thompson:
Mr. Goicoechea, with the amendment, where you are talking about the petition on page 2 and it being signed off by the majority of the appropriators, is that just to get a consensus on what that management agreement plan is or just to make sure that they are noticed as to that plan?

Assemblyman Goicoechea:
The way the bill is drafted, it is kind of confusing because if you get clear back to page 5 and lines 38 through 46, that talks about the State Engineer having the ability to look at a groundwater basin himself. It says he "may" designate that groundwater basin. In the event that you have the majority of the appropriators from a basin petitioning him to create a critical management area, then it becomes "shall." It becomes a case of the appropriators of the water in that basin, if they are concerned about the levels of decline in that groundwater basin, and as long as you can get the majority of them to agree, then they

would bring that forward as a critical management area. The State Engineer would have to move forward and adopt a water management plan and start that ten-year clock. Again, you have ten years to accomplish your road to recovery. The problem is where we are today, again the State Engineer, and I am not throwing any rocks at the Division of Water Resources, but the bottom line is we just are not getting it done. We continue to see these groundwater basins decline. I hope that answers your question. One is "may." One is "shall." At the point you are petitioned, it becomes shall. The State Engineer has to address it.

Chair Kirkpatrick:
Mr. Goedhart, then Mr. Ellison, and then Ms. Pierce.

Assemblyman Goedhart:
At one point in time, you said 40 percent of the appropriators, but it is actually a majority. So I am thinking 50 percent plus one.

Assemblyman Goicoechea:
I apologize. It is in the bill. We did catch that. If you look at page 2, lines 3 and 4, it says a majority. If you go back to page 5, it reflects pursuant to NRS 534.030. In NRS Chapter 534, in existing statute, it requires 40 percent. Again, I am flexible on this. We have talked about it. They are clearly two different sections. It would be good if we could get them together. So, I would prefer on page 2, lines 3 and 4, that we talk about the 40 percent, which is in existing statute.

Assemblyman Goedhart:
I was going to ask you one more question, in terms of priority. Say you are in a valley with 1,000 different parcels, and every parcel comes at it with a right for appropriation of up to two acre-feet, for example. The date of appropriation does not go back to the date of the property reparceling; it goes back to when the well was actually drilled. Is that correct?

Assemblyman Goicoechea:
That is correct. For those of you who do not understand regulation by priority, you have a priority date affixed to your certificate which is in place. That is when you made your proof of beneficial use. Just because you have owned the property since the late 1800s, does not mean you have a water priority from the 1800s.

Assemblyman Goedhart:
What it brings to mind, though, say you have a piece of property, a 10-acre parcel and the developer wanted to reparcel it into ten one-acre parcels. In that

case, he would have to buy water rights for each additional well. The permit he bought was from a certificate that was 100 years in priority, from 100 years ago. Then, even though he just drilled that well, because it ties back to the original water certificate, that is where his priority is, even though he just drilled the well in the last year. Is that correct?

Assemblyman Goicoechea:
Well, I would probably defer that to the State Engineer. It is my understanding that if you make a change in the place and manner of use, he could require you to change your priority date. Typically, yes, it would be when you made a transfer of an older priority date and brought it forward. Again, in that case, I am assuming you are dealing with maybe an agricultural water right that you brought forward and converted into . . .

Assemblyman Goedhart:
And that is my question. Where does that then put the priority date? The time in which you made that change and application from agricultural to residential, or does it still feed back to the original water right?

Assemblyman Goicoechea:
I will defer back to you. I think it depends on if it was protested or not. There well could be a ruling on it. But I will defer that to the State Engineer.

Assemblyman Ellison:
Mr. Goicoechea, the way I looked at this, what would you do if you were in a basin that was closed by the State Engineer? You have all these water rights out there or subdivisions that are still out there that have not come online. We have had all the studies that the municipalities that this is not adequate. I mean not right; let me go back and say that. That has created a problem in the past, getting studies done and then getting them accepted. Maybe you can hit on that.

Assemblyman Goicoechea:
Clearly, this deals with closed water basins. Almost every basin that is overappropriated has been closed. Some of them have been designated. Again, this is just one more level to that, with the critical management area. That is the problem. We have paper water rights and we have wet water rights in all these basins. Some of them are strictly a water right that is being held and really does not have any proof of beneficial use attached to it. It is just out there. We have other people who have appropriations that are, maybe, exceeding what they have appropriated. Again, at the point you raised the level of that groundwater basin to a critical management area, it requires the appropriators in that basin to bring forward, to the State Engineer or those

appropriators, this water management plan that will clearly have to require some people to surrender those paper water rights. There will probably be a curtailment in other places as they try and move forward and bring the basin into balance. It is not going to be good, but it is something we have to address.

Assemblyman Ellison:
Hypothetically, you have studies out there that go back years and years, to the 1960s, done by the state or whomever. I mean, the state has not stepped up to the plate to actually do any current studies in some of these basins. The municipalities or the counties are going out and spending hundreds of thousands of dollars in looking at these basins and the numbers do not match.

Assemblyman Goicoechea:
Yes. And I agree. Typically, any time a basin is closed, and clearly when it is designated, there is a full-blown monitoring plan in place by the Division of Water Resources. They are out there annually, spring and fall, checking those water levels in those basins, and, in many cases, recording the flows on streams and surface water. I agree that we missed the mark in a number of these groundwater basins over the years, and whether it be a basin that is serving a municipality or an agricultural sector, the bottom line is that we missed the perennial yield of what that basin was. It is going to place a hardship on all of this to bring those basins back into compliance. We clearly have to. It cannot be a race to the bottom, and whoever has the deepest pockets pumps the most water. We cannot allow that to go forward.

Assemblywoman Pierce:
There is right now, no definition of perennial yield in NRS?

Assemblyman Goicoechea:
Well, I believe there is probably a definition somewhere. I haven't found it. We were going to incorporate it into the bill, but again, just looking at it, we decided to leave that for A.B. 466, which is also a bill that has been introduced and is coming to this Committee. It also has another issue with environmental soundness and some of those things. Rather than trying to debate it in this bill, which is kind of separate, we . . .

Assemblywoman Pierce:
And that is A.B. 466?

Assemblyman Goicoechea:
Yes. And I believe it has been assigned to this Committee.

Assemblywoman Pierce:
And you like that definition of perennial yield, which is in that bill?

Assemblyman Goicoechea:
Yes. Well, I do not know what is in that bill. I have not studied it. But I assume it is probably very similar to what we had because that is pretty much the accepted hallmark for perennial yield.

Chair Kirkpatrick:
Thank you. Does anyone else have any questions? Mr. Goicoechea, I just have one question. Hypothetically, what happens? You said that domestic wells would be regulated, too. What happens, and this has happened in Clark County, to a subdivision that has relinquished its water rights? Do we tell those people that they have to move out of their house? I think in southern Nevada they actually had to sign up to municipality water. But when they bought into it, they bought into it knowing it was their home and that it had water that was running. Ten years later they realize they had no water rights and they were in a sticky situation. It was very expensive for them. But if you are saying it was regulated, do we go back and take it back? I know it is not necessarily a taking because they were using water that they should have been, to begin with. Do they have a vested right? I just feel like that could be a Supreme Court ruling this Legislature might be dealing with in 2020.

Assemblyman Goicoechea:
Truly, everyone is aware that at the point you are issued a water right, it is a priority right. That is Nevada water law. It is first in time, first in right. If you have a junior right, I think this deals with Assemblyman Goedhart's question and exactly how those rights are brought forward. Where did you acquire the right? Typically though, with domestic wells in the state, if you have a parcel created, you have a right to drill a domestic well and I do not think anyone argues that. But at the point they have to start adjusting the perennial yield of that basin, this bill just says domestic wells have to be included in that. Yes, you probably could be caught up in that and have a junior water right that the State Engineer would consider suspending but, on the flip side, how is he going to suspend your domestic well permit if you do not have municipal water available to you or some other avenue? There is no doubt domestic is a higher priority use, than say, agricultural, so I think he would have to deal with the manner of use that was concerned. You cannot displace that homeowner and say, "Okay, all you domestics are gone but we are going to let Mr. Goedhart go ahead and pump his water to use for his cows or his dairy." It becomes an issue of the highest and best manner of use, which is another piece of it. Then it probably becomes a taking from Mr. Goedhart. And he would probably sue.

Chair Kirkpatrick:
I did not say that because I am not an attorney but I was just thinking that. Are there any other questions on A.B. 419? Okay. At this time, I am going to go ahead and call up those that are in favor of A.B. 419. Please come forward. Mr. King.

