

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**Case No. 81224**

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

Appellants,

v.

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

Respondents.

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

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**JOINT APPENDIX  
VOLUME XI**

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LEONARD LAW, PC  
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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
05/13/2019	DNRPCA Intervenors' Motion to Intervene	I	JA0191-0224

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE RANGE</b>
05/28/2019	Unopposed Motion to Extend Time to File the State Engineer's Record on Appeal	I	JA0225-0232
06/07/2019	Order Granting DNRPCA Intervenor's Motion to Intervene	I	JA0233-0234
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

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE RANGE</b>
07/01/2019	Notice of Mailing of Notice of Legal Proceedings	VI	JA1318-1330
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
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 filed 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
09/16/2019	Opening Brief of Bailey Petitioners	VII	JA1451-1490

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE RANGE</b>
10/23/2019	DNRPCA Intervenors' Answering Brief	VII	JA1491-1522
10/23/2019	DNRPCA Intervenors' Addendum to Answering Brief	VII	JA1523-1626
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
12/10/2019	Opening Argument of Bailey Petitioners Presentation	X	JA2155-2184
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
12/11/2019	DNRPCA Intervenors' Presentation	XI	JA2366-2380

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE RANGE</b>
04/27/2020	Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review	XI	JA2381-2420
04/30/2020	Notice of Entry of Order filed by Sadler Ranch, LLC and Ira R. and Montira Renner	XII	JA2421-2464
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
05/19/2020	Order Denying DNRPCA Intervenors' Ex Parte Motion for Order Shortening Time; Order Granting DNRPCA Intervenors' Motion for Temporary Stay Pending Decision on Intervenors' Motion for Stay Pending Appeal	XIV	JA2803-2807
05/21/2020	Eureka County's Notice of Appeal	XIV	JA2808-2811

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE RANGE</b>
05/21/2020	Eureka County Joinder to DNRPCA Intervenor's Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIV	JA2812-2815
05/27/2020	Opposition of Bailey Petitioners to DNRPCA Intervenor's Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIV	JA2816-2831
05/27/2020	Sadler Ranch and Ira R. and Montira Renner's Opposition to Motion for Stay Pending Appeal	XIV	JA2832-2864
06/01/2020	DNRPCA Intervenor's 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 Intervenor's 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
6/30/2020	Order Denying DNRPCA Intervenor's Motion for Stay Pending Appeal	XIV	JA3009-3013

**ALPHABETICAL INDEX TO JOINT APPENDIX**

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE RANGE</b>
10/23/2019	Answering Brief of Eureka County	VIII	JA1675-1785
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
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
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10/23/2019	DNRPCA Intervenor's Answering Brief	VII	JA1491-1522
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05/13/2019	DNRPCA Intervenor's Motion to Intervene	I	JA0191-0224
05/14/2020	DNRPCA Intervenor's Notice of Appeal	XII	JA2508-2554

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12/11/2019	DNRPCA Intervenors' Presentation	XI	JA2366-2380
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
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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
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04/27/2020	Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review	XI	JA2381-2420
02/11/2019	Ira R. and Montira Renner Petition for Judicial Review	I	JA0116-0144

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE RANGE</b>
04/26/2019	Letter to Chambers re Stipulated Extension for Record on Appeal	I	JA0187-0188
07/31/2019	Motion to Intervene by Beth Mills, Trustee of the Marshall Family Trust	VI	JA1354-1358
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09/16/2019	Opening Brief of Bailey Petitioners	VII	JA1451-1490
09/16/2019	Opening Brief of Petitioners Sadler Ranch, LLC and Ira R. and Montira Renner	VII	JA1383-1450

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06/24/2019	Opposition of Baileys to Motion in Limine	VI	JA1276-1285
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09/04/2019	Order Granting Motion in Limine	VI	JA1369-1378
06/07/2019	Order Granting Motion to Extend Time to File The State Engineer's Record on Appeal	I	JA0235

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12/10/2019	Transcript of Proceedings, Oral Argument Volume I	X	JA1946-2154
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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## 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



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

TIMOTHEY LEE & CONSTANCE MARIE BAILEY, et al., Petitioners,

vs.

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

CONSOLIDATED CASE NO.: CV-1902-348  
DEPT. NO.: II

**SADLER RANCH & IRA & MONTIRA RENNER OPENING ARGUMENT**

JA2185

# Issues

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The issues in this case fall into three broad categories:

- Are the provisions of the Groundwater Management Plan (“GMP”) lawful?
  - Standard of review – de novo
- Does the GMP contain the necessary steps for removal of the Critical Management Area (“CMA”) designation?
  - Standard of review – substantial evidence
- Did the State Engineer follow the proper process for approving a GMP?
  - Standard of review – abuse of discretion (statutory interpretation of NRS 534.037 – de novo)



# Undisputed Facts

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- Pumping has exceeded PY every year since 1970.
- Over-pumping has caused harm to senior, pre-statutory water rights.
- Basin's perennial yield ("PA") is 30,000 afa.
- At GMP Year 35 authorized pumping of rights subject to the plan will be 34,200 afa – 14% higher than PY. SE ROA 510.
  - Does not include pumping of rights not subject to plan.
- GMP violates prior appropriation doctrine.
  - “[I]t is acknowledged that the GMP does deviate from the strict application of the prior appropriation doctrine . . . .” SE ROA 6.



# GMP Development Timeline (1)

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- June 4, 2011 – Governor signs AB 419.
  - NRS 534.037 – GMP approval standards.
  - NRS 534.110(7) – Creates CMA designation.
- February 2014 – State Engineer hosts workshop in Eureka and requests that users begin process of developing GMP.
- March 2014 – Eureka Conservation District (“ECD”) takes lead role in organizing water users to develop GMP.
- May 2014 – ECD retains Walker & Assoc. to assist with initial scoping and issue identification. SE ROA 249-69.



# GMP Development Timeline (2)

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- February 2015 – SB 81 introduced.
  - Seeks changes to GMP and CMA statute.
  - Fails to pass.
- April 23, 2015 – GMP planning workshop.
  - Purpose is to “[o]utline the components, process, and timeline of a GMP.”  
SE ROA 287.
- June 11, 2015 – Workshop with Mike Young presenting “Australian” scheme (share system).
  - First time “changing our water rights system” becomes stated goal of planning project. SE ROA 294.
  - GMP proponents begin developing draft GMP outline based on Australian scheme, not a conservation plan. SE ROA 294.
- August 25, 2015 – State Engineer issues Order 1264 designating Diamond Valley as a CMA. SE ROA 134.



## GMP Development Timeline (3)

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- September 2015 – Mike Young publishes paper on “unbundling” water rights in Diamond Valley.
- February 26, 2016 – Draft GMP Chapter 1 sent to water users. SE ROA 318.
- June 7, 2016 – Australian scheme and Diamond Valley issues presented to legislative subcommittee.
- August 2016 – Legislative subcommittee agrees to forward GMP bill draft to 2017 Legislature (SB 269).
- Fall 2016 – Draft GMP sent to State Engineer.



# GMP Development Timeline (4)

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- September 26, 2016 – State Engineer presents GMP share system at Western State Engineer’s Conference.
  - States that they “[n]eed statutory change to make legal.”
  - Indicates that bill drafts are being submitted “to do just that.”
- November 17, 2016 – State Engineer pre-files a new bill, SB 73, with Legislature.
- February 28, 2017 – Committee hearing on SB 73. PET ADD 008-026.
  - Attended by both GMP proponents and opponents.
  - No further action, bill fails.
- March 15, 2017 – SB 269 introduced. SE ROA 430.
  - No hearing is ever held on bill and it too fails to pass.



# GMP Development Timeline (5)

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- July 26, 2017 – Second draft GMP sent to State Engineer for review.
- October 9, 2017 – Workshop to amend draft plan based on State Engineer comments. SE ROA 441.
- October 2017–January 2018 – Continued work on draft GMP.
- January 26, 2018 – Third draft GMP sent to State Engineer for review. SE ROA 453.
- February 14, 2018 – Final comments from State Engineer.



# GMP Development Timeline (6)

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- August 20, 2018 – GMP proponents submit final plan and petition to State Engineer.
  - State Engineer ROA begins here, nothing from before.
  - ROA does not include Young report or prior drafts and comments from State Engineer.
- October 1, 2018 – Notice of public meeting sent.
- October 30, 2018 – Public comment meeting held in Eureka.
  - After meeting, commenters are given 3 days to submit written materials.
- January 11, 2019 – State Engineer issues Order 1302 approving the GMP.



# Sadler Ranch Curtailment Petition

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- April 27, 2015 – Sadler Ranch files a petition requesting the State Engineer to begin curtailment.
- June 3, 2015 – State Engineer files motion to dismiss.
  - Claims that Sadler Ranch has been fully mitigated.
- August 2015 – Case is stayed while State Engineer considers CMA designation.
- November 16, 2015 – First amended petition filed. New motion to dismiss filed and briefed.
- July 25, 2016 – Court denied MTD in part and issued alternate writ.



# Order 1302 – State Engineer Standard of Review

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- State Engineer standard of review for GMP
  - Plan must contain “necessary steps” for removal of CMA designation. NRS 534.037(1).
  - 6 factors to consider. NRS 534.037(2):
    - Basin hydrology;
    - Basin physical characteristics;
    - Spacing and location of withdrawals;
    - Water quality;
    - Location of wells, including domestic wells; and
    - Whether another GMP already exists for basin.



# Order 1302 – Initial Findings of Fact

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- Key Findings of Fact
  - 126,000 afa of irrigation rights have been issued.
  - In 2016, irrigation pumping was 76,000 afa – 253% of PY.
  - Groundwater levels have consistently declined at rates greater than 2 ft/year.
  - Plan was supported by simple majority (53.2%) of confirmed groundwater right holders.
  - Majority of senior-priority owners did not support plan (53.2% did not sign petition).
  - Vested rights, non-irrigation rights (mining & municipal), and domestic wells not included in plan.



# Order 1302 – Prior Appropriation

- Bulk of Order 1302 is State Engineer’s responses to adverse public comments.
- Prior appropriation
  - “[I]t is acknowledged that the GMP does deviate from the strict application of the prior appropriation doctrine with respect to “first in time, first in right . . . .” SE ROA 6.
  - Erroneously claims Legislature’s enactment of NRS 534.037 “demonstrates legislative intent to permit action in the alternative to strict priority regulation.” SE ROA 6.
    - Admits that “legislative history contains scarce direction concerning how a plan must be created or what the confines of the any plan must be.” SE ROA 7.
    - Only authority discussed is New Mexico’s *Lewis* case. SE ROA 7.
  - States that plan “honors prior appropriation” through share allocation method. SE ROA 8.



# Does Order 1302 Honor Prior Appropriation?

Most senior user (100 afa)		Most junior user (100 afa)	
<u>Shares</u>	100	<u>Shares</u>	80
<u>Year 1 allocation</u>	67 acre-feet	<u>Year 1 allocation</u>	54 acre-feet
	33% cut		46% cut
<u>Year 35 allocation</u>	30 acre-feet	<u>Year 35 allocation</u>	24 acre-feet
	70% cut		76% cut



# Does Order 1302 Honor Prior Appropriation?

Senior user at cutoff (100 afa)		Junior user at cutoff (100 afa)	
<u>Shares</u>	95	<u>Shares</u>	95
<u>Year 1 allocation</u>	63 acre-feet	<u>Year 1 allocation</u>	63 acre-feet
	37% cut		37% cut
<u>Year 35 allocation</u>	28 acre-feet	<u>Year 35 allocation</u>	28 acre-feet
	72% cut		72% cut



# Order 1302 – Well Use Approvals (1)

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- Under NRS 533.330, permits are tied to single point of diversion. Any change in point of diversion requires permit holder to file change application. NRS 533.345; NRS 533.325.
- GMP allows free transfer of allocations between wells as long as maximum permitted volume of any given well is not exceeded.
  - Commenters raised objection that this violates NRS mandate that change in point of diversion requires approval of change application.
  - State Engineer does not address this objection.



# Order 1302 – Well Use Approvals (2)

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- Under GMP requests to exceed permitted volume in any given year are also automatically approved if not acted on in 14 days.
  - This creates an unregulated ability to exceed permitted maximum duties.
  - State Engineer claims that this is okay because NRS 533.345 temporary applications must also be approved unless they impact existing rights or are detrimental to public interest. SE ROA 8-9.
  - But NRS 533.345 temporary application process requires the State Engineer to actually perform a conflict and public interest analysis, the GMP does not.
  - GMP has no process for protesting change applications; temporary applications under NRS 533.345 can be protested.



# Order 1302 – Well Plugging

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- GMP Section 14.2 states that wells linked to an allocation account “shall be exempt from well abandonment requirements pursuant to NRS 534 and NAC 534.”
- State Engineer claims that this provision is consistent with NAC.
  - How can a provision that exempts a well from NAC be consistent with that regulation?



# Order 1302 – Banking Program

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- Banking program
  - GMP allows unused allocations to be “banked” and used in a subsequent year.
  - Eureka County’s own expert stated that this fits within the definition of an aquifer storage and recovery (“ASR”) project. SE ROA 522.
  - State Engineer summarily states that because water is not being injected into the ground, it is not an ASR project under the statute. SE ROA 10.
    - Does not cite any statutory language or legislative history supporting this determination.
    - Does not cite to any evidence showing that program is hydrologically feasible.
    - ASR is only authorized way to store water in an underground aquifer.



# Order 1302 – Beneficial Use

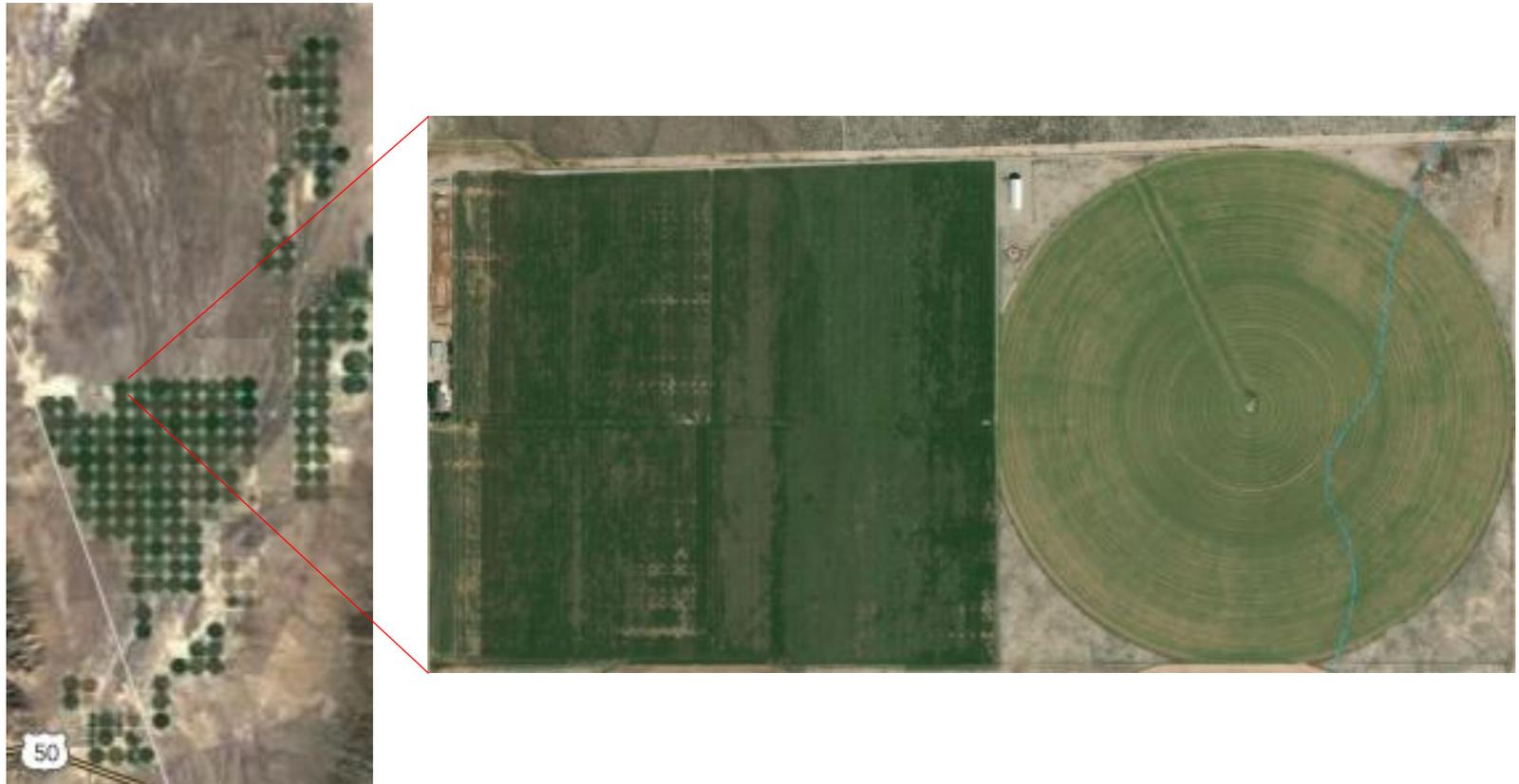
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- Beneficial use
  - State Engineer rejects proposal that unused water rights should be canceled or forfeit before share allocations are made.
    - Claims, without evidence, that forfeiture proceedings would be untimely. SE ROA 10.
    - Claims, without evidence, that initiation of forfeiture is contrary to goal of reducing pumping. SE ROA 10-11.
    - Erroneously claims that because reductions start at current pumping, not total permits, forfeiture of paper water would not have major effect. SE ROA 11.



# Effect Of Failing To Require Perfection Of Water Rights Before Allocations Are Made

- Center pivot versus full irrigation



# Effect Of Failing To Require Perfection Of Water Rights Before Allocations Are Made

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- Farmer A
  - Has  $\frac{1}{4}$  section with center pivot (160 acres).
  - Received permit for 4 af/acre (640 afa).
  - Complied with the law and filed proof of beneficial use
  - Water right perfected at 4 af/acre x 128 acres actually irrigated by center pivot (512 afa).
  - Water allocation under GMP
    - Year 1 – 343 af
    - Year 35 – 154 af



# Effect Of Failing To Require Perfection Of Water Rights Before Allocations Are Made

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- Farmer B
  - Has  $\frac{1}{4}$  section with center pivot (160 acres).
  - Received permit for 4 af/acre (640 afa).
  - Only watered 128 acres but never filed proof of beneficial use so allocation based on full permit quantity.
  - Water allocation under GMP
    - Year 1 – 428 af (85 af more than Farmer A)
    - Year 35 – 192 af (38 af more than Farmer A)
    - Total cumulative windfall to Farmer B = 1,940 af



# Effect Of Failing To Require Perfection Of Water Rights Before Allocations Are Made

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- Permit Holder C
  - Has  $\frac{1}{4}$  section (160 acres).
  - Received permit for 4 af/acre (640 afa).
  - Never fully developed land or placed water to use, but received multiple extensions of time to do so.
  - Water allocation under GMP
    - Year 1 – 428 af
    - Year 35 – 192 af
    - Can sell share allocations to others without ever having farmed the appurtenant land.
    - Violates beneficial use and anti-speculation doctrine.



# Order 1302 – Mitigation, Domestic Wells, Advisory Board

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- Mitigation for harm to seniors.
  - Plan contains no mitigation for ongoing harm to vested rights.
  - State Engineer claims that mitigation rights issued under Order 1226 provide full mitigation. SE ROA 13.
- Domestic wells
  - State Engineer claims that because domestic wells are not regulated under the plan, they are protected. SE ROA 15.
- Advisory board representation
  - Concern that juniors dominate the board.
  - SE accepts the board makeup as presented. SE ROA 15.



# Order 1302 – Scientific Soundness (1)

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- State Engineer correctly notes that proper measure of success “is a stabilization of water levels.” SE ROA 16.
- Also correctly states that recharge and discharge must be balanced for water levels to stabilize. SE ROA 16.
- But, State Engineer admits that “modeling and hydrogeologic analysis are *not* the basis” for GMP’s pumping reductions. SE ROA 16 (emphasis added).
- Instead, pumping targets were selected “by agreement of the GMP authors” using “existing published values.” SE ROA 16.
  - No analysis, citation, or reference to those “published values.” SE ROA 16.



## Order 1302 – Scientific Soundness (2)

- State Engineer indicates that pumping will be adjusted in future based on monitoring data. SE ROA 16.
  - But, State Engineer is prohibited from making adjustments during first 10 years and is limited to 3% annual change thereafter.
- State Engineer states that there are 4,437 afa of permits not subject to the plan and uses this number to conclude that pumping will not exceed 42,000 afa at Year 35. SE ROA 17.
  - Ignores Sadler, Bailey, Venturacci permits that total apx. 6,400 afa. (Permits 82268, 81720, 63497, 81825, 82572, 87661).
  - Table 1a (SE ROA 481) shows 5,252 af of non-irrigation permits and certificates, not 4,437 afa.



## Order 1302 – Scientific Soundness (3)

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- State Engineer claims that “lack of a groundwater model or detailed hydrogeologic analysis does not preclude approval of the GMP as written.” SE ROA 17.
  - But NRS 534.037(2)(a) specifically requires State Engineer to perform a hydrologic analysis.
- State Engineer sidesteps concerns over lack of objective triggers and thresholds to guide future management decisions. SE ROA 17.
  - Having smart meters and charging people for overuse is not the same as establishing objective standards for determining whether pumping targets need to be adjusted.



# Order 1302 – Scientific Soundness (4)

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- Banking program depreciation rates
  - State Engineer states that this was “only component of the GMP expressly based on groundwater model simulations.” SE ROA 18.
    - But, Order 1302 also states that “depreciation rates in the final GMP were a compromise . . . .” SE ROA 18.
  - Simulation results, model report, and simulation data not included in GMP, ROA, or Order 1302 (no way to independently verify).
  - Notes that adjustments to rates will be made based on data, but no identification of what data will be used or how that data will guide such adjustments.



# Order 1302 – Conclusions (1)

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- First time NRS 534.037(2) factors are considered.
  - Says plan contains discussion of factors. SE ROA 18.
  - But, statute says State Engineer must analyze them.
- State Engineer again references *Lewis* as basis for conclusion that GMP can ignore prior appropriation doctrine. SE ROA 18.
- Concludes that GMP is not legally deficient without citation or analysis. SE ROA 18.
- Reiterates that there is no time to implement forfeiture or cancelation of non-used permits. SE ROA 18.
- States that “standard for determining success of the plan by stabilizing water levels is sound.” SE ROA 19.
  - But what are the standards to measure this by?



## Order 1302 – Conclusions (2)

- Agrees that “groundwater modeling is an important tool for projecting the effects of pumping reduction” and recommends that it should be used to guide future decisions. SE ROA 19.
  - But State Engineer is handcuffed to do anything regardless of model analysis.
  - No explanation of why model should not have been used to establish reductions to start with.
- States that pumping reductions will “lead to the entire basin’s groundwater pumping approaching the perennial yield and stabilization of groundwater levels.” SE ROA 19.
  - But NRS 534.037 requires plan to bring pumping below PY, not approaching.
- Reiterates that objective triggers and thresholds are not required to guide future management actions. SE ROA 19.



# Judicial Standard of Review (1)

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- Legal determinations reviewed de novo.
  - A State Engineer ruling on question of law is “not entitled to deference.”
    - *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37 (2019).
  - Courts “review purely legal questions de novo.”
    - *King v. St. Clair*, 134 Nev. 137, 414 P.3d 314 (2018).
  - Court must “review purely legal questions without deference to the State Engineer’s ruling.”
    - *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 245 P.3d 1145 (2010).
  - Court has “authority to undertake an independent review of the State Engineer’s statutory construction, without deference to the State Engineer’s determination.”
    - *Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 179 P.3d 1201 (2008).



# Judicial Standard of Review (2)

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- Factual determinations are reviewed under substantial evidence standard.
  - Court must determine “whether substantial evidence in the record supports the State Engineer’s decision.”
    - *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979).
  - “Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.”
    - *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 245 P.3d 1145.



## Judicial Standard of Review (3)

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- Decisions of the State Engineer must not be arbitrary, capricious, or an abuse of discretion.
  - *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 245 P.3d 1145.
- Arbitrary – “made without consideration of or regard for facts, circumstances, fixed rules, or procedures.” Black’s Law Dictionary (10th ed. 2014).
- Capricious – “contrary to the evidence or established rules of law.” Black’s Law Dictionary (10th ed. 2014).
- A misapplication or misinterpretation of Nevada’s water laws is both arbitrary and capricious.
  - *King v. St. Clair*, 134 Nev. 137, 414 P.3d 314.



# Prior Appropriation is Foundational Doctrine of Nevada's Water Laws

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- Has been the basis of Nevada water law since statehood.
  - *Lobdell v. Simpson*, 2 Nev. 274 (1866).
- Two foundational principles:
  - Priority – “First in time, first in right”
  - Beneficial use – “Use it, or lose it”
- “The Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute.”
  - *Wilson v. Happy Creek, Inc.*, 135 Nev. Adv. Op. 41, 448 P.3d 1106 (2019).



# The Priority Date Of A Water Right Is Its Most Valuable Element

- Priority ensures that a senior will receive their water *during a time of shortage*.
- “[T]o deprive a person of his priority is to deprive him of a most valuable property right.”
  - *Whitmore v. Murray City*, 154 P.2d 748 (Utah 1944).
- “[A] loss of priority that renders rights useless certainly affects the rights value and can amount to a de facto loss of rights.”
  - *Wilson v. Happy Creek, Inc.*, 135 Nev. Adv. Op. 41, 448 P.3d 1106.
- Holders of senior priority water rights have a reasonable, investment-backed expectation in the security that their priority date provides.
- There is no dispute the GMP strips priority from seniors and thereby violates prior appropriation doctrine. SE ROA 6.



# Issue 1: The Legislature Did Not Authorize A GMP To Replace The Prior Appropriation System.

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- The plain language of the statute does not alter prior appropriation.
- The legislative history of AB 419 does not evidence an intent to abrogate prior appropriation in CMAs.
- The State Engineer previously determined that the share system was not legal under AB 419 and changes to the statute were needed to make the GMP work.
- The Legislature rejected those changes and maintained the prior appropriation system.



# The Plain Language Of NRS 534.037 & 534.110(7) Does Not Repeal Prior Appropriation In CMAs

- The “legislative history contains scarce direction concerning how a plan must be created or what the confines of any plan must be.” SE ROA 7.
- Nothing in the plain language of the statutes abrogates prior appropriation doctrine.
- If the Legislature desires to repeal or create exceptions to a long-standing doctrine, it must do so with express language that clearly states that intent.
  - *W. Realty Co. v. City of Reno*, 63 Nev. 330, 172 P.2d 158 (1946).



## NRS 534.037 (1)

- 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.*



## NRS 534.037 (2)

- 2. In determining whether to approve a groundwater management plan submitted pursuant to subsection 1, the State Engineer shall consider, without limitation:
  - (a) The hydrology of the basin;
  - (b) The physical characteristics of the basin;
  - (c) The geographic spacing and location of the withdrawals of groundwater in the basin;
  - (d) The quality of the water in the basin;
  - (e) The wells located in the basin, including, without limitation, domestic wells;
  - (f) Whether a groundwater management plan already exists for the basin; and
  - (g) Any other factor deemed relevant by the State Engineer.



## NRS 534.037 (3) – (5)

- 3. Before approving or disapproving a groundwater management plan submitted pursuant to subsection 1, the State Engineer shall hold a public hearing to take testimony on the plan in the county where the basin lies or, if the basin lies in more than one county, within the county where the major portion of the basin lies. The State Engineer shall cause notice of the hearing to be:
  - (a) Given once each week for 2 consecutive weeks before the hearing in a newspaper of general circulation in the county or counties in which the basin lies.
  - (b) Posted on the Internet website of the State Engineer for at least 2 consecutive weeks immediately preceding the date of the hearing.
- 4. The decision of the State Engineer on a groundwater management plan may be reviewed by the district court of the county pursuant to NRS 533.450.
- 5. An amendment to a groundwater management plan must be proposed and approved in the same manner as an original groundwater management plan is proposed and approved pursuant to this section.



# NRS 534.110(7)

- 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 534.110(7) Does Not Abrogate Prior Appropriation In CMA Basins

- Magic words are not in the statute – need to say “GMP does not need to conform to priority.” (*See, e.g., SB 73*).
- Purpose of language was to force action by State Engineer.
- Language *requires* curtailment.

6. Except as otherwise provided in subsection 7, . . . the State Engineer **may** order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.

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



# A GMP Is Provided As An Alternative To Mandatory Curtailment

- In NRS 534.110(7) the Legislature provided an “out” to mandatory curtailment – GMP approval.

**Nowhere does the statute indicate priority should be abandoned.**

6. Except as otherwise provided in subsection 7, . . . the State Engineer **may** order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.

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

JA2228



# Legislative History Of AB 419 (2011)

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- Bill was introduced by Assemblyman Goicoechea.
- Purpose of the bill was to force action to bring over-pumped basins into compliance.
  - “The problem is where we are today, again the State Engineer, and I am not throwing rocks at the Division of Water Resources, but *the bottom line is we are just not getting it done*. We continue to see these groundwater basins decline.” EC 006 (emphasis added).



# Why Did Legislature Need To Force Action? 1982 Curtailment Hearing (1)

- 1982 – State Engineer holds hearing in Diamond Valley.
  - Concludes that over-pumping is causing harm to senior, pre-statutory water rights.
    - “[T]he water table is declining because of pumpage in excess of the perennial yield.”
      - Tr. of Proceedings of the Hr’g before Pete G. Morros, State Engineer, vol. 1, 45:7-10, May 24, 1982 (Morros).
    - Conclusion supported by a 1982 United States Geological Survey (“USGS”) field investigation showing that the cause of the decline was “sustained pumpage from irrigation wells in the *south* Diamond Valley.”
      - Tr. of Proceedings of the Hr’g before Pete G. Morros, State Engineer, vol. 1, 30:5-10, May 24, 1982 (Morros).



# Why Did Legislature Need To Force Action? 1982 Curtailment Hearing (2)

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- State Engineer Morros stated that water management decisions in Diamond Valley have been driven by politics, not science.
  - “There was, and I’m going to be very candid, there was a tremendous amount of pressure put on the State Engineer’s Office to issue permits, far in excess of what we had identified at the time was the perennial yield . . . .”
    - Tr. of Proceedings of the Hr’g before Pete G. Morros, State Engineer, vol. 1, 41:6-10, May 24, 1982 (Morros).
- No effective action was taken.
  - Meter order issued, never enforced.
  - Adjudicated started, not timely pursued.



## Why Did Legislature Need To Force Action? 1988 Morros Testimony (1)

- 1988 – State Engineer Morros testified that pumping needs to be reduced sooner rather than later.
  - Sworn testimony given before a jury trial.
    - *Kephart v. Bilyeau*, 2nd J.D. Case No. 85-8046.
  - “[T]here has been significant lowering of the static water tables” in Diamond Valley.
    - Tr. of Proceedings Jury Trial vol. 1, 32:15-17, Dec. 6, 1988 (Morros).
  - “Diamond Valley rates as probably one of the highest areas of concern in the state right now.”
    - Tr. of Proceedings Jury Trial, vol. 1, 38:15-17, Dec. 6, 1988 (Morros).



## Why Did Legislature Need To Force Action? 1988 Morros Testimony (2)

- “The decline in the water tables continued from ‘75 to ‘82. There was no relief.”
  - Tr. of Proceedings Jury Trial, vol. 1, 60:7-9, Dec. 6, 1988 (Morros).
- “I think there’s a substantial probability that it [regulation] will occur in five years . . . I don’t think there’s any question it will occur in ten years.”
  - Tr. of Proceedings Jury Trial, vol. 1, 52:25-53:4, Dec. 6, 1988 (Morros).
- “[R]egulation is imminent.”
  - Tr. of Proceedings Jury Trial, vol. 1, 62:21-22, Dec. 6, 1988 (Morros).
- Even after testifying that regulation was needed in 5-10 years, nothing was done.



## Why Did Legislature Need To Force Action? 1988 Morros Testimony (3)

- The first step in regulating pumping is to “segregate the water rights into those water rights that have been perfected... and those water rights that are still under a permit status where the beneficial use has not been shown . . . We have taken action . . . in other ground water basins throughout the state . . . in the form of restricting extensions of time being granted under permitted rights . . . limiting the amount of time that the holder of the right will have to show beneficial use.”
- Tr. of Proceedings Jury Trial, vol. 1, 55:17-56:11, Dec. 6, 1988 (Morros).



# Why Did Legislature Need To Force Action?

## 2009 State Engineer Workshop

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- Warned water users that something had to be done.
- Noted that his options were to curtail pumping, cancel permits and forfeit water rights for non-use, deny extensions of time, or impose penalties for over-pumping.
- Encouraged water users to investigate withdrawing rights for non-irrigated corners, increasing efficiency, switching to lower consumption crops, increasing filtration, and importing water to recharge basin.
- No significant reduction of pumping from 2009 – 2011.



# Why Did Legislature Need To Force Action?

## Order 1226 Hearing

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- State Engineer stated that he has been “trying to work with the stakeholders” for past 40 years but was repeatedly told by junior irrigators to “go away.” Tr. of Hr’g on Proposed Designation Order for the Diamond Valley Hydrographic Basin, vol. 1, 27:6-17, Jan. 23, 2013 (King).
- State Engineer stated that at 2009 workshop, “everyone, it seemed, was happy with where they were in terms of their crops and the declining water table. And when we gave our presentation, we said, that’s fine.” Tr. of Hr’g on Proposed Designation Order for the Diamond Valley Hydrographic Basin, vol. 1, 28:1-4, Jan. 23, 2013 (King).



# Why Did Legislature Need To Force Action?

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- Despite official acknowledgment that water tables were declining and causing harm to senior, pre-statutory water rights, no effective action was taken to reduce pumping between 1982 – 2011.
- This was the context for Assemblyman Goicoechea’s 2011 statement that the State Engineer is “just not getting it done. We continue to see these groundwater basins decline.” EC 006.
- Legislature wanted better enforcement of prior appropriation, not abrogation.



# Legislative History Of AB 419 (2011)

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- Nothing in minutes of committee meeting indicates an intent to overturn prior appropriation.
- What type of GMP was contemplated in 2011?
  - A voluntary plan
    - “We support the concept of giving parties tools so they can find voluntary ways to reduce overappropriation.” EC029.
  - Burden on juniors to make cuts
    - “People with junior rights will try to figure out how to conserve enough water under these plans.” EC049.
  - Conservation measures, not new water rights system
    - Users “would have to work forward and develop a conservation plan.” EC004.
    - Plan could include “planting alternative crops, water conservation, or using different irrigation methods.” EC046.



# The State Engineer Previously Agreed That The Australian Share Scheme Was Unlawful (1)

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

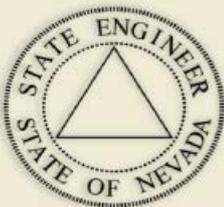
Shows that GMP is based  
on Australian scheme

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

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

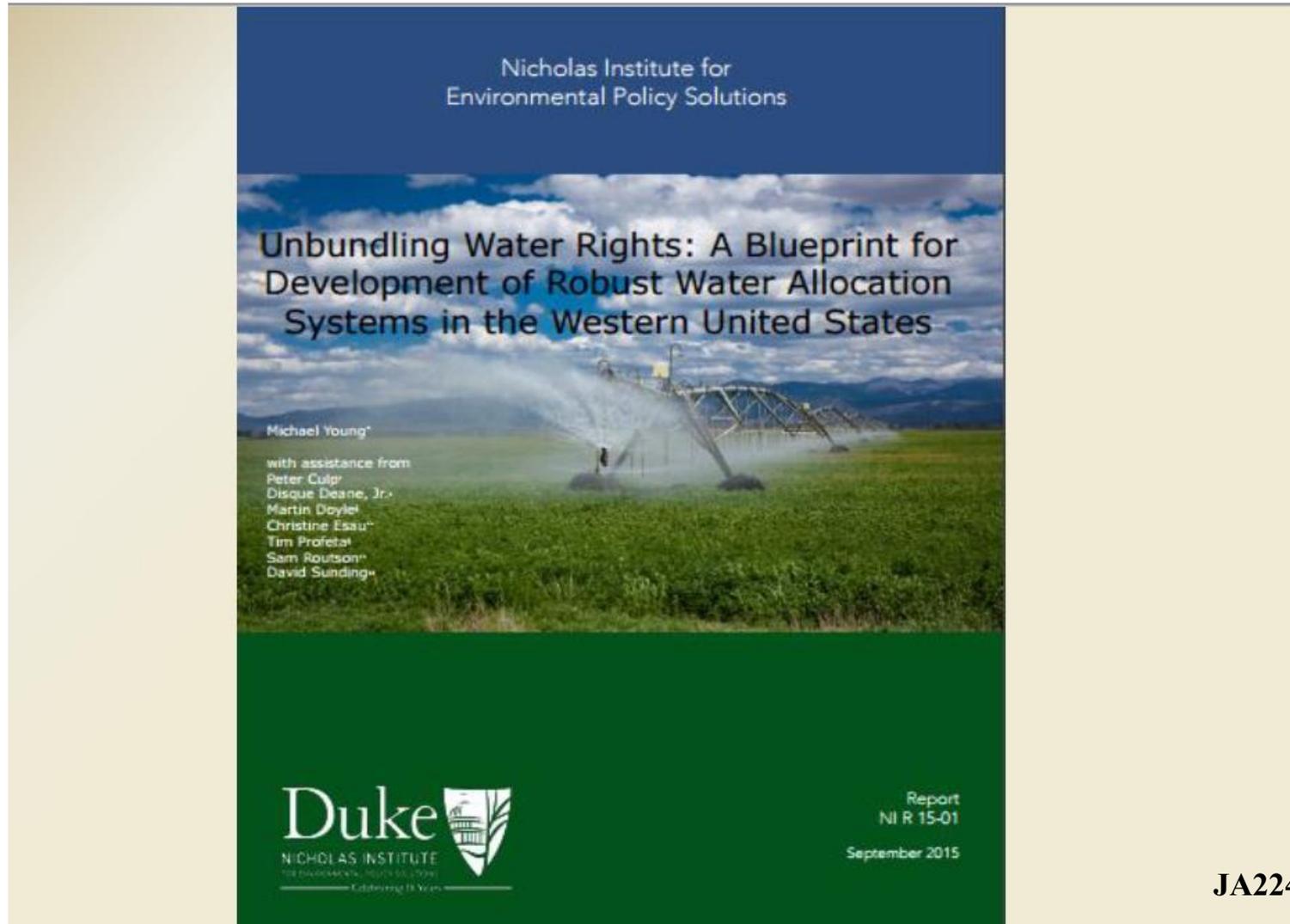
Indicates presentation is  
being given in official capacity  
as State Engineer

State Engineer's  
official seal



JA2239

# The State Engineer Previously Agreed That The Australian Share Scheme Was Unlawful (2)

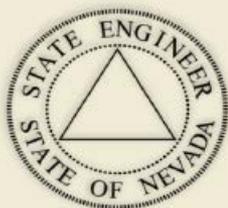


JA2240

# The State Engineer Previously Agreed That The Australian Share Scheme Was Unlawful (3)

## Unbundling Water Rights

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



# The Legislature Deliberately Chose To Maintain Prior Appropriation In CMAs

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- In 2017, two bills were introduced in an attempt to get authorization to set aside priority:
  - SB 73 – State Engineer proposal.
  - SB 269 – Interim subcommittee proposal.
- Both bills failed to pass out of committee.
  - SB 269 did not even receive a hearing.



# SB 73 (2017)

- Proposed new subsection to NRS 534.037 as follows:

34       3. *In addition to any other power granted by law, the State*  
35 *Engineer may consider any reasonable action set forth in a*  
36 *groundwater management plan submitted pursuant to subsection*  
37 *1 or 2, including, without limitation:*  
38       (a) *Limiting the quantity of water that may be withdrawn*  
39 *under any permit or certificate or from a domestic well on a basis*  
40 *other than priority;*  
41       (b) *Limiting the movement of water rights, particularly those*  
42 *water rights which have not been used for 5 successive years;*  
43       (c) *Designating preferred uses of existing water rights;*  
44       (d) *Establishing a program for the voluntary relinquishment of*  
45 *a water right to revert to the groundwater source of the water;*



\* S B 7 3 \*



# Testimony On SB 73 Provided Legislature With A Clear Choice – Proponent Testimony

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- Jake Tibbitts:

- Application of prior appropriation would be devastating to community. PET ADD 029.
- “The time to fix this problem through strict prior appropriation was 60 years ago when there was a flood of applications. Now 60 years later, the State Engineer is saying we are going to use strict prior appropriation. This is unworkable for a community.” PET ADD 016.

- Dusty Moyle:

- “Senate Bill 73 will give us the opportunity to implement the [Diamond Valley] plan and move forward to rectify the problem.” PET ADD 022.



# Testimony On SB 73 Provided Legislature With A Clear Choice – Opponent Testimony

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- Bob Marshall:
  - “Nevada’s water law is based on two basic principles: 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 in times of shortages. *Before rights can be taken away or made less valuable, the holders have to be compensated.* Every single permit issued is subject to prior rights. That is Nevada’s law.” PET ADD 22 (emphasis added).



# The Legislature Deliberately Chose To Maintain Prior Appropriation In CMAs

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- When the Legislature is given a clear choice between two policy alternatives, and chooses one over the other, the State Engineer and the Courts should respect that choice.
- *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
  - Where Congress rejected proposals to increase an agency's regulatory authority, the agency was precluded from claiming it had such authority.



# Legislative History Of SB 269

- Product of Legislative Commission's Subcommittee to Study Water.
- June 7, 2016 – Hearing on Australian scheme and Diamond Valley GMP process
  - [http://nvleg.granicus.com/MediaPlayer.php?clip\\_id=5797](http://nvleg.granicus.com/MediaPlayer.php?clip_id=5797)
  - Testimony of Jake Tibbitts
    - To date there has been lots of talk, not much action.
      - Hr'g audio at 1:53:06.
    - Mike Young was sent to Diamond Valley by State Engineer to propose his plan.
      - Hr'g audio at 2:06:17.
    - Legislation is needed to empower us in drafting GMP.
      - Hr'g audio at 2:10:49.
    - Legislation is needed to provide flexibility from mandatory provisions of water law.
      - Hr'g audio at 2:15:10.
    - County Commission's position that CMA should be exempt from prior appropriation.
      - Hr'g audio at 2:27:31.



# SB 269 (2017) – Alternative To Priority

- Proposed new subsection to NRS 534.037 as follows:

1 management plan for the basin may be submitted to the State  
2 Engineer. The petition must be signed by a majority of the holders  
3 of permits or certificates to appropriate water in the basin that are on  
4 file in the Office of the State Engineer and must be accompanied by  
5 a groundwater management plan which must set forth the necessary  
6 steps for removal of the basin's designation as a critical  
7 management area.

8     2. *The State Engineer may approve any reasonable*  
9 *limitation, restriction or requirement set forth in, or provision of, a*  
10 *groundwater management plan submitted pursuant to subsection*  
11 *1, including, without limitation:*

12     (a) *Limiting the quantity of water that may be withdrawn*  
13 *under any permit or certificate or for any other use outlined in the*  
14 *groundwater management plan. Any limitation imposed pursuant*  
15 *to this paragraph must provide that the holders of permits or*  
16 *certificates with earlier dates of priority receive a larger quantity*  
17 *of water than the holders of permits or certificates with later dates*  
18 *of priority.*



# SB 269 (2017) – Exemption From Proofs, Single Use, Place of Use, Point of Diversion

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19        *(b) Exempting a water right from any of the provisions of NRS*  
20        *533.390, 533.395, 533.410 or 534.090 during the period that the*  
21        *groundwater management plan is in effect so that any*  
22        *conservation practices that are implemented do not result in the*  
23        *cancellation or forfeiture of the water right.*

24        *(c) Imposing requirements for the use of groundwater within*  
25        *the critical management area that are not bound to any specific*  
26        *point of diversion, place of use or manner of use.*



## SB 269 (2017) – Banking

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27        *(d) Authorizing the banking of groundwater for any unused*  
28 *volume of groundwater granted in any given year for future*  
29 *withdrawal.*

- Bottom line – SB 269 included express authorization for all the key elements of the Diamond Valley GMP, but was rejected by the Legislature.



# The GMP Does Not Comply With Other Mandatory Provisions In The Water Law

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- Single use requirement
  - NRS 533.330
- ASR statute
  - NRS 534.250 – 350
- Proofs of completion and beneficial use
  - NRS 533.380



# The GMP Violates The Single Use Requirement

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- NRS 533.330 – “No application shall be for the water of more than one source to be used for more than one purpose.”
- GMP – Water allocations may be used for “any beneficial purpose under Nevada law.” SE ROA 234.
- Effectively turns users water rights permits into “super” permits whose water can be used anywhere in the basin for any purpose whatsoever.
- May result in more water being removed from storage if water placed to use for purposes other than irrigation.



# The GMP Banking Program Violates State Law (1)

- Proponents' own expert stated that banking program requires ASR permit.
  - “Water banking, or saving un-pumped groundwater for use in a subsequent year or years, is a type of aquifer storage of recovery (ASR) program regulated by the Nevada State Engineer (NSE).” SE ROA 522.
- ASR projects must comply with NRS 534.250 – 534.350.
  - Require special permit.
  - Require State Engineer to make a determination that:
    - Water being stored is available for appropriation; and
    - The project is hydrologically feasible.



# The Banking Program Violates State Law (2)

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- Water being banked under the plan is not available for appropriation.
  - Only way water would be available to be banked is if total pumping in the basin was less than PY.
    - If pumping totals 27,000 af in a given year, 3,000 af might be available to store.
- Banking program is not hydrologically feasible.
  - Encourages continued over-pumping of an already-depleted basin.
  - Because of bank, all water allocations will be fully used.



# The GMP Cannot Exempt Water Right Holders From The Requirement To File Proofs

- NRS 533.380 mandates that a permit holder timely file a proof of completion and/or proof of beneficial use to perfect their right.
- GMP effectively perfects water rights permits without requiring a showing of beneficial use.
- A request for extension of time to file a proof requires State Engineer to make an individualized determination of good **cause**. *See, e.g., Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37.
- Process allows right holders who may be affected to challenge any grant of extension request and/or appeal that determination to district court.



## Issue 2: The State Engineer Did Not Consider NRS 534.037's Mandatory Factors

- In Order 1302, the State Engineer claims that the GMP discusses the factors. SE ROA 18.
- But, the statute requires the *State Engineer* to consider the factors *in his order*.
- 5 factors at issue:
  - Hydrology of the basin;
  - Physical characteristics of the basin;
  - Geographic spacing and location of withdrawals;
  - Water quality; and
  - Location of wells, including domestic wells.



# The Hydrology Of The Basin Does Not Support Approval Of The GMP (1)

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- NRS 534.037 standard – plan must contain necessary steps for removal of CMA designation.
- NRS 534.110(7) – CMA designation applies when withdrawals consistently exceed PY.
- Therefore, plan must include necessary steps to ensure that withdrawals fall below PY.
  - All withdrawals, not just pumping regulated by plan.
  - For 49 years pumping has exceeded PY in every year.
  - During 35-year plan timeframe, authorized pumping will never be below PY.



# The Hydrology Of The Basin Does Not Support Approval Of The GMP (2)

- Measure of whether plan meets goal of reducing pumping below PY is whether groundwater levels will stabilize. SE ROA 16.
  - Neither the GMP nor Order 1302 contains any hydrologic analysis of whether groundwater levels will stabilize as a result of pumping reductions.
- Hydrologic evidence in record
  - 1968 USGS/State Engineer Report;
  - 2016 USGS Report;
  - GMP Appendix D; and
  - Turnipseed Engineering Report.

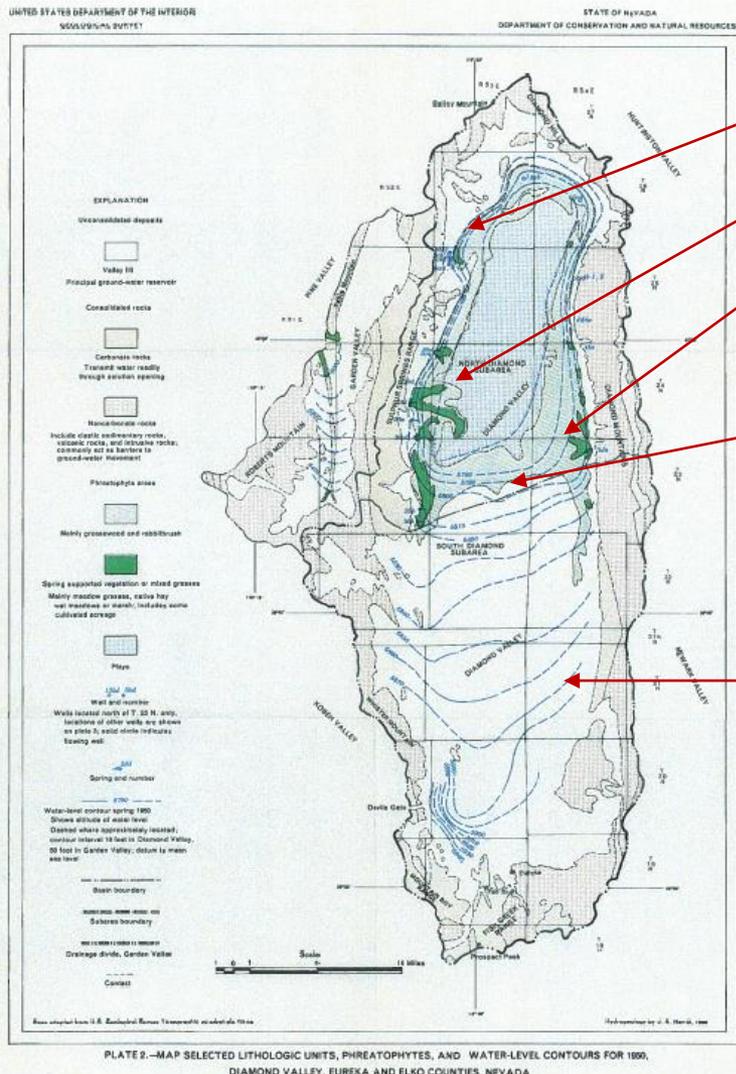


# The Hydrology Of The Basin Does Not Support Approval Of The GMP (3)

- 1968 USGS/State Engineer Report
  - Identifies a hydrologic divide between north and south basins. SE ROA 32.
  - Because there is little to no natural discharge in south basin, pumping in this area depletes reservoir storage. SE ROA 106.
  - If pumping in southern basin remains at 1968 level of 12,000 af, equilibrium will take 300-400 years. SE ROA 106.
  - If pumping in southern basin exceeds 12,000 afa, equilibrium will never be reached, meaning that groundwater levels will continue to decline. SE ROA 102.



# The Hydrology Of The Basin Does Not Support Approval Of The GMP (4)



Natural phreatophyte discharge areas

North/South divide

Location of southern irrigation pumping



SE ROA 132

JA2260



# The Hydrology Of The Basin Does Not Support Approval Of The GMP (5)

- 2016 USGS Report
  - Basin water budget is “not in balance.” Estimated imbalance of 63,000 afa. SE ROA 828.
  - Reducing pumping from 76,000 afa to 34,000 afa (a difference of 42,000 afa) does not make the basin whole.
  - Indicates that the divide is migrating north as a result of the massive cone of depression created by pumping in the south. SE ROA 829.



# The Hydrology Of The Basin Does Not Support Approval Of The GMP (6)

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- GMP Appendix D
  - Declining water levels represent a threat to Devils Gate General Improvement District and Town of Eureka water supply. SE ROA 484.
    - But, there is nothing in the GMP that addresses this threat.
  - Groundwater exploitation caused senior right holders' springs to cease flowing. SE ROA 493.
  - Only describes current hydrologic situation. No analysis or discussion of whether pumping reductions in the GMP will result in removal of CMA designation.



# The Hydrology Of The Basin Does Not Support Approval Of The GMP (7)

- Turnipseed Engineering Report
  - Over-pumping has already removed 1,750,000 acre-feet of aquifer storage. SE ROA 654.
  - Under GMP, at end of 35 years, 2,517,155 afa of storage will be permanently removed. SE ROA 654.
  - GMP does not contain necessary steps for removal of CMA designation. SE ROA 624.
  - No hydrologic based analysis in the GMP that provides information on groundwater levels at end of 35-year period. SE ROA 627.
  - No discussion of hydrologic impacts of the pumping reductions, anticipated groundwater level recovery, impacts to remaining spring flows, or description of the monitoring plan. SE ROA 627.



# The Hydrology Of The Basin Does Not Support Approval Of The GMP (8)

- Turnipseed Engineering Report
  - GMP does not discuss how benchmark water allocation percentages were developed. SE ROA 627.
  - Conclusions in Appendix I cannot be independently verified because it did not include copy of the model, a modeling report, or model calibration information. SE ROA 627.
  - Final conclusion – “[T]he GMP as written will continue to allow for the exploitation of the groundwater resource for the [plan’s] duration, and will not sufficiently reduce groundwater pumping to remove the CMA designation.” SE ROA 631.



# The Physical Characteristics Of The Basin Do Not Support Approval Of The GMP

- Basin is long and narrow.
  - 56 miles from north to south, 20 miles at maximum width. SE ROA 30.
- Areas of natural discharge are concentrated in the north; intense pumping is concentrated in the south. SE ROA 814, 827.
- Alluvial aquifer is relatively shallow.
  - “Information from the deeper wells suggests that the sediments become more cemented with depth and that below this depth [400’] the sediments do not yield large quantities of water.” SE ROA 480.
- Taken together, these physical characteristics indicate that water levels will not stabilize as a result of GMP pumping reductions.



# Geographic Spacing And Location Of Withdrawals

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- GMP allows water shares to be used anywhere in the basin regardless of the groundwater divide.
- 1968 hydrology report contains specific and credible evidence related to where pumping should be authorized.
- GMP forces same reductions on pumping on both sides of the divide despite the evidence showing that the problem is in the south.
- This approach is inconsistent with prior approaches to regulating the basin.
  - *See Orders 277, 280, 541, 717, 809, & 813.*



# Evidence Indicates That Water Quality Will Deteriorate Under The GMP

- 2016 USGS – “This migration [of the north/south divide] indicates that the cone of depression caused by groundwater pumping in the south is expanding radially, has not reached equilibrium, and, eventually, can lead to southward movement of poor-quality groundwater.” SE ROA 829.
- GMP Appendix D – “The result [of the expanding cone of depression] is a reversal of the natural hydraulic gradient such that the high TDS water, normally found beneath the playa can now flow in an opposite direction. The long-term consequence is migration of high TDS water toward the nearest irrigation wells . . . .” SE ROA 494.



# Location Of Wells, Including Domestic Wells

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- In Order 1302, State Engineer does not address what effect continued groundwater declines will have on domestic wells.
  - Ari Erikson public comment – “I came across a gentleman who had a domestic well and his domestic well had dried up and he had to drink out of bottled water for a couple months while he worked on the domestic well.” SE ROA 684.
- No information in Order 1302 regarding the depths of domestic wells or current and projected future water levels at those wells. Also, no analysis of how many domestic wells are projected to fail during the GMP term or consideration of mitigation for such failures or whether GMP will lead to more or less well failures than curtailment.



# The GMP Does Not Contain The Necessary Steps For Removal Of CMA Designation (1)

- Measure of whether pumping is below PY is if water levels stabilize. SE ROA 16.
- Neither Order 1302, nor the GMP analyzes whether pumping reductions will halt groundwater level declines.
  - Groundwater model was available, but not used.
  - 1968 & 2016 USGS reports indicate that withdrawals will never fall below the perennial yield of the basin with rate of pumping proposed in GMP.
    - This means water levels will continue to decline.



# The GMP Does Not Contain The Necessary Steps For Removal Of CMA Designation (2)

- The plan does not even bring regulated pumping under the PY.
  - PY = 30,000 afa.
  - Year 35 regulated pumping = 34,200 afa. SE ROA 510.
  - This is 114% of the PY.
- Regulated pumping does not include all authorized pumping.
  - Excludes Bailey, Sadler, and Venturacci permits (6,357 afa).
  - Excludes mining, domestic, municipal, and other non-irrigation uses (5,486 afa). SE ROA 481.
  - Year 35 authorized withdrawals total 45,000 afa, 250% of the PY.



# Issue 3: The GMP Approval Process Did Not Comply With NRS 534.037

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- *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262.
  - Substantial evidence standard of review “presupposes the fullness and fairness of the administrative proceedings.”
  - If proper procedures, “grounded in basic notions of fairness and due process,” are not followed, courts should not hesitate to intervene.
- The State Engineer abuses his discretion and acts arbitrarily and capriciously when he fails to follow proper procedure.



# The Public Comment Meeting Did Not Comply With NRS 534.037

- NRS 534.037(3) – mandates the State Engineer hold a “public hearing *to take testimony.*” (emphasis added)
- NAC 533.240(1) – “public commentary is not considered testimony” and “[a]ll testimony of witnesses appearing on behalf of a party must be given under oath or affirmation.”
- NAC 533.240(4) – Parties have a right to cross-examine witnesses called by other parties.
- No commenter at public meeting was sworn under oath and no party was provided the opportunity to cross-examine them.



# The State Engineer Did Not Properly Verify Petition Signatures (1)

- NRS 534.037(s) – mandates that a petition “must be signed by a majority of the holders of permits or certificates . . . .”
  - The statute says to count people not permits.
  - The State Engineer counted permits.
    - Moyle family has 5 people who are listed as owners of 50 permits. By counting permits not people, they counted as 50 votes instead of 5. SE ROA 149, 153, 157, 159.
  - There is no analysis in the record to show how the State Engineer verified petition signatures, or what water rights were counted as eligible to vote.
    - Petition says the vote count was 290 out of 493 permits. SE ROA 148.
    - Order 1302 says the vote count was 223 out of 419 permits. SE ROA 3.



# The State Engineer Did Not Properly Verify Petition Signatures (2)

- Some signatures were not the owner of record.
  - Owner of Permit 18999 is Charles Cooper, but Matt Morrison signed. SE ROA 151.
  - Owner of Permits 18242 & 72370 is Harlow & Bonnie Andersen, but Valerie Wood signed. SE ROA 167.
- Whole permit was counted even if only 1 owner signed. SE ROA 3 (“represented by at least one signature”).
  - No investigation to determine whether one joint owner has authority to represent or sign for co-owners.
  - No indication of whether senior holders had permission of mortgage lienholders to sign away portion of loan collateral.



# The State Engineer Did Not Properly Verify Petition Signatures (3)

- Some votes were double or triple counted on GMP tally sheet. ROA 149-166.
  - Permits 24204 & 24262-65 = 5 water rights
    - Diamond Valley Hay Co. signed petition for all 5 rights. Counted as 5 votes on GMP petition tally sheets. SE ROA 166.
    - John Marvel listed as co-owner for all 5 rights. Did not sign but was counted as 5 additional votes because co-owner signed. SE ROA 152.
    - James or Pamela Buffham are listed as co-owners for 4 of the rights, did not sign, but were counted as another 4 votes because co-owner signed. SE ROA 150.
    - So, with 1 signature from 1 co-owner, 5 water rights were tallied as 14 votes in support.



# Evidence Was Not Properly Vetted

- The primary pieces of scientific evidence the State Engineer relied on were not supported by testimony, subjected to cross-examination, or capable of independent verification.
  - Appendix D (hydrology report)
    - No identified author
    - No way to know author's credentials or expertise.
    - Author did not provide testimony and was not subject to cross-examination.
  - Appendix I (Bugenig Memo)
    - Author did not provide testimony and was not subject to cross-examination.
    - Memo did not include reference or citation to peer-reviewed model report and did not identify assumptions.
    - No way to independently verify or test model results.



# The State Engineer Did Not Consider Alternative Approaches

- The power to approve includes the power to conditionally approve. *Conn. Fund for Env't, Inc. v. EPA*, 672 F.2d 998 (2d Cir. 1982).
- State Engineer had full authority to consider other methods of reducing pumping that do not violate prior appropriation.
  - Voluntary transfers;
  - Rotating water schedules;
  - Installation of water conservation infrastructure;
  - Importing water from other basins; and
  - Planting of less water-intensive crops.



# Conclusion

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- Sadler Ranch and the Renners respectfully ask that the Court reverse Order 1302 in its entirety.
  - GMP violates Nevada's water laws;
  - Not supported by substantial evidence; and
  - State Engineer did not follow proper procedure.
- In the alternative, Order 1302 should be stayed and the case remanded for further evidentiary proceedings.



Eureka County's  
PowerPoint Presentation  
December 2019 Hearing

Importantly, a water right does not create an ownership interest in the water—it only gives the water rights holder the right to use lawfully-appropriated water. See *Bacher*, 122 Nev. at 1116, 146 P.3d at 797 (recognizing water is a “precious and increasingly scarce resource”, and addressing statutes governing the appropriation of water); *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949) (holding that a water right does not grant the owner “a property in the water as such ... but a right gained to use the water beneficially which will be regarded and protected as real property.”); *Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917) (“Water is not capable of permanent private ownership; it is the use of water which the state permits the individual to appropriate. The water itself, so the statute declares, belongs to the public.”). Water law seeks to balance a water rights holder’s property rights with the State’s police power to regulate water rights, and the State may therefore prescribe how water may be used. *Town of Eureka*, 108 Nev. at 167, 826 P.2d at 950.

Mountain Falls Acquisition Corp. v. State, 441 P.3d 548 (Nev. 2019) 2019 WL 2305720, No. 74130, May 29, 2019, (unpublished disposition cited for its persuasive value).

**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.

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

(a) Given once each week for 2 consecutive weeks before the hearing in a newspaper of general circulation in the county or counties in which the basin lies.

(b) Posted on the Internet website of the State Engineer for at least 2 consecutive weeks immediately preceding the date of the hearing.

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

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

(Added to NRS by 2011, 1383)

**NRS 534.110 Rules and regulations of State Engineer; statements and pumping tests; conditions of appropriation; designation of critical management areas; restrictions.**

1. The State Engineer shall administer this chapter and shall prescribe all necessary regulations within the terms of this chapter for its administration.

2. The State Engineer may:

(a) Require periodical statements of water elevations, water used, and acreage on which water was used from all holders of permits and claimants of vested rights.

(b) Upon his or her own initiation, conduct pumping tests to determine if overpumping is indicated, to determine the specific yield of the aquifers and to determine permeability characteristics.

3. The State Engineer shall determine whether there is unappropriated water in the area affected and may issue permits only if the determination is affirmative. The State Engineer may require each applicant to whom a permit is issued for a well:

(a) For municipal, quasi-municipal or industrial use; and

(b) Whose reasonably expected rate of diversion is one-half cubic foot per second or more,

→ to report periodically to the State Engineer concerning the effect of that well on other previously existing wells that are located within 2,500 feet of the well.

4. It is a condition of each appropriation of groundwater acquired under this chapter that the right of the appropriator relates to a specific quantity of water and that the right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion. In determining a reasonable lowering of the static water level in a particular area, the State Engineer shall consider the economics of pumping water for the general type of crops growing and may also consider the effect of using water on the economy of the area in general.

5. This section does not prevent the granting of permits to applicants later in time on the ground that the diversions under the proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriator, so long as any protectable interests in existing domestic wells as set forth in NRS 533.024 and the rights of holders of existing appropriations can be satisfied under such express conditions. At the time a permit is granted for a well:

(a) For municipal, quasi-municipal or industrial use; and

(b) Whose reasonably expected rate of diversion is one-half cubic foot per second or more,

→ the State Engineer shall include as a condition of the permit that pumping water pursuant to the permit may be limited or prohibited to prevent any unreasonable adverse effects on an existing domestic well located within 2,500 feet of the well, unless the holder of the permit and the owner of the domestic well have agreed to alternative measures that mitigate those adverse effects.

## NRS 534.110 (continued)

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.

È 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.

8. In any basin or portion thereof in the State designated by the State Engineer, the State Engineer may restrict drilling of wells in any portion thereof if the State Engineer determines that additional wells would cause an undue interference with existing wells. Any order or decision of the State Engineer so restricting drilling of such wells may be reviewed by the district court of the county pursuant to NRS 533.450.

[10:178:1939; A 1947, 52; 1949, 128; 1955, 328] — (NRS A 1993, 2641; 2001, 553; 2011, 1385)

- The examples given by Sadler/Renner and Bailey of what the GMP should have “mandated” are irrelevant as these were not put forward in a GMP for approval under the statute. Petitioners could have developed a GMP with these provisions and tried to get the majority of signatures necessary on a petition to the State Engineer, but they did not.
- Items Petitioners argue for include changing crops to species that require less water per acre, increasing the efficiency of watering systems/sprinklers, removing end guns, implementing better irrigation practices, reducing the number of irrigated acres, educating farmers on more efficient irrigation techniques, restricting the season of use, implementing a water rights buyout program, and rotating fields out of production are not within the State Engineer’s authority. (Sadler/Renner Reply Brief p. 13 and Bailey Reply Brief p. 3. 6). None of these examples are restricted by the GMP and many are promoted (GMP Sections 21, 22, and 23). In fact, the only way the GMP can really work for individual pumpers is for these things to be embraced and adopted in tandem with the required pumping reductions. 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 GMP, not the ways reduced pumping would be met nor other land use or management mandates.
- Bailey’s argue that these above “ideas and solutions” were identified as far back as 2014 and were the only “true local input” and that “a water marketing approach” only received a single vote of support at that time” (Reply Brief p.3). It is important to understand that this process occurred in June and July 2014, over a year before CMA designation. Many early ideas and solutions, even after CMA designation (such as unbundling water rights from specific real estate) did not move forward.

- Baileys state that “Eureka County and/or the Eureka Conservation District announced that ‘our recommendation have been influenced significantly by a Blueprint for Western Water management that builds upon the Australian water sharing and permit unbundling and was presented to us by Prof. Mike Young on Thursday, June 11, 2015” (Bailey Reply Brief p. 3) and that “the Eureka Conservation District imposed this concept onto the process from the very beginning.” (Bailey Reply Brief p. 2) and “the only local input was around the edges” (Bailey Reply Brief p. 4). Eureka Conservation District (ECD) never supported or imposed anything in the GMP and never made any decision to proceed with any specific idea. ECD simply provided administrative support and facilitation; it was the water rights holders actively participating in the GMP process that charted the path forward. No water right holder signing the petition for GMP approval was forced to sign. The document Baileys quoted was solely written by Denise Moyle. This document was never “adopted” by anybody and was never circulated or used again as any official GMP outline. It was provided by Denise Moyle for discussion purposes at a GMP meeting in July 2015. SE ROA 297.
- Sadler/Renner Reply Brief on p. 13 states: “The Australian scheme was not known to the Legislature in 2011 and, therefore, could not have been contemplated by them when they adopted NRS 534.037 and 534.110(7).” Sadler/Renner Reply Brief also focused on a presentation State Engineer Jason King gave at a conference entitled “The Australian Approach to Water Management: A Pilot Project in Diamond Valley, Nevada” in September 2016 where Mr. King talked about legislative changes to allow the “Australian Approach” to move forward.
- The Diamond Valley GMP does not do the Australian “unbundling” as contemplated before and during the 2017 legislative session. The final GMP for approval was submitted in late 2018, well after the 2017 Legislative session and after some significant changes between drafts of the GMP. What’s very telling from the State Engineer’s 2016 presentation are the many items in the presentation that did not make it into the GMP submitted for approval. The State Engineer gave this presentation in September 2016, months before DWR ever received any draft version of the GMP for review. To Eureka County’s knowledge, the State Engineer developed the presentation based on a high-level, 10 page outline that was more talking points and had not been fleshed out or consensus made by the GMP group. Essentially a “deliberative” product that doesn’t matter now; only the submitted and approved GMP is what matters because that is what was put forth. Pre-GMP submittal PowerPoint presentations, outlines, etc. are all superfluous now. The GMP did not implement keystone and foundational concepts of the Australian Model. The GMP participants consciously chose to not pursue these things. While the GMP is a water market, there are very distinct differences between the GMP and what was done in Australia or what were outlined in Young’s “Blueprint” publication.
- Baileys argue the “GMP’s fundamental approach never deviated from the Young Paper’s blueprint” (Reply Brief p. 4).

- Some of the more major items that wholly distinguish the Diamond Valley GMP from the “Australian Model” as outlined in Young’s “Blueprint”:
  - No Unbundling of water rights. This is the keystone of the Australian Model and the title of Young’s paper. Young states on p. 1 that “the blueprint’s essential element is unbundling of existing water rights.” Water rights and their attendant shares in the GMP remain tied to a specific piece of land and a deed. Young’s “Blueprint” based on Australian Model is that “Once an allocation is made, decisions about how, when, and where to use the allocation are no longer linked to the share” (Young p. 12). Not the case under GMP. It is true that water allocations can be used anywhere in Diamond Valley, but this use has to come from legal wells tied to specific real estate (not unbundled) that were already permitted by the State Engineer and have had conflict analysis ran and cannot exceed the diversion rate nor duty originally permitted in the well. So the “when and where” are tightly regulated which is not the case in Australia. If folks want to use a new well or have a higher diversion rate or duty from any given will, they have to apply for a permanent change of the base water right.
  - No trading of shares. In Australia, and as Young proposes, both shares (called entitlements) and water allocations are freely tradable (Young p. 12, 21), If somebody wants to own more shares under the GMP, they have to buy the base water right and do a transfer of the water right, just like always, and still tied to a deed (not unbundled).
  - No water shares set-aside for the environment (another key concept of the Australian Model) (Young p. 12-13, 19-21).
  - Surface waters not included to be managed “conjunctively” (called by Young, “system interconnectivity”) in one “robust” market. In fact, in Australia, the water market is primarily surface water from river systems (Young p. 23-25, 28-29).
  - No “priority tiers” of water allocations where certain water uses receive weighted water allocations “to efficiently manage supply risks” for uses such as municipal water (Young p. 15).
  - No groundwater “Authority”, no CEO, no other effort to remove authority from State Engineer (Young p. 22-23). Eureka County does not enforce components of plan nor appoint any Authority (Young p. 26).
  - GMP does not “reduce all rights by a proportion such that each duty aligns with best irrigation practice” (Young p. 27, 28).
  - Does not replace “current paper-based system” to “Torrens Title registration system” (Young p. 14-15 and Appendix B).
  - No “tagged trading” with an “exchange rate” for various geographic zones of water use (Young p. 21).
  - Does not use a “net allocation system” to give credit for “return flows” (Young p. 23)
  - No annual and separate “Use Approvals” or “Works Approvals” “without indicating where or how he or she will source the water” (Young p. 19).
  - No transaction fees (Young p. 21).
  - No water shares owned by Eureka County for households and businesses (Young p. 4, 27).
  - Does not use a “100 year allocation” nor the share formula proposed by Young (p. 16, 28).

## Order 1302, p. 11, fn. 42 (SE ROA 12-13)

Neither the plain language nor the legislative history indicate that mitigation of senior surface water rights that have allegedly been adversely affected by groundwater pumping must be mitigated by a GMP.<sup>42</sup>

<sup>42</sup> In fact the opposite appears to be true from the legislative history. As proposed, A.B. 419 would have required the State Engineer “to consider the relationship between surface water and groundwater in the basin,” but this consideration was amended out of the bill after the First Reprint. *See* A.B. 419 (First Reprint), Senate Committee on Government Affairs, 76<sup>th</sup> Sess. (May 25, 2011).

Briefly stated, legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them. This power is indeed very broad, and, except where limited by Federal or State Constitutional provisions, that power is practically absolute. Unless there are specific constitutional limitations to the contrary, statutes are to be construed in favor of the legislative power. In the Matter of Platz, 60 Nev. 296, 108 P.2d 858 (1940). See also: Hard v. Depaoli, 56 Nev. 19, 41 P.2d 1054 (1935); Moore v. Humboldt County, 48 Nev. 397, 232 P. 1078 (1925); State v. Lincoln County Power Dist., 60 Nev. 401, 111 P.2d 528 (1941).

Galloway v. Truesdell, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967)

The executive power extends to the carrying out and enforcing the laws enacted by the Legislature. Except where there is a constitutional mandate or limitation, the Legislature may state which actions the executive shall or shall not perform.

5678 'Judicial Power' is the capability or potential capacity to exercise a judicial function. That is, 'Judicial Power' is the authority to hear and determine justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree or order. A

Galloway v. Truesdell, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967)

Hence it follows that the judicial power, and the exercise thereof by a judicial function, cannot include a power or function that must be derived from the basic Legislative or Executive powers.

Galloway v. Truesdell, 83 Nev. 13, 21, 422 P.2d 237, 243 (1967)

It is our duty to maintain the supremacy of the Constitution. The courts must be wary not to tread upon the prerogatives of other departments of government or to assume or utilize any undue powers. If this is not done, the balance of powers will be disturbed and that cannot be tolerated for the strength of our system of government and the judiciary itself is based upon that theory.

Galloway v. Truesdell, 83 Nev. 13, 31, 422 P.2d 237, 249 (1967)

- The GMP will work and will stabilize the water table. Based on robust groundwater monitoring in Diamond Valley, reductions in pumping are known to substantially reduce drawdown.
  - SE ROA 471 – “Section 13.13 Perennial yield and a stabilized groundwater levels are two different goals. If both are goals, then the Plan should describe how they are linked. Adjusting the pumping reduction should not be limited by the 2% maximum cumulative adjustment. Pumping reductions should be determined by what is necessary to bring the Basin back into balance. The methodology for determining the Annual Allocation should also be described.”
    - “Yes, the two goals are linked. Until ET is captured, transitional storage will continue to be used with associated water drawdown. However, based on monitoring data in DV, small reductions in pumping have created substantial reductions in drawdown. Based on past monitoring in DV, the pumping reductions in the GMP will result in water levels in the main drawdown cone of depression stabilizing and even rising in a few years. The GMP outlines how the Annual Allocations will be made. It is expected that they will follow the benchmark reductions but can be greater if stabilization is not occurring fast enough. The group wanted some certainty for planning and financing purposes and set this certainty set at the 2% cumulative amount. While the limitation is on the cumulative pumping amount, year-to-year reductions after Year 10 would actually average 1.75% under the benchmark reductions and 3.5% under the most aggressive reductions. Some years could see over 4% reductions based on the immediate previous year. This actually provides a lot of room for the State Engineer to make adjustments as necessary should the water table not respond to the pumping reductions favorably.”

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

4 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF  
5 NEVADA, IN AND FOR THE COUNTY OF EUREKA  
6 BEFORE THE HONORABLE GARY D. FAIRMAN  
7 DISTRICT JUDGE, PRESIDING  
8

9 TIMOTHY LEE BAILEY and  
10 CONSTANCE MARIE BAILEY;  
11 FRED BAILEY and CAROLYN  
12 BAILEY; IRA R. RENNER, an  
13 individual; SADLER RANCH,  
14 LLC; and DANIEL S.  
15 VENTURACCI,  
16  
17 Petitioners,

18 vs.

19 TIM WILSON, P.E., Nevada  
20 State Engineer, DIVISION OF  
21 WATER RESOURCES, DEPARTMENT  
22 OF CONSERVATION AND NATURAL  
23 RESOURCES,  
24 Respondent,

EUREKA COUNTY; DNRPCA  
INTERVENORS,  
Interveners.

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT, VOLUME II

WEDNESDAY, DECEMBER 11, 2019

EUREKA, NEVADA

Reported by: Shellie Loomis, RPR  
Nevada CCR #228

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APPEARANCES:

For Saddler Ranch,  
Ira Renner, Daniel  
S. Venturacci:

Taggart and Taggart, Ltd.  
By: David H. Rigdon, Esq.  
Carson City, Nevada

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Carson City, Nevada

For Eureka County:

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By: Karen Peterson, Esq.  
Carson City, Nevada

-and-

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By: Debbie Leonard, Esq.  
Reno, Nevada

For Diamond Valley  
Ranch Properties:

John Marvel, Esq.  
Eureka, Nevada

For the Marshall  
Family Trust:

Beth Mills, Trustee

1 EUREKA, NEVADA, WEDNESDAY, DECEMBER 11, 2019, A.M. SESSION

2 -o0o-

3  
4 THE COURT: Good morning, everyone. This is the  
5 present day -- or the continuation of our case, Case Number --  
6 excuse me, CV-1902 -- excuse me, dash 348, consolidated with  
7 Case Number CV-1902-349 and CV-1902-350.

8 Yesterday, when we took our recess, we were going  
9 to commence the argument of the DNRCPA Interveners. We'll do  
10 that in a moment.

11 Let the record reflect that the Petitioners in  
12 this case, Sadler Ranch, Mr. and Mrs. Renner, are appearing by  
13 and through their counsel, Mr. David Rigdon.

14 Also appearing today are the Baileys by and  
15 through their counsel, Mr. Mixson.

16 The State Engineer is appearing today by and  
17 through his counsel, Mr. Baldwin -- or Bolotin, excuse me.

18 And Ms. Karen Peterson is here, representing  
19 Eureka County.

20 At this time then, I will allow Ms. Debbie  
21 Leonard to go forward with the oral argument on behalf of the  
22 DNRPCA Administrators -- or Interveners, excuse me. Go right  
23 ahead.

24 MS. LEONARD: Thank you, Your Honor. Debbie

1 Leonard on behalf of the DNRPCA interveners, and I want to  
2 point out the representatives of DNRPCA, Mark Moyle and Marty  
3 Moskowitz are here today as well as numerous people in the  
4 audience who have worked on this GMP.

5 So I want to focus my arguments on the  
6 Petitioners' contention that the GMP purportedly violates the  
7 prior appropriation doctrine. And to do that, I want to  
8 create a little bit of factual context for who is a, quote,  
9 "senior" and who is a, quote, "junior."

10 I want to start with a little bit of history of  
11 the -- of groundwater appropriations in Diamond Valley because  
12 I think this really informs the issue of prior appropriation.  
13 And to do that, I'm citing to the Harrill report from 1968,  
14 which is on record on appeal at page 20.

15 So the Harrill report describes that the first  
16 groundwater development in the Valley occurred in -- between  
17 1948 and 1949, and that major well drilling efforts started  
18 really in 1958. And then the number of new irrigation wells  
19 that were drilled went from 85 to 200 between 1961 and 1965.

20 At that point, the area was then closed to  
21 additional development. So what we've learned from that is  
22 that there's this really narrow window of time when most of  
23 the groundwater rights were developed in the Valley. So  
24 this -- in viewing this issue of prior appropriation, I think

1 it's important for the court to recognize that this isn't what  
2 we often see in surface water streams where you have rights  
3 that were established in the 1850's or 60's, and that who are,  
4 quote, "senior," and then the juniors come along in the 70's,  
5 80's, 90's, or even today. This is a situation where a lot of  
6 the development occurred within a very narrow window of time.

7 So let me turn to the PowerPoint that I put  
8 together, and this is just straight out of appendix F in the  
9 record on appeal. And I provided the deputy with a copy of  
10 the PowerPoint, so you can have it in front of you. And I  
11 realize it's not very easy to read on the screen, but that's  
12 why I gave you a copy.

13 So what you see here is that the first permit is  
14 from 1951 and then you go down the list and you see there are  
15 some 1951, 1953, you know, really just a handful, maybe ten,  
16 through 1960.

17 And then you get down here to March 7, 1960, and  
18 we see that there are a number of permits that get --  
19 applications that get filed at that time, including, and  
20 there's an arrow pointing to it, the Baileys. So they are --  
21 their first application was filed March 7th, 1960.

22 Okay. What's the secret here? Did the battery  
23 go dead?

24 THE COURT: We'll just be at ease a moment.

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MS. LEONARD: Thank you, Your Honor.

THE COURT: We'll have a lot of assistance here, I'm sure.

MS. LEONARD: Okay. So, again, the top of the next slide is the Bailey's -- one of Bailey's applications from March 7th, 1960. And if you look down that entire list on that page, you can see that nearly half the page is consumed by applications that were filed on that same day, March 7th, 1960, and the entire page is all applications that were made within a six-week period of time.

So the next application at the bottom of the page was April 22nd, 1960. Now it's working. There's another application in the middle of the page, again, of the Bailey's, March 7th, 1960.

Turning to the next page, again, you look at this, every single application was filed within a two-month period of time in 1960. The Baileys have another application that was filed May 3rd, 1960.

Now, here's the key piece of this, is that if the State Engineer were to curtail by priority the cutoff, not accounting for recharge into the aquifer, but the 30,000-acre foot perennial yield, the cutoff would be right here, May 12, 1960.

Okay. So when the Baileys call themselves,

1 quote, "seniors," some of their applications are nine days  
2 senior. The others are maybe, at most, two months, quote,  
3 "senior." And all of these folks were working to get their  
4 applications in right around the same time as their -- the  
5 well development is occurring in Diamond Valley.

6           Going through down the rest of this list, you can  
7 see how many of them are so close to this curtailment cutoff,  
8 right? You have Gallagher Farms, they missed it by, what,  
9 four days. So that means that the Baileys -- if there were  
10 curtailment by priority, the Baileys would have their full  
11 amount of water and the Gallaghers, because they are four days  
12 after this cutoff, they have nothing.

13           And the -- I think that an important thing about  
14 this is, and when you think about what's important in water  
15 law, is establishing beneficial use, putting the water to  
16 beneficial use. An applicant has to be diligent, work the  
17 land, put the water to beneficial use in order to satisfy  
18 the -- what's most important about water law.

19           And you see here that all of these folks who come  
20 after May 12, 1960, who knows why they couldn't get to the  
21 State Engineer four days earlier to submit their applications.  
22 But they, since that time, have been working diligently to use  
23 the water on their land, not knowing that, you know, they were  
24 four days late, or as you move down the list, you know, a few

1 weeks late or a few months late.

2           They've been diligently, for the last 60 years,  
3 working the land. And so I think that's an important piece  
4 why Diamond Valley is unique and why this Groundwater  
5 Management Plan is appropriate for this Valley, when you look  
6 through this list and you realize the dramatic effects of --  
7 and the equities regarding who would be cut off in a strict  
8 prior appropriation context.

9           Now, when we were going through the list that we  
10 got up to this point here where the curtailment by priority  
11 cutoff would be, the thing -- one thing you won't see is  
12 Sadler Ranch, and another name you won't see is Renner, and  
13 that's because they don't have senior groundwater rights that  
14 would benefit from strict prior appropriation curtailment type  
15 of scenario.

16           They don't have senior groundwater rights. So  
17 they're complaining about the fact that this GMP purportedly  
18 doesn't incorporate prior appropriation, but they have no  
19 standing to even benefit were stricter curtailment by priority  
20 going to occur in terms of whether they can exercise  
21 groundwater rights, because they don't have senior groundwater  
22 rights.

23           The Baileys have, quote, "senior" groundwater  
24 rights, but as I point out, they're within days, at most

1 months, of the divide line between junior and senior.

2 And I would note that only -- all the folks who  
3 are above the dividing line, the only ones who have challenged  
4 the GMP are the senior -- are the Baileys.

5 So there was much said yesterday about, you know,  
6 whether or not seniors, quote supported the GMP, and I think  
7 Ms. Peterson did a really nice job of addressing that issue.

8 But I would point out that there's been no other  
9 legal challenge from any other senior who would have been  
10 able, under strict prior appropriation situation and  
11 curtailment, would be able to exercise the full amount of  
12 their rights.

13 THE COURT: Ms. Leonard, with respect to all the  
14 applications in 60's, did that have to do with rural  
15 electrification or why?

16 MS. LEONARD: I don't think that electricity came  
17 to the Valley until the late '70's.

18 THE COURT: Late '70's. Okay.

19 MS. LEONARD: And I think these folks were using  
20 diesel generators to pump water in the 1960's. I'm sure my  
21 clients will speak up if I'm incorrect in that.

22 So when you look through this list, and I did  
23 point it out at the top, but you can look at it in the handout  
24 I gave you, that there's a priority factor. That's the second

1 column to the right, and this is how the prior appropriation  
2 system is incorporated into the GMP. The Petitioners seem to  
3 suggest that the GMP completely jettisons prior appropriation  
4 principles, and that's simply incorrect.

5 There's a priority factor that's attributed to  
6 the priority date of a permit, and that's seen in this chart.  
7 And as you go more, quote, "junior," your priority factor is  
8 lower and the conversion from-acre-feet to -- or from the  
9 permitted rights to, quote, to "shares" is -- addresses that  
10 priority factor.

11 So the fact that there is this spread in the  
12 priority dates is accounted for in the GMP with that priority  
13 factor. And you can see, if we continue to move down this  
14 chart, again, we're still in June, 1960, when we get to the  
15 bottom of this page in ROA501. But those folks would be cut  
16 off even though they're just weeks after the deadline.

17 All of these folks, these are all applications  
18 that were filed at the same time in the 1960's, were just  
19 months after this 30,000-acre foot cutoff. These folks would  
20 all have nothing under a strict curtailment scenario.

21 Turning to the next page, we're still in the  
22 1960's here. We're still just months after this cutoff and  
23 you can see how many rights would be affected just because who  
24 knows why they didn't get their applications filed with the

1 State Engineer a few months earlier. But they didn't know the  
2 fact that they got them filed in, for example, December 1960,  
3 which is what we're seeing at the bottom of this list on this  
4 page, they didn't know that 60 years later, they would be  
5 curtailed by priority simply because they've been working the  
6 land the same as anybody else in the interim.

7 And you can continue down the list, and I don't  
8 want to belabor the point, but here we are. I mean, we're  
9 just, you know, still going through this list of priorities  
10 and we're still -- we're not even through 1961. And I'm just  
11 doing this to point out that everybody was working at --  
12 working the land at the same time. Everybody was filing these  
13 applications around the same time.

14 Again, it's not as if somebody has an 1860  
15 priority date on a surface water stream and someone comes in  
16 later and they -- you know, are truly junior. Under a strict  
17 prior appropriation system, of course, there has to be a  
18 cutoff somewhere and there are, quote, "seniors" and  
19 "juniors." But I just want to provide some context for what  
20 that really means in Diamond Valley.

21 And I want to make another point about  
22 petitioner's alleging that the making -- they make much of the  
23 fact that they stayed, that some of the applications or  
24 permits are, quote, "unperfected," and that there's all this

1 water out there that hasn't been perfected, but that was still  
2 given shares under the GMP.

3 And if you look at this chart, the second column  
4 is the certificate number, which means that the water was  
5 perfected. And if you look at the ones that don't have a  
6 certificate number, they're a changed application where the  
7 base right was perfected, was certificated, and then there was  
8 a subsequent change application that was filed.

9 Now, that's not shown specifically in this chart,  
10 but the State Engineer certainly knew and you could -- and the  
11 State Engineer's records certainly show that these base rights  
12 were certificated.

13 So the petitioner's contention that there's all  
14 these, quote, "unperfected" permits out there that were given  
15 shares is not supported by the record.

16 On the unperfected argument as well, I would  
17 point out that at any time the petitioners could have  
18 petitioned the State Engineer to declare forfeiture or  
19 abandonment of rights that they claimed were not being  
20 exercised. They didn't do so. There is a mechanism by which  
21 they could do so, and they never did that.

22 They're just complaining that those, quote,  
23 "unperfected" rights were then incorporated into the GMP and  
24 then given shares. And what they're seeking is this very

1 perverse result that there would be increased pumping for  
2 people to avoid a declaration of forfeiture or abandonment  
3 when the whole goal of the GMP is to reduce pumping.

4 And the State Engineer properly exercises  
5 discretion to say, no, we are not going to do that. We have a  
6 problem with Diamond Valley. We are not going to be creating  
7 incentives for people to increase pumping when the whole goal  
8 is to decrease pumping.

9 And that was a proper exercise of a State  
10 Engineer's discretion to make that decision. If the  
11 Petitioners wanted to make sure that people weren't exercising  
12 or weren't holding onto rights that should have been -- that  
13 haven't been used for a period of time, they could have sought  
14 to get the State Engineer to declare a forfeiture or  
15 abandonment.

16 The State Engineer recognized that the whole use  
17 it or lose it basis of prior appropriation would have  
18 undermined the whole purpose of the GMP, and I want to talk  
19 about now the statute and how it's designed to address that  
20 harmfulness of the use it or lose it aspect of prior  
21 appropriation.

22 And I know the others who came before me talked  
23 about the statutory language, but it's very important and I  
24 want to emphasize this, that the statute says that if a basin

1 has been designated as a critical management area for at least  
2 ten consecutive years, the State Engineer shall order that  
3 withdrawals, including without limitation, withdrawals from  
4 domestic wells be restricted in that basin to conform to  
5 priority rights, here's the important piece: Unless a  
6 Groundwater Management Plan has been approved for the basin  
7 pursuant to NRS 534.037.

8 So the legislature expressly said to the State  
9 Engineer, you are authorized to not conform to priority  
10 rights. So the Petitioners are saying that there is this --  
11 you know, that this language somehow repealed prior  
12 appropriation and it had to be done expressly. I disagree  
13 with their contention that this is a, quote, "repeal" of prior  
14 appropriation.

15 This, I think, is a situation where the  
16 legislature has said, State Engineer, you do not have to  
17 conform to prior appropriation principles in this instance, in  
18 this specific situation.

19 What's that situation? Where there's been a  
20 Groundwater Management Plan approved. And it assumes that the  
21 Groundwater Management Plan wouldn't conform to prior  
22 appropriation to priorities because the language specifically  
23 says you don't have to.

24 So the status quo, had the legislature not acted,

1 would be conform to prior appropriation curtailed by priority.  
2 Cut all these folks off who filed their applications after  
3 May 12th, 1960.

4           The -- with the GMP legislation, the legislature  
5 created an alternative to prior appropriation, saying do  
6 something different because we know what happens. It's a  
7 draconian result when you cut people off and I -- and this  
8 table here that I -- the chart that I've put up on the  
9 PowerPoint demonstrates that perfectly, how -- what is the  
10 result of prior appropriation?

11           It has dramatic effects on the people who worked  
12 hard and appropriated water just a few weeks after their  
13 neighbors who would be complete -- and have worked in this  
14 valley for 60 years and would be cut off under strict priority  
15 appropriation.

16           The legislature said we want to do something  
17 different than that. That's why we're creating an exception  
18 here. We want to not create the negative results to the  
19 people, to the social fabric of the community, to the economy  
20 of the county. We want to create an exception to that drastic  
21 result and it's with the GMP process.

22           If the Petitioners don't like that, if they think  
23 that prior appropriation should prevail, then they need to  
24 challenge the legislations, but they did not do that. They

1 never have said the legislature did something that violates  
2 the law.

3           They are saying the State Engineer's  
4 implementation of the legislation is what's -- what they have  
5 a problem with. But the State Engineer is doing just that,  
6 implementing legislation where the legislature said we do not  
7 want the drastic results of prior appropriation.

8           This -- I think that this interpretation of the  
9 statute is well supported by basic statutory construction  
10 principles. Again, I say that this is an express  
11 authorization. There's nothing -- you don't have to read into  
12 any language here to see that this is an express authorization  
13 to make an exception to prior appropriation.

14           And I've cited in the brief to some basic  
15 principles of statutory construction where a statute should be  
16 construed with a need to promoting rather than defeating the  
17 legislative policy behind them.

18           That's exactly what the Petitioners want to do.  
19 They want to defeat the entire purpose of this legislation by  
20 saying that the GMP, that the majority of permit holders here  
21 in the Valley came up with is unacceptable.

22           It would make no sense for the legislature to  
23 approve legislation that allows the State Engineer to stray  
24 from the strict curtailment prior appropriation and then limit

1 the State Engineer's authority to approve only a GMP that  
2 strictly enforces priorities. That completely undermines the  
3 purpose of the legislation.

4 Because there hasn't been a, quote, "repeal" of  
5 prior appropriation, the State -- the legislature just created  
6 an exception to the doctrine in certain limited circumstances.

7 There's no presumption in favor of the  
8 Petitioners, and both Petitioners argue that there should be  
9 some kind of presumption in their favor.

10 There's no presumption in their favor. This is  
11 express language in the legislation that creates an exception  
12 in limited circumstances.

13 There's no repeal of a statute and I think that  
14 they -- the Petitioners are leading the court down an  
15 incorrect path when they suggest otherwise.

16 To the extent the court thinks there is any  
17 ambiguity in the language of a statute, we've provided the  
18 legislative history. We've provided the statements made where  
19 the legislators were saying, we don't want these bad results  
20 that ensue when you cut people off.

21 You can destroy an entire community, you can  
22 destroy an economy, you can create major social issues that  
23 have really bad results.

24 The legislature says in the legislative history,

1 we don't want that. Let's try to figure out another way. I  
2 think it's important to note that the Petitioners, they don't  
3 dispute that the legislature can alter prior appropriation  
4 doctrine. And in my brief, I pointed this out, an example of  
5 another time when the legislature has done so, and that's with  
6 the abandonment and forfeiture statute.

7 This occurred in 1999 and the legislature  
8 recognized that, wow, this strict doctrine of abandonment and  
9 forfeiture has really negative effects on farmers. We don't  
10 want that. We want something different and they changed the  
11 statute. This -- and this is exactly what the CMA designation  
12 and Groundwater Management Plan statute, it's the same thing.

13 The legislature said we don't want these drastic  
14 results. There's -- they're real people and this dramatically  
15 shows that. There are real people who are going to be  
16 affected by this. Let's do something different. It's the  
17 same thing.

18 So there's no dispute that the legislature  
19 certainly has authority to modify the prior appropriation  
20 system to create situations, limited circumstances where the  
21 State Engineer doesn't have to enforce it and none of the  
22 Petitioners dispute that.

23 The Baileys tried to distinguish that situation  
24 in 1999 from the legislation that's at issue in this case, but

1 they haven't pointed out any logical distinction that would  
2 make the court think that the -- somehow the legislature  
3 cannot alter the effects of the prior appropriation doctrine  
4 in limited circumstances when it wants to.

5 I mean, they could repeal the entire prior  
6 appropriation doctrine, but that's not what's occurred here.  
7 And so there's certainly no issue with the legislature being  
8 authorized to do exactly what it did in this situation.

9 I want to address the argument made by both  
10 Petitioners that somehow curtailment is a remedy for the  
11 doctrine of prior appropriation, and I think what their --  
12 Ms. Peterson addressed this a little and I wanted to  
13 underscore it, that it's really a distinction without a  
14 difference. Curtailment by priority is not a remedy for a  
15 violation, it is the doctrine of prior appropriation.

16 And I turn back to this distinction between  
17 groundwater and surface water because I think it's really  
18 important. Both Petitioners says that curtailment is a remedy  
19 that occurs in times of shortage, and that makes sense on a  
20 stream system where you have just a limited amount of water  
21 coming down a stream or river in any given year.

22 In the groundwater basin, according to the  
23 Petitioners, there's been a time of shortage since May 12,  
24 1960. And so you have a situation where -- and this isn't

1 just a limited time period where, oh, we need to curtail by  
2 priority to deal with a shortage. This is a basin that's been  
3 overpumped for the last 60 years.

4 So their notion that this is somehow just a  
5 remedy as opposed to the doctrine itself just falls flat when  
6 you think about it in the context of a groundwater basin.

7 The GMP does exactly what the legislature wanted.  
8 It addresses the harmful effects of this use it or lose it  
9 concept, and it really preserves the economy and the social  
10 fabric of this community. It prevents waste. It encourages  
11 conservation and efficiencies and it makes sure that the water  
12 gets put to the most productive use at the most productive  
13 time.

14 So this whole notion that the Petitioners have  
15 said that the GMP discourages or allows people not to put  
16 water to beneficial use, it's so backwards because the whole  
17 idea is to put the water to beneficial use when it's most  
18 needed, when it's going to be most productive, and the GMP  
19 provides that flexibility.

20 Now, in my brief, I pointed out another source of  
21 legal authority for the GMP. It wasn't cited by the State  
22 Engineer and the Petitioners, in their reply briefs, didn't  
23 even address it at all. But it's NRS 534.120 and -- which  
24 authorizes the State Engineer, in his or her administrative

1 capacity, to make such rules, regulations and orders as are  
2 deemed essential for the welfare of the area involved, and in  
3 the interest of public welfare, can designate preferred uses.

4 Ms. Peterson pointed out the Mountain Falls  
5 acquisition case yesterday, which says that permits are  
6 subject to reasonable regulation, and there's water law  
7 creating this balance between the property rights asserted and  
8 this reasonable regulation.

9 So all these folks with, quote -- or the Baileys  
10 with, quote, "senior" water rights, their water is subject to  
11 reasonable regulation in a designated basin, such as Diamond  
12 Valley.

13 And so this -- we contend that this statutory  
14 authority is a separate basis by which the State Engineer  
15 could approve the Groundwater Management Plan. Again, the  
16 Petitioners didn't even address it. Their briefs are  
17 completely silent on that.

18 I want to turn now to what I think are some  
19 mischaracterizations of the GMP, itself, and the process by  
20 which it was approved. The Baileys have tried to characterize  
21 the GMP as sort of being this out -- this subject to outside  
22 influence that's not -- wasn't created by local stakeholders  
23 who actually have real skin in the game.

24 And I'm sure there are a number of people in this

1 room who have worked tirelessly for years to develop the GMP  
2 who would be very offended by that statement, that somehow it  
3 was an outside job, that somebody else came in and influenced  
4 the community for some other purpose other than what's  
5 important to this community.

6 The record is really clear. There are pages and  
7 pages of minutes from meetings, discussing all sorts of  
8 iterations of what they can do to create a GMP that will work  
9 for this community.

10 And I -- I'm not going to belabor the point or go  
11 through these notes. The court can read them on its own. But  
12 it describes a very extensive multi-year process and what the  
13 shows -- the record shows very clearly, is that the proponents  
14 of the GMP spent years trying to figure out what is going to  
15 work for this community and they looked amount all sorts of  
16 different ideas.

17 You have in there, they -- through the Eureka --  
18 not Eureka County, but they retain enhanced environmental  
19 consulting to do a couple of studies to examine some of the  
20 economics of groundwater management strategies. They looked  
21 at the financial feasibility of a general improvement district  
22 to execute a water management program. They looked at  
23 potential water set-aside programs.

24 There were a number of suggestions that were

1 really strong for the walker scoping process. All of these  
2 were considered. You can look back at the minutes, they were  
3 considered. They were digested, they were discussed, and  
4 ultimately the GMP proponents said that those are not going to  
5 work here. Why? Why -- we don't have to answer -- the court  
6 doesn't have to answer that.

7 But it seems pretty obvious that if you have  
8 seniors who have no incentive at all, simply because they're  
9 above that May 12th, 1960, cutoff, they have no incentive to  
10 conserve, they have no incentive to participate in any  
11 program.

12 How are you ever going to get a plan in place  
13 that will reduce the pumping enough to reach the perennial  
14 yield if every single person that is above that perennial  
15 yield cutoff has no motivation to do any conservation, to do  
16 any reductions in pumping, nothing.

17 They had to work with that limitation that the  
18 system that's in place doesn't incentivize conservation by  
19 anybody who's above their curtailment cutoff line.

20 Ironically, the Petitioners point out -- they  
21 suggest all these alternatives that they think should have  
22 been in a GMP, and so many of them are already incorporated  
23 into the GMP.

24 For example, they say, well, you could have

1 suggested metering. Metering is a key part of the GMP. Why?  
2 It mandates that every single groundwater user have a smart  
3 meter on their well, a certain type of smart meter because  
4 they wanted uniformity.

5 They didn't want to have any quibble with whether  
6 there was a standardized meter that was recording what was  
7 happening at every single person's well.

8 They also wanted to make sure they had high  
9 quality data and this has been an issue Petitioners, you know,  
10 have argued that there should have been modeling, or there  
11 should have been all sorts of other data that was collected.

12 That is exactly what the GMP is going to do  
13 because they have smart meters that are able to collect the  
14 data. There's going to be more data known with regard to  
15 pumping and what's happening with the aquifer than has ever  
16 existed before.

17 That's already incorporated into the GMP, which  
18 the Petitioners say that should have been done. It was done.  
19 And those smart meters, those have to be installed before  
20 anybody can pump groundwater under the GMP. They have say  
21 that there should have been more efficiencies incorporated.

22 Well, the use of this technology creates  
23 efficiencies. The ability to allow someone who really needs a  
24 little extra water to get them through the season and allow a

1 transfer of that water or a conveyance of that water, that  
2 creates efficiencies. It means that nobody's just going to be  
3 pumping water to make sure they don't lose their rights.  
4 They're going to be putting it to beneficial use or allowing  
5 someone else to do so for a limited period of time or if --  
6 when it's most needed.

7           The GMP talks about seeking out grants to assist  
8 with some of these efficiencies. It talks about, in  
9 Section 18, best management practices. It talks about  
10 education to help people understand better ways to irrigate.  
11 These were things that were suggested that the petitioner  
12 said, oh, your GMP should have had these things as opposed to  
13 water marketing. Those things are in the GMP.

14           They say that the GMP component should have  
15 addressed fallowing. That's also in the GMP where there's --  
16 they want to seek funding to -- for fallow land stabilization,  
17 weed control and road control, because when land goes fallow,  
18 it has detrimental effects on neighboring lands that are still  
19 being farmed. And there is a provision in the GMP with regard  
20 to water relinquishment.

21           So other aspects of the GMP, there is a whole  
22 discussion of other land management wanting to work with other  
23 land management agencies to manage vegetation, direct runoff  
24 into catchment basins for infiltration into the alluvial

1 aquifer, use of aerators or infiltration equipment and cloud  
2 sealing.

3 So, that -- the GMP is not just about this  
4 conversion to shares and movement of shares, you know,  
5 marketing of shares. It's so much more than that, and the  
6 Petitioners have really tried to focus on this very myopic  
7 view of it. That is just simply not accurate and the court  
8 can refer to the record. This is all in the GMP itself.

9 The proponents also -- or, excuse me, the  
10 Petitioners also suggested that the proponents should have  
11 considered a shorter irrigation season. But that is, again,  
12 addressed in the GMP, not that the shorter irrigation season  
13 wasn't needed because you have a limited amount of water.

14 The GMP allows a farmer to use that when the  
15 farmer needs it the most, whether it's through an extended  
16 irrigation season or a shorter irrigation season or a certain  
17 time of the irrigation season. It creates the flexibility,  
18 again, creating efficiencies, ensuring beneficial use.

19 And I think I addressed the Petitioners suggested  
20 that all of this could have been achieved through voluntary  
21 reductions. If you don't have the seniors incentivized to  
22 reduce anything, then you can't get where you need to go and  
23 still make sure that these hundreds of water rights that are  
24 below the May 12, 1960, cutoff still can stay active farming.

1           I want to just take a minute to talk about this  
2 term "unbundling," because the Petitioners have thrown this  
3 around a lot. I think that Ms. Peterson did an excellent job  
4 yesterday of pointing the court to the differences between  
5 this -- the Mike Young, his paper on what a water marketing  
6 scenario could look like and what was actually adopted in the  
7 GMP.

8           And I'm not going to go back through that, but I  
9 want to make sure that the court understands that under the  
10 GMP, the water rights are still tied to land. And existing  
11 law allows sales, leases, trades, transfers, all of those  
12 things, just with a lot more transaction costs, a lot more  
13 obstacles to getting water moving to where it needs to go and  
14 being used most efficiently.

15           So I think that the court need not concern itself  
16 with whether this is just sort of this free-wheeling water  
17 market because that's not the case at all.

18           Again, I would refer the court to Ms. Peterson's  
19 PowerPoint where she made -- she demonstrated very clearly  
20 what the Petitioners have really taken out of context, which  
21 is, this is not just hook, line and sinker, accepting what was  
22 proposed in Mr. -- or Professor Young's report or paper.

23           This is -- this was an organically generated by  
24 the stakeholders in this valley, a plan that works for them,

1 that is tied to the principles of prior appropriation within  
2 the flexibility that was created by the Groundwater Management  
3 Plan statute.

4 One other comment I want to make about the  
5 Petitioners' characterization of the GMP, they take issue --  
6 yeah, and they took issue yesterday with how the votes were  
7 tallied, and that in some instances, they take issue with the  
8 fact that the only water permits that were used in the tally  
9 were those who have groundwater permits, and that makes sense.  
10 Why? Because the GMP statute falls under Chapter 534 of  
11 Nevada Revised Statutes. That only addresses groundwater.

12 It would make no sense when you look at that  
13 statute to say, oh, and it must include surface water, too.  
14 And the statute refers to the -- when it's talking about who  
15 gets to participate in the GMP process, it refers to the  
16 basin, which suggests the aquifer.

17 So the State Engineer correctly interpreted that  
18 language and the location of the statute within Chapter 534 to  
19 say this should only be the groundwater permit and certificate  
20 holders who vote on the GMP. Plus it makes sense because  
21 they're the only ones affected by it.

22 And I also just want to state as an aside that  
23 yesterday Mr. Rigdon was -- he was talking about the -- that  
24 there was somehow incorrect names or names counted twice or

1 something of the sort. I'm honestly not sure what his --  
2 exactly the point he was trying to make, and of course, he  
3 hadn't showed us that before yesterday. So it shouldn't be  
4 included or considered.

5 But it seemed to us that he was referring to  
6 aggregated rights, rather than the actual existing rights with  
7 the names on existing permits.

8 And so to the extent the court is planning to  
9 consider any of that, which I think would be incorrect because  
10 it's outside the record, I think that the court needs to look  
11 very closely because I don't think he -- Mr. Rigdon got the  
12 names correct in his analysis.

13 What -- one other point with regard to the GMP.  
14 The Petitioners made much of this suggestion that even after  
15 35 years the GM -- the pumping is still not reduced below the  
16 perennial yield, and I know Your Honor, yesterday, asked about  
17 the math. And I want to point out a couple things about this.

18 First of all, the legislation does not create a  
19 time frame in which a basin has to be in balance. The  
20 legislation is completely silent on that issue. It creates a  
21 time frame in which a GMP has to be developed after critical  
22 management area designation, but there is no deadline.

23 There is nothing that says the State Engineer can  
24 only approve a GMP if it envisions getting the basin into

1 balance within X number of years. Nothing. There's no  
2 limitation on that whatsoever.

3 Now, the benchmark reduction table in the GMP  
4 goes out 35 years, but it -- it's not the end of the GMP if --  
5 until the State Engineer is comfortable that the basin's no  
6 longer a critical management area.

7 So the math that Your Honor was concerned about  
8 yesterday should be a concern. Also, and I think Ms. Peterson  
9 pointed this out really nicely yesterday, that the benchmark  
10 reduction table does not account for recharge into the  
11 aquifer. And these, of course, are irrigation rights where if  
12 you're, you know, accounted for consumptive use, there's also  
13 going to be recharge back into the aquifer.

14 So I think that is an area that the court need  
15 not concern itself with. There's no requirement with regard  
16 to any specific time frame that the State Engineer is bound  
17 by, and the GMP is very clear, in multiple places, that the  
18 goal is to get the basin pumping reduced down to the perennial  
19 yield.

20 So the benchmark reduction table that contains  
21 the first 35 years of GMP existence is not the -- what the  
22 court needs to focus on. The court can focus on the language  
23 in the GMP that says the goal of stabilizing the aquifer and  
24 getting the pumping below the perennial yield satisfies the

1 requirement of what the legislature wanted, which is exactly  
2 that.

3 A couple more points on the perennial yield.  
4 First of all, the GMP, itself, says that the benchmark  
5 reductions are, quote, "preliminary" and subject to revision.  
6 The GMP is subject to amendment. The -- there is the notion  
7 that the understanding of perennial yield may be refined and,  
8 in fact, the latest USGS report has the perennial yield for  
9 Diamond Valley as 35,000 -acre-feet.

10 So the statute NRS 534.037 just requires that the  
11 GMP implement steps for removal from the -- a critical  
12 management area designation. It does not require a time  
13 frame.

14 We objected yesterday to the petitioner's  
15 reference to materials outside of the administrative record.  
16 I want to reiterate that objection here. I think it's  
17 inappropriate for the court to consider things that came that  
18 were not provided by the State Engineer in the record.

19 I think the court already reached that conclusion  
20 with the motion in limine ruling. I think it's inappropriate  
21 for the court to look at other legislative sessions in terms  
22 of what might or might not have occurred.

23 I think Ms. Peterson addressed this, as did  
24 Mr. Bolotin. But any of the statements to the extent the

1 court is going to consider them, which again, I think would be  
2 inappropriate, any of the statements that the State Engineer  
3 might have made in other contexts are not official agency  
4 interpretation of the law under the given facts of the GMP  
5 that was submitted to the State Engineer.

6 And I think that there is case law in Nevada,  
7 State versus Dragsten, 89 Nevada 478. There's the Good  
8 Samaritan Hospital versus Shalayla case that Mr. Bolotin cited  
9 yesterday, 508 U.S. 402, that says that an agency can change  
10 its view if it believes it's grounded on a mistaken legal  
11 interpretation. It's not disqualified from changing its mind.

12 So in conclusion, I want to say these things.  
13 First of all, I think this GMP is exactly what the legislature  
14 contemplated. It is a solution to a problem that the  
15 legislature knew existed, it knew the result of what would  
16 happen if the prior appropriation doctrine were applied in all  
17 of its strictness where all of those people, anybody who came  
18 after May 12, 1960, would be packing up and leaving, going  
19 bankrupt, defaulting on loans. This community would be  
20 destroyed.

21 It was approved by a majority of the permit  
22 holders and I think this is a really interesting point, that  
23 the legislature could have said, we wanted to be approved by  
24 95 percent of the permit holders or 90 percent or 85 or 80 or

1 75 or 70. It didn't say that. It said a simple majority is  
2 good enough.

3           So the legislature recognized not everybody was  
4 going to be on board. In fact, almost half of the people  
5 might not be on board. But as long as a little bit more than  
6 half are on board, the legislature would be happy with the GMP  
7 and that's an important point for the court to take -- to  
8 digest, I think, because if the legislature wanted to make  
9 sure that there was more by it, it would have created a higher  
10 threshold for approval, and it didn't. It just wanted to see  
11 what could a majority of people approve.

12           As I started with, and I think the -- this chart  
13 makes clear, the GMP accounts for priorities. It creates the  
14 priority factor. It addresses this spread that exists with,  
15 again, very narrow window of time and accounts for the  
16 seniorities. So again, this isn't a situation where prior  
17 appropriation has been completely kicked out the door.

18           The GMP also takes the necessary steps to bring  
19 the basin back into balance. And I reiterate that if the  
20 Petitioners don't like this legislation, they should have  
21 challenged the legislation. This is a situation where the  
22 State Engineer is just implementing what the legislation  
23 allowed, and the legislature said, you don't have to conform  
24 to priorities.

1           So here we are, the court is sitting as an  
2 appellate court. This is a petition for judicial review. The  
3 standard of review is clear that the court can't substitute  
4 its judgment for that of a State Engineer.

5           It looks to whether substantial evidence supports  
6 the State Engineer's approval, which we think that there's  
7 ample substantial evidence to support this GMP as well as a  
8 local effort. It addresses the statutory requirements. It  
9 checks all those boxes, and for that reason, we would request  
10 that the court affirm the State Engineer's approval of the  
11 GMP.

12           THE COURT: Thank you very much, Ms. Leonard. At  
13 this time, the court will take a brief recess to allow either  
14 Mr. Rigdon or Mr. Mixson to get set up. Take about a  
15 five-minute recess and we'll go forward with the reply  
16 arguments. The Court's in recess.

17           (Recess.)

18           THE COURT: We are in the continuation of our  
19 case. We have all the parties and our counsel present.  
20 Mr. Rigdon is prepared to go forward with the Renners and  
21 Sadler Ranch reply.

22           MR. RIGDON: Thank you, Your Honor. Okay. Thank  
23 you, Your Honor.

24           Yesterday we presented you all the reasons why

1 Order 1302 should be overturned, and I think I'm going to  
2 quickly go through and respond to some of the comments that  
3 were brought up in the respondent's arguments, and go  
4 through nine of those reasons why Order 1302 doesn't make  
5 sense.

6           The very first one of them, I think you really  
7 keyed in on it yesterday, Your Honor. You asked the State  
8 Engineer, explain to me the math. Explain to me the math  
9 behind whether pumping actually comes below the Groundwater  
10 Management Plan, and I don't think you got an answer from the  
11 State Engineer.

12           Even Ms. Peterson and Ms. Leonard tried to come  
13 in and say, well, because of net consumptive use and that's  
14 why it doesn't have to actually get down to 30,000-acre-feet  
15 of pumping.

16           But let's remember what the simple math here is.  
17 The number one thing, the number one requirement of the  
18 statute for Groundwater Management Plan is that it bring  
19 withdrawals and the statute uses the term "withdrawals," not  
20 pumping, withdrawals below the perennial yield.

21           That's what it's got to do, and it's all  
22 withdrawals. The statute doesn't say only withdrawals that  
23 are subject to the plan, only withdrawals that do this  
24 particular thing. It says withdrawals, all withdrawals in the

1 basin had to come below the perennial yield because the  
2 perennial yield is a perennial yield for everyone in the  
3 basin, not just the people subject to the plan.

4 And the GMP clearly does not do that. Right  
5 here, on the screen is the pumping reductions that are under  
6 the plan. What we see is under the benchmark pumping  
7 reduction, at year 35, the amount of withdrawals and this is  
8 just the water rights subject to the plan, not all the  
9 withdrawals in the Valley, only comes down to  
10 34,200 -acre-feet.

11 Under the most aggressive schedule, it only comes  
12 down to 33,440 -acre-feet. And like we talked about, that's  
13 not all the withdrawals in the basin. That's not all the  
14 people who have a claim on this perennial yield.

15 We have another 5,000-acre-feet of non-irrigation  
16 permits that have claims and then we have the Venturacci, the  
17 Sadler and the Bailey permits that have another  
18 6400 -acre-feet of pumping.

19 So we've got 45,000 -acre-feet of withdrawals  
20 from the basin in a basin that has a 30,000 acre foot  
21 perennial yield. That is the fundamental problem with the  
22 Groundwater Management Plan and they just can't get around it.  
23 There is no way to get around it.

24 And when we talk about the consumptive use

1 portion, the consumptive -- the non-consumptive use portion  
2 doesn't even come into play here, and the reason it doesn't  
3 come into play is because it only applies to irrigation water.

4 So the consumptive -- this idea that there's only  
5 a portion of the water right that's consumptively used and a  
6 portion that's not consumptively used, that's true when your  
7 manner of use under your permit is irrigation because some of  
8 the water was spilled on the ground and not go into the plants  
9 and return back to the groundwater aquifer.

10 But remember this plan says these permits are no  
11 longer bound to an irrigation manner of use. That's what it  
12 says. They can be -- these share allocations, this  
13 34,000 -acre-feet of pumping can be used for mining, it can be  
14 used for industrial activity, it can be used for any lawful  
15 use in the State of Nevada.

16 So we can't discount consumptive use even if we  
17 wanted to, and even if we did, it wouldn't bring the pumping  
18 below. There's not 15,000 -acre-feet of nonconsumptive use.  
19 And so even if we did, it wouldn't bring it down.

20 But you can't take that into account because the  
21 plan, itself, says we can use this water for anything we want.  
22 We can fully consume this water. That's what the plan says.

23 Now, the other simple math that we brought up to  
24 you yesterday, and this one has been completely unaddressed by

1 the Respondents, and that's the 2016 USGS report. In that  
2 report, the United States Geologic Survey found there's an  
3 imbalance between recharge and discharge in this basin of  
4 63,000 -acre-feet. That's the imbalance.

5 And we heard the Respondents for Eureka County,  
6 Ms. Peterson, she told you the exact same thing I told you.  
7 She said, let's go to the order, go to Order 1302, and look at  
8 that one paragraph where the State Engineer talks about  
9 perennial yield.

10 We want to look at that paragraph because in that  
11 paragraph, what the State Engineer says is that in order -- he  
12 says at the very end of that paragraph, in order for the GMP  
13 to achieve its goal of stabilizing groundwater levels,  
14 recharge must equal discharge. That's what he says. That's  
15 the water balance equation that the State Engineer uses to  
16 determine whether equilibrium is met in the basin.

17 They have 63,000-acre-feet imbalance right now,  
18 at the start, and they're only reducing pumping. The only  
19 withdrawals that they're reducing by 42,000-acre-feet. That  
20 leaves a perpetual imbalance by my simple math calculation of  
21 21,000-acre-feet.

22 More withdrawals were discharged, were continued  
23 to exceed recharge, and therefore, by the State Engineer's own  
24 analysis, water levels will not stabilize and the GMP goals

1 cannot be met.

2 Bottom line is that the plan doesn't do the one  
3 thing that the statute required it to do, and that doesn't  
4 bring pumping below the perennial yield.

5 Now, the second reason the GMP -- that the Order  
6 1302 should be overturned is because the GMP forcibly,  
7 forcibly seizes water from senior users who did not agree to  
8 the plan, and it redistributes it among the juniors. There is  
9 no question that that is what this plan does. It takes water  
10 from unwilling seniors and redistributes it to juniors.

11 But that's not what the testimony in 2007 said  
12 that they were contemplating when they authorized groundwater  
13 management plans to be made. We put up the -- we put up some  
14 of that on our slide presentation, testimony that said the  
15 plans are supposed to be voluntary. They're supposed to be  
16 voluntary.

17 Pumping -- or statements that said -- and just to  
18 talk about what Ms. Leonard just brought up, she's wondering,  
19 well, there's no incentive then. If it has to be voluntary,  
20 what's the incentive for seniors to participate? Well, this  
21 is done all over the western United States. There are all  
22 kinds of areas where juniors come to seniors.

23 A lot of times it's like junior municipal water  
24 entities and they come to senior irrigators who generally have

1 the senior waters rights, and they say, hey, if we invest in  
2 your farm and we help you put in, and we pay for and help you  
3 put in the drip irrigation and the better -- and line your  
4 ditches and do the things to conserve water, if we put that in  
5 for you as an incentive, will you give us the water you save,  
6 and let us use it as juniors. And people do that all the  
7 time. These are voluntary transactions that are entered into  
8 all the time in water law.

9           So there are ways to incentivize seniors, but you  
10 have to fully compensate them. This plan does away with that  
11 altogether. It says we're going to take your property, we're  
12 going to distribute it among everybody else and too bad for  
13 you.

14           The assemblyman who sponsored the bill  
15 Assemblyman Goicoechea is clear. He said that the juniors,  
16 not the seniors had the burden to figure out how to craft a  
17 GMP and how to do it and how to reduce and cut the pumping  
18 amongst themselves. That's what the assemblyman said in the  
19 legislative history. The burden was on the juniors. There  
20 was no authorization to go forcibly take water from seniors  
21 and redistribute among the juniors.

22           And that brings me to my third point. The third  
23 reason Order 1302 should be overturned, because it  
24 fundamentally changes the prior appropriation doctrine. And

1 to do that, there needs to be express language in the statute.

2           There is not express language in the statute. We  
3 put up the statute for you. We're the only ones that did  
4 actually put it up on the screen for you, and we went through  
5 the statute.

6           And it says that -- we've already had a statute,  
7 Subsection 6 in 534.110, and that statute was the curtailment  
8 statute that provided the curtailment remedy for enforcement  
9 of prior appropriation.

10           And they took that and they -- but it said "may"  
11 in 110.7, and they took that "may" and they put it in 110.7,  
12 and they turned it into a "shall." That's what they did. The  
13 goal was to say if it hasn't been done for ten years, that  
14 they are -- I mean, if the CMA has been in place for ten  
15 years, the State Engineer shall curtail unless, and what the  
16 "unless" is for is the "shall curtail."

17           The unless isn't for unless priority, it's  
18 unless -- he shall curtail unless a Groundwater Management  
19 Plan has been approved. What that means is if a Groundwater  
20 Management Plan has been approved, he's no longer mandated to  
21 curtail. He still has the discretionary power under 110.6.  
22 That's still there and he can still do that. But he can't  
23 force a curtailment. That's what the "unless" language does.

24           It has nothing to do with an exception to prior

1 appropriation. They haven't -- and the allegation that if we  
2 have a problem with the statute, we should go take it up with  
3 the legislature, we don't have a problem with the statute  
4 because the status doesn't say what they say it says.

5 The statute's very clear. The statute was put in  
6 place and it was put in place because -- and we put up that,  
7 the purpose. Ms. Leonard's right, we need to look at the  
8 purpose of the statute. We gave you the purpose.

9 The bill sponsor, himself, said the purpose was  
10 to force the State Engineer to take action, that the State  
11 Engineer was not getting it done, and they wanted -- and  
12 groundwater levels continued to decline. That was the purpose  
13 of the statute, to force action.

14 So the legislature told us, and I do take  
15 exception with the idea that this is exactly the plan that was  
16 contemplated by the legislature. The legislature told us what  
17 kind of a plan they were contemplating. They were  
18 contemplating a conservation plan.

19 In the 2011 minutes of the legislative session,  
20 that word "conservation plan" is used over and over and over  
21 again to describe what a Groundwater Management Plan should  
22 do.

23 And the bill sponsor said, he offered suggestion,  
24 planning alternative crops, water conservation, using

1 different irrigation methods. The State Engineer threw out  
2 ideas in 2009 with nonirrigating quarters, increasing  
3 sufficiency lower consumption crops. And when they started  
4 working on this plan, those are exactly the kinds of things  
5 that they were looking for.

6 The Walker and Associates, when you look back  
7 through the record, Walker and Associates, when they went  
8 around and surveyed everybody.

9 They were talking water right buyouts, water  
10 right buyouts, maintaining prior appropriations. This is what  
11 I was just talking about with other alternatives. You can go  
12 to the senior, it's perfectly acceptable in -- under prior  
13 appropriations, to go to a senior and say, hey, look, I'll pay  
14 you not to farm this year if you let me use your water to farm  
15 this year, and have that kind of voluntary transaction.  
16 That's perfectly appropriate under prior appropriation. Those  
17 are the kinds of things that they were talking about.

18 But then it changed. In 2015, the State Engineer  
19 sent Mike Young out here, and Mike Young said, I got a plan  
20 where you don't have to do that kind of hard work. I got a  
21 plan where we can change the existing water rights system and  
22 we'll just cut everybody equally. And you can't fault people  
23 for just trying to glom on and jump onto that. It sounds  
24 great. But it's not legal. It's not legal and it doesn't

1 conform to the prior appropriation system and the State  
2 Engineer, himself, says it deviates from the prior  
3 appropriation system.

4 The fourth reason why the order should be  
5 overturned is that it essentially allows for the complete  
6 deregulation of water use in Diamond Valley. Unbundling is  
7 deregulation, that's what it is.

8 Once these shares are issued -- and this isn't in  
9 the plan, once these shares are issued, all restrictions in  
10 the existing permits related to the point of diversion, the  
11 place of use, and the manner of use are now gone. They're  
12 lifted.

13 Ms. Peterson, herself, said, you can use these --  
14 this water anywhere in Diamond Valley, and you can use it on  
15 any existing point of diversion, not the one you're permitted  
16 for, not the one your permit says you're limited to here and  
17 not the land the where your permit says you're limited to use  
18 this water on your land. It allows it to be used anywhere in  
19 the basin on any existing point of diversion.

20 Now, yes, she's right. Technically they didn't  
21 follow the much broader unbundling that Mr. Young was  
22 proposing. They narrowed it to Diamond Valley because they  
23 were worried, under Mr. Young's unbundling approach, you could  
24 actually transfer these shares and they could to an interbasin

1 transfer out of here with the water, and nobody wanted to do  
2 that. So, yeah, they narrowed it down to only in Diamond  
3 Valley, not anywhere in the State of Nevada. But it's still  
4 complete deregulation of the permits.

5 None of this is authorized by Statute NRS  
6 533.330. It could not be clearer. Every single permit is  
7 allowed one, one manner of use. Not multiple manners of use,  
8 not any use allowed under the law like the GMP says. One  
9 manner of use.

10 NRS 533.325 is clear that any change to a  
11 permitted manner of use point of diversion or place of use  
12 shall, it uses the language shall, shall require a filing of a  
13 change application with the State Engineer.

14 You have to do that and there is nothing in the  
15 GMP statute that says they're exempt from these requirements.  
16 Yet the GMP unbuckles all this and allows the water to be used  
17 anywhere without change applications on any point of diversion  
18 in the basin.

19 Now, they asked -- importantly, Your Honor, they  
20 asked for these exemptions from these provisions of law. In  
21 2017, they convinced the legislative subcommittee to forward a  
22 bill on their behalf, and that bill under Subsection 2,  
23 Subsection 2(c) said, please allow -- well, it doesn't say  
24 "please" in the bill, but the bill basically would allow a

1 Groundwater Management Plan to impose requirements that are,  
2 quote, not bound to any specific places of use, point of  
3 diversion or manner of use. That's what it said in the  
4 legislation. That's the type of express legislation you need  
5 to overturn an existing statute.

6 That was in that 2017. They wouldn't have asked  
7 for it if they didn't believe they needed it, and we showed  
8 you what the testimony that they gave saying how much they  
9 needed that in order to make this plan work. It didn't pass.

10 Now, people have been quibbling with my statement  
11 that the legislature said no. Okay? Yes, I cannot point to  
12 any resolution where the legislature said no. Absolutely.  
13 The legislature did not pass the legislation that they say  
14 they needed in order to make this plan work, and that's the  
15 real key here.

16 There is some -- and I will grant to Mr. Bolotin  
17 in my -- when I took statutory interpretation in law school,  
18 there is controversy over what effect not past legislation  
19 should have on cases and on statutory interpretation. It is a  
20 controversy. There are people on both sides of this issue.

21 I pointed out the Justice O'Connor's opinion and  
22 the FDA versus William Brown tobacco case in which she did use  
23 legislative history that showed the bills had not been passed,  
24 and therefore, the FDA did not have authority. So there are

1 cases on both sides of this issue.

2 The key here is they, themselves, said they  
3 needed the legislation. The State Engineer said he needed  
4 this legislation to pass and the legislation didn't pass.  
5 That's the key.

6 It hadn't -- it's not that the legislation did  
7 not pass and show some kind of an intent on the part of the  
8 legislature. It's that it shows the intent on the part of the  
9 Respondents. They needed this legislation and the legislation  
10 didn't pass.

11 The fifth reason why Order 1302 needs to be  
12 overturned is that it does not provide mitigation for senior  
13 vested water rights that have been impaired. There's a strict  
14 non-impairment -- a strict non-impairment clause in the  
15 statute that protects senior water -- senior vested water  
16 rights from any impairment. Nothing -- it says nothing in  
17 this chapter can impair senior vested water rights.

18 No mitigation is provided for seniors in the  
19 plan. And while I appreciate the fact that Ms. Peterson wants  
20 us to start today with a clean slate and just ignore 40 years  
21 of history, 40 years of history where our clients have already  
22 had to suffer a practical curtailment because their springs  
23 have dried up, and then have to fight tooth and nail against  
24 these very Respondents just to get an adequate mitigation

1 right to cover that. They want to ignore that. Just set that  
2 aside, Your Honor. Let's ignore that and let's start with  
3 clean slate today. I wouldn't want to do that if I was on  
4 their side as well. But we can't ignore that history.

5 The mitigation rights would be -- the mitigation  
6 rights do not provide a full remedy to my clients, and they  
7 have never been intended to provide a full remedy to my  
8 clients.

9 Ms. Peterson made a big deal about the settlement  
10 that we have with the State Engineer regarding the quantity of  
11 the mitigation right that this court ordered for Sadler Ranch.  
12 That settlement was a result of the fact that we have an  
13 adjudication going on, and your order said we're setting this  
14 mitigation right, but that's subject to the -- whatever the  
15 final determination that comes out of the mitigation is. And  
16 that was perfectly correct and that's -- that was good.

17 So we said, look, instead of continuing to fight  
18 this up to the Supreme Court, the amount of this, the quantity  
19 of this mitigation right, let's just wait until -- we'll just  
20 accept the 5100-acre-feet until we finish the final order of  
21 determination in the adjudication proceeding, and then we'll  
22 proceed from there. And that will be the basis of the  
23 mitigation water right, whatever comes out of that proceeding  
24 within the final decree.

1 All we were discussing was the quantity of the  
2 mitigation right. There was nothing in that settlement that  
3 said that that was the exclusive remedy available to Sadler  
4 Ranch.

5 There was nothing in that settlement that said  
6 Sadler Ranch isn't entitled to any other remedies, anything  
7 like that, and that -- as this court has determined in the  
8 past, that mitigation right is only good if the water's  
9 available, if the groundwater levels don't continue to decline  
10 and don't dry up the valley from all the overpumping.

11 So we do have standing to be here. We have  
12 standing to be here because we have a mitigation right that is  
13 a groundwater mitigation right. Contrary to what Ms. Leonard  
14 said, we have a groundwater mitigation right that has a  
15 priority date in the 1870's. That's our priority date. It's  
16 not a few weeks before 1970. It's in the 1870's.

17 And that's why we have standing to be here  
18 because as the water level declines every year, from this --  
19 from now forward, even if we're going to wipe the slate clean  
20 in Nevada, from this day forward, my clients have to pay  
21 electricity to pull that water out of the ground, water that  
22 used to flow freely from their springs.

23 They have to pay for the cost of operating and  
24 maintaining those wells and those well pumps, and if the water

1 level declines, they may even have to drill those wells deeper  
2 and pay those costs.

3 They've never been -- that's going forward. And  
4 if the plan does not bring the basin into balance, those water  
5 levels will continue to decline and my clients will still have  
6 those expenses and those have never been mitigated by the  
7 people who caused the problem. So we haven't been made whole  
8 and the mitigation rights certainly doesn't make us whole by  
9 itself.

10 So the sixth reason Order 1302 should be  
11 overturned is the State Engineer didn't do the analysis that  
12 he was required to do under the law. We did bring it up in  
13 our opening brief.

14 We said there were several of the five -- of the  
15 six factors in the law. We said there were several of those  
16 factors that the State Engineer ignored. There was one that  
17 he looked at is there -- is there's a Groundwater Management  
18 Plan in the basin? No, there's not. Okay. That's fine.  
19 Five out of six is several.

20 He didn't do his analysis of those five out of  
21 six factors. He relied on this appendix D in the Groundwater  
22 Management Plan. That's what he said. He says it right in  
23 his conclusion.

24 These five factors are considered in appendix D,

1 and therefore, the Groundwater Management Plan is okay.  
2 That's what he said.

3 And we brought up the fact that appendix D  
4 doesn't seem to have an author. There's nothing on it. If  
5 you look at just appendix D, there doesn't seem to be an  
6 author identified, anything like that.

7 Now, Ms. Peterson helpfully help us fill in that  
8 blank that we didn't know, and she pointed to the email in the  
9 record on appeal. There's an email regarding the authorship  
10 of appendix D. It doesn't say in the email that appendix D  
11 was authored by these people. What it says in the email, and  
12 this is on ROA318, it says Chapter 1, the draft Chapter 1 was  
13 authored by these people.

14 So we learned yesterday, and I appreciate  
15 Ms. Peterson helping us out with this and pointing it out to  
16 us, is that appendix D is apparently what was originally  
17 drafted in Chapter 1.

18 And that's really important because that email  
19 was sent in 2016 and that's when -- when we looked at our  
20 timeline, that's when draft Chapter 1 was drafted. That was  
21 drafted before. It says in the email, this is the start,  
22 before we've done anything else in the plan, this gives us a  
23 start. So the plan wasn't even created when that draft  
24 Chapter 1 was drafted.

1           So the question then -- the obvious question then  
2 that is raised is: How can something that was drafted prior  
3 to any of the plan and any of the pumping reductions put in be  
4 considered an adequate hydrologic analysis, physical  
5 characteristics analysis, water quality analysis, all those  
6 five factors that we're supposed to look at?

7           How can it possibly evidence to support that the  
8 plan that wasn't even written at the time that draft Chapter 1  
9 was written, how can that possibly be support for determining  
10 whether the pumping reductions in the plans weren't -- haven't  
11 been done yet actually bring pumping below perennial yield to  
12 bring the basin back into balance? It can't be.

13           So we do appreciate them pointing that out to us  
14 so that we could -- you know, we could learn that and learn  
15 that appendix D is not substantial evidence that this court  
16 can rely on to support the State Engineer's determination.

17           So the seventh main reason why Order 1302 should  
18 be overturned is that the State Engineer did not use the best  
19 available science to review the Groundwater Management Plan.  
20 This is important.

21           NRS 533.024 Sub 1, Sub D says that the State  
22 Engineer is supposed to, quote, and this is a quote, "consider  
23 the best available science in rendering his decisions  
24 concerning the available surface and underground sources of

1 water in Nevada." The legislature has told him, you have to  
2 use the best available science.

3 The State Engineer acknowledges in Order 1302,  
4 the groundwater modeling is an informative tool for projecting  
5 the effects of pumping reduction.

6 The very thing that we need to do here is project  
7 the effects of these proposed pumping reductions in order to  
8 determine whether the plan contains the necessary steps for  
9 removal of the CMA.

10 The very thing we're looking for here, he says  
11 that the ground water modeling is a very informative tool for  
12 doing that. It's the best available science. But it wasn't  
13 done. It wasn't used.

14 Now, we're hearing, well, we're going to use it  
15 in the future. Okay. That's what we're going to do, we're  
16 going to use it in the future. We're going to do this  
17 monitoring in the future.

18 We heard the same arguments -- or you heard the  
19 same arguments, Your Honor, in the Eureka Moly case, and the  
20 Supreme Court heard the same arguments in the Eureka Moly  
21 case. Oh, don't worry, we're going to do a mitigation plan in  
22 the future. We're going to do a monitoring plan in the  
23 future. We're going to approve this water right and we'll do  
24 things in the future. And that'll take care of all the

1 problems.

2           The Supreme Court said, no, that's not the way it  
3 works. You have to do those things now. At the time you're  
4 considering the plan, the petition, whatever it is, you have  
5 to do those things now, up front, so that we -- so that we  
6 know what -- we have the objective standards to guide the  
7 future actions. That's what Eureka says.

8           So the eighth reason why the Order 1302 should be  
9 overturned is the voting irregularities. I keep hearing the  
10 Respondents talk about how this is a community based plan, a  
11 majority of the people in the community support this plan.

12           Well, first of all, there's absolutely zero  
13 evidence in the record that the majority of the people in the  
14 Diamond Valley community support this plan.

15           Only the -- the only people we know support the  
16 plan are the people who signed the petition who actually hold  
17 permits for under -- permits or certificates for underground  
18 water. That's the only people we know supported it by a very,  
19 very slim simple majority.

20           We have no input in the record from vested water  
21 right holders who didn't get a vote. We have no information  
22 in the record about whether it's supported by domestic well  
23 owners in the basin. They didn't get a vote. We have no  
24 information in the record whether it was supported by

1 non-groundwater permit owners. I'll leave Mr. Mixson to talk  
2 more about that. But there's no information in the records  
3 whether they supported it.

4 A simple majority of whole -- of a small subset  
5 of the community, holders of groundwater permits supported it,  
6 and that is the only thing that is in the record. And that is  
7 even questionable based upon what we brought up.

8 Now, people took a -- talked about my analysis  
9 and said it was outside the record analysis. Well, it's not.  
10 Let's -- this is the record, and in the record here, we've  
11 cited to this when we did our analysis.

12 In the record here, this is the -- this is the  
13 tally of the petitions that were submitted and we brought up  
14 the people were -- that permits were being counted multiple  
15 times. That's right in here. Let's look at that.

16 If we go to page 150 of the record, right here,  
17 we see those permits I brought up, the four of them. 24262,  
18 24263, they're right here. It identifies those permits, it  
19 identifies the owner as James or Pamela Buffington, and it  
20 says right here that they were signed for by Diamond Valley  
21 Hay Company and they count as four votes. So that's four  
22 votes being counted in the tally column here, four votes.

23 We then go to page 152, the very next two pages  
24 over, and we see those exact same groundwater rights -- find

1 it here. Yeah, right up here. Those very same groundwater  
2 rights 24262, 24263, 24264, the exact same ones, they list as  
3 being owned by John Marvel and they say Diamond Valley Hay  
4 signed, not John Marvel Diamond Valley Hay Company, and they  
5 count as five votes there in the tally column.

6 Then we go to 166, right here at the very end,  
7 and we see those exact same permits listed, this time with the  
8 owner being Diamond Valley Hay Company, the person who signed  
9 the petition on behalf of all three owners supposedly, and  
10 then -- and there's five more votes there.

11 So they turned five permits into 14 votes in the  
12 plan and that's in the record. That's not an analysis I did.  
13 All you have to do is read the record to look at it.

14 There were significant voting irregularities here  
15 and that -- it should just concern the court. There's no way,  
16 there's literally no way to tell based upon what's in the  
17 record, whether a majority of groundwater right holders  
18 approved the petition.

19 Ms. Leonard noted, because when we brought this  
20 up, that, yes, there's a difference between what they said in  
21 the petition and what the State Engineer actually counted.  
22 The State Engineer counted a fewer number of permits and a  
23 fewer number of votes.

24 The problem is the State Engineer didn't include

1 any analysis in there to tell us which votes he was -- or  
2 which permits he was redacting. We don't know if these ones  
3 that I just mentioned were some of the ones that the State  
4 Engineer disregarded or took out.

5 So there's nothing in there to show us. So  
6 nobody can go back and check the work of the State Engineer,  
7 independently verify any of the numbers that he puts out on  
8 the -- on that. There's no analysis in the record.

9 But, Your Honor, the more important point is  
10 this: Even if the plan did have majority support, in this  
11 country a majority of people cannot, don't have the power to,  
12 by simple vote, forcibly seize property from the minority and  
13 redistribute it amongst themselves without providing any  
14 compensation whatsoever. That's just simply not allowed in  
15 this country. So it doesn't really matter if there's a  
16 majority that support the plan because the majority couldn't  
17 do this anyway.

18 How do we know that? It goes all the way back to  
19 the founding of this country. James Madison, writing the  
20 federalist 51 said, in a society under which the stronger  
21 faction can unite and oppress the weaker, anarchy may be said  
22 to reign. And we don't have that kind of country, we have a  
23 country where the rule of law reigns, not anarchy.

24 The ninth reason why Order 13302 should be

1 overturned. Simply put, the record on appeal is deficient.  
2 First of all, there's obvious information that's been excluded  
3 from the record.

4 As we mentioned yesterday, there were three prior  
5 drafts sent to the State Engineer for review. He provided red  
6 lines and comments to those three prior drafts. None of that  
7 is in the record because the State Engineer says -- he says on  
8 page 7 of his brief, my consideration only started when the  
9 actual petition was submitted to me. That's what he says.

10 But that's belied by the fact that three times  
11 this thing was given to him, three times he reviewed it in  
12 detail, and three times he provided comments.

13 We don't know what changes were made. We don't  
14 know from the time the unbundling plan was put, you know, they  
15 keep saying this doesn't exactly match up with the unbundling  
16 plan that Mike Young presented. We don't know what changes  
17 were made because the State Engineer didn't include any of  
18 that in the record.

19 The second reason why the record is deficient is  
20 it doesn't include any hydrologic analysis. As I mentioned  
21 before, there's no independent hydrologic analysis as to  
22 whether these pumping reductions up here on the screen will  
23 actually result in the removal of the perennial yield.

24 The only expert analysis that was done on that

1 very question is the Turnipseed Engineering report that we  
2 submitted, and that concluded that it didn't. But that is the  
3 only expert who has looked at this and concluded that the  
4 plan -- and they concluded the opposite of what the State  
5 Engineer did. So he has no substantial evidence to support  
6 his determination that the plan somehow does do that.

7           There's also -- the other reason that -- or the  
8 third reason why the record on appeal is deficient is because  
9 there's been no ability to examine or challenge the accuracy  
10 of evidence relied upon by the State Engineer just as there  
11 was no showing the work, showing the homework of how the votes  
12 were counted, there was no showing the homework on the  
13 analysis over the depreciation rates.

14           Nobody could independently verify that because  
15 they weren't given the modeling data, they weren't given the  
16 model simulation, they weren't given any of the data to back  
17 that up. It's not there.

18           And none of the -- none of the people who created  
19 that are people that before Mr. Bugenig who apparently also  
20 created appendix D and appendix I, was never brought in and to  
21 explain what he did, what he was saying, and was never allowed  
22 to be cross-examined.

23           Finally, there was no analysis of the vote  
24 counting procedure as we just said. So for those reasons, the

1 record on appeal is deficient.

2 Now, there's a couple of miscellaneous things  
3 that were brought up that I want to address that were brought  
4 up by Respondents in their arguments.

5 It was said that Sadler Ranch didn't -- or knew  
6 about this CMA law when it purchased the ranch, and therefore,  
7 it shouldn't be surprised that the CMA designation allows  
8 seniors to be harmed by the juniors.

9 But that's not what the law does. We've shown  
10 that's not what the law does. Yeah, Sadler Ranch and the CMA  
11 legislation was there and that that was the standard. That  
12 legislation, as we said, was to force action to protect the  
13 seniors. That's why that legislation was put in. Groundwater  
14 levels were declining, State Engineer wasn't doing anything.

15 They wanted to force action by the State  
16 Engineer. That would be a reason to buy the ranch. That  
17 doesn't -- that wouldn't have any issue over whether -- that  
18 the Sadler Ranch somehow waived its claim, its senior vested  
19 right water because it knew about this legislation. That --  
20 it just doesn't make any sense and it doesn't hold water.

21 Other things were brought up about, well, the  
22 goals, the plan has all these goals and you look at the  
23 record, that's the substantial evidence that the State  
24 Engineer relied on.

1           It says in the plan, our goal is to stabilize  
2 water levels. Our goal is to bring pumping below the  
3 perennial yield. All these goals are the plan and that's what  
4 they're saying is the necessary steps to remove the CMA.

5           But goals are not necessary steps. That's not  
6 what they are. Goals are aspirational. I may have a goal to  
7 lose 50 pounds over this next year, and I really do need to do  
8 that. But the necessary steps to get to that goal would be  
9 dieting, exercise, having a schedule put in place to -- that  
10 I'm going to exercise this much on this day. That would be  
11 the necessary steps.

12           This plan, the only thing they have is pumping  
13 reductions that don't get below the perennial yield. That's  
14 it. That's what they have. It doesn't contain the necessary  
15 steps and aspirational goals cannot fill in for evidence.

16           It was discussed about adjustments to the plan  
17 and there was a big deal made about this six-year review under  
18 the plan, and that, hey, if things aren't working in six years  
19 and the State Engineer has the data, he can come in and we can  
20 completely -- and he can completely order this plan be  
21 changed.

22           That's not what the six-year review provision of  
23 the GMP says. That provision, if Your Honor wants to go look  
24 it up, is Section 26.2 of the GMP and it's found at ROA 246.

1                   What does that say? That says that six years,  
2 they are going to have a big meeting out here. They're going  
3 to bring everybody in, they're going to provide special notice  
4 that's different from their regular annual meeting.

5                   But the purpose is just to, quote, "seek input"  
6 as to whether the GMP should continue, end quote. That's it.  
7 That's just -- that's the purpose is to poll everybody in the  
8 basin as to whether they -- the GMP should continue.

9                   There's nothing in there that requires any review  
10 of the monitoring data, any review of scientific analysis.  
11 There's no objective standards put in there for if the  
12 monitoring data shows this, then we're going to make this  
13 adjustment to the plan. Nothing.

14                   And remember, this six years is still within the  
15 time that the plan says the State Engineer is handcuffed from  
16 making any pumping reductions for that first ten years.

17                   So even if people come in and say, hey,  
18 there's -- the groundwater levels are continuing to decline,  
19 the State Engineer can't do anything for another four years.  
20 And even then, after that four years, all he can do is move  
21 from this schedule to that schedule, which all both end up at  
22 the same place. It just happens a little bit faster. That's  
23 the six-year review. It's not this big, well, we'll come in  
24 and redo the whole plan.

1           The State Engineer, again, brought up Lewis, the  
2 Lewis case from New Mexico, and we seem to be on a back and  
3 forth here. At first, it's got the full page out of the page  
4 and a half analysis on prior appropriations. It's dedicated a  
5 full page and cited as -- and it's the only authority cited in  
6 Order 1302 for the conclusion of the statute contemplates a  
7 deviation from prior appropriation.

8           In his answering brief, he goes and says, oh, no,  
9 we just meant it as an interesting example. We didn't rely on  
10 it as authority, and then I believe I heard yesterday, we're  
11 coming back to, oh, no, no, now it's persuasive authority  
12 again. So what is it?

13           Well, there's huge differences between the Lewis  
14 case and the present case. But the main difference, the main  
15 key difference for this case is that in the Lewis case, the  
16 legislature reviewed the plan and said, yes, this is okay.  
17 And in this case, that never occurred.

18           We heard a comment about, well, just let us try  
19 this. What's the downside? What's the downside to just  
20 letting us move forward? We've already hired a water manager,  
21 we're already moving forward. What's the downside?

22           Well, I shouldn't have to say this, but the  
23 downside is that people are having their property forcibly  
24 seized from them and given to other people. That's a huge

1 downside.

2 Another downside is the basin's continuing to be  
3 pumped -- overpumped. This is continued overpumping of the  
4 basin for 35 years, causing continuing damage to vested rights  
5 and continuing environmental damage. There's pictures in the  
6 record on appeal, Your Honor, of the results of land subsides  
7 out here as a result of the water table dropping so  
8 drastically and the damage that land subsiding is causing.

9 Ms. Peterson noted one of the differences between  
10 Mike Young's unbundling plan and the Groundwater Management  
11 Plan is that there's no water set aside on the Groundwater  
12 Management Plan for environmental concerns. Yeah, that's  
13 true. There's nothing set aside in this Groundwater  
14 Management Plan.

15 There is nothing in here to deal with the  
16 environmental problems that have been created by a  
17 hundred-foot groundwater decline in over 50 years that has  
18 resulted in this massive land subsidence.

19 The choice is not between the Groundwater  
20 Management Plan and the current situation. That's not the  
21 choice. The choice is between the Groundwater Management Plan  
22 or a properly drafted Groundwater Management Plan. That's the  
23 choice.

24 A Groundwater Management Plan that complies with

1 the law, respects senior water rights and respects the prior  
2 appropriation principle.

3 We also heard that our suggestion that they go in  
4 and require proof of beneficial use and cancel things would  
5 actually encourage waste. That was the term that I believe  
6 the State Engineer said. It would encourage waste.

7 Well, Your Honor, waste is illegal. It's illegal  
8 under Nevada law to waste water. You cannot prove up the  
9 beneficial use by wasting water because wasting water is not  
10 beneficial use. So if you purposely go out and just run a  
11 pump out in the desert so that you can get a meter reading,  
12 that's illegal. You can't do that.

13 We heard that Sadler and Renner have no senior  
14 groundwater rights. Sadler's vested rights date back to the  
15 1860's. Renners date back to 1875. They are some of the  
16 first water users in this basin, a hundred years before these  
17 1960 dates of the junior permit holders who came into the  
18 valley and pumped and caused damage to our rights. If we  
19 don't have standing, I don't know who does.

20 We don't dispute -- Ms. Leonard put up here that  
21 all this activity happened in 1960, within weeks of each  
22 other. People flooded the State Engineer's office with these  
23 applications. We don't dispute that. And we don't dispute  
24 that the State Engineer office at that time, and it's not the

1 current State Engineer's office, but back in 1960, did the  
2 wrong thing and approved all these permits.

3 That's not a reason to not correct the problem  
4 now. Yeah, they did the wrong thing. The burden is on them  
5 to fix it. It's not on Sadler Ranch, it's not on Renner, it's  
6 not on the Baileys. The burden is on them to fix the problem  
7 that they -- their predecessors created. That's who the  
8 burden is on.

9 It was stated that a number of people in this  
10 room worked really hard on the GMP and we acknowledge that.  
11 There are a lot of people in this room who worked hard on the  
12 GMP.

13 Among them is Ira Renner, my client sitting right  
14 there at this table. He took time away from his family and he  
15 took time away from his farm to serve on the advisory board of  
16 this committee. He did his best to try to provide input. He  
17 was constantly voted down, 7 to 1 by the juniors. He did his  
18 best. He wanted a management plan that would work, a properly  
19 draft management plan. But it didn't happen.

20 Yeah, people worked on it and it's too bad that  
21 the end result of what they worked on doesn't comply with the  
22 law because that's -- there was a hard work that went into  
23 this, and we sympathize with that. But at the end of the day,  
24 the hard work had to produce something that complies with the

1 law, and they didn't do that.

2 So with that, Your Honor, we ask that you  
3 overturn 1302. It doesn't comply with the law, it doesn't  
4 have substantial evidence supporting it, and the process was  
5 not -- the proper process was not followed in adopting it and  
6 we rest our case.

7 THE COURT: Thank you, Mr. Rigdon. Again, the  
8 court will take a brief recess and allow for Mr. Mixson to  
9 come forward and have the final reply brief on behalf of the  
10 Baileys. The Court's in recess.

11 (Recess.)

12 THE COURT: Let the record reflect that we're in  
13 the continuation of our case. Mr. Mixson, on behalf of the  
14 Baileys.

15 MR. MIXSON: Thank you, Your Honor. I just want  
16 to provide a brief rebuttal to a few points that the  
17 Respondents made.

18 First of all, I want to talk a little bit about  
19 the Michael Young paper. The State Engineer, through  
20 Mr. Bolotin, makes the argument that the Michael Young paper  
21 is not some sort of authority that the Groundwