

**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.

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

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**JOINT APPENDIX  
VOLUME VIII**

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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

ORIGINAL

Case No. CV-1902-348  
(Consolidated with CV-1902-349 and CV-1902-350)

NO. FILED

Dept. No. 2

OCT 23 2019

By *[Signature]*  
Eureka County Clerk

**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.

**RESPONDENTS STATE ENGINEER'S  
ANSWERING BRIEF**

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

Respondent,

EUREKA COUNTY; and DNRPCA  
INTERVENORS,

Intervenors.

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21 AB 95 ..... 6  
22 AB 419 ..... 5, 17, 23  
23 *Minutes of Assemb. Comm. on Gov't Affairs* (March 30, 2011), p. 67 ..... 23  
24 *Minutes of Senate Comm. on Gov't Affairs* (May 23, 2011), p. 16 ..... 17, 23  
25 *Minutes of Senate Comm. on Nat. Res.* (Feb. 28, 2019), p. 9 ..... 22

26 **Rules**

27 NRCP 12(f) ..... 40  
28

1 Tim Wilson, P.E., in his capacity as Acting Nevada State Engineer, Department of  
2 Conservation and Natural Resources, Division of Water Resources (hereafter "State  
3 Engineer"), by and through counsel, Nevada Attorney General Aaron D. Ford and Senior  
4 Deputy Attorney General James N. Bolotin, hereby files his Answering Brief. This  
5 Answering Brief is based upon the attached Points and Authorities and the pleadings and  
6 papers on file herein.

## 7 POINTS AND AUTHORITIES

### 8 I. INTRODUCTION

9 The Baileys, the Renners, and Sadler Ranch (collectively "Petitioners") use a  
10 shotgun approach to challenging the State Engineer's approval of the Diamond Valley  
11 Groundwater Management Plan ("GMP") in Order No. 1302, in addition to challenging  
12 the GMP itself. Unhappy with the fact that the majority of water right holders in  
13 Diamond Valley agreed to an arrangement that they disfavor, Petitioners pepper  
14 arguments against its approval across the pages of two separate briefs. Therein,  
15 Petitioners attack Order No. 1302 and the underlying GMP on a variety of fronts,  
16 including, but not limited to, allegations that it violates foundational principles of Nevada  
17 water law, violates statutory water law, violates NRS 534.037 (the statute authorizing a  
18 groundwater management plan in a critical management area), violates due process  
19 protections, and that the State Engineer failed to consider alternatives other than the  
20 GMP submitted for the Diamond Valley Hydrographic Basin, Basin No. 153 ("Diamond  
21 Valley").

22 Petitioners make these allegations against the GMP, a community-driven solution,  
23 after a majority of Diamond Valley's water users spent years through numerous  
24 workshops putting aside their differences and respective positions by assembling this  
25 plan. They did this in an attempt to avoid strict curtailment by priority and to preserve  
26 their way of life as farmers in Diamond Valley and to maintain the community and  
27 culture that they built over generations together, as farmers and neighbors. Additionally,  
28 Petitioners attack the final version of the GMP despite the fact that Petitioners (with the

1 exception of the Renners) did not regularly attend<sup>1</sup> and/or participate in the workshops  
2 where the GMP was assembled. State Engineer's Record on Appeal ("SE ROA") 286,  
3 293, 299, 301, 304, 311-312, 338-340, 342, 345, 349, 357-358, 382-383, 404, 416-417,  
4 421-422, 425, 428-429, 431-432, 435, 437-438, 442, 445, 447, 449, 454-455, 457. It was  
5 at these workshops where the community, including senior and junior water right  
6 holders, gathered to explore various options, ideas, and alternatives for the development  
7 of the GMP and where the Petitioners could have discussed their issues or proposed the  
8 alternatives they now present through their briefs.

9 Lost in the weeds of Petitioners' arguments is the actual process for the creation of  
10 a groundwater management plan and the State Engineer's statutory role in **approving** a  
11 groundwater management plan pursuant to NRS 534.037. Petitioners neither  
12 legitimately allege, nor provide any analysis, that the State Engineer failed to do what  
13 NRS 534.037 requires of him. Specifically, neither of Petitioners' Opening Briefs makes  
14 any allegation that the State Engineer failed to consider the hydrology of the basin, the  
15 physical characteristics of the basin, the geographic spacing and location of the  
16 withdrawals of groundwater in the basin, the quality of the water in the basin, the wells  
17 located in the basin, or whether a groundwater management plan already exists for the  
18 basin as required by NRS 534.037(2). *See generally* Bailey Opening Brief; Sadler/Renner  
19 Opening Brief. Additionally, there is no citation to where the State Engineer is required

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24 <sup>1</sup> Petitioners were noticed of all GMP workshops prior to their occurrence via email from  
25 Jake Tibbitts, Eureka County's Natural Resource Manager. SE ROA 277-475. The Renners (and Ira in  
26 particular) attended the workshops somewhat regularly throughout the process, attending 13 of  
27 28 meetings starting with the second workshop on June 11, 2015, and ending with the third to last  
28 workshop on February 21, 2018. SE ROA 286, 293, 299, 301, 304, 311-312, 338-340, 342, 345, 349,  
357-358, 382-383, 404, 416-417, 421-422, 425, 428-429, 431-432, 435, 437-438, 442, 445, 447, 449,  
454-455, 457. Tim Bailey started out as a regular attendee, attending 8 of the first 9 workshops, from  
April 23, 2015, through April 25, 2016, before he, and any other Baileys, seemed to stop attending the  
workshops altogether. *Id.* Pursuant to a review of the workshop sign-in sheets, Sadler Ranch only had a  
representative (Doug Frazer) attend one GMP workshop, the very first meeting held on April 23, 2015. *Id.*

1 to consider alternatives when deciding whether to approve a groundwater management  
2 plan submitted to him with a petition signed by a majority of water users in a basin.<sup>2</sup>  
3 Absent is any genuine analysis of the State Engineer's legal obligation strictly contained  
4 within NRS 534.037(2). Instead, Petitioners' arguments conflate the role of the  
5 community of groundwater users in the development of a plan of their creation and the  
6 State Engineer's limited role in determining whether or not to approve the plan as  
7 required by law.

8 To the extent Petitioners argue that strict adherence to the prior appropriation  
9 doctrine is necessary, Petitioners fail to explain why the Legislature would enact  
10 NRS 534.037 and NRS 534.110(7) if the only solution was curtailment by priority. Based  
11 upon the plain, unambiguous language of the statutes, it is clear that the intent was to  
12 provide the residents of a basin designated as a critical management area ten years to  
13 come up with a solution **other than** curtailment by priority. Restricting withdrawals to  
14 conform to priority rights is the only regulatory alternative presently available to the  
15 State Engineer to resolve the issues leading to designation of a basin as a critical  
16 management area. The development of an alternative solution is precisely what the  
17 groundwater users in Diamond Valley did with this GMP.

18 Again, the State Engineer's role under NRS 534.037 is strictly limited to  
19 **approving** a groundwater management plan meeting certain criteria. The State  
20 Engineer properly approved the GMP presented to him, pursuant to the statutory  
21 criteria, and Order No. 1302 should be affirmed. Petitioners make it clear that they  
22 dislike the GMP and that they preferred their own alternatives, or wanted the State  
23 Engineer to consider other criteria than the statute requires. However, the State  
24 Engineer was only tasked with deciding whether to approve the GMP, as developed by  
25 the groundwater users and submitted to his office pursuant to NRS 534.037. While

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26 <sup>2</sup> Note, the GMP submitted to the State Engineer did not contain any alternatives for consideration.  
27 Additionally, there is no provision in NRS 534.037 for the State Engineer to unilaterally alter a  
28 groundwater management plan agreed to by a majority of the water users in a basin. The State Engineer's  
role was to consider the GMP as submitted using the criteria outlined in NRS 534.037; since the GMP met  
all statutory criteria, it was approved.

1 certain Petitioners may criticize democracy,<sup>3</sup> this is our system of government. Pursuant  
2 to that system of government, the Legislature designed NRS 534.037 to be one where a  
3 majority of holders of permits or certificates would be permitted to develop a solution to  
4 managing groundwater in their particular basin following its designation as a critical  
5 management area, as an alternative to strictly regulating by priority.

6 In accordance with NRS 534.037, a majority of permit and certificate holders in  
7 Diamond Valley petitioned the State Engineer for approval of the GMP. After taking the  
8 proper steps, including affording all groundwater users affected by the GMP notice and  
9 an opportunity to be heard, considering the comments of the community, and considering  
10 the NRS 534.037(2) factors, the State Engineer approved the GMP in Order No. 1302.  
11 Petitioners' disagreement with the plan chosen by the majority, including both senior and  
12 junior priority water right holders, is insufficient to invalidate the GMP. The State  
13 Engineer respectfully requests that this Court affirm Order No. 1302.

## 14 II. FACTS

15 Diamond Valley is one of the most problematic groundwater basins in the State of  
16 Nevada. On the one hand, Diamond Valley has a rich history as a major farming area  
17 consisting of approximately 26,000 acres of irrigated land producing primarily premium  
18 quality alfalfa and grass hay. SE ROA 2, 225. Through their hard work and struggle, the  
19 farmers in Diamond Valley have established a prosperous farming industry in this area,  
20 which in 2013 produced approximately 110,000 tons of hay and alfalfa resulting in a  
21 farming income of approximately \$22.4 million. *Id.* On the other hand, Diamond Valley  
22 is severely over-appropriated and over-pumped. The State Engineer has established the  
23 perennial yield<sup>4</sup> of Diamond Valley as 30,000 acre-feet annually ("afa"). SE ROA 3.  
24 Meanwhile, there are approximately 126,000 afa of irrigation groundwater rights  
25 appropriated in Diamond Valley, "and as of 2016, groundwater pumping for irrigation  
26 was estimated to be 76,000 afa." *Id.* In other words, current pumping rates are more

27 <sup>3</sup> See Sadler/Renner Opening Brief, p. 1.

28 <sup>4</sup> Perennial yield is the maximum amount of groundwater than can be developed each year over the  
long term without depleting the groundwater reservoir.

1 than 250% of the perennial yield, while existing water rights in good standing constitute  
2 approximately 420% of the perennial yield. This has been the case for over 40 years,  
3 resulting in declining groundwater levels of more than 100 feet at a rate of up to 2 feet  
4 per year in some areas of the basin. SE 3, 314, 489. The water issues are well known and  
5 have been at the center of meetings held by the State Engineer in Diamond Valley for a  
6 number of years. SE ROA 3.

7 Due to these aforementioned water issues in Diamond Valley, and utilizing a  
8 statutory change,<sup>5</sup> on August 25, 2015, the State Engineer issued Order No. 1264

9  
10 <sup>5</sup> In 2011, Nevada's 76th Legislature passed Assembly Bill ("AB") 419, which the Governor signed  
into law. As a result, two (2) primary additions were made to Nevada's groundwater law.

11 First, the Legislature amended NRS 534.110 to include subsection (7) establishing the CMA  
designation process as follows:

12 The State Engineer:

- 13 (a) May designate as a critical management area any basin in which  
withdrawals of groundwater consistently exceed the perennial yield of  
the basin.
- 14 (b) Shall designate as a critical management area any basin in which  
15 withdrawals of groundwater consistently exceed the perennial yield of  
the basin upon receipt of a petition for such a designation which is  
16 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.

17 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  
18 designated as a critical management area for at least 10 consecutive years,  
the State Engineer shall order that withdrawals, including, without  
19 limitation, withdrawals from domestic wells, be restricted in that basin to  
conform to priority rights, unless a groundwater management plan has been  
20 approved for the basin pursuant to NRS 534.037.

21 Second, the Legislature added NRS 534.037 establishing a process for water users to create a  
groundwater management plan to resolve the conditions leading to the critical management area  
22 designation, the necessary steps to petition the State Engineer for approval, and the criteria that the State  
Engineer is required to consider in determining whether to approve a groundwater management plan:

- 23 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  
24 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  
25 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  
26 groundwater management plan which must set forth the necessary steps for  
removal of the basin's designation as a critical management area.
- 27 2. In determining whether to approve a groundwater management plan  
submitted pursuant to subsection 1, the State Engineer shall consider,  
without limitation:

- 28 (a) The hydrology of the basin;  
(b) The physical characteristics of the basin;

1 designating Diamond Valley a Critical Management Area (“CMA”) pursuant to  
2 NRS 534.110(7). SE ROA 3, 134–138. Diamond Valley is the first, and presently the  
3 only, groundwater basin in Nevada designated as a CMA. SE ROA 226. Pursuant to  
4 statute, this CMA designation started a ten-year clock. See NRS 534.110(7). So long as  
5 Diamond Valley remained a CMA for ten consecutive years, the State Engineer would be  
6 required to order that withdrawals, “including, without limitation, withdrawals from  
7 domestic wells,<sup>6</sup> be restricted in that basin to conform to priority rights” (i.e., curtailment)  
8 unless the State Engineer approved a groundwater management plan pursuant to  
9 NRS 534.037. *Id.*; SE ROA 225. Although groundwater users in Diamond Valley started  
10 meeting to potentially create a groundwater management plan as early as March of 2014,  
11 in anticipation of a CMA designation, not until August 25, 2015, did the official  
12 CMA designation exist, thereby starting the ten-year clock. SE ROA 226.

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

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

16 (e) The wells located in the basin, including, without limitation, domestic  
17 wells;

18 (f) Whether a groundwater management plan already exists for the  
19 basin; and

20 (g) Any other factor deemed relevant by the State Engineer.

21 3. Before approving or disapproving a groundwater management plan  
22 submitted pursuant to subsection 1, the State Engineer shall hold a public  
23 hearing to take testimony on the plan in the county where the basin lies or, if  
24 the basin lies in more than one county, within the county where the major  
25 portion of the basin lies. The State Engineer shall cause notice of the hearing  
26 to be:

27 (a) Given once each week for two consecutive weeks before the hearing in  
28 a newspaper of general circulation in the county or counties in which the  
basin lies.

(b) Posted on the Internet website of the State Engineer for at least  
two consecutive weeks immediately preceding the date of the hearing.

4. The decision of the State Engineer on a groundwater management plan  
may be reviewed by the district court of the county pursuant to NRS 533.450.

5. An amendment to a groundwater management plan must be proposed  
and approved in the same manner as an original groundwater management  
plan is proposed and approved pursuant to this section.

<sup>6</sup> During the Nevada Legislature’s 80th (2019) session, the Legislature passed, and the Governor signed into law, AB 95. In doing so, NRS 534.110 was amended to include subsection (9), whereby domestic wells now retain the ability to withdraw up to 0.5 afa of water, which must be recorded by a water meter, where withdrawals are restricted to conform to priority rights by either a court order or pursuant to State Engineer order. At the time of the State Engineer’s public hearing on October 30, 2018, and the issuance of Order No. 1302 on January 11, 2019, domestic wells with a junior priority date would have been fully curtailed where withdrawals were restricted to conform to priority rights.

1 Over the course of the next three years, water right holders in Diamond Valley met  
2 regularly, where they considered options for and assembled the GMP, aiming to reduce  
3 pumping and stabilize groundwater levels in the basin to avoid curtailment by priority.  
4 SE ROA 226–227, 277–475. Steps were taken to ensure that all groundwater right  
5 holders in Diamond Valley were informed of meetings and provided opportunities to be  
6 involved in the process. SE ROA 226. Early in the process, Diamond Valley water users  
7 attended workshops where they developed major portions of the GMP. SE ROA 227. In  
8 February 2016, the water users elected an Advisory Board, consisting of different types of  
9 water right holders<sup>7</sup> in Diamond Valley, to do the heavy lifting on the GMP and bring  
10 their progress to the larger community-wide workshops for input and decision-making.  
11 SE ROA 226–227, 277.

12 At all times, the goal was to create a plan that was adapted to “local needs, desires,  
13 and constraints.” *Id.*; see also SE ROA 315 (July 2, 2015, Eureka Sentinel article  
14 regarding a “community-based approach to addressing water resource management.”).  
15 An overarching concept of the GMP was the idea that the GMP was not designed to, nor  
16 does it, address inequities of the past or old decisions; rather, the GMP “starts with  
17 current pumping levels and current water rights in good standing and works forward to  
18 reduce pumping to sustainable levels.”<sup>8</sup> SE ROA 471.

19 Pursuant to NRS 534.037, water right holders in Diamond Valley filed a Petition to  
20 Adopt a Groundwater Management Plan with the State Engineer on August 20, 2018.  
21 SE ROA 2, 148. In accordance with the statute, this is where the State Engineer’s  
22 consideration of the GMP began. While the water users assembling the GMP did on  
23 occasion request input from the State Engineer and Division of Water Resources (“DWR”)

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24 <sup>7</sup> At the time of the GMP’s submittal to the State Engineer, the Advisory Board consisted of  
25 eight seats: one person representing mining groundwater rights holders, one person representing  
26 groundwater rights holders with primary interests in ranching in Diamond Valley and representing  
27 claimants with vested spring rights claims on the valley floor, four farmers with both senior and junior  
rights, and two farmers with all of their groundwater rights being within the first 30,000 afa to have been  
appropriated in Diamond Valley (*i.e.*, senior rights). SE ROA 230.

28 <sup>8</sup> Reduction of pumping to sustainable levels (*i.e.*, withdrawals not causing continued groundwater  
decline) would demonstrate that conditions were appropriate for the State Engineer to consider removal of  
the CMA designation.

1 staff, and DWR staff members often attended the GMP workshops to serve as a resource,  
2 the GMP was ultimately assembled by the water users in Diamond Valley and was  
3 submitted as a community-based approach to resolving the groundwater issues. *See*  
4 SE ROA 277–475.

5 In accordance with NRS 534.037, after adhering to the mandatory notice  
6 provisions, the State Engineer held a public hearing on October 30, 2018, during which he  
7 took public testimony in favor of and in opposition to the GMP submitted to his office.  
8 SE ROA 3–4, 653. Following the hearing, the State Engineer held open the period for  
9 written public comment for three working days (until November 2, 2019) after the  
10 hearing. SE ROA 4, 741. Following the hearing, and based upon the GMP as submitted  
11 with the petition to the State Engineer, the State Engineer considered the required  
12 statutory factors and determined that a majority of the holders of permits or certificates  
13 to appropriate water in Diamond Valley signed the Petition. SE ROA 2–19. Based upon  
14 these considerations, the State Engineer approved the GMP via Order No. 1302 on  
15 January 11, 2019. SE ROA 2–19.

### 16 III. PROCEDURAL HISTORY

17 As provided for in NRS 534.037, Petitioners<sup>9</sup> timely filed Petitions for Judicial  
18 Review challenging Order No. 1302 pursuant to NRS 533.450. Upon stipulation of the  
19 parties, the Court entered an order consolidating all Petitions for Judicial Review into a  
20 single case, Case No. CV1902-348, on March 27, 2019. *See* Stipulation and Order to  
21 Consolidate Cases. On April 3, 2019, Eureka County filed its Motion to Intervene in the  
22 consolidated cases. On April 9, 2019, the Court held a telephone status conference with  
23 the parties and Eureka County (not yet a party) to discuss briefing and other procedural  
24 matters. *See* April 25, 2019, Order Following Telephone Status Hearing Held April 9,  
25 2019. During the conference, the parties discussed the SE ROA. The State Engineer  
26 objected to Petitioners' proposed use of extra-record evidence or to judicial

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27 <sup>9</sup> Daniel S. Venturacci was also originally named as a joint Petitioner in Sadler Ranch's Petition for  
28 Judicial Review, but Mr. Venturacci withdrew himself from this matter via the Notice of Withdrawal filed  
on or about June 10, 2019.

1 supplementation of the SE ROA, but agreed to meet and confer for the limited purpose of  
2 considering for inclusion in the SE ROA any clerical errors or inadvertent omissions they  
3 might identify in their review. Thereafter, the Court ordered the State Engineer to file  
4 the SE ROA on April 30, 2019. April 25, 2019, Order at 3. Further, the Court ordered  
5 that “legal counsel for the parties shall meet and confer by telephone . . . for the purpose  
6 of discussing the contents of the [SE ROA], as filed, [and] any proposed supplemental  
7 exhibits to the [SE ROA].” *Id.*

8 The State Engineer prepared the SE ROA for filing and shared the Draft Summary  
9 of the Record with all of the parties on April 16, 2019. Upon reviewing the State  
10 Engineer’s Draft Summary of the Record, Petitioners did not send any “proposed  
11 supplemental exhibits” that were inadvertently omitted, in accordance with this Court’s  
12 Order and the State Engineer’s expectations. Instead, on April 23, 2019, Petitioners  
13 submitted a “meet and confer letter,” seeking to include in the SE ROA a list of  
14 documents, which were not part of the record relied upon in the issuance of Order  
15 No. 1302; in reality, the letter was more similar to a public records request seeking some  
16 50 years of records relating to the Diamond Valley Hydrographic Basin.

17 On or about May 10, 2019, Real Parties-in-Interest J&T Farms, Gallagher Farms,  
18 Jeff Lommori, M&C Hay, Conley Land & Livestock, LLC, Jim and Nick Etcheverry,  
19 Tim and Sandie Halpin, Diamond Valley Hay Co., Mark Moyle Farms, LLC, D.F. and  
20 E.M. Palmore Family Trust, Bill and Patricia Norton, Sestanovich Hay & Cattle, LLC,  
21 Jerry Anderson, Bill and Darla Bauman, and Diamond Natural Resources Protection and  
22 Conservation Association filed a Motion to Intervene (collectively “DNRPCA  
23 Intervenors”). The Court held another telephonic status conference on June 4, 2019,  
24 where the SE ROA issue was again raised. See June 11, 2019, Order Following  
25 Telephone Status Hearing Held June 4, 2019. The Court also laid out a process by which  
26 parties or entities could seek and be granted intervention as a matter of right so long as  
27 these motions were filed on or before August 1, 2019. *Id.* at 2. The Court also set a  
28 briefing schedule, ordering opening briefs to be filed on or before September 16, 2019,

1 answering briefs<sup>10</sup> to be filed on or before October 16, 2019, and reply briefs to be filed on  
2 or before November 12, 2019. *Id.* at 3. Lastly, the Court set oral arguments to be held on  
3 December 10, 11, and 12, 2019, at the Eureka Opera House in Eureka, Nevada. *Id.* The  
4 Court formally granted Eureka County's Motion to Intervene on April 30, 2019, and  
5 formally granted the DNRPCA Intervenor's Motion to Intervene on May 29, 2019.

6 In order for the State Engineer to consider the full scope of the requests listed in  
7 the Meet and Confer Letter, the parties stipulated to an extension of time to file the  
8 SE ROA on May 24, 2019. The State Engineer filed a subsequent Request for Extension  
9 of Time to file the Record on June 7, 2019, which this Court granted. Unable to reach an  
10 agreement with Petitioners regarding the contents of the SE ROA, on June 11, 2019, the  
11 State Engineer filed the SE ROA with the Court accompanied by a Motion in Limine  
12 seeking to limit the evidence considered in this matter to the SE ROA. The Motion in  
13 Limine received a full briefing, with Petitioners opposing the Motion in Limine and  
14 Eureka County and the DNRPCA Intervenor's filing jointers to the Motion in Limine. On  
15 or about July 29, 2019, Diamond Valley Ranch, LLC, American First Federal, Inc.,  
16 Berg Properties California, LLC, and Blanco Ranch, LLC (collectively "DVR Parties"),  
17 filed a Motion to Intervene to file an answering brief and participate in the proceedings  
18 as respondents.

19 On September 4, 2019, the Court issued its Order Granting Motion in Limine,  
20 thereby making two key findings. First, the Court ordered that all evidence in this  
21 matter shall be limited to the SE ROA, as filed by the State Engineer on June 7, 2019.  
22 Order Granting Motion in Limine at 10. Second, the Court found that "the public hearing  
23 process to consider the GMP under NRS 534.037 provided notice and the opportunity for  
24 anyone to be heard and to offer evidence, thus satisfying due process standards." *Id.*  
25 Therefore, in making its determination whether there is substantial evidence in the  
26 record to support the State Engineer's Order No. 1302, the Court "will only consider that

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27 <sup>10</sup> In accordance with the Stipulation for Extending Briefing Schedule executed on October 7,  
28 2019, Answering Briefs are due to be filed on October 23, 2019, and Reply Briefs are due to be filed on  
November 19, 2019.

1 which was presented at the public hearing held October 30, 2018, or the comments and  
2 evidence submitted before November 2, 2018, at 5:00 p.m.” *Id.* at 9–10.

3 In accordance with the Court’s June 11, 2019, Order Following Telephone Status  
4 Hearing Held June 4, 2019, Petitioners timely filed and served their Opening Briefs.<sup>11</sup>  
5 The State Engineer now timely submits his Answering Brief.

#### 6 IV. STANDARD OF REVIEW

7 Water law proceedings, like this, are special in character and the provisions of  
8 NRS 533.450 establish the boundaries of the court’s review and strictly limits the review  
9 to the narrow confines established under the statute and as interpreted by the Nevada  
10 Supreme Court. *See Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949)  
11 (“It is also well settled in this state that the water law and all proceedings thereunder are  
12 special in character, and the provisions of such law not only lay down the method of  
13 procedure but **strictly limits** it to that provided.” (emphasis added)). All proceedings to  
14 review a decision of the State Engineer are subject to the provisions of NRS 533.450,  
15 which explicitly provides in part that such proceedings are “in the nature of an appeal”  
16 and are “informal and summary.”

17 The court’s review of a decision brought under NRS 533.450 is limited to deciding  
18 whether the State Engineer’s decision is supported by substantial evidence. *See Revert v.*  
19 *Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence is “that which a  
20 reasonable mind might accept as adequate to support a conclusion.” *Id.* When reviewing  
21 a decision or order of the State Engineer, the court may not “pass upon the credibility of  
22 the witness nor reweigh the evidence.” *Id.*; *see also Bacher v. State Eng’r*, 122 Nev. 1110,  
23 1121, 146 P.3d 793, 800 (2006).

24 The Legislature has specified that “[t]he decision of the State Engineer shall be  
25 *prima facie* correct, and the burden of proof shall be upon the party attacking the same.”

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26 <sup>11</sup> Filed concurrent with their Opening Briefs and after conferring with all counsel, Petitioners  
27 submitted their Unopposed Motion to Exceed Page Limit seeking approval for their briefs to exceed the  
28 page limits set in this Court’s Standing Order. The parties filing Answering Briefs concurrently request a  
similar ability to exceed the page limit, which is also unopposed after conferring with counsel for  
Petitioners. *See State Engineer’s and Intervenors’ Unopposed Motion to Exceed Page Limit.*

1 NRS 533.450(10); *see also Revert*, 95 Nev. at 786, 603 P.2d at 264. Generally, the State  
2 Engineer’s “factual determinations will not be disturbed” by the reviewing court on a  
3 Petition for Judicial Review pursuant to NRS 533.450 so long as they are “supported by  
4 substantial evidence.” *Pyramid Lake Paiute Tribe v. Washoe Cty.*, 112 Nev. 743, 751,  
5 918 P.2d 697, 702 (1996) (internal citations omitted). However, if the court determines  
6 that the State Engineer’s decision was “arbitrary and capricious,” and therefore an abuse  
7 of discretion, the court may then overrule the State Engineer’s conclusions. *Id.*

8 Further, the Nevada Supreme Court has explained that “an agency charged with  
9 the duty of administering an act is impliedly clothed with power to construe it as a  
10 necessary precedent to administrative action,” and therefore “great deference should be  
11 given to the agency’s interpretation when it is within the language of the statute.” *State*  
12 *v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (internal citations omitted);  
13 *see also Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008)  
14 (“[B]ecause the appropriation of water in Nevada is governed by statute, and the State  
15 Engineer is authorized to regulate water appropriations, that office has the implied power  
16 to construe the state’s water law provisions and great deference should be given to the  
17 State Engineer’s interpretation when it is within the language of those provisions.”).  
18 However, where a court is reviewing the State Engineer’s decision on a pure question of  
19 law, the State Engineer’s ruling is persuasive, but not entitled to deference. *Sierra Pac.*  
20 *Indus. v. Wilson*, 135 Nev. Adv. Op. 13 (2019) (citing *Pyramid Lake Paiute Tribe of*  
21 *Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (Stating that the Nevada  
22 Supreme Court “review[s] purely legal questions without deference to the State  
23 Engineer’s ruling.”)).

24 Therefore, NRS 533.450 provides the basis and the limit for challenging decisions  
25 of the State Engineer. Accordingly, this Court’s review is limited to whether substantial  
26 evidence in the record on appeal supports the State Engineer’s decision.

27 However, this is the first case challenging a groundwater management plan  
28 created by the community members in a basin pursuant to NRS 534.110(7) and approved

1 pursuant to NRS 534.037, as the State Engineer was persuaded that the GMP includes  
2 the necessary steps for removal of the CMA designation by the end of the GMP's planning  
3 horizon. Thus, once again, it is important to note that this is wholly unlike other State  
4 Engineer Orders, such as those issued pursuant to NRS 534.110(8) or NRS 534.120(1),  
5 where the State Engineer, with the assistance of DWR staff, generates his own order as  
6 he deems necessary for the welfare of an area. Rather, under NRS 534.037, the State  
7 Engineer's role is to merely **approve** a GMP submitted to him with a petition "signed by  
8 a majority of the holders of permits and certificates to appropriate water in the basin that  
9 are on file in the Office of the State Engineer" that "set[s] forth the necessary steps for  
10 removal of the basin's designation as a [CMA]." NRS 534.037(1).

11 The State Engineer is not provided with an opportunity to make edits, changes, or  
12 suggestions to a submitted groundwater management plan; such changes would not be  
13 appropriate as a groundwater management plan is a community-driven solution, and  
14 there is no guarantee that such edits would receive the majority support required by  
15 NRS 534.037(1). Instead, the State Engineer is only charged with approving or  
16 disapproving a groundwater management plan after considering the hydrology of the  
17 basin, the physical characteristics of the basin, the geographic spacing and location of the  
18 withdrawals of groundwater in the basin, the quality of the water in the basin,  
19 the wells located in the basin, whether a groundwater management plan already exists  
20 for the basin, and any other factor he deems relevant, and holding a public hearing.  
21 NRS 534.037(2); (3). Therefore, the abuse of discretion standard of review in this case  
22 should be applied to the limited discretion that the State Engineer had pursuant to  
23 NRS 534.037 after following the statutory requirements.

## 24 V. ARGUMENT

### 25 A. The Diamond Valley GMP is a Community-Based Solution Operating 26 Outside of the State Engineer's Other Statutory Powers

27 First and foremost, as stated above, it is important to not lose sight of the State  
28 Engineer's role in the process outlined in both NRS 534.110(7) and NRS 534.037 or

1 conflate his role with that of the water right holders who develop and petition  
2 for approval of a groundwater management plan. Per NRS 534.110(7)(a), the State  
3 Engineer “[m]ay designate as a [CMA] any basin in which withdrawals of groundwater  
4 consistently exceed the perennial yield of the basin.” This differs from the mandatory  
5 CMA designation provision in NRS 534.110(7)(b) where he receives “a petition for such a  
6 designation which is signed by a majority of the holders of certificates or permits to  
7 appropriate water in the basin that are on file in the Office of the State Engineer.” Under  
8 the permissive CMA designation statute, NRS 534.110(7)(a), the State Engineer used his  
9 discretion to designate Diamond Valley as a CMA in Order No. 1264 on August 25, 2015.  
10 See SE ROA 3.

11 Should the State Engineer keep a basin designated as a CMA for at least  
12 ten consecutive years, the State Engineer is required to “order that withdrawals,  
13 including, without limitation, withdrawals from domestic wells, be restricted in that  
14 basin to conform to priority rights, **unless** a groundwater management plan has been  
15 **approved** for the basin pursuant to NRS 534.037.” NRS 534.110(7) (emphasis added).  
16 NRS 534.037 provides the groundwater users in a basin designated as a CMA with  
17 an opportunity to come together and create a groundwater management plan and  
18 petition the State Engineer for **approval** of the groundwater management plan. See  
19 NRS 534.037(1). In deciding whether to **approve** a groundwater management plan, the  
20 State Engineer must consider, without limitation:

- 21 (a) The hydrology of the basin;
- 22 (b) The physical characteristics of the basin;
- 23 (c) The geographical spacing and location of the withdrawals of  
24 groundwater in the basin;
- 25 (d) The quality of the water in the basin;
- 26 (e) The wells located in the basin, including, without limitation,  
27 domestic wells;
- 28 (f) Whether a groundwater management plan already exists for  
the basin; and
- (g) Any other factor deemed relevant by the State Engineer.

27 NRS 534.037(2). Lastly, “[b]efore **approving or disapproving** a groundwater  
28 management plan submitted pursuant to [NRS 534.037(1)], the State Engineer shall hold

1 a public hearing to take testimony on the plan in the county where the basin lies or, if the  
2 basin lies in more than one county, within the county where the major portion of the  
3 basin lies.” NRS 534.037(3) (emphasis added). The public hearing must be properly  
4 noticed for two consecutive weeks preceding the hearing. *See id.*

5 It is clear from the plain language of NRS 534.037 and NRS 534.110(7) that the  
6 State Engineer has two options when presented with a petition for approval of a  
7 groundwater management plan: approve or disapprove. Despite Petitioners’ arguments  
8 that the State Engineer could have considered other methods of reducing pumping for the  
9 GMP, NRS 534.037 does not empower the State Engineer with the authority or discretion  
10 to consider alternatives to majority approved groundwater management plans submitted  
11 for his review and approval. *See Bailey Opening Brief, pp. 17–18; Sadler/Renner Opening*  
12 *Brief, p. 30.* The State Engineer’s role in the groundwater management plan process is  
13 statutorily limited to a thumbs-up or thumbs-down determination on a plan assembled  
14 and agreed to by a majority of the water right holders in a given basin. *See NRS 534.037.*  
15 It is not arbitrary and capricious for the State Engineer to limit his focus to the majority  
16 approved groundwater management plan he receives rather than looking to alternatives  
17 that the water users **could** have used. Rather, the State Engineer is neither required,  
18 nor permitted under the statutes, to consider alternatives to supplant the work done by  
19 the community members in assembling a given groundwater management plan and  
20 agreed to via the signed petition.

21 Groundwater management plans under NRS 534.037 are ultimately designed,  
22 assembled, and agreed upon by the community they affect, and that is the case with the  
23 GMP submitted and approved for Diamond Valley in Order No. 1302. SE ROA 217–527.  
24 Petitioners Sadler Ranch and the Renners, however, make the unsubstantiated allegation  
25 that the GMP is actually “as much a creation of the State Engineer as it was of the water  
26 users.” *Sadler/Renner Opening Brief, p. 6.* This baseless allegation profoundly misstates  
27 the State Engineer’s and DWR’s role in this process. The State Engineer and DWR staff  
28 are public servants, tasked with the important (yet often thankless and criticized) job of

1 conserving, protecting, managing and enhancing the State's water resources for Nevada's  
2 citizens through the appropriation of the public waters. In this role of serving Nevada's  
3 citizens, DWR prides itself on being a customer-service oriented agency frequently  
4 serving in an advisory role. Rather than acting as a black box, and requiring water users  
5 to submit the GMP blindly, the State Engineer and DWR staff were willing to provide  
6 expertise when requested. This is especially important with Diamond Valley's GMP that  
7 requires significant oversight, and included having a staff member on hand at workshops.  
8 *See* SE ROA 217-247, 277-475.

9       The fact that former-State Engineer, Jason King, informed water users in Diamond  
10 Valley that it would be a good idea "to begin the process of developing a GMP" does not  
11 illustrate some nefarious intent as alleged by Sadler Ranch and the Renners. *See*  
12 *Sadler/Renner Opening Brief*, p. 6. Rather, this is an example of the State Engineer  
13 providing sound advice to the citizens of Diamond Valley, given that NRS 534.110(7) had  
14 been enacted into law and the well-known fact that Diamond Valley had severe and  
15 consistent over-pumping issues. None of this changes the fact that this GMP is the  
16 community's plan, and a majority of water right holders in Diamond Valley, as required  
17 by NRS 534.037(1), petitioned for its approval. Once this petition reached the State  
18 Engineer's desk, and after consideration of the necessary factors and a public hearing,  
19 the State Engineer's role was limited to one thing: approval or disapproval. *See*  
20 NRS 534.037. The State Engineer properly adhered to his statutory role in approving the  
21 Diamond Valley GMP in Order No. 1302.

22       **B. The State Engineer Complied With the Unambiguous, Plain**  
23       **Language of NRS 534.037 in Approving the Diamond Valley GMP**

24       Petitioners seek to lead this Court into the weeds, filling the pages of their Opening  
25 Briefs with red herrings of legislative intent and supposed requirements that the State  
26 Engineer failed to meet despite them being absent from the relevant statutes governing  
27 groundwater management plans. Legislative intent "is the controlling factor" when  
28 interpreting a statute. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011)

1 (citing *Robert E. v. Just. Ct.*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983)). In determining  
2 legislative intent, the starting point is the statute's plain meaning; "when a statute 'is  
3 clear on its face, a court cannot go beyond the statute in determining legislative intent."  
4 *Id.* Here, the plain meaning of NRS 534.037 is unambiguous<sup>12</sup> and the legislative intent  
5 (to allow the community to come up with solutions to groundwater issues outside of strict  
6 adherence to curtailment by priority) is clear on its face. Therefore, it would be improper  
7 to look beyond the plain language of the statute. The State Engineer complied with this  
8 plain language, and substantial evidence in the SE ROA supports the State Engineer's  
9 decision to approve the Diamond Valley GMP in Order No. 1302.

10           **1. The State Engineer adhered to the notice and hearing**  
11           **requirements in NRS 534.037(3)**

12           In terms of the plain language of NRS 534.037, the State Engineer had a relatively  
13 simple task. Before approving or disapproving the GMP, he was required to hold a public  
14 hearing to take testimony on the GMP in the county where Diamond Valley lies, and  
15 provide notice of the hearing for 2 consecutive weeks beforehand, both "in a newspaper of  
16 general circulation in the county or counties where the basin lies" and "on the Internet  
17 website of the State Engineer." NRS 534.037(3).

18           While this aspect of the GMP is unchallenged by Petitioners, the State Engineer  
19 properly noticed the October 30, 2018, public hearing. In compliance with  
20 NRS 534.037(3)(a), the State Engineer published notice of the public hearing in multiple

21 \_\_\_\_\_  
22           <sup>12</sup> Assuming *arguendo*, if this Court finds that NRS 534.037 is not unambiguous, such that it looks  
23 to legislative history to determine legislative intent, the limited legislative history supports the State  
24 Engineer's interpretation of the statute as being "consistent with reason and public policy." See *Lucero*,  
25 127 Nev. at 95, 249 P.3d at 1228 (2011). Before the Assembly Committee on Government Affairs in 2011,  
26 former DWR Deputy Administrator Kelvin Hickenbottom stated that "[w]e do not want to go into a basin  
27 and strong-arm people into allowing certain priorities to put water to beneficial use. It would have a huge  
28 impact on the whole economy near those basins. We would rather work with the **individual right  
holders in the basin to figure out ways to bring the basin back into balance.** That is what  
[AB 419] is trying to address." *Minutes of Assemb. Comm. on Gov't Affairs* (May 4, 2011), p. 23 (emphasis  
added); see also *Minutes of Senate Comm. on Gov't Affairs* (May 23, 2011), p. 16 (Testimony of  
Andy Belanger: "We understand the need to manage groundwater basins and to give people a **soft landing**  
to get basins back into balance . . . We understand the process is critical to **giving local groundwater**  
users say in whether basins need to be defined as critical management areas and to the development of  
groundwater management plans.") (emphasis added).

1 newspapers of general circulation in Eureka County, where Diamond Valley is located,  
2 including the *Eureka County Sentinel*, the *Elko Daily Free Press*, and the *Ely Times*,  
3 during the weeks of the 15th and 22nd of October. SE ROA 4, SE ROA 528–534.  
4 Furthermore, in compliance with NRS 534.037(3)(b), the State Engineer posted notice of  
5 the hearing on DWR’s Internet website starting on October 1, 2018, and it remains on the  
6 website at this time. SE ROA 4, 534; *see also* <http://water.nv.gov/documents/Hearing>  
7 [Notice-Diamond Valley GMP.pdf](http://water.nv.gov/documents/Hearing) (last accessed 10/11/19).

8 Additionally, the State Engineer held a public hearing on October 30, 2018, at the  
9 Eureka County Opera House in Eureka, Nevada. SE ROA 4, 653–742. During this  
10 hearing, the State Engineer took testimony in favor of and in opposition to the GMP, and  
11 also held open the period for written public comment on the GMP for an additional  
12 three days following the hearing. *Id.* Order No. 1302 specifically addresses each of the  
13 primary comments made during the public hearing. *See* SE ROA 6–18. This hearing  
14 complied with the plain language of NRS 534.037(3), as this Court already determined in  
15 its Order Granting Motion in Limine, filed on September 4, 2019. *See* Order Granting  
16 Motion in Limine, pp. 6–10. Specifically, the Court found that public hearing held  
17 on October 30, 2018, and the notice provided thereof, “to consider the GMP under  
18 NRS 534.037 provided notice and the opportunity for anyone to be heard and to offer  
19 evidence, thus satisfying the due process standards.” *Id.*, p. 10.

20 Thus, substantial evidence supports the fact that the State Engineer complied with  
21 the notice and hearing requirements in NRS 534.037(3) prior to approving the GMP.

22 **2. The State Engineer considered the requisite factors in**  
23 **NRS 534.037(2) in approving the Diamond Valley GMP in**  
24 **Order No. 1302 and the GMP sets forth the necessary steps for**  
**removal of Diamond Valley’s CMA designation**

25 Once a hearing is held in accordance with NRS 534.037(3), in determining whether  
26 to approve the GMP, the State Engineer must consider: (a) the hydrology of the basin;  
27 (b) the physical characteristics of the basin; (c) the geographic spacing and location of the  
28 withdrawals of groundwater in the basin; (d) the quality of the water in the basin; (e) the

1 wells located in the basin; (f) whether a groundwater management plan already exists for  
2 the basin; and (g) any other factor he deems relevant. NRS 534.037(2). The key  
3 determination for the State Engineer to make in deciding whether to approve or  
4 disapprove a groundwater management plan is whether it “set[s] forth the necessary  
5 steps for removal of the basin’s designation as a [CMA].” NRS 534.037(1).

6 One of Petitioners’ primary arguments, especially from Sadler Ranch and the  
7 Renners, is that Order No. 1302 failed to meet the standards of NRS 534.037. See  
8 Sadler/Renner Opening Brief, pp. 9–18; Bailey Opening Brief, pp. 30–32. As shown  
9 above, the State Engineer must consider specific factors, delineated in NRS 534.037(2),  
10 before approving or disapproving a groundwater management plan based upon a finding  
11 that it sets forth the steps necessary for removal of a basin’s CMA designation. See  
12 NRS 534.037(1).

13 The State Engineer considered the required factors prior to approving the GMP,  
14 and evidence pertaining to these factors was provided by the proponents of the GMP in  
15 Appendix D of the GMP. SE ROA 18–19, 223, 227–228, 476–496. Specifically,  
16 Appendix D contains evidence regarding: the hydrology of Diamond Valley and its  
17 physical characteristics, as required by NRS 534.037(2)(a) and (b), at SE ROA 476–477;  
18 the geographic spacing and location of the withdrawals of groundwater in the basin and  
19 the wells located in the basin (including domestic wells), as required by NRS 534.037(2)(c)  
20 and (e), as well as water uses, and additional information regarding surface water rights  
21 and groundwater levels, as permitted for consideration by NRS 534.037(2)(g), at  
22 SE ROA 477–492; and the water quality in Diamond Valley, as required by  
23 NRS 534.037(2)(d), at SE ROA 494–496. The State Engineer considered other  
24 information as well, that he deemed relevant for consideration pursuant to  
25 NRS 534.037(2)(g), including J.R. Harrill’s Water Resources Bulletin No. 35, prepared in  
26 cooperation with the United States Geological Survey (“USGS”), entitled *Hydrologic*  
27 *Response to Irrigation Pumping in Diamond Valley, Eureka and Elko Counties, Nevada,*  
28 *1950–65*, USGS Maps of Diamond Valley, prior State Engineer Orders in Diamond

1 Valley, vested rights and mitigation rights issued in Diamond Valley, the expert report  
2 from David Hillis, P.E., other evidence submitted by Sadler Ranch, the USGS report  
3 entitled *Budgets and Chemical Characterization of Groundwater for the Diamond Valley*  
4 *Flow System, Central Nevada, 2011–12*, banked water models, and annual crop  
5 inventories maintained by DWR. SE ROA 20–146, 620–652, 743–952. Lastly, and  
6 indisputably, the State Engineer determined that there was no groundwater  
7 management plan in existence in Diamond Valley prior to the issuance of Order No. 1302,  
8 pursuant to NRS 534.037(2)(f). SE ROA 18.

9 Thus, the State Engineer looked at the necessary factors prior to approving the  
10 GMP. In fact, Petitioners do not really challenge this aspect of the GMP, other than  
11 arguing that the Sadler Ranch expert report was better evidence than the other factors  
12 the State Engineer considered. See Sadler/Renner Opening Brief, pp. 15–18. However, it  
13 is within the State Engineer’s discretion to look at all the evidence and come to a decision,  
14 in this case approval of the GMP, based upon substantial evidence. Substantial evidence  
15 in the record supports the fact that the State Engineer considered the necessary factors  
16 under NRS 534.037(2) before approving the GMP.

17 While Petitioners do not legitimately challenge the fact that the State Engineer  
18 considered the proper factors, they do challenge the State Engineer’s approval of the  
19 GMP, which, per NRS 534.037(1), required a determination that the GMP “set[s] forth  
20 the necessary steps for removal of [Diamond Valley’s] designation as a [CMA].” See  
21 Sadler/Renner Opening Brief, pp. 9–18; Bailey Opening Brief, pp. 27–33. In doing so,  
22 Petitioners offer yet another red herring by setting their own standard for a groundwater  
23 management plan that is contained nowhere in the plain language of NRS 534.037.  
24 Pursuant to NRS 534.110(7)(a), the State Engineer utilized his discretion to designate  
25 Diamond Valley as a CMA in Order No. 1264. SE ROA 134–138; see also *Las Vegas*  
26 *Valley Water Dist. v. Curtis Park Manor Water Users Ass’n*, 98 Nev. 275, 278, 646 P.2d  
27 549, 551 (1982) (the term “may” grants the State Engineer discretion). The point  
28 that Petitioners miss in challenging Order No. 1302 is that removal of the

1 CMA designation is similarly within the State Engineer's discretion. The key  
2 consideration here is whether the State Engineer is persuaded that the GMP sets forth  
3 the necessary steps for removal of Diamond Valley's CMA designation.

4 Despite acknowledging that the key factor in determining whether to approve the  
5 GMP was whether or not the GMP included, in the State Engineer's discretion, the  
6 necessary steps for removal of the CMA designation, Petitioners place many different  
7 constraints on this determination that are **absent** from the plain statutory language.  
8 Sadler/Renner Opening Brief, pp. 9–18; Bailey Opening Brief, pp. 30–33. Specifically,  
9 Petitioners argue that the GMP should not have been approved because there was no  
10 showing that the GMP's pumping reductions "will result in stabilized groundwater levels  
11 or a balanced water budget" but rather "at the end of the thirty-five-year planning period  
12 withdrawals in the basin will continue to exceed the established perennial yield."  
13 Sadler/Renner Opening Brief, pp. 9–11, 14–18; *see also* Bailey Opening Brief, pp. 30–33.  
14 Petitioners also make another nearly identical argument, under the guise that the GMP  
15 also authorizes groundwater mining. Sadler/Renner Opening Brief, pp. 11–13; Bailey  
16 Opening Brief, p. 32. Lastly, all Petitioners argue both directly and impliedly that  
17 the 35-year process is too long, without any citation to the plain and unambiguous  
18 language of NRS 534.037. Sadler/Renner Opening Brief, pp. 13–14; Bailey Opening Brief,  
19 pp. 30–33. These alleged standards for approval of the GMP do not exist in the statutory  
20 language and are not required for the State Engineer to approve a groundwater  
21 management plan.

22 The GMP's stated goals include stabilizing the groundwater levels, as well as  
23 reducing consumptive use below the perennial yield, increasing groundwater supply, and  
24 maintaining and preserving the economic outputs and socio-economic structure of  
25 Diamond Valley. SE ROA 228. These goals all play a role in reaching the only required  
26 threshold by statute: achieving removal of the CMA designation. NRS 534.037(1). While  
27 this situation may be different where a basin is mandatorily designated as a CMA under  
28 NRS 534.110(7)(b), here the State Engineer used his discretion to designate Diamond

1 Valley as a CMA based on groundwater withdrawals consistently exceeding the perennial  
2 yield. SE ROA 134–138. Similarly, he used his limited discretion to approve the GMP.

3 Ultimately, the issue in Diamond Valley is over-pumping, and the GMP  
4 unquestionably reduces pumping from today's rate each year over the 35-year course of  
5 the GMP "until the perennial yield is not **consistently** exceeded." SE ROA 16 (emphasis  
6 added). This is really the key: approximately 125 of Nevada's 256 groundwater basins  
7 are over-appropriated, with existing rights exceeding the perennial yield; however,  
8 Diamond Valley is the first and only basin to date designated as a CMA. SE ROA 2;  
9 *see also Minutes of Senate Comm. on Nat. Res.* (Feb. 28, 2019), p. 9. As seen in  
10 Appendix G of the GMP, the GMP significantly reduces pumping in Diamond Valley, from  
11 76,000 acre-feet in the first year of the GMP to 34,200 acre-feet pumped in year 35  
12 (using the benchmark as opposed to the most-aggressive pumping reduction scenario).  
13 SE ROA 510. Given the dramatic reduction in pumping to less than 50% of current levels  
14 and the fact that a portion of the pumped water infiltrates the soil to become secondary  
15 recharge, this was sufficient to persuade the State Engineer that he would feel  
16 comfortable lifting the CMA designation by the end of the GMP's planning horizon  
17 (Year 35). SE ROA 17, 488. Substantial evidence supports this conclusion.

18 In terms of Petitioners' argument that the GMP's 35-year timeline violates  
19 NRS 534.037, there is absolutely no support for this proposition. While the State  
20 Engineer is required to restrict withdrawals to conform to priority rights if a basin  
21 has been designated for at least ten consecutive years, that is "**unless** a groundwater  
22 management plan has been approved for the basin pursuant to NRS 534.037."  
23 NRS 534.110(7) (emphasis added). NRS 534.037 does not contain any sort of time limit  
24 within which a GMP must remove a basin's CMA designation. Therefore, based upon the  
25 plain, unambiguous language of these statutes, once a groundwater management plan is  
26 approved, the ten-year clock towards curtailment stops.

27 As shown above, the plain language of the relevant statutes is unambiguous on  
28 this point. However, to the extent this Court determines that the language of

1 NRS 534.037 as to the time for recovery is ambiguous such that it is proper to look to  
2 legislative history, the limited legislative history supports the State Engineer's  
3 interpretation of NRS 534.037, which is "consistent with reason and public policy." See  
4 *Lucero*, 127 Nev. at 95, 249 P.3d at 1228 (2011) (citing *Great Basin Water Network v.*  
5 *State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010)). Specifically, the proponent of  
6 these statutes, then-Assemblyman Pete Goicoechea,<sup>13</sup> noted when introducing AB 419  
7 (which became NRS 534.037 and NRS 534.110(7)) that its purpose was to have water  
8 users in a CMA "work forward and develop a water conservation plan that actually brings  
9 that water basin back into some compliance. I am not saying they would ever get it  
10 completely back there. **They surely would not get there in ten years, but as long as**  
11 **it was on its way to recovery, I think the State Engineer would feel comfortable**  
12 **with that."** *Minutes of Assemb. Comm. on Gov't Affairs* (March 30, 2011), p. 67  
13 (emphasis added); see also *Minutes of Senate Comm. on Gov't Affairs* (May 23, 2011), p. 16  
14 ("This bill allows people in overappropriated basins ten years to **implement** a water  
15 management plan to get basins in balance.") (emphasis added).

16 Here, substantial evidence supports the State Engineer's determination that the  
17 Diamond Valley GMP takes the necessary steps to get Diamond Valley on the road to  
18 recovery, to where he would feel comfortable lifting the CMA designation. Removal of the  
19 CMA designation need not occur within ten years once the GMP is in place, as exhibited  
20 by the plain language of NRS 534.037 and NRS 534.110(7) and the legislative history.

21 **3. The petition was signed by a majority of holders of permits or**  
22 **certificates to appropriate water in the basin in compliance**  
23 **with NRS 534.037(1)**

24 In Chapter 534 of the NRS, which is Nevada's statutory **underground** water law,  
25 NRS 534.037(1) states that a petition for approval of a GMP "must be signed by a  
26 majority of the holders of permits or certificates to appropriate water in the basin that  
27 are on file in the Office of the State Engineer."

28 <sup>13</sup> As an Assemblyman in 2011, Mr. Goicoechea represented Nevada Assembly District 35, which includes Eureka County and Diamond Valley.

1           The Bailey Petitioners allege that the actual petition by which the Diamond Valley  
2 GMP was submitted to the State Engineer failed to meet the required majority threshold,  
3 arguing that the “vote to approve the GMP violated NRS 534.110(7).”<sup>14</sup> Bailey Opening  
4 Brief, pp. 33–34. Specifically, the Baileys allege that the petition was signed by “only a  
5 majority of groundwater irrigation permits” rather than “*all permits* on file with the State  
6 Engineer.” Bailey Opening Brief, p. 34. Specifically, the Baileys argue that the  
7 GMP proponents failed to give a “vote<sup>15</sup> for or against” the GMP to vested surface water  
8 permits and both surface water and groundwater stockwater permits.

9           The State Engineer ensured that a majority of the water right permits or  
10 certificates were accounted for in the petition. SE ROA 3. In doing so, the State  
11 Engineer determined that, regardless of how a “majority” was defined, a majority of the  
12 permits and certificates in Diamond Valley were represented in the petition, for all  
13 manners of use, including underground stockwater, regardless of whether or not they are  
14 subject to the GMP. *Id.* Specifically, in Order No. 1302, the State Engineer found:

15           At the time of filing the petition, there were 419 water right  
16 permits or certificates in the Diamond Valley Hydrographic  
17 Basin. Of these, 257 are represented by at least one signature  
18 in the petition. Comparing the signatories with the confirmed  
19 owner of record in the files of the Office of the State Engineer  
20 demonstrates that 223 water right permits or certificates are  
21 represented by the owner of record. If accepting the affirmation  
22 made on each page of the signed petition, then 257 rights of  
23 419 rights is 61%. If limiting only to those signatures by a  
24 confirmed owner of record, then 223 of 419 is 53.2%. In either  
25 case, a majority of permits and certificates in the Diamond  
26 Valley Hydrographic Basin are represented in the petition.

27 SE ROA 3.

28           To the extent the Baileys argue that surface water should have been factored into  
this calculation, these types of water rights are managed under NRS Chapter 533, rather  
than NRS Chapter 534 which is the exclusive statutory authority regarding underground

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<sup>14</sup> Though the Baileys cite NRS 534.110(7) for their argument that the petition was insufficient, it appears that this was an inadvertent error and the Baileys intended to cite NRS 534.037(1).

<sup>15</sup> The majority approval required for a GMP under NRS 534.037(1) requires a signed petition, not a vote. Therefore, any reference to a “vote against” the GMP is misleading as the only option is to sign or not sign the petition.

1 water. The State Engineer included all permits and certificates falling under the control  
2 of NRS Chapter 534, where NRS 534.037(1) is found. Vested claims (*i.e.*, those  
3 appropriations initiated in accordance with law prior to March 22, 1913, for surface water  
4 and prior to March 25, 1939, for groundwater) are pre-statutory, do not require the  
5 permitting/certificating process, and the State Engineer may not impair these rights. *See*  
6 NRS 533.085; NRS 534.100. Existing outside of the typical permitting/certificate process,  
7 these vested water rights (including their associated mitigation rights) are not subject to  
8 the reductions in the GMP, and therefore are not affected by the GMP. Therefore, these  
9 surface water rights and vested rights were properly omitted from the State Engineer's  
10 calculation for majority approval under NRS 534.037(1), and substantial evidence  
11 supports the State Engineer's determination that a legal majority exists.

12 **4. Strict adherence to the prior appropriation doctrine is not**  
13 **required under NRS 534.037 and would render the statute**  
14 **meaningless**

15 One of Petitioners' primary arguments for reversing Order No. 1302 is based on the  
16 allegation that the GMP violates the doctrine of prior appropriation. *See* Bailey Opening  
17 Brief, pp. 16–23; Sadler/Renner Opening Brief, pp. 18–24. The prior appropriation  
18 doctrine is an important aspect of Nevada water law. However, the Legislature was  
19 aware of this when enacting NRS 534.037 and NRS 534.110(7). The plain language of  
20 these statutes shows the Legislature's intent to allow local communities to come together  
21 and agree upon a solution for groundwater management other than strict application of  
22 prior appropriation, such as the Diamond Valley GMP.

23 In 2011, recognizing the issues surrounding over-appropriated and over-pumped  
24 groundwater basins in Nevada, the Legislature enacted NRS 534.037 and  
25 NRS 534.110(7). NRS 534.110(7) shows the Legislature's clear recognition of the prior  
26 appropriation doctrine, requiring junior priority rights to be curtailed in favor of senior  
27 priority rights where a basin has been designated a CMA for at least 10 consecutive  
28 years. *See* NRS 534.110(7) ("If a basin has been designated as a critical management  
area for at least 10 consecutive years, the State Engineer shall order that withdrawals,

1 including, without limitation, withdrawals from domestic wells, be restricted in that  
2 basin to conform to priority rights.”). However, the Legislature provided an exception to  
3 this application of the prior appropriation doctrine where “a groundwater management  
4 plan has been approved for the basin pursuant to NRS 534.037.” *Id.*

5 As discussed previously, NRS 534.037 provides that water users in a basin may  
6 assemble a groundwater management plan and then petition the State Engineer for  
7 approval. NRS 534.037(1). In deciding whether to approve or disapprove a groundwater  
8 management plan, the State Engineer must determine whether it sets forth the  
9 necessary steps for removal of the basin’s CMA designation, and must consider certain  
10 factors in reaching that determination. NRS 534.037(1); (2). Absent from this list of  
11 factors is any requirement that the proposed groundwater management plan comply with  
12 the strict application of the prior appropriation doctrine in order for the State Engineer to  
13 approve it. *See* NRS 534.037(2).

14 The State Engineer does not disagree with Petitioners’ observation that the GMP  
15 does not adhere strictly to prior appropriation; in fact, the State Engineer said this  
16 himself in Order No. 1302, acknowledging “that the GMP does deviate from the strict  
17 application of the prior appropriation doctrine with respect to ‘first in time, first in right.’”  
18 SE ROA 6. However, as noted in Order No. 1302, NRS 534.037 illustrates the  
19 unambiguous intent of the Legislature to provide water users in a particular basin with  
20 the ability to come up with a community-based solution to address a water shortage  
21 problem. In short, the statute authorizes the water users to consider out-of-the-box  
22 solutions to resolve the conditions leading to the CMA designation, and provides the State  
23 Engineer with authority to approve a groundwater management plan that includes these  
24 out-of-the-box solutions.

