IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

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

Appellants,

v.

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

Respondents.

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

JOINT APPENDIX
VOLUME X

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CHRONOLOGICAL INDEX TO JOINT APPENDIX

DATE	DOCUMENT	VOLUME	PAGE RANGE
02/11/2019	Sadler Ranch, LLC and Daniel S. Venturacci's Petition for Judicial Review (filed in Case No. CV-1902-349, later consolidated with CV-1902-348)	I	JA0001-0089
02/11/2019	Bailey Petitioners' Notice of Appeal and Petition for Review of Nevada State Engineer Order No. 1302 (filed in Case No. CV-1902-350, later consolidated with CV-1902-348	I	JA0090-0115
02/11/2019	Ira R. and Montira Renner Petition for Judicial Review	I	JA0116-0144
04/03/2019	Eureka County's Motion to Intervene	I	JA0145-0161
04/05/2019	Notice of Entry of Stipulation and Order to Consolidate Cases	I	JA0162-0182
04/25/2019	Order Following Telephone Status Hearing Held April 9, 2019	I	JA0183-0186
04/26/2019	Letter to Chambers re Stipulated Extension for Record on Appeal	I	JA0187-0188
05/10/2019	Order Granting Eureka County's Motion to Intervene	I	JA0189-0190
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06/07/2019	Order Granting Motion to Extend Time to File The State Engineer's Record on Appeal	I	JA0235
06/11/2019	State Engineer Motion in Limine	II	JA0236-0307
06/11/2019	Summary of Record on Appeal and Record on Appeal bates-numbered SE ROA 1-952	II (JA0308-0479) III (JA0480-0730) IV (JA0731-0965) V (JA0966-1196) VI (JA1197-1265)	JA0308-1265
06/11/2019	Order Following Telephone Status Conference Held June 4, 2019	VI	JA1266-1268
06/14/2019	Notice of Withdrawal of Petitioner Daniel S. Venturacci	VI	JA1269-1271
06/20/2019	Eureka County's Joinder to State Engineer's Motion in Limine	VI	JA1272-1275
06/24/2019	Opposition of Baileys to Motion in Limine	VI	JA1276-1285
06/24/2019	Sadler Ranch, LLC and Ira R. and Montira Renner Opposition to Motion in Limine	VI	JA1286-1314
06/24/2019	DNRPCA Intervenor's Joinder to State Engineer's Motion in Limine and Eureka County's Joinder Thereto	VI	JA1315-1317

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07/01/2019	Eureka County's Joinder to State Engineer's and DNRPCA's Replies in Support of Motion in Limine	VI	JA1337-1341
07/02/2019	State Engineer's Reply in Support of Motion in Limine	VI	JA1342-1353
07/31/2019	Motion to Intervene by Beth Mills, Trustee of the Marshall Family Trust	VI	JA1354-1358
08/01/2019	Motion to Intervene field by Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC and Blanco Ranch, LLC	VI	JA1359-1368
09/04/2019	Order Granting Motion in Limine	VI	JA1369-1378
09/06/2019	Order Granting Motion to Intervene for Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC and Blanco Ranch, LLC	VI	JA1379-1382
09/16/2019	Opening Brief of Petitioners Sadler Ranch, LLC and Ira R. and Montira Renner	VII	JA1383-1450
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10/23/2019	State Engineer's Answering Brief	VIII	JA1627-1674
10/23/2019	Answering Brief of Eureka County	VIII	JA1675-1785
11/26/2019	Reply Brief of Petitioners Sadler Ranch, LLC and Ira R. and Montira Renner	IX	JA1786-1818
11/26/2019	Sadler Ranch, LLC and Ira R. & Montira Renner's Addendum to Reply Brief	IX	JA1819-1855
11/26/2019	Reply Brief of Bailey Petitioners and Addendum to Bailey Reply Brief	IX	JA1856-1945
12/10/2019	Transcript of Proceedings, Oral Argument Volume I	X	JA1946-2154
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12/10/2019	Sadler Ranch & Ira & Montira Renner Opening Argument Presentation	XI	JA2185-2278
12/10/2019	Eureka County's Presentation	XI	JA2279-2289
12/11/2019	Transcript of Proceedings, Oral Argument Volume II	XI	JA2290-2365
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04/30/2020	Notice of Entry of Findings of Fact, Conclusion of Law, Order Granting Petitions for Judicial Review filed by Bailey Petitioners	XII	JA2465-2507
05/14/2020	DNRPCA Intervenors' Notice of Appeal	XII	JA2508-2554
05/14/2020	DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIII	JA2555-2703
05/15/2020	State Engineer Notice of Appeal	XIII	JA2704-2797
05/19/2020	State Engineer Joinder to DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIII	JA2798-2802
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06/01/2020	DNRPCA Intervenors' Reply in Support of Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIV	JA2865-2929
06/01/2020	State Engineer's Reply in Support of DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIV	JA2930-2941
06/01/2020	Eureka County's Reply in Support of Motion for Stay Pending Appeal	XIV	JA2942-3008
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06/24/2019	DNRPCA Intervenor's Joinder to State Engineer's Motion in Limine and Eureka County's Joinder Thereto	VI	JA1315-1317
07/01/2019	DNRPCA Intervenor's Reply in Support of Joinder to State Engineer's Motion in Limine and Eureka County's Joinder Thereto	VI	JA1331-1336
10/23/2019	DNRPCA Intervenors' Addendum to Answering Brief	VII	JA1523-1626
10/23/2019	DNRPCA Intervenors' Answering Brief	VII	JA1491-1522
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05/13/2019	DNRPCA Intervenors' Motion to Intervene	I	JA0191-0224
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04/27/2020	Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review	XI	JA2381-2420
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12/10/2019	Opening Argument of Bailey Petitioners Presentation	X	JA2155-2184
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12/11/2019	Transcript of Proceedings, Oral Argument Volume II	XI	JA2290-2365
05/28/2019	Unopposed Motion to Extend Time to File the State Engineer's Record on Appeal	I	JA0225-0232

AFFIRMATION

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

Date: September 23, 2020

/s/ Debbie Leonard

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Attorney for DNRPCA Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on September 23, 2020, the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system. All others will be served by first-class mail.

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

Case No. CV-1902-348 consolidated with case numbers CV-1902-349 and CV-1902-350
Department II

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

BEFORE THE HONORABLE GARY D. FAIRMAN

DISTRICT JUDGE, PRESIDING

TIMOTHY LEE BAILEY and CONSTANCE MARIE BAILEY; FRED BAILEY and CAROLYN BAILEY; IRA R. RENNER, an individual; SADLER RANCH, LLC; and DANIEL S. VENTURACCI,
Petitioners,

vs.

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

EUREKA COUNTY; DNRPCA INTERVENORS,
Interveners.

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT, VOLUME I

TUESDAY, DECEMBER 10, 2019

EUREKA, NEVADA

Reported by: Shellie Loomis, RPR
Nevada CCR #228

APPEARANCES:

For Saddler Ranch, Ira Renner, Daniel S. Venturacci:	Taggart and Taggart, Ltd. By: David H. Rigdon, Esq. Carson City, Nevada
For the Baileys:	Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP By: Christopher Mixson, Esq. Reno, Nevada
For the State Engineer:	James N. Bolotin, Senior Deputy Attorney General Carson City, Nevada
For Eureka County:	Allison MacKenzie By: Karen Peterson, Esq. Carson City, Nevada -and- Theodore Buetel, District Attorney Eureka, Nevada
For DNRPCA:	Leonard Law, PC By: Debbie Leonard, Esq. Reno, Nevada
For Diamond Valley Ranch Properties:	John Marvel, Esq. Eureka, Nevada
For the Marshall Family Trust:	Beth Mills, Trustee

EUREKA, NEVADA, TUESDAY, DECEMBER 10, 2019, A.M. SESSION

-o0o-

THE COURT: Good morning. This is Case -- this is Case Number CV-1902-3348 consolidated with case numbers CV-1902-349 and CV-1902-350.

The parties in this case are Timothy Lee and Constance Marie Bailey, Fred and Carolyn Bailey, Ira R. Renner and Montira Renner and Sadler Ranch, LLC. They are the petitioners in this case.

The respondent is Tim Wilson, professional engineer, State of Nevada Division of Water Resources. The Department of Conservation and Natural Resources.

Also Eureka County, Diamond Natural Resources Protection and Conservation Association, J&T Farms, Gallagher Farms, Jeff Lamory, M & C Hay, Conley Land and Livestock, Jim and Nick Etcheverry, Tim and Sandy Halpin, Diamond Valley Hay Company, Mark Moyle Farms, LLC, D.F. and L.M. Palimore Family Trust, Bill and Patricia Norton, Sestanovich Hay & Cattle, LLC, Jerry Anderson and Bill and Dara Bauman.

Those are all of the respondents in this case that have filed briefs.

In addition, with respect to motions to intervene that were filed in this case, we also have intervenors as real

parties in interest that have been allowed to intervene as a matter of right. Those are Diamond Valley Ranch, LLC, First American Federal, Inc., Burke Properties, LLC and Blanca Ranch, LLC. They're known as DVR Properties.

And also in the proper person, the Marshall Family Trust with Beth Mills as trustee, and she's representing herself.

Neither of the Mills or the Marshall Family Trust, nor the intervenors commencing with Diamond Valley Ranch, LLC, First American Federal, Burke Properties, et cetera, have filed briefs in this matter. They have just filed motions to intervene and have been granted intervention as a matter of right.

With respect to representation in this case, Sadler Ranch, the Renners are -- are represented by David Rigdon.

The Bailey petitioners are represented by Don Springmeyer and Christopher Mixson.

And actually Mr. Paul Taggart also represents Sadler Ranch and the Renners in this case.

With respect to representing the State Engineer, it's senior deputy attorney general, Mr. James Boloton.

Legal counsel for Eureka County, Ms. Karen A. Peterson, Mr. Theodore Beutel.

Representing the DNRPCA intervenors and the other parties that I mentioned as also interveners, Ms. Debbie Leonard.

Representing the Diamond Valley Ranch properties are Mr. John Marvel.

And as I said earlier, the Marshall Family Trust is represented by Beth Mills as the trustee of the trust. There's no legal counsel that's representing.

With review of a relevant history of the docket, the summary of record on appeal was filed on June 11th of 2019.

The opening brief of petitioner Sadler Ranch, LLC and the Renners was filed on September 16th of 2019.

The opening brief of the Bailey petitioners was filed on September 16th of 2019. Respondent, the State Engineer's in the answering brief was filed on October 23rd, 2019. The DNRPCA intervenors' answering brief and addendum was filed on October 23rd, 2019.

The reply brief of petitioner Sadler Ranch and the Renners and their addendum was filed on November 26th of 2019. And the Bailey reply brief was also filed on November 26th of 2019.

Before we get started today, I want to extend a thank you on behalf of the 7th Judicial District Court to

Patty Peek, director of the Eureka Opera House for making this beautiful building available to the court. It certainly accommodates our counsel today I think much better than the historic courtroom at the Eureka courthouse just -- just because of the space available.

And hopefully the seats will be a little more comfortable for everyone that's here today in the courtroom who would certainly have an interest in this case than many times our seats in the courtroom provide.

As far as the order today, I had my law clerk contact all of the counsel with respect to who will be presenting today.

It's my understanding that the order of presentation is that Sadler Ranch will and the Renners through Mr. Rigdon today will be presenting for those petitioners followed by I believe Mr. Mixson, Christopher Mixson representing the Bailey petitioners.

After their opening, the State Engineer will then present its answer, its response. That will be followed by Eureka County and then followed by the DNRPCA intervenors.

Subsequent to that, the closing will be provided to Sadler Ranch and to the Baileys. And that will be the extent of the -- the argument today.

What will happen in this case logistically is

that after each counsel's presentation, I believe my law clerk talked to you about it a little bit, we'll take a break. If some of the presentations are going a little longer than potentially anticipated I'll just manage the courtroom and we'll take a convenience break for everyone, even, you know, during a particular presenter's presentation.

But certainly after each presentation we'll take a break, that will allow counsel who are making the presentation to comfortably exit the stage and the next, you know, counsel to be able to set up his or her presentation.

We'll take make, you know, like a five- or ten-minute recess, something like that, maybe a little longer. And I think that will work.

We'll try to take a break somewhere around the noon hour, I'll just play it by ear, see where we are as far as the arguments go and break for lunch and then we'll continue this afternoon until about 5 o'clock.

If it turns out that we're close to finishing, I will probably go over a little bit to finish up today. If we're not, we've set aside tomorrow to do this certainly and even Thursday.

If we haven't finished today, then what -- and we're coming back tomorrow at the end of the day, this afternoon we'll -- we'll talk about returning. I am certainly

able to start earlier in the day tomorrow. If you want to start at 9:30 or 9:00 in the morning, it doesn't make a difference what time we get up, you'll be here. So we can certainly make it over here to start the proceedings a little bit earlier tomorrow as -- as a convenience to everyone.

With respect to how the matter will be handled by the court, after all of the presentations have been made today, all the oral arguments made by counsel on behalf of their clients, the court will take the matter under submission.

There will -- obviously you all know a number of -- a number of issues that have been presented that -- that merit thoughtful consideration by the court, which is given already and will continue to give after hearing the arguments today, the court will enter a written decision in this case.

I will do so as soon as my -- I'm able to. Court calendars for District Court judges also look bad and sometimes clear up, particularly general jurisdiction courts. Because we have a lot of criminal matters and they're stacked from here to -- I don't know, well into next year.

But a lot of those matters go off calendar, allow the judges a little bit more time that aren't planned for to allow courts to work on cases. We know this is a very important case to this community, to the state of Nevada, so

we'll give it all the attention that we possibly can and render a decision as timely as possible with respect to the presentation.

For everyone that's here today -- that's interested at the courthouse, if you need to leave the courtroom at any time you certainly can do so. You know, just be respectful of whoever is making their presentation in going in and out and certainly keep it as quiet as possible.

Otherwise, if you need a convenience break or anything like that during counsels' presentation as far as this court's concerned, you're certainly at liberty to address whatever you need if something has to take you out of the courtroom.

So I believe those are all the matters that the court is going to address. And then with that, we'll start with petitioner Sadler Ranch and the Renners. Opening oral argument.

Mr. Rigdon, please take your time, come forward.

And, Mr. Rigdon, before you go ahead, while you're setting up, I've been advised by the court reporter that she has not been sworn in yet in this jurisdiction and in the 7th we -- we rarely use court reporters because we have JAVS, but because we're here at this courthouse and in most water rights cases we have court reporters, we have visiting

court reporters that come to our jurisdiction.

So we'll have our court reporter sworn in before you start.

MR. RIGDON: Okay.

(Sworn.)

THE COURT: Thank you. Mr. Rigdon, you may proceed.

MR. RIGDON: Thank you, Your Honor. For the record, David Rigdon, R-I-G-D-O-N, representing Ira and Montira Renner and the Sadler Ranch. And I just wanted to introduce the court to my clients.

Seated at our table is Mr. Ira Renner from the Renner Ranch and Mr. Doug Frazer from Sadler Ranch. And we have in the audience Montira Renner and Levi Shoda, the ranch manager for Sadler Ranch.

Your Honor, this case is about whether a simple majority of water right holders can essentially vote to exempt themselves from Nevada's long established water laws. And in doing that, whether they can then seize the private property of other people for their own use.

The respondents' arguments in this case really boil down to the legislature essentially gave them a blank check to write their own water law as long as a majority of people, water users in the basin agree with that.

But as we all know. There's some things that even in our system of democracy here that majorities can't do. Majorities can't vote to strip away the property rights of others. As the very eminent justice, former Supreme Court Justice Robert Jackson noted in the case West Virginia State Board of Education versus Barnett, under our bill of rights, some things are simply beyond the power of the majority.

Things like free speech and things like, you know, the right to be free from seizure and those types of things. Among that is the person's right to their property, which Justice Jackson said, "May not be submitted to a vote and depends on the outcome of no election."

My clients are not opposed to a groundwater management plan. And they want to make that clear. Just the opposite, they would really like to have and they believe that a properly drafted groundwater management plan.

And by properly drafted they mean one that respects Nevada's existing water laws and is based on the scientific evidence and analysis and one that respects the rights of senior appropriators, that type of a groundwater management plan would be far superior to manage the basin through strict detail. My clients believe that strongly and that is why despite the allegations that were in respondents' brief, my clients participated actively, both of my clients

participated actively in the groundwater management process.

Mr. Renner served on the advisory board. He went to almost every meeting, he served as a member of the advisory board and actively participated in those meetings.

Sadler Ranch through their ranch manager Levi Shoda didn't show up for just one meeting as was alleged by the State Engineer, they showed up for no less than 11 meetings and participated and offered comments and suggestions.

Unfortunately, every time that Mr. Renner or the Sadler Ranch representative would offer comments they would immediately get voted down seven to one. They were the -- they were the only representatives for senior vested rights there and they were just -- they're common spelling differs. And like I said, they would love a properly drafted groundwater management plan.

But this groundwater management plan is not property drafted. It does not bring pumping below the perennial yield, that's number one, that's the number one thing that a groundwater management plan is supposed to do is bring all the pumping, the total pumping in the basin below perennial yield, this one doesn't do that.

It doesn't fix the imbalance in the basin's water budget and it forces -- forces seniors, it doesn't say it's a

voluntary program for seniors, it forces seniors to give up their water in order to give it to junior appropriators.

So there's three -- we've raised a lot of issues in this case as you mentioned, Your Honor, and the issues fall into three broad categories. The first is why are the provisions of the groundwater management plan lawful? The standard review is de novo, it's a purely legal question as to -- and courts review that de novo.

The second broad category is does the groundwater management plan contain the necessary steps for removal of the critical management area designation? And the standard review there is the substantial evidence standard of review, did the State Engineer have substantial evidence to support his determination on that basis.

And then there's a third category of issues that have been raised about the process here and did the State Engineer follow the proper process for approving the GMP?

And the standard of review there is -- is usually with process questions of abuse of discretion. However, there is one -- one of the issues with regard to process, that is a statutory interpretation issue. That statutory interpretation issue would be a de novo review by the court, but the other issues would be abuse of discretion issues.

Now, there's some really -- really key here is

that there's some undisputed facts here about what's going on in the basin. It's undisputed that the basin -- that pumping in the basin has exceeded perennial yield every single year since 1970. It's undisputed that the overpumping in the basin has caused harm to senior pre-statutory water rights.

It's also undisputed that the State Engineer's published established value for the perennial yield is 30,000-acre-feet a year. That's the State Engineer's published established value and it has been since the 1960s.

It's also undisputed that in year 35 in the plan, the very last year of the plan, pumping under the -- the pumping of just the rights regulated under the plan will be 34,200-acre-feet, 14 percent higher than the perennial yield. And that doesn't include -- that's not total pumping in the basin, that's just pumping of the rights that are regulated under the plan.

It's also undisputed, and this is key, it's undisputed the state has just said it in his own order that the GMP violates prior appropriation doctrine. In Order 1302 the State Engineer acknowledged that the groundwater management plan deviates from strict application of the prior appropriation doctrine.

So there's no question here as to whether it violates prior appropriation, the only question is whether the

legislature authorized then to violate prior appropriation.

Now, in order to -- to put some of the legal -- there's a lot of legal interpretation here in stuff, a lot of questions here about what did the legislature intend to do when it passed the groundwater management plan ordinance in 2011.

And I think it's important to put that in context to go through a little bit of a timeline about the development of the GMP so we can understand where things were happening and what time.

So the AB419, which is the statute that would become the groundwater management plan statute was signed into law on June 4th, 2011.

And it was codified in two separate sections of the code. And under NRS 534.037, that's where they put the GMP approval standards, and then under NRS 534.110 they created a new subsection 7 that establishes the ability to create the CMA designation and designate a basin as a CMA and does that part of the statute.

So those are the two things that we're talking about today. When I talk about the statute in question, I'm talking about these two particular provisions of -- of the law.

So about three years goes by, a little less than

three years goes by and -- and nothing -- nothing really happens -- I'm not going to say nothing happens, but there's talk, there's a lot of talk, but nothing formal happens. And then in February of 2014, the State Engineer comes out here to Eureka and he hosts a workshop. And he requests that the users begin -- use this tool that they got in 2011 and begin to process the developing a groundwater management plan for the area.

And so they respond. They determine that the Eureka Conservation District should take the lead role in organizing that -- that process. And in turn Eureka Conservation District retained Walker & Associates to assist with the initial scoping and issue identification. And they went through a process where they went out and started talking to people and finding out, getting ideas as to what the plan should include. And that's all included in the record on appeal between pages 249 and 69 where it goes through what Walker & Associates did.

And the really key thing there when you look at it is what ideas that they were talking about in 2014. They weren't talking about changing the water rights system. They were talking about things like conservation. They were talking about things like potentially planting different crops. They were talking about installing more efficient

irrigation systems. Those types of things that would conserve enough water to try to bring the basin pumping down.

So then in February of 2015, new legislative session starts and the State Engineer introduced a bill into that legislative session known at SB81. And that's sought to make some amendments to the 2011 statute.

They weren't amendments specific to the Diamond Valley groundwater management plan, although that was certainly on the mind when that was put forward, but there were things like reducing the ten-year window to create a groundwater management plan down to a five-year window, those types of things. But that failed to pass. And so we still had the 2001 legislation exactly as it was back in 2011.

So then on -- in April of 2015, the -- they have another GMP planning workshop. And the whole purpose of this workshop, they've got all the information back from Walker & Associates, all the surveys that were done.

And the purpose is to outline the components, process and timeline for developing a groundwater management plan.

They continue to have some meetings about that and they have a meeting scheduled for June 11th, 2015, they were going to have a regular meeting.

And then according to testimony of the

legislative record the -- Mr. Tibbits from Eureka County received a call from the State Engineer who said hey, I got this guy Mike Young, we want to send him out there, we want to introduce this Australian scheme that's essentially a share system to people.

So Mike Young came out on June 11th, 2015 and presented this to the people out here in Eureka. And this is a really important date, Your Honor, because this is the first time in the record that the idea of changing our water rights system becomes the stated goal of the planning profit. And that's on State Engineer record of appeal 294.

And it's at that point that the GMP proponents begin developing a draft GMP outline that's based on the Australian scheme. They throw out -- they basically throw out all the suggestions that were made to Walker & Associates about all the conservation and efficiency and planting different crops and those types of things.

Then they say nope, instead we're go on this and we're going to convert this whole thing to a share system and change our water rights system. And that becomes the basis on which the future discussions about the GMP are based.

In September of 2015, Mike Young publishes his paper on "unbundling water rights in Diamond Valley" and how to adapt his Australian scheme to Diamond Valley.

And, Your Honor, unbundling is an interesting word. What it essentially means is deregulation of water rights, it's basically removing all constraints and all controls on the water rights.

And so in February 2016, they -- they finished a draft of the Chapter 1 and they sent it to the water users.

On June 7th of 2016, the plans continue to move forward. During this time, starting about February of 2016, this was interim between the 2015 and the 2017 legislative sessions. And during this interim you'll remember, Your Honor, at this time the state was in the middle of an extreme drought, very, very long extreme drought. And one of the worst that we've had in this state in a long time.

And so there was a lot of interest by from both the governor and the legislature on trying to address issues associated with the drought. And so the legislature created an interim subcommittee that was going to meet during 2016 and they were going to -- they met at various locations about -- I believe there was about six meetings, five or six meetings, they held them in different locations and each meeting discussed a different issue regarding water use in Nevada. And then at the end they met in Carson City and they formulated recommendations to the 2017 legislature.

So on June 7th, 2016, that legislative interim

subcommittee met out in Dyer, Nevada and two of the items on the agenda, back to back agenda items, the first was Mike Young presenting his Australian scheme to the legislature -- to the legislature subcommittee and describing how it works.

And then Mr. Tibbitts gave a presentation about the Diamond Valley groundwater management plan and the issues that they were -- they were facing there. And asked the legislative subcommittee to bring forward legislation to help them move that process forward of making this Australian scheme work in Diamond Valley.

So August 2016, like I said, the legislative subcommittee met in Carson City. They brought all of their recommendations to all their meetings together and they agreed to forward on behalf of the people here in Diamond Valley, they agreed to forward a bill draft, the groundwater management plan bill draft to the 2017 legislature with all the ideas in it that the people here in Diamond Valley wanted. Or said they wanted. And that became for the 2017 legislature SB269, and we'll talk about that a little bit later.

One of the other -- one of the things that was mentioned to the subcommittee at the June 7th meeting by Mr. Tibbitts was that they -- they felt that they were in their self-imposed deadline to present the State Engineer with

a draft copy of the groundwater management plan by the fall of 2016. And he stated that the purpose for that was so that the State Engineer could review it for them and tell them whether additional legislation was actually going to be needed to -- to make the plan legal, so to speak.

And so they did that. In the fall of 2016, they sent the draft GMP to the State Engineer for a very initial review, that type of legal review.

In September of 2016, and late September, the State Engineer went to the Western States State Engineers Conference and he presented the GMP share system for Diamond Valley to his fellow State Engineers at the Western State Engineers Conference.

And he presented it as an innovative approach to groundwater management. And he had -- in that presentation, at the very end of that presentation after introducing the whole plan, talking about the share system, how the share system works, he stated, and remember, he had been given the plan to determine whether -- whether legislation would be needed to -- to be able to make the plan legal, he stated that the plan needed a statutory change to make it legal.

It needed a statutory change to make it legal, but he said that we're going to get that statutory change, we've introduced bill drafts to the legislature to do just

that.

And in November 17th of 2016, the State Engineer prefiled a separate bill, SB73, that came from his office with the legislature which also dealt with groundwater management plan. So there was two bills going to the legislature in 2017 dealing with the Diamond Valley groundwater management issue.

The first was SB73. That they had a -- the committee -- the committee in the legislature considering the bill actually held a hearing on it. It was attended by both opponents and proponents of the GMP, both attended and no further action was done on the bill, that bill failed.

Again in March 15th, 2017, SB269, the bill that was forwarded on behalf of the Diamond Valley folks from the legislative interim subcommittee was introduced to the legislature, no hearing was ever held on that bill and it failed to pass.

So neither of the two bills that the -- that the -- that the State Engineer determined were needed to -- needed to make the groundwater management plan legal passed the legislature.

But that didn't deter anybody. In July 26, 2017, a second draft GMP, this was after the legislative session is over was sent to the State Engineer. It doesn't fundamentally alter the share system, the share system is still the key

component of the groundwater management plan at this point.

That's sent to the State Engineer for review, he sends comments back and they have a workshop on October 9th, 2017 to make -- make amendments based upon State Engineer's comments.

So at this point he's viewed it a second time, he's provided red line comments back to the -- back to the advisory group and then their working on the plan based on those comments.

They work on that through winter of 2017 into 2018. And on January 26, 2018, they send a third draft of the GMP to the State Engineer for review. And this is all in the record the, Your Honor, the fact that they did this.

So a third draft is sent to him and he sends his final comments on that third draft back to them on February 14th. So at this point the State Engineer has looked at the plan three separate times.

Based on those final comments, the plan is finalized, they go around get the petitions signed, put the petitions out, get them signed. And then on August 20th, 2018, they officially submit the final plan and petition to the State Engineer.