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources:
We are in support of this bill, as amended. And I agree with Mr. Goicoechea that I think it still probably needs just a little bit of wordsmithing, but we like the bill. We think it does good things. If you would like, I could try and answer some of the questions you had regarding the relinquishment of water rights for domestic wells and where those priorities lie. It is in statute that if someone came forward to develop a domestic well subdivision and had to relinquish an existing water right, the water rights which are now pertinent to those domestic wells, even though they are relinquished, would still have the priority of that right that was relinquished. The priority system works. We have cases throughout the state where domestic well subdivisions were built without requiring a relinquishing of water right. Those occur in basins that are not fully appropriated. The priority of those rights would be the date that the well was drilled.

Chair Kirkpatrick:
Thank you for clearing that up. Does anyone have any questions? Thank you, Mr. King. Ms. Lynn.

Susan Lynn, representing Great Basin Water Network:
We are here to support the revised version of A.B. 419 with the exception that we really would like to see perennial yields stay in the bill. We understand that there are many good things about this bill, and rather than get bogged down in the discussion of perennial yield, we are thinking that it is fine to move forward. We think this gives the State Engineer good tools but, at the same time, at some point we do need to have the discussion to define some of these common legal terms that we use, such as perennial yield or safe yield or whatever the case might be. When A.B. 466 comes out, we will talk more about that later. At this time, I say we do support A.B. 419. [Provided prepared testimony (Exhibit L).]

Chair Kirkpatrick:
Ms. Lynn, I can tell you that I have committed myself and Mr. Goicoechea—and I am sure we have freshman that are interested—during the interim to look at the water law chapters themselves and seeing if we can come up with some legislative thoughts before next session. We have made great strides this

session with some of the things we have already done, but I think it is time for us to clean a lot of that up so that our laws are very clear. We have made that commitment to meet on Saturdays, once a month. That commitment is out there, at least from me and Mr. Goicoechea.

Dean Baker, representing Baker Ranches, Inc.:
I am strongly in favor of this bill. I think it is necessary. I look at all the problems that are being created by the overuse of the water, often called the perennial yield. That is a critical part of the problem that goes forward. Perennial yields are committed and put forth by a variety of people. In my experiences in Snake Valley, where I can show it has been called 80,000 acre-feet and where it was used in negotiations between Utah and Nevada, but as 133,00 acre-feet. Those two different numbers were argued and probably there would have been an agreement between Utah and Nevada had not that 130,000 acre-feet been pushed forward and the demand that it remain.

Perennial yield is largely created by the plants that grow and the service water which is there. In Snake Valley, which is what I am familiar with, most of the water with the wells that have been drilled is in the first 150 feet, the vast majority of them. If you get to a deeper level, they have never found significant water that could be pumped. When you lower the water table any, which you do with pumping, which we at Baker Ranches have done, we have dried springs up around our ranch; we have caused impacts that we do not like on neighbors. We have tentatively agreed that we should not be putting any more drawdowns on rights that we both have and could do, but if we do want to keep the water, we sort of have to do it. It gets to be a real question.

Take, for instance, the south end of the Burbank Meadow, which is a big, natural meadow that is very much today as it was when the first white man saw it and all of the Indians were there gathering their food and whatnot. We have a building there that has newspapers that were put in the walls to seal it in 1892. I think there are four or five dates in the 1800s in the newspapers which were put in the walls. The graveyard there dates to 1880. But the area is reduced historically, sometimes in different ways. Through the last 20 or 30 years, it has been largely home for 2000 mother cows and their calves. In other words, it is very productive. It was productive to the Indians before the white man ever came, before there was a territory or a state, and the water flows across two states.

One of the developments that has been created in producing water is at the south end of the meadow, right between two of the major springs of the Burbank Meadows. But on the Nevada side, where there were old fields that

were not any good because the land was not good and they could not produce, it was sold. But it was bought by a person who readily admits that he bought it and put a dozen pivots or more in it to produce water that he can sell if a pipeline comes from either Utah or Nevada. He does not care which way they come. That is a well. When he did those in 2001, got that and started developing, the first year that he pumped, he dried up the Needlepoint Spring. When you talk about the water for wild horses, 17 wild horses were killed when they started pumping that in 2001. A major spring in the Burbank Meadows is the same water that is in the Needlepoint Spring that killed the 17 wild horses. I will not say absolutely, but our indication is that the cows are not surviving as well. Not just because the springs are not flowing as well, but because of the subirrigation that comes in the Meadow—there are springs all around the meadow. The location where the 1890s newspapers are, are springs that were part of the Clay place and were used by Depression-era people because it was a spring.