25 The result is not absurd, as the Baileys allege, but rather provides necessary  
26 flexibility in an area of the law that was previously rigid. While the Baileys describe a  
27 parade of horrors should the State Engineer’s interpretation stand, they again ignore  
28 the process for approval of a groundwater management plan. Any plan would require the

1 water users to come together and reach a consensus such that a majority of the holders of  
2 permits or certificates to appropriate water in the basin signed the petition for a  
3 groundwater management plan's approval. NRS 534.037(1). Thus, this process will  
4 ferret out any ridiculous ideas such as those examples provided by the Baileys. See  
5 Bailey Opening Brief, p. 20. Then, once this majority is reached, the groundwater  
6 management plan must still be **approved** by the State Engineer; if it does not include  
7 steps necessary for removal of a basin's CMA designation, the State Engineer cannot and  
8 will not approve it. See NRS 534.037.

9 Here, water users in Diamond Valley came up with a plan that garnered majority  
10 support, including support from a substantial amount of senior water rights holders.  
11 SE ROA 148-742. This type of community-based solution is exactly what the  
12 unambiguous language of NRS 534.037 provides, and it is proper to allow the users  
13 themselves to consider the type of solutions that are appropriate for their specific  
14 circumstances, community, and needs.

15 As discussed by the Baileys, "statutory language should be construed to avoid  
16 absurd results and 'no part of a statute should be rendered nugatory, nor any language  
17 turned to mere surplusage, if such consequences can be properly avoided.'" *Speer v. State*,  
18 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000) (citing *Paramount Ins. v. Rayson & Smitley*,  
19 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)). As mentioned previously, the State Engineer  
20 can only consider a groundwater management plan submitted for approval; not potential  
21 alternative plans. See NRS 534.037. That being said, the Baileys provided some  
22 alternatives that they believe would have complied with the law. See Bailey Opening  
23 Brief, pp. 17-18. However, they failed to present these plans during the GMP  
24 development process and/or failed to persuade a majority of water right holders to agree  
25 to these alternatives. Presenting these ideas now, as part of an appellate proceeding,  
26 circumvents the process available to the Baileys at the time the GMP was developed and  
27 violates the intent of NRS 534.037.

28 ///

1           Conversely, Sadler Ranch and the Renners argue that strict adherence to prior  
2 appropriation is the only way for the GMP to be legal, although there is no support for  
3 this in statute. Sadler/Renner Opening Brief, pp. 18–24. If the Legislature intended  
4 strict adherence to prior appropriation then NRS 534.037 and NRS 534.110(7) are  
5 rendered useless, contrary to plain statutory interpretation. This cannot be the case as it  
6 leads to an absurd result.

7           Prior to the enactment of NRS 534.037 and NRS 534.110(7), the State Engineer  
8 already had the power to curtail junior rights in favor of senior rights via NRS 534.110(6).  
9 See SE ROA 8. Furthermore, NRS 534.110(7) specifically provides for curtailment of  
10 junior rights after being designated as a CMA for ten years **unless** a groundwater  
11 management plan is approved. What would be the purpose of a groundwater  
12 management plan if it requires the same result as a ten-year CMA designation? The  
13 Legislature clearly intended to create a solution that allowed the water users within the  
14 basin to come up with a solution outside of this rigid application of prior appropriation.  
15 That is precisely what the water users did with the development of the GMP, as approved  
16 in Order No. 1302.

17           All of this being said, it is important to note that the Diamond Valley GMP does  
18 not ignore prior appropriation. Throughout the GMP itself, as well as the documents in  
19 the SE ROA regarding the steps the water users took to assemble the GMP, and the  
20 public comments at the hearing, it is clear that prior appropriation was a factor in the  
21 GMP's assembly. SE ROA 217–742. The central tenet of the GMP is a formula whereby  
22 the original water right duty and priority of the right is converted into shares, and the  
23 amount of water allocated to each share is reduced annually. SE ROA 5–6; 218–219;  
24 232–233. The GMP factors priority into the share allocation process by assigning a  
25 higher priority factor to more senior rights, thus resulting in more shares and more water  
26 for senior rights holders. *Id.* While the reductions are not borne solely by the junior  
27 rights holders in favor of the senior rights holders, the senior rights holders still retain an  
28 advantage over junior rights holders in the GMP, as agreed upon by a majority of the

1 permit or certificate holders in Diamond Valley. So long as it has majority support, this  
2 is the type of flexibility that the Legislature intended in enacting NRS 534.037.  
3 Substantial evidence supports the State Engineer's determination that it includes the  
4 steps necessary to remove Diamond Valley's CMA designation.

5           **5.     The *Lewis* case from New Mexico is not cited as authority for**  
6           **Order No. 1302, but as an example of another western state**  
7           **utilizing a solution to water shortages outside of strict**  
8           **regulation by priority**

9           Petitioners take aim at the State Engineer's citation of *State Engineer v. Lewis*, a  
10 New Mexico Supreme Court case. 150 P.3d 375 (N.M. 2006); *see also* Bailey Opening  
11 Brief, pp. 20–23; Sadler/Renner Opening Brief, pp. 20–22. However, Petitioners  
12 misconstrue the State Engineer's use of *Lewis*, alleging that it is cited as “authority” for  
13 overturning prior appropriation in Nevada. *Id.* While *Lewis* is a form of persuasive  
14 authority, it is not binding case law nor is it cited that way; rather, the State Engineer  
15 cited this case as an example of a unique approach taken in another western prior  
16 appropriation state to address a water shortage without curtailment by strict priority.  
17 SE ROA 6–8.

18           Petitioners are quick to distinguish those points where the *Lewis* case and the  
19 GMP differ, and the State Engineer does not dispute that the two situations have factual  
20 differences. Bailey Opening Brief, pp. 20–23; Sadler/Renner Opening Brief, pp. 20–22.  
21 However, the case remains an interesting example and there are similarities between the  
22 solution used in New Mexico and that in the Diamond Valley GMP that shows that  
23 another state has utilized an innovative solution in order to resolve water shortages.  
24 Petitioners point to the fact that *Lewis* dealt with a settlement agreement that was  
25 expressly ratified by the New Mexico Legislature, but the GMP was not ratified by the  
26 Nevada Legislature. *Id.* However, NRS 534.037 was expressly ratified by the Nevada  
27 Legislature, and has a clear intent to allow local water users to agree to a solution other  
28 than curtailment by priority. SE ROA 7. This is exactly what the water users in

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1 Diamond Valley did with their GMP, and the analysis in *Lewis* is instructive on this  
2 point.

3 *Lewis* is also instructive in other ways. In that case, Tracy/Eddy, a primary  
4 objector to the settlement agreement in New Mexico, failed to provide any authority for it,  
5 an individual member of the Carlsbad Irrigation District (“CID”), to either request  
6 curtailment or act outside of an agreement made by the CID, nor did they challenge the  
7 authority of the CID to act on behalf of its members. *Lewis*, 150 P.3d at 388. Here the  
8 Baileys, Sadler Ranch, and the Renners provide no authority for someone in the minority  
9 (*i.e.*, someone who did not want the GMP approved) in a basin where a groundwater  
10 management plan is approved to act outside of the plan that was agreed to, per statute,  
11 by a majority of the holders of water permits and certificates, nor do they legitimately  
12 challenge the language of the statute providing for a simple majority to create a  
13 basin-wide groundwater management plan. While NRS 534.037 allows Petitioners to  
14 challenge the GMP via the procedure laid out in NRS 533.450, there is no authority for  
15 those not in favor of the GMP to act outside of it.

16 Additionally, despite the Constitution of the State of New Mexico specifically  
17 including the prior appropriation doctrine within its text, the *Lewis* court found that it  
18 was “reasonable to construe these [Constitutional] provisions to permit a certain  
19 flexibility within the prior appropriation doctrine.” *Lewis*, 150 P.3d at 386. Here, it is  
20 reasonable to construe the statutory provisions of NRS 534.037 and NRS 534.110(7) as  
21 permitting flexibility from rigid application of the doctrine, especially considering that,  
22 unlike New Mexico, the prior appropriation doctrine is not enshrined in the Constitution  
23 of the State of Nevada. Here, substantial evidence supports the State Engineer’s  
24 approval of the Diamond Valley GMP pursuant to NRS 534.037.

25 **C. The State Engineer Retains his Authority to Manage the Basin**

26 Petitioners attack Order No. 1302 on the basis that the State Engineer, in  
27 approving the GMP, has somehow unlawfully ceded his authority to manage groundwater  
28 withdrawals from Diamond Valley. Bailey Opening Brief, pp. 27–33; Sadler/Renner

1 Opening Brief, pp. 25–32. Despite the fact that NRS 534.037 shows clear legislative  
2 intent for a locality to come up with its own plan for managing groundwater withdrawals,  
3 as was done in Diamond Valley, the State Engineer expressly retains his authority to  
4 enforce Nevada water law in both Order No. 1302 and the GMP itself. SE ROA 17–18,  
5 220, 222, 229, 233, 236, 240, 242.

6 **1. The GMP's flexibility regarding temporary movement of**  
7 **allocations complies with state law**

8 Both sets of Petitioners target the State Engineer's approval of the GMP based  
9 upon the GMP's provisions regarding temporary movement of water allocations as part of  
10 the water market system. Bailey Opening Brief, pp. 27–30; Sadler/Renner Opening Brief,  
11 pp. 25–27. These arguments were addressed head-on by the State Engineer in Order  
12 No. 1302. SE ROA 8–9. Specifically, substantial evidence supports the fact that these  
13 provisions of the GMP are in accordance with existing state law.

14 Under the GMP, water rights are converted into shares that become freely  
15 transferrable, while the allocation of water given to each share is reduced each year.  
16 SE ROA 218, 232–237. While these shares are transferable, meaning that the water can  
17 be used at different wells or places of use than originally approved under the base right,  
18 any new wells or additional withdrawals exceeding the volume or flow rate initially  
19 approved under the base right must be submitted to the State Engineer for approval.  
20 SE ROA 8–9, 236–237. The State Engineer must act within 14 calendar days to  
21 determine if the new use or additional withdrawal is in the public interest and that it will  
22 not impair existing rights. *Id.* If the State Engineer does not deny such a change within  
23 14 calendar days, it is deemed approved; however, only for a period not to exceed 1 year.  
24 Specifically, those new wells or additional withdrawals that would exceed 1 year, or that  
25 the State Engineer has concerns about within 14 days, would be required to go through  
26 the standard procedures under NRS 533 and NRS 534, including the publication and  
27 protest processes. *Id.*

28 ///

1           Clearly, the State Engineer is still involved throughout this process for any  
2 proposed new well or withdrawal that would exceed the originally approved duty of a  
3 given well. These changes are akin to temporary changes under existing Nevada water  
4 law, and were modeled after these existing statutes. SE ROA 8, 237 (“Sections 14.8  
5 and 14.9 follow a process consistent with NRS 533.345(2) through (4).”). Under existing  
6 law, temporary changes (less than one year) to place of diversion, manner of use, or place  
7 of use for water already appropriated need not go through the standard publication and  
8 protest process and are approved so long as the temporary change is in the public interest  
9 and does not impair existing water rights. NRS 533.345(2).

10           Additionally, the State Engineer has the power to invoke the standard publication  
11 and protest processes if he determines that the proposed change may run afoul of the  
12 public interest or existing rights. NRS 533.345(3). These are the exact same provisions  
13 that exist within the GMP regarding the movement of shares, which are derived from  
14 previously appropriated water rights. SE ROA 236–237. Despite Petitioners arguments  
15 that the GMP’s transfer system violates state law, or even violates the “Young Paper”  
16 (which has no authority in Nevada), it in fact comports with existing temporary change  
17 statutes.

18           While the GMP includes a 14-day deadline for the State Engineer to act, existing  
19 law includes no deadline. However, simply because the State Engineer has agreed to  
20 take it upon himself to make these necessary decisions within 14 days does not mean that  
21 the GMP violates state law. Pursuant to the GMP, within 14 days, the State Engineer  
22 simply must make a decision that the change “may not be in the public interest or may  
23 impair the water rights held by other persons.” SE ROA 237 (emphasis added). If this  
24 determination is made, then the standard change application procedures are required.  
25 *Id.* Further, should someone feel aggrieved by the State Engineer’s approval (or  
26 non-denial) of one of these proposed changes within 14 days, it is within their rights to  
27 challenge that decision under NRS 533.450.

28   ///

1 As the State Engineer found, and substantial evidence supports, the GMP was  
2 modeled after existing law regarding temporary changes and still requires application of  
3 NRS 533.370 to changes exceeding one year. Additionally, the State Engineer is involved  
4 throughout this process and retains his authority to enforce Nevada water law.

5 **2. Order No. 1302 complies with the doctrine of beneficial use**

6 Beneficial use is the basis, the measure, and the limit of the right to use Nevada's  
7 water resources. NRS 533.035; *see also Bacher v. State Eng'r*, 122 Nev. 1110, 1116,  
8 146 P.3d 793, 797 (2006). Types of beneficial uses can be established by practical  
9 necessity and decisions of the Nevada Supreme Court, in addition to longstanding custom  
10 and statutes. *State v. Morros*, 104 Nev. 709, 714, 766 P.2d 263, 267 (1988).

11 Petitioners' attacks fail where they challenge Order No. 1302 on the basis that it  
12 violates beneficial use. Both sets of Petitioners challenge the GMP's treatment of proofs  
13 of beneficial use ("PBUs"), albeit in different ways. The Baileys challenge the fact that,  
14 under the GMP, unperfected water rights (those that have not filed PBUs to be  
15 certificated) are converted into shares, which are banked. Bailey Opening Brief,  
16 pp. 23–26. The Baileys allege that in doing so, the GMP unlawfully "automatically  
17 perfected" permitted rights through no actual beneficial use, and that the banking system  
18 itself is a new, unsupported form of beneficial use. *Id.* Sadler Ranch and the Renners, on  
19 the other hand, challenge the GMP's freezing of abandonment and forfeiture proceedings  
20 and the subsequent automatic grant of extensions of time by virtue of Order Nos. 1305  
21 and 1305A. Sadler/Renner Opening Brief, pp. 31–32.

22 First, to the extent that the GMP's banking provisions are challenged as creating a  
23 "new" form of beneficial use, such an argument is belied by the unambiguous legislative  
24 intent in enacting NRS 534.037. The Legislature gave the local communities the ability  
25 to come up with a plan, like the Diamond Valley GMP, in order to resolve groundwater  
26 shortages and dropping water levels. This water banking provision of the GMP is a major  
27 component of the plan that the State Engineer has deemed takes the necessary steps to  
28 remove Diamond Valley's CMA designation. Therefore, based upon practical necessity,

1 this banking of water rights serves the beneficial purpose of resolving Diamond Valley's  
2 significant groundwater declines by retaining water in the aquifer that would otherwise  
3 be pumped in order to be beneficially used at a later time.

4 As to the arguments that the GMP unlawfully automatically perfects permitted  
5 paper water rights or grants extensions of time for paper water rights, Petitioners greatly  
6 misstate how water is used and perfected under permits and certificates. Petitioners  
7 attempt to use a term not defined in statute, which they call "paper water rights", to try  
8 to confuse this issue. It appears that the Petitioners are falsely implying through the use  
9 of this vague terminology that water rights not currently certificated in Diamond Valley  
10 are not valid water rights; this is not correct. Only valid water right permits and  
11 certificates meeting specific criteria were made part of the GMP and assigned shares.

12 When a permit is issued to a water right holder, the holder of that permit is  
13 entitled to the use of the public's water within the confines of the permit terms. This is  
14 the crux of the issue in Diamond Valley and the GMP is the community-based solution  
15 offered in accordance with NRS 533.037. Specifically, not all permits and certificates are  
16 currently being pumped. Additionally, there are senior permitted water rights, which  
17 exist as changes to previously certificated rights where the PBU has not been filed.<sup>16</sup>  
18 Rather, the key to the GMP is that "reductions in pumping by the GMP start at the  
19 ceiling of *actual pumping* (76,000 afa), not at the ceiling of existing rights (126,000 afa)."  
20 SE ROA 11. Thus, pumping will never exceed current levels, and will drop each year as a  
21 result of the GMP. This completely defeats the Petitioners' cancellation, forfeiture, and  
22 beneficial use arguments.

23 While the GMP approved in Order No. 1302 does suspend the "use it or lose it"  
24 provisions of Nevada water law (as further clarified in Order Nos. 1305 and 1305A), this  
25 is because the entire purpose of the GMP is to reduce groundwater pumping in Diamond  
26 Valley. Strict enforcement, such as pursuing forfeiture or abandonment, would

27  
28 <sup>16</sup> See e.g. Permit No. 85133 (owned by the Renners), <http://water.nv.gov/permitinformation.aspx?app=85133>; see also e.g. Permit No. 72370, <http://water.nv.gov/permitinformation.aspx?app=72370>.

1 contravene the intent of the GMP and negatively affect the basin. Specifically, these  
2 processes would slow down the recovery of the basin and the finalization of the GMP, as  
3 the State Engineer would have to go through various administrative processes and likely  
4 end up in court on each one of these decisions. SE ROA 10–11. Further, it would  
5 incentivize more pumping, as those users facing forfeiture would receive notice of  
6 non-use pursuant to NRS 534.090 and would then likely try to make full use of their  
7 water to prove up for a PBU. *Id.*

8 The GMP process outlined in NRS 534.037 specifically and expressly applies to the  
9 holders of **permits** and **certificates**, and therefore both stages of water rights in  
10 Diamond Valley, that were valid and in good standing at the time of GMP approval, are  
11 treated as water rights in good standing for purposes of the GMP. There is a low  
12 probability of success for abandonment proceedings given the necessary elements and it is  
13 likely that forfeiture proceedings would actually lead to increased pumping. Therefore,  
14 substantial evidence supports the State Engineer’s approval on this portion of the GMP,  
15 as it is a necessary step to **reduce** pumping and move towards the removal of the  
16 CMA designation.

17 **3. The State Engineer can make changes to the GMP’s pumping**  
18 **reductions after ten years**

19 Finally, the State Engineer retains the authority to make changes to the actual  
20 GMP. Specifically, the reduction in pumping is set at 3% per year for the first ten years,  
21 during which time the effects of the plan will be monitored and observed by measuring  
22 the changes in groundwater levels throughout the basin. SE ROA 16. After year ten,  
23 “the State Engineer, in consultation with the [Advisory Board], as informed by  
24 groundwater level monitoring data multi-year trends” may adjust the reduction  
25 percentages by plus or minus 2% annually. SE ROA 235. This monitoring data directly  
26 responds to the actual issue in Diamond Valley, groundwater decline due to pumping,  
27 making it more relevant than groundwater modeling. SE ROA 16. “The plan to reduce  
28 pumping, monitor the effects on water levels, and then adjust pumping reductions is a

1 sound approach to achieving the goal of stabilizing groundwater levels” and removing the  
2 CMA designation. SE ROA 17. Further, the GMP allows for modification of the GMP by  
3 the users within the first ten years if the monitoring data demonstrates that modification  
4 is necessary. SE ROA 222, 246–247. As such, the GMP is intended to be a dynamic plan  
5 that can be adapted to continue to meet the goal of removing CMA designation if the  
6 plan, as implemented, does not appear to be achieving the goal in the time anticipated.

7 **D. The GMP Ultimately Reduces Groundwater Pumping and Therefore**  
8 **Alleviates Rather than Exacerbates Impacts to Vested Rights**

9 Petitioners also allege that the GMP improperly impacts pre-statutory vested  
10 rights, both by failing to mitigate effects to these vested rights caused by junior  
11 groundwater pumping and by allowing continued pumping and lowering of the water  
12 table. Sadler/Renner Opening Brief, pp. 24–25; Bailey Opening Brief, pp. 30–32. These  
13 arguments ignore the purpose of the GMP and Order No. 1302, again requesting  
14 provisions to be included in the GMP that are not required by NRS 534.037, and that  
15 Petitioners failed to successfully advocate for during the GMP assembly process.

16 The GMP is the community-based, forward-looking solution to addressing  
17 over-pumping while protecting Diamond Valley’s community and economy to the  
18 greatest extent possible. SE ROA 2–19, 217–742. The entire purpose of the GMP (per  
19 NRS 534.037), is to reduce pumping to the point where the State Engineer will remove  
20 Diamond Valley’s CMA designation. The GMP will steadily reduce groundwater  
21 withdrawals and thereby improve rather than exacerbate potential impacts to vested  
22 rights. Mitigation of senior surface water rights (typically vested rights) that have been  
23 allegedly impacted by groundwater pumping have a mechanism by which they may apply  
24 for mitigation rights, pursuant to Order No. 1226, and Sadler Ranch has already taken  
25 advantage of this provision. See SE ROA 12–13, 139–146.

26 A groundwater management plan is not a mitigation plan, and NRS 534.037 does  
27 not require the proponents of a groundwater management plan or the State Engineer to  
28 consider the alleged effects on surface water rights or mitigate those alleged effects.

1 The GMP takes steps (albeit more slowly than Petitioners desire) to bring groundwater  
2 withdrawals in Diamond Valley towards a sustainable level, which will have a  
3 side-benefit of protecting senior surface rights. The approval criteria set out in statute is  
4 unambiguous and attempts by the Petitioners to expand the GMP to mitigation of  
5 their vested surface water rights is inappropriate. This is the plan with which the  
6 majority of holders of permits or certificates in Diamond Valley agreed as the solution to  
7 over-pumping and the State Engineer, in following NRS 534.037 and based upon  
8 substantial evidence, approved.

9 **E. The Water Banking Component of the GMP is Not an**  
10 **Aquifer Storage and Recovery Project and Need Not Adhere to**  
11 **NRS 534.250-340**

12 Sadler Ranch and the Renners also challenge the GMP, and the State Engineer's  
13 Order No. 1302 approving the GMP, as violating the provisions of state law governing  
14 aquifer storage and recovery ("ASR") programs, while also challenging the depreciation  
15 rates attributed to the banked water lost to evapotranspiration ("ET"). Sadler/Renner  
16 Opening Brief, pp. 27-29, 32-34. These arguments are completely without merit.

17 While a consulting hydrogeologist who worked on the GMP, Dale Bugenig, may  
18 have described the water banking portion of the GMP as an ASR program, the State  
19 Engineer affirmatively found that the GMP is not an ASR program and was therefore not  
20 required to comply with NRS 534.250-340. SE ROA 9-10. Specifically, the GMP "allows  
21 unused allocations [of existing groundwater] to be carried over and banked for use in a  
22 subsequent year to increase the amount of water the rights holder can use in the next  
23 year" whereas "a typical [ASR] project is operated by injecting and infiltrating water from  
24 a surface source into the aquifer for the purpose of accumulating storage for future use."  
25 SE ROA 10.

26 In fact, a brief look at the ASR statutes makes it clear that they are inapplicable to  
27 the water banking system in the GMP. A key provision of these statutes is to use a  
28 different source of water for recharge of a basin. See NRS 534.250(2)(b); NRS 534.260(7)  
and (8); NRS 534.300(1). Here, the GMP merely allows unused allocations (*i.e.*, water

1 already in the basin) to remain in the aquifer and be carried over for use in a subsequent  
2 year “to increase the amount of water the rights holder can use in the next year.”  
3 SE ROA 10. Again, this serves the primary goal of the GMP to reduce pumping in  
4 Diamond Valley by “allow[ing] flexibility by users to determine when to use their limited  
5 allocation and to encourage water conservation practices” while the banked allocation  
6 “is subject to depreciation in the amount that is carried over to account for natural losses  
7 over time.” *Id.* As the State Engineer properly found, the GMP does not include an  
8 ASR program but rather complies fully with NRS 534.037; therefore, it was not required  
9 to meet the requirements of NRS 534.250–340.

10         Despite the fact that the GMP does not need to comply with NRS 534.250–340,  
11 Sadler Ranch and the Renners nonetheless argue that the GMP violates NRS 534.250(2)  
12 because the water that would be banked as part of the GMP is not available for  
13 appropriation because the permits were “issued above the perennial yield.”  
14 Sadler/Renner Opening Brief, p. 28. This argument defies all logic considering that the  
15 water that will be banked as part of the GMP was already appropriated via permits  
16 and certificates. Therefore, while the GMP does not need to conform with NRS 534.250,  
17 it undoubtedly would meet NRS 534.250(2)(b) as the already issued permits and  
18 certificates provide their holders with “the right to use the proposed source of water . . .  
19 pursuant to an approved appropriation.”

20         Lastly, substantial evidence supports the use of different depreciation rates to  
21 apply to banked allocations based upon the location of the banked water. Specifically,  
22 § 13.9 of the GMP “describes that Diamond Valley is divided between the main farming  
23 area (generally located in the southern half of the basin) and the groundwater  
24 discharge area (the northern half of the basin). Banked water north of the dividing line  
25 in the discharge area depreciates at 17% and banked water south of the line at 1%.”  
26 SE ROA 10, 234, 522–527. This analysis was shown in Appendix I of the GMP, using the  
27 groundwater flow model for the Mount Hope Project, showing that Diamond Valley was  
28 essentially broken into two sub-areas, distinguishing the primary ET discharge area in

1 the north from the southern portion where there is little to no ET. SE ROA 522–527.  
2 Because wells in the northern part of Diamond Valley are near the ET discharge areas,  
3 “[w]ater not pumped in these areas is lost to phreatophyte ET.” SE ROA 527.

4 Sadler Ranch and the Renners argue that the banking provisions are  
5 “non-sensical” because unused water purchased by a southern irrigator from a northern  
6 irrigator would depreciate at the northern rate. Sadler/Renner Opening Brief, p. 34. The  
7 determining factor is where the water is banked. SE ROA 234. It is incumbent upon the  
8 water users to be aware of where they are banking the water so that they are aware of  
9 the potential depreciation. Again, disagreement with the plan is insufficient to overturn  
10 the GMP where a majority, under NRS 534.037(1), agreed to it. Substantial evidence  
11 supports the State Engineer’s decision to approve the GMP under NRS 534.037, including  
12 the depreciation provisions.

13 **F. Petitioners Sadler Ranch and the Renners Violated this Court’s**  
14 **Order Granting Motion in Limine**

15 Finally, on September 4, 2019, this honorable Court issued its Order Granting  
16 Motion in Limine, ruling affirmatively that (1) “the public hearing process to consider the  
17 GMP under NRS 534.037 provided notice and the opportunity to be heard and to offer  
18 evidence thus satisfying due process standards,” and (2) “that all evidence in this matter  
19 shall be limited to the State Engineer’s record on appeal, as filed by the State Engineer  
20 on June 7, 2019.” Order Granting Motion in Limine, p. 10.

21 Nonetheless, in defiance of these settled issues for purposes of this case, Sadler  
22 Ranch and the Renners attached an exhibit consisting of a PowerPoint from a  
23 presentation former-State Engineer Jason King gave at the 2016 Western State  
24 Engineer’s Annual Conference. See Sadler/Renner Opening Brief, Exhibit 1. Petitioners’  
25 argument that this somehow does not violate the Court’s Order because it supports their  
26 argument that the GMP violated a purely legal issue is unsupported by any authority.  
27 Purely legal issues are decided based upon pure law, not by a PowerPoint presentation  
28 given by the former-State Engineer (who was not a lawyer). Further, these Petitioners

1 also again argue that the State Engineer's public hearing, pursuant to NRS 534.037(3),  
2 violated their due process rights, despite this Court already ruling otherwise. *See*  
3 *Sadler/Renner Opening Brief* pp. 34–35; *see also* *Order Granting Motion in Limine*, p. 10.  
4 Given that these issues were already resolved, and yet these Petitioners nonetheless  
5 argued them in their Opening Brief, the State Engineer respectfully requests that this  
6 Court strike or otherwise ignore both Exhibit 1 and the due process section of their  
7 Opening Brief as constituting a redundant matter pursuant to NRCP 12(f).<sup>17</sup>

## 8 VI. CONCLUSION

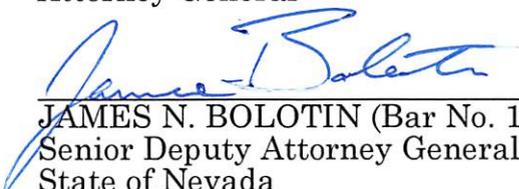
9 The State Engineer's Order No. 1302 complies with NRS 534.037 and  
10 NRS 534.110(7) and is based upon substantial evidence in the SE ROA. For these  
11 reasons, the State Engineer respectfully requests that this Court affirm Order No. 1302.

## 12 AFFIRMATION

13 The undersigned does hereby affirm that the preceding Respondent State  
14 Engineer's Answering Brief does not contain the social security number of any person.

15 DATED this 22nd day of October, 2019.

16 AARON D. FORD  
17 Attorney General

18 By: 

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28 <sup>17</sup> Courts are generally given discretion to control their dockets, and courts have demonstrated a willingness to strike improperly filed documents, even where those documents are not a pleading. *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 944 (9th Cir. 2006) (the district court did not abuse its discretion in striking a plaintiff's "extra-record" document because the document was offered for an impermissible use); *Monitor Pipe & Steel Co. v. Flanigan Warehouse Co.*, 63 Nev. 449, 451 (1946) (court noted that bills of exception could be stricken if superfluous and without value); *Hambleton Bros. Lumber Co. v. Balkin Enter., Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005) (court granted motion to strike an errata notice and witness' declaration where the filing of such papers did not comport with procedural rules).

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the State of Nevada, Office of the Attorney  
3 General, and that on this 22nd day of October, 2019, I served a true and correct copy of  
4 the foregoing RESPONDENT STATE ENGINEER'S ANSWERING BRIEF, said  
5 document applies to Case Nos. CV-1902-348, -349 and -350, electronically to:

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14 and via U.S. Mail to:

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18 Eureka, Nevada 89316  
19 *Trustee of the Marshall Family Trust in Propria Persona*

20 *Courtesy Copy to Chambers:*  
21 The Honorable Gary D. Fairman  
22 Post Office Box 151629  
23 Ely, Nevada 89315

24   
25 Dorene A. Wright

OCT 23 2019

By Eureka County Clerk  
[Signature]

1 Case No. CV-1902-348  
2 (consolidated with Case Nos.  
3 CV-1902-349 and CV-1902-350)  
4  
5 Dept. No. 2

6 **IN THE SEVENTH JUDICIAL DISTRICT COURT**  
7 **OF THE STATE OF NEVADA IN AND FOR**  
8 **THE COUNTY OF EUREKA**

9 TIMOTHY LEE BAILEY and  
10 CONSTANCE MARIE BAILEY; FRED  
11 BAILEY and CAROLYN BAILEY; IRA  
12 R. RENNER, an individual, and  
13 MONTIRA RENNER, an individual; and  
14 SADLER RANCH, LLC,

15 Petitioners,

16 vs.

17 TIM WILSON, P.E., Nevada State  
18 Engineer, DIVISION OF WATER  
19 RESOURCES, DEPARTMENT OF  
20 CONSERVATION AND NATURAL  
21 RESOURCES,

22 Respondent,

23 EUREKA COUNTY; DIAMOND NATURAL  
24 RESOURCES PROTECTION AND  
25 CONSERVATION ASSOCIATES, J&T  
26 FARMS, GALLAGHER FARMS, JEFF  
27 LOMMORI, M&C HAY, CONLEY LAND &  
28 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, et al.,

Respondents/Intervenors.

**ANSWERING BRIEF OF EUREKA COUNTY**

JA1675

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1 EUREKA COUNTY, by and through its counsel of record, ALLISON  
2 MACKENZIE, LTD. and THEODORE BEUTEL, ESQ., EUREKA COUNTY  
3 DISTRICT ATTORNEY, submits this Answering Brief in response to the Opening  
4 Brief of Petitioners SADLER RANCH, LLC (“SADLER”) and IRA R. RENNER and  
5 MONTIRA RENNER (“RENNER”) and the Opening Brief of Petitioners TIMOTHY  
6 LEE and CONSTANCE MARIE BAILEY and FRED BAILEY and CAROLYN  
7 BAILEY (collectively “BAILEY”) filed on or about September 16, 2019. In this  
8 appeal, SADLER, RENNER and BAILEY seek judicial review of Order 1302, issued  
9 by the STATE ENGINEER for the STATE OF NEVADA DIVISION OF WATER  
10 RESOURCES (“STATE ENGINEER”) granting the Petition to Adopt the  
11 Groundwater Management Plan (“GMP”) for the Diamond Valley Hydrographic  
12 Basin in Eureka County. Order 1302 was adopted by the STATE ENGINEER  
13 pursuant to NRS 534.037.

14 I.

15 **SUMMARY OF THE ARGUMENT**

16 Petitioners in this matter contend the GMP approved by the STATE  
17 ENGINEER in Order 1302 does not meet the requirements of NRS 534.037 and  
18 violates Nevada’s longstanding prior appropriation and beneficial use doctrines. The  
19 STATE ENGINEER’s Order complied with the requirements of NRS 534.037,  
20 addressed all the concerns of the Petitioners and is supported by substantial evidence.

21 Petitioners’ arguments regarding the prior appropriation and beneficial use  
22 doctrines and other mandatory requirements of Nevada water law are misplaced.  
23 When the STATE ENGINEER designated the Diamond Valley Hydrographic Basin  
24 (“Diamond Valley”) as a Critical Management Area pursuant to NRS 534.110(7) in  
25 2015, NRS 534.037, providing for the approval of a GMP, necessarily came into play  
26 and withdrawals from Diamond Valley restricted to conform to priority of rights was  
27 explicitly not required for at least 10 years. The Legislature adopted the relevant  
28 statutes with full knowledge of the prior appropriation and beneficial use doctrines

1 and existing water law provisions. For the most part, Petitioners' claims of error  
2 relate to legislative policy, not whether the STATE ENGINEER's approval of the  
3 GMP via Order 1302 must be upheld on judicial review. If Petitioners wanted to  
4 insist that the doctrines of prior appropriation and beneficial use be strictly applied,  
5 they should have appealed the STATE ENGINEER's designation of Diamond Valley  
6 as a Critical Management Area in 2015. Petitioners did not and their policy  
7 arguments are too late.

8 Likewise, the arguments of the senior vested water right holders are not relevant  
9 to this proceeding. Vested water rights are not subject to the GMP and in any event  
10 have been made whole by the mitigation rights granted to them by the STATE  
11 ENGINEER. They are estopped to complain in this proceeding that they have not  
12 been made whole. The GMP only applies to underground base irrigation rights, not  
13 vested water rights and associated mitigation water rights, stockwatering rights or  
14 other underground water uses in Diamond Valley. Notwithstanding that certain uses  
15 are excluded from the GMP, all holders of groundwater permits and certificates in  
16 Diamond Valley received the Petition and had an opportunity to vote on the GMP.  
17 Senior underground irrigation right holders sit on the GMP Advisory Board and senior  
18 underground irrigation right holders voted for the GMP as part of the majority  
19 required by NRS 534.037 to petition the STATE ENGINEER for approval of a GMP.

20 NRS 534.037 provides the STATE ENGINEER with extremely broad  
21 discretion in granting a petition to approve a GMP which sets forth the necessary steps  
22 for the removal of the basin's designation as a Critical Management Area, and is also  
23 acceptable to a majority of the holders of water rights (senior and junior) in the subject  
24 basin. The existing statute gives the STATE ENGINEER authority to approve a GMP  
25 presented to him and no other authority is necessary. After complying with the  
26 explicit terms of NRS 534.037 and considering all of the input and information  
27 received, the STATE ENGINEER issued Order 1302 approving the GMP. The  
28 STATE ENGINEER addressed the concerns of Petitioners in Order 1302. The

1 STATE ENGINEER set out his reasons and rationale for his disagreement with the  
2 Petitioners’ concerns. Petitioners ask this Court to substitute their judgment for that  
3 of the STATE ENGINEER. The Court should decline to do so. Order 1302 must be  
4 upheld on judicial review.

5 Finally, in their Opening Briefs, Petitioners propose certain examples or  
6 components of groundwater management plans they contend satisfy their prior  
7 appropriation, beneficial use or other concerns and should or could have been  
8 included in the GMP. However, the record shows Petitioners did not actively  
9 participate in advocating those components or plans for consideration during the years  
10 of meetings and work to develop a GMP that would comply with NRS 534.037 in  
11 their opinion. Instead, Petitioners’ desultory participation resulted in others doing the  
12 work to create a GMP acceptable to a majority of the water rights holders (senior and  
13 junior) in Diamond Valley and now Petitioners criticize the approved GMP and the  
14 process. Petitioners were afforded every opportunity during the GMP proceedings  
15 occurring over the last 5 or so years to create their own plan or components of a plan,  
16 to work and meet with other water right holders and try to obtain a majority approval  
17 of any such plan or components of a plan. Petitioners did not do so. The Court  
18 should not rewrite NRS 534.037 as Petitioners urge in their appeals.

19 **II.**

20 **STATEMENT OF RELEVANT FACTS**

21 **A. The GMP.**

22 The primary groundwater usage in Diamond Valley is irrigation. SE ROA at 3,  
23 225. There are about 26,000 acres of irrigated land in Diamond Valley. SE ROA at 2,  
24 225. The total duty of groundwater rights in Diamond Valley is 130,625 acre-feet  
25 annually (“afa”). SE ROA at 3. Of these groundwater rights, 126,188 afa are  
26 irrigation based water rights subject to the GMP and 4,437 afa are not subject to the  
27 GMP. SE ROA at 3, 225. The perennial yield of Diamond Valley is 30,000 afa. SE  
28

1 ROA at 3, 225. In 2016, groundwater pumping for irrigation was estimated to be  
2 76,000 afa.<sup>1</sup> SE ROA at 3, 225.

3 The GMP<sup>2</sup> only applies to underground irrigation rights and mining and milling  
4 rights that have an agricultural base right in Diamond Valley. SE ROA at 11-12, 218,  
5 220, 228-229. The GMP does not apply to vested water rights, including spring  
6 vested rights that have been mitigated with groundwater rights through the STATE  
7 ENGINEER or court order, ruling, decree or other legal decision. SE ROA at 5, 218,  
8 220, 229, 240-241. The GMP does not apply to domestic wells or stockwater,  
9 municipal or commercial groundwater rights and mining groundwater rights without  
10 an irrigation source permit and domestic wells. SE ROA at 5, 220, 229.

11 Priority (seniority) is factored into the underground base irrigation rights  
12 subject to the GMP using a formula which converts the rights to a set amount of  
13 shares. SE ROA at 5, 218, 232. The spread in the priority factor share formula  
14 between the most senior groundwater right and the most junior groundwater rights  
15 shall be 20% as agreed to in the GMP by senior and junior water right holders. SE  
16 ROA at 232. The shares are used on a year-to-year basis for calculating the volume of  
17 water allowed to be used, sold, traded and banked. SE ROA at 5, 218, 234-235.  
18 Groundwater allocations banked for use in subsequent years are subject to a  
19 depreciation factor based upon location in Diamond Valley to account for natural  
20 losses through evapotranspiration. SE ROA at 17-18, 234. The depreciation factors  
21 were based on numerical flow modeling analysis. SE ROA at 17-18, 221, 234, 522-  
22 527.

23  
24 <sup>1</sup> To create confusion, SADLER uses higher numbers of purported historical irrigation pumping in  
25 its arguments to the Court. See Sadler and Renner Opening Brief at 1, 12. Order 1264 issued  
26 August 25, 2015 contains the actual historical irrigation pumping in Diamond Valley per the STATE  
27 ENGINEER's records.

28 <sup>2</sup> BAILEY repeated refers to the GMP as "Eureka County's Plan". BAILEY is mistaken. The  
Eureka Conservation District ("ECD") is not part of EUREKA COUNTY and is a NRS Chapter 548  
public body. EUREKA COUNTY has one appointed supervisor on the ECD Board: Jake Tibbitts.  
ECD provided administrative support at the request of the GMP participants. ECD never voted as a  
public body to support the GMP. ECD provided facilitation, paper, meeting space, copying, etc.  
Nothing more. See SE ROA at 285. ("The conservation district is taking the lead" per April 14,  
2015 email).

1 Existing water right users may continue to use water in proportion to their water  
2 rights and seniority. SE ROA at 218, 234-235. The shares set for each water right do  
3 not change over the life of the GMP. SE ROA at 218, 234-235. The GMP requires  
4 reductions in pumping over time. SE ROA at 5, 218, 234-235. This is accomplished  
5 by a system of shares with annual reductions (acre-feet of water per share) of water  
6 being available based on a formula. SE ROA at 5, 218, 221, 234-235. Annual  
7 allocations (acre-feet of water per share) are reduced each year under the GMP to  
8 meet the required pumping reductions. SE ROA at 5, 218, 221, 234-235, 499-510.

9 The GMP creates a system to track water allocations and use. SE ROA at 219,  
10 232-239, 499-521. The GMP provides for penalties for overdrawing a groundwater  
11 account and for other violations of the GMP. SE ROA at 6, 221, 239-240. The  
12 STATE ENGINEER administers and manages the GMP while advised by a locally  
13 elected Advisory Board and is able to hire a Water Manager, if necessary, to assist.<sup>3</sup>  
14 SE ROA at 6, 219, 229-231, 243-244, 497-498. The STATE ENGINEER shall hold a  
15 joint annual meeting. SE ROA at 245-246. Under the GMP, the STATE ENGINEER  
16 retains full authority to analyze and take appropriate action regarding groundwater  
17 withdrawals that may conflict with existing rights, domestic wells or impacts to vested  
18 claims or rights. SE ROA at 229, 236-237. Section 14 of the GMP provides that any  
19 wells withdrawing groundwater under the GMP must comply with the GMP and NRS  
20 Chapter 534 and NAC 534, including all well construction activities. SE ROA at 236-  
21 237. This includes the process consistent with NRS 533.345(2) through (4) for  
22 temporary or permanent applications for new wells or additional withdrawals  
23 proposed from an existing well that exceeds the volume or flow rate that was initial  
24 approved under the base permit. SE ROA at 229, 236-237.

25 The main goals of the GMP are to remove Diamond Valley's Critical  
26 Management Area designation within 35 years by stabilizing groundwater levels in  
27 Diamond Valley and reducing consumptive use not to exceed the perennial yield. SE  
28

---

<sup>3</sup> A Water Manager has been hired by the STATE ENGINEER and is based in Eureka.

1 ROA at 5, 228. The GMP requires reductions in pumping in Diamond Valley over  
2 time to achieve these goals. SE ROA at 218, 234-235. At a minimum, the STATE  
3 ENGINEER in coordination with the Advisory Board shall review the GMP in Year  
4 6. SE ROA at 246. The GMP may be amended or discontinued at any time in  
5 accordance with the requirements of NRS 534.037(5) or other applicable law. SE  
6 ROA at 246.

7 **B. The STATE ENGINEER’s approval of the GMP.**

8 The Petition and GMP were submitted to the STATE ENGINEER on August  
9 20, 2018. SE ROA at 2. In accordance with the explicit terms of NRS 534.037, the  
10 STATE ENGINEER was presented with a Petition to adopt a GMP that had been  
11 approved by 58% of the water rights holders in the basin. SE ROA at 148. The  
12 submittal to the STATE ENGINEER included petitions signed by the holders of 290  
13 of the 493 groundwater permits (all uses) in the basin. SE ROA at 148-216.

14 The STATE ENGINEER’s office independently verified the number of water  
15 right permits or certificates in Diamond Valley and compared the signatures in the  
16 Petition with the confirmed owner of record in the files of the STATE ENGINEER.  
17 SE ROA at 3. The STATE ENGINEER also looked at the duty of groundwater rights  
18 in Diamond Valley subject to the GMP. SE ROA at 3-4. By duty, over 96% of the  
19 total groundwater commitments in Diamond Valley were subject to the GMP. SE  
20 ROA at 4. The STATE ENGINEER determined it was reasonable and appropriate  
21 that the focus of the plan to reduce groundwater pumping be focused on those  
22 manners of use that have the greatest potential effect on the pumping in the  
23 groundwater basin. SE ROA at 4, 11-12.

24 The STATE ENGINEER reviewed the number of senior and junior  
25 groundwater rights represented in the Petition. SE ROA at 4. The STATE  
26 ENGINEER noted there were 77 senior water right permits or certificates and 36, or  
27 46.8%, of the senior water rights were represented by at least one signature on the  
28 Petition. SE ROA at 4. Of the remaining 342 junior water rights, 221, or 64.6%, of

1 the junior water rights were represented by at least one signature on the petition. SE  
2 ROA at 4. The STATE ENGINEER noted that of the 29,325 afa of senior water  
3 rights, 18,700 afa, or about 64%, were represented by signatories of the Petition. SE  
4 ROA at 4. The STATE ENGINEER found that significant portions of both senior and  
5 junior rights were represented in the Petition. SE ROA at 4.<sup>4</sup> The STATE  
6 ENGINEER found by duty over 96% of committed rights in Diamond Valley were  
7 subject to the GMP. SE ROA at 4, 12.

8 Following receipt of the Petition, the STATE ENGINEER conducted a public  
9 hearing, as required by the statute, on October 30, 2018 during which written  
10 comments and public testimony were presented to the STATE ENGINEER. SE ROA  
11 at 4, 528-536, 539-545, 547-592, 594-595, 642-652, 653-742. Written public  
12 comment was held open after the hearing for an additional three working days. SE  
13 ROA at 4, 537-538, 546, 593, 596-641. After complying with the explicit terms of  
14 NRS 534.037 and considering all of the testimony and information received, the  
15 STATE ENGINEER issued Order 1302 on January 11, 2019 approving the GMP. SE  
16 ROA at 2-19.

### 17 III.

### 18 STANDARD OF REVIEW

19 Decisions of the State Engineer are prima facie correct, and the party  
20 challenging the decision has the burden to prove error. NRS 533.450(10); *Pyramid*  
21 *Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1147-48  
22 (2010). “With questions of fact, the reviewing court must limit itself to a  
23 determination of whether substantial evidence in the record supports the State  
24 Engineer’s decision.” *Town of Eureka v. Office of State Eng’r of State of Nev., Div. of*  
25 *Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). It is not a District Court’s  
26 role to reweigh the evidence, but rather determine whether “a reasonable mind might

27 \_\_\_\_\_  
28 <sup>4</sup> General Moly, Kobeh Valley Ranch, and Eureka Moly collectively supported the GMP at the public hearing. SE ROA at 726. General Moly holds many senior and junior underground water rights in Diamond Valley. While not signing the Petition, its formal support at the hearing shows these percentages would have increased substantially if it had signed the Petition.

1 accept [the State Engineer’s evidence] as adequate to support [his] conclusion.”  
2 *Bacher v. Office of State Eng’r of State of Nevada*, 122 Nev. 1110, 1121, 146 P.3d  
3 793, 800 (2006) (internal quotations omitted). The District Court “will not pass upon  
4 the credibility of the witnesses nor reweigh the evidence” presented to the State  
5 Engineer. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). “[N]either the  
6 district court nor this court will substitute its judgment for that of the State Engineer.”  
7 *Id.*

8 Nevada law defines substantial evidence as “that which ‘a reasonable mind  
9 might accept as adequate to support a conclusion.’” *State, Emp. Security v. Hilton*  
10 *Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales*,  
11 402 U.S. 389, 401, 91 S.Ct. 1420 (1971) (quoting *Consolidated Edison Co.*, 305 U.S.  
12 197, 229, 59 S.Ct. 206 (1938))). In *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-  
13 32, 267 P.3d 777, 780 (2011), the Court stated an arbitrary or capricious exercise of  
14 discretion is one “founded on prejudice or preference rather than on reason,” Black’s  
15 Law Dictionary 119 (9th ed. 2009) (defining “arbitrary”) or “contrary to the evidence  
16 or established rules of law,” *id.* at 239 (defining “capricious”). *See generally, City*  
17 *Council v. Irvine*, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986) (concluding that “[a]  
18 city board acts arbitrarily and capriciously when it denies a license without any reason  
19 for doing so”). *Id.* at 932, 267 P.3d at 780.

20 An agency is not bound to accept as true un rebutted expert evidence if such  
21 evidence lacks credibility. *See, Pub. Serv. Comm’n v. Cont’l Tel. Co. of California*,  
22 94 Nev. 345, 348, 580 P.2d 467, 469 (1978) citing *State v. Public Service*  
23 *Commission*, 220 S.W.2d 61 (Mo. 1949); *New Haven Water Co. v. Connecticut Public*  
24 *Utilities Comm’n*, 305 A.2d 863 (Conn 1972). *See also, Allen v. State*, 99 Nev. 485,  
25 488, 665 P.2d 238, 240 (1983) (Expert testimony is not binding on the trier of fact;  
26 jurors can either accept or reject the testimony as they see fit., citing *Clark v. State*, 95  
27 Nev. 24, 588 P.2d 1027 (1979).)  
28

1 In interpreting statutes, the primary consideration is the Legislature’s intent.  
2 *Cromer v. Wilson*, 126 Nev. 106, 109, 255 P.3d 788, 790 (2010). When a statute is  
3 clear and unambiguous, the Court is to give effect to the plain and ordinary meaning  
4 of the words and may not resort to rules of construction. (cite omitted.) *Id.* The  
5 Court must consider the plain meaning of the language and consider the statute as a  
6 whole, giving meaning to each word, striving to avoid interpretations that render any  
7 words superfluous or meaningless. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177,  
8 179 (2011).

9 An agency charged with administering an act is impliedly clothed with power  
10 to construe it as a necessary precedent to administrative action. *Pyramid Lake Paiute*  
11 *Tribe of Indians v. Washoe County*, 112 Nev. 743, 747-748, 918 P.2d 697, 700 (1996).  
12 The Nevada Supreme Court has repeatedly stated: “great deference should be given to  
13 the [administrative] agency’s interpretation when it is within the language of the  
14 statute.” (cite omitted.) *Id.* The agency’s interpretation is not controlling, but it is  
15 persuasive. (cite omitted.) *Id.* While the interpretation of the STATE ENGINEER is  
16 not controlling, its decision shall be presumed correct, and the party challenging the  
17 decision has the burden of proving error. *U.S. v. State Engineer*, 117 Nev. 585, 589,  
18 27 P.3d 51, 53 (2001). “When interpreting a statute, this court must give its terms  
19 their plain meaning, considering its provisions as a whole so as to read them ‘in a way  
20 that would not render words or phrases superfluous or make a provision nugatory.’”  
21 (cite omitted.) *Southern Nevada Homebuilders Ass’n v. Clark County*, 121 Nev. 446,  
22 449, 117 P.3d 171, 173 (2005). “[I]t is an accepted rule of statutory construction that  
23 a provision which specifically applies to a given situation will take precedence over  
24 one that applies generally.” *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989  
25 P.2d 870, 877 (1999) quoting *Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601  
26 P.2d 56, 57-58 (1979).

27 However, if the statutory language is capable of more than one meaning, it is  
28 ambiguous, and the plain meaning rule is inapplicable and the drafter’s intent controls.

1 *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 539-540, 135 P.3d 807, 810  
2 (2006). Ambiguous statutory provisions should be construed in accord “with what  
3 reason and public policy would indicate the legislature intended,” and the court’s  
4 interpretation should not produce an absurd or unreasonable result. *Id.*

5 IV.

6 **ARGUMENT**

7 **A. NRS 534.037 and NRS 534.110(7) do not require withdrawals from a**  
8 **Critical Management Area basin to be restricted to conform to**  
9 **priority rights.**

10 Most of the arguments in Petitioners’ Opening Briefs relate to the doctrine of  
11 prior appropriation. *See* Bailey Opening Brief at 14-23; Sadler and Renner Opening  
12 Brief at 4-6, 18-24. Petitioners contend a GMP adopted pursuant to NRS 534.037  
13 must comply with the prior appropriation doctrine so that even under a GMP approved  
14 by a majority of the water right holders in a basin, senior water right holders must be  
15 satisfied before junior water right holders. Petitioners’ arguments are without merit  
16 and should be disregarded by the Court.

17 Assembly Bill 419 amended NRS 534.110 and adopted the provisions now  
18 codified as NRS 534.037 effective July 1, 2011. Diamond Valley was designated by  
19 the STATE ENGINEER as a Critical Management Area on August 25, 2015 as  
20 provided by amended NRS 534.110(7). SE ROA at 134-138. No one, including any  
21 of the Petitioners, appealed the STATE ENGINEER’s designation of Diamond Valley  
22 as a Critical Management Area.

23 In reviewing the action of the STATE ENGINEER pursuant to NRS 533.450,  
24 this Court must review the STATE ENGINEER’s decision to ensure compliance with  
25 the terms of NRS 534.037, not whether or not the underlying policy of NRS  
26 534.110(7) and NRS 534.037 is good or bad. Petitioners object now to the underlying  
27 policy of NRS 534.110(7) and NRS 534.037 and want this Court to review the  
28 STATE ENGINEER’s action approving the GMP without reference to the Critical  
Management Area designation provisions of NRS 534.110(7). Yet, the STATE

1 ENGINEER's designation of Diamond Valley as a Critical Management Area  
2 pursuant to NRS 534.110(7) is what brought the provisions of NRS 534.037 into play.  
3 Each statute references the other. NRS 534.037(1) provides that a petition for  
4 approval of a groundwater management plan in a basin that has been designated as a  
5 Critical Management Area pursuant to "subsection 7 of NRS 534.110" may be  
6 submitted to the STATE ENGINEER. Likewise, NRS 534.110(7) specifically  
7 references a groundwater management plan approved pursuant to NRS 534.037 and  
8 provides the STATE ENGINEER is not required to limit groundwater withdrawals to  
9 conform to priority rights for at least 10 consecutive years after designation as a  
10 Critical Management Area or unless "a groundwater management plan has been  
11 approved for the basin pursuant to NRS 534.037." Petitioners' argument the GMP  
12 does not comply with the requirements of the law because it does not conform with  
13 the prior appropriation doctrine fails to acknowledge the provisions of NRS 534.037  
14 and NRS 534.110(7) which do not require that senior rights be fulfilled before junior  
15 rights in a Critical Management Area or in an approved groundwater management  
16 plan.

17 **1. Nevada's curtailment statutes.**

18 NRS 534.110(6) and (7) provide (with emphasis added):

19 **6. Except as otherwise provided in subsection 7,** the State  
20 Engineer **shall conduct** investigations in any basin or portion  
21 thereof where it appears that the average annual replenishment  
22 to the groundwater supply may not be adequate for the needs of  
23 all permittees and all vested-right claimants, and if the findings  
24 of the State Engineer so indicate, the State Engineer **may order**  
25 that withdrawals, including, without limitation, withdrawals  
26 from domestic wells, be restricted to conform to priority rights.

27 **7. The State Engineer:**

28 (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

1 in the basin that are on file in the Office of the State  
2 Engineer.  
3 →The designation of a basin as a critical management area  
4 pursuant to this subsection **may be appealed** pursuant to NRS  
5 533.450. **If a basin has been designated as a critical**  
6 **management area for at least 10 consecutive years, the State**  
7 **Engineer shall order that withdrawals, including, without**  
8 **limitation, withdrawals from domestic wells, be restricted in**  
9 **that basin to conform to priority rights, unless a**  
10 **groundwater management plan has been approved for the**  
11 **basin pursuant to NRS 534.037.**

12 **2. Statutory construction of NRS 534.110(6) and (7).**

13 Subsections (6) and (7) of NRS 534.110 are not ambiguous. Subsection 6  
14 provides the general discretionary curtailment provisions for groundwater basins  
15 except as otherwise provided in Subsection 7. Subsection 7 is a specific section  
16 authorizing the designation of Critical Management Areas and for mandatory  
17 curtailment in a basin only after it has been designated as a Critical Management Area  
18 for at least 10 consecutive years, unless a groundwater management plan has been  
19 approved for the basin pursuant to NRS 534.037. Subsection 7 is a plain and clear  
20 “exception” to the general discretionary curtailment provision in Subsection 6.  
21 Subsection 7 is a special statute authorizing Critical Management Areas, and controls  
22 over general Subsection 6 for basins designated as Critical Management Areas. Thus,  
23 regulation by priority by the STATE ENGINEER is not required for at least 10  
24 consecutive years for a basin designated a Critical Management Area unless a  
25 groundwater management plan has been approved for the basin in that timeframe.  
26 NRS 534.110(7) does not require the STATE ENGINEER order senior rights be  
27 fulfilled before junior rights in the Critical Management Area for at least 10  
28 consecutive years after the designation. It does not make sense for the STATE  
ENGINEER to require a provision in a groundwater management plan that he is not  
required to do pursuant to NRS 534.110(7) for at least 10 consecutive years after  
Critical Management Area designation if no groundwater plan is approved. NRS  
534.110(7) deviates from the prior appropriation doctrine and expressly references  
NRS 534.037.

1                   **3.     NRS 534.037 governing groundwater management plans.**

2     NRS 534.037 provides as follows:

3                   1.     In a basin that has been designated as a critical  
4     management area by the State Engineer pursuant to subsection  
5     7 of NRS 534.110, a petition for the approval of a groundwater  
6     management plan for the basin may be submitted to the State  
7     Engineer. The petition must be signed by a majority of the  
8     holders of permits or certificates to appropriate water in the  
9     basin that are on file in the Office of the State Engineer and  
10    must be accompanied by a groundwater management plan  
11    which must set forth the necessary steps for removal of the  
12    basin's designation as a critical management area.

13                  2.     In determining whether to approve a groundwater  
14    management plan submitted pursuant to subsection 1, the State  
15    Engineer shall consider, without limitation:

- 16                   (a)    The hydrology of the basin;
- 17                   (b)    The physical characteristics of the basin;
- 18                   (c)    The geographic spacing and location of the  
19    withdrawals of groundwater in the basin;
- 20                   (d)    The quality of the water in the basin;
- 21                   (e)    The wells located in the basin, including, without  
22    limitation, domestic wells;
- 23                   (f)    Whether a groundwater management plan already  
24    exists for the basin; and
- 25                   (g)    Any other factor deemed relevant by the State  
26    Engineer.

27                  3.     Before approving or disapproving a groundwater  
28    management plan submitted pursuant to subsection 1, the State  
29    Engineer shall hold a public hearing to take testimony on the  
30    plan in the county where the basin lies or, if the basin lies in  
31    more than one county, within the county where the major  
32    portion of the basin lies. The State Engineer shall cause notice  
33    of the hearing to be:

- 34                   (a)    Given once each week for 2 consecutive weeks  
35    before the hearing in a newspaper of general circulation in the  
36    county or counties in which the basin lies.
- 37                   (b)    Posted on the Internet website of the State Engineer  
38    for at least 2 consecutive weeks immediately preceding the date  
39    of the hearing.

40                  4.     The decision of the State Engineer on a groundwater  
41    management plan may be reviewed by the district court of the  
42    county pursuant to NRS 533.450.

43                  5.     An amendment to a groundwater management plan  
44    must be proposed and approved in the same manner as an  
45    original groundwater management plan is proposed and  
46    approved pursuant to this section.