And this is a really important date as well, Your Honor, and it's important because of this. The

State Engineer makes the statement on page 7 of his answering brief, he makes the statement that this day, August 20th, 2018, and this is an actual quote, this is where the State Engineer's consideration of the GMP began. That's what he says in his -- in his answering brief.

But we just saw -- he saw this thing three times before this was submitted and reviewed it. But he claims that this is the first time he started really considering the plan. And the reason he takes that position, Your Honor, is because this is where he wants to start his record on appeal for this case.

He didn't include in the record of appeal any of that stuff we talked about before. Any of the stuff about the three previous drafts, that's not in the plan, that's not in the record on appeal, those three previous drafts.

None of the red lines that he provided, the comments that he provided back to them, none of that is in the record on appeal. This is where he started his record on appeal. Because this is where he claims this is the first time he was -- he began considering the plan.

The record on appeal doesn't include the Young report, that 2015 report by Mike Young, it's not in there, even though that's formed the basis -- that was the basis on which the record shows that the plan -- the plan was drafted,

but that's not in here as well.

So then on October 1st he sends out the notice that they're going to have a public meeting to take public comment on the plan.

On October 30th that public meeting is held, it's held right here in this room. And -- and after the meeting commenters are given three days to submit written materials, any additional written materials that they have.

And then on January 11th, the State Engineer issues Order 1302 approving the plan. So that's the -- that's the historical context, that's the development timeline and the background as to -- as to what was going on during this -- this process.

Now, when he received -- or when he received the plan -- oh, let me take a step back. I wanted to include one other thing here. Just because we thought the court might be curious about this.

The court's aware that there's a curtailment petition out there that's been filed by Sadler Ranch. And -- and you may have questions as to how does that fit into this whole GMP timeline? And so we just wanted to make sure you're aware of that.

So April 27, 2015 was when Sadler Ranch filed its petition requesting the State Engineer to begin a curtailment

in the basin. That's important because if you remember back on the timeline this is right before -- this is -- this is about four months before the State Engineer issues the CMA order.

The State Engineer filed a motion to dismiss and in that -- in that motion to dismiss he claimed that Sadler Ranch shouldn't get the remedy of curtailment because they've already been fully mitigated by the mitigation issue that was obviously issued. That was at issue in that case.

The case was stayed while the CMA designation went through. An amended petition was filed. A new motion to dismiss was filed.

In that new motion to dismiss the State Engineer reiterated his arguments that Sadler Ranch is not entitled to curtailment because they've already been fully mitigated. Same -- same issue that they're raising here. We've been fully mitigated, we shouldn't have any problem with the GMP.

But, Your Honor, you -- you ruled -- you filed -- you denied that motion to dismiss in part. And in that order where you denied it, you -- you ruled that the mitigation right is not a full remedy for Sadler Ranch because -- because if they can't get the water, if the water table is continuing to decline, what good is a mitigation plan? That was basically the gist of the order.

So, that -- that's where the curtailment petition is. Right now we've been -- the curtailment petition has kind of been put on ice because we've been hoping that this GMP process would work things out. Unfortunately it hasn't. So -- so that -- that curtailment petition is still an active case out there.

So when the groundwater management plan was submitted to the State Engineer for his review in the formal submission, the State Engineer has a standard of review in the statute that he's supposed to look at. He's supposed to decide one key thing, one key determination.

Does the plan contain the necessary steps for the removal of the CMA designation? That's the -- that's the standard that he's operating under. And the statute says that in making that determination the State Engineer, not anybody else, the State Engineer is supposed to consider in his order basin hydrology, basin physical characteristics, spacing of location of withdrawals, water quality, location of wells and whether another GMP already exists for the basin. So there's six factors here he's supposed to consider.

Now, as I talk further on I'll be talking about five factors because the sixth one here is a given. There is no other GMP in this basin, nobody disputes that, but the five factors that he really needed to look at were those first five

factors on that list.

And so when I refer to the five factors, that's what I'm referring to.

So, let's look at the order, Order 1302. And, Your Honor, I have a copy here I'd like to give you, Order 1302. And my colleagues have handed out copies to everybody else.

THE COURT: Is it particularly marked up? Because I have my own.

MR. RIGDON: Oh, if you have your own, that's fine. That's great.

THE COURT: Yeah.

MR. RIGDON: So what I'd like to do, Your Honor, is just walk through Order 1302, because this is what the State Engineer is supposed to do in Order 1302. So let's walk through and see what he actually does in Order 1302. And I'll give you a minute to grab it.

THE COURT: We're good.

MR. RIGDON: Okay. Great. So page -- the first page of the -- of the -- of Order 1302, the first thing he does is he starts out -- and the first couple of pages are a bunch of whereases where he's basically laying the -- it's similar to a factual and procedural background type of section. And he lays out certain key facts here. He lays out

the fact that there's 126,000-acre-feet of irrigation water rights that have been issued in Diamond Valley, that's at the top of page 2.

He talks about how irrigation pumping, actual pumping of those rights in 2016 was estimated to be 76,000-acre-feet a year, and that that's in excess of the 30 -- he states here that the perennial yield is 30,000-acre-feet, and that 76,000-acre-feet is basically 253 percent of the perennial yield being pumped on an annual basis.

He -- he goes on to talk about how water levels are declining, consistently declining at rates of greater than two feet per year in the basin.

He talks about -- so then he goes into another whereas about the petition process. And talks about how the plan was supported by a simple majority of confirmed groundwater right holders in the basin, 53.2 percent was the number. That's -- that's the simple majority vote, not the people who were actually confirmed by the State Engineer to be water right holders.

We have some issues that we'll talk about a little bit later. Needless to say, we -- we -- we -- think that there's issues with this vote with the way the votes were tallied. We'll bring those up a little bit later. But right

now the order -- we're just going through the order. The order says that 53.2 percent of a simple majority supported the plan.

The order also says, although it says it in the negative, and I don't know why it would say it in the negative, but the majority of senior priority water right owners did not support the plan. 53.2 percent. He says -- he says it the other way, 47 percent did. But it -- the reverse of that is 53.2 percent of the seniors did not support the plan. Yet they will be forced, those 53.2 percent of the seniors will be forced to give up their water under the plan forcibly.

He also talks about how vested rights, non-irrigation rights, mining and municipal rights and domestic wells are not included in the plan.

Meaning that they're not regulated, their pumping is not cut back under the plan in there.

He -- he talks about the process that was used on page 3 there, the hearing process and the notice for the -- for the public comment meeting. And then he talks about the five -- the six factors that are in -- the six factors that he talks about in NRS 534.037.

He says that he's supposed to consider these six factors, he says it right at the beginning of the order, I'm

supposed to consider these six factors.

And then he describes how the share system works in the plan, that's right at the bottom of page 4, he describes how that works. And that comes to the end of his basic factual background.

And so on page 5 is where he starts his "analysis." And, Your Honor, as I was reading through this order, it struck me that this is different than typical orders that I've -- that I'm used to seeing from administrative agencies.

And that most of the time you see a background section like that and then you have an analysis section in the middle where they do a whole analysis using the six factors, do the big analysis.

And then they do a period at the end where they talk about okay, and here's -- here's the arguments of the parties regarding -- regarding that and here's my final determinations.

This -- this order doesn't read like that. It reads like an appellate brief. We're going to set up a factual background and we're going to jump right into these people made comments who are opposed to the plan and this is how I'm replying to these comments.

That's the entire rest of this order is simply

the State Engineer arguing against the people who were opposed to the plan. And that's -- that's what each of these sections are.

So the first main heading that he has is -- is public comments that were presented related to legal sufficiency. And the very first area that he goes into is at the -- at the public comment meeting, one of the things that was brought up is that the plan violates prior appropriations.

And the State Engineer acknowledges it again, he says it's acknowledged that this does deviate from strict application of the prior appropriation doctrine. And it's right there on page 5 where he says that.

But then he says that the legislator -- legislature's 2011 enactment of NRS 534.037 and 534.110(7) demonstrates a legislative intent to set aside prior appropriation. He doesn't cite to any language, there's no statutory analysis of the statute here, there's no language analysis to the statute here.

Instead what he does is the entire next page, this whole section on prior appropriation is about a page and a half long, and the entire case is devoted to this case from New Mexico, which is State Engineer versus Lewis in New Mexico, a case that he claims provides legal precedent for setting aside prior appropriations where a majority of water

right holders have voted to do so and created a management plan to do so.

Now, this is important because this is the only legal authority that is cited in the order in support of his determination that the legislature intended to abrogate prior appropriations.

And as we'll see later, now in his answering brief, the State Engineer says oh, no, I didn't mean that to be the legislative authority, I -- or legal authority, I wasn't citing that as legal authority, I was simply citing it because it's an interesting example. That's the word he uses in his answering brief.

He says it's an interesting example. But it was not supposed to be legal authority. And he had to say that because in our opening briefs we -- we took a look at Lewis and -- and -- and we found one key thing, a very key difference between Lewis and the plan in this case. And in Lewis in New Mexico when they created the plan, they took their plan to the legislature and the legislature passed a resolution supporting the plan.

In this case as we'll see later on, they took the elements that they wanted in their to the legislature and the legislature said no. Big key difference between Lewis and the current case. And so now it's no longer authority that he's

citing, it's only an interesting example of where it was done.

But, if it's not authority, then this order as it's written as you're looking at it right here, Your Honor, contains no authority to support the legal determination of the State Engineer.

And as -- as you know, the -- the Supreme Court has said that the State Engineer must put whatever he's deciding, whatever he's relying on in his order, he cannot come up with post hoc arguments on appeal to the court to try to justify what he did before. It's got to be in the order.

So that's it for prior appropriations. Oh, he claims that while the legislature intended to allow for a deviation from prior appropriation, and the plan does deviate from prior appropriation, he claims -- and this is -- there's a quote from the -- from the order here that it somehow honors prior appropriation. Does it?

Well, let's look at an example of how this plan works. You got the most senior water right user in the basin and the most junior water right user in the basin. For every 100-acre-feet, and I used 100-acre-feet because it's easy simple math for me, I'm a lawyer, I don't do math very well, but the most senior water right user in the basin, for every 100-acre-feet of water right that he has he gets roughly 100 shares, there's some decimal points, 99.99, but it's basically

100 shares. The most junior water user gets 80 shares.

First year the most senior water user gets cut by 33-acre-feet, he only gets to pump 67-acre-feet. The most junior user who would -- who would get cut completely under prior appropriation gets -- gets 54-acre-feet, he takes a 46 percent cut.

So there seems to be a fairly big difference in the cuts on the first year, not a huge difference but a difference.

But the way this plan works because the share allocations, the -- the advantage for priority is given initially in the share allocation and the reductions are based on that. The difference in between what seniors and juniors get shrinks over the course of the plan.

So by year 35 the senior water user, the most senior water user is basically getting cut 70 percent and he's only getting six-acre-feet a year more than the most junior water user, six-acre-feet.

So they've taken 70-acre-feet from him to give an advantage "of six-acre-feet," and they're saying that that honors prior appropriation. I'm sorry, but not in my book.

Now, that's the most extreme example. The most senior versus the least senior. Let's look at a less extreme example. You go right to the cutoff line, the

30,000-acre-foot cutoff line in the plan. And you look at the allocation of shares to the junior user -- the senior user just above that cutoff line and the junior user just below that cutoff line. And there's no effective difference.

Again, there's some decimal points on these where you could say there's a slight difference based upon a hundredths of a decimal point, but the reality is that they both get roughly 95 shares and they both get the same amount of water.

That doesn't honor prior appropriation, the senior getting the same amount of water, the exact same amount of water as the junior, that certainly doesn't honor prior appropriation.

So now it goes into the next section. We talked about comments related to well use approvals. Now, under NRS 533.330 every single permit that is issued is tied to a single point of diversion.

Any change in that point of diversion requires -- the language in the statute is shall and must. It requires a permit holder to file a formal change application to move his water to another -- to another point of diversion.

Under the groundwater management plan the unbundling, one of the things that they unbundled, deregulated is the place of use. You can move water around to any place

of use, to any well in the basin without filing a change application as long as the maximum permitted volume of any given well is not exceeded, that's what the groundwater management plan says.

Now, commenters raised objections that this violates the -- the mandate, the change in point of diversion requires an approval of the change application. And the State Engineer does not address this -- this objection. This is one of the two objections.

There were two objections related to prior use of approval that were -- that were presented. One was that moving water where the -- where the -- where the -- as long as the maximum permitted volume of the well is not exceeded you can move water freely around.

The second one, the one that he does address in the order here is the issue that if you're going to move the water around and if that -- that would exceed the maximum permitted volume of any particular well, but you're only moving the water around for less than a year for one irrigation season, which is remember how this is supposed to be traded shares, at least things are short-term -- short-term trading for one irrigation season, they can -- you can notify the State Engineer that you intend to do that, and if he doesn't act on that notice within 14 days, it's automatically

approved. No review required. Automatically approved.

The State Engineer doesn't have to makes make a determination that's in the public interest. He doesn't have to make a determination that it doesn't conflict with other water rights, he just has to sit on the application for 14 days and it's automatically approved. That basically creates an unregulated ability to exceed maximum permitted duties on a practical basis.

Now, the State Engineer claims here in the order that this is okay because it's very similar, this is what he says, it's very similar to the temporary change application process in NRS 533.345.

So under NRS 533.345 if you're going to make it, if you're going to change a point of diversion for less than a year on a temporary basis just for less than a year, you can file a change application to do that, that change application doesn't have to go through the normal noticing and that type of requirement.

But what it does require is it does require to make -- the State Engineer to make an affirmative determination, and this is actually in the code, that they -- that that change won't impact existing rights and it won't be detrimental to the public interest. He has to actually take an action to approve that.

So it's not the same thing. Because -- because in this plan the State Engineer doesn't have to take an affirmative action and it's automatically approved, whereas under the NRS 533.345, temporary application, the State Engineer actually has to make a determination.

Why is that important? Because determinations made by the State Engineer can be appealed like we're doing here today. It gives people the right to appeal if they think it's going to harm their rights.

But there -- there doesn't appear to be a right to appeal here, if it's not acted on in 14 days the State Engineer hasn't made a determination so what are you supposed to appeal?

So that's -- that's the well use approval section that we go through here. Then it gets into comments related to well plugging regulations. So this isn't -- this isn't something that -- that -- that is a huge issue, it's just something that was pointed out that the Section 1402 -- 14.2 of the groundwater management plan clearly states that wells linked to an allocation account, and this is the language it uses, shall be exempt from well abandonment requirements under NRS 534 and NAC 534.

Now, people raise the issue well, you can't just exempt people from the law, mandatory provisions of the law.

So in here in answering that claim and it's just a real quick little paragraph, he says well, no, the -- the provisions in the GMP are consistent with the NAC, completely consistent with the NAC.

But that just raises the question how can a provision that exempts a well from NAC be consistent with that NAC, it just -- it doesn't seem logically possible, but I'm not an expert in -- in well plugging or -- and that type of thing. And so that -- that -- that's all we really need to say about that.

The -- the final portion of this part about legal sufficiency is he's responding to comments that were raised about the banking program in the plan. And under this banking program, Your Honor, what people can do is if they don't -- they get their allocation every year and if they don't use all of their allocation they get to save that and use it another year, essentially carry it forward a year. Okay. It's a form of carryover, year-to-year carryover storage.

And people pointed out that Eureka County's own expert in the GMP -- a member in the GMP stated that the banking program is a type of aquifer storage and recovery project that's regulated by the State Engineer under the NRS.

And so people pointed out well, wait a second, they said this is an ASR project and yet they never applied

for an ASR permit under the statute. And you can't approve the banking program and an ASR permit requires a whole bunch of hydrologic analysis and things to be done in order to approve it. And they didn't go through that process, but they put a banking program in here anyway.

So the State Engineer summarily states that because water is not being injected into the ground to be stored, we're not taking water from another storage and putting it in here to store it, but it's not an ASR project, it doesn't fit within the definition under the statute.

He doesn't cite any statutory language or legislative history to support that determination, no legal authority whatsoever is cited here. And he doesn't cite to any evidence showing that the program is hydrologically feasible. All he says is it's not an ASR project so they don't have to comply with that -- that statute.

But here's the problem, Your Honor. If it's not an ASR project there's only two ways that the code provides is you can store water carryover storage year to year.

One is in a surface water reservoir which you have to get a permit for to have a surface water reservoir. And one is if you're going to store it in the ground you have to have an ASR permit. Those are the only two authorized ways under the code that you can store water from year to year.

If it's not an ASR project and it's definitely not a surface water reservoir project, then it's not -- then there's no way that it can be approved under the code.

It's also telling him that he says well, because water's not being injected into the ground it's not an ASR project. That's precisely the point people are raising, it's a bank, and they call it banking program, it's a bank with nothing but withdrawals, no deposits, no deposits are ever made in this bank, it's all withdrawals from the storage of the aquifer. That's not a bank. No bank can survive letting people just take money and never having to deposit anything into the bank.

So he continues on and he now moves into a section where he deals with comments that is on page 9 where he's dealing with comments related to abandonment, forfeiture, proof of beneficial use.

Several comments were raised about the use it or lose it provisions and the fact that the groundwater management plan appears to exempt people from having to prove up their permits from being subject to forfeiture and from having to prove that the -- be subject to forfeiture and -- and not have to file individual extensions of time to file proofs of beneficial use.

The State Engineer uses this section to talk

about forfeiture and he rejects the proposal that unused water rights should be cancelled or forfeited before share allocations are made. Several of the commenters brought up the idea that before you start allocating shares you should get rid of the dry water.

Remember there's 126,000-acre-feet of water rights that are issued, but there's only 76,000-acre-feet of actual beneficial use pumping going on, meaning that there's permits out there that aren't being either fully used or used at all.

And the question was brought up before you start giving these people share allocations you should -- you should require that they put -- prove beneficial use before you give them a share allocation that they can trade for money.

So the State Engineer claims without any evidence that going through these type of proceedings would be untimely, it would take too long, claims without any evidence that the initiation of the forfeiture or cancellation is contrary to the goal of reducing pumping in the plan.

And then makes a -- what we consider a very strange claim that because reduction started the current pumping level, that 76-acre-foot level, not the total permit level of 126,000-acre-feet, forfeiture of the paper water wouldn't have any major effect. And this is why we think

that's curious, Your Honor.

So this is -- on your left you have a picture of a Google Maps image with the southern part of Diamond Valley where motion pumping takes place. And you'll see all these center -- these round circles at the center pivot irrigation system. And I pulled out a section here because it shows both a fully irrigated parcel and a center pivot parcel.

And you'll notice that on the center pivot parcel these corners are not watered by the center pivot. So while the -- while the owner of the permit gets permitted for the full section of land, they don't actually put any beneficial use of water on these corners, because the center pivot goes around and doesn't put water there.

Why is that important? Well, let's look at a couple hypothetical examples. We've got farmer A. Farmer A, let's just say he has a corner section with center pivot, a 160-acre parcel. He received his permit because the permit was based on this total size of the parcel at four-acre-feet an acre, so he got a permit for 640-acre-feet.

He complied with the law though, he did what he was supposed to do, he put in his center pivot, he watered, proved up beneficial use, but he perfected the water right of what he actually used, which is what you're supposed to do. So he eliminated those corners and proved up his water right

of 512-acre-feet excluding the amount of water that the -- the amount of land that wasn't watered on those corners. So he did everything right.

Under the GMP these are his allocations, he gets 343-acre-feet of the first year and 154-acre-feet in the -- in the second year.

Now, let's look at another example, farmer B. Farmer B here does the exact same thing as farmer A, corner section with a center pivot, 160 acres. He receives a permit like the other person for four-acre-feet per acre, so 640-acre-foot permit.

He -- he goes in and he builds his infrastructure and he waters, but he never files his proof of beneficial use. He keeps filing extensions of time and getting those approved.

Because we're not cancelling the parts that he didn't water first, under the GMP share allocation he gets -- he gets his allocation based on 640-acre-feet, not the -- not the 512-acre-feet that his neighbor did and did it right. He -- he gets more water under the allocation. How much more? In year one he ends up with 85-acre-feet more water than farmer A, who farmer A was the guy who followed the rules and did it right.

Year 35 he gets 38-acre-feet more than farmer A. I -- I went through and I did the math. Cumulative windfall

to farmer B over the 35 years of the plan is almost 2,000-acre-feet of water that he gets more than farmer B does. And remember, the whole purpose of the share program is to convert this stuff into shares that you can trade for money. And so he gets to take his 2,000-acre-feet and go make a profit on it, whereas farmer A doesn't.

But it gets even worse, Your Honor, because now let's consider permit holder C here. Permit holder C, the reason I call it permit holder C and not farmer C is because of the farm. He gets -- he gets a water right for a corner section, 160 acres. He receives a permit for 640-acre-feet, but he never fully develops his property on places the water to use. But he keeps receiving extensions of time to do so for whatever good cause he shows.

Under the GMP he gets a full allocation of water, the same as farmer B. He gets 428-acre-feet in the first year. He gets 192-acre-feet in year 35. And he can sell those share allocations to others without ever having developed a farm and ever having farmed the land that the water right is appurtenant to. That's what the -- that's what the GMP allows. That violates by the way both the beneficial use and the anti-speculation doctrines.

So, now the State Engineer moves on to a couple other issues under this -- under what he calls comments

related to the applicability of the -- the plan to certain water rights. And there's -- there's a couple of comments that were raised, one was that the plan -- we talked about this a little earlier, the plan provides no mitigation for ongoing and continuing harm to senior water right holders.

The senior water right holders would have lost their vested rights, have never been mitigated for the costs of having to put in wells to -- to -- to access those rights and they have never been mitigated for the costs associated with having to pump water through wells instead of having naturally flowing springs.

Never -- never happened. The plan contains no mitigation for either that past harm or the ongoing harm. Remember, this plan as we'll show you a little bit later is going to have continual water level declines for the next 35 years.

It permits continue to overpumping in the basin for the next 35 years. That means that the water levels are continuing to go down which means the pumping costs for the mitigation rights is going to continue to go up. And there's nothing in the plan to compensate people for that.

Again, the State Engineer claims that the mitigation rights issued to the Renners, to the Sadlers -- or actually Renner doesn't have a mitigation right, to the

Sadlers, to other people, provide full mitigation for the seniors. But as you said, Your Honor, that's not the case. There's still the ongoing harm that the seniors are facing even if they have their mitigation right.

So then it talks a little bit about domestic wells. Concerns were brought up if water levels are continuing to decline and we're continuing to allow the basin to be overpumped for another 35 years, domestic wells which are usually some of the shallowest wells in the basin could be impacted by that.

Well, the State Engineer kind of sidesteps that issue of impact to domestic wells and ultimately says well, look, I'm not cutting domestic wells, and if I did a strict curtailment I'd have to cut the domestic wells. So because I'm not cutting them -- or because we're not cutting them under this plan they are thereby protected.

But that doesn't -- that's not what the issue was. The issue was groundwater levels continuing to decline, there's no analysis in here as to whether there will be -- whether how deep these wells are with the existing water levels that these wells are, how the -- what the effect of the -- of the continued pumping for the next 35 years will be on the groundwater levels and whether that will cause any of these wells to fail. That was the issue. That was the issue

that was being raised. But that issue is not answered here in the order.

And then the final thing under this section that -- and this is on page -- excuse me, I got a little bit behind here. This is on page 14 of the order now, we're up to page 14, is comments related to the advisory board of representation.

And, Your Honor, there's no standards at all in the statute. We -- we admit that. There's no standards in the statute for how the advisory board has to be made up, who should be on it, those type of things. The comments were simply pointed out that we have a situation where by pure number juniors have -- are far more numerous than seniors in the basin.

And the advisory board is the elected board. And so there's no guarantees that seniors will have any representation on this advisory board in the future going forward. And that was simply brought out, that those concerns were brought out, the State Engineer merely accepts the board as presented. As I said, there's no real legal standard to really govern this, it's more of a policy.

So the final section of analysis "analysis in this plan" is the State Engineer's replies to comments that were brought up by commenters about the scientific soundness

of the groundwater management plan.

Now, this section, and I really encourage you to read these first two paragraphs on page 15, Your Honor, not right now, but -- but these two paragraphs on the top of page 15 are -- are very, very well written and very well drafted.

The State Engineer starts this analysis very promising, he says -- and he knows, and correctly knows, something that we brought up in our opening brief, that the proper measure of success of whether your -- the proper way to measure whether the plan will bring pumping below the perennial yield, the correct measure of that is a stabilization of water levels. If water levels stabilize then -- then you've done that and you've got success.

And he goes into the second paragraph here, he goes into a whole long paragraph talking about how -- how -- what -- how perennial yield is -- is -- is -- the basic concept behind the perennial yield and how basins balance -- how basins' water budgets are balanced.

So he talks about that you have to have in order to have water levels stabilized, you have to have a basic water budget where recharge and discharge are equil -- what's known as equilibrium in the basin.

So if recharge and discharge are equal then you

have equilibrium and water levels should be -- should be flat, should be stabilized. So he goes into all this and lays -- lays the perfect background.

But then the opening sentence in the very next partial he says groundwater modeling, which could be used to measure this and hydrogeologic analysis are not the basis for the groundwater management plan determination of pumping reduction rates.

So all that stuff -- basically what he's saying is all that stuff like this thing about perennial yield and need to balance the basin and that type of stuff, that's out the window, they didn't do that and I'm not going to require them to do that is what he says in here.

Instead he says the pumping targets were selected by agreement of the groundwater management plan authors using -- and this is his quote, existing published values. And you notice where he says existing published values in here there's no footnote. There is no citation. There is no mention of what published values were used. So the plan brings pumping down to 34,000, the regulated pumping, not all the pumping, the regulated pumping down to 34,200-acre-feet annually by year 35.

There's no citation as to where that number came from. We -- we -- we went and looked. We -- we tried to find

that. We went through the hydrologic reports that are in the record and tried to find a 34,200 number and we couldn't find it.

There's no indication in here of where these published values that were supposedly set and used to set the targets which were set by agreement of the GMP authors basically through politics, not through science, no mention of that at all.

So there's there no -- there's no basis for this determination. There's no way we can -- we can go back and look up and see what these existing published values were.

Now, the State Engineer then indicates the pumping will be adjusted in the future. He says don't worry about the front end hydrologic analysis, don't worry about, we don't need groundwater modeling to try to predict where groundwater levels will be, we're going to have this monitoring plan.

This monitoring plan will tell us -- will provide us data and we'll adjust pumping values in the future based on this data. That's what he says in here.

But that ignores something really important, and that ignores the fact that the groundwater management plan itself, in Section 13.313 of the groundwater management plan it says, "Allocation shall be firmly set for the first ten

years." There is no -- you can't make any adjustments to the allocations in the first year regardless of what the monitoring plan data says.

And then it says after that first ten years, for the next 25 years, the remainder of the plan, allocations -- the total cumulative -- the total change -- cumulative changes or adjustments cannot be more than two percent a year.

So regardless of what the modeling data says, the State Engineer is handcuffing himself and saying it doesn't matter so we're not putting the analysis up front to see what these pumping reductions will actually result to stabilization modeling, we're not using the groundwater model, we're not using the budget to determine that up front.

We're claiming that we're going to use a monitoring plan to determine on the back end, but then we're going to handcuff the State Engineer on what he can do based upon the data coming back from that monitoring plan. And another issue, Your Honor, there is no description of the monitoring plan in the -- in the order whatsoever.

There's no description of where the wells are going to be located in the monitoring plan or what the -- what the start levels are going to be, any of that, none of that's in there.

So then the State Engineer goes on to say that

there -- he's responding to comments that because the plan only reduces regulated pumping, the plan -- the right subject of the plan, the 34,200-acre-feet, that pumping will actually be beyond that because there's other rights that would still be allowed to pump in the basin, the mitigation rights, municipal rights, domestic wells, mining rights will all be able to still pump. And they're pumping above that 34,000. He says well, no, there's only -- there's only 4,437-acre-feet in the permit that is not subject to the plan.

Again, there's no footnote, there's no explanation of how he came up with 4,437 number. We have no idea where that came from.

And he says because of that pumping won't exceed 42,000-acre-feet a year at year 35. Well, that's still 12,000-acre-feet more than the perennial yield.

But it ignores -- these are the real numbers, it ignores the fact that Sadler, Bailey and Venturacci have all received permits that are not subject to the plan where they are authorized to pump up to 6400-acre-feet a year.

And if you go to Table 1A in the GMP, the only way -- the only table that shows a breakdown of -- of irrigation water rights versus other types of water rights and irrigation water rights are the only water rights that are regulated by the plan, when you add up the other ones it shows

that there's 5,252-acre-feet of non-irrigation permits and certificates, not 4,437. When you add those numbers together with the 34,200 authorized to be pumped under the plan, you're actually up to 45,000-acre-feet a year that's authorized to be pumped out of the basin at the end of the plan once all the pumping reductions are done.

Now, the State Engineer next goes on to talk about the complaints we raised -- public commenters raised issues about like I said, the lack of a groundwater model or any detail up front hydrologic analysis of these pumping reductions.

And he says that doesn't preclude the approval of the GMP, he can approve it without that. But that's not what NRS 534.037(2)(a) says. It specifically requires the State Engineer to perform the hydrologic analysis, it says he must consider the hydrology of the basin in order to determine whether pumping is brought below the perennial yield. And that's not in here.

And then -- and then the State Engineer goes on and he sidesteps concerns over the fact that there's a lack of objectives, triggers and thresholds.

So another comment that was made was look, if you're going to have this monitoring plan and you're going to reduce pumping based upon data feedback from the monitoring

plan, then you need to have objective standards for -- for -- for doing that. You need to set up front objective standards for doing that.

Remember in the -- the Eureka Moly case the State Engineer faulted -- I mean, the Supreme Court faulted the State Engineer for approving water permits based on a future development of standards and thresh -- for a 3M Plan. And that wasn't allowed. You had to do it up front.

Well, there's no up front monitoring plan here, there's no up front thing that says hey, this is how I'm going to judge future management actions under this plan. Water levels are here right now. If the monitoring levels in these wells hit here, this action will be taken. That's the kind of objective, trigger and threshold that we're talking about.

And the State Engineer totally cites that concern and says well, we're going to have smart meters and we're going to charge people for overuse of water and so that will -- that will take care of the problem.

But that's a completely different issue as to what -- you know, that's -- that's what people are taking out of the ground and using on their smart meters, that has nothing to do with what -- how you're going to set what data you're going to use to set future pumping reductions.

And there's simply nothing in here, nothing in

the plan about how those future manage -- to guide those future management actions based upon the monitoring data.

So now we get into the banking program. And people were -- brought up their concerns about the banking program. And specifically about the difference in depreciation rates about the banking program.

And here, this is really -- really curious, the State Engineer says well, the banking depreciation rates were the only component of the GMP that was based on groundwater model simulations.

So this tells us two things. This tells us number one, they had a groundwater model available and that groundwater model could have been used to do a hydrologic analysis for the whole plan. And they didn't do that.

They used this groundwater model which is the best available science they had available to them and they used it for one specific little piece of a plan establishing the banking depreciation.

They didn't even use it to determine whether the banking program is hydrologically feasible, they used it strictly to determine what -- what the difference in depreciation rates should be between the north and the south part of the basins.

But then after saying that it was based on that

he also says the depreciation rates in the final GMP were compromised. So the question is the compromise between what? What were the initial numbers that came out of the model which is what was the compromised number that ended up in the final plan? That's not talked about and we don't know where that came from.

The other issue is -- so they did use the groundwater modeling for this -- this one little component, but they didn't include anywhere in the plan or anywhere in this analysis the simulation results, the model report that verifies the accuracy of the model and they didn't include the simulation data that was used to set up the simulations.

So there's -- there's simply no way to independently verify any of the information regarding the purported report of what the -- what the model simulations show.

We handed this plan to our -- our engineer, Turnipseed Engineering. We handed it to him and said tell us -- tell us how they -- how they came up with these depreciation rates, and he handed it back to us and he said I can't, I have no way to independently look at this because there's no information on which I can test the results or independently verify them. And that's a huge problem.

And then -- and then finally the State Engineer

notes at the end of this section here, he notes that adjustments to the -- to the depreciation rates will be made in the future just like adjustments to the -- the pumping reductions will supposedly be made in the future based on data.

But again, where is the -- what data is going to be used? How is it going to be analyzed? And how -- how would that data be used to guide future adjustments? There's nothing, nothing in the plan, nothing in Order 1302 that talks about that.

So this is the point, page 17 of the Order, Your Honor. This is the point where the State Engineer stops, that's it, that's the full analysis that's included in here. And he then moves on to his final conclusion with this whereas that's on page 17.

And over the next basically page and a half, he -- he just makes a bunch of summary statements that he says are his findings of fact, conclusions of law and order.

The very first one of them, remember at the beginning of the order, he said in one of his whereas is why I have to look at basin hydrology and I have to look at physical characteristics, all those five factors that he talked about, he said set that up at the beginning.

Well, we just looked through the whole analysis

and he didn't talk about those five factors. And you go to here about right after this first whereas and the only thing that he states here is he finds that Appendix D, an appendix to the plan that was included in the plan, an appendix, by the way, Your Honor, that has no author, nobody knows who wrote it, nobody knows what the credentials of the person who wrote it are, it's just this appendix in the back that describes the current hydrology of the basin. He finds that Appendix D sufficiently describes all five of his factors. That's his conclusory statement. That's it.

But that's not what the statute says. The statute says the State Engineer is required to consider these factors, not that the plan has to include a section or appendix on it, and this appendix doesn't consider the five factors, Your Honor, but even if it did, the State Engineer has to do his own independent analysis. And it's not in here, he's simply strictly relying on Appendix D in here.

He then goes on to say that he finds there's no groundwater management plan in existence for Diamond Valley, that's -- that's not controversial.

He then goes through again the issue on prior appropriation and brings up the Lewis case once again. He finds that the GMP is not analogous to the supplement agreement to the supplement of the Lewis case. And therefore,

he concludes based upon that, that's the authority he's citing to, the Lewis case, that the adoption of the GMP is expressly authorized by statute and does not violate the prior appropriation doctrine because the statute provides the flexibility outside the strict priority regulation. That's the only authority again that he's citing is the Lewis case.

And as we -- as I showed in our opening briefs that case is wildly different. And the State Engineer in his answering brief acknowledges that it wasn't legal authority, but he was simply citing it as an interesting example. But that's the only authority he cites in Order 1302 for it.

The State Engineer then goes on to find that there -- he makes this -- another summary finding that the length of time required to do the cancellations or forfeitures or require him to prove up those corners or along the land where water hasn't been placed to beneficial use would be too long and it's not in the best interest.

Summary conclusion. He then -- he then states that the standards for determining the success of the plan by stabilizing water levels is sound. We would agree that that's what the actual plan did.

If his analysis and stuff in there -- his analysis was done to show that the plan would be successful by -- by actually stabilizing the water levels in the basin we

would be fine, but that's not what the plan does. And that's not what the -- he didn't do any analysis of that.

So there is no standard for determining the success of the plan by stabilizing water levels.

He agrees -- he agrees here, and this is -- this is important, the groundwater modeling, that the ground -- the very groundwater modeling he says he doesn't need to do, he says here at the end of the conclusion that it's an important tool for projecting the effects of pumping reductions. And recommends that it should be used in the future to guide future management actions.

Well, if it's such an important tool and it is the best available science, we -- we agree that it's the best available science that he could have used and he didn't use it, then why not use it now? Why not use it at the beginning to determine if these pumping reductions are sound?

And he ignores again the fact that he's handcuffed to do anything regardless of -- to -- to take measures, effective measures regardless of what the monitoring data comes back with.

Finally, he states that that pumping reductions will lead to the entire basin's groundwater pumping approaching the perennial yield and stabilization of groundwater levels.

And this is -- this is interesting. Notice that he doesn't -- the determination he's supposed to make is that pumping will be brought below the perennial yield. That's the determination that he's supposed to make under the statute.

What's the determination that he does make in Order 1302? He says that the basin's groundwater pumping will approach the perennial yield, not be brought below it, approach it and that that will help stabilize groundwater levels.

That's not the standard that the statute sets out for him. And he reiterates again that the objective, triggers and thresholds are not required to guide future management actions.

So that's Order 1302, Your Honor. That's what the State Engineer did and that's what we're appealing here in front of you today and that's what you're here to do.

THE COURT: Why don't we do this at this time. We've been going about an hour and a half --

MR. RIGDON: That would be good.

THE COURT: Let's take about a ten- to 15-minute recess, then you can continue on with the opening. Okay?

MR. RIGDON: Perfect. Thank you.

THE COURT: Court's in recess.

(Recess.)

THE COURT: Let the record reflect that we're in the continuation of our case. The presence of the parties and counsel. We are in Sadler Ranch and the Renners' argument. Mr. Rigdon, you can proceed.

MR. RIGDON: Thank you, Your Honor. Thank you, Your Honor.

Just prior to our break, we went through Order 1302 and we looked at what the State Engineer said and did in Order 1302. And that's -- that's the order that's in front of you, Your Honor, and that's what you're judging is that order.

And so what's the standard of review for looking at the issues that were raised in Order 1302? Well, the first thing is as we said earlier, legal determinations are reviewed on a de novo basis.

And this for some reason continues to come up and -- and the Supreme Court continues to say that legal interpretations of the State Engineer are not entitled to deference and that the courts are supposed to review them de novo.

Just this year they said it once again in Sierra Pacific Industries versus Wilson, this is an opinion that just came out a few months ago. The Supreme Court said that the State Engineer's ruling on a question of law is not entitled to deference.

Last year in King versus Sinclair, they said the court's to review purely legal questions de novo. I could throw up a dozen -- a half dozen more cases on here, that's the standard of review. It's a de novo standard of review without deference to the State Engineer's determinations.

Now, with regards to factual determinations, those are reviewed under substantial evidence standard. And the court must determine whether substantial evidence supports the State Engineer's decision on a factual basis, substantial evidence, we use the reasonable man test, it's what a reasonable mind might accept is adequate to support a conclusion.

And finally, the State Engineer's decisions cannot be arbitrary, capricious or an abuse of his discretion. Arbitrary is any decisions made without consideration and regard for facts, circumstances, fixed rules or procedures. And capricious means contrary to the evidence or contrary to established rules of law.

And in the King versus Sinclair case just last year the Supreme Court specifically said when the State Engineer misapplies or misinterprets Nevada's water doctrines that is by definition arbitrary and capricious.

That case was about the State Engineer, there was -- there's long established prior appropriation doctrine

that says with a pre-statutory vested water right, before you can declare it abandoned you have to show intent, there has to be an intent element to show intent to abandon.

The State Engineer abandoned a water right without showing that intent. The Supreme Court said you misapplied that clearly established legal rule and precedent. And that was arbitrary and capricious. So what is the clearly established rule of law that we're talking about in this case?

Well, that's the prior appropriation doctrine. It is the foundational law for water law in -- in -- in Nevada. It's been around since statehood.

One of the very first decisions, the Bell versus Simpson applied prior appropriation back in 1866. This is probably one of the most foundational doctrines in Nevada law -- in Nevada law altogether, not just water law.

Now, there was -- there was a brief period of about ten years where the State Supreme Court said no, we're going to do riparians instead of prior appropriations.

That didn't work out well and that -- that -- it actually stands as a pretty good warning to the judiciary about what the negative effects can be in messing around with prior appropriation. It's a long established principle and it's been around since statehood.

Two principles of the doctrine are priority first

in time, first in right and beneficial use, use it or lose it. It's presumed there's a statutory construction presumption that the legislature does not overturn long established principles of law when enacting new statutes. That's the presumption, the presumption is that they didn't overturn.

Now, why is prior appropriation so important? Because the priority date of a water right is its most valuable element.

Priority contrary to -- to statements made to the legislature by proponents of the plan. Priority ensures that the senior user receives their water during a time of shortage. Priority doesn't mean anything unless there's a shortage, it's only when there's a shortage that priority becomes important.

The courts have said to deprive a person of their priority date is to deprive them of the most valuable property right, the loss of priority, this is in the Wilson Happy Creek case that was just decided this year, the Supreme Court of Nevada said a loss of priority that renders a right useless certainly affects the right's value and can amount to a de facto loss of the right.

Priority is a key element of a water right. Holders of senior priority water rights have a reasonable investment backup expectation to the in the security that

priority date provides them. And that security is security for procured for times of shortage. There's no dispute here that the GMP stripped priority from seniors and thereby violates part of the doctrine.

The legislature did not authorize a GMP to replace the prior appropriation system in 2011. The issue wasn't even in front of the legislature in 2011 when they were considering the groundwater management plan statute.

There's four reasons why, and we'll go through each of these four reasons. The plain language of the statute doesn't alter prior appropriation. The legislative history in 2011 when AB419 was passed doesn't evidence an exact obligee of prior appropriations.

The State Engineer in 2016 determined that the share system wasn't legal under the 2011 law and the changes were the statute were needed to make the GMP work. And finally, the legislature rejected those changes and maintained the prior appropriation system.

So the plain language, the legislative history, this is -- this is a quote from the State Engineer's own order, he says the legislative history contains scarce direction, not express direction, scarce direction concerning how a plan must be created or what the confines of the plan may be.

It's not there. Nothing in the plain language of the statutes aggregate the prior appropriation doctrine. Like I said, we have a presumption in our favor and that presumption is the legislature did not intend to abrogate prior appropriations, that's the presumption we started with.

The only way you can overcome that presumption is if the legislature includes express language in the statute indicating their desire to repeal that longstanding doctrine of law. And that comes from this West Realty versus City of Reno case. So that's what they have to show. They have to show that the plain language says this in a way that overcomes the presumption in our favor.

So what does the plain language of the statute say? Well, here's NRS 534.037(1). It says in a basin that's been designated a critical management area by the State Engineer pursuant to subsection 7 of NRS 534.110, a petition for the approval of a groundwater management plan for the basin may be submitted to the State Engineer.

The petition must be signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the office of the State Engineer and must be accompanied by a groundwater management plan which must set forth the necessary steps for removal of the basin's designation as a critical management area. That's what it

says. What doesn't it say? It doesn't say the groundwater management plan can't abrogate prior appropriation. It's not there. That's the plain language of the statute. I don't see those words there anywhere.

We go on to Section 2 -- subsection 2. This section talks about the five factors that we talked about that he has to consider. Nowhere in this subsection does it say oh, and by the way, the groundwater management plan can be done on the basis other than priority. It's not in here.

Subsections 3, 4 and 5 of the same statute, subsection 3 talks about the process for holding a public hearing. It doesn't say anything in there that the groundwater management plan can violate prior appropriation doctrine.

Subsection 4 talks about how if people are unhappy with the plan we can do exactly what we're doing here, we can come to you and appeal this plan under 533.450.

It doesn't say anything again about, you know, we can appeal the plan to the District Court and the District Court can allow plan to violate the prior appropriations, it doesn't say that, it says we appeal it to you.

And then the fifth subsection just says if the plan is going to be amended that it has to be done in the same way that it was originally adopted. That's it.

Nothing in this statute, that's the whole statute we just went through there. And nothing in that statute says that a groundwater management plan can limit water use on a basis other than priority.

What's the other statute in question here? A subsection 7 of 534.110. This one, the first part of it says the State Engineer may designate a critical management area in certain circumstances and he has to designate a critical management area if a petition is -- is forwarded to him.

That's not an issue here. So we get back to this last paragraph of 534.110(7). And this says once a basin has been designated as a critical management area, that -- that designation can be appealed.

But that didn't happen, there's no appeal to the critical management area here. And it says if it's been designated as a critical management area for at least ten consecutive years, so they're placing a condition, if it's at least ten consecutive years, the State Engineer shall order the withdrawals -- including with allocation withdrawals from domestic wells be restricted in that basin to conform to priority rights.

So it's saying that if the basin's been designated for ten years, the State Engineer has to, he no longer has discretion, he must order a curtailment in the

basin.

But it creates an exception to that. The exception is to the mandate that he has to order curtailment. And that exception says unless a groundwater management plan has been approved in the basin pursuant to 534.037. That's the plain language of the statute.

This statute does not abrogate the prior appropriation, the magic words are not there. Again, it doesn't say the GMP does not need to conform to priority. And we'll see later when we talk about SB73 what magic words were needed in order for those -- to be able to do that. And those magic words aren't in the statute.

The purpose of this language was to force action by the State Engineer. 110(6) is the original curtailment statute that was in -- in -- in the law before 2011 when the legislature created the new subsection 7.

And subsection 6 was always the curtailment provision. You notice the wording here is very, very similar to the wording in subsection 7. Subsection 6 says in -- in -- in certain basins the State Engineer may order the withdrawals including without limitation withdrawal from domestic wells be restricted to conform to priority rights. That's curtailment.

Over here it says the State Engineer shall order withdrawals including without limitation to withdrawals from

domestic wells be restricted to conform to priority rights. That's what it was doing, it was forcing action by the State Engineer. No longer can he may do it, he has to do it. But again, he has to do it unless a groundwater management plan has been approved, unless the exception is in there.

That's the out that the legislature provided to him. The out is an out from mandatory curtailment. It's not an out from prior appropriations, it doesn't say that the groundwater management plan doesn't have to conform to prior appropriations, it says if a groundwater management plan is there the State Engineer doesn't have to, he's not forced to order a curtailment in the basin.

So there's nothing in the plain language of the statute that says -- that gives express authority for anybody, the groundwater management plan proponents or the State Engineer to develop or approve a plan that violates prior appropriation doctrine.

So what's in the legislative history? Well, let's look at that. The bill that created this law was introduced by Assemblyman Goicoechea back in 2011.

The purpose of the bill was to force action, as we said, to force action to bring over flood basins in to compliance.

How do we know that that's the purpose of the

bill? Because the assemblyman told us it's the purpose of the bill. He said, the problem -- the problem the legislation is trying to solve is that where we are today, the State Engineer, and he's trying not to throw rocks at them, but the bottom line is we're not getting it done.

We continue to see groundwater basins decline. That's the problem that he was trying to fix. The forced action, which is exactly what we just saw the statute does.

Why did the legislature feel that they needed to force action? Well, let's look at the history here. And this is history that the assemblyman was very familiar with. In 1982, the State Engineer came out here to Diamond Valley and he held a hearing.

There was complaints that they were -- that -- that the water pumping in the south part of the basin was drying up spring rights.

And he held a hearing out here and he found that the water table is declining because of pumpage in excess of the perennial yield. He found -- he concluded -- prior to this hearing he set the United States Geological Survey out here on a field investigation.

And the USGS said that the cause of the decline was sustained pumpage from irrigation wells in the south part of Diamond Valley. That's what was -- that what was known in

1982 at these proceedings.

State Engineer Morros conceded -- I mean, this was -- this was very -- very candid statement by State Engineer Morros. The water management decisions in Diamond Valley have been driven by politics, not by science.

He says I'm going to be very candid, there was a tremendous amount of pressure around the State Engineer's office to issue permits far in excess of what we have identified in the perennial yield. They knew when they issued these permits that these permits would be in excess of the perennial yield and they bowed to political pressure and issued them anyway.

Despite all of this in 1982, no effective action was taken. A meter order was issued, but it was never enforced. And adjudication was started but as soon as the proofs of -- of claims were filed it was not timely pursued. So nothing came out of this 1982 hearing. Assemblyman Goicoechea at the time he was an assemblyman knew that, he knew nothing had happened after 1982.

We come to 1988. In 1988, State Engineer Morros was called to testify at a jury trial under oath in Washoe County over issues in Diamond Valley.

He said there's been a significant lowering of the static water tables in Diamond Valley and it rates as

probably one of the highest areas of concern in the state right now. In 1988, it was one of the highest areas of concern in the state.

He said that the reason he held the curtailment hearing in '82 was because the decline in water levels had continued from '75 to '82 and there was no relief.

THE COURT: Mr. Rigdon?

MR. RIGDON: Yes.

THE COURT: Yes, Ms. Peterson?

MS. PETERSON: You know what, I'm going to object to this in the record at this point because none of this was even attempted to be included by the petitioners Sadler and Renner in their opposition to the motion in limine.

So notwithstanding that the court has already ruled that there's not going to be any extra evidence in the record other than what the State Engineer submitted, this is something of a court case that we have never seen before and has not been introduced into the record and it's totally inappropriate here in oral argument.

So I ask these slides be stricken and this line of argument be stricken from the record.

THE COURT: Thank you. Either Mr. Bolotin or -- and/or Ms. Leonard?

MS. LEONARD: Well, Your Honor, we've been

objecting with regard in our briefing as well that anything that is outside the record should not have been included in their brief. This is far in excess of even what was in their brief. And so I would join in the same objection.

MR. BOLOTIN: I join in that objection as well, Your Honor. And like Ms. Leonard, I also object --

THE COURT: Response, Mr. Rigdon?

MR. RIGDON: Yes, Your Honor, let's talk -- let's understand what we're talking about here. We're talking about statutory interpretation, an issue that we reviewed de novo. And we're putting in context legislative history.

We're using a -- a transcript from an official court proceeding, I have a copy of it here if you would like it, and on the back page of that transcript is the attestation from the court reporter that it is a true and accurate copy of what was done. It's an official record of the Second Judicial District Court which the court can take notice of this as a -- as a judicial record.

In fact, the court's required to under 47150 take notice of this as offered by a party as long as the veracity of it can be easily ascertained.

I would represent that a transcript from the District Court proceeding in this state that comes from the official records of that court is something that can be easily

ascertained by the parties as far as its veracity.

We -- again, we are not offering this as a supplement to the record on appeal. That's not what we're doing. And we understand that you issued the order regarding the supp -- the record on appeal and stating that it couldn't be supplemented.

We're not supplementing the record on appeal. What we're doing is we're saying -- we're bringing in context legislative history using official records from the second JD and from the -- and from the legislative history, the -- the minutes from the legislative history, which incidentally both of the respondents who are the non-State Engineer respondents included addendums to their briefs that included legislative history materials.

This is background information for legislative history going to this issue of statutory interpretation that's reviewed de novo by this court.

THE COURT: Ms. Peterson?

MS. PETERSON: Yes, thank you, Your Honor. Your Honor, this is from a case in 1988 in Washoe County. We have no idea what the case was about. It's not legislative history tied in any way to AB419.

There's no nexus between this leg -- this testimony in a court proceeding which we know nothing about

who was -- who was the Plaintiff, who was the Defendant and how it ties to AB419 that was introduced in 2011? And I don't think Assemblyman Goicoechea referenced this court case at all anywhere in the proceedings in 2011.

It should be stricken. This is far outside the order, Your Honor. You ordered that there was not going to be any supplement to the record.

THE COURT: As it -- this is the court's order. As it relates to the discussion of what occurred in the case in the Second Judicial District, that type of history, the court sustains the objection.

MS. PETERSON: Thank you.

MR. RIGDON: Then I'll move on.

THE COURT: The court's going to allow -- let everyone know right now, any -- any of the legislative history, the -- the comments, the minutes in 2011, 2017, that's relevant.

And I think you all have attached those both before and after as far as the legislative history and the subsequent actions, but I think we're too far afield here. The objection's sustained.

MR. RIGDON: Okay. Well -- well, we just offered it solely for the purpose of showing some background information. But that's fine. The -- I'll just skip through.

THE COURT: And this court's familiar with a lot of this stuff already.

MR. RIGDON: I'm sorry?

THE COURT: This court's familiar with a lot of this stuff just from prior cases in this jurisdiction.

MR. RIGDON: Okay. So we'll move on from that.

So in -- again, why did this legislature need to force action? In 2009, the State Engineer came out here and he warned water users that something had to be done in a workshop out here.

He noted that some of his options were to curtail pumping, cancel permits, forfeit water rights, these were all different remedies that he could have done to enforce prior appropriations.

He encouraged water users to investigate the broader water rights for non-irrigated corners, increase efficiency, switch to lower consumptive crops, increase filtration and importing water recharge basin.

We'll see these kinds of things over and over again in the legislative record that these were the kinds of things that were contemplated by the legislature as part of a plan to -- to reduce pumping in the basin.

Yet, there was no significant reduction of pumping from 2009 until 2011 when the legislature was brought

forward.

The State Engineer also held a hearing when he considered the mitigation rights applications that the order to allow for mitigation rights applications.

At that hearing he stated that he had been trying to work with stakeholders in this basin for four years but was repeatedly told by junior irrigators to go away. That's right in the transcript.

He stated that at the 2009 workshop, the one we were just talking about, everyone was happy with where we were, happy with crops and decline in water table. When we gave our presentation we said that's fine -- he said that's fine. The declining water tables are fine. If everybody's happy, that's fine. That's the reason why action needed to be taken.

Because despite official acknowledgement that water tables were declining, they were causing harm to pre-statutory water rights, no effective action was taken to reduce pumping between 1982 and 2011. That's the context Assemblyman Goicoechea stated that the State Engineer is just not getting it done.

And we continue to see these groundwater basins decline. They want better -- the legislature wanted better enforcement of prior appropriation, not to abrogate.

Nothing in the minutes of the committee meeting minutes, they're all -- they're all in the briefs and addendums to the briefs, indicates an intent to overturn prior appropriation.

What was contemplated by the legislature in 2011, a voluntary plan. This is testimony from one of the people who testified on the bill, we support the concept of giving parties tools so they can find voluntary ways to reduce over appropriation, not forcing seniors to give up their water, voluntary ways to do it.

The assemblyman said the burden was on the juniors to make the cuts, the people with the junior rights are supposed to figure out how to conserve enough water in these plains. That's what was contemplated, not taking water from seniors.

What was contemplated was conservation measures. Remember we just talked about some of those measures? The assemblyman said that the junior users would have to work forward to develop a conservation plan. That's what they were talking about, a conservation plan. And that that plan could include things like what we've been hearing from the scoping, what we've been hearing, planting alternative crops, water conservation, using different irrigation methods. These are the things that were contemplated in 2011, not changing our

water rights system.

If you remember back to the timeline I showed you, they couldn't have been contemplating changing the water rights system and adopting this Australian share scheme because it wasn't even known about until 2015.

Mike Young didn't come out and present anything to the legislature or to the people out here in Diamond Valley until 2015. So there's no way in 2011 the legislature could have contemplated a water sharing plan like what's being proposed in this GMP.

Now, the State Engineer previously agreed that the Australian share scheme was unlawful. And this is -- this is an exhibit that we put in with our -- our -- our -- our exhibit we attached to our opening brief and there's a couple of important things here, Your Honor.

Each page of this exhibit bears the State Engineer's official seal right down here in the corner. The State Engineer of the State of Nevada. The State Engineer indicates in giving this presentation that he's giving this presentation as the Nevada State Engineer.

It's an official record of the State Engineer's office. It shows that the Diamond Valley pilot project, the groundwater management plan is based on the Australian scheme. And -- and to make that point even more clear.

THE COURT: Mr. Rigdon. Mr. Bolotin?

MR. BOLOTIN: Your Honor, objection. I -- the State Engineer objected to the inclusion of the PowerPoint in the briefing on this matter as well. And Mr. Rigdon's explanation in the briefing was that it deals with a purely legal issue with the State Engineer talking, he's not the final say on purely legal issues.

The State Engineer's office isn't bound by stare decisis and there's even U.S. Supreme Court precedent that says that administrative agencies are not prohibited from changing their view where beliefs of a previous review was grounded upon mistaken legal interpretation with the Good Samaritan Hospital case in 508 U.S. 402 from 1993.

But as we argue in the briefs, this is outside of the record. Your order on the motion in limine shouldn't have been included in the briefs or in this hearing.

THE COURT: Thank you. Mr. Rigdon? And -- or Mr. Mixson? But go ahead, I don't know if other counsel has anything to say, but I'll allow you, Mr. Rigdon, to respond.

MR. RIGDON: Well, Your Honor, again, just to describe exactly what this is, this is a determination by the State Engineer made as in his official capacity as the State Engineer that a statutory change is needed to make a plan legal. But the plan's not legal.

Now, Mr. Bolotin is right, administrative agencies are allowed to change their opinion, but it's certainly relevant to this court's determination of whether the -- what the statute says what a previous interpretation by the same State Engineer, this is the same person who signed the order in this case, what they believed that the -- that the law, state of the law was in 2016, this is certainly relevant to that.

And again, it's an official record of the State Engineer under public records law, this is discoverable as a public record. It's an official record of his. And it's a prior inconsistent interpretation. And again, you review these things de novo, this is the de novo standard.

THE COURT: Ms. Leonard?

MS. LEONARD: Your Honor, I would reiterate an objection and also point out that the court's role here is not to second guess the judgment of the State Engineer.

The court is sitting in an appellate stance right now and Mr. Rigdon wouldn't be making these types of presentations on other statements made by the State Engineer if he were appearing in front of the Nevada Supreme Court right now.

So I just wanted to reiterate our objection that this is inappropriate consideration for the matter that's

before the court.

THE COURT: Thank you. The objection's overruled in the context of which it was made, timing of the statements in relation to the legislation the court finds it does have relevance. You can continue.

MR. RIGDON: Okay. Thank you. So, again, how do we now this was based on the Australian approach? Because the State Engineer actually put the cover of Mike Young's report in the presentation.

So it's clear that the -- what he was talking about was the share system from the Australian scheme that was being brought into Diamond Valley for the groundwater management plan. And what did he find? He found that under the 2011 ordinance he needed a statutory change to make the plan legal.

And he indicated that that's okay, because we've got bill drafts coming forward in 2017 to do just that. That was the purpose of these bill drafts in 2017 to try to make the plan legal.

So, what happened in 2017? In 2017, two bills as we said were introduced. SB73, which is a proposal from the State Engineer and SB269, which is a proposal from the interim committee. Both bills failed. They failed outside the committee. SB269 didn't even get a hearing.

What did SB73 say? Remember when we talked about that magic language that's needed to overcome the presumption that the State Engineer -- that the legislature is not setting aside established rules of law.

Well, here's what -- here's what was proposed in the language of SB73, that in addition to any other power granted by law the State Engineer can consider any actions set forth in the groundwater management plan including without limitation, and this is it right here, limiting the quantity of water that may be withdrawn under any permit or certificate or from a domestic well, magic words, on a basis other than priority.

That's what they were asking the State Engineer to do -- the legislature to do in 2017. It was clear that priority was now an issue in front of the legislature, which it wasn't in 2011.

The legislature heard testimony from people both for and against this idea. You heard testimony from Jake Tibbitts that the application of the prior appropriation doctrine would be devastating to communities, it's clear they're talking about prior appropriation doctrine.

That the time to fix this problem was 60 years ago and now it would be unworkable for the community to use strict prior appropriation. That was the issue here, strict

prior appropriation. And the arguments that they were making to the legislature at that time are the same arguments they're making in their answering briefs to you here, Your Honor, that it's -- it's going to be too hard for the community, you're going to devastate this community economically if you do this. They presented those same exact policy arguments to the legislature.

Ms. Moyle has testified Senate Bill 73 will give us the opportunity to implement the Diamond Valley plan and move forward and rectify the problem. Acknowledging again just like the State Engineer said that everybody understood that this legislation was needed in order to make the plan legal.

But people were on the other side. An attorney representing senior water right holder Mr. Bob Marshall came in and testified about the importance of prior appropriation. And -- and -- and -- and testified that before rights can be taken away or making less valuable, holders have to be compensated, the seniors do.

Every single permit is issued subject to prior rights and that's Nevada law. Bob Marshall came in and said you shouldn't abrogate prior appropriations. The legislature has a clear choice here between two policy alternatives, stick with the status quo, which is prior appropriations, or adopt

this new language which would allow a groundwater management plan and CMA to abrogate prior appropriations.

What did the legislature do? They chose to stick with the status quo. And when the legislature is given a clear choice between two policy alternatives and chooses one over the other, the State Engineer and the court should respect that choice.

They're the policymaking body in the state, the state legislature is. And we should not be overriding their choice through -- by making our own policy judgments here.

I brought up this case FDA versus Brown and Williamson Tobacco Corp., this is United States Supreme Court case, an opinion authored by Justice O'Connor because it's -- it presents a similar situation. We had a situation where the FDA wanted to regulate tobacco companies under the FDA ruling back when companies weren't regulated under the FDA.

Several times throughout the 1980s and 1990s proposals were brought forward to congress to give the FDA authority over tobacco companies. And congress rejected those proposals.

The FDA went ahead and decided to try to regulate the tobacco companies anyway despite that rejection by congress. And it went all the way up to the Supreme Court. And Justice O'Connor in her opinion, one of the reasons she

gave for -- for ruling against the FDA was that congress had rejected these prior proposals. And when they do that, the agency was precluded after that from claiming it had that authority.

Very, very similar type of situation, we have an agency going to the legislature saying give me this authority. The legislature saying no. And -- and -- and then the agency tried to do it anyway.

So, that was SB73, let's look at SB269. Well, as I said, this was a product of that interim subcommittee. And the -- that they had that meeting in Dyer and the audio transcript of that meeting is available at this -- this particular location on the Nevada legislature's website.

And there was testimony given as to why this was needed. Jake Tibbitts said today there's been lots of talk and no action in 2016 when he's giving his testimony, lots of talk, no action. He said that Mike Young was sent to Diamond Valley by the State Engineer specifically to propose this plan and that legislation is needed.

He said legislation is needed to empower us in drafting a GMP based upon that plan. He said it more than once, they needed flexibility from the mandatory provisions from the water law. This is why they needed a bill in 2017.

And he stated that it was the county commission's

position that in CMA basins, water -- water users should be exempt from prior appropriations. That's -- that's what he was asking the legislature to do when they forwarded a bill draft request on behalf of the water users and that's -- and when they -- and so when they did the bill draft request look at what it said.

It said -- it said -- wrong button there, that the State Engineer may approve any reasonable limitation or restriction set forth in the provisions of the groundwater management plan submitted including without limitation.

So the first thing that they could do is they could limit the quantity of water that may be withdrawn as long as they gave holders of senior permits a larger quantity of water than holders with junior permits. That's the share system that's in this GMP. That's exactly what the share systems of the GMP does. That's what they were asking the legislature to make available to them.

What else were they asking the legislature for authority to do? To exempt water rights from the provisions of 533.390, 395, 410 and 090, these are the provisions regarding extensions of time, filing proofs for beneficial use, forfeiture and cancellation during the period that the groundwater management plan is in effect so that the conservation practice could be implemented.

So they were asking for that specific authority. Remember earlier we said how this plan violates those statutes. They were asking for specific authority to violate those statutes.

They were asking that the plan be allowed to impose requirements for the use of water within the CMA that are not bound to any specific point of diversion, place of use or manner of use, unbundling, not bound to any point of diversion, this is the unbundling that they wanted to do. The deregulation of these water rights.

And finally, they wanted specific authorization to allow the banking of groundwater from one year to the next. Just like the banking program in the plan. All of these key elements that are in the plan were brought to the legislature in 2017 and said please authorize these things for us. And the legislature said no. But they went ahead and did it anyway.

Now, in addition to the violations of prior appropriation the GMP does not comply with other provisions of state law. The law has a single use requirement, there's the ASR statute and there's the issue of proof of completion of beneficial use.

NRS 533 is clear, no application for water shall be for the water more than one source to be used for more than

one purpose, you cannot use water for more than one purpose. The purpose stated in your application is all you can use it for.

What does the GMP say? It says water that allocations under the plan can be put to any beneficial purpose under Nevada law. You're no longer tied. So these water rights -- irrigation water rights today could be used for mining tomorrow, they could be used for municipal tomorrow, they could be used for some kind of industrial use tomorrow under the GMP without requiring a change application to do so.

It effectively turns these water right permits into super permits if water can be used anywhere in the basin for any reason whatsoever.

And it may actually result in more water being removed from storage. Because one of the main issues here is with irrigation water rights when you irrigate land some of that water goes back to the basin, not all of it's consumptively used. But if you change it to a use like an industrial use or -- or mining use, that water could be fully consumed, no water goes back to the basin.

So you can actually end up because of this provision of the plan removing more water to the basin than you otherwise would.

The banking program. We talked about this, how it violates state law. Their own expert said the banking program is an ASR program. And in that -- in that same memo where he said that, he discusses that the whole reason he was doing the groundwater model analysis was because he had -- he was trying to comply with ASR statute. That's why he says he was doing it. And he says that he was directed to do that by the deputy State Engineer Rick Felling.

Now, they -- they didn't -- but they didn't comply with it because it requires a special permit to be able to do that. When you get that special permit you have to show that water being stored is available for appropriation and that the project is hydrologically feasible.

They didn't do any of this. Water banked under the plan is not available for appropriation. This is water that is being pumped above the perennial yield. The only water that's available for appropriation in the basin is water below the perennial yield. You can't -- so if the water is not available for appropriation it can't be used to bank.

If -- if, for example, pumping in the basin was only 27,000-acre-feet in a given year, then there would be 3,000-acre-feet because the perennial yield's 3,000, there might be 3,000-acre-feet available to store of unused water. But this is all water above the perennial yield in the basin.

The banking program is not hydrologically feasible. It's all withdrawals and no deposits. And it incurs -- it means that the full allocations of water will be used. Because if I don't use ten-acre-feet this year I get to add it to my allocation next year. So every bit of water authorized to be pumped under the GMP will be pumped because of this provision.

Now, the last thing here is the GMP can't exempt water right holders from the requirement to file proofs. That's a mandate. Permit holder must timely file a proof of completion or a proof of beneficial use to perfect their water right or request an extension of time to be able to do so.

The GMP here effectively perfects water rights without requiring a showing of beneficial use. We went over that a little bit earlier. Request for extension of time, this is key.

Why -- why do we care about whether people have to file individualized requests for extensions of time? Because requests for extension of time require the State Engineer to make an individualized determination in that case whether there's a good cause to grant that decision and that can be appealed to a court.

As it was, in the recent case here in 2019, of Sierra Pacific Industries versus Wilson. That case was all

about an appeal of a State Engineer approval of an extension of time. If the State Engineer is not making individualized determinations for extensions of time, water right holders -- other water right holders could be conflicted by that or could be harmed by that won't have any opportunity to repeal those decisions.

So, the plan violates prior appropriations. It violates other mandatory provisions of state of the law. But it's also not supported by substantial evidence.

Why do I say it's not supported by substantial evidence? Because the State Engineer did not consider the mandatory factors of NRS 534.037.

The State Engineer claims that the GMP discusses those factors, but that's not what the statute requires, the statute requires the State Engineer to look at each of these factors, analyze them and make a determination on each of these factors.

The fact that he didn't do that is reason enough to overturn Order 1302, that in and of itself is reason enough.

But let's look at these five factors and let's look at whether the plan contains substantial evidence, the GMP contains substantial evidence on these five factors.

Let's -- hydrology. We'll start with hydrology

here. Remember the plan must contain necessary steps for removal of the CMA designation. A CMA designation applies when withdrawals consistently exceed the perennial yield, therefore, the plan must include necessary steps to ensure the withdrawals fall below the perennial yield. So it's pure logic here.

And it's all withdrawals, the -- the plan doesn't said only withdrawals regulated by the plan, the statute doesn't say only withdrawals regulated by the plan, the statute says all withdrawals in the basin have to be brought below the perennial yield.

Now, some of the respondents quibbled over the statute's use of the word consistently. They -- they -- they focused on the fact that the statute said that pumping has to be consistently above the perennial yield.

Well, let's look at the situation. For 49 years, every single year, pumping has exceeded the perennial yield. I don't know about you, but my definition of consistently includes a hundred percent of the time something happening.

During the 35-year plan time frame when you look at the pumping reduction table over the next 35 years authorized pumping will never be below the perennial yield. Never, not once, there's not one year on that -- that -- that pumping reduction table that authorized pumping below the

perennial yield. That is consistently.

Now, the measure as we've said is whether -- or the plan meets that goal is whether groundwater levels were stabilized. There's four pieces of hydrologic evidence that are in the record. There's the 1968 USGS State Engineer reconnaissance report. There's the 2016 USGS report. There's that unauthored Appendix D in the GMP. And there's the Turnipseed Engineering report that was submitted by Sadler Ranch at the public comment meeting.

What does the 1968 report say? It identifies that there's a hydrological divide between the north and south part of the basins. And because there's no natural discharge -- little to none natural discharge in the south basin, pumping in the south part of the basin, which is where the majority of this pumping will occur under the plan depletes the storage -- reservoir storage. It doesn't do anything with regard to natural discharge. All it does is deplete reservoir storage.

He said in 1968 the levels of pumping at that time were 12,000-acre-feet a year. He said if we continue and just say we're going to keep it at 12,000-acre-feet a year in the south part of the valley, it will take three to 400 years -- whoops, three to 400 years for the -- the basin to reach equilibrium between the -- the budget to balance between

recharge and discharge, three to 400 years.

And he said if it exceeds 12,000-acre-feet by any significant amount, equilibrium, balance between recharge and discharge will never be reached, never. Meaning the groundwater levels will continue to decline. And if groundwater level declines for the standard of measurement for success, then pumping in the south needs to be limited to 12,000-acre-feet a year.

This is a picture from the -- from that -- that report, that 1968 report that just visually describes this. We have over here the Google Maps image, you can see where all the pumping is taking place, over here you can see all these areas up here where the natural discharge is occurring. And they're very far away from each other. And that's the basic problem that we have.

So what does the 2.16 USGS report says? It says that basin water is not balance, no surprise there, everybody knows that. But this is a key, they estimated what the imbalance. The imbalance is 63,000-acre-feet a year. 63,000-acre-feet or more a year is being taken out of the basin and is being put into the basin.

But the plan only reduces pumping, this plan is supposedly based on these published values that are in these studies, it only reduces pumping by 42,000-acre-feet. That's

all it does. So you have 60,000-acre-foot imbalance. What the USGS says is the imbalance and you're reducing pumping by 42,000-acre-feet. That does not make the basin whole.

And it also indicates that the groundwater divide, because the cone of depression from this pumping has grown so large that the groundwater divide is migrating north as a result of that -- that expansion of the cone of depression.

What do they say in GMP in Appendix D? They say -- this is again unauthored, we have no idea who wrote this Appendix D, a report that's attached to the GMP. It says declining water levels are a threat, a threat to the Devil's Gate general improvement district and the town of Eureka water supply.

But it says nothing about how the GMP pumping reductions address that threat. It says the groundwater exploitation has caused senior right holders' springs to cease flowing. And here's the key, this appendix that's supposed to be a hydrologic analysis that the State Engineer relies on, only describes the current situation.

Nowhere in this analysis -- nowhere in this report is there any analysis or discussion of how the pumping reductions in the plan will get to removal from the CMA designation. It's not there.

So what did the Turnipseed Engineering report say? It says that overpumping has already removed, and this is a massive number, 1.75 million-acre-feet of aquifer storage has already been permanently removed from the basin. It's not coming back.

Under the GMP at the end of 35 years, that number is going to increase to 2.5 million-acre-feet of storage in the reservoir will be permanently removed.

Another -- another -- so their solution to the problem of continual groundwater declines is to take another 750,000-acre-feet of reservoir storage and permanently remove it from the basin.

The GMP does not -- the -- the Turnipseed Engineering report is the only report, the only hydrologic report in the record that answers the question, that even attempts to answer the question will the GM -- does the GMP contain the necessary steps for removal of CMA designation.

And Turnipseed Engineering determined that no, it does not. No hydrologic-based analysis. He -- he -- he looked at the plan. He said -- he said there's no hydrologic analysis in here that provides information on what ground -- groundwater levels may be at the end of the 35-year period.

He said there's no discussion of the hydrologic impacts of the pumping reductions on anticipated groundwater

levels. Impacts remain in spring flows -- and there's no description of the model in the plan. He identified all that stuff in his report. And he said -- he even identified how the GMP does not discuss how bench warrant percentages were developed.

And finally, he looked at the conclusions in Appendix I, this was on the depreciation, the 17 percent versus the one percent, the one area where modeling was done.

And like I said, he couldn't independently verify any of the information in that because it didn't -- there was no copy of the data behind that information. There was no information on the model, the model report or the model calibration of the information.

His final conclusion, again, the only expert -- expert report that is in the record reaches a final -- that reaches a final conclusion on the ultimate issue, that conclusion is that the GMP as written will continue to allow for the exploitation of groundwater resources and will not sufficiently reduce groundwater pumping to remove the CMA designation.

The one thing the GMP is supposed to do, Turnipseed Engineering reviewed the whole plan and said it will not do that one thing it's supposed to do.

Physical characteristics of the basin don't

support approval of the GMP. It's a huge long and narrow basin. There's a big divide between north and south in the basin from the north where the natural discharge occurs to the south where all the pumping is occurring. The alluvial aquifer here is also relatively shallow.

One of the things in that unauthored Appendix D that's in the report, it says information from well logs suggest that the depth of the aquifer is only 400 feet below that, it becomes cemented and there's no -- it doesn't yield large quantities of water before then.

So we're pumping the basin dry. We've got a shallow, big aquifer and it's being pumped -- literally pumped dry. Taking together those physical characteristics indicate that the water levels will not stabilize.

Geographic spacing and location of withdrawals. The GMP allows water anywhere in the basin regardless of groundwater divide.

The 1968 report contains specific and credible evidence about where pumping should be authorized in the basin. It should be authorized in the north, not in the south. But the GMP forces the same reductions regardless of whether you're located in the basin.

That approach is inconsistent with prior approaches to regulating the basin. All of these orders right

there as we listed, 277 through 813, all of those orders the State Engineer when he issued those orders issued them only on the south part of the basin. He didn't issue those orders on the north part of the basin. He used to manage this basin as a north and south. And he doesn't do that anymore.

Now, evidence indicates that the water quality will deteriorate under the GMP. This is the findings he talks about are water quality.

The USGS study says that migration of that more south divides north. What it's doing is it's reaching under the playa and starting to pull poor quality groundwater south. That's water that will poison those wells in the south.

GMP Appendix D says the same thing, it says that the long-term consequences of migration of high TDS water towards the nearest irrigation pumps.

So they're pulling high TDS, high -- high saltwater water down into the south because they continue to overpump the basin. And the GMP allows this continue to allow overpumping for another 35 years.

Location of wells including domestic wells. Again, we talked about how we didn't look at the effects of domestic wells.

We had the public comment from Ari Erickson about domestic wells going dry in the basin, there was no analysis

of how many domestic wells may fail in this basin as the result of continuing groundwater well declines even with the pumping reductions.

So, the groundwater management plan doesn't contain the necessary steps for removal of the CMA designation. The measure is whether groundwater levels stabilize.

Neither Order 1302 nor the GMP analyzes whether groundwater levels will stabilize under these pumping reductions. It's not there. Groundwater model was available, it wasn't used. The State Engineer is supposed to use the best available science. It was available to him, it wasn't used.

And the -- the United States Geologic Survey reports indicate that withdrawals will never fall below the perennial yield in the basin with the rate of pumping in the proposed GMP, which means water levels will continue to decline.

And how do we know that? Here's the simple math. The plan doesn't even bring regulated pumping under the perennial yield. Perennial yield is 30,000-acre-feet a year, year 35 regulated pumping, 34,200.

That's 114 percent of the perennial yield and it doesn't include, like we said, the 6400-acre-feet of water

rights for Bailey, Sadler and Venturacci and the 5400-acre-feet of water rights that aren't regulated under the plan, there are other non-irrigation uses.

So in year 35 authorized withdrawals, and I -- and I've been in numerous hearings with the State Engineer where I've been told he has to manage basins not what's actually pumped but what's authorized to be pumped. Because he has to assume that everybody's going to pump everything that they're authorized to pump.

Well, here we go, year 35, authorized withdrawals total 45,000-acre-feet a year. That should be -- I'm sorry, there's a typo here, that should be 150 percent of the perennial yield, not 250, that's a mistake, I apologize.

So now we're under our third issue and this is the process, this will go fairly quickly, Your Honor.

The Revert v. Ray, in 1979 the Supreme Court said the substantial evidence standard of review that is somewhat deferential to the State Engineer presupposes the fullness and fairness of the administrative proceedings that he's implemented. If proper procedures aren't followed, the court shouldn't hesitate to intervene.

The State Engineer abuses his discretion and acts arbitrarily and capriciously when he fails to follow proper procedure.

Public comment meeting didn't comply with NRS 534.037. It mandates the State Engineer to hold a public hearing, these are the key language, to take testimony. What's the purpose of the public hearing? To take testimony.

Failures for own regulations for hearings, the only regulations for hearings he has, these are the only ones that he has, it says public comment is not testimony. That was known when this law was put into place. This was the regulation in place when this law was put into place. The public hearing is not testimony. And the State -- that the legislature said you have to have a public hearing to take testimony.

It also says the -- again, these are the only regulations that the State Engineer has governing procedure in the State Engineer hearings. And it says parties have a right to cross-examine witnesses called by other parties. None of this occurred, nobody was sworn under oath, no testimony was given and no party was provided the opportunity to cross-examine another party.

The State Engineer didn't properly verify the petition signatures. The law mandates that a petition must be signed by the majority of the holders' permits or certificates.

Now, it's important what it says, the majority of

the holders of permits or certificates. It's not the majority of the permits or certificates, it's counting people, not permits. Okay.

But the State Engineer counted permits. For example, the Moyle family has five individuals that are part of that family, but they're listed as the owners of 50 permits. They counted as 50 votes, those five people counted as 50 votes instead of five in this process. Because he counted permits and not people.

There's no analysis -- there's also no analysis in the record to show how the State Engineer verified petition signatures or what water rights were counted as eligible to vote.

The petition that was submitted to him said that there was 493 permits and that they got votes from 290 of them.

Order 1302 says that the vote count was -- there was 419 permits and the vote count was 223.

But there's no explanation as to what the difference is or why the State Engineer ignored -- not ignored, why the State Engineer threw out permits or threw out certain permits. Some of the signatures -- when we went back through and did an analysis, some of the signatures weren't by the owner of record on the petition.

The owner of Permit 18999 is Charles Cooper. But who signed the petition? Somebody named Matt Morrison. Same with these two permits, the owner is Harlow and Bonnie Andersen, but it was signed by somebody named Valerie Wood. These are the owners of record in the State Engineer's office.

And the whole permit was counted even if only one owner signed. So where you have multiple owners of a permit, as long as one person signed the petition it counted for the whole groundwater management plan.

And there's no indication of whether senior holders had permission of their mortgage lienholders to sign away a portion of their collateral. There's third parties here who have an interest in whether seniors are actually voting to give up their -- their collateralized water rights.

Some votes were double or triple counted. We went back through the petition and we looked at it and we found these five -- these five water rights right here.

And we looked at these five water rights, these five water rights have three separate owners. And they were listed as individual lines on the spreadsheet that was counted to total those.

Diamond Valley Hay Company signed the petition for all five rights, that counted as five votes. John Marvel was listed as the owner -- as the co-owner for all five

rights. He didn't sign, but then it says oh, because Diamond Valley signed, we're going to count his votes and then counted as an additional five votes.

James and Pamela Buffham were listed as co-owners for four of the rights, they didn't sign, but they were also counted as another four votes because the co-owner Diamond Valley Hay Company signed.

So you've got written up with -- this was tallied in the petition as 14 votes in support of the plan even though you have three owners, three actual people and five water rights.

Finally, the evidence was not properly vetted. The primary pieces of scientific evidence the State Engineer relied on was not supported by testimony, was not subjected to cross-examination and was not capable of independent verification.

We said the Appendix D, the hydrology report, no identified author. We have no idea who wrote that or what their qualifications were, whether they're a hydrologist, an engineer, anything.

We have no way to know their credentials or expertise. And that author didn't -- nobody -- nobody stood up and provided any testimony saying I'm the author of this and I'm attesting to what's in them.

Appendix I, again, the author did not provide any testimony, was not subjected to cross-examination, the memo didn't include any reference to citation or peer-reviewed model report, didn't identify what assumptions were used, there's no way to independently verify based upon that memo the test -- the model simulation results.

And the State Engineer didn't consider alternative approaches. He claims in his answering brief that he was prohibited from considering alternative approaches, that his hands were tied, all he could do is approve or disapprove the plan that was submitted to him.

But as everybody who studies administrative law knows, the power to approve includes the power to conditionally approve. He could have approved it with conditions.

Now, they may have -- those conditions may have forced him to go back and have the GMP authors vote on those -- those conditions and whether they wanted to continue the plan with those conditions, but he had the full authority to consider other methods of reducing pumping.

What are those other methods? We talked about them before. Voluntary transfers between seniors and juniors. Voluntary transfers, not forced transfers. Rotated water schedules. Installation of water conservation infrastructure.

Importing water from other basins. Planting of less water intensive crops. These are all things that could have been considered and weren't.

Instead we went with changing our water right system as we talked about at the beginning of time. In 2015, once Mike Young came in with that Australian scheme it became all about -- not about this stuff, not about the voluntary stuff and the conservation stuff, it became all about changing the water right system so that we could create tradable shares and monetize the water.

So in conclusion, Your Honor, we respectfully request that you reverse Order 1302 in its entirety. It violates Nevada water laws, it's not supported by substantial evidence and the State Engineer didn't follow proper procedure.

In the alternative, you could remand it for further evidentiary proceeding. We actually honestly believe that with the violations of Nevada's basic doctrines of prior appropriation, there's just simply no way that even additional evidence will -- will cure the defects in this plan.

And so we ask that you overturn it.

THE COURT: Thank you, Mr. Rigdon.

MR. RIGDON: Thank you.

THE COURT: What the court's going to do at this

time is to take our noon recess. It's about a quarter to 1:00.

The court's going to reconvene at 2 o'clock, about an hour and 15 minutes. We have some flexibility. If there's difficulties getting lunches we'll just sort of monitor it.

We'll try to start again at 2 o'clock and we'll start at that time with the Baileys' presentation and continue afterwards. Okay. Take our noon recess.

(Lunch recess at 12:48 p.m.)

EUREKA, NEVADA, TUESDAY, DECEMBER 10, 2019, P.M. SESSION

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THE COURT: Let the record reflect that this is the continuation of our case. We have the presence of the parties, their counsel. We have the presence of Mr. Mixson who is representing the Bailey petitioners.

Before Mr. Mixson's argument, just as a trailer to Mr. Rigdon, if any of you have PowerPoints today, make copies of those and send them to my office with the exception of any exhibits that have been ordered deleted through the argument, cull those and then send -- send the others over. Okay? On behalf of the Baileys.

MR. RIGDON: Thank you, Your Honor. Good afternoon. Chris Mixson from the Wolf Rifkin law firm on behalf of the Bailey petitioners. And with me today in the front is Tim Bailey and in the first row of the audience is his wife Connie. And also in the front row is Carolyn Bailey and in the audience is her husband Fred Bailey.

And I brought copies of my PowerPoint that I can leave with the -- your clerk today.

THE COURT: Thank you.

MR. RIGDON: So, Your Honor, I'd like to start my presentation with a relatively brief wrapped around both the

Baileys' interest in this matter and then I will discuss the GMP and Order Number 1302, then we'll get into the legal arguments.

Our legal arguments are that the GMP violates the doctrine of prior appropriation and beneficial use. It also violates the statutory change application procedures in Nevada law. It continues and exacerbates adverse impacts to senior vested surface water rights.

And also we argue that surface water rights should have been allowed to vote and they were precluded from doing so.

So, as we stated in our briefs, the -- Elwood and Robert Bailey, the brothers' homesteaded in Diamond Valley in the 1860s, the Bailey family has been here a long time. The Bailey Ranch has been recognized as in continuous operation since around 1863. And the Bailey Ranch holds numerous vested senior surface water rights.

In addition to the ranch and vested surface water rights, the Baileys hold five senior and one junior irrigation groundwater permit. And the permit numbers and acre foot duties are listed in this slide.

So starting in the 1970s, the State Engineer began to approve irrigation permits for groundwater use that far exceeded supply, we've been over this with Mr. Rigdon.

The recognized perennial yield of Diamond Valley groundwater aquifer is about 30,000-acre-feet a year.

The State Engineer has issued permitted rights for approximately 126,000-acre-feet per year. I thought it was important to note that that permitted rights number is -- for irrigation does not include non-irrigation uses such as domestic wells.

And then it's estimated or at least it was estimated in 2016 that approximately 76,000-acre-feet of groundwater was pumped for irrigation in Diamond Valley.

So the balance there is 46,000-acre-feet of pumping at least in 2016, and I think that number is pretty constant for alluvial pumping annually in the basin.

And then I also thought it was important that we get into this that there are approximately 50,000-acre-feet of groundwater permits that are not pumped.

It's not clear from the record in that 50,000-acre-feet how many of those are perfected, meaning the water has actually been put to beneficial use and the certificate's been issued versus how many of those are unperfected and have not had their beneficial use perfected.

So in 2011, as we know, the Nevada legislature passed the groundwater in the plain statutes, that's NRS 534.037 and 534.110(7). Following that in the summer of 2014,

as the record shows in this case, the local groundwater users were invited to and many participated in a scoping process to determine how are we going to deal with this overpumping problem.

That -- we'll go into a little bit more detail about that process in later slides.

So in October of 2014, the Eureka Conservation District sent a letter to groundwater users in Diamond Valley inviting them for their input on whether they would support a voluntary designation of Diamond Valley as a critical management area under NRS 534.011(7)(b).

The record's not clear about why that effort was not followed through with. There's some documents in the record about vote totals, but it doesn't exactly shed light on why a voluntary CMA designation never took place and wasn't further pursued. But because it wasn't by -- in August of 2015, the State Engineer himself designated Diamond Valley as a critical management area under NRS 534.110(7)(a).

So I want to go back to the 2014 local scoping process. And this gets into some of the arguments you read in the briefs about whether the Diamond Valley Groundwater Management Plan was the product of local input or from somewhere else.

So I have a few slides about the results of the

2014 local scoping process. And here's one solution that was proposed in the solution summary in 2014, its voluntary water rights by us. And this is an idea where there's a recognition that there's too many people pumping groundwater and so we're going to try to find some money for willing sellers to sell their groundwater and essentially relinquish their use of those permits in exchange for getting paid.

And the solution summary goes through various ways of potentially raising the funds for these voluntary buyouts. A $2500 per year fee on all active pivots. And then a couple ideas were based on some proceeds that had been generated through activity related to the claim in the local area.

In addition to voluntary water rights buyouts, the 2014 local solutions that came forward were that a lot of them had to do with irrigation efficiencies. Again, the purpose of these is to reduce the demand on the aquifer.

So mechanical or operational efficiency improvements, state of the art sprinklers, banning end guns on the ends of the pivots, metering wells, establishing an irrigation season that would limit when irrigation would take place, banning watering on one or more days per week, again, banning watering during the afternoons, fallowing, which is taking lines out of production for temporary periods of time,

monitoring soil moisture, again, that's to increase efficiency, drip irrigation to increase efficiencies and then trying to see if the federal government can help us out as well with the problem.

Continuing on with the solution summary for 2014, another idea that came forward was lower -- using lower water use crops to again reduce the demand for irrigation. And then finally, the final solution summary recognized that they may have to modify state water law to allow nonuse of water without losing the right. This is related to forfeiture and abandonment and use it or lose it, which we'll get into.

But what I think is important from this 2014 process, which was truly the local process is the solution summary here contains no recommendations regarding the water rights marketing scheme, property rights, unbundling, any of those sort of core concepts that developed in the Diamond Valley GMP, none of those came forward after the scoping process with the local water users.

And also there's nothing in the record that shows that these local solutions from 2014 would not work. In other words, they were just discarded. The record doesn't have any indication of why they were discarded.

So instead of the 2014 local scoping process leading to what should be in the Groundwater Management Plan,

we've talked a lot in the briefs and Mr. Rigdon talked about Professor Young from Australia, his unbundling if private property.

This concept emerged in recent Diamond Valley around 2015, after the time that the Eureka Conservation District took the lead role to develop the Groundwater Management Plan.

And again, Mr. Young's specific unbundling of private property concept in the water marketing scheme was not mentioned in the 2014 local solution summary. And the record on appeal in this case and the State Engineer's Order 1302, which approved the GMP, they don't discuss the 2014 local solutions as compared to the 2015 Michael Young unbundling concept.

And in the respondents' answering briefs there's no explanation of again why the 2014 scoping summary was thrown out and why Mr. Young's unbundling concept was what was carried forward.

So, I -- this is a -- sort of a screen shot from the executive summary of Professor Young's 2015 paper and I just included this to show that, you know, Mr. Young is an Australian economist and his paper from the beginning, he recognized that it's a blueprint for pilot testing in Diamond Valley.

And he says that the concepts were developed as a blueprint and derived from the Australian experience. And I include this to drive home the point that Mr. Young's scheme is not the product of the local groundwater users.

So what does the GMP do? It converts water rights which are private property into shares. And when converting water rights into shares, the most senior water right was given just shy of one share per acre foot. And the most junior water right was given eight tenths of a share per acre foot.

And this is what's referred to in the GMP as the 20 percent spread or the priority factor. And this was the sole way that the GMP attempted to remain compliant with the prior appropriation doctrine.

THE COURT: Mr. Mixson, if it's possible I think the sheriff is going to help you out a little bit to just speak more directly into the mic. I could hear you -- and although this isn't for everyone.

MR. RIGDON: Okay.

THE COURT: It would be good that they could hear. See how that works.

MR. RIGDON: Is that better? Okay. So back to the groundwater management plan's core provisions. It converts water rights into shares and we have the 20 percent

spread, the priority factor. And it's important to note that the conversion is not one for one right.

So everyone's water rights are converted from either one -- just shy of one share per acre foot to eight-tenths of a share per acre foot or somewhere within that spread.

So after converting water rights to shares, the Groundwater Management Plan allocates on an annual basis a certain amount or volume of water to each share.

So that in year one, which was 2019, this past irrigation season that just ended, each share was only provided 0.67-acre-feet per share. So two-thirds of a -- of a -- of the original water right after applying the priority factor.

And so by year 35 it's 0.307-acre-feet per share or one-third. You get -- which is a reduction of two-thirds.

Okay. In addition to converting property into shares, the GMP also allows for the easy transfer of shares and allocations among groundwater users. They can be freely bought, sold or traded.

The only real limitations on transferring allocations or shares under the GMP is that for -- if it's a new well or an additional withdrawal from an existing well, then the State Engineer can only disallow the transfer if it

impairs existing rights and it's not in the public interest. But he must do that within 14 days.

So it severely limits the State Engineer's ability to review these transfers of allocations because he has to make these determinations within 14 days. If he doesn't, the transfer is deemed approved.

For existing wells the State Engineer could only disallow the transfer if you exceed the original well's flow rate and it conflicts with existing water rights.

And then I think it's important to note Section 10.2 potentially delegates this entire obligation to the "water manager," which is a new position created under the Groundwater Management Plan.

And so Section 10.2 reads, "Whenever this GMP references State Engineer, this may include the water manager or State Engineer designee as determined through the State Engineer's discretion."

So it's possible that the State Engineer himself wouldn't even be presented with these allocation transfers, that it would go to the designated agent of the State Engineer.

So in addition to converting shares or water rights to shares and free transfer of shares, the GMP also allows for the novel concept in Nevada at least of water

banking. And water banking allows unused annual allocations to be banked in the aquifer for future use. And it's not just for the next year, it's they're banked forever and they can be used indefinitely into the future.

And the banking also allows for the banking of unperfected or paper water rights, which as we discussed there's about 50,000-acre-feet of unused water rights, it's not clear how much of that is unperfected, but all of that can be banked even though it's never been used in the past. Or it's not being used in the present.

And the only real limitation on the water banking is that it suffers an annual depreciation. And in the southern valley that annual depreciation is only one percent, so I would argue that's relatively de minimus.

And in the northern valley it's 17 percent, which I think is rather large, especially compared to the one percent in the south of the valley. And this banked water depreciation according to the GMP was initially developed using a hydrologic watering model, but that model is not part of the record. And, in fact, in Order 1302 the State Engineer said that the depreciation was actually a result of a compromise and not so much the result of the water modeling itself.

And as to these annual depreciations of banked

water, Order 1302 didn't rely on any other evidence in the record to support penalizing the northern banked water of 17 percent while only penalizing in the south one percent.

So that's -- that's the GMP in a nutshell.

So what is the GMP's effect on the Baileys' water rights? As I said, the Baileys have five senior groundwater permits. And prior to the GMP the total amount of water rights under those five permits was just shy of 2,000-acre-feet. Year one, which was this year, the Baileys' allocation was only 1,250-and-change-acre-feet.

Year 15 it goes down to 820. And by year 35, the end of the groundwater management plan's term, they're cut down to 568-roughly-acre-feet. I do want to say for the record these calculations aren't my own, neither the GMP nor the State Engineer in Order 1302 calculated the individual allocations to each groundwater permit, so the caveat there, like Mr. Rigdon, I'm an attorney, not an accountant, but I think these numbers are accurate.

But the point here is after 35 years the Baileys are reduced from almost 2,000-acre-feet down to 568-acre-feet. And that's -- under the GMP that's all they would be permitted to pump, even though they have senior groundwater rights.

So the State Engineer Order Number 1302, this is the State Engineer's order that's the subject of the Baileys'

petition for judicial review. It approved the Diamond Valley Groundwater Management Plan.

The State Engineer then entered Order 1302 determined and stated that the Groundwater Management Plan does deviate from the prior appropriation law. But he approved the GMP nonetheless. He argued that it must be the case that the legislature intended to allow these deviations from law. And he argued that the application of the priority factor to the conversion of water rights into the shares "honors prior appropriation."

And the State Engineer in Order 1302, he also recognized that the Groundwater Management Plan violates Nevada's beneficial use doctrine by allowing banking of unperfected water rights. But approving nonetheless on the unsupported claim that there was not sufficient time to undergo statutory forfeiture proceedings of these unperfected paper water rights.

So the Baileys have also claimed that the State Engineer in Order 1302 and the Groundwater Management Plan adversely affect their senior vested surface water rights. The State Engineer determined in Order 1302 that he didn't need to address those impacts, he didn't say there weren't impacts, he said he did not need to address them because they were not required by the plain language of the Groundwater

Management Plan statutes or the legislative history.

He also determined that the existing statutory safeguards for water rights transfers in Nevada law were unnecessary for the GMP because he still has authority to review change applications and it's similar he claimed to his authority for reviewing temporary change applications under existing law. Temporary change applications being those that are for periods one year or less.

Also in State Engineer Order Number 1302 the State Engineer did not undertake any independent scientific or hydrologic analysis of the claims made by the Groundwater Management Plan proponents with respect to whether the GMP would actually work, whether it would actually result in reducing in pumping down to or below the 30,000-acre-foot perennial yield.

So that was Order 1302 in a nutshell. I'm going to move in to discussing the prior appropriation beneficial use doctrines. I want to start with the State Engineer's own statement on his website.

He says, "Nevada water law is based on two fundamental concepts, prior appropriation of beneficial use. Prior appropriation, also known as first in time, first in right, allows for the orderly use of the state's water resources by granting priority to senior water rights."

I agree with the State Engineer, prior appropriation and beneficial use are absolutely the foundations of Nevada's water law.

So quickly, prior appropriation doctrine. Colloquially known as first in time, first in right. The way this works is that the first person to appropriate water has a senior claim to that water over all others who come after him in time.

And in times of scarcity junior water rights can only exercise their rights after the senior water rights are fulfilled. That's what we mean by first in time, first in right. That's why the prior appropriation doctrine is the foundation of the law. Even as far back as 1885 when the Nevada Supreme Court recognized that first in time and first in right is the way our water law is structured in Nevada.

Similarly, beneficial use doctrine. This is -- simply stands for the proposition that if you're going to use water in Nevada you must use it for a beneficial purpose. This is recognized in NRS 533.035, "Beneficial use shall be the basis, the measure and the limit of the right to use water."

Your beneficial use of water must be a recognized beneficial use. The State v. Morros case from 1988 tells us that beneficial uses are established either by statute or by

longstanding custom.

Beneficial use includes a component that the water is actually used. You can't -- that's -- this is the use it or lose it proposition under the doctrine of beneficial use. I cite a statute here, 533.380, which shows us the water must be beneficially used within ten years of the time your original permit is granted. After that you have to use it at least once every five years to avoid forfeiture or abandonment.

So the take home here is that to establish the water right you have to actually use it and to keep the water right you have to keep using it. You have to actually keep using it.

So how does the Groundwater Management Plan treat the prior appropriation doctrine? As we discussed, it converts water rights into shares and it unbundles the private property rights of the water into shares and allocations.

There's no dispute that this is a violation of the prior appropriation doctrine. The State Engineer recognized it in Order 1302. And I think all of the respondents recognized in their briefs that this unbundling concept must violate the prior appropriation doctrine in order for it to work.

The reason that it violates prior appropriation

is that it restricts senior groundwater pumping while at the same time allowing junior water rights to continue pumping. And as we established, the prior appropriation doctrine does not restrict senior rights before it restricts junior rights.

And again, in the Baileys' case it violates prior appropriation because by the end of the 35-year period, they're reduced 70 percent from the face value of their water right, meaning they're only pumping 30 percent of the face value while junior water rights continue to pump.

This is literally a redistribution of water from senior water rights to junior water rights in violation of the prior appropriation doctrine.

So how does the GMP violate the beneficial use doctrine? As we established, there are approximately 50,000-acre-feet of irrigation groundwater permits that are not being pumped. And we don't know from the record what amount of that 50,000-acre-feet are unperfected, meaning they were -- they've never been pumped. We can't establish that from the record.

So -- but what we do know is that the Groundwater Management Plan converts all unused water rights, even unperfected water rights into shares. And after they're converted to shares an allocated water right on an annual basis, they can be banked and then those banked allocations

can be sold and traded to other users of water.

This violates the beneficial use doctrine because it automatically perfects these previously unused and unperfected water rights. The GMP has created a new beneficial use in Nevada of aquifer banked water. That's never been recognized and it's still not recognized in the statute and it's not recognized by any longstanding custom.

As I said, beneficial use requires that the water actually be used. When water allocations are banked it's literally the opposite of actual use, they're not used. The water is left in the aquifer to be taken out at some future time after those allocations are either transferred to someone else or used by that original shareholder.

Had the State Engineer or the Groundwater Management Plan not allowed banking of these unused paper water rights it would have increased the number of shares that the perfected water rights would have been granted under Groundwater Management Plan.

And so by allowing unperfected paper water rights to be converted to shares it actually punishes the water right holders who have perfected their water rights.

So what do the relevant statutes say about Groundwater Management Plan development and approval? NRS 534.0 -- sorry, 534.110, this is the curtailment statute, and

subsection 6 provides the State Engineer with the discretion to issue curtailment orders if the pumping in the basin exceeds the perennial yield.

And subsection 7 is an exception to subsection 6 that says but if the basin is designated as a critical management area, it takes away the State Engineer's discretion and says he shall curtail by priority if no Groundwater Management Plan has been approved within ten years of the scheme of this application. There's nothing in that statute about abrogating or repealing or undoing the prior appropriation doctrine.

Similarly, NRS 534.037, this I admit puts the Groundwater Management Plan development into the hands of local users. And it provides the five or six mandatory factors for the State Engineer to consider when approving a Groundwater Management Plan. And again, this statute also lacks any express language about abrogating or repealing prior appropriation or beneficial use doctrines.

Neither of these statutes are ambiguous, they do not say that the State Engineer can ignore prior appropriation or beneficial use. It's -- there's no reading of them that could give you that interpretation.

In fact, NRS 534.037(2), these are the factors that the State Engineer must consider. The language there

says he must consider those factors "without limitation." And that means that those are not the only factors that the State Engineer is permitted to consider.

He can consider whether or not a Groundwater Management Plan violates the prior appropriation doctrine or violates the beneficial use doctrine.

What the State Engineer argues in his answering brief is that he is only allowed to consider these five factors. And any factor outside of these including whether or not the Groundwater Management Plan complies with prior appropriation or outside of his authority.

There's no such language in the statutes. In fact, he is given authority of this without limitation language in the statute to consider prior appropriation of beneficial use.

In fact, it would be unworkable if the standard of statutory interpretation was that the legislature was required to list all the other laws that its new statute had to be in compliance with. That would never work and that's why the presumption as we'll get to is that there is no repeal of existing law.

The -- the prior appropriation doctrine and the groundwater water management plan statutes are not in conflict, and we'll move on to that issue.

If they were in conflict you could argue that there was an imply for repeal, but they're not in conflict. If you're going to argue that the prior appropriation was impliedly repealed, their presumption is against that argument.

The -- the West Realty case says where express terms of repeal are not used the presumption is always against an intention to repeal an earlier statute. In a more recent Nevada Supreme Court case, the Happy Creek case says the legislature is presumed not to intend to overturn long established principles of law.

Other cases, the Rommel case and the Ramsey case explain that the implied -- to impliedly repeal you have to show that the two statutes at issue are flatly and irreconcilably redundant. The Washington case says there must be no other reasonable obstruction of the two statutes except that one repealed the other.

And then Hefetz versus Beavor case says what you're really required to do is attempt to harmonize two potentially conflicting statutes before you determine if one is repealed by the newer one.

So the argument that the respondents make on this point is that it must be the case that the groundwater management plans repeal the prior appropriation doctrine

because the Groundwater Management Plan statutes were specifically passed by the legislature to avoid strict curtailment by a creditor. But this argument conflates curtailment by priority of the prior appropriation doctrine as a whole.

Strict curtailment is only a remedy under the prior appropriation doctrine. I agree, it's the ultimate remedy under prior appropriation, but it's a remedy. It's not synonymous with the doctrine itself.

That's the error the respondents made in their argument. There are actually multiple alternatives for reducing pumping that would on the one hand continue to comply with the prior appropriation doctrine and also not be strict curtailment.

And these were -- many of these were -- came forward in the 2014 local scoping summary. So voluntary water rights buyouts, that is a way to reduce the demand on the aquifer without strict curtailment while complying with prior appropriation.

The same for irrigation efficiency improvements. The same for establishing an irrigation season and establishing -- and prohibiting watering days and times, fallowing, establishing high value, low water use crops.

These are all ways that a Groundwater Management

Plan could on one the hand comply with prior appropriation doctrine and not use the ultimate remedy of strict curtailment.

Which shows that the Groundwater Management Plan statutes and the doctrine of prior appropriation are not in conflict with each other.

So how else does the Groundwater Management Plan violate law? As we've discussed, it allows liberal transfers of water allocations. The whole point of these liberal transfers by the way is to prevent the State Engineer from exercising the typical statutory oversight over transfers of water rights.

So in Section 13.8 and 13.10, again, whether or not the water is banked, it can be pumped anywhere else within the valley. The only limit to these transfers is -- is if you're -- if it's a new well or the transfer to an existing well would exceed that well's existing pumping volume, and only then the State Engineer is only given 14 days to make the determination whether or not this transfer would violate existing rights.

So this is contrary to the existing statute, 543.325 and 533.37072. These are the statutes that require formal applications to the State Engineer to transfer the place of use, manner of use and the purpose of use of any

water right under Nevada law.

In all cases under these statutes the State Engineer is required to make a determination whether or not the proposed transfer conflicts with existing rights or the public interest. And again, the provisions of the Groundwater Management Plan that deep transfers approved within 14 days violates these statutes because it removes the State Engineer's authority.

This can result in the lack of any analysis of whether potential transfers will in fact impact existing water rights.

And finally, it violates the Young paper because in the Young paper, which was the blueprint for this Diamond Valley Groundwater Management Plan, Professor Young said if you're going to do these liberal transfers of water rights allocations, you need to determine up front what the impacts are going to be when you make those transfers. And that way when it comes time to do the transfer the impacts are already considered and the State Engineer can approve them. But the Diamond Valley Groundwater Management Plan didn't do that.

There's no analysis in either the GMP or in Order 1302 that does this work up front to determine whether these transfers are going to violate existing rights.

The GMP also has ongoing and extended -- extends

existing adverse impacts to senior vested water rights. The vested water rights in Diamond Valley are primarily surface water rights from springs that are highly groundwater dependent. And because of the pumping in the valley these springs have been decimated.

So the GMP does nothing to address the impacts of existing pumping on the surface water -- vested surface water rights.

After 35 years the GMP still allows irrigation withdrawals to be at least 34,200-acre-feet. As we've established, that's -- that is above the existing perennial yield estimation.

So the GMP would not actually raise the water table. At best we don't know this for sure because no one else has done it, but at best the GMP is going to slow the decline of the groundwater table, which is not going to help the vested water rights, it's going to actually -- the lower the water table goes the worse the impacts are to the vested water rights because it's going to be longer before those water rights will ever see sufficient stream flows again to exercise their vested claims.

This violates NRS 533.085(1) which reads nothing contained in this chapter shall impair the vested right of any person. Senior vested water rights cannot be impaired by

anything in the Nevada statutes because they are pre-statutory senior water rights. And the Groundwater Management Plan violates that by exacerbating the impacts to these senior groundwater dependent vested water rights.

In the same vein the water banking actually delays aquifer recovery. So by allowing the banking of unused water it's going to delay the recovery of the aquifer because that water is going to be pumped out eventually; right? The whole purpose of banking water is -- is if you're not going to use it this year, it can be transferred or you can pump it out yourself in the future.

So this does nothing to help the decline of the aquifer because it just results in letting unused water be pumped out at some point in the future.

And there's no analysis in the State Engineer's Order 1302 about how quickly the aquifer might have recovered had they not allowed this arbitrary water banking scheme under the GMP.

Finally, I want to discuss the voting procedure a little bit. I agree first of all with Mr. Rigdon's presentation that the math and the counting of the votes in Order 1302 is incredibly difficult to follow. And it's not clear at all that they actually got the 51 percent required. So I will rely on the calculations that Mr. Rigdon did in that

respect.

Our primary issue on the voting though is that the statute doesn't say only groundwater rights get to vote. The statute at issue, 534.037, simply says the petition must be signed by the majority of the holders of permits or certificates to appropriate water in the basin. It doesn't say the holders of groundwater permits or certificates. It doesn't say the holders of permits or certificates to appropriate groundwater in the basin.

It just says permits and certificates to appropriate water. This does not preclude surface water rights from having the opportunity to vote on the GMP which frankly affects their interests in their surface water rights.

The GMP proponents only sent the petition to approve the Groundwater Management Plan to groundwater permit holders. And so we think the State Engineer should have determined the number of surface water rights in the -- in the basin and that should have gone into --

THE COURT: Mr. Mixson, don't -- do vested rights claimants hold permits or certificates?

MR. RIGDON: Most vested rights at this point -- Your Honor, that's a good question. Most vested rights at this point because the basin is under adjudication do not hold permits or certificates, but this argument is also about

surface water rights that do hold permits or certificates. So there are stock water and other water rights that -- that do hold permits and certificates that are not vested.

THE COURT: Thank you.

MR. RIGDON: Thank you. And that's -- that's the end of my presentation, Your Honor. In conclusion, because the Groundwater Management Plan violates Nevada statute, we request that the State Engineer's decision be reversed and -- because it was arbitrary and capricious.

THE COURT: Thank you.

MR. RIGDON: Thank you.

THE COURT: The court's going to just take a brief recess to allow the State Engineer to set up his presentation.

So, be approximately ten minutes, we'll go back on the record for Mr. Bolotin's presentation. Court's going to be in recess.

(Recess.)

THE COURT: We are in the continuation of our hearing. We have the presence of all the parties, counsel for the parties and State's counsel, is it Mr. Bolotin or Bolotin?

MR. BOLOTIN: Bolotin, Your Honor.

THE COURT: Mr. Bolotin, I want to get it right, representing the State Engineer. You can go forward with

respondents' argument.

MR. BOLOTIN: Thank you, Your Honor. And I don't have a PowerPoint, but I think it will be okay. Good afternoon, Your Honor, my name is James Bolotin, senior deputy attorney general with the Nevada Attorney General's Office here today on behalf of the Nevada State Engineer. I just want to point out with me is Micheline Fairbank and Adam Sullivan, both of whom are deputy administrators with the Division of Water Resources.

THE COURT: Okay. Thank you.

MR. BOLOTIN: Overall petitioners' arguments against Order 1302 are best summarized as displeasure with the majority approved Diamond Valley Groundwater Management Plan or GMP.

However, this disagreement of the GMP adopted by the State Engineer pursuant to the plain unambiguous language of NRS 534.037 is insufficient to strike down Order 1302.

The State Engineer properly approved the GMP pursuant to his role outlined in NRS 534.037 and this decision is based on substantial evidence in the record. For these reasons, the State Engineer respectfully requests this court uphold Order 1302.

Just briefly I'm going to touch on some of the facts though we've been through a lot of them so far this

morning.

As has been discussed, Diamond Valley has a complicated history as far as water goes. In that it is a major successful farming area with approximately 26,000 acres of irrigated land producing primarily alfalfa and grass hay with an approximate farming income of 22.4 million dollars as of 2013.

However, Diamond Valley is also over appropriated and overpumped. As the perennial yield in the basin is estimated at 30,000-acre-feet of pumping as of 2 -- 2016 it was estimated approximately 76,000-acre-feet annually and existing irrigation rights total approximately 126,000-acre-feet.

These conditions have existed for over four years with groundwater levels declining at a rate of up to two feet per year in some areas of Diamond Valley.

As a result and in light of the passage of Assembly Bill 419, which resulted in the adoption of NRS 534.110(7) and NRS 534.037, on August 25th, 2015, the State Engineer issued Order Number 1264, designated Diamond Valley as a critical management area or CMA. Diamond Valley is the first and currently only CMA in the state of Nevada.

This CMA designation started a ten-year clock such that if Diamond Valley remained a CMA for ten years the

State Engineer would be required to curtail by priority unless he approved the GMP pursuant to NRS 534.037.

While discussions regarding a GMP for Diamond Valley predated the actual CMA designation, this designation formally started the ten-year clock. Over the course of the next three years following the designation, water right holders in Diamond Valley met regularly to consider options for a GMP and started putting one together in order to reduce pumping in order to avoid curtailment by priority.

Originally this was handled by a large group of the water right holders until February of 2016 when the group elected an advisory board made up of different types of water right holders in Diamond Valley who then took on the heavy lifting and would run their progress by the rest of the community at larger workshops.

At all times the entire purpose was to draft a GMP that produces pumping in a way that by statute set forth the necessary steps for removal of the basin's designation as a critical management area. That was the requirement pursuant to NRS 534.037(1).

As a result -- as a result of this process, on August 20th, 2018, a majority of the water right holders in Diamond Valley filed a petition to adopt the GMP with the State Engineer.

And this is where the State Engineer's formal consideration of the GMP began. Petitioners spent a lot of time this morning and this afternoon reviewing facts and history outside the record on appeal. And while much is made by petitioners about the State Engineer's involvement as a resource in the creation of the GMP, ultimately what matters here was that a majority of the people approved of the plan that reached the State Engineer's desk.

The State Engineer and his staff served as a resource during the GMP's development, but ultimately it's the community's plan by virtue of the fact that the majority of the community wanted it approved.

Pursuant to NRS 534, which is the groundwater -- groundwater law for the state of Nevada, the State Engineer found the a majority of groundwater permits signed and he used two different calculations. And under either scenario he found a majority.

This is that record on Appeal 3, which is from the Order 1302. He found a majority based on signatures alone. And he also found a majority based on confirmed owners of record based on those signatures.

In accordance with NRS 534.037, after receiving the majority approved GMP and after adhering to the mandatory notice provisions, the State Engineer held a public hearing on

October 30th, 2018 right here in the Eureka Opera House.

Following the hearing the State Engineer held open the period for written public comment for three working days. After reviewing all testimony at the hearing and all public comments and after considering the required statutory factors and determining that a majority of permit and certificate holders signed the petition, the State Engineer issued Order Number 1302 on January 11th, 2019.

The order was timely challenged by the petitioners Sadler Ranch, the Renners and the Baileys and that's why we're here today.

One other important note, on September 4th, 2019, prior to the filing of opening briefs this court issued its order granting motion in limine thereby limiting the evidence in this case to the State Engineer's record on appeal and finding that the public hearing process provided notice and an opportunity to be heard thus satisfying due process.

Quickly, Your Honor, I'd like to review the standard of review. Water law proceedings are special in character and the boundaries of the court's review are strictly limited to the provisions of such law as established by statute and interpreted by Nevada Supreme Court. This is from the application of Filippini case, 66 Nevada 17 from 1949.

Per NRS 533.450(10) -- well, sorry, per NRS 533.450, proceedings of reviewed decisions of the State Engineer are in the nature of an appeal and informal in summary. Pursuant to sub 10, the State Engineer's decision is prima facie correct and the burden of proof is on the party attacking the same.

Ultimately, the court's role is to decide whether the State Engineer's decision is supported by substantial evidence in the record. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.

The court may not pass upon the credibility of the witnesses nor reweigh the evidence. And this is all from the Revert versus Ray case.

And generally the State Engineer's factual determination will not be disturbed so long as those determinations are supported by substantial evidence in the record.

Additionally, an agency charged with the duty of administering an act is impliedly clothed with the power to construe it is necessary precedent to administrative actions and great deference should be given to the agency's interpretation when it is within the language of the statute.

That's from the State v. Morros case, 104 Nevada

709, as well as the Anderson Family and Associates versus Ricci case, 124 Nevada 182.

However, courts review purely legal questions without deference to the State Engineer's ruling. And that was stated recently this year in the Sierra Pacific Industries case.

Here the ultimate issue being challenged is the State Engineer's approval of the Diamond Valley GMP under NRS 534.370. And therefore, the abuse of discretion standard should be applied to the limited discretion that the State Engineer had under this statute.

The key issue here, Your Honor, is the State Engineer's proper exercise fits discretion. In 2015, the State Engineer properly exercised its discretion in Diamond Valley per NRS 534.110(7) as he may designate a CMA any basin on which withdrawals of groundwater consistently exceed the perennial yield of the basin.

It is not disputed that the CMA designation was proper, and to the extent it is it's too late, as Order Number 1264 went unchallenged is therefore in full force and effect pursuant to NRS 533.450(1).

Pursuant to this discretionary CMA designation, should the designation remain in place for ten years the State Engineer is required to order that withdrawals including

without limitation withdrawals from domestic wells be restricted in that basin to conform to priority rights unless a Groundwater Management Plan has been approved for the basin pursuant to NRS 534.037. And that's from NRS 534.110(7).

Thus, NRS 534.037 provides groundwater users in a CMA with a chance to create a GMP and petition the State Engineer for approval of the GMP, specifically in order to avoid priority administration or in other words curtailment.

This requires the petition be signed by a majority of the holders of permits or certificates to appropriate water in the basin.

In deciding whether to approve a GMP, again, under the statute approval or disapproval is the extent limit of the State Engineer's discretion, the State Engineer must consider the basin's hydrology, physical characteristics, the geographical spacing and location of groundwater withdrawals, the quality of water, the wells including domestic wells, whether a GMP already exists in the basin and any other factor deemed relevant.

Finally, before approving or disapproving a GMP the State Engineer shall hold a public hearing and take testimony on the plan in the county where the basin lies and notice of the hearing must be done properly for two consecutive weeks proceeding the hearing.

In following the statutory requirements the State Engineer properly limited its focus to the majority approved GMP he received from the water users in Diamond Valley and applied the statutory factors.

The State Engineer disputes the allegations made by petitioners that this isn't really a community-based plan. The fact of the matter is it was assembled by the community and it had a majority vote. That was what was required.

After receiving this petition the State Engineer properly exercised its discretion, which was to either approve or disapprove the plan by looking at certain factors to make the ultimate determination required by statute, does the GMP contain the necessary steps for removal of Diamond Valley's CMA designation.

This is ultimately a question of persuading the State Engineer. Just as the CMA designation of Diamond Valley was a proper exercise of the State Engineer's discretion, the State Engineer can properly utilize its discretion to lift the basin's CMA designation so long as he considers the required factors and so long as a majority approved GMP convinces the State Engineer that it includes the necessary steps to reach a point where he'd be comfortable with lifting a CMA designation, it is proper to use his discretion to approve a GMP.

Thus, the State Engineer just needs to be persuaded based on the evidence that the GMP includes the necessary steps to get the basin to a point where withdrawals of groundwater no longer consistently exceed the perennial yield of the basin. That is exactly what the State Engineer did here in properly approving the GMP in Diamond Valley.

Ultimately the issue in Diamond Valley is overpumping. After considering the requisite factors and the evidence as laid out in Appendix D of the GMP found in ROA476 through 496, as well as other information deemed relevant and presented at the public hearing, all of which is included in the ROA, the State Engineer found that the GMP addresses the overpumping problem such that at the end of the relevant planning horizon he would feel comfortable lifting a CMA designation.

I just want to point out that contrary to Mr. Mixson's argument, at the bottom of page 19 of the State Engineer's answering brief, he does in fact lay out other factors and evidence that he considered in approving the GMP and that's all part of the record on appeal.

At that -- again, once he feels comfortable lifting the CMA designation, at that point along with monitoring any potential edits made pursuant to the language of the GMP, withdrawals would no longer consistently exceed

the perennial yield.

Thus, he approved the GMP in Order 1302 and this is a proper use of the State Engineer's discretion. His findings of fact are entitled to deference. And while the Sadler and Renners provide an expert report, this expert report was considered by the State Engineer but did not persuade the State Engineer. And this court may not substitute its judgment for that of the State Engineer in regards to the evidence.

It cannot be legitimately disputed that in year 35 of the GMP under the benchmark pumping scenario there'll be a dramatic reduction in pumping for less than 50 percent of current levels. Considering that a portion of water use for irrigation infiltrates the soil as secondary recharge and is therefore not entirely consumptive, pumping levels at the end GMP would be such that withdrawals would no longer consistently exceed the perennial yield. And therefore, the State Engineer would lift the CMA -- would feel comfortable lifting the CMA designation.

THE COURT: Let me stop you there. How does that work? How does the math work on there? You know, I've heard math on the other side that it doesn't. Explain that to me, because I'm hearing a figure of 30,000 and I'm hearing a figure of 76,000.

Explain to me the math that you're looking at and how it brings it back into an equilibrium where, you know, where the discharge is -- is, you know, equal to the perennial yield coming back in.

MR. BOLOTIN: I'm going to get to that --

THE COURT: Okay. All right.

MR. BOLOTIN: -- in a second. But basically it is a dynamic plan and it needs to get to a point where the State Engineer feels comfortable that it would no longer consistently exceed the perennial yield.

And in year six of the GMP, the State Engineer and the advisory board will meet to see how it's working. And basically it can be edited if required if the State Engineer comes in in year six and says this isn't working. Or at year ten he's allowed to ratchet up the reductions to make sure that it reaches a point at the end of the planning horizon where he would feel comfortable lifting the CMA designation.

THE COURT: Okay. Thank you.

MR. BOLOTIN: Petitioners argue that the decision to approve the GMP was arbitrary and capricious in large part by injecting requirements into the GMP statutes that don't exist. As I just stated, a GMP must simply contain the steps necessary to lift a CMA designation, meaning it must include the steps such that withdrawals no longer consistently exceed

the perennial yield.

Included in -- included among these requirements that are outside the statute is a time limit for lifting the CMA designation, whereas petitioners argue that the 35-year planning horizon is unreasonable, NRS 534.037 does include any time limit for lifting the CMA designation.

While there's a ten-year clock for which point -- at which point curtailment will occur absent a GMP's adoption, so long as a GMP is approved during that time period the ten-year clock stops.

The GMP's planning horizon does not run afoul of NRS 534.037 and the State Engineer's approval was based upon substantial evidence.

Additionally, the Young paper in the GMP differed and the Young paper is not a source of legal authority in Nevada such that a GMP can violate the Young paper.

Another primary argument of the petitioner is that Order Number 1302 should be overturned because it allegedly violates prior appropriation.

In their reply briefs the State Engineer and the intervening parties are conflating the doctrine of prior appropriation with the remedy of restricting withdrawals by priority.

This distinction is false. Curtailing by

priority is the result of enforcing prior appropriation. The plain language of NRS 534.037 and 534.110(7) make it clear that the legislature was aware of prior appropriation and intended to carve the GMP process outside of the strict application of the doctrine.

It's not an implied repeal or really a repeal at all. When the legislature adopted these statutes in 2011 it created a new process allowing localized areas based upon majority approval to come up with their own plan for the management of problematic groundwater basins that existed outside the narrow confines of existing water law at that point in time.

Even with placement of a statute NRS 534.110(7) following directly after NRS 534.110(6), which is the express groundwater curtailment statute, shows the legislature was aware of prior appropriation and enforcement of the doctrine and intended to provide localities with another option from majority approved.

Noticeably absent from NRS 534.037 is any requirement that a GMP adhere to prior appropriation. Rather as discussed at length there are a number of factors to consider before the State Engineer reaches a fairly straightforward conclusion. Does this do enough to lift the CMA designation?

The Diamond Valley GMP by consistently reducing pumping does enough for the State Engineer to lift the CMA destination. Prior appropriation and enforcement of priorities is already the default under the law. The GMP statutes would be meaningless if not for providing flexibility needed to come to a majority-approved solution like that in Diamond Valley with the GMP that exists outside the rigid contours of the law that existed before the adoption of these statutes.

It's also important to point out the GMP does not ignore prior appropriation. The GMP proponents spent a lot of time as illustrated in the record on appeal discussing prior appropriation and ultimately factored it into the GMP through the priority factor that ensures that senior rights holders retain an advantage over junior rights holders. This results in more shares and more water for seniors. This was agreed to by a majority of the right holders which included both seniors and juniors.

Additionally, the State Engineer retains its authority to manage the basin in spite of the GMP. As discussed in the briefing and Order 1302, the transferability of shares under the GMP is modeled after existing law for temporary change applications.

The State Engineer has 14 days to approve each

proposed transfer and retains the ability to send such proposed transfers to the publication protest and hearing process if he deems necessary.

While existing law concerning temporary changes includes no deadline for the State Engineer to make this determination, the fact that the State Engineer has taken it upon his himself and his office to act within the 14-day time period to determine whether these changes impair existing rights or impact the public interest does not affect the viability of the GMP. It is improper to challenge these potential future challenge -- it is improper to challenge these potential future transfers by challenging the GMP as a whole.

Should someone feel aggrieved by this process later in time as specifically affecting their rights or the public interest, then it is within their right to do it as applied challenge to the transfer pursuant to NRS 533.450 at that time.

Order Number 1302 also complies with the doctrine of beneficial use. Simply because the GMP provides for banking of water rights in the aquifer does not mean that this banking is being construed as a new form of beneficial use or that the water is being wasted. Rather, it's just a length in time that the water will ultimately be beneficially used.

The entire GMP of which the banking component is an important aspect serves the beneficial purpose of resolving Diamond Valley's overpumping such that curtailment can be avoided and the community can continue to prosper.

As to the argument that petitioners make concerning automatic perfection of paper water rights, this is a red herring and seeks to confuse the issues. The key here is that the GMP starts with the sealing of actual pumping, not the sealing of existing rights. Pumping will never exceed current levels and will drop each year. Any water that is pumped will be beneficially used. The State Engineer retains the authority that will assure that water is beneficially used and not wasted.

The suspension of the use it or lose it rules for rights under the GMP also ensures beneficial use rather than runs afoul. The entire purpose of the GMP is to reduce pumping such that the State Engineer can lift the CMA designation for Diamond Valley.

Pursuing forfeiture and abandonment would contravene this goal this goal and would actually likely result in water wasting and more pumping in order to avoid forfeiture.

Additionally, any such forfeiture or abandonment proceedings would almost assuredly get caught up in the

appeals process delaying the beneficial results that would come from the GMP in threatening its ultimate viability.

Additionally, as far as the State Engineer's authority is concerned, he retains the authority to make changes to the GMP's pumping after year ten including increasing the pumping reductions if necessary to lift the CMA designation.

Additionally, modification can be done earlier if monitoring demonstrates that it is necessary. Specifically, Section 26 of the GMP found that ROA246 through 47 sets out the modification process.

While allocations are set for ten years, the GMP can be modified at any time by a majority and there will be a specific review in year six by the State Engineer and the advisory board -- and the advisory board.

As I mentioned earlier, the GMP is a dynamic plan that can be modified in order to ensure that it meets the ultimate goal. Removal of the CMA designation without the need for priority administration.

As to vested rights, this is another red herring raised by petitioners. Vested rights and their associated mitigation rights are not part of the GMP and are not produced in accordance with the GMP.

However, the ultimate goal of the GMP is to

reduce pumping. By doing so the ultimate effect will be that vested rights should actually be improved over the course of the GMP rather than being negatively affected.

Again, the negative effects of vested rights have occurred due in large part to overpumping. By reducing pumping there will be benefits to all in Diamond Valley including to vested rights.

The State Engineer properly improved the GMP by following the plain language of the statute. It is inappropriate for petitioners to read the requirements to mitigate vested rights into the GMP statute that does not exist in the statute. This is especially true considering that there already exists the ability to apply for mitigation rights, which the Baileys and Sadler Ranch have already done.

Sadler Ranch and the Renners' arguments concerning the lack of a storage permit are similarly meritless. The State Engineer found that the GMP is an aquifer storage and recovery or ASR appropriate. But rather complies fully with NRS 534.037.

The ASR statutes are irrelevant. Both in their opening and reply briefs the petitioners make the argument that the water can't be banked because it isn't available for appropriation. This doesn't make sense, Your Honor, because the water is already appropriating. It's kind of like trying

to fit a square peg in a round hole.

These arguments concerning an ASR deal with an entirely different situation and therefore, inapplicable to the GMP's banking provisions that concern existing appropriations converted to shares.

Lastly, the fact that the petitioners dislike the depreciation rates of the banking provisions is insufficient to invalidate the GMP. This is what the majority approved and was based upon substantial evidence from the groundwater flow model associated with the Mount Hope project.

This is an overarching theme of the case, Your Honor, petitioners' dislike of the plan is irrelevant so long as majority approved the plan. That was the case here and the State Engineer properly exercised its discretion in following the statute to improve the GMP based on substantial evidence. That's what was required by the statute and the State Engineer's decision should be upheld.

Lastly, the court already determined that the State Engineer's October 2018 hearing complied with due process in the order granting the motion in limine. And therefore, Sadler Ranch and the Renners should not be rehashing this argument in the briefing or this court.

That being said, due process requires notice of the ability to be heard. Petitioners cannot legitimately

argue that they did not receive notice and did not have an opportunity to be heard as is clearly outlined by the transcript and the record.

Also, Mr. Rigdon spoke earlier about NAC 533, which the statute -- the regulations he specifically cited deal with protest hearings, which are different than the statutorily outlined GMP process. And under NAC 533.110, it specifically refers to public comment as testimony.

So, I think based on the statute, public comment is seen as testimony and it's also laid out that way in other parts of the regulations.

There are a couple points in the Sadler and Renner reply brief that I need to dispute. Specifically in regards to the Lewis case from New Mexico. The State Engineer did not disavow the only supporting authority cited in Order 1302 as alleged by Sadler Ranch and the Renners.

The binding authority for Order 1302 was found in the plain language of NRS 534.037. However, as stated in the State Engineer's answering brief, the Lewis case is a persuasive as an example of another western state allowing flexibility outside the ridged application of prior appropriation.

The State Engineer's Order 1302 literally says, for example, simply because the State Engineer is aware of

obvious factual distinctions between the two situations, including one is obvious that the Lewis case deals with surface water and the GMP deals with groundwater, this is not undue to usefulness of the State Engineer raising this example in Order 1302.

In fact, as the State Engineer argued, the Lewis case showed an example of another western state legislature, in that case New Mexico, allowing flexibility from prior appropriation and it being upheld despite prior appropriation being enshrined in New Mexico's constitution.

Here the Nevada legislature similarly provided flexibility in the form of the GMP statutes and this flexibility is even more proper in light of prior appropriations' absence from Nevada's constitution.

As far as the ambiguity of the statutes is concerned, while petitioners argue that the State Engineer and the intervening parties have different arguments in their briefs, this is belied by the fact that all three responding parties including the State Engineer found that Order Number 1302 complied with the plain language of the statutes which were unambiguous.

On the other hand, it is actually petitioners that lack cohesiveness on this point with the Baileys arguing that the statutes are unambiguous and Sadler Ranch arguing

that they are ambiguous for failing to lay the groundwork before jumping into legislative history.

Sadler Ranch and the Renners furthermore completely take language from Order Number 1302 out of context in their reply brief to try and argue that the State Engineer previously found ambiguity in the statutes.

Where the State Engineer talks about scarce direction, this was specific reference of the legislative history. The State Engineer never found that statutes themselves contained scarce direction but rather found affirmatively that the statute contained six specific and one general consideration codified in the statute and he adhered to these considerations in reaching his determination that the Diamond Valley GMP contained the steps necessary to remove the CMA designation.

The State Engineer saying he has ordered that we look to the legislative history to see if a specific type of GMP was discussed is a far cry from the State Engineer affirmatively saying that a statute is ambiguous.

As clearly indicated by Order 1302, the State Engineer sought to comply with the plain unambiguous language of the statute.

One more point is in regards to these un-passed bills that Sadler Ranch and the Renners discussed earlier.

The Sadler Ranch and the Renners focus heavily on the failure of Senate Bill 81 in 2015, Senate Bill 269 in 2017, which by the way was not a DWR bill, and Senate Bill 73 as somehow illustrating legislative intent that is fatal to the GMP.

This is not part of the record on appeal and there's absolutely no authority for this can of statutory construction and legislative intent at all. In fact, there is substantial contrary persuasive authority.

While this issue hasn't been dealt with in depth in Nevada, California courts have routinely attributed little to no value to un-passed bills as evidence of legislative intent.

While of course it's easy for the petitioners to argue that the bill failed because the legislature wanted to affirmatively uphold prior appropriation, it's just as easy to argue that the bill failed because the legislature found it unnecessary because NRS 534.037 and 110(7) already gave the State Engineer the power to approve the GMP like the one it approved for Diamond Valley in Order 1302.

Simply put, there are too many reasons including that that Bill SB73 had a lot of domestic well language in it that the bill -- for reasons why a bill might not pass to glean any useful inside into the intent of the legislature by virtue of an un-passed bill.

And specifically these cases from California, there's the Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal App 2nd 41, the California Court of Appeals from the Third District, 1968, Apple, Inc. versus Superior Court, 56 Cal 4th 128 from 2013 from the California Supreme Court where they found un-passed bills as evidence of legislative intent have little value.

One last point in regards to the math that was brought up earlier as examples between farmer A, B and C that Mr. Rigdon discussed earlier.

This analysis was not in the briefs and there's no way to factually verify if it's accurate under the GMP as we stand here today on the fly. And I'd just like to object to that use of numbers as it's not on the brief and we had no chance to fact check whether those numbers are correct.

In conclusion, Your Honor, Order 1302 approving the Diamond Valley GMP complies with the plain language of NRS 534.037 and 534.110(7) as the State Engineer considered the necessary factors and held a public hearing before finding the GMP included the necessary steps for removal of Diamond Valley's CMA designation. This is what was required by statute and substantial evidence in the ROA supports this conclusion.

Petitioners' dislike of the plan is simply not

enough to do the hard work that was -- to undo the hard work that was poured into the plan by the local community and agreed upon by a legal majority.

Therefore, Your Honor, the State Engineer respectfully requests that this court affirm Order 1302.

THE COURT: Thank you, Mr. Bolotin.

MR. BOLOTIN: Thank you.

THE COURT: Again, the court will take another brief recess to allow Eureka County to go ahead and get set up for Eureka County's oral argument.

(Recess.)

THE COURT: We're in the continuation of our water rights hearing. Again, we have the presence of all the parties, their counsel. And Eureka County will be making its presentation. Ms. Peterson, you can go forward.

MS. PETERSON: Thank you, Your Honor. For the record, Karen Peterson from Allison MacKenzie law firm representing Eureka County. And I'd also like the record to note that Jake Tibbitts who is the Eureka County Natural Resources manager is also present here today.

THE COURT: Thank you.

MS. PETERSON: Thank you. And, Your Honor, before I get started with my prepared remarks, I just wanted to address one of the questions that you asked the State

Engineer's attorney.

THE COURT: Certainly.

MS. PETERSON: With regard to the numbers and the perennial yield numbers. And so I'd like to -- I don't know if you have a copy of the record in front of you, but I'd like to direct your attention to where you can find the answers to your question in the record.

THE COURT: The record is on a CD and I have it, but it's in CD form. So I can pull it up. If you'll give me the page numbers that will be satisfactory.

MS. PETERSON: Okay. Thank you. So, Your Honor, the consumptive use was analyzed in a lot of detail in putting this plan together, and it specifically stated in the actual plan itself as one of the GMP goals, it's on page 11 of the plan, which is State Engineer's record on Appeal 228.

Under Section 6, the goals that -- the goal with regard to pumping and getting to the perennial yield is to reduce consumptive use to not exceed perennial yield.

So the numbers with regard to pumping are based on consumptive use. And I know Your Honor knows that, for example, when there's irrigation pumping, all of the water that's pumped isn't necessarily consumptively used. And so the targets and the goals in the plan relate to consumptive use and the perennial yield.

And then I would also direct your attention to the State Engineer's analysis, which is in his Order 1302, it's on page 15. And again, that's State Engineer record on appeal 16 where -- where the State Engineer recognizes that the GMP is based on the simple fact that groundwater pumping is the cause of declining water levels and therefore, pumping must be reduced to solve the problem.

And then he goes into a lot more analysis about perennial yield and stabilizing water levels and how he believes that this plan will accomplish those goals.

And then in the third full paragraph down there he concludes that upon implementation the real effect of the plan will be monitored and observed by measuring the change in groundwater levels throughout the basin.

These measurements will be the basis for planned review and any modifications of pumping reduction rates that the GMP requires after an observation period of ten years.

And then again, going back to the plan, if you look at Sections 13.12 and 13.3, which therein the State Engineer record on appeal at page 235, there's all the language in there about modifications made to the pumping levels based upon the measuring that it's been doing and the monitoring that's been going on. And do we need to, you know, more aggressively reduce pumping or less aggressively reduce

pumping.

And -- and then probably finally to point, Your Honor, to the record, there were a lot of questions and answers that were raised during this whole process and they were included in the record on appeal. They were included as a part of the plan that was submitted to the State Engineer's office.

And directing your attention to comments that were made on pages 247, 249 and 252 of the actual plan document that was submitted to the State Engineer, and for your record purposes those are State Engineer record on appeal 464, 466 and 469, you'll see that in response to some of the questions from vested right holders they were concerned that there not be a further net loss of groundwater from the basin.

And in response to those comments, and again, all the three pages that I'm pointing you to and the bullets that I'm pointing you to, those are all related to questions by vested use water right holders.

And wanting to know how there's going to be a stabilization of the groundwater levels and what can we do so that there's no -- no further net loss of groundwater. And again, that gets to that consumptive use concept is this net loss.

And -- and the responses that, you know,

apparently satisfied everybody that put their names on the petition for the plan was -- and I'm going to read this to you because it is important.

You know, it's taken nearly 60 years of over appropriation and overpumping to reach the current overdraft situation in Diamond Valley. And again, this is the response that's provided to those concerns from the vested water right holders about stabilization of water levels and this overpumping and reaching the perennial yield.

The -- the GMP will reduce net pumping to reach the perennial yield about half the time or even one-third of the time if the most aggressive pumping restrictions are imposed. The GMP requires stabilizations of water levels on this same time frame. The GMP reduces pumping from current levels by 30 percent in the first ten years and net pumping to perennial yield and stabilization of water levels within 22 and 35 years.

Pumping reductions after year ten will be informed by robust groundwater monitoring to ensure stabilization of the water table is occurring.

So -- so you can see that the plan envisions that we're going to be moving towards stabilization of the water levels in the ground, you know, in the basin after the first ten years.

And then again, the same type of question about the perennial yield and water levels dropping indefinitely and what is this plan going to do to help with all that and including the vested rights, again, same type of answer and the same information provided in the answer. And again, it reinforces that the GMP requires stabilization of water levels based on the same time frame, again, the GMP will reduce net pumping to reach their perennial yield about half the time or even one-third of that time if the most aggressive pumping reductions are imposed.

The GMP reduces pumping from current levels by 30 percent starting in the first ten years and then net pumping to perennial yield and stabilization of water levels within 22 to 35 years.

So -- so again, that's the concept behind the plan. And -- and on this final page that I've cited to you, State Engineer record on appeal 469, there's more explanation that based on current understanding of the water table it is expected that pumping reductions would start to stabilize the center of the drawdown area.

And again, so the comments based on the analysis that had been done leading up to the plan is showing you -- or everybody, I guess, quantitatively when the plan proponents thought that the groundwater basin would start to stabilize,

when they will reach the perennial yield, all those kinds of things. And I think that hopefully answers the questions that maybe you had.

And obviously the State Engineer looked at all this and considered it in his determination to approve the plan.

THE COURT: Okay. Thank you.

MS. PETERSON: Okay. Sorry about that.

THE COURT: That's all right.

MS. PETERSON: My long -- my long lead in, so...

So, Your Honor, I guess one thing that I do want to say on the record is that sometimes there's this notion that if we don't respond to arguments or we don't address it in the oral argument here that somehow we've agreed with the -- the arguments that are made by the petitioners.

And we're not here to restate to you all the arguments that we made in our answering brief, and I guess speaking on behalf of Eureka County what I'd like to say is that if for some reason we don't address an argument in the oral argument today, it has been addressed in our brief, by not addressing the argument today we're not saying that we agree with any of the arguments of the petitioners.

And if for some reason we agree with anything of the petitioners we have will definitely let you know. But

don't assume because we didn't address something that that means that we agree with the petitioners. And I know the petitioners make that argument too. And I don't think that's the right inference you can draw from maybe not addressing something.

THE COURT: Well, this court doesn't believe that if anyone here did not make a specific argument that they didn't abandon the brief. I've read all the briefs several times, I'm familiar with them. So because it wasn't mentioned by anyone specifically today this court doesn't consider it abandoned.

MS. PETERSON: Thank you. And then what we wanted to do is we -- we want to get the court to step back a little bit and look at where we are right now.

And the way we look at this is that actually by the State Engineer designating Diamond Valley as a critical management area and starting in that ten-year time frame to get a Groundwater Management Plan in place, kind of what Diamond Valley was given along with the legislature in AB419 that passed the new statutes. They were kind of given a new slate, clean, new slate.

So it really, I don't think from our perspective, it doesn't really matter what happened in the 1980s. It doesn't matter what happened in the 1990s. It doesn't matter

what happened in the 2000s. It doesn't matter what happened in 2011, 2013, 2015, 2017. That doesn't matter.

What matters is that there were a majority of groundwater right holders in Diamond Valley that agreed on a plan to get their groundwater basin that has continually been pumped over the perennial yield.

They have a plan to get their groundwater basin out of the critical management area designation. And that's what's important to the court is to look at the plan that was -- they -- they proposed to the State Engineer that the majority of those holder of water right permits and certificates agreed to, that they asked the State Engineer to consider, that they asked the State Engineer to approve, that the State Engineer did approve, that's what's important and in front of you today.

And the State Engineer did everything the State Engineer was required to do under the statute. Under the first subsection of NRS 533.037, a majority of the groundwater right holders had to submit the plan to the State Engineer and it had to include a plan to remove the critical management area designation of the Diamond Valley groundwater basin.

And that petition was submitted to the State Engineer. It was submitted by the majority required by the statute. And it did have steps, necessary steps as I've just

gone through with you to show that they want to get that ground water management designation removed from the Diamond Valley groundwater basin.

The State Engineer considered the factors in NRS 533 -- 534.037(2). The State Engineer held the hearing that was required under subsection 3. The State Engineer approved the plan.

And -- and he did everything that he was required to do under NRS 534.037 and he did more. He actually specifically addressed all the comments that he received in writing, both I guess before and after the hearing. And he addressed all of the oral comments that he heard at the hearing.

And that -- I don't know that I've ever seen a better job that the State Engineer has done in issuing the order in addressing every single issue that was presented to him with regard to this plan, both pro and con.

And Order -- and I think you've heard this a lot before, but Order 1302 is based upon substantial evidence and the State Engineer's approval of the plant is rational.

His findings give you reason to go ahead and approve the plan that was approved by the State Engineer in Order 1302. And there's never -- not any indication that there was any kind of abuse of discretion by the State

Engineer.

And the majority of the water right holders in the Diamond Valley hydrographic basin that put this plan, agreed to this plan, put this plan in front of the State Engineer, got the State Engineer's approval of the plan and now that plan is before you, they should -- that they should be given the opportunity to see if that plan is going to work. And notwithstanding this appeal, the Groundwater Management Plan has been put into effect. The plan has gone through the first year.

As you heard before, there is a water manager that's been hired that has been looking after everything that's been required to be done under the plan in the last year.

And actually on Thursday, the State Engineer's office is going to hold that first annual meeting here in Eureka to -- as required under the plan to see how everything's going so far.

So everybody, the majority of the water right holders in the basin, as I said, that they should be given the opportunity because they complied with the statute, presented what was required by the statute, they should be given an opportunity for their plan to work and let -- let's see if everything that they looked at, everything that they studied,

everything that they debated, everything that they argued about, everything -- I think there was a lot of hard work that went into this plan. Everything that they did, it should be given an opportunity to see if it -- if it works. Let's see what happens with that.

With regard to the arguments that have been made, Your Honor, what I see is that there were certain arguments made in the opening briefs by the petitioners. The respondents responded to those arguments.

And then the next thing that happens is that the petitioners have different arguments in their reply brief, new arguments in their reply brief and then new arguments even today that we haven't seen, as the State Engineer's attorney indicated, we got a new argument today that we just saw in the PowerPoint presentation by Sadler regarding some issue with some of the people that had signed the petition and whether there was a majority or not.

I mean, we -- we did not see any of that argument until today. It's not in the brief. It's not in the opening brief of the -- of Sadler. It's not in the reply brief of Sadler.

And, I mean, really I have to wonder how important that argument was if the first time we're hearing it is today in front of you when we don't even get a chance to

respond to it.

So what happened is with regard to the petition, the petition that was filed, there -- there -- the petition was filed by the water right holders. They had a tally of the votes, I guess -- well, we call them votes, I know the State Engineer doesn't like to call them votes.

But of -- of the groundwater right holders that signed onto the petition, it was a majority of the water right holders in the basin.

And then the State Engineer did his own independent analysis as he was required to do under the statute based on the records in his office.

And the State Engineer based on what he put in his Order 1302, the numbers were a little different from the numbers that the plan proponents had put in the petition submitted to the State Engineer.

The State Engineer decreased those -- or it didn't count, I guess, some of the signers of the petition. Didn't include some of those in his vote tallies.

But the State Engineer further determined based upon his records that a majority -- as the State Engineer's attorney indicated, that there was a clear majority of water right holders in the basin that approved the plan.

One of the other things that's come out in the

briefing that's been done in this matter is that there were maybe arguments -- and again, this is with regard to Sadler and what we saw in the presentation today, there was an issue that was brought up just in passing in the opening brief, the respondents really didn't even have an opportunity to respond to it because of the vague reference in the opening brief of Sadler/Renner, and it was on page 10, Footnote 59, that they argued that the State Engineer failed to address several, that was the wording, of the six factors listed in NRS 530.437(2).

And then there was no explanation in the opening brief of which factors those were that weren't addressed by the State Engineer. And so obviously I know Eureka County wouldn't respond to that because there was nothing to respond to.

Then when we get to the reply brief and Sadler and Renner they argue that pages 17 to 20 and then we saw quite a few slides today how the State Engineer failed to consider those six factors.

And of course number 1, we saw the first argument on that in the reply brief, so we didn't have a chance to respond to it.

And again, we saw that those slides today that showed that same argument that just came out in the reply brief. And of course we didn't have any opportunity to

respond to that.

So as the State Engineer's attorney indicated, that the statute requires that the State Engineer consider those six factors. The State Engineer did consider, the word is consider in the statute, the State Engineer did consider those six factors in its order, it's at page 18 and 19 of the State Engineer's record on appeal.

And then also the six factors are set forth in length in Appendix D. And that is State Engineer record on appeal number 476 to 496. But again, it's improper for Sadler and Renner to argue something in their reply brief that the respondents were not given an opportunity to respond to in their answering briefs.

And then in the reply briefs for the most part the petitioners did not argue Order 1303 as not based upon substantial evidence or that it's not a proper exercise of the State Engineer's discretion.

Instead what they did is basically they invented some purported legal distinction with regard to the prior legal appropriation doctrine. And they're contending that there's a difference in -- I guess between the prior appropriation doctrine and they're calling it the remedy of curtailment.

And -- and basically, Your Honor, that's just

pure fiction as shown by their own definitions, the petitioners' own definitions of the prior appropriation doctrine in their reply briefs.

And if you look at Baileys' reply brief at page 5. And again, this may have been on one of the slides for Bailey today. On page 5 of the reply brief at lines 21 to 23, Bailey states that the prior appropriation doctrine is based upon the notion that the holder of the senior right is entitled to the full use of his right before a junior right.

And conversely, a junior right may not use water from the source unless the senior right is fully satisfied. Your Honor, what that means is curtailment of junior rights. That's exactly what that means, their own definition.

And then if you look at Sadler and Renner brief at page 6, and I know this is one of the Sadler slides, Sadler/Renner slides today, they contend that the prior appropriation doctrine is when the water right holder has a senior priority date but that holder is ensured that he will receive his water during a time of water stor -- shortage -- sorry. Again, that means curtailment of junior rights so that the senior right can have his water.

There's -- there's -- there's no difference. The prior appropriation doctrine is -- is the language in the statute our statute uses with the State Engineer shall order

withdrawals by order of priority. That's basically curtailment and that's -- the statute talks about priority, the statute's talking about the prior appropriation doctrine.

So from Eureka County's perspective, that argument that the petitioners make again is an invented legal argument that's pure fiction.

The other thing that the petitioners do is that they ignore the facts or the findings of the State Engineer and they continue to -- continue to make factually incorrect arguments. Again, such as the GMP is nothing more than a collaboration by junior water right holders to abolish the priority rights of the senior water right holders. And that's at the Sadler/Renner reply brief at 6.

And again, we didn't have an opportunity to -- to -- to look at or address anything that was brought up in the slides today with regard to counting any of the -- the water right certificates or permits that signed on to the petition.

But not according to -- to Order 1302, the State Engineer's order at 4, it's the State Engineer's appeal on record at 4.

The State Engineer found that 46.8 percent of the 77 senior water permit rights or certificates signed the petition. And the State Engineer indicated that that

represented 64 percent of the water rights in terms of-acre-feet in Diamond Valley.

So the State Engineer was satisfied and the specific language that he used was that significant portions of both senior and junior rights are represented in the petition. And again, that's State Engineer record on appeal at 4.

And then Footnote 36 of the Sadler/Renner reply brief. And again, I'm focusing on the reply brief because I feel that we addressed everything in the opening briefs that were filed by the petitioners. So I don't want to just repeat those arguments here for you.

But Footnote 36 of the Sadler/Renner reply brief there is a statement made that some water right holders with senior and junior water rights are getting more water under the plan under their junior rights. Of course, there's no support in the record, there's no slide to the record for that statement, that bold statement that's made in the reply brief.

And so, again, notwithstanding the findings that the State Engineer made. And, again, those findings are entitled to deference and the State Engineer looked at his records to determine how many senior and junior water right holders signed on to the plan.

Sadler and Renner continue to make a misstatement

in the arguments that the GMP is something nothing more than a collaboration by the junior water right holders to abolish the priority rights of the senior water right holders.

And in the brief -- in their brief Sadler and Renner also made certain arguments about the majority of water right holders based on the perennial yield in the math.

They made some arguments based on the math and that based on the perennial yield that all -- you know, senior water right holders didn't sign on to the plan. But of course they don't give you their math. I mean, I don't understand where their math is coming from. And there's nothing in the statute that says that you can only count water right holders based on the perennial yield. So I don't know where that argument is coming from.

But I -- you know, there's no way for us to address it because they didn't even show us how they got the math.

So I do want to turn to our PowerPoint. And one of the things that Eureka County wanted to bring to the court's attention is the notion, and this comes from Mountain Falls Acquisition Corporation versus State, it's a decision that came out of May 29th, 2019. It's an unpublished disposition, but it is cited here for its persuasive value.

And it was just a nice succinct rendering I guess

of all the pertinent water right holdings by the Nevada Supreme Court with regards to a water right and what interest a water right holder has.

And again, the Supreme Court went through that, you know, the water right does not create an ownership interest in the water, it only gives the water right holder the right to lawfully use the water.

And the main thing here is that the water itself -- again, getting to the end of that quote, the water itself as the statute declares belongs to the public. And the last sentence there water law seeks to balance a water right holder's property rights with the state's police power to regulate water rights and the state may therefore prescribe how the water may be used.

And that's exactly what the legislature was doing when the legislature enacted AB419, NRS 533.037 and NRS -- I'm sorry, 534, I keep saying 533, but it's 534.007 and 534.110(7). And then again, these are the statutes.

And then finally, Your Honor, I wanted to bring to your attention that the arguments that the petitioners make in support of their petitions ignore again kind of where we started out again where we are today. And what was put before the State Engineer in the petition for the GMP and what the court has to consider today.

And so there were certain examples given by Sadler and Renner and Bailey of what the GMP should have mandated. Again, those are irrelevant, and I'm on page 6 of the PowerPoint, those are irrelevant as they were not put forward in the GMP for approval under the statute. The petitioners could have developed a GMP with certain provisions and tried to get the majority of signatures necessary on a petition to be filed with the State Engineer, but they didn't.

There's some items in the second bullet point there that the petitioners argue should have been included. And again, none of those examples having to do with more efficient crops, restricting the season of use, implementing water rights via a program, none of those are -- examples are restricted by the GMP and many are promoted. And the cites to the GMP are in there, Sections 21, 22 and 23.

Again, the only way the GMP can really work is for individual pumpers to do those things adopted in tandem with the mandatory pumping reductions that were put in place by the plan.

And again, it was determined by those involved in crafting the GMP very early on that only the amount of water pumped could be regulated under the Groundwater Management Plan and could be regulated by the State Engineer. And not the ways reduced pumping could be met or other land use or

management mandates.

And then turning to the last bullet point there, the Baileys argue about ideas and solutions that were identified as far as back as 2014. And they supposedly were the only true local input. But it's -- it's important to understand that what the Baileys were pointing to heard in June and July of 2014, over a year before the critical management area designation.

And many of those early ideas and solutions even after the CMA designation such as the unbundling water rights from specific real estate, which is the Young blueprint did not move forward.

And so I think that's kind of one of the fundamental things that we saw with regard to these arguments that are being made by the petitioners. They're arguing about things that may have been discussed early on in the plan process, but those -- those plan concepts or those plan ideas didn't go forward. And -- and obviously they're not included in the plan.

And specifically with regard to this argument becomes important, specifically with regard to the Young blueprint. Because according to the petitioners there were statutory changes that needed to be made for the Young blueprint. And you'll see we have a slide coming up here, the

GMP plan that was put before the State Engineer is not the Young blueprint.

And again, getting to the -- to the briefs and some of the arguments that are made, and this just recites some of the arguments that were made in the briefs. And again, over there is a document that the Baileys quoted was written by Denise Moyle.

And again, this document was never adopted by anybody. It was never circulated again or used again kind of at the bottom of the first bullet point, it was never circulated or used in any official GMP outline.

And it was provided at the very beginning of the process for discussion purposes only. And again, that's cited at SBA -- SRA297. And again, that third bullet point kind of gets to that little argument about the legislation proposed in 2015 or 2017. The -- the -- the plan that was put in place and proposed to the State Engineer is not the Young -- is not the Young blueprint.

And there's no legislation that was needed for the GMP plan that was put in front of the State Engineer and approved by the State Engineer. The plan is indicated -- if you go through the record, the plan is indicated in that third bullet point, changed substantially after the 2017 legislative session.

And the reason the Young blueprint wasn't in the record on appeal, the reason the State Engineer didn't consider it on that blueprint was because the Young blueprint wasn't part of the GMP plan.

And if you notice, Your Honor, the petitioners did not show you what was in the Young blueprint and what was in the GMP plan and where the similarities were. And they couldn't, they couldn't show that to you because those similarities aren't there.

Whoops. And if you go to this slide, Your Honor, this is slide 8, this shows you all the differences between the Young blueprint or the Australian model, not included in the GMP. And the main -- the main component of the Australian model or the Young blueprint was the -- the total of unbundling of water rights.

And again, you look at that State Engineer's slide that he had in his 2016 presentation that says unbundling of water rights. And that meant you were given your allocation under the Australian model and you could go use that anywhere. You could use it anywhere, anyplace, anyhow. Not true under the GMP.

In the water allocations can be used anywhere in Diamond Valley, but it would have to be tied to legal wells and they have to be tied to specific real estate. That's

already permitted by the State Engineer.

And again, the water rights that are in a well that has a specific duty, the conflict analysis has already been done by the State Engineer for water rights in that well for that particular duty.

Going down to the next -- next bullet point, there's no trading of shares. In Australia and as Young proposes, shares called entitlements and water allocations are deemed to be tradeable.

And again, we've cited to you because the petitioners put that Young blueprint into the -- as an addendum to one of their briefs. We've cited the specific provisions in the Young where you see the Australian model or the Young blueprint. And again, not -- you're not going to find it in the GMP. And they haven't showed you where it is in the GMP.

And going on to that second bullet point again. If somebody wants to own more shares under the GMP they have to buy them. And if they want to move them, you know, they have to do a transfer of the water right just like always. And the water is still tied to land and still tied to a well, not unbundled as in the Australian model.

And then if you go to the third bullet point, no water shares are set aside for the environment, that's another

part of the Australian model. And again, pointing to you where in that Young blueprint paper those concepts are.

Surface waters are managed conjunctively held by Young system interconnectivity in one robust market. In Australia the water market is primarily surface water from river systems.

And again, the cite to the Young paper where that is. In the GMP there's no priority tiers of water allocations like there are in the Young system where certain water systems weighted allocations to manage supply risks. And those supply risks are uses such as municipal water.

Under our GMP there's no groundwater authority, there's no CEO, no -- no other effort to remove authority from the State Engineer. Again, that's found at Young, pages 22 and 23.

The GMP does not reduce all rights by a proportion such that each duty alliance with the best irrigation practice. Again, that's found at Young, pages 27 and 28.

The current GMP does not replace current interbasis system to the Torrens title registration system, that's found in the Young blueprint in Appendix B.

In our GMP there's no tag trading with an exchange rate for various geographic zones of water. Again,

part of that all unbundling the water rights in the Young blueprint. And you'll find that at Young, pages 21.

There is not use of a net allocation system to give credit for return blows, that's not found in our GMP. That's Young at page 23.

There's no annual and separate use approvals or work approvals without indicating how or where someone stores the water. Again, that's Young, page 19. There's no transaction fees like there are on Young, page 21.

There's no water shares owned by Eureka County for households and businesses. Again, a key component of Young at pages 24 and 27.

And there's -- our plan does not use a hundred share allocation nor the share formula proposed by Young. And that's at page 16 and 28.

So there's a reason that the Young plan was not in the record before the State Engineer and the State Engineer did not consider it and why it wasn't included in the GMP. Because the Young plan is very different from what the plan that was proposed to the State Engineer that was agreed to by a majority of the water right holders.

And again, the water right holders that proposed that plan took into consideration what the state of the law was in 2017 and 2018 when they proposed that plan to the State

Engineer.

And then with regard to vested water rights, Your Honor, the Baileys have had mitigation rights since 1998. And they've never complained in the last 20 years about the sufficiency of their mitigation rights. And they've never complained to the knowledge of Eureka County, I want to make that clear.

And Sadler settled with the State Engineer on its mitigation rights pending the final determination in the Diamond Valley adjudication as set forth in the record. And it's cited in our brief.

There's an appeal pending of Sadlers' mitigation rights. And the Sadlers made it very clear that they settled with the State Engineer with regard to the mitigation rights. Eureka County is the party that appealed that and has an appeal pending before the Supreme Court. And actually Sadler has argued that it should be dismissed because it has settled with the State Engineer.

So it's really hard for me to understand how somebody can settle with the State Engineer with regard to their mitigation rights and their claims that they have to their mitigation rights and then somehow contend that they still have some outstanding damage with regard to their mitigation.

The same is true with Venturacci. Venturacci settled with the State Engineer and Eureka County on their mitigation rights pending the Diamond Valley final adjudication.

And again, that's cited in our brief Venturacci had filed with the Supreme Court. And that's been settled probably like in the last six months or something like that.

So with regard to vested water rights and mitigation rights, the petitioners chose to apply for those underground water rights.

And I guess most recently Renner has applied for mitigation applications and we just found that out in the reply brief that was filed by Sadler and Renner.

And with regard to that the only thing I can say is that we have no indication whether the State Engineer is going to determine whether Renner should be granted any mitigation rights.

But again, with regard to its claims of vested rights, Renner has chosen its remedy and has chosen to apply for mitigation rights from the State Engineer.

And so there's no claims for any kind of further -- further remedies with regard to vested claims in this proceeding.

And then the other thing I'd like to reinforce

and the State Engineer put this in his Order 1302, but it's found in the record on appeal at page 12 and 13.

And the petitioners don't address this, and I would say they don't address it because they don't dispute it, but the State Engineer indicated in his order that neither the plain language or the legislative history of AB419 indicate that mitigation of senior surface water rights have been adversely affected by groundwater pumping as mitigated by the GMP.

And the State Engineer relied on the legislative history of 419 where there was a specific provision in there and those factors that they've now been codified in the 534, subsection 2 at one time as originally proposed the State Engineer was to consider the relationship between surface water and groundwater in the basin, but that was specifically amended out of the bill.

And that is found at Eureka County -- it's the addendum, it's pages 54 and 55. And I guess that was the May 25th, 2011 hearing.

So, from Eureka County's perspective we -- we believe that what the petitioners are really asking you to do is to legislate a revised version of NRS 534.037 or 534.110(7) so that their concerns with what should be in the Groundwater Management Plan be in the statute. And they're not in the

statute.

And we just wanted to bring to the court's attention that concept of separation of powers. You know, there's legislative branch, the executive branch, the judicial branch. And each branch is not supposed to step on the toes of the other branches.

And really what the petitioners want you to do again as I said is to modify the statute so that their concerns are addressed. And that's not what the legislature did.

And, in fact, actually when Sadler bought their property in 2011 and they bought their water rights, AB419 was already passed. So when the current owners of Sadler Ranch bought their property AB419 was already in effect.

And around a critical management area could be designated and a Groundwater Management Plan could be adopted for a critical management area.

So when they want their water rights, again, they took it up to existing law and applied it to the existing law and AB419 was already in effect.

And the Nevada Supreme Court has been very clear as set forth in that first excerpt from Galloway Truesdell that with regard to the legislative power, I mean, unless it's limited by federal or state constitutional provisions, the

power is practically absolute.

And the last bullet point is the courts are not -- are to be wary not to tread upon the projects of the other departments of the government including the legislative powers.

Your Honor, kind of getting to the end of my prepared arguments, what could have happened in this case is when the State Engineer made his designation in 2015, I mean, the water right holders in Diamond Valley could have done nothing. I mean, they -- they could, the junior water right holders could have continued to pump their full duty for the next ten years until 2025 until they were cut off. But that's not what they did.

All the water right holders got together and they tried to come up with a plan so that they -- their way of life, their agricultural way of life could continue, which benefits the whole community.

And they came up with a plan after a lot of hard work and presented it to the State Engineer. And each -- again, it should be allowed the opportunity to proceed so that everybody can attempt to use their water, that the water levels can be stabilized in the basin.

That basin can get out of that critical management area and designation. We're trying to figure out

if the court overrules the State Engineer's order what's going to happen?

Again, as I set forth in the earlier part of the argument, notwithstanding these appeals, the plan has been in place. And it's been going forward for this first year.

And so if the plan is overruled there's not -- I mean, those -- those pumping reductions that are planned for next year are not -- are not going to go into place. And so we're wondering how -- how the basin is going to be better off if the plan is not given an opportunity to proceed, is not given -- those plan reductions are not given an opportunity to go forward, everybody can see what happens with the reductions.

There would be another six years where everybody could try to come together and put another plan in front of the State Engineer and get approval, but there is something in place right now that the State Engineer has approved based upon his knowledge and expertise that doesn't have pumping reductions in the basin.

And if the petitioners have a better idea or if everybody sees that this -- this is not working, then amendments can be proposed to the plan. Petitioners can come forward with something that they think is going to work if they can get the majority of water right holders on board.

But we -- we just -- we can't -- we can't figure out what -- I guess what the downside is of going forward with the plan and -- and getting these plan reductions in place. And as I first pointed out to you, the planned proponents believe that -- I mean, you know, immediate results will be seen from the planned reductions.

And I guess that probably gets me to maybe my last slide. And one of the arguments is that they don't see -- the petitioners are saying that they don't see that there's anything in the record that shows reduction of pumping that's in the order.

And again, I cited to you at the very beginning of the argument your information in the record about what the planned proponents of the provisions to happen with the pumping reductions that are proposed in the plan.

But there is something in the record and nobody responded to it in the reply brief, and I don't know why. But the record on appeal at page 471. Again, those are in those questions and answers that were part of the plan submitted to the State Engineer.

There's a discussion about Section 13.13 and perennial yield and just a question about stabilized groundwater levels and aren't those two different holes. And again, the plan proponents of the GMP will work and stabilize

the water table. And the answer there is in that third part down there that they have already seen small reductions in pumping have created substantial reductions in drawdown.

And so based on past monitoring in Diamond Valley, the pumping reduction for the GMP will result in water levels in the main product of your question stabilizing and even rising in the first few years.

So I don't that that was one of the arguments that the petitioners made.

And, Your Honor, I don't know, would it be possible if I could have a five-minute break? I did want to respond to some of the further arguments we heard this morning, but I'm hoping maybe I can streamline it and then I can be done?

THE COURT: Certainly. The court will take the five-minute break. That's a reasonable request. But given where we are today let me talk about the rest of the day and/or evening. The last presentation by Ms. Leonard is upcoming.

MS. LEONARD: I'm sorry, I can't hear you.

THE COURT: The last presentation that we would have today would be that by Ms. Leonard on behalf of her clients. And we're approximately about 20 minutes to 5:00.

With Ms. Leonard's presentation, and I don't want

to go too late in the evening and I don't want to take any time away from any counsel with respect to any arguments, we have set tomorrow morning aside, and an option that we certainly have is to allow Ms. Peterson to conclude today.

Ms. Leonard, if you prefer to start with your argument first thing in the morning, we can certainly do that. It appears that we're going to be here tomorrow anyway because of the fact that we have reply arguments from both Sadler Ranch and from the Baileys. I don't see how we can get those done in a reasonable time and allow counsel to argue as they deem appropriate in this case.

MS. LEONARD: Your Honor, my preference would be to start in the morning just for the reasons that you just stated that this is an important issue for my clients. And I'd like to make sure that they have the time to state the arguments that we want to state.

THE COURT: Certainly. And that's -- that's why I brought that up at this stage today --

MS. LEONARD: Thank you.

THE COURT: -- to look at tomorrow because we're getting near the end of the oral arguments and we have plenty of time. And that's been set aside for it.

So, Ms. Peterson, with your request the court will recess for five minutes. We'll check on you. When

you're good to go we'll conclude your argument and the court will recess today.

What we'll do is we'll reconvene at 9:00 a.m. tomorrow. No reason we can't start a little earlier. All of you are here. We'll be here. That will make good use of tomorrow's morning. Okay? So we'll take a brief recess.

MS. PETERSON: Thank you.

(Recess.)

THE COURT: We're here in the continuation of our oral arguments. We have counsel, the parties present. Ms. Peterson, please continue.

MS. PETERSON: Okay. Thank you, Your Honor. I'll try to be brief. But I am going to be jumping around just because this is based on my notes from the argument today.

But one of the things that we wanted to bring to your attention is that the end cut, reductions in pumping. There was a question. They're aligned with the pumping duty versus being aligned with a permit amount as shown maybe in some of the -- the Sadler/Renner slides and the Baileys' slides.

The other thing with regard to temporary changes, the State Engineer did address that in his ruling 1302, it's on page 8, SEROA at 9. And again, the temporary applications

are tied to the existing duty.

So the State Engineer has already made a determination that the well, that duty in that well has been I guess subject to a conflict check.

And again, the State Engineer looked at this and he determined that the procedure outlined in the GMP was modeled after the existing law regarding temporary changes. And that is -- that is why he approved it.

There was an argument just briefly about the advisory board. And again, it's an advisory board to the State Engineer. The State Engineer retains full authority under the plan.

There was an argument made and again, I think this was by Sadler and Renner, that the majority of the senior water right holders did not support the plan. And we think that that language is a little bit of a stretch.

Water right holders were asked to sign the petition. There were water right holders as we know from the public hearing that occurred in front of the State Engineer that maybe did not sign the petition, but they did support the plan.

And that was General Moly came forward, they didn't sign the petition, they hold obviously mining rights, but they did support the petition and they came forward at the

heart of the hearing for the State Engineer that was held here in Eureka on the plan and came forward to put on the record that they did support the plan.

And we cited to that in our brief. So the specific records to the transcript came forward within our brief. But the language that just because somebody did not put their name on the petition and include that with the State Engineer does not necessarily mean that they did not support the plan.

And again, I think that there's just some imprecise use of language here to make an argument and it's not factually correct.

With regard to -- there was a slide about SB37 proposed in 2017 with this argument about priority and that legislation was needed.

And if you look at that slide and the priority, it had to do with priority of domestic wells, it didn't have to do with priorities of any other water rights. SB267, I don't believe that that was ever argued in the brief, but the statement was made that the legislature said no to that legislation.

And again, imprecise language, not what happened. That bill never got out of committee. We don't know why it never got out of the committee, but it wasn't because it was

the vote of the legislature, the chairman of the committee for some reason did not let that bill go forward.

There was an argument with regard to that Turnipseed's report submitted by Sadler and Renner was the only expert report in the record. And again, the State Engineer did consider that report, obviously it was in the record before him, but he didn't -- he declined to follow anything in that report.

So again, the argument made about you have to accept the Turnipseed report would require Your Honor to substitute your judgment for the State Engineer's judgment.

There was statements made that there was no indication of who wrote Appendix D, but if you look at the record on appeal, it's SEROA at 318, it's page 101 of the GMP petition.

It says that Steve Walker and Dave Bugenig wrote Appendix D. Also in one the slides going through all those factors that are in Appendix D, Sadler/Renners' argument about NRS 534.037(2).

On the slides there's no cites to anything in the record with regards to some of those statements that are made with regard to the hydrology of the basin and those factors that are under 544 -- 534 -- sorry, 037(2).

There was an issue about how many -- well, they

call them votes, but like how many votes per certificate. And if you look at the legislative history, it's EC004, Assemblyman Goicoechea put on the record that the intent was one vote per one certificate.

And then, Your Honor, regarding this pumping of water rights that are not subject to the plan, if you look at Sections 18.4 of the GMP, it's pages 24 to 25 of the GMP, and it's the record on appeal at 2412.2, there's many recommendations made about how to decrease pumping of water rights that are not subject -- water right uses that are not subject to the GMP.

So -- so the GMP does have recommendations and suggestions for how to decrease pumping of those -- of those water rights.

And then there was a statement made that the banking depreciation rates are not in the report. They are in the report at page 309, it's SEROA at 526. And there was a discussion about what the compromise was.

And the results of the modeling of the banking depreciation rate -- sorry, for the south it was 0.3 percent. But the compromise was that the GMP, that was rounded up to one percent.

And, Your Honor, I think that's all I have. Your Honor, this was a lot of good work that was done by the water

right holders in Diamond Valley. And the order is a really good order by the State Engineer. There was a lot of work that was done on this. So Eureka County would ask that the court deny the petition for judicial review.

THE COURT: Thank you, Ms. Peterson.

MS. PETERSON: Thank you.

THE COURT: That concludes this afternoon's oral arguments in the case. The court will reconvene at 9:00 a.m. tomorrow morning. At that time we'll proceed with Ms. Leonard's argument on behalf of her clients. That will be followed by Mr. Rigdon and then followed by Mr. Mixson. If that's the order you choose. And then the matter will stand submitted after that. Okay?

The court stands in recess.

(Proceedings concluded at 4:59 p.m.)

STATE OF NEVADA)
)
CARSON CITY)

I, Michel Loomis, Certified Shorthand Reporter of the Seventh Judicial District Court of the State of Nevada, in and for Eureka County, do hereby certify:

That I was present in Eureka, Nevada Opera House and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Carson City, Nevada, this 8th day of January, 2020.

//MICHEL LOOMIS//
Michel Loomis, RPR
Nevada CCR No. 228

SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF EUREKA
Case No. CV1902-348

Timothy Lee Bailey & Constance Marie Bailey, Fred Bailey & Carolyn Bailey, Ira R. Renner & Montira Renner, and Sadler Ranch, LLC,
Petitioners,

vs.

Tim Wilson, P.E., Acting State Engineer, Div. of Water Resources, Nevada Dept. of Conservation and Natural Resources, Respondent

&

Eureka County, Nevada, DNRPCA Intervenors, et al.,
Intervenors.

Opening Argument of Bailey Petitioners

Christopher W. Mixson, Esq.

WRS S&R Wolf Rifkin Shapiro Schulman Rabkin, LLP
LOS ANGELES, LAS VEGAS, RENO

- Brief Background
- GMP and Order No. 1302
- GMP Violates Prior Appropriation Doctrine
- GMP Violates Beneficial Use Doctrine
- GMP Violates Change Application Statute
- GMP Exacerbates Adverse Impacts to Vested Rights
- Surface Water Rights Were Precluded from Voting

- Brothers Elwood and Robert Bailey homesteaded in 1860s
- Bailey Ranch has been in continuous operation since 1863
  - Numerous vested senior surface water rights
- Baileys have irrigated Diamond Valley parcels for decades with groundwater permits, 5 senior and 1 junior (ROA 149):

Priority Date	Permit / Certificate	Duty
3/7/1960	Permit 22194 / Cert. 6182	537.04 acre-feet
3/7/1960	Permit 22195 / Cert. 6183	622.00 acre-feet
3/7/1960	Permit 55727 / Cert. 15957	20.556 acre-feet
5/3/1960	Permit 28036 / Cert. 8415	277.00 acre-feet
5/3/1960	Permit 48948 / Cert. 13361	478.56 acre-feet
1/23/1974	Permit 28035 / Cert. 8414	201.56 acre-feet

- In the 1970s, the State Engineer approved permits for groundwater use that far exceeded the supply
- Annual Perennial Yield: ~30,000 acre-feet (ROA 003, 225)
- Permitted Rights: ~126,000 acre-feet (*id.*)
  - This does not include non-irrigation uses
- Pumping estimate: ~76,000 acre-feet (2016) (id.)
- Excess Pumping: ~46,000 acre-feet annually
- Unused "Paper" Rights: ~50,000 acre-feet

- 2011: passage of NRS 534.037 and NRS 534.110(7)
- Summer 2014: Local users scoping process (ROA 249-69)
- Oct. 2014: Eureka Cons. Dist. attempt for voluntary CMA designation per NRS 534.110(7)(b) (ROA 270-76)
- Aug. 2015: SE designates CMA per NRS 534.110(7)(a) (ROA 134-38)

GMP Creation

- 2014: extensive local scoping process (ROA 249-69)
- Result: truly local "Solution Summary" (ROA 253-54)

Solution Summary

Water right buyouts. Specific programs were mentioned included:

- Generated funding through a $2500 per year fee on all active pivots
- Dedicate a portion Eureka County proceeds of minerals funds
- Potential 4 million dollars available through the hay growers coop if/when General Moly proceeds with the construction of the Mount Hope Molybdenum mine.

GMP Creation

- 2014 Local "Solution Summary" (con't) (ROA 253-54):

Solution Summary Cont.

- Mechanical and operation irrigation efficiency improvements
- Require state of art sprinkler design and operation;
- No end guns
- All wells metered
- Establish an irrigation season
- Require 1 day per week no watering
- Shut off sprinklers daily during afternoons
- Fallow a percentage of the valley yearly
- Soil moisture monitoring
- Subsurface drip irrigation
- Encourage federal programs to broaden payment/cost shares to a wider variety of irrigation systems.

GMP Creation

- Local "Solution Summary" (con't) (ROA 253-54)

Solution Summary Cont.

- Grow lower water use crops and develop storage and marketing plan for those crops – wheat; triticale, brewing barley, Quinoa, et al. Make Diamond Valley grains/alternative crops coveted like the alfalfa hay/timothy hay has become. Reduce irrigation season length
- Modify state water law to allow non-use without losing water right/protect existing duty.

- **No recommendation for water rights marketing scheme**
- Nothing in the record to demonstrate these 2014 solutions would not reduce pumping and/or bring aquifer back in balance

GMP Creation (con't)

- Young's "unbundling" of private property concept imposed in 2015
  - after Eureka Conservation District takes lead role re GMP (ROA 285, 294)
- Even though:
  - not mentioned in 2014 "Solution Summary"
  - ROA and Order 1302 lack any discussion of 2014 local solutions versus 2015 Young Paper
- No Respondents' Answering Briefs explain how or why water rights "unbundling" and marketing scheme was sole focus

GMP Creation (con't)

- GMP concept came from an Australian economist and was intended to be a pilot program for this untested water marketing scheme:

Executive Summary

Overview

This report lays out a blueprint for transitioning to robust water rights, allocation, and management systems in the western United States—a blueprint ready for pilot testing in Nevada's Diamond Valley and Humboldt Basin. If implemented, the blueprint's reforms would convert prior appropriation water rights into systems that stabilize water withdrawals to sustainable limits, allow rapid adjustment to changing water supply conditions, generate diverse income streams, and improve environmental outcomes.

Many of the concepts developed in the blueprint presented here derive from Australian experience. Over a 20-year period, beginning in 1994, Australia embraced the idea that the low-cost trading of water shares (i.e., entitlements) and allocations, coupled with the use of statutory water resource sharing plans, could be used to improve water use. Under the system that Australia has now put in place

If the proposed pilot tests suggested that the proposed system is beneficial and more desirable than the current water right system, this blueprint could be used to assist with the preparation of proposed legislative reforms necessary to facilitate the proposed system's wider application in the United States.

(Addendum to Bailey Reply Brief at 3)

GMP Core Provisions

- Water rights converted to "shares" (Sec. 12, ROA 232, 499)

  Most senior = 0.9997 shares/acre-foot
  Most junior = 0.8000 shares/acre-foot
  } "20 percent spread" / priority factor

  - i.e. **not** 1-for-1 conversion - reduced from 1% to 20% off the top

- Then, each share allowed annual "allocation" of water (ROA 510)

  - But "allocations" significantly reduced each year
    Year 1 = 0.670 acre-feet/share
    Year 35 = 0.307 acre-feet/share

GMP Core Provisions (con't)

- Allocations can be freely bought, sold and traded (Sec. 13.10, ROA 235)
- Narrow limitations on transfers (Sec. 14.7 and 14.8, ROA 237)

  1. For existing well, State Engineer cannot disallow unless transfer would exceed well's flow rate and conflict with existing water rights.

  2. For new well or additional withdrawal from existing well, State Engineer cannot disallow unless transfer would:
     - impair existing rights and not in public interest, **and**
     - State Engineer makes determination within 14 days, otherwise transfer is "deemed approved"

- Sec. 10.2 (ROA 229) may delegate this review to the "Water Manager" instead of the State Engineer
  - "Whenever this GMP references 'State Engieer' this may include the Water Manager or State Engineer designee, as determined through State Engineer discretion."

GMP Core Provisions (con't)

- Unused annual allocations are "banked" in the aquifer for future use (Sec. 13.2, ROA 234)
- GMP specifically allows "paper" (i.e. unperfected) water rights to be banked
- Only restriction is annual depreciation of 1% in southern valley and 17% in northern valley (Sec. 13.9, ROA 234)
  - Initially used water model, which is not part of the record, but eventually the result of "compromise" (Order 1302 at p.17, ROA 018)
  - Order 1302 did not rely on any other evidence to support penalizing water banked in north more than water banked in south

Effect of GMP on Baileys' Water Rights

The Baileys have five senior groundwater rights:

Permit	Original	Shares	Year 1	Year 15	Year 35
22194 (3/7/60)	537.04 af	528.4081	354.0334 af	229.8575 af	159.0508 af
22195 (3/7/60)	622.00 af	613.1900	410.8373 af	266.7377 af	184.5702 af
55727 (3/7/60)	20.556 af	20.2648	13.5774 af	8.8152 af	6.0997 af
28036 (5/3/60)	277.00 af	265.6139	177.9613 af	115.5420 af	79.9498 af
48948 (5/3/60)	478.56 af	458.8887	307.4554 af	199.6166 af	138.1255 af
TOTAL	1,934.116 af		1,250.4649 af	820.5690 af	567.7960 af

The Baileys also have one junior groundwater right:

Permit	Original	Shares	Year 1	Year 15	Year 35
28035 (1/23/74)	201.56 af	171.0555	114.6072 af	74.4091 af	51.4877 af

State Engineer Order No. 1302

Approved the Diamond Valley GMP

- Determined GMP "deviates" from prior appropriation law, but approved because:
  - Legislature must have intended to allow deviations from law; and
  - Application of priority factor ("20 percent spread") to share conversion "honors prior appropriation"

(ROA 006-07)

- Recognized GMP violates beneficial use via banking unperfected paper water rights, but approved because lack of "sufficient time" for statutory forfeiture proceedings (ROA 010-11)

State Engineer Order No. 1302 (con't)

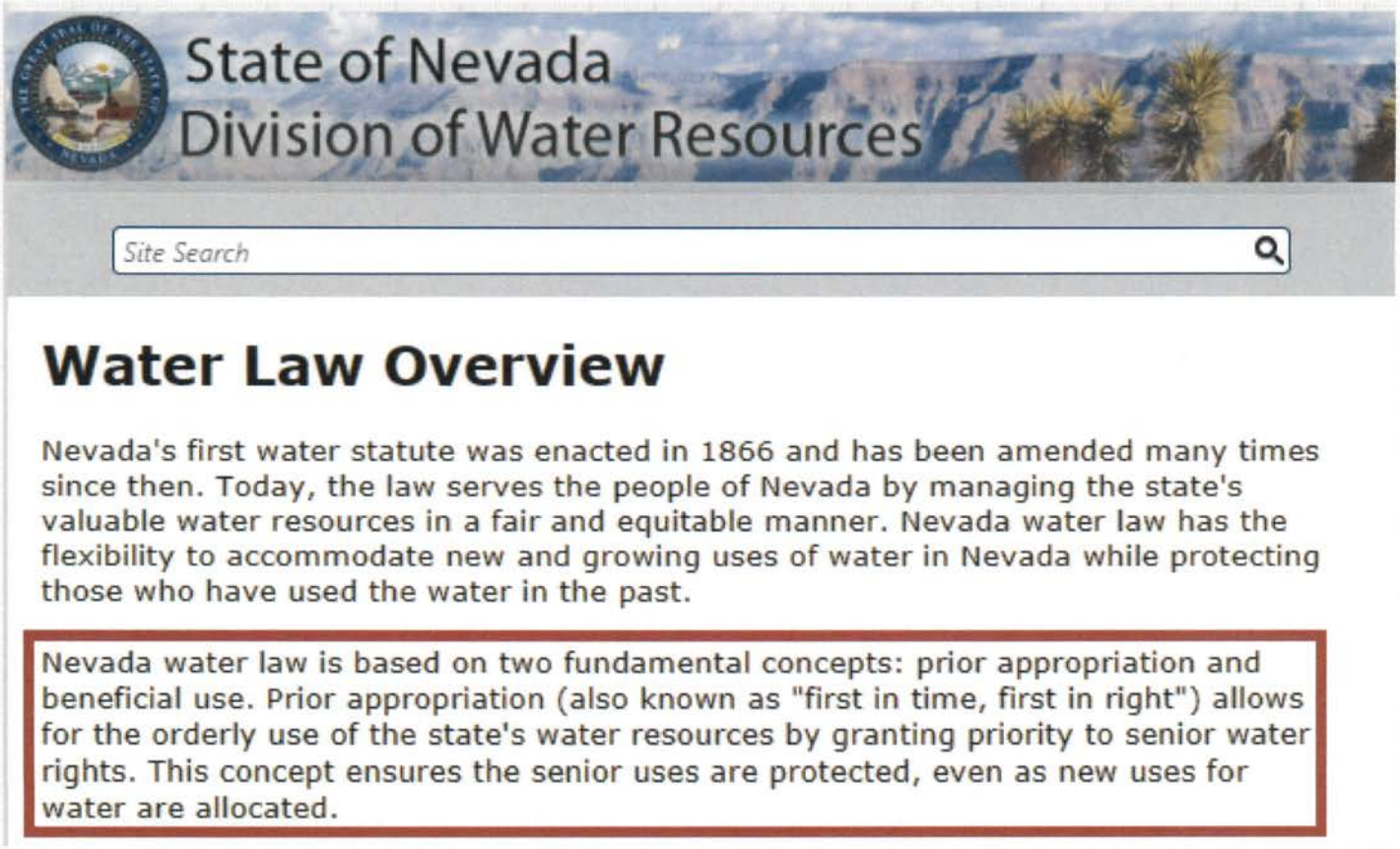
- Determined GMP need not address impacts to senior vested surface water rights because not required by plain language of statutes or legislative history of NRS 534.037 (ROA 012)

- Determined safeguards of statutory water right transfer procedure not necessary because authority to review is only reduced for temporary changes less than 1 year (ROA 008-09)

- Did not undertake any scientific or hydrologic analysis of the claims made by GMP proponents with respect to whether the GMP will actually work (ROA 015-16)

Foundations of Nevada Water Law

Two Foundations: Prior Appropriation & Beneficial Use



State of Nevada
Division of Water Resources

Site Search

Water Law Overview

Nevada's first water statute was enacted in 1866 and has been amended many times since then. Today, the law serves the people of Nevada by managing the state's valuable water resources in a fair and equitable manner. Nevada water law has the flexibility to accommodate new and growing uses of water in Nevada while protecting those who have used the water in the past.

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

http://water.nv.gov/waterlaw.aspx

Foundations of Nevada Water Law (con't)

1. Law of Prior Appropriation

- "first in time, first in right"
  - The first to use water use has a senior claim to those who come later
  - In times of scarcity, junior rights may only be exercised after senior rights are fulfilled
  - *Jones v. Adams*, 19 Nev. 78, 86 (1885):
    "the first appropriator of the waters of a stream had the right to insist that the water flowing therein should ... be subject to his reasonable use and enjoyment to the full extent of his original appropriation"
    (quoting *Barnes v. Sabron*, 10 Nev. 217 (1875))

Foundations of Nevada Water Law (con't)

2. Doctrine of Beneficial Use

- NRS 533.035: "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."
- Water must be put to a recognized beneficial use
  - *State v. Morros*, 104 Nev. 709, 716 (1988): beneficial uses are established by statute or longstanding custom
- Water must be *actually* used
  - NRS 533.380: water must be beneficially used within 10 years of date of permit approval
- "Use it or lose it": Subject to forfeiture and abandonment for non-use

GMP Violates Prior Appropriation

- GMP abolishes priority system in favor of "unbundling" property rights into "shares" and "allocations"
- Respondents do not dispute violation of prior appropriation
- Requires senior rights to reduce pumping so junior rights can continue pumping
  - Junior rights can use water even while senior rights are not satisfied first
- Baileys' senior permits reduced 70%
  - from 1,934.116 af to 567.796 af
- GMP literally redistributes water from senior rights to junior rights

GMP Violates Beneficial Use

- Diamond Valley has approximately 50,000 acre-feet of unused water
  - Neither GMP nor Order 1302 provide the amount of unperfected rights
- GMP converts all unused water rights – perfected and unperfected – into shares that can be banked and then sold, traded, etc.
  - Sec. 18.1 (ROA 240-41) (paper irrigation rights not excluded from GMP)
- This violates beneficial use doctrine by automatic perfection of previously unused water rights
- No statutory, common law or longstanding custom of aquifer "banking" as a beneficial use of water
- Aquifer banking is not an *actual use* of water
  - it is literally the opposite of actual use
- Disallowing banking of unused water would allow larger allocations per share

GMP Statutes

- NRS 534.037 and 534.110(7) govern GMP development and approval

NRS 534.110 Rules and regulations of State Engineer; statements and pumping tests; conditions of appropriation; designation of critical management areas; restrictions.

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

7. The State Engineer:

(a) May designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.

(b) Shall designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin upon receipt of a petition for such a designation which is signed by a majority of the holders of certificates or permits to appropriate water in the basin that are on file in the Office of the State Engineer.

➥ The designation of a basin as a critical management area pursuant to this subsection may be appealed pursuant to NRS 533.450. If a basin has been designated as a critical management area for at least 10 consecutive years, the State Engineer shall order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights, unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037.

NRS 534.037 Groundwater management plan for basin designated as critical management area: Petition; hearing; approval or disapproval; judicial review; amendment.

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

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

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

- Nothing in either statute ***expressly*** repeals prior appropriation or beneficial use requirements of Nevada water law

GMP Statutes Do Not Allow Violations of Law

- Neither statue is ambiguous regarding compliance with existing law
- NRS 534.037(2) lists factors SE shall consider when reviewing GMP
  - but says "without limitation" and catch-all "other factors"
  - i.e. SE ***not limited*** to only those factors, as Respondents argue
  - SE should have considered whether GMP complied with existing law
- Legislature not required to list ***all*** laws GMPs were subject to
- The only way to read the statutes as ambiguous regarding applicability of existing law is to *assume* either:
  - GMP cannot operate under prior appropriation, or
  - Strict curtailment by priority is the only alternative
- Prior appropriation and groundwater management plan laws are not in conflict

GMP Statutes Do Not Allow Violations of Law (con't)

- There is no ***implied*** repeal of Nevada water law
  - *W. Realty Co.* at 344: "Where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute"
  - *Happy Creek* at 1111: "The Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute.
- Implied repeal requires that two statutes be "flatly or irreconcilably repugnant" to each other
  - *Ronnow v. City of LV* at 364-65
  - *Ramsey v. City of N. LV* at 629
- There must be "no other reasonable construction of the two statutes" to repeal
  - *Washington v. State* at 739
- Require to harmonize if possible, which is easy here
  - *Hefetz v. Beavor*, at 475: "When construing statutes and rules together, this court will, if possible, interpret a rule or statute in harmony with other rules and statutes"

GMP Statutes Do Not Allow Violations of Law (con't)

- Strict curtailment by priority is not the only alternative
- Respondents' primary error is assuming "prior appropriation" and "strict curtailment" are one and the same
  - Strict curtailment is ultimate remedy, but not only remedy
- There are multiple alternatives for reducing pumping that would neither require strict curtailment nor ignoring prior appropriation
- *See* 2014 Local Scoping Summary examples:
  - Voluntary water rights buyouts (fees / mine proceeds)
  - Irrigation efficiency improvements (sprinklers, subsurface drip, ban end guns, etc)
  - Establish shorter irrigation season
  - Prohibited watering day(s) / time(s)
  - Fallowing programs
  - Soil moisture monitoring
  - Low-water/high-value crops
- Because strict curtailment by priority is not the only alternative means to reduce pumping that is consistent with prior appropriation, the GMP statutes are not in conflict with the law of prior appropriation

Liberal Water Transfers Violate Statute

- DVGMP Sec. 13.8 and 13.10 permit "allocations," whether banked or not, to be pumped anywhere in Diamond Valley at any time (ROA 234-35)

- Only limit is Sec. 14.7 to 14.9 (ROA 237)
  - Only applies to new wells or pumping that exceeds existing well volume
  - shifts burden to SE to act within ***14 days***, otherwise "deemed approved"

- Contrary to NRS 533.325 and 533.370(2)
  - require formal water rights change applications
  - require SE to determine whether conflicts with existing rights or public interest

- Results in lack of any analysis of potential impacts of repeated transfers

- Violates Young Paper requirement that water banking establish protective water transfer rate *up front* (Reply Br. Addendum at 15)

Ongoing Adverse Impacts to Vested Rights

- Senior vested surface water rights are primarily from springs that have been decimated by lowering water table
- GMP does **nothing** to address these impacts
  - After 35 years, irrigation withdrawals still at least 34,200 af (ROA 510)
  - Does not *raise* water table, at best *slows decline*
- Order 1302: "amount of transitional storage consumed before a new equilibrium state is reached may affect the depth to water" (ROA 016)
- Violates NRS 533.085(1)
  "Nothing contained in this chapter shall impair the vested right of any person"

Water Banking Delays Aquifer Recovery

- GMP Water Banking Scheme unnecessarily delays aquifer recovery
- Even assuming GMP is legal, no evidence water banking is necessary for the GMP to work
- State Engineer should have analyzed how quickly aquifer could recover without arbitrary water banking scheme

Vote Procedure Violated Law

- NRS 534.037: "The Petition must be signed by a majority of the holders of permits or certificates to appropriate water in the basin..."
- The GMP proponents only sent the petition to *groundwater* permit holders (ROA 148)
- Statute does not limit voting to groundwater rights
- State Engineer should have determined number of surface water rights that were not provided voting opportunity

CONCLUSION

Because the Diamond Valley GMP violates multiple provisions of Nevada water law, the State Engineer's decision in Order No. 1302 was arbitrary and capricious and should be reversed.