When you start the drawdowns of the water table and the perennial yield, there needs to be some kind of definition where this water in Snake Valley, which is near the surface . . . it is very clear that if that seven-foot pipeline is put into that area, or into White Pine County, or at least in Snake Valley, I am sure that there will be an environmental disaster that will have to be dealt with. Those existing rights, which are the majority of Baker Ranches' rights, are ones that predate the state's where we have bought land and whatnot. With the perennial yield, it should be realistic. The exception of interbasin transfers should be looked at very differently than building a farm on top of the aquifer or building a city on top of the aquifer because that it is a totally different environmental thing.

You will notice that the wild horses here can come in and drink the water out of the farmlands. Sorry to take too long.

Chair Kirkpatrick:
It is all good. We like hearing the history behind it. It is important for all the other folks on the Committee. Mr. Livermore.

Assemblyman Livermore:
Mr. Baker, before you leave, the perennial yield is a study of a period of years that take place. Can you tell me, in the instance that you are referencing in that meadow, what the last perennial yield study was? What is the data?

Dean Baker:
Both of those that I mentioned were United States Geological Surveys. The second one, with the more water, said that there were 40,000 acre-feet

coming from Spring Valley, the valley west of us and coming into Snake Valley. So they could raise it up so that they thought there ought to be more water available there, even though that water in Spring Valley had already been considered and partially allocated. The reality of perennial yield can only be created if you kill all the plants and draw the water table down to where it will stay at one level and not go deeper or not come back up. If you pump that much water out of it, you get the perennial yield, but you will also kill springs and other things, which has been the tradition that a drawdown is acceptable. It was a tradition created by creating the farm or the town on top of the water table.

Assemblyman Livermore:
Well, Mr. Baker, I understand that. My question was, when was the last time the appropriation or whatever the USGS did? What is the latest data that they have? What is the date of the data?

Chair Kirkpatrick:
Just the date.

Dean Baker:
I think it was about five years ago.

Chair Kirkpatrick:
No other questions? Thank you, Mr. Baker. Does anyone else want to testify in support of A.B. 419?

Bjorn Selinder, representing Churchill, Eureka, and Elko Counties:
I would just like to go on record as saying that we support any bill that gives the State Engineer more tools to manage water resources which are so scarce in this state. Obviously, there are some issues here, which we understand. We just want to indicate that we are willing to continue to work with the parties to resolve those issues to make A.B. 419 a workable document. With that, I would urge your support of A.B. 419, as amended. I would be happy to answer any questions if there are any.

[Assemblywoman Bustamante Adams assumed the Chair.]

Vice Chair Bustamante Adams:
Are there any questions from the Committee members? Okay. I do not know if you also want to testify.

Jake Tibbitts, Natural Resource Manager, Eureka County:
I will just concur with what Mr. Selinder has already said. Thank you.

Vice Chair Bustamante Adams:
Are there any other individuals in the audience in support of the bill? Okay. At this time we are going to transition into the opposition. Are there any individuals who would like to testify in opposition of the bill? Are there any in the neutral position?

Andy Belanger, Manager, Management Services Division, Southern Nevada Water Authority:
We worked with the parties on the proposed amendment. However, we still have some terms that need further clarification, and as a result of that, we cannot offer support today. Therefore, we are in the neutral position. I just want to go on record and state that as we move forward with this bill, we are interested in clarifying what the term "majority of the appropriators" means. I think Mr. Goicoechea mentioned this briefly; that it has to do with the certificate holders in the basin. What we want to make sure is that in basins where you have water rights that are majority—where water rights are held by one party and there are other parties that hold water rights, as well—that we look at both the number of parties that hold water rights, but also the relative amount of water that they hold because those two things have very different constituencies and issues, and we want to make sure that that is considered as we discuss that term.

The other point I would like to make is in subsection 7, page 5. We have language in there that allows the State Engineer "may designate" or pursuant to NRS 534.030 "shall be designated." *Nevada Revised Statutes* 534.030 is the section of law that has to do with the designation of basins, and we are a little concerned that we are confusing the designation statute, which is a specific term in state water law and a designation as a critical groundwater critical management area. We just want to clarify if we understand the intent, which is 40 percent of the appropriators have to petition. But maybe we do not need to reference NRS 534.030 in order to do that. It would probably be clearer if we just said, "if 40 percent of the appropriators petition the State Engineer, the State Engineer shall designate." I just wanted to get those two points on the record, and I am here for any questions.

Vice Chair Bustamante Adams:
Thank you. Are there any questions? Mr. Goedhart.

Assemblyman Goedhart:
I was also considering that as far as bringing forth with 40 percent of the water right stakeholders, to bring to the State Engineer's Office. If you have, say, ten water right owners in one valley and eight of them own one acre-foot and

two of them own 2,000 acre-feet, do you give equal weight to that? That is the question. I would be interested to see how you folks work through that.

Andy Belanger:
That was a discussion when we met prior to the bill. We have not, I think, gotten our heads around it completely, but I think we need to.

Vice Chair Bustamante Adams:
Thank you very much. Go ahead.

Randy Robison, representing Virgin Valley Water District:
I talked to Mr. Goicoechea before the hearing and told him I would listen closely to what he had to say before I came to the table. We had some of the same concerns that were articulated by Mr. Belanger from the Southern Nevada Water Authority (SNWA). We had one concern that was unique to the Virgin Valley Water District. It is in section 1, subsection 3. This is after the State Engineer would have received a petition by a majority of the appropriators of record to request the critical management plan. It says, "The State Engineer shall hold a public hearing in the county where the basin lies." The Virgin Valley Water District is the senior water right holder in a basin that is entirely contained within Lincoln County. We would have some concern about a hearing that had to take place in Lincoln County about a basin in which we are the senior water right holder. Not that we cannot drive our car up there and participate. In talking with Mr. Goicoechea, hopefully there is a way where there might be some balance there that would allow us an appropriate, less defensive venue to talk about that critical management plan. I appreciate that.

Vice Chair Bustamante Adams:
Are there any questions from the Committee members? Okay. Thank you so much. Any others in the neutral position that would like to testify? One more person, Mr. Goicoechea. We are almost there.

Vahid Behmaram, Water Rights Manager, Department of Water Resources, Washoe County:
We generally support this bill. One slight hesitation was in some areas where there is known data of over appropriation, exceeding the perennial yield; we did not quite understand waiting another ten years to solve this issue. It is definitely a positive bill. We support it. Thank you.

Vice Chair Bustamante Adams:
Are there any more questions? Mr. Goicoechea.

Assemblyman Goicoechea:
I will be very brief in closing. Clearly, I think the reference to NRS 534.030 can be deleted. We are more than willing to incorporate whatever language we come up with as far as "a petition must be signed." Whether it's a majority, 40 percent, which is on page 2, we will work on that language between lines 3 and 5 and see if we can come together with that. And deleting the language on page 5, I am completely agreeable to and deleting any reference to NRS 534.030. With that, I think a couple of wordsmiths can clean this up and get the bill out. I want to state and make sure on the record that I believe that the State Engineer made a point, and as the gentleman from Washoe County said, bottom line, we cannot wait ten years until we start working on it. I think the State Engineer has the ability, with A.B. 419, to go ahead and declare a critical management area upon this bill becoming effective.

Assemblywoman Pierce:
Just a comment. I think that on the noticing in the newspaper, you should add a web page there. If there is a web page, it should be on the web page.

Assemblyman Goicoechea:
Yes. And I will let the State Engineer address that. As far as the noticing, that is fine with the web page if they hold one or have one available to them. I think that is going to be language in almost every bill. As far as where the hearings would be held, I assume the State Engineer would not have any problem holding a second hearing if the majority of the water rights were held in another county, even though they were in the same hydrologic basin.

Vice Chair Bustamante Adams:
Thank you very much. With that, we are going to go ahead and close the hearing on A.B. 419. We will now open the hearing on Assembly Bill 422.

Assembly Bill 422: Provides specific authority for public bodies to lease water rights to certain owners or holders of water rights. (BDR 48-681)

Assemblywoman Marilyn Kirkpatrick, Clark County Assembly District No. 1:
Today, I come before you with A.B. 422.

I just want to give you a little bit of history, really quickly. I represent an area that is rural in nature, as well as urban in other parts. I have a particular neighborhood in my district that was the end of Las Vegas, back in the day. The residents moved out there when Tonopah Highway did not exist. So you can imagine, for them, that they had a lot of challenges over time. One of the things that they did have, though, is that they had a subdivision that was built and they had water rights for their subdivision. The subdivision was approved

for, probably, 76 acre-feet of water. However, there are 137 homes there. I am sure you always hear me ask, "How many gallons of water do you think the home is supposed to live on?" I actually have a subdivision that struggles with that on a daily basis. As the laws changed, they did not really transition or stay up on the process because they bought into their homes thinking they had a community well and they were fine, as a group. That is why I ask, "What happens to the people who continue to move there?" Do they know what they are buying into because most people really just are looking for a certain type of home, in a certain type of neighborhood, and they do not think about everything else that goes along with it.

My constituents within my district and I will say the Office of the State Engineer has worked with me for about four years to try and help them come into compliance. However, they will never be able to come into compliance because they do not have the appropriate water rights to do that. They have spent hundreds of thousands of dollars over the course of ten years trying to update their systems, fixing all their leaks on a regular basis. They are very good stewards of trying to do the right thing. However, they do live on half-acre lots. They would like to have a little bit of grass; some of them do have pools. I would say they are not lush, by any means, as much as they are comfortable. They have large trees that have been in place for over 40 years. They do not have the xeriscaping that can survive on the 500 gallons a day. However, they are making strides. We did put a law in place, I believe it was in 2007, that put fines in place. In working with the State Engineer's Office then so that folks like this would not be hurt by the process, it would allow them to try and come into compliance.

The State Engineer's Office keeps a list, every year, of those that are no longer in compliance. My residents fall at number two on the list. Here are their options. They can hook up to municipality water. I cannot even invite Mr. Belanger to my district to have a neighborhood meeting about that because they do not want to see the Southern Nevada Water Authority there. They want no part of them. They do not want to see the Las Vegas Valley Water District there because they are very rural in nature and they want to stay rural in nature, even though all the parcels around them do have municipality water. They are a small neighborhood. For those of you who live in southern Nevada, if you ever want take a drive by it, it is off of Jones Boulevard and Cheyenne Avenue. It is a very nice neighborhood. Their second option is to buy more water rights. Most of the people within that neighborhood are older folks who have lived there and paid off their house, and paying higher homeowners' association fees to buy water rights is not something a lot of them can do. Their third option is one that I am here with before you today

because they really would like to come into compliance, but they are not sure how to do it.

I spoke with the Southern Nevada Water Authority on ways that we can do it so that they can be in compliance. This is an option that I spoke with the Southern Nevada Water Authority about, being able to let them lease the rights of water so that they can actually come into compliance. The State Engineer's Office sends out a nice letter every year. I can always tell you when the letter goes out because I get 137 phone calls in the same two days because they are concerned they are going to be fined for not being in compliance. Originally, we had talked about letting them buy the water at wholesale prices and that does not necessarily work out so well for either side, after doing a lot more investigation. However, I think that if they could make an arrangement to lease water from another agency, they would not have the expense of buying the actual water rights, and they would be in compliance with their pumpage. I believe that the State Engineer's Office is going to be neutral on this, as they should be. But I believe that he could probably tell you that they are hundreds of acre-feet over on a regular basis. They have made strides. I think that when I first became their Assemblyperson, they were 250 acre-feet over, for the year. That is huge. That is what some cities use. They are now down to about 110 acre-feet over. They are working to get some meters on some of their homes so that they can figure out where the leaks are. They are repairing roadways. I will tell you, in their defense, they happen to be in a situation where they are in an unincorporated county line; however, the city is directly to the west of them and through their neighborhood is where a lot of those lines go for more development, on the city side. They currently have one of their roads that is torn up and will be torn up for three years because that is what the developer was given in Clark County to tie into the Las Vegas city water. At no fault of their own, again, they are subject to being in the middle of this rural neighborhood with big oak trees and big cottonwoods, being a thoroughfare for water pipes. With that, I come to you and ask to give the Southern Nevada Water Authority or other municipalities the ability to lease folks that are overpumping. The State Engineer keeps a very good list, on a regular basis, so they have a third option. I will tell you, though, that we are working with them to see if there are some other remedies. Also, my community serves on the Well Owner's Association meetings. They attend on a regular basis. The Southern Nevada Water Authority and I, over time, with the water laws that we have made and made changes to, have gotten to where we do not need as many meetings. We were having them quite often. In the beginning, they turned into a lot of brawls on the way out. Over time, trying to work with everyone on an individual basis, within their communities, we have gotten to where we have a really good dialogue. So well of a dialogue, that the

attendance is low now because people feel that they do have a voice after all of this time.

Also, in working with the Southern Nevada Water Authority, we agree that one year is well enough so that people can come and have their voice. I think it will actually help the attendance, over time, so that people know that they are getting together once a year to address their concerns. That is sufficient at this time. I would say to the legislative body that they have made great strides in order to give people those voices. So now they have their picnic and they have a regular voice with their legislative folks. I just wanted to give you a little bit of background and show where my constituents are coming from. I am able to answer any questions.

Vice Chair Bustamante Adams:
Mr. Goedhart.

Assemblyman Goedhart:
Thank you. In this situation of your neighborhood where you have a community with a municipal water well in their own system, if they were to lease that extra water that they are overappropriating now, over and above what they are allocated to pump, that would be a physical transfer of water. You could pay for it. Theoretically, they could lease it and still pump it out of the same well. They do not have to physically move it off of their system into your system. Is that correct?

Assemblywoman Kirkpatrick:
That is correct, and that was my point because currently they are not paying for anything and they are willing to pay for something.

Assemblyman Goedhart:
I thought that kind of makes sense, too, because I know the SNWA also has a certain number of water permits within that basin. Thank you.

Vice Chair Bustamante Adams:
Mr. Stewart.

Assemblyman Stewart:
I am familiar with this area. It is a beautiful area. I think this is a wonderful idea.

Vice Chair Bustamante Adams:
Ms. Pierce.

Assemblywoman Pierce:
If they lease this water, and you spoke about meters, they would get meters, so they would have some idea what they are using?

Assemblywoman Kirkpatrick:
Currently, there are two separate issues. One is that it has taken us about four years to even get them to agree to some homes having meters because they feel that it is an infringement. However, we have made great strides. Some of the homeowners are working now to get meters on their homes so we can try and at least identify where the potential leaks could be. In the meantime, as that process takes place to get a regular setting on it, they are agreeing; they want to pay their fair share for water and they do not want to get the letters anymore. We thought if they could lease the water rights and as they get the water meters, they would be able to determine where their problems are and hopefully help them fix it, eventually. Honestly, we have made great strides because it took us four years to get that far.

Vice Chair Bustamante Adams:
Ms. Benitez-Thompson and then Mr. Livermore.

Assemblywoman Benitez-Thompson:
So for your residents in this area, what has noncompliance meant for them? They have been receiving a letter. Have they been paying fines or is it just the threat of fines?

Assemblywoman Kirkpatrick:
They have been receiving the letters but I can tell you what has happened. Over the course of years they got used to getting the letters and really just chucked them. In 2007, when we put the fines in place, we tried to start working with them because, although Mr. Taylor was great to work with and Mr. King is great to work with, what if another engineer comes in and enforces it a little more sternly than they have in the past? Their work with me has been to get these people into compliance; let us help them. This particular community has a more stringent drought code than the Southern Nevada Water Authority. They have made great strides on trying to come into compliance. Have they gotten any fines? No. Have they done a master plan on the things that they can do? Yes. Is there concern that for the future, they could get fines? Yes. But ultimately, they are overpumping, and the rest of us are paying for that.

Assemblyman Livermore:
I really like the bill because it shows the willingness of people to come together and find a solution that works for them. Can you help me understand who is

going to be leasing the water? Is it the homeowners' association (HOA)? Or is it the individual homes?

Assemblywoman Kirkpatrick:
Currently, they have an HOA because that helps with the water master and the community well that they have. With the HOA, the water master would be the one that would sign all documents. They have an active board that meets on a regular basis. They meet every Tuesday. They are pretty active as far as wanting to do the right thing. As a group, they would own it because the water rights are to the association.

Vice Chair Bustamante Adams:
Mrs. Benitez-Thompson.

Assemblywoman Benitez-Thompson:
My last question. This language is written as "any public body may lease to anyone else who owns." Is there anyone throughout the state in which you would not like to see this apply to? Or just apply in any situation where the two bodies, the two entities can come to an agreement on that lease?

Assemblywoman Kirkpatrick:
I think that it is important to know that this does say, "as designated by the State Engineer" on who is overpumping. Because the State Engineer does keep a very detailed list of who is overpumping. I think those are the folks that are currently, in my opinion, if they did not take an option like this or they were not making strides, that they should get the fine. This is to give them an ability to come into compliance, yet another way to come into compliance. There are those who probably do not ever think they should come into compliance or do not want to come into compliance. The penalty applies to those who are not even trying to come into compliance, so this gives them yet another option to come into compliance.

Vice Chair Bustamante Adams:
With that, we are going to go ahead and transition to any others that are in support of A.B. 422. Are there any in the neutral position?

Andy Belanger, Manager, Management Services Division, Southern Nevada Water Authority:
We support Assembly Bill 422. We did propose an amendment that the Chair, Mrs. Kirkpatrick, went through (Exhibit M). I will go through that in a little bit more detail. Section 3 of the amendment takes the language that is in section 1 and puts it specifically in the special act creating the Las Vegas Valley

Groundwater Management Program. This is necessary in order to ensure that our program specifically has that language in it.

Section 4 through section 7 of the bill makes minor technical changes to the administration of the Las Vegas Valley Groundwater Management Program. As the Chair said, currently the committee meets four times a year. They have to submit biennial reports to the Legislature and an annual report, as well, to outline what happened with the groundwater management program the year prior. This amendment removes the requirement for three quarterly meetings and makes it at least once a year. We have committed that if there are other meetings that are necessary, we will continue to have those. But if there is nothing going on in the community, we want to make sure that we do not have to have meetings just to have meetings.

There is a requirement in the original bill draft, in section 9, that required the election of a chair to the committee. It has been somewhat cumbersome to appoint a chair, and the chair does not really have any duties or responsibilities. The process has always been consensus driven, and so we are suggesting that that be removed as well. That is in section 5.

Section 6 has to do with reports. Section 7 has to do with the program for providing financial assistance to well owners who choose to get off of their wells and connect to the municipal system. Our program provides 85 percent of the cost of connection for people who choose to do that, or who are required by the State Engineer to do that. And what this language does is it allows us to decouple some of the requirements of that. One of the requirements is that you have to provide for repayment over time. That is not something we have done. We have always provided it as a grant and not as a repayment. They do not have to pay the 85 percent back. Changing "must" to "may" and including a line in there, "including any other provision reasonably necessary to carry out the provisions and intent of the program," will allow us to use this section of law in a more consistent way with the way the statute reads.

Those are the comments I have, and I am happy to answer any questions.

Vice Chair Bustamante Adams:
Any questions? Mrs. Pierce.

Assemblywoman Pierce:
In a situation like this, the whole community would have to agree to be hooked up to the municipal water. It is not something a group of people could do or something, right?

Andy Belanger:
The way that the program works is that if it is a community well, we require that every property owner in the community agrees to connect. In the case of a mandatory connection, where the well has failed and the property is within 180 feet, they do not have a choice because they do not have a water supply. But in the case that they want to volunteer to connect, we require unanimity.

Vice Chair Bustamante Adams:
Any other questions? Okay. Mr. King.

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources:
Thank you for the opportunity to testify on A.B. 422. As Chair Kirkpatrick has already stated, our office is neutral on this bill. I did want to get on the record, though, that I concur with what Chair Kirkpatrick said about her constituents and the fact that they have been working with our office for many years. They have made strides towards coming back into compliance. They are still a ways out, but they are trying to do the right thing and we will continue to work with them. Thank you.

Vice Chair Bustamante Adams:
Any questions for Mr. King? Mr. Walker.

Steve Walker, representing Truckee Meadows Water Authority:
We are neutral on the bill, as amended. I was directed by the board of Truckee Meadows Water Authority to oppose the bill unless it was amended, so I am glad it did get amended more to our liking. We feel that the amendment puts the solution where it belongs, and that is within the local area, where the problem is. Quasi-municipal wells serving several houses are a pretty rare beast in northern Nevada. We are on the record as neutral, supporting the amendments. Thank you.

Vice Chair Bustamante Adams:
Thank you, Mr. Walker. Any questions? Seeing none, are there any others in the neutral position? Those in opposition to A.B. 422, please come up. Seeing no opposition, Chair Kirkpatrick do you have any closing remarks?

Assemblywoman Kirkpatrick:
Thank you for the opportunity to try and give my constituents another way to come into compliance, and I appreciate the time today.

Vice Chair Bustamante Adams:
We will close the hearing on A.B. 422. We will adjourn until 7:30 a.m. on Friday. Thank you.

[Meeting adjourned at 12:03 p.m.]

RESPECTFULLY SUBMITTED:

_____
Sheryl Burrows
Committee Secretary

_____
Matthew S. Baker
Transcribing Secretary

APPROVED BY:

_____
Assemblywoman Marilyn K. Kirkpatrick, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: March 30, 2011 **Time of Meeting: 7:30 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 410	C	Assemblyman Goedhart	Water Right Protest Packet
A.B. 410	D	Assemblyman Goedhart	Handout Regarding Water Right Applications
A.B. 276	E	Assemblyman Conklin	Conceptual Amendment
A.B. 329	F	Carrol Abel	Prepared Testimony
A.B. 329	G	Sheila Schwadel	Prepared Testimony
A.B. 329	H	Bonnie Matton	Pamphlet and Prepared Testimony
A.B. 329	I		Several Letters in Opposition to Bill
A.B. 387	J	Michael DeLee	Amendment Proposal
A.B. 419	K	Assemblyman Goicoechea	Amendment Proposal
A.B. 419	L	Susan Lynn	Prepared Testimony
A.B. 422	M	Andy Belanger	Proposed Amendment