47                  There is no requirement in NRS 534.037 that groundwater withdrawals be  
48    restricted to conform to priority rights, i.e., senior rights are satisfied before junior  
49    rights, as required by NRS 534.110(6). SADLER and RENNER acknowledge NRS

1 534.037 and NRS 534.110(7) allow water users “to develop a GMP in lieu of  
2 curtailment” and allow “the State Engineer to consider approving a GMP in lieu of  
3 regulation by priority”. See Sadler and Renner Opening Brief at 25:15; 30:10-11.  
4 NRS 534.037 does not require any specifics with regard to a groundwater  
5 management plan other than a petition submitted to the STATE ENGINEER signed  
6 by a majority of the holders of permits or certificates to appropriate water in the basin  
7 on file with the STATE ENGINEER and the groundwater management plan must set  
8 forth the necessary steps for removal of the basin designation as a critical management  
9 area. In determining whether to approve a groundwater management plan, the STATE  
10 ENGINEER shall consider without limitation the items set forth in NRS  
11 534.037(2)(a)-(g). The items set forth in NRS 534.037(2)(a)-(g) do not require the  
12 STATE ENGINEER consider the prior appropriation or beneficial use doctrines.

13 Further, if the Legislature had wanted senior rights fulfilled before junior rights  
14 as part of any groundwater management plan approved pursuant to NRS 534.037, it  
15 would have put such a requirement in NRS 534.037 along with the requirement that  
16 the plan be supported by a majority of permit and certificate holders in the basin. The  
17 Legislature did not do that and required only that the majority of permit and certificate  
18 holders in the basin support the groundwater management plan. Petitioners want this  
19 Court to add provisions into NRS 534.037 which the Legislature declined to include  
20 and which give Petitioners control of the GMP even though they are not the majority  
21 with respect to the GMA approved by Order 1302. The STATE ENGINEER did not  
22 err in not requiring that senior rights be fulfilled before junior rights as part of the  
23 GMP.

24 Reductions in groundwater pumping must be part of a groundwater  
25 management plan approved pursuant to NRS 534.037. NRS 534.037(1) requires that  
26 any groundwater management plan submitted to the STATE ENGINEER for approval  
27 “must set forth the necessary steps for removal of the basin’s designation as a critical  
28 management area” (emphasis added). Only basins where “withdrawals of

1 groundwater consistently exceed the perennial yield of the basin” may be designated  
2 as a critical management area (NRS 534.110(7)(a)). Therefore, in order for a  
3 groundwater management plan to meet the necessary steps for removal as a critical  
4 management area, the plan must ensure that withdrawals of groundwater eventually do  
5 not “consistently exceed the perennial yield of the basin.” The GMP submitted to the  
6 STATE ENGINEER and approved in Order 1302 meets the criteria of NRS 534.037.  
7 SE ROA at 148-527.

8 **4. Legislative history of Assembly Bill 419.**

9 If this Court deems NRS 534.037 or NRS 534.110 ambiguous, evidence of the  
10 Legislature’s intent may be used to determine the meaning of statutory provisions.  
11 The legislative history of Assembly Bill 419, Ch. 265 § 3, 2011 Nevada Statutes  
12 1386-1387 declares the intent of the Critical Management Area designation and the 10  
13 year period. The 10 year period allows appropriators of the resource to address the  
14 issues in the over-appropriated basin by developing a groundwater management plan  
15 to get the basin back on its way to recovery and to bring the basin back into balance.  
16 See Eureka County Addendum<sup>5</sup>. For the Court’s convenience, some of the comments  
17 made at the legislative hearings are set forth below:

18 At the Assembly Committee on Government Affairs held on March 30,  
19 2011, Assemblyman Pete Goicoechea testified as follows:

20 We have a number of groundwater basins in this state that are  
21 overappropriated and I think that number is growing, probably  
22 quicker than we would like to see. The State Engineer does not  
23 want to be heavy-handed and have to go into these basins and  
24 regulate by priority, which means junior permits, where the  
25 pumping is curtailed or suspended. Ultimately, you bring that  
26 basin back into balance, with only the senior water rights being  
27 held.

28 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

<sup>5</sup> The page numbers listed in the Addendum refer to the bates-stamped page numbers.

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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.

. . . . . 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.

. . . . . Again, you have ten years to accomplish your road to recovery.

Eureka County Addendum at pp. 003-004, 006.

At the Assembly Committee on Government Affairs held on May 4, 2011, Andy Belanger, representing the Southern Nevada Water Authority and the Las Vegas Valley Water District, testified as follows:

. . . . . However, A.B. 419(R1) was the bill that was going to address these issues. Both sides understood that it was the preferred place. We support the concepts of this bill. We believe in groundwater management plans. We understand the issues as they relate to basins that are overappropriated and getting those basins back into balance in a reasonable period of time. We support the concept of giving parties tools so that they can find voluntary ways to reduce overappropriation. We have done that in the Las Vegas Valley for the last 14 years. It has been tremendously successful. The Legislature gave us authority in 1997 to create a groundwater management program.

Eureka County Addendum at p. 029.

Kelvin Hickenbottom of the Nevada State Engineer's Office testified that:

. . . . . We do not want to go into a basin and strong-arm people into only allowing certain priorities to put water to beneficial use. It would have a huge impact on the whole economy near those basins. We would rather work with the individual right holders in the basin to figure out ways to bring the basin back into balance. That is what A.B. 419(R1) is trying to address.

. . .

I agree with you. We have gone out and given presentations where we would show what priorities would be cut off if we had to limit the amount of draft on the basin to the perennial yield. There are a lot of other things that go into the decisions that we make. It is not just the perennial yield itself. If there

1 are irrigation rights, we look at return flows. We look at other  
2 things to establish how much we think the safe yield of the  
3 basin is. Sometimes we have exceeded that, but I have stated  
4 the reasons for that. To enforce the water law, that is the way  
5 we have to do it. We draw a blue line across that list of rights  
6 within that basin. We would say, for example, that a 1965  
7 water right is the highest priority that can be pumped. Then,  
8 everyone else has to cease. We would prefer to work with the  
9 basins to bring them back in line. We have the ability to  
10 change applications from agricultural use to any other use. We  
11 can take the consumptive use of that right and only transfer it.  
12 There are a lot of other safeguards in there. There are  
13 dedication rates for subdivisions that go into play. They  
14 actually dedicate more water than one house typically uses.  
15 That goes back to getting the basin balanced. On paper it may  
16 not be balanced, but in actual pumpage of the groundwater it  
17 does come back into balance. Those are things that we look at.  
18 We would not just go out and draw the line. We look at all of  
19 those other pieces to say this would be the level of curtailment  
20 if there was one.

21 Eureka County Addendum at pp. 032, 036.

22 Jason King, the Nevada State Engineer, submitted a written statement at  
23 the May 4, 2011 Assembly Committee on Government Affairs which stated in part as  
24 follows:

25 First let me say that our office appreciates the effort of the bill's  
26 supporters to provide our office with additional tools to deal  
27 with over-appropriated basins outside the heavy handedness of  
28 simply regulating by priority.

... Assembly Bill 419 that was passed out of this committee.  
As I testified on the Senate side, I believe AB419 does a better  
job in addressing Critical Management Areas and is applicable  
statewide.

21 Eureka County Addendum at p. 038.

22 The Minutes from the Assembly Committee on Ways and Means held on  
23 May 11, 2011 state the following:

24 Assemblyman Goicoechea stated that: A groundwater basin  
25 deemed a critical-management area would require additional  
26 monitoring by the Division of Water Resources and would  
27 require the operators of those basins to conduct a ten-year  
28 conservation plan to bring the basins into balance.

Jason King, State Engineer, Division of Water Resources,  
Nevada Department of Conservation and Natural Resources,  
advised that A.B. 419 (R1) provided the Division of Water

1 Resources an additional process to take action with respect to  
2 overappropriated groundwater basins.

3 Mr. King used the analogy that a designated basin could be  
4 compared with a yellow alert and a critical-management area  
5 with a red alert. He said that A.B. 419 (R1) would require the  
6 Division of Water Resources to monitor the basins to bring  
7 them back into balance, which, as Assemblyman Goicoechea  
8 mentioned, necessitated holding public hearings in each basin  
9 to determine whether the basin should be designated a critical-  
10 management area.

11 Eureka County Addendum at p. 042.

12 Assemblyman Goicoechea testified on May 23, 2011 before the Senate  
13 Committee on Government Affairs as follows:

14 . . . . If the water management plan results are not achieved in  
15 ten years, it requires the State Engineer to start regulating the  
16 water basin by priority. We have groundwater basins that are  
17 declining.

18 The Legislature has established a gradient of decline and the  
19 State Engineer does not want to regulate those basins by  
20 priority. Assembly Bill 419 requires that, after a ten-year  
21 period with a water management plan in place, the State  
22 Engineer regulates by priority if water management goals are  
23 not met. Water management plans will come into place; with a  
24 water management plan, the bill allows the State Engineer to  
25 waive criteria under law, especially forfeiture laws, to bring the  
26 basins back in balance whether it be by planting alternative  
27 crops, water conservation or using different irrigation methods.  
28 Almost every basin in the State that has real development is on  
the verge of becoming overappropriated or is overappropriated.

Assembly Bill 419 is another tool in the toolbox for the State  
Engineer.

Eureka County Addendum at pp. 045-046.

Andy Belanger for the Southern Nevada Water Authority and the Las  
Vegas Valley Water District testified that same day:

I am neutral on A.B. 419. We understand the need to manage  
groundwater basins and to give people a soft landing to get  
basins back into balance. We understand the support the  
concept of groundwater management plans. The plan in the Las  
Vegas Valley has worked well. We are concerned with some  
language in the bill, but we are willing to work over the next  
two years as the bill is implemented to make sure those  
concerns are addressed, specifically the petition process. We  
understand the process is critical to giving local groundwater  
users say in whether basins need to be defined as critical

1 management areas and to the development of groundwater  
2 management plans.

3 Assemblyman Goicoechea went on to state:

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

9 Eureka County Addendum at p. 049.

10 The legislative history unambiguously indicates NRS 534.110(7) was enacted  
11 to give the STATE ENGINEER another tool for dealing with overappropriated basins  
12 instead of just the harsh process of regulating a basin by priority. Once the basin is  
13 designated as a Critical Management Area, the STATE ENGINEER may approve a  
14 groundwater management plan brought to him pursuant to NRS 534.037 or must  
15 regulate by priority if no groundwater management plan has been approved within the  
16 10 year time frame. The purpose of the 10 year period is to allow the water rights  
17 holders in the basin to propose a plan and get the basin on its way to recovery prior to  
18 any regulation by priority. Reason and public policy indicate the tool of discretionary  
19 curtailment provided in NRS 534.110(6) is not the only tool the STATE ENGINEER  
20 has available to deal with overappropriated basins, and that once the Critical  
21 Management Area designation has been made, the provisions of NRS 534.110(7) and  
22 NRS 534.037 control. *See* SE ROA at 7-8.

23 A groundwater management plan by its very nature is going to involve give and  
24 take to get a majority of senior and junior water rights holders in a basin to agree on  
25 the terms of the plan. Each basin and its water right holders are different. What might  
26 be agreeable to a majority of water right holders in one Critical Management Area  
27 basin may not be agreeable to a majority of water right holders in a different basin  
28 designated as a Critical Management Area. If the STATE ENGINEER were required

1 to simply apply the prior appropriation doctrine in a Critical Management Area, NRS  
2 534.037 and NRS 534.110(7) would have no meaning and would not be necessary.  
3 By its very nature, a groundwater management plan supported by a majority of permit  
4 and certificate holders in a basin would necessarily vary from a simple application of  
5 the doctrine of prior appropriation. If such was not the case, the subject statutory  
6 provisions would serve no purpose and be rendered meaningless.

7 The statutory scheme regarding critical management areas and groundwater  
8 management plans does not require the STATE ENGINEER to apply the prior  
9 appropriation doctrine and in fact acknowledges that groundwater management plans  
10 will not conform to the priority of rights.<sup>6</sup> The STATE ENGINEER complied with  
11 the requirements of NRS 534.037 in considering and approving the GMP.

12 **5. The STATE ENGINEER’s analysis of NRS 534.037 with the**  
13 **New Mexico case was appropriate.**

14 In Order 1302, the STATE ENGINEER analyzed the New Mexico case of *State*  
15 *Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006). SE ROA at 7. In *Lewis*, the New  
16 Mexico Supreme Court found a statute which allowed a shortage sharing plan to  
17 resolve a critical situation through a process more flexible than strict priority  
18 enforcement was constitutional and did not violate the prior appropriation doctrine  
19 contained in the New Mexico Constitution. 150 P. 3d at 385.

20 The STATE ENGINEER noted that like *Lewis*, the Nevada Legislature adopted  
21 a procedure to resolve a shortage problem. SE ROA at 7. In addition, the STATE  
22 ENGINEER quoted from amendments to NRS 534.110 and the legislative history of  
23 AB 419 to conclude the Nevada Legislature was aware of the prior appropriation  
24 doctrine in 2011 when it adopted AB 411. SE ROA at 7. The STATE ENGINEER  
25 interpreted NRS 534.037 “as intending to create a solution other than a priority call as  
26 the first and only response.” SE ROA at 7. The STATE ENGINEER stated:  
27 “[N]othing in the legislative history of AB 419 or the text of NRS § 534.037 suggests  
28

<sup>6</sup> The STATE ENGINEER explicitly acknowledged in Order 1302 that without the approval of a groundwater management plan he would be “required to curtail the basin by priority.” SE ROA at 3.

1 that reductions in pumping have to be borne by junior rights holders alone – if that  
2 were the case, the State Engineer could simply curtail junior rights – a power already  
3 granted by pre-existing water law in NRS § 534.110(6). Thus, the State Engineer  
4 concludes that NRS § 534.037 provides flexibility outside of regulation by priority,  
5 and the manner in which the GMP proposes to reduce pumping is authorized by  
6 Nevada law.” SE ROA at 8, *see also* SE ROA at 18.

7 The STATE ENGINEER as the agency charged with administering an act is  
8 impliedly clothed with power to construe it as a necessary precedent to administrative  
9 action. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747-  
10 748, 918 P.2d 697, 700 (1996). The Nevada Supreme Court has repeatedly stated:  
11 “great deference should be given to the [administrative] agency’s interpretation when  
12 it is within the language of the statute.” (cite omitted.) *Id.* The agency’s  
13 interpretation is not controlling, but it is persuasive. (cite omitted.) *Id.* the STATE  
14 ENGINEER’s interpretation of NRS 534.037 is within the language of the statute.  
15 Nothing in NRS 534.037 requires that pumping reductions be taken by junior water  
16 right holders alone and Petitioners cannot point to anything in NRS 534.037 to  
17 support their argument that senior water right holders must be satisfied prior to junior  
18 water rights holders as a condition of GMP approval. The STATE ENGINEER’s  
19 interpretation is correct – NRS 534.037 provides flexibility outside of regulation to  
20 create a solution other than a priority call as the first and only response. SE ROA at 7-  
21 8.

22 The STATE ENGINEER went on to note in Order 1302 “even though NRS §  
23 534.037 does not require a GMP to impose reductions solely against junior rights, the  
24 most senior rights in the GMP have a higher priority factor than junior rights when the  
25 share calculation is made. Thus, the State Engineer finds that the GMP still honors  
26 prior appropriation by allocating senior rights a higher priority factor than junior  
27 rights.” SE ROA at 8. The STATE ENGINEER noted the 20% spread for the priority  
28

1 factor received the greatest consideration and debate during the GMP process and was  
2 what a majority of plan proponents could agree to. SE ROA at 8, fn. 18.

3 The STATE ENGINEER’s use of the *Lewis* case to assist in his interpretation  
4 of NRS 534.037 was appropriate. Petitioners’ arguments that the STATE  
5 ENGINEER erred in his interpretation of NRS 534.037 by reviewing the *Lewis* case  
6 are without merit and should be dismissed by the Court.

7 **B. Senior vested surface water rights have been made whole to their**  
8 **satisfaction by mitigation rights.**

9 With regard to their senior vested rights, Petitioners contend the GMP does not  
10 provide adequate mitigation and compensation to holders of prestatutory surface water  
11 rights. *See* Bailey Opening Brief at 30-32, Sadler and Renner Opening Brief at 24-25.  
12 The STATE ENGINEER dismissed such arguments noting: “Neither the plain  
13 language [of NRS 534.037] nor the legislative history indicate that mitigation of  
14 senior surface water rights that have allegedly been adversely affected by groundwater  
15 pumping must be mitigated by a GMP.” SE ROA at 12. The STATE ENGINEER  
16 stated the requirement for approval of a GMP is that it “must set forth the necessary  
17 steps for removal of the basin’s designation as a critical management area.” SE ROA  
18 at 12 citing to NRS 534.037(1).

19 The STATE ENGINEER noted that 2 commenters who raised the issue,  
20 SADLER and DANIEL VENTURACCI, had taken advantage of Order 1226 which  
21 provided a mechanism for mitigation of senior surface water rights allegedly impacted  
22 by junior groundwater pumping. SE ROA at 13, 139-146. The STATE ENGINEER  
23 found mitigation was not a required element of the GMP. SE ROA at 13.

24 It should be noted that SADLER and VENTURACCI have settled with the  
25 STATE ENGINEER with regard to the quantity of their mitigation rights and thus are  
26 satisfied with the mitigation rights granted by the STATE ENGINEER. *See*, Case No.  
27 75736, In the Supreme Court of the State of Nevada, *Eureka County, Appellant vs.*  
28 *Sadler Ranch, LLC and Tim Wilson, P.E., Nevada State Engineer, Division of Water*

1 *Resources, Department of Conservation and Natural Resources, Respondents,*  
2 *Settlement Agreement dated August 24, 2018 attached as Exhibit 1 to SADLER’s*  
3 *Reply in Support of Motion to Dismiss filed March 12, 2019; and Case No. 77512, In*  
4 *the Supreme Court of the State of Nevada, In the Matter of Applications 81825,*  
5 *82570, 82571, 82572 and 82573, in Diamond Valley Hydrographic Basin 153, Eureka*  
6 *County Nevada, Daniel S. Venturacci vs. Eureka County, Tim Wilson, P.E., State*  
7 *Engineer; and the State of Nevada, Division of Water Resources, Respondents,*  
8 *Stipulation to Dismiss Appeal filed June 7, 2019.*

9 Prior to the entry of Order 1226, BAILEY was granted a mitigation right for a  
10 vested surface right by the STATE ENGINEER in 1998 via Permit 63497, Certificate  
11 16935. BAILEY has never complained since 1998 that its mitigation right was not  
12 adequate. RENNER has not applied for mitigation water rights. See Sadler and  
13 Renner Opening Brief at 4-6, 24. Thus Petitioners are estopped from contending the  
14 GMP does not contain adequate mitigation.

15 **C. The GMP meets the requirements of NRS 534.037.**

16 Petitioners RENNER and SADLER contend the GMP does not comply with the  
17 requirements of NRS 534.037 because: 1) the GMP does not include necessary steps  
18 to ensure groundwater levels are stabilized; 2) the GMP authorizes continued  
19 groundwater mining; and 3) the GMP’s thirty-five year timeframe is unreasonable.  
20 See Sadler and Renner Opening Brief at 9-14.

21 The STATE ENGINEER summarized the issue very simply in his Order:

22 “The GMP is based on the simple fact that  
23 groundwater pumping is the cause of declining water levels,  
24 and therefore pumping must be reduced to solve the  
25 problem. The reduction of pumping is at 3% per year for the  
26 first 10 years, and may be adjusted up or down thereafter as  
27 informed by groundwater level monitoring data. The goal of  
28 this approach 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 water levels.”

1 SE ROA at 16. The STATE ENGINEER went on to explain that perennial yield is  
2 based on the principle of conservation of mass, which dictates that levels will stabilize  
3 when recharge equals discharge. SE ROA at 16. As long as recharge and discharge  
4 are ultimately balanced then an equilibrium condition can be reached and the goal of  
5 the GMP to stabilize water levels can be achieved. SE ROA at 16. The STATE  
6 ENGINEER noted the target for total pumping at the end of the GMP was selected  
7 from existing published values and the pumping reduction rate was selected by  
8 agreement of the GMP authors. SE ROA at 16. The STATE ENGINEER stated the  
9 importance of monitoring of groundwater levels as the GMP is implemented in order  
10 that adjustments may be made as warranted. SE ROA at 16. The STATE  
11 ENGINEER concluded the plan to reduce pumping, monitor the effects on water  
12 levels, and then adjust pumping reductions is a sound approach to achieving the goal  
13 of stabilizing water levels. SE ROA at 17. Finally, the STATE ENGINEER found  
14 “the standard for determining success of the plan by stabilizing water levels was  
15 sound” and “the GMP’s annual reductions in pumping will lead to the entire basin’s  
16 groundwater pumping approaching the perennial yield and stabilization of  
17 groundwater levels.” SE ROA at 19. The substantial evidence in the record  
18 supporting the STATE ENGINEER’s determination are the Petition and GMP. SE  
19 ROA at 148-527.

20 NRS 534.037 provides the STATE ENGINEER with extremely broad  
21 discretion in granting a petition to approve a GMP which sets forth the necessary steps  
22 for the removal of the basin’s designation as a Critical Management Area, and is also  
23 acceptable to a majority of the holders of water rights (senior and junior) in the subject  
24 basin. After complying with the explicit terms of NRS 534.037 and considering all of  
25 the input and information received, the STATE ENGINEER properly issued Order  
26 1302 approving the GMP. SADLER and RENNER’s arguments the STATE  
27 ENGINEER’s approval of the GMP was not in compliance with NRS 534.037 should  
28 be rejected by the Court.

1           **D. Order 1302 was based upon substantial evidence and was not an**  
2           **arbitrary or capricious exercise of the STATE ENGINEER's**  
3           **discretion.**

4           SADLER and RENNER contend Order 1302 is not supported by substantial  
5 evidence showing the pumping reductions will result in the removal of the Critical  
6 Management Area designation because the GMP proponents provided no evidence  
7 showing groundwater levels will stabilize as a result of the GMP implementation,  
8 SADLER provided expert evidence showing the GMP will not stop groundwater  
9 declines and the STATE ENGINEER failed to use modeling to analyze the effects of  
10 the GMP. *See* Sadler and Renner Opening Brief at 14-18.<sup>7</sup> BAILEY does not dispute  
11 reducing groundwater pumping to the estimated perennial yield may eventually allow  
12 for an equilibrium to be reached. *See* Bailey Opening Brief at 11.

13           As set forth above, the STATE ENGINEER disagreed with the comments  
14 regarding water level stabilization as a result of the GMP implementation. *See* SE  
15 ROA at 15-17, 471. The STATE ENGINEER stated groundwater modeling was not  
16 necessary to conclude that reductions in pumping will lead to reductions in water level  
17 drawdown. SE ROA at 16. “Groundwater modeling and hydrogeologic analysis  
18 beyond what is publicly available in existing published reports would not change the  
19 fact that the cause of groundwater decline is due to pumping groundwater and that the  
20 stakeholder-authored plan seeks to reduce pumping.” SE ROA at 16. The STATE  
21 ENGINEER concluded the lack of a groundwater model or hydrogeologic analysis  
22 does not preclude approval of the GMP as written. SE ROA at 19.

23           In Order 1302, the STATE ENGINEER reviewed and considered significant  
24 information from all those supporting and opposing the GMP. SE ROA at 6-18. The  
25 STATE ENGINEER addressed all the comments and arguments of Petitioners  
26 opposed to the GMP based upon water level stabilization as a result of the GMP

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27 <sup>7</sup> There is no reason SADLER and RENNER could not have run a groundwater model including the  
28 publically available Mt Hope Mine Project model, which was the model used for the ET depreciation  
factors, and presented those results to the STATE ENGINEER if they had wanted the STATE  
ENGINEER to consider that information. The STATE ENGINEER and the GMP proponents are  
not required to make SADLER and RENNER’s case for them.

1 implementation and lack of groundwater modeling. SE ROA at 15-17. The STATE  
2 ENGINEER disagreed with Petitioners' arguments. SE ROA at 16, 19. The STATE  
3 ENGINEER was not required to accept as true un rebutted expert evidence if such  
4 evidence lacks credibility. *See, Pub. Serv. Comm'n v. Cont'l Tel. Co. of California*,  
5 94 Nev. 345, 348, 580 P.2d 467, 469 (1978); *Allen v. State*, 99 Nev. 485, 488, 665  
6 P.2d 238, 240 (1983). The STATE ENGINEER specifically noted the written  
7 comments of RENNER and SADLER and testimony from SADLER's attorney and  
8 expert in Order 1302 (SE ROA at 15, footnote 55) but disagreed the GMP was  
9 required to be supported by more groundwater modeling and hydrologic analysis  
10 beyond what was publicly available in existing published reports because it would not  
11 change the fact that the cause of groundwater decline was due to pumping  
12 groundwater and the stake holder-authored GMP seeks to reduce pumping. SE ROA  
13 at 16.

14 The STATE ENGINEER also addressed comments about the GMP's ET  
15 depreciation rates. SE ROA at 17-18. Order 1302 noted that the selection of the rates  
16 was expressly based on groundwater model simulations. SE ROA at 18, 234, 522-  
17 527. Petitioners contend the ET depreciation dividing line was arbitrary. However,  
18 the North/South dividing line was in the Mt. Hope Mine Project Model and not  
19 arbitrarily picked by the GMP proponents. SE ROA at 523. Certain pumping updates  
20 were made to the model and the planned scheduled pumping reductions under the  
21 GMP were incorporated into model simulations. SE ROA at 524-526. The model  
22 calculated the depreciation rates used in the GMP. SE ROA at 526. There was  
23 nothing arbitrary or capricious about the calculation of the ET depreciation rates. This  
24 is the same Mt. Hope Mine Project Model SADLER and RENNER contend the  
25 STATE ENGINEER should have used. *See, Sadler and Renner Opening Brief* at 17-  
26 18. The accuracy of the model and appropriateness of assigning ET depreciation rates  
27  
28

1 based on model interpretation was discussed at GMP planning meetings.<sup>8</sup> SE ROA at  
2 18, 458, 465, 467-468, 470. The ET depreciation rates in the final GMP were a  
3 compromise and there was never a consensus. SE ROA at 18. Adjustments to the  
4 rates is provided for under the provision to amend the GMP, as warranted by the data.  
5 SE ROA at 18, 246. In numerous places in Order 1302, the STATE ENGINEER  
6 notes it is appropriate to afford great weight to those that created and are affected by  
7 the plan and that the public and local community interests weigh heavily in the  
8 determination at hand. SE ROA at 12, 13, footnote 46, 14-15. Thus, SADLER and  
9 RENNER's arguments that the ET depreciation rates are arbitrary, capricious and not  
10 supported by substantial evidence are without merit. *See* Sadler and Renner Opening  
11 Brief at 32-34.

12 It is not this Court's prerogative to reconsider all of this information and  
13 evidence and substitute its opinion for that of the STATE ENGINEER. This Court is  
14 simply to determine whether the final decision of the STATE ENGINEER to approve  
15 the GMP was based upon substantial evidence and was not arbitrary and capricious.  
16 *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991). The STATE  
17 ENGINEER's conclusions are supported by substantial evidence and are rational and  
18 well-reasoned. The Court should not substitute its judgment for that of the STATE  
19 ENGINEER nor accept Petitioners' judgment as to the weight of the evidence over the  
20 STATE ENGINEER's judgment.

21 **E. The GMP does not violate other provisions of Nevada law.**

22 Petitioners argue the GMP allows water right holders to change their permitted  
23 point of diversion, place of use and manner of use of their permits without filing a  
24 change application, the water banking provisions violate the requirements of the  
25 aquifer and storage statutes and limit the authority of future STATE ENGINEERS to  
26  
27

28 <sup>8</sup> The publicly available Mt Hope Mine Project model was used to quantify the ET depreciation rates. Petitioners could have independently used this same model to verify or counter the ET depreciation rates.

1 manage Diamond Valley. *See* Bailey Opening Brief at 27-30; Sadler and Renner  
2 Opening Brief at 25-31.

3 The STATE ENGINEER addressed these concerns and determined with regard  
4 to change applications, the GMP was consistent with existing change application  
5 statutes and did nothing more than what was allowed under existing law for temporary  
6 and permanent change applications. SE ROA at 8-9, citing GMP §§ 14.8 and 14.9  
7 which are found at SE ROA at 237. The STATE ENGINEER found GMP § 14.8 was  
8 not a significant departure from existing law and it was unpersuasive that § 14.8  
9 diminishes STATE ENGINEER and public review. SE ROA at 9. The STATE  
10 ENGINEER found that with respect to new wells, additional withdrawals exceeding 1  
11 year or where the STATE ENGINEER determined within the 14 calendar days the  
12 change may not be in the public interest or may impair rights other persons, the  
13 existing procedures in NRS Chapter 533 and 534 apply. SE ROA at 8-9. Petitioners  
14 arguments regarding change applications were without merit.

15 The same holds true for the banking and aquifer storage and recovery  
16 arguments of Petitioners. *See* Bailey Opening Brief at 32-33; Sadler and Renner  
17 Opening Brief at 27-29. The STATE ENGINEER distinguished a typical storage  
18 aquifer and recovery project which is operated by injecting or infiltrating water from a  
19 surface source into the aquifer for the purpose of accumulating storage for future use  
20 to the banking provisions of the GMP. SE ROA at 10, 458. The STATE ENGINEER  
21 found these parts of a storage aquifer and recovery project were not part of the GMP  
22 and that banking of unused allocations in the GMP was a mechanism to allow  
23 flexibility by users to determine when to use their limited allocation and to encourage  
24 water conservation practices. SE ROA at 10. Consequently, the STATE ENGINEER  
25 found that the banking allocations in the GMP were a reasonable means to facilitate  
26 conservation and water planning by water users as provided for under NRS 534.037  
27 and the GMP was not required to fulfill the statutory obligations of NRS 534.250-340.  
28 SE ROA at 10. Again, Petitioners arguments that the GMP provisions violate state

1 law or that banking unnecessarily extends the response time for aquifer recovery are  
2 without merit.

3 SADLER and RENNER complain the GMP limits the future authority of  
4 STATE ENGINEERS if the GMP is not working and sets artificial deadlines on future  
5 STATE ENGINEERS. With regard to the GMP working in the future, the GMP  
6 specifically provides for annual public meetings with the Advisory Board to receive  
7 public input and that at a minimum, the STATE ENGINEER in coordination with the  
8 Advisory Board shall review the GMP in Year 6. SE ROA at 245-246. The purpose  
9 of the Year 6 review is to receive input, discuss and consider whether the GMP should  
10 continue, be amended or be discontinued. SE ROA at 246. The GMP notes in  
11 Section 26.1 and 26.3 the GMP can be amended or discontinued following the  
12 procedures required by NRS 534.037(5). Section 26.4 of the GMP provides  
13 groundwater management shall revert back to the base groundwater right with the  
14 same status that existed at the time of GMP approval should the GMP be  
15 discontinued. SE ROA at 246-247. The STATE ENGINEER concluded the GMP  
16 was not legally deficient nor waives any authority of the STATE ENGINEER to  
17 enforce Nevada water law. SE ROA at 18.

18 There are procedures in place for the STATE ENGINEER to annually review  
19 and monitor how the GMP is working. Every future STATE ENGINEER is going to  
20 be bound by the actions and decisions of previous STATE ENGINEERS, including  
21 actions on applications, settlement agreements to resolve litigation, etc. It does not  
22 make sense that a STATE ENGINEER could only make decisions that bind him as the  
23 STATE ENGINEER. Water right holders need certainty as to their rights. Sections  
24 13.12 and 13.13 of the GMP provide for benchmark and most aggressive pumping  
25 reductions. SE ROA at 235. The written GMP as approved by the STATE  
26 ENGINEER provides that certainty to water right holders. It is speculative to ponder  
27 what a future STATE ENGINEER may or may not do under the GMP. SADLER and  
28

1 RENNER have provided no legal authority to support their argument that the GMP as  
2 approved by the STATE ENGINEER is not appropriate going forward.

3 **F. The GMP does not violate beneficial use principles.**

4 Petitioners argue the GMP violates the doctrine of beneficial use because it  
5 recognizes “paper” water rights (could be abandoned or forfeited) and allows them to  
6 be banked and unlawfully exempts water right holders from the requirement to file  
7 proof of beneficial use of their water. *See* Bailey Opening Brief at 23-27; Sadler and  
8 Renner Opening Brief at 31-32.

9 Order 1302 discussed this issue in depth. SE ROA at 10-11. The STATE  
10 ENGINEER found that pursuing forfeiture or abandonment prior to implementing any  
11 GMP was ill advised for several reasons. SE ROA at 10. The STATE ENGINEER  
12 noted that time was of the essence for water right holders to get a plan approved prior  
13 to August 25, 2025 or curtailment by priority will be ordered for all rights in Diamond  
14 Valley. SE ROA at 10. Because forfeiture and abandonment must be shown by clear  
15 and convincing evidence, it was doubtful there was sufficient time to investigate and  
16 assemble evidence concerning abandoned rights, conduct administrative hearings and  
17 engage in any appellate proceedings with time left to secure a final table of water  
18 rights to support the GMP. SE ROA at 10.

19 With regard to forfeiture, the STATE ENGINEER is required to serve a notice  
20 of non-use prior to forfeiting unused water rights to provide one year to cure a  
21 forfeiture. SE ROA at 10. Serving notices of non-use at this stage would require that  
22 owners of used water rights make efforts to resume beneficial use, i.e., pumping and  
23 that the consequence of resuming pumping was contrary to the intent of the GMP to  
24 reduce pumping. SE ROA at 10-11. Similar to the timing problems for abandonment,  
25 initiating forfeiture proceedings could exacerbate conditions in the basin by increasing  
26 pumping, prior to reducing pumping pursuant to the GMP, thereby lessening the  
27 effectiveness of the plan. SE ROA at 11.

28

1 The STATE ENGINEER stated assuming *arguendo* there were water rights  
2 existing only on paper (e.g., that could be abandoned or forfeited), reductions in  
3 pumping under the GMP start at the ceiling of actual pumping (76,000 afa) not at the  
4 ceiling of existing rights (126,000 afa). SE ROA at 11. The elimination of “paper”  
5 water rights would not change the fact that the reductions in pumping begin at the  
6 component of active rights. SE ROA at 11.

7 The STATE ENGINEER recognized the issue of paper water was raised and  
8 considered during the GMP drafting process and it was determined the GMP  
9 contemplated that any valid right in good standing was to be issued shares. SE ROA  
10 at 11, citing SE ROA at 461. The STATE ENGINEER concluded there was a low  
11 probability of success for abandonment and a likely unanticipated effect of pursuing  
12 forfeiture. SE ROA at 11. Therefore, the STATE ENGINEER found that requests to  
13 eliminate paper water do not warrant halting the GMP process in order to initiate  
14 abandonment or forfeiture proceedings. SE ROA at 11.

15 The STATE ENGINEER further found for the reasons stated above, requiring  
16 proof of beneficial use prior to implementing the GMP was not in the best interest of  
17 taking immediate action to adopt a GMP. SE ROA at 11. NRS 534.037 specifically  
18 references holders of *permits* and certificates and recognizes permitted rights which  
19 have not fully proven beneficial use will participate in the GMP process. SE ROA at  
20 11.

21 EUREKA COUNTY has several responses to Petitioners’ arguments. First,  
22 Petitioners presented no evidence of the quantity of “paper” irrigation water rights in  
23 Diamond Valley they allege can be banked in violation of the beneficial use doctrine.  
24 Thus, there is no evidence in the record to support their argument and claim that  
25 “paper” water rights can be banked in violation of the beneficial use doctrine.  
26 Banking under the GMP does not increase the overall volume of water that may be  
27 pumped and used in Diamond Valley. The GMP allows a set and certain volume of  
28 water to be withdrawn from the aquifer and beneficially used; while banking may shift

1 the temporal withdrawal and use of water, this does not equate to addition of the total  
2 water that may be withdrawn and used from the aquifer.

3 EUREKA COUNTY disagrees that “paper” irrigation rights are going to result  
4 in a large volume of banked water. For the most part, the large bulk of water rights  
5 not used are tied to 160 acre quarter sections where the corners of an irrigation pivot  
6 are not used. So, the recognition of “paper water” is basically recognition of the bulk  
7 of water-righted parcels being watered. These will be the same parcels continuing to  
8 be irrigated. The GMP starts with the amount of water currently pumped. SE ROA at  
9 11. There are not huge opportunities for banking unless ground *currently irrigated* is  
10 removed from production. It is not clear how excessive amounts of water could be  
11 otherwise banked if this amount of water is needed by Diamond Valley irrigators now  
12 to make a living.

13 BAILEY’s argument that it is improper to assign shares to unperfected paper  
14 water rights is wrong.<sup>9</sup> All water rights assigned shares under the GMP were rights in  
15 good standing with the STATE ENGINEER’s Office - meaning they were not subject  
16 to cancellation for failing to file proofs of completion or beneficial use or subject to  
17 forfeiture if an application for extension of time to prevent a forfeiture had been  
18 granted. By law, these water rights could be pumped and beneficially used at any  
19 time so there was no reason to exclude them from the GMP to be converted to shares  
20 to be beneficially used under the GMP. And as stated above, NRS 534.037  
21 specifically recognizes permitted unperfected water rights will participate in the GMP  
22 process.

23 Further, BAILEY’s argument that banking of unperfected paper water rights is  
24 *theoretically* a beneficial use under the GMP is a red herring. First, nothing in the  
25 GMP says banking a water share allocation “perfects” an underground water permit.

26 \_\_\_\_\_  
27 <sup>9</sup> BAILEY recognizes that not all 50,000 afa not pumped in Diamond Valley are correctly referred  
28 to as “paper water rights”. Bailey Opening Brief at 24. Again, BAILEY failed to provide evidence  
for the record of the amount of water rights it contends are “paper water rights” so we know the  
magnitude of its claimed problem. It is not the STATE ENGINEER’s function to provide evidence  
to substantiate BAILEY’s arguments. BAILEY should have provided the evidence it wanted the  
STATE ENGINEER to consider in support of its “paper water rights” argument.

1 Second, banked share allocations may be beneficially used (just as unperfected  
2 permitted water rights may be beneficially used) so BAILEY's argument there is no  
3 beneficial use of banked water rights is factually incorrect. Finally, what BAILEY is  
4 advocating is that every irrigator be required to use its limited allotment every year  
5 even if an irrigator may not have enough water for a crop to avoid losing its water  
6 under BAILEY's beneficial use argument. This is nonsensical under a groundwater  
7 management plan with the goal of reducing pumping and efficiently using water. The  
8 STATE ENGINEER determined banking of unused allocations in the GMP is a  
9 mechanism to allow flexibility by users to determine when to use their limited  
10 allocation and to encourage water conservation practices. SE ROA at 10. Less water  
11 will actually be used under the GMP if banked water is pumped because banked water  
12 is subject to the annual 17% or 1% ET depreciation factor. SE ROA at 234. The  
13 STATE ENGINEER found banking allocations in the GMP was a reasonable means  
14 to facilitate conservation and water planning by water users as provided for under  
15 NRS 534.037. SE ROA at 10.

16 BAILEY's argument that under the beneficial use standard, the STATE  
17 ENGINEER should have considered components not in the plan is the wrong  
18 standard. See BAILEY Opening Brief at 25-26. The GMP before the STATE  
19 ENGINEER had a banking component in it approved by a majority of the  
20 underground water right holders in Diamond Valley. The STATE ENGINEER was  
21 under no duty under NRS 534.037 to analyze the GMP without a banking plan or to  
22 determine whether perfected certificated water right holders could have been granted  
23 additional shares for their water rights by reducing the shares granted to unperfected  
24 water rights. Those ideas were not in the GMP before him. If BAILEY had wanted  
25 those components in a GMP, BAILEY should have attempted to put together a GMP  
26 with those components approved by a majority of the underground water right holders  
27 in Diamond Valley.  
28

1 SADLER and RENNER raise the issue of Order 1305. *See* Sadler and Renner  
2 Opening Brief at 31-32. Order 1305 was issued by the STATE ENGINEER on July  
3 31, 2019 and Amended Order 1305A was issued on September 6, 2019 providing that  
4 the requirement for all irrigation rights and mining rights with a base irrigation right in  
5 Diamond Valley subject to the GMP to file extensions of time to prove beneficial use  
6 or to prevent a forfeiture was suspended for 5 years through July 31, 2024. SADLER  
7 and RENNER’s argument opposing this Order does not make sense. Under the GMP,  
8 use of all irrigation water rights will be decreasing over the next 5 years. It would be  
9 impossible for an irrigation water right holder to prove up or show beneficial use of its  
10 full permitted or certificated water right because the water right holder’s limited  
11 allocation of water under the GMP is decreasing every year. Order 1305A was  
12 properly issued by the STATE ENGINEER so that water right holders do not have to  
13 incur the expense of filing extensions of time when their allocations of water are  
14 decreasing in compliance with the GMP. The STATE ENGINEER’s Order 1305A is  
15 in compliance with NRS 534.120 which allows the STATE ENGINEER to make  
16 orders as are deemed essential for the welfare of the area involved in any area  
17 designated by the STATE ENGINEER and in furtherance of the GMP approved  
18 pursuant to NRS 534.037. The legislative history shows such measures included as  
19 part of a GMP were contemplated by the Legislature. Eureka County Addendum at p.  
20 046 (“the bill allows the State Engineer to waive criteria under law, especially  
21 forfeiture laws, to bring the basins back in balance whether it be by planting  
22 alternative crops, water conservation or using different irrigation methods.”)

23 **G. The procedures in NRS 534.037 comply with due process**  
24 **requirements.**

25 NRS 534.037 allows a majority of the holders of water rights in a basin that has  
26 been designation as a critical management area to petition the STATE ENGINEER for  
27 the approval of a groundwater management plan. This process of adopting a  
28 groundwater management plan is not something that is initiated by the STATE

1 ENGINEER, but rather by the holders of water rights in the subject basin. NRS  
2 534.037(3) requires that prior to approval or disapproval of a groundwater  
3 management plan, the STATE ENGINEER is to hold a public hearing and take  
4 testimony on the plan. In nearly 70 pages of argument against the STATE  
5 ENGINEER’s decision in this matter, the two groups of Petitioners’ spend less than 3  
6 pages challenging STATE ENGINEER’s compliance with requirements of NRS  
7 534.037 in adopting the GMP.

8 Petitioners SADLER and RENNER contend their due process rights were  
9 violated by the STATE ENGINEER failing to hold an administrative hearing that  
10 allowed for the presentation of witnesses and evidence and cross examination of  
11 witnesses such as in a water right application hearing and the STATE ENGINEER’s  
12 involvement in the GMP process was not appropriate. Petitioner BAILEY’s argument  
13 is that the Petition was not approved by a majority of the water rights holders in the  
14 basin.

15 **1. Hearing process.**

16 With regard to the hearing conducted by the STATE ENGINEER, NRS  
17 534.037 simply requires that STATE ENGINEER to “hold a public hearing to take  
18 testimony on the plan in the county where the basin lies.” The statute provides no  
19 more detail with regard to the structure of the public hearing or any specific  
20 procedures that must be followed. In this case, the STATE ENGINEER conducted a  
21 public hearing on October 30, 2018 at the Eureka Opera House in Eureka, Nevada.  
22 SE ROA at 653-742. During the hearing, the STATE ENGINEER listened to  
23 testimony and comments from 20 individuals or groups, including at least five  
24 presentations by or on behalf the Petitioners in this case. SE ROA at 653-742. In  
25 addition to the public hearing, the STATE ENGINEER accepted and considered  
26 hundreds of pages of written comments and materials up until November 2, 2018,  
27 including information from the Petitioners and Petitioner SADLER’s legal counsel.  
28 SE ROA at 536-539; 593; 596-641.

1 The STATE ENGINEER complied with the explicit terms of NRS 534.037 by  
2 considering the Petition of a majority of the holders of water rights in Diamond Valley  
3 to adopt the GMP. The STATE ENGINEER received written comments from  
4 interested individuals and entities, and held a public hearing, taking testimony of all  
5 those who wished to speak or provide information. Following completion of the  
6 statutorily required public hearing, the STATE ENGINEER approved the GMP. The  
7 STATE ENGINEER complied with the requirements of NRS 534.037 in considering  
8 and approving the GMP.

9 The public hearing held under NRS 534.037 was not an adversarial proceeding  
10 such as the protest hearings provided for in the STATE ENGINEER’s Rules of  
11 Practice and Procedure contained in NAC 533.110-370. Due process required notice  
12 and an opportunity to be heard. That was afforded to Petitioners in the public hearing  
13 and comment period provided by the STATE ENGINEER. Petitioners provide no  
14 legal authority to support their arguments they were entitled to an adversarial hearing  
15 and their arguments should be disregarded by the Court.

16 In *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979), the Nevada Supreme Court  
17 discussed the due process requirements for a hearing before the STATE ENGINEER:  
18 “all interested parties must have had a “full opportunity to be heard,” *See* NRS  
19 533.450(2); the State Engineer must clearly resolve all the crucial issues presented,  
20 *See, Nolan v. State Dep’t. of Commerce*, 86 Nev. 428, 470 P.2d 124 (1970) (on  
21 rehearing); the decisionmaker must prepare findings in sufficient detail to permit  
22 judicial review, *Id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419 (Or.1969);  
23 *See also*, NRS 233B.125. When these procedures, grounded in basic notions of  
24 fairness and due process, are not followed, and the resulting administrative decision is  
25 arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will  
26 not hesitate to intervene. *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65  
27 (1973).” *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264–65 (1979).

28

1           These procedures were followed by the STATE ENGINEER in this proceeding.  
2 The Petitioners had a full opportunity to be heard, the STATE ENGINEER resolved  
3 all the crucial issues presented and the STATE ENGINEER prepared findings in  
4 sufficient detail to permit judicial review.

5           Petitioners cite to no legal authority that the public hearing required by NRS  
6 534.037 requires witnesses, cross examination, expert testimony or expert reports.  
7 The public notice of hearing states the STATE ENGINEER “will hold a public  
8 hearing to receive testimony on a proposed groundwater management plan setting  
9 forth the steps to remove the critical management area designation for the Diamond  
10 Valley Hydrographic Base 153. A copy of the petition and the proposed plan may be  
11 viewed” at <http://water.nv.gov> or by contacting the Nevada Division of Water  
12 Resources.” SE ROA at 534.

13           SADLER and RENNER contend the public hearing was not “structured” in a  
14 manner that provided participants with the opportunity to challenge the evidence  
15 relied on by the STATE ENGINEER or offer contrary presentations. *See* Sadler and  
16 Renner Opening Brief at 34-35. EUREKA COUNTY disagrees. The Petition and  
17 proposed GMP for the STATE ENGINEER to consider were available to everyone.  
18 The STATE ENGINEER would also consider the testimony at the hearing which was  
19 also available to everyone including SADLER and RENNER attending the public  
20 hearing. At the beginning of the public hearing, the Hearing Officer indicated the  
21 “purpose of this hearing is to provide information to the public and receive written and  
22 oral testimony from any interested person about the proposed plan provided in Nevada  
23 Revised State Section 534.037.” SE ROA at 654-655. The Hearing Officer explained  
24 the procedure. SE ROA at 655. The STATE ENGINEER stated at the beginning of  
25 the hearing: “We want to hear all of your comments. So please, if you’re on the fence  
26 as to whether or not you want to stand up and comment, I would try to encourage you  
27 to do that.” SE ROA at 656. The STATE ENGINEER indicated at the beginning of  
28 the hearing that written comments would be accepted until Friday November 2, 2018.

1 SE ROA at 656. The STATE ENGINEER's four exhibits consisting of the Petition,  
2 GMP, notice of the hearing to County Commissions with returned certified mail  
3 receipts and public notice of the hearing to the newspaper with received proofs of  
4 publication were marked and admitted into evidence. SE ROA at 656-657. SADLER  
5 presented all the arguments and information to the STATE ENGINEER at the public  
6 hearing that it makes in its Opening Brief. SE ROA at 659-679. The Hearing Officer  
7 continued to ask near the end of the hearing if anyone else wanted to provide  
8 comment. SE ROA at 735, 736, 737, 741. At the end of the hearing, SADLER's  
9 attorney asked about getting copies of the written comments provided to the STATE  
10 ENGINEER at the hearing and when the transcript would be available. SE ROA at  
11 741. EUREKA COUNTY disagrees there was no opportunity to rebut later  
12 statements made by proponents at the public hearing because the Hearing Officer  
13 repeatedly asked if there was anyone else that wanted to provide comment and written  
14 comments were accepted after the public hearing. SADLER provided subsequent  
15 written comments to the STATE ENGINEER after the public hearing and had an  
16 opportunity to rebut later statements made by proponents at the public hearing. SE  
17 ROA at 596-641.

18 SADLER and RENNER fail to identify what was relied upon by the STATE  
19 ENGINEER that they did not have an opportunity to challenge or what further  
20 contrary presentations they would have presented. Order 1302 relies upon the  
21 Petition, Plan and written and oral comments received by the STATE ENGINEER.  
22 Petitioners due process rights have not been violated and their due process argument  
23 should be disregarded by the Court.

24 **2. STATE ENGINEER involvement in the GMP process.**

25 SADLER and RENNER are just plain wrong in alleging the STATE  
26 ENGINEER began coordinating with EUREKA COUNTY and the junior priority  
27 irrigators in 2015 to develop a groundwater management plan in order to blunt  
28 SADLER's efforts to enforce its vested claims via curtailment. SADLER and

1 RENNER further allege that as part of that effort, the STATE ENGINEER, with  
2 EUREKA COUNTY’s support, issued Order 1264 designating Diamond Valley as a  
3 Critical Management Area. *See* Sadler and Renner Opening Brief at 6. SADLER and  
4 RENNER cite to nothing in the record or even outside the record to support these  
5 allegations. These allegations are in direct contradiction to SADLER and RENNER’s  
6 citation to the record on appeal in the next paragraph indicating the STATE  
7 ENGINEER urged the junior appropriators to begin the process of developing a GMP  
8 in February 2014 – long prior to the commencement of SADLER’s curtailment action  
9 in April 2015. SADLER’s unfounded allegations need to stop.

10 The GMP process chronology was included with the GMP. SE ROA at 277-  
11 282. The meeting process began on April 23, 2015. SE ROA at 277. For the most  
12 part, the group including the Advisory Board met two or three times per month  
13 thereafter. SE ROA at 277-282. A year and a half after the first meeting, the October  
14 24, 2016 meeting notes the Advisory Board felt it could send the first draft of the  
15 GMP to the STATE ENGINEER for review. SE ROA at 279. Thereafter, at the  
16 numerous meetings held each month, the draft GMP was discussed and amended  
17 according to attendee input. SE ROA at 279-280. Seven months later, the May 22,  
18 2017 entry notes the draft GMP was sent to the STATE ENGINEER again to ensure  
19 there were no major hurdles before signatures were gathered. SE ROA at 280. In one  
20 meeting thereafter, the STATE ENGINEER’s comments were discussed and the draft  
21 GMP was amended according to attendee input to address the STATE ENGINEER’s  
22 comments but to the mutual satisfaction of the GMP meeting attendees. SE ROA at  
23 281. Otherwise, for the next eight months the draft GMP was discussed and amended  
24 based on attendee input. SE ROA at 281. In January 2018, the draft GMP was sent to  
25 the STATE ENGINEER. SE ROA at 281. Thereafter, the draft GMP was discussed  
26 and amended based on attendee input until the final Advisory Board meeting on May  
27 22, 2018. SE ROA at 281-282.

28

1 The GMP was developed and put together by the water users in Diamond  
2 Valley. SE ROA at 277-475. When those developing the GMP had questions, they  
3 asked the STATE ENGINEER's office. The STATE ENGINEER talked to them,  
4 reviewed at the water users' request their drafts of the GMP and gave suggestions.  
5 The process was transparent; Petitioners were copied on all the emails with the drafts  
6 of the GMP and with the emails back from the STATE ENGINEER with suggestions  
7 as were all others on the email list. Petitioners, who received these emails, never  
8 complained about questions being asked of the STATE ENGINEER or that drafts of  
9 the GMP were sent and reviewed by the STATE ENGINEER. The STATE  
10 ENGINEER would have consulted with Petitioners if they were developing their own  
11 plan and had questions or asked the STATE ENGINEER to review their drafts.  
12 SADLER and RENNER's allegation the GMP was as much a creation of the STATE  
13 ENGINEER as it was of the water users is incorrect. Regardless, a majority of the  
14 groundwater permit and certificate holders signed the Petition to request the STATE  
15 ENGINEER approve the GMP as the proposed GMP by the water rights holders.

16 **3. Voting for the GMP.**

17 With regard to the vote, Order 1302 specifically provides the vote totals  
18 considered and reviewed by the STATE ENGINEER. SE ROA 3. The STATE  
19 ENGINEER's office independently verified the number of water right permits or  
20 certificates in Diamond Valley and compared the signatures in the Petition with the  
21 confirmed owner of record in the files of the STATE ENGINEER. SE ROA 3. The  
22 STATE ENGINEER determined a majority of permits and certificates in Diamond  
23 Valley were represented in the petition and that the Petition satisfied the requirements  
24 of NRS 534.037(1). SE ROA 3. The STATE ENGINEER also reviewed water rights  
25 subject to the GMP by duty and found over 96% of the total groundwater  
26 commitments are subject to the GMP. SE ROA 4. The STATE ENGINEER further  
27 found that significant portions of both senior and junior rights are presented in the  
28 Petition. SE ROA 4.

1 BAILEYS contend only irrigation groundwater permits and certificates voted  
2 for the GMP. Bailey Opening Brief at 33-34. This argument is factually incorrect.  
3 First, it is not clear what BAILEY means when it indicates the STATE ENGINEER’s  
4 Preliminary Order of Determination in the pending Diamond Valley adjudication  
5 “recognizes approximately 300 permits and/or certificates for vested groundwater  
6 rights for both irrigation and stockwater for the Diamond Valley Basin.” Vested  
7 groundwater rights do not have permits or certificates, so it is not clear what  
8 BAILEYS are referring to with regard to the approximately 300 permits and/or  
9 certificates for vested groundwater rights. Further, the Critical Management Area  
10 designation as provided in NRS 534.110(7) pertains to *groundwater* withdrawals  
11 consistently exceeding the perennial yield of the basin and has nothing to do with  
12 surface rights or withdrawals. This is confirmed in Order 1264. SE ROA at 134-138.  
13 The plan to be approved pursuant to NRS 534.037 is under NRS Chapter 534 entitled  
14 “Underground Water and Wells” providing for a *groundwater* management plan and  
15 does not pertain to management of vested surface rights.

16 Certain water uses and water rights are excluded from the GMP. SE ROA at  
17 218, 220, 228-229, 240-241. However, all groundwater rights in Diamond Valley, no  
18 matter the use, received a Petition and had an opportunity to vote. SE ROA at 148-  
19 216. The STATE ENGINEER concurred that it was appropriate that the GMP only  
20 applied to irrigation base water rights as that was the manner of use that has the  
21 greatest potential effect on the pumping in the groundwater basin. SE ROA at 4. The  
22 STATE ENGINEER also noted that with 96% of the committed groundwater rights in  
23 Diamond Valley subject to the GMP, the application of the GMP to those rights that  
24 will have the most impact and be most impacted appropriate. SE ROA at 3, 11-12.

25 All groundwater rights not subject to the GMP did receive the Petition and had  
26 an opportunity to vote. Many of these rights did sign the Petition. *See for example,*  
27 SE ROA at 171 for Permits 83852 and 83853 (commercial); SE ROA at 178 for  
28 Permit 81614 (stockwatering); SE ROA at 191 for Permit 66439 (stockwatering); and

1 SE ROA at 203 for Permit 54409 (quasi-municipal). The Petition in this case was  
2 signed by a majority of the holders of groundwater, primarily irrigation based permits  
3 or certificates to appropriate water in the basin that are on file in the Office of the  
4 State Engineer and was accompanied by the GMP which set forth the necessary steps  
5 for removal of the basin's designation as a critical management area based upon the  
6 reductions in irrigation based pumping set forth in the GMP. While the GMP does not  
7 apply to stockwater rights, stockwater groundwater rights did receive the Petition and  
8 had the opportunity to vote. It is not clear why Petitioner BAILEY believes these  
9 rights did not have the opportunity to vote.

10 **H. Petitioners had every opportunity to submit their own Plan if they**  
11 **could obtain majority approval.**

12 In their Opening Briefs, Petitioners give examples of plan components or ideas  
13 which they contend the GMP plan proponents or the STATE ENGINEER never  
14 considered and satisfy their objections to the current GMP. For example, BAILEY  
15 states a GMP could establish a basin-wide fee to raise funds in order to pay water right  
16 holders to forego diversions or a GMP could establish a water market for the trade of  
17 groundwater rights that only subjects the junior appropriators to the annual reductions  
18 in pumping. *See* Bailey Opening Brief at 17-18. SADLER and RENNER argue the  
19 GMP should provide compensation to senior vested right holders. *See* Sadler and  
20 Renner Opening Brief at 25. Petitioners should have attempted to get a GMP  
21 approved with those components in it if that is what they wanted in the GMP. There  
22 is no indication they ever formally proposed such ideas in the GMP process or  
23 attempted to put together their own majority of underground water right holders in  
24 Diamond Valley to support such concepts in a GMP.

25 BAILEY argues there is no substantial evidence in the record that either the  
26 GMP plan proponents or STATE ENGINEER considered other methods to reduce  
27 demand on the aquifer while also complying with prior appropriation and it was  
28 arbitrary and capricious for the STATE ENGINEER to approve the GMP without

1 considering whether its goals could have been achieved via other methods. *See* Bailey  
2 Opening Brief at 17-18. This argument misses the point. Again, there is no  
3 requirement pursuant to NRS 534.037 for the STATE ENGINEER to consider or  
4 approve components of a GMP that were not before him supported by a majority of  
5 the underground water right holders in Diamond Valley. Petitioners' attempt to  
6 change the requirements of NRS 534.037 to suit their purposes is without merit and  
7 should be rejected by the Court.

8 **V.**

9 **CONCLUSION**

10 The STATE ENGINEER was right: the GMP plan proponents should be  
11 congratulated for their hard work and efforts in proposing a GMP supported by a  
12 majority of underground senior and junior water right holders in Diamond Valley.  
13 The GMP complies with NRS 534.037 and sets forth the necessary steps for removal  
14 of Diamond Valley's designation as a Critical Management Area.

15 Petitioners' arguments that the GMP approved by the STATE ENGINEER does  
16 not comply with existing water law are without merit. The Legislature specifically  
17 approved NRS 534.037 with full knowledge of the prior appropriation and beneficial  
18 use doctrines and existing water laws. By enacting NRS 534.037, the Legislature  
19 gave the STATE ENGINEER and water right holders more flexibility than  
20 curtailment by strict priority in areas designated as Critical Management Areas to  
21 resolve the problem of groundwater withdrawals that consistently exceed the perennial  
22 yield of the basin. The GMP accomplishes the goal of removing Diamond Valley's  
23 designation as a Critical Management Area by reducing groundwater withdrawals that  
24 consistently exceed the perennial yield of the basin.

25 As the GMP proponents admitted at the public hearing, the GMP is not perfect  
26 to every water right holder. But it was proposed by a majority of groundwater right  
27 holders in Diamond Valley, both senior and junior, and accomplishes the goal of  
28 reducing irrigation pumping and saving the Diamond Valley community and the

1 established agricultural way of life in Diamond Valley. SADLER and RENNER  
2 acknowledge as much in their Opening Brief: “The purpose of a GMP is to provide  
3 water right holders the opportunity to take voluntary, collective action to limit *their*  
4 *own* pumping in a manner that benefits everyone.” (Emphasis in original). See Sadler  
5 and Renner Opening Brief at 30. That is exactly what occurred in this matter as  
6 proposed by a majority of senior and junior groundwater right holders in this matter.

7 Petitioners complain about legislative policy and those arguments are too late.  
8 Petitioners complain about matters the STATE ENGINEER should have considered,  
9 yet they did not present any such evidence to the STATE ENGINEER for  
10 consideration. Petitioners complain the GMP should have included other components  
11 or other ideas, yet Petitioners did nothing to actively advance or advocate including  
12 those components or ideas into the GMP or come up with their own plan approved by  
13 a majority of groundwater right holders in Diamond Valley.

14 Order 1302 shows the STATE ENGINEER’s grant of the Petition and approval  
15 of the GMP was sensible and reasonable and based upon substantial evidence. The  
16 STATE ENGINEER reviewed and addressed all the oral and written comments in  
17 Order 1302 explaining in detail his thoughts and rationale for his disagreement with  
18 various comments and Petitioners’ arguments. The Court should not substitute its  
19 judgment for that of the STATE ENGINEER. Accordingly, the petitions for judicial  
20 review should be denied and Order 1302 should be upheld.

21 **VI.**

22 **AFFIRMATION**

23 The undersigned hereby affirms that this document DOES NOT contain a social  
24 security number.

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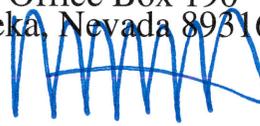
DATED this 23<sup>rd</sup> day of October, 2019.

KAREN A. PETERSON, ESQ.  
Nevada State Bar No. 0366  
ALLISON MacKENZIE, LTD.  
402 North Division Street  
Carson City, Nevada 89703

~ and ~

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BY:

  
\_\_\_\_\_  
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Placing a true copy thereof in a sealed postage prepaid envelope, in the United States Mail in Carson City, Nevada [NRCP 5(b)(2)(B)]

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

Courtesy Copy to Chambers:

Hon. Gary D. Fairman  
Department Two  
P.O. Box 151629  
Ely, NV 89315

DATED this 23<sup>rd</sup> day of October, 2019.

  
NANCY FONTENOT

4851-3146-7946, v. 1

ADDENDUM TO  
EUREKA COUNTY'S  
ANSWERING BRIEF

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/](http://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](mailto: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

JA1729

Minutes ID: 699 EC001



**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.

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

**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

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-Sixth Session  
April 8, 2011**

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 7:33 a.m. on Friday, April 8, 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/](http://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](mailto: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 Randy Kirner, Washoe County Assembly District No. 26

**JA1746**

Minutes ID: 818 EC018



Assemblyman Tick Segerblom, Clark County Assembly District No. 9  
Assemblyman Paul Aizley, Clark County Assembly District No. 41

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst  
Sheryl Burrows, Committee Secretary  
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Ron Cuzze, representing Nevada State Law Enforcement Officers' Association  
Ron Dreher, Director, Government Affairs, Peace Officers Research Association of Nevada  
Brett Barratt, Insurance Commissioner, Division of Insurance, Department of Business and Industry  
James Wells, Executive Officer, Public Employees' Benefit Program  
Kimberlee Tarter, Deputy Administrator, Division of Purchasing, Department of Administration  
Bob Johnson, representing Retired Public Employees of Nevada  
Kevin Ranft, representing American Federation of State, County, and Municipal Employees Local 4041  
Michelle Jotz, Director, Government Affairs, Las Vegas Police Protective Association; and Southern Nevada Conference of Police and Sheriffs  
Melanie Bruketta, Human Resources Director, City of Carson City  
Teresa Thienhaus, Director, Department of Personnel  
P. Michael Murphy, representing Clark County  
Javier Trujillo, Intergovernmental Relations Specialist, City of Henderson  
Chris Ferrari, representing City of Reno  
Chuck Callaway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Department  
Steve Walker, representing Lyon County  
Mary Pierczynski, representing Boulder City  
Bart Mangino, representing Clark County School District  
Steve Driscoll, Assistant City Manager, City of Sparks  
Jeanine Lake, representing American Federation of State, County, and Municipal Employees Local 4041  
Bob Ostrovsky, representing City of Las Vegas  
Marcia Turner, Vice Chancellor, Operations, Nevada System of Higher Education

William Banter, Lieutenant, Highway Patrol Division, Department of  
Public Safety

Lisa Foster, representing Boulder City

John B. Hefner, Legislative Chairman, Enlisted Association of Nevada

Stephen Osborne, representing Nevada Justice Association

Amy Davey, Personnel Analyst III, Department of Personnel

Ron Bratsch, Corrections North Chapter President, American Federation  
of State, County, and Municipal Employees Local 4041

Pam Del Porto, Inspector General, Department of Corrections

**Chair Kirkpatrick:**

[The roll was called.] Good morning. We will go ahead and get started. We have six bills to get through today, and we need to be on the floor at 10:45 a.m., therefore I will hold you to some time limits. We will start with Mr. Kirner, and we will open the hearing on Assembly Bill 365.

**Assembly Bill 365: Makes various changes relating to the Public Employees' Benefits Program. (BDR 23-604)**

**Assemblyman Randy Kirner, Washoe County Assembly District No. 26:**

I will ask you to go into Nevada Electronic Legislative Information System (NELIS) and view the amendment (Exhibit C), so that it will be easier to follow together. I would like to say that this bill is simple and straightforward, but I do not think that is in the lexicon of our Assembly. I will walk us through the bill, which comes from my background as a board member in the Public Employees' Benefits Program (PEBP) and several years as Chair.

Let us begin with section 1. As it stands now, PEBP is a billion dollar program. If we go out for a request for proposal (RFP), it goes through an evaluation committee, which the Board does not participate in. The evaluation committee makes a decision regarding the usage of a third-party administrator. We are trying to create a second step by working with Greg Smith of the State of Nevada Purchasing Division. The evaluation committee would make a decision, which then goes through the Board. The top two candidates would be reviewed by the Board, while taking into consideration the evaluation committee's assessment. The Board then makes their evaluation and proceeds with the election. Therefore, it becomes a two-step process. On the bottom of page 2 of the amendment, line 38 makes reference to the Executive Officer performance appraisal. The approach that we would like to take would honor the open meeting law. At the same time, we want to provide good and consistent feedback on a board level. The process we are outlining here would provide the performance appraisal at an open meeting. It would then go into a

on the size of the project. I am very sympathetic to the contractors and subcontractors. Even though I have those concerns, I will probably support this because I am concerned about the economy's effects on the subcontractors and their rights to receive fair payments.

**Chair Kirkpatrick:**

This section expires in a few years so that it may be revisited at that time.

**Assemblyman Ellison:**

I do agree with my colleague. When we went through the bill, we really studied this down to make sure of all the checks and balances. I agree that we can bring it back, if we need to. I do believe this will provide a good tool for these individuals.

ASSEMBLYMAN ELLISON MOVED TO AMEND AND DO PASS  
ASSEMBLY BILL 413.

ASSEMBLYWOMAN BENITEZ-THOMPSON SECONDED THE  
MOTION.

THE MOTION PASSED UNANIMOUSLY.

Assembly Bill 419: Revises provisions relating to groundwater basins.  
(BDR 48-299)

**Susan Scholley, Committee Policy Analyst:**

Assembly Bill 419 was sponsored by Assemblyman Goicoechea. The bill was heard in this Committee on March 30, 2011. [Read from work session document (Exhibit S).] The bill was presented by Assemblyman Goicoechea. The State Engineer testified in support of the bill with the proposed amendments. Other testimony was provided as shown. Amendments were proposed by the bill's sponsor at the hearing. Further amendments were worked out after the hearing and are included in the mock-up. Also, Assemblywoman Pierce proposed an amendment to require the posting of notices relating to these proceedings on the State Engineer's website. Looking at the mock-up, the majority of vote issue is proposed to be changed. Instead of "appropriators of record," it will read "holders of permits or certificates to appropriate water in that basin on file in the Office of the State Engineer." On page 2, there is an inclusion of domestic wells in consideration. These are the factors that a state engineer would consider when deciding whether to approve a groundwater management plan. The other changes are on page 5 of the mock-up. This allows the State Engineer the option to either designate a basin after the withdrawals of groundwater have consistently exceeded perennial yield

**JA1749**

of the basin or requires him to do so upon receipt of a petition signed by a majority of the holders of permits and certificates. Also there is an addition of the website notice. This amendment deletes the definition of perennial yield from the bill.

**Chair Kirkpatrick:**

I would like to point out that Mr. Goicoechea said that this may see an amendment on the other side. However, until we see the actual amendments that come out of legal, people are comfortable with this moving forward.

**Assemblyman Goedhart:**

On page 5, there were a few different amendments. On line 16, subsection 7 will say "may" designate, correct? On the front summary sheet it says, "Requires the State Engineer to designate a groundwater basin as a critical management area . . . ." Are those in conflict with each other?

**Susan Scholley:**

I will confess that when I prepare mock-ups, I do not change the digest. I am not even sure if I am allowed to do that on my mock-up tool. Legal will certainly take care of that.

**Assemblyman Goedhart:**

The other item in the digest says, "The bill also allows the State Engineer to consider the existence of a groundwater basin management plan as a factor when reviewing requests for an extension of time to avoid forfeiture." I did not see the language in the bill itself. Where in the bill is that specific language?

**Susan Scholley:**

That can be found on page 3 of the mock-up, in the blue bolded print. That was part of the original bill; therefore, I did not go over it in the changes.

**Assemblyman Goedhart:**

I will call the water engineer directly, but the bill mentions that if the engineer has to bring the groundwater withdrawals into compliance with the perennial yield, it would not exclude domestic wells. I think we had a conversation in that hearing about the priority date given to the domestic well. Was there a point where there was a new piece of land subdivided that created that new parcel? In Nevada water law, every parcel of land comes appurtenant with it, 2.80 acre-feet for personal use. I will be talking to the water engineer on that as well. I just want to make sure that we do not inadvertently have a person who has been living out there a long time, without access to domestic water, especially if there is no access to a public water service.

**Chair Kirkpatrick:**

Is there any other discussion?

ASSEMBLYWOMAN PIERCE MOVED TO AMEND AND DO PASS  
ASSEMBLY BILL 419.

ASSEMBLYMAN STEWART SECONDED THE MOTION.

I want to remind the Committee that until we actually see the amendment from legal, we will keep this addressed.

THE MOTION PASSED UNANIMOUSLY.

That concludes our work session for today. The meeting is adjourned [at 10:03 a.m.].

[Additional exhibits not discussed during the hearing include: written testimony in support of Assembly Bill 420, from Lt. Col. Richard Blower (Exhibit T), and written testimony regarding Assembly Bill 338 from Bart Patterson, Vice Chancellor, Administrative and Legal Affairs, Nevada System of Higher Education (Exhibit U).]

RESPECTFULLY SUBMITTED:

RESPECTFULLY SUBMITTED:

\_\_\_\_\_  
Lenore Carfora-Nye  
Transcribing Secretary

\_\_\_\_\_  
Sheryl Burrows  
Recording Secretary

APPROVED BY:

\_\_\_\_\_  
Assemblywoman Marilyn K. Kirkpatrick, Chair

DATE: \_\_\_\_\_

**EXHIBITS**

**Committee Name:** Committee on Government Affairs

**Date:** April 8, 2011

**Time of Meeting:** 7:33 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 365	C	Assemblyman Kirner	Amendments to the Bill
A.B. 266	D	Assemblyman Segerblom	Proposed Amendment
A.B. 266	E	Assemblyman Segerblom	PowerPoint Presentation
A.B. 266	F	Teresa Thienhaus, Director, Department of Personnel	Prepared Testimony
A.B. 354	G	Assemblyman Segerblom	PowerPoint Presentation
A.B. 354	H	Teresa Thienhaus, Director, Department of Personnel	Prepared Testimony
A.B. 338	I	Assemblyman Paul Aizley, Clark County Assembly District No. 41	Presentation
A.B. 338	J	Teresa Thienhaus, Director, Department of Personnel	Prepared Testimony
A.B. 420	K	John B. Hefner, Legislative Chairman, Enlisted Association of Nevada	Prepared Testimony
A.B. 420	L	Stephen Osborne, representing Nevada Justice Association	Proposed Amendment
A.B. 179	M	Assemblyman Elliot Anderson, Clark County Assembly District No.15	Mock-up Amendment
A.B. 179	N	Marcia Turner, Vice Chancellor, Operations, Nevada System of Higher Education	Proposed Clarifying Language
A.B. 179	O	Teresa Thienhaus, Director, Department of Personnel	Prepared Testimony
A.B. 63	P	Susan Scholley, Committee Policy Analyst	Work Session Document

A.B. 276	Q	Susan Scholley, Committee Policy Analyst	Work Session Document
A.B. 413	R	Susan Scholley, Committee Policy Analyst	Work Session Document
A.B. 419	S	Susan Scholley, Committee Policy Analyst	Work Session Document
A.B. 420	T	Lt. Col. Rick Blower, Staff Judge Advocate, Nevada Military Department	Written Testimony
A.B. 338	U	Bart Patterson, Vice Chancellor, Administrative & Legal Affairs, Nevada System of Higher Education	Written Testimony

MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-Sixth Session  
May 4, 2011

The Committee on Government Affairs was called to order by Vice Chair Irene Bustamante Adams at 8:30 a.m. on Wednesday, May 4, 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/](http://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](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

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

**COMMITTEE MEMBERS ABSENT:**

Assemblywoman Marilyn K. Kirkpatrick (excused)  
Assemblywoman Melissa Woodbury (excused)

JA1754

Minutes ID: 1073 EC026

\*CM1073\*

**GUEST LEGISLATORS PRESENT:**

Senator Dean A. Rhoads, Rural Nevada Senatorial District  
Senator Michael A. Schneider, Clark County Senatorial District No. 11

**STAFF MEMBERS PRESENT:**

Susan Scholley, Committee Policy Analyst  
Cynthia Carter, Committee Manager  
Jenny McMenemy, Committee Secretary  
Olivia Lloyd, Committee Assistant

**OTHERS PRESENT:**

Mike L. Baughman, representing the City of Caliente; and Executive Director, Humboldt River Basin Water Authority  
Steve Walker, representing the Truckee Meadows Water Authority; Lyon County; and Carson City  
Kelvin Hickenbottom, Deputy State Engineer, Office of the State Engineer, Division of Water Resources, State Department of Conservation and Natural Resources  
Andy Belanger, representing the Southern Nevada Water Authority; and the Las Vegas Valley Water District  
Kyle Davis, representing the Nevada Conservation League  
K. Neena Laxalt, representing the Nevada Cattlemen's Association  
Randy Weaver, Private Citizen, Las Vegas, Nevada  
Renaldo Tiberti, Private Citizen, Las Vegas, Nevada  
Dean Baker, Manager, Baker Ranches, Inc.

**Vice Chair Bustamante Adams:**

[Roll was called. A quorum was present.] We will open the hearing on Senate Bill 153 (1st Reprint). The mayor of Caliente has sent someone to be a representative.

**Senate Bill 153 (1st Reprint): Revises provisions governing the appropriation of water by municipalities. (BDR 48-821)**

**Mike L. Baughman, representing the City of Caliente:**

The City of Caliente requested S.B. 153 (R1) to address a number of issues the city had encountered with regard to its water resources in that small municipality out in southeastern Lincoln County. There were a variety of concerns raised with the bill as introduced. As a result, the bill was significantly amended. Many of the provisions that were stricken were provisions that the city was initially interested in, however, in several meetings with the

**JA1755**

EC027

**Randy Weaver:**

We do not want a population cap. By putting that in there, it would state that the plan would only be for Clark County because there is no other 700,000 population county. We started out trying to cover all the other counties but Clark County. It did not make sense to have a bill that excluded one county, so we wanted to include Clark County. I know they have a current water management program in process in Clark County that I think is working for them. I am not aware that they are currently considered an overallocated basin.

**Assemblywoman Bustamante Adams:**

Your original intent was to have it as a statewide bill. Is that correct?

**Randy Weaver:**

Absolutely.

**Assemblyman Stewart:**

That was my question. I would like to make it clear that it was a statewide program.

**Assemblyman Anderson:**

Could we go over Assembly Bill 419 (1st Reprint) at some point? That is the bill that Assemblywoman Neal referenced that is going to be a back-and-forth thing that we need to figure out how those two bills would work together.

**Assemblywoman Bustamante Adams:**

Yes, A.B. 419 (R1) was Assemblyman Goicoechea's bill that dealt with the same topic.

**Renaldo Tiberti, Private Citizen, Las Vegas, Nevada:**

We are here in support of this bill. A water right holder has a five-year period in which he uses it or loses it. I do own water rights in the Las Vegas Valley. The five-year period is too short. It does not give a lot of room to come up with a possible beneficial use for the water. The key word is beneficial. It forces people who own water rights to come up with a scheme to maintain their water rights that may or may not be beneficial. This would give the State Engineer a way to extend that time period to use it or lose it until the holder finds a true beneficial use for that water right. With the recession, it gives us time to put the water to beneficial use.

**Assemblywoman Bustamante Adams:**

Is there anyone who would like to testify in support of S.B. 362 (R1)?

**Dean Baker, Manager, Baker Ranches, Inc.:**

It is important that there is more emphasis put on the use and what water is available. I am not complaining about the State Engineer. The tradition of the drawdown has been acceptable to a point that it has overused different basins. There are many examples of this in Nevada and other states. It is possible to put this bill together with A.B. 419 (R1). It is important, and it needs to be studied. The drawdowns can affect both the person who has applied for the water and those who were already there. It will leave a situation that will be bad in the future. It will be devastating to the applicant and the existing water right holders. I support this bill.

**Assemblywoman Bustamante Adams:**

We will call up those that are neutral on S.B. 362 (R1).

**Andy Belanger, representing the Southern Nevada Water Authority; and the Las Vegas Valley Water District:**

We are neutral on S.B. 362 (R1) for the purposes of supporting the amendment that Mr. Weaver and Senator Schneider mentioned regarding the population cap. We have some concern whenever water law is specific to a county. We believe it makes most sense for water law to be applied evenly statewide so that there is one set of rules that all parties are following and working towards. We understand that A.B. 419 (R1) was passed by this Committee. It approached this issue in a somewhat different way. That bill, when it moves over to the Senate, will be heard and processed in some way. This bill does some similar things to that bill. It does it in a different way.

In the Senate, when this bill was processed, the commitment that we heard universally from the Committee was that A.B. 419 (R1) is in existence and we want to have another vehicle in case that bill is stalled somewhere. However, A.B. 419 (R1) was the bill that was going to address these issues. Both sides understood that it was the preferred place. We support the concepts of this bill. We believe in groundwater management plans. We understand the issues as they relate to basins that are overappropriated and getting those basins back into balance in a reasonable period of time. We support the concept of giving parties tools so that they can find voluntary ways to reduce overappropriation. We have done that in the Las Vegas Valley for the last 14 years. It has been tremendously successful. The Legislature gave us authority in 1997 to create a groundwater management program. That program has helped hundreds of well owners in the Las Vegas Valley who have wanted to get off of their wells and connect to a municipal system, thereby reducing drawdown on the groundwater basin there. It has been tremendously successful; it is paid for by the well owners in the valley. That is the way the Las Vegas Valley works as it relates to this concept. The language in this bill helps to make that universal and

statewide. We appreciate Senator Schneider's leadership on this issue. We appreciate the issues that Mr. Weaver and Mr. Tiberti brought up. We stand ready to work with the Committee and other parties to process a bill related to groundwater management plans this session.

**Steve Walker, representing the Truckee Meadows Water Authority:**

We are neutral on the bill. We have concerns as the bill is written. The 700,000 population cap was not spontaneously generated. It happened at the Senate Committee on Government Affairs to get the bill passed on April 15. That is where it came from. Putting a population cap or a county delimiter on a water bill that deals with hydrographic basins makes no sense. If you look at the 236 hydrographic basins in the state, they are squiggly. The county lines are straight. There is no nexus between them. The statement that every five years I am forced to waste water is called agriculture, at least in northern Nevada. You put the water to beneficial use, either you build houses, grow crops, dedicate it to wildlife, et cetera. It is a beneficial use. If, in fact, you are wasting water, in the 2007 Session on Senate Bill 487 of the 74th Session, we developed a fining system for wasting water that would be more effective. Wasting water is the wrong term. It is a beneficial use.

We think that A.B. 419 (R1) that this bill has been related to is good. Taking aspects from this bill that are positive and including them in A.B. 419 (R1) would give us a way to manage water better in the state where basins are designated and where you have records that pumping of the water exceeds the perennial yield of the basin and that there is evidence of that by dropping groundwater levels.

**Assemblywoman Neal:**

You stated that the 700,000 population cap was added in so it could pass the Senate committee.

**Steve Walker:**

That was my opinion, and that is what I saw.

**Assemblywoman Neal:**

I will ask the question based on what you think you understood. If it goes back to the Senate from us and we take the 700,000 out, then when they try to agree on our amendment, do you think this will kill the bill?

**Steve Walker:**

I do not know that it would kill the bill. The 700,000 cap on this bill does not work. The aspect that you are asking for, that instead of proving beneficial use, you would pay a fee so that you did not have to prove beneficial use, is counter

**JA1758**

to state water law as a "use it or lose it" state. That aspect alone will kill the bill.

**Assemblyman Ellison:**

I agree. If you look at the votes, this bill passed 11 to 10 out of the Senate. If they made the amendment to get the bill out, then it will die if we send it back over without the population cap in place.

**Steve Walker:**

The vote 11 to 10 happened on the Senate floor. The vote I am referring to happened in the Senate Committee on Government Affairs.

**Assemblyman Anderson:**

I have a tendency to agree with you. I feel that we should not be worried about getting things out of Committee. We should make sure it is good policy. Your comments about a basin, that is right on. We do not create the earth's geography in this body. When we are dealing with groundwater basins, they ought to conform to something that has to do with groundwater basins and not the lines that we draw. We should not be making water law that applies to one county.

**Kyle Davis, representing the Nevada Conservation League:**

We are now neutral on the bill. I will echo the previous comments that have been made. I agree that this should be something that applies statewide. We should not have water law apply to one specific county. It sounds like that is a universal attitude from the sponsor as well as the people that you have heard from today. The second point is that we need to consider how this bill works with A.B. 419 (R1). We did support A.B. 419 (R1) in this Committee and this house. It does a good job of addressing what we see as the problem. We want to make sure that this bill will work with that bill. As these bills move forward, I think that is important to keep in mind.

**Kelvin Hickenbottom, Deputy State Engineer, Office of the State Engineer,  
Division of Water Resources, State Department of Conservation and  
Natural Resources:**

Our office appreciates the effort of the bill's supporters to provide our office with additional tools to deal with overappropriated basins outside of the heavy-handedness of simply regulating by priority. [Read from prepared testimony (Exhibit I).]

**Assemblyman Ellison:**

You are saying that some of the studies were done back in the 1960s on the appropriation of water rights. There are a lot of disagreements with the studies **JA1759**

made off the mountain tops to what actually is. Is the state going to go forward and do actual tests? The counties have already done this. Is the state going to step up to the plate and go back and look at some of these water basins and determine if they are overallocated? You are basing a law on overallocation. The state should have to show proof.

**Kelvin Hickenbottom:**

Are you suggesting that we go back and look at the perennial yield of each one of the basins that we have overallocated?

**Assemblyman Ellison:**

There is a lot of discrepancy on some of these basins. Some are actually overused and some are not. There has been a lot of money spent to determine that they are not being used enough or too much. We are creating bills that say that we should go off of how much water is there currently. I disagree. If the state is going to do that, the state should have to show proof.

**Kelvin Hickenbottom:**

We try to manage all of our groundwater basins on the perennial yield. From the first State Engineer forward, I imagine that none of them anticipated that the basins that are in trouble now would have been in trouble because of the issuance of permits. The ones that we see that are significantly overappropriated are ones where we had desert land entries during the 1960s and 1970s. The success rate throughout most of the state was only three percent of those permits issued ever proved beneficial use. There are those exceptions; Diamond Valley is one and Pahrump is one. The success rates in those basins reached 20 percent. That is where the overallocation of those basins came from. Their success rate and putting water to beneficial use came from those studies as compared to other basins that only achieved a three percent success rate. It was not intentional; it was just what happened. We have to go back and try to work with those people. Our office went out to Diamond Valley in 2009 to address the problem of dropping water levels because of overappropriations and what we could do to get the basin back into balance. They told us that they were fine. They would regulate themselves. We have gone to Pahrump and met with the utilities to figure out ways to bring the basin back into balance. We do not want to go into a basin and strong-arm people into only allowing certain priorities to put water to beneficial use. It would have a huge impact on the whole economy near those basins. We would rather work with the individual right holders in the basin to figure out ways to bring the basin back into balance. That is what A.B. 419 (R1) is trying to address.

We are not going back to every basin to figure out what the perennial yield is. Generally, people come to us with new studies and say the perennial yield is much higher. We found that looking at the old studies that were done by the United State Geological Survey (USGS) was not out of line. They are spot-on for the technology that they use. We do not see a significant increase. There are some that show more water, but for the most part we are talking about five or ten percent maximum. As people want to develop water in those basins that are not developed now, they will come forward with studies. We will require them to conduct a study to see whether or not there is that water available. We have that ability under our statutes now. We are trying to go forward with that. We are trying to make people who have filed applications for large amounts of water to prove that there is that much water in the basin. That is under *Nevada Revised Statutes* 533.368. We do have that ability. We are assessing them. It is usually a case-by-case basis rather than going through the entire state. We have over 252 basins and subbasins in the state. It is really expensive to conduct a study to collect the required data in order to determine the perennial yield of the basins. Every basin is different. Some have surface water and some do not. Some basins have phreatophytes where you can determine what the discharge of the basin is. There is a whole realm of techniques.

**Assemblyman Ellison:**

That is what I was trying to get across. One law does not fit all. Every basin is totally different. That is why I thought A.B. 419 (R1) was a good bill.

**Assemblywoman Neal:**

When you get these plans, how do you scrutinize the value of a plan that has a 10 percent or 5 percent difference? How do you deal with that deviation? Is that readily accepted that it may not be the actual amount of water in the basin?

**Kelvin Hickenbottom:**

Nothing is readily accepted. In these large projects, the applications are protested. There is the applicant side of what they believe is correct in terms of the perennial yield or the availability of water within that basin, and on the other side, there is the protestant. They do their own studies to determine how much water is in the basin. We have our own experts on staff who review the reports as well. We look at the hydrology and geology of the basins. We look at all of the different techniques they use in order to determine what they feel the water availability in the basin is. We do scrutinize these basins. We go to hearings as well. We have expert testimony on both sides. Water projects are contested if they are of any size or magnitude. There is a lot of scrutiny that is put on by our office as well as the public.

**Assemblywoman Neal:**

On section 2, subsection 2(b)(4) of the bill, when they enter into the agreement with all the owners of water rights in the basins to regulate the use of the water, can you give me an example of what that would look like? These are options. Is that correct? If the State Engineer finds that they may not be using the water in the manner that they should, they can be taken away. What does that look like? It says that the method should be based on the conformity with the priority of rights. The person who is trying to enter into this agreement is possibly going to lose his rights. How does this priority work for group regulation of the use? Let us imagine this is a homeowner's association (HOA) for water. I am going to lose my rights within this situation. It is being challenged. I will then go to the other owners and say that they need to regulate me. We are then going to agree on how I use my water. Is that what this looks like?

**Kelvin Hickenbottom:**

It would be how you do not use your water. If they have a junior priority, they do not have anything to leverage. If you are a junior right holder and we have to go and regulate by priority, the higher priority will get their water first. A junior appropriator would approach these more senior ones and have them not use their water in order for them to continue to use theirs. I do not understand subparagraph (4). To go through some of the other options, these are already things that can be done. Subparagraphs (1), (2), and (3), can already be done in a basin without any bill to allow it. People go out and buy water rights all the time. I do not think that anyone will go out and relinquish their water for free. It does have a value. Someone else could then go and purchase it from them, and then either use it or relinquish it.

**Assemblywoman Bustamante Adams:**

Mr. Weaver, would you be able to answer Assemblywoman Neal's question?

**Randy Weaver:**

I will try. I hate to refer to Nebraska, but under the federal magistrate, we were forced to come up with guidelines that we would not have come up with before. They went against state law. I do not have to point out the problems because of the overallocated areas and the State Engineer was very helpful. When I approached this bill originally, it was based on if I was a water holder, I would like the option to not have to prove up my rights for a period of two, three, or four years and pay a fee to the State Engineer's Office. That fee would be used only to buy back water rights. That was the plan for the future. That was how to help these basins out, because right now we do not have a plan.

Unfortunately, that type of thinking goes against our "use it or lose it law" in Nevada which we have to maintain. Instead of putting those types of specifics in a bill, we tried to come up with a bill that allows the State Engineer more tools to work with those designated areas and try to keep within the current state water law. Assembly Bill 419 (R1) was a great bill, but I did not feel that it had enough teeth to it. The State Engineer needed to move forward with a plan for the future. Although we can already do some of the verbiage in this bill, such as voluntarily relinquishing water rights and so on, the bottom line is there are not too many people that voluntarily relinquish their water rights. We are trying to give the State Engineer tools where he can work with an individual area. If they come up with a plan for the future, it is something he can do without violating state water laws. That was the original intent of this bill. We have taken out enough verbiage and put new language in that it works in their favor. It was on Friday when I saw the population cap. I felt that completely threw the bill out because this is for the entire state and not just for one county. I am glad to hear everyone supports that. I do not know if that answers Assemblywoman Neal's question. That was the original idea behind the bill. We are trying to come up with a plan for the future. As far as the priority rights, you are getting out of my level of understanding. There are people that have priority rights that are over the junior water rights. The State Engineer's Office that handles that.

**Assemblyman Livermore:**

Water rights are personal property. If this plan would potentially eliminate people's ownership of water rights, would that be deemed a taking? Would the state be responsible to pay for that taking? Could this go to court?

**Kelvin Hickenbottom:**

We are not out to take anyone's water right. If you are not using it for five consecutive years, and this applies to groundwater rights, you have the potential of forfeiture. That is not a taking. You have not put your water to beneficial use. You may not need it any longer. That is just the way the statute has been set up. If we had to regulate by priority, I guess you could look at that as a taking. However, our law is set up that, on surface water in particular, the senior right holder got his water first in times of shortage and everyone else got theirs as water became available. It applies to groundwater as well. It is in the law. They can contest any decisions that we make by appealing our decisions to a court. I do not know that it would be a taking.

**Assemblyman Livermore:**

I served on the Carson Water Subconservancy District for almost 11 years. There are other basins with which we have been involved. The potential process of what this plan would do, you look at the modeled water rights and

the perennial yield, and there is a blue line drawn right across the plan of the senior and junior water right holders. If the plan was adopted, the junior water right holders have no water; the value is gone. That is what I am questioning.

**Kelvin Hickenbottom:**

I agree with you. We have gone out and given presentations where we would show what priorities would be cut off if we had to limit the amount of draft on the basin to the perennial yield. There are a lot of other things that go into the decisions that we make. It is not just the perennial yield itself. If there are irrigation rights, we look at return flows. We look at other things to establish how much we think the safe yield of the basin is. Sometimes we have exceeded that, but I have stated the reasons for that. To enforce the water law, that is the way we have to do it. We draw a blue line across that list of rights within that basin. We would say, for example, that a 1965 water right is the highest priority that can be pumped. Then, everyone else has to cease. We would prefer to work with the basins to bring them back in line. We have the ability to change applications from agricultural use to any other use. We can take the consumptive use of that right and only transfer it. There are a lot of other safeguards in there. There are dedication rates for subdivisions that go into play. They actually dedicate more water than one house typically uses. That goes back to getting the basin balanced. On paper it may not be balanced, but in actual pumpage of the groundwater it does come back into balance. Those are things that we look at. We would not just go out and draw the line. We look at all of those other pieces to say this would be the level of curtailment if there was one.

**Assemblywoman Bustamante Adams:**

Is there anyone else who would like to testify as neutral for S.B. 362 (R1)? [There was no one.] Is there anyone who is in opposition? [There was no one.] We will close the hearing on S.B. 362 (R1). Is there any public comment? [There was none.]

Meeting adjourned [at 10:19 a.m.].

RESPECTFULLY SUBMITTED:

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Jenny McMenemy  
Committee Secretary

APPROVED BY:

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Assemblywoman Irene Bustamante Adams, Vice Chair

DATE: \_\_\_\_\_

**JA1764**

EC036

**EXHIBITS**

**Committee Name: Committee on Government Affairs**

**Date: May 4, 2011**

**Time of Meeting: 8:30 a.m.**

<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A		Agenda
	B		Attendance Roster
S.B. 153 (R1)	C	Kelvin Hickenbottom, Office of the State Engineer	Amendment
S.B. 153 (R1)	D	Kelvin Hickenbottom, Office of the State Engineer	Prepared Testimony
S.B. 361 (R1)	E	Senator Dean Rhoads	Prepared Testimony
S.B. 361 (R1)	F	Senator Dean Rhoads	Summary Testimony
S.B. 361 (R1)	G	Kelvin Hickenbottom, Office of the State Engineer	Amendment
S.B. 361 (R1)	H	Kelvin Hickenbottom, Office of the State Engineer	Prepared Testimony
S.B. 362 (R1)	I	Kelvin Hickenbottom, Office of the State Engineer	Prepared Testimony

**SB 362**  
**Testimony of Jason King, State Engineer**  
**Assembly Government Affairs**

May 4, 2011

Marilyn Kirkpatrick - Chair	Peggy Pierce
Irene Bustamante-Adams - Vice Chair	John Ellison
Elliot Anderson	Ed Goedhart
Teresa Benitez-Thompson	Pete Livermore
Lucy Flores	Lynn Stewart
Harvey Munford	Melissa Woodbury
Dina Neal	

Good morning Madam <sup>vice</sup> Chair and Members of the Committee, for the record, my name is Jason King, State Engineer for the Division of Water Resources. Thank you for the opportunity to provide testimony on SB 362.

First let me say that our office appreciates the effort of the bill's supporters to provide our office with additional tools to deal with over-appropriated basins outside the heavy handedness of simply regulating by priority. I don't want anyone to think that we don't appreciate that effort.

However, there is much overlap <sup>we</sup> between this bill and Assembly Bill 419 that was passed out of this committee. As I testified on the Senate side, I believe AB419 does a better job in addressing Critical Management Areas and is applicable statewide. As you know, as amended, this bill applies only to Clark County. It is our belief that any benefits that would be realized under SB362 can be found in AB419. If AB419 doesn't move forward, we would be willing to work with the proponents of SB362 on some additional language.

With that, I'd be happy to answer any questions.

**JA1766**

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON WAYS AND MEANS**

**Seventy-Sixth Session  
May 11, 2011**

The Committee on Ways and Means was called to order by Vice Chair Marcus Conklin at 4:48 p.m. on Wednesday, May 11, 2011, in Room 3137 of the Legislative Building, 401 South Carson Street, Carson City, 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/](http://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](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

Assemblywoman Debbie Smith, Chairwoman  
Assemblyman Marcus Conklin, Vice Chair  
Assemblyman Paul Aizley  
Assemblyman Kelvin Atkinson  
Assemblyman David P. Bobzien  
Assemblywoman Maggie Carlton  
Assemblyman Pete Goicoechea  
Assemblyman Tom Grady  
Assemblyman John Hambrick  
Assemblyman Crescent Hardy  
Assemblyman Pat Hickey  
Assemblyman Joseph M. Hogan  
Assemblyman Randy Kirner  
Assemblywoman April Mastroluca  
Assemblyman John Ocegüera

**GUEST LEGISLATORS PRESENT:**

Assemblyman Lynn Stewart, Clark County Assembly District No. 22

**STAFF MEMBERS PRESENT:**

Rick Combs, Assembly Fiscal Analyst

**JA1767**

Minutes ID: 1190 EC039



Connie Davis, Committee Secretary  
Janice Wright, Committee Assistant

Vice Chair Conklin opened the hearing on A. B. 259 (1st Reprint).

**Assembly Bill 259 (1st Reprint): Requires a portion of certain existing fees to be used for certain programs for legal services. (BDR 2-817)**

Barbara Buckley, former Speaker of the Nevada State Assembly, appeared before the Committee, in her capacity as Executive Director, Legal Aid Center of Southern Nevada, to testify in support of A.B. 259 (R1), an act that required a portion of certain existing fees to be used for certain programs for legal services. [The Legal Aid Center of Southern Nevada, a nonprofit organization, served indigent persons with legal problems].

Ms. Buckley advised that A.B. 259 (R1) was heard first in the Assembly Committee on Judiciary and was rereferred to the Assembly Committee on Ways and Means to consider the portion of the bill related to the Account for Foreclosure Mediation.

Ms. Buckley testified that A.B. 259 (R1) redirected \$20 from the district courts in Clark County and Washoe County for the provision of legal aid services to indigent persons including abused and neglected children, victims of domestic violence, and victims of fraud. Ms. Buckley mentioned that the Legal Aid Center of Southern Nevada did not provide criminal law services because those services were provided by the Public Defender's Office. Unlike criminal law, in which everyone accused of a crime was entitled to an attorney, Ms. Buckley said abused children, victims of domestic violence, and victims of fraud were only entitled to legal aid paid for through fees and philanthropy.

Ms. Buckley explained that the provision that diverted \$20 from Washoe County and Clark County district courts to legal aid was included in a bill in 2009 as part of the court's business plan. However, the 2009 bill was amended, and the money, although assessed, was not allocated for legal aid services. Ms. Buckley explained that the \$20 that A.B. 259 (R1) redirected to legal aid service organizations in Clark County and Washoe County was from existing fees and not new fees.

Additionally, Ms. Buckley explained that the assessment was not redirected in rural communities specifically for legal aid services. Rather, A.B. 259 (R1) allowed the rural courts to use the money for options based on the courts' needs. Those options included maintaining facilities, as provided in section 1, subsection 2, paragraphs (a) and (b), or to support court appointed special

Mr. Froese indicated that the same rules would apply to a vehicle owned by a family trust.

Chairwoman Smith asked whether the bill specified to whom the vehicle was registered.

Assemblyman Stewart advised that page 2, line 38 of the bill indicated that the veteran was not entitled to exemption for the duration of a transfer and, therefore, was entitled to only one exemption.

Chairwoman Smith indicated that the question Assemblyman Kirner asked referred to whom the vehicle was registered.

Assemblyman Kirner, using himself as an example, explained that his family trust owned the vehicle for which he received an exemption, and he wanted to ensure that his spouse would not be excluded if he died.

Assemblyman Stewart pointed out that a spouse was no longer entitled to the exemption once the veteran was dead.

Chairwoman Smith indicated the question was about registration and asked Mr. Froese whether a vehicle could be registered in a family trust and whether the spouse was entitled to the exemption.

In response to Chairwoman Smith, Mr. Froese advised that he did not know the answer to the question.

Chairwoman Smith advised that family trusts were becoming very commonplace, and she wanted to ensure that question could be answered.

Assemblyman Kirner expressed his support for A.B. 245 (R1) but also wanted some clarification concerning the ability to transfer an exemption for a vehicle owned by a family trust.

Hearing no response to her request for additional testimony either in support of, in opposition to, or from a neutral position, Chairwoman Smith closed the hearing on A.B. 245 (R1) and opened the hearing on A.B. 419 (R1).

**Assembly Bill 419 (1st Reprint): Revises provisions relating to groundwater basins. (BDR 48-299)**

Assemblyman Pete Goicoechea, representing Assembly District No. 35, presented A.B. 419 (R1), an act relating to water; the bill required the State

Engineer to designate certain groundwater basins as critical management areas in certain circumstances.

Assemblyman Goicoechea advised that the bill pertained to overappropriated water basins throughout the state and provided for a new water basin designation, which, depending on the level of decline, could ultimately be declared a critical-management area.

Assemblyman Goicoechea advised that the fiscal note reflected a fiscal impact of \$22,100 in each year of the 2011-2013 biennium. He pointed out, however, that there was no impact to the General Fund because the funding would be derived from basin-fee assessments. Additionally, A.B. 419 (R1) provided that the State Engineer's duties for a designated basin would include monitoring basins at a level above normal survey monitoring, and a basin designated as a critical-management area would require extensive monitoring.

Assemblyman Goicoechea indicated that under the provisions of A.B. 419 (R1), the State Engineer would regulate the basins by priority, which required public hearings, travel to the basin locations, and the suspension of "junior" permits. Assemblyman Goicoechea explained that "junior" permits would be the first to be suspended because in Nevada water law, the principle of "first in time, first in right" applied. A groundwater basin deemed a critical-management area would require additional monitoring by the Division of Water Resources and would require the operators of those basins to conduct a ten-year conservation plan to bring the basins into balance.

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources, advised that A.B. 419 (R1) provided the Division of Water Resources an additional process to take action with respect to overappropriated groundwater basins.

Mr. King used the analogy that a designated basin could be compared with a yellow alert and a critical-management area with a red alert. He said that A.B. 419 (R1) would require the Division of Water Resources to monitor the basins to bring them back into balance, which, as Assemblyman Goicoechea mentioned, necessitated holding public hearings in each basin to determine whether the basin should be designated a critical-management area. Mr. King said that the fiscal note, submitted by the Division of Water Resources, budgeted \$2,100 for staff and a court reporter to travel to each basin and conduct a hearing to hear testimony. The \$20,000 balance of the fiscal note was estimated to pay staff in the field to collect depth-to-water measurements, perform crop and pumpage inventories, and produce an annual report. The total

of \$22,100 per fiscal year would be covered by the fees assessed to water-right holders.

In response to Chairwoman Smith's question concerning the fiscal note, Mr. King reiterated that the \$2,100 per fiscal year related to meeting expenses, and \$20,000 in each fiscal year would pay for staff that the Division already employed.

Rick Combs, Assembly Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, asked for clarification concerning whether the staff members performing the field work were in the agency's budget or outside of The Executive Budget.

Mr. King advised that the staff were paid through basin-fee assessments outside of The Executive Budget.

Hearing no response to her request for additional testimony either in support of, in opposition to, or from a neutral position, Chairwoman Smith closed the hearing on A.B. 419 (R1) and opened the hearing on A.B. 466 (R1).

**Assembly Bill 466 (1st Reprint): Requires the State Engineer to define, by regulation, the term "environmentally sound" for the purpose of making certain determinations relating to interbasin transfers of groundwater. (BDR 48-1120)**

Jason King, State Engineer, Division of Water Resources, Nevada Department of Conservation and Natural Resources, presented A.B. 466 (R1), an act related to groundwater that required the State Engineer to define, by regulation, the term "environmentally sound" for the purpose of making certain determinations related to interbasin transfers of groundwater.

Mr. King testified that the Division of Water Resources' decision-making process for interbasin transfers of water [water pumped out of one basin to another] was guided by criteria in *Nevada Revised Statutes* (NRS). Mr. King explained that NRS provided that the Division of Water Resources establish whether the transfer of water from basin to basin was "environmentally sound." Assembly Bill 466 (R1), he said, proposed that the State Engineer define the term "environmentally sound" by regulation. The bill proposed that the State Engineer on or before December 31, 2011, begin the regulatory process to adopt regulations and on or before December 31, 2012, adopt regulations. If the regulations were not adopted before December 31, 2012, the Division would submit a report to the 77th Session of the Nevada Legislature concerning the progress made toward adoption of the regulations.

**MINUTES OF THE  
SENATE COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-sixth Session  
May 23, 2011**

The Senate Committee on Government Affairs was called to order by Chair John J. Lee at 8:15 a.m. on Monday, May 23, 2011, in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator John J. Lee, Chair  
Senator Mark A. Manendo, Vice Chair  
Senator Michael A. Schneider  
Senator Joseph (Joe) P. Hardy  
Senator James A. Settelmeyer

**GUEST LEGISLATORS PRESENT:**

Assemblyman Pete Goicoechea, Assembly District No. 35  
Assemblyman Tick Segerblom, Assembly District No. 9

**STAFF MEMBERS PRESENT:**

Michael Stewart, Policy Analyst  
Heidi Chlarson, Counsel  
Cynthia Ross, Committee Secretary

**OTHERS PRESENT:**

Terry Care, Ex-Senator  
Larry Matheis, Executive Director, Nevada State Medical Association  
Randall Todd, Washoe County Health District  
Jason King, P.E., State Engineer, Division of Water Resources, State  
Department of Conservation and Natural Resources  
Andy Belanger, Southern Nevada Water Authority; Las Vegas Valley  
Water District  
Kyle Davis, Nevada Conservation League

**JA1772**

EC044

Section 22, subsection 1, paragraph (d) of the bill mentions a mechanism whereby volunteers can be registered in advance to enjoy the provisions of this bill. The mechanism is the Emergency System for Advance Registration of Volunteer Health Practitioners. Every state is required under the Centers of Disease Control and Prevention Public Health Emergency Preparedness Grant Program to develop a database where volunteers can register and become vetted in the ways this Act requires. If volunteers need to be deployed in other states, the credentials of the health care volunteers are vetted, and the volunteers can provide emergency services. It works the same way in reverse. The other states have similar databases of volunteers who are registered and vetted, and if we have the Uniform Act, these volunteers can come into Nevada to help in an emergency and practice within the scope of their licenses. The Uniform Emergency Volunteer Health Practitioners Act is important, so we encourage the Committee to support A.B. 98, as noted in my handout (Exhibit I).

CHAIR LEE:

The hearing on A.B. 98 is closed and I open the hearing on A.B. 419.

ASSEMBLY BILL 419 (1st Reprint): Revises provisions relating to groundwater basins. (BDR 48-299)

ASSEMBLYMAN PETE GOICOECHEA (Assembly District No. 35):

Assembly Bill 419 permits the State Engineer to designate a groundwater basin as a critical management area. The State has a number of groundwater basins that are overappropriated.

Assembly Bill 419 allows the State Engineer to designate a groundwater basin as a critical management area if the withdrawals consistently exceed the perennial yield of that basin. It also allows for a petition process if the majority of the water right holders in that basin petition the State Engineer to create a water management plan in the critical management area. The bill also requires the State Engineer hold a public hearing to bring forward the water management plan that has to be approved in a public hearing process. If the water management plan results are not achieved in ten years, it requires the State Engineer to start regulating that water basin by priority. We have groundwater basins that are declining.

The Legislature has established a gradient of decline and the State Engineer does not want to regulate those basins by priority. Assembly Bill 419 requires that, after a ten-year period with a water management plan in place, the State Engineer regulates by priority if water management goals are not met. Water management plans will come into place; with a water management plan, the bill allows the State Engineer to waive criteria under law, especially forfeiture laws, to bring the basins back in balance whether it be by planting alternative crops, water conservation or using different irrigation methods. Almost every basin in the State that has real development is on the verge of becoming overappropriated or is overappropriated.

Assembly Bill 419 is another tool in the toolbox for the State Engineer.

CHAIR LEE:

What is a priority right?

ASSEMBLYMAN GOICOECHEA:

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

CHAIR LEE:

The water right stays with the property, so if I buy a ranch with water rights dating back to the 1800s, I would have a high priority.

JASON KING, P.E. (State Engineer, Division of Water Resources, State Department of Conservation and Natural Resources):

The priority stays with the right, so if you purchased ten water rights pertinent to that ranch, we would look at those rights and see they were filed in the 1800s. The priority is attached to the rights, and they would be inherited when the ranch was purchased.

CHAIR LEE:

If I bought a new ranch and bought old water rights, the water rights transfer at the date the water rights were filed.

SENATOR SETTELMAYER:

When a property was established by a settler, the State Engineer went back in time and through decrees determined when the water was proven to be put to beneficial use. My ranch has water rights dating back to the 1860s. I know of water rights predating the State in the 1840s. This includes water rights held by the Washoe Tribe. The water right is established when the water was proven for beneficial use.

My concern with the bill is section 1, subsection 2, paragraph (c) because it puts into law the relationship between surface water and groundwater in a basin. I worry this rids the concept of secondary water rights.

ASSEMBLYMAN GOICOECHEA:

That section refers to criteria the State Engineer shall consider. There is a correlation between groundwater pumping and surface water rights, and it has to be considered.

SENATOR SETTELMAYER:

I understand the correlation, but this might potentially eliminate secondary water rights. If the language is added into law and a correlation is evident, person A can go to the State Engineer and say his or her neighbor, person B, lost his or her water rights from the river and wants to use the supplemental secondary rights. Person A contends he or she has better primary rights and that person B should not have the right to pump person A's water. I do not want this to get into law because this can affect many situations.

ASSEMBLYMAN GOICOECHEA:

Are you addressing a person with a supplemental right that has a higher priority than the neighbor?

SENATOR SETTELMAYER:

That correlation derived from Native American tribes goes beyond the correlation. If a person has secondary water rights and is pumping water and the neighbor has primary rights, the water pumped is the neighbor's primary water.

ASSEMBLYMAN GOICOECHEA:

You are talking about surface water.

SENATOR SETTELMEYER:

Yes, if you are creating the correlation that the Tribes support.

ASSEMBLYMAN GOICOECHEA:

I look at the language in section 1, subsection 2, that says "... the State Engineer shall consider, without limitation: (a) The hydrology of the basin; (b) The physical characteristics of the basin; (c) The relationship between surface water and groundwater in the basin." This is the bill's intent because pumping groundwater basins impact surface water rights. It is different in a decree basin where the right has been adjudicated and a surface water connection is for the length of the basin. The legislation is focused on groundwater basins not having surface water connections between them.

SENATOR SETTELMEYER:

This bill only deals with critical management areas. This bill does not apply anywhere else other than these critical groundwater basins.

ASSEMBLYMAN GOICOECHEA:

Yes, and the way to establish critical groundwater basins is that withdrawals in the basins must consistently exceed the perennial yield, and that most likely does not occur where there are surface water connections in groundwater basins. If gradient declines in groundwater basins are established and a loss of two feet occurs each year without spikes back up, these basins become critical management areas and need to be addressed.

CHAIR LEE:

Are there many critical management areas throughout the State? If this bill passes, will it take place effectively because of pending issues?

MR. KING:

If this bill becomes law, I can foresee four to six basins where we would hold hearings to designate the basins as critical management areas to pull the basins back into balance.

Our office supports this bill as amended in the first reprint.

Senate Committee on Government Affairs  
May 23, 2011  
Page 16

ANDY BELANGER (Southern Nevada Water Authority; Las Vegas Valley Water District):

I am neutral on A.B. 419. We understand the need to manage groundwater basins and to give people a soft landing to get basins back into balance. We understand and support the concept of groundwater management plans. The plan in the Las Vegas Valley has worked well. We are concerned with some language in the bill, but we are willing to work over the next two years as the bill is implemented to make sure those concerns are addressed, specifically the petition process. We understand the process is critical to giving local groundwater users say in whether basins need to be defined as critical management areas and to the development of groundwater management plans.

CHAIR LEE:

Protests are common with water rights. Is this bill another tool for protestants to slow economic development?

MR. KING:

No. There are two ways that critical management areas can move forward. One, the office can be petitioned by the majority of water right holders in a basin. In this case, there is consensus. Two, critical management areas can be established if the office sees continued declining perennial yields in basins. I do not see this legislation as an obstacle, but rather it helps move things along.

ASSEMBLYMAN GOICOECHEA:

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

CHAIR LEE:

Is a junior water right a water right that does not have a high priority?

ASSEMBLYMAN GOICOECHEA:

A junior water right is a newer right. This is the common reference for water rights. Senator Settelmeyer has an 1860 water right and you come in with a 1960 water right. This would make you a junior water right holder.

JA1777

EC049

SENATOR HARDY:

Are there situations that make junior water rights priority water rights, such as domestic use versus agricultural use?

MR. KING:

No. Water right priorities are established at the date applications are filed in our office or as Senator Settlemeyer spoke to, when the water was first put to beneficial use. Since 2007, domestic wells have priority but for a long time, they were not under State law. In 2007, the Seventy-fourth Session established that the date a domestic well was drilled is the priority of that water right. Priority has nothing to do with the highest or best use of water but the date rights are filed in our office, put to beneficial use via a vested right or decree, or in the case of domestic wells, when the wells were drilled.

SENATOR HARDY:

Do the tribes have an overarching groundwater basin priority versus surface water priority?

MR. KING:

There are two water sources: surface water sources and groundwater sources. When a reservation is established, it has a reserved right to the water that is necessary to grow that reservation and that water right has a priority. Ninety-nine percent of the time, the water right is surface water. It can be near a stream, spring or lake. In many cases, this priority is the No. 1 priority on a system. Pyramid Lake is a perfect example. Regarding groundwater, Nevada does not recognize a reserved right for a tribal reservation.

SENATOR HARDY:

Section 1, subsection 2, paragraph (c) saying "The relationship between surface water and groundwater in the basin" could open that up.

MR. KING:

No. I understand Senator Settlemeyer's concern about it spreading throughout the statute. Section 1, subsection 2, paragraph (c) is saying that when a groundwater management plan is submitted to our office for review, looking at the connection between surface water and groundwater is another criteria we use when making our decision. I do not look at this language as an opening of any door.

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SENATOR HARDY:

I see it not as opening a door but a floodgate. If the language is put into statute, it is contestable, but we are establishing legislative intent.

KYLE DAVIS (Nevada Conservation League):

We are in support of this bill. This is a good piece of legislation for dealing with the problem of overappropriated basins. When groundwater recedes, it causes environmental impacts. It is important to place into statute some way to remedy that problem. If this bill becomes law, it will accomplish our goals in dealing with overappropriated basins.

CHAIR LEE:

The hearing is closed on A.B. 419 and this meeting is adjourned at 9:10 a.m.

RESPECTFULLY SUBMITTED:

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Cynthia Ross,  
Committee Secretary

APPROVED BY:

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Senator John J. Lee, Chair

DATE: \_\_\_\_\_

**JA1779**

EC051

<b><u>EXHIBITS</u></b>			
<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A		Agenda
	B		Attendance Roster
A.B. 240	C	Heidi Chlarson	Proposed Amendment 7031
S.B. 271	D	Heidi Chlarson	Proposed Amendment 6850
S.B. 271	E	Heidi Chlarson	Amendment Handout
A.B. 98	F	Terry Care	Letter
A.B. 98	G	Terry Care	Summary
A.B. 98	H	Terry Care	Article from <i>USA Today</i>
A.B. 98	I	Randall Todd	Written Testimony

MINUTES OF THE  
SENATE COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-sixth Session  
May 25, 2011

The Senate Committee on Government Affairs was called to order by Chair John J. Lee at 10:11 a.m. on Wednesday, May 25, 2011, in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator John J. Lee, Chair  
Senator Mark A. Manendo, Vice Chair  
Senator Michael A. Schneider  
Senator Joseph (Joe) P. Hardy  
Senator James A. Settelmeyer

STAFF MEMBERS PRESENT:

Michael Stewart, Policy Analyst  
Heidi Chlarson, Counsel  
Martha Barnes, Committee Secretary

CHAIR LEE:

I will open the hearing for the first bill on our work session agenda, Assembly Bill (A.B.) 98.

ASSEMBLY BILL 98 (1st Reprint): Enacts the Uniform Emergency Volunteer Health Practitioners Act. (BDR 36-56)

MICHAEL STEWART (Policy Analyst):

Assembly Bill 98 presented in the work session document (Exhibit C) was proposed by Assemblyman Tick Segerblom and enacts the Uniform Emergency Volunteer Health Practitioners Act, which establishes legal guidelines for recognizing other states' licenses for physicians and health care practitioners who volunteer to provide assistance during the time of a declared emergency. Testimony indicated this Uniform Act has been adopted by 13 state legislatures and is pending approval in 4 other states. It basically creates a new chapter in the *Nevada Revised Statutes* relating to service in Nevada by volunteer

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health practitioners and veterinarians during an emergency or during training for an emergency. The Division of Emergency Management, Department of Public Safety, can create a registration system for volunteer health practitioners and veterinarians and regulate the activities of such persons. There were no amendments offered.

SENATOR SETTELMAYER MOVED TO DO PASS A.B. 98.

SENATOR MANENDO SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR LEE:

We will discuss A.B. 419 from the work session agenda.

ASSEMBLY BILL 419 (1st Reprint): Revises provisions relating to groundwater basins. (BDR 48-299)

MR. STEWART:

Assembly Bill 419 presented in the work session document (Exhibit D) permits the State Engineer, Division of Water Resources, State Department of Conservation and Natural Resources, to designate a groundwater basin as a critical management area if the withdrawals consistently exceed the perennial yield of the basin. The bill sets forth certain criteria the State Engineer may consider when reviewing a groundwater management plan. If a basin has been designated as a critical management area for at least ten consecutive years, the State Engineer shall order all withdrawals of groundwater to be restricted based on priority unless a groundwater management plan has been approved.

An amendment discussed by Senator Settlemeyer would affect one of the criteria the State Engineer may use when considering determination to approve a groundwater management plan. This amendment would delete language in section 1, subsection 2, paragraph (c) as it relates to criterion that states the relationship between surface water and groundwater in the basin may be considered by the State Engineer. That is the only proposed amendment.

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SENATOR SETTELMAYER:

I understand the concerns Assemblyman Pete Goicoechea has in his hydrographical water basins; however, the inclusion of this language may be used by other individuals and lawyers in other cases throughout the State. It brings to light the whole issue of whether secondary water rights would even exist.

SENATOR SETTELMAYER MOVED TO AMEND AND DO PASS AS AMENDED A.B. 419.

SENATOR HARDY SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR LEE:

We will now discuss A.B. 519.

ASSEMBLY BILL 519 (1st Reprint): Makes various changes relating to the Office for Consumer Health Assistance. (BDR 18-1157)

MR. STEWART:

Assembly Bill 519 presented in the work session document (Exhibit E) combines the Office of Minority Health, currently in the Health Division, Department of Health and Human Services (DHHS), with the Office for Consumer Health Assistance, Office of the Governor, and transfers both offices to the DHHS. According to testimony, this proposed transfer in A.B. 519 has been supported in recommendations of the Legislative Committee for the Fundamental Review of the Base Budgets of State Agencies and has already been included as part of the budget closings for the DHHS made by the Joint Committees on Ways and Means and Finance. There were no amendments offered for this bill.

SENATOR HARDY MOVED TO DO PASS A.B. 519.

SENATOR SETTELMAYER SECONDED THE MOTION.

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THE MOTION CARRIED UNANIMOUSLY.

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CHAIR LEE:

We will move these bills down to the Senate Floor for a vote. I will adjourn the meeting of the Senate Committee on Government Affairs at 10:16 a.m.

RESPECTFULLY SUBMITTED:

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Martha Barnes,  
Committee Secretary

APPROVED BY:

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Senator John J. Lee, Chair

DATE: \_\_\_\_\_

**JA1784**

EC056

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<b><u>EXHIBITS</u></b>			
<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A		Agenda
	B		Attendance Roster
A.B. 98	C	Michael Stewart	Work session document
A.B. 419	D	Michael Stewart	Work session document
A.B. 519	E	Michael Stewart	Work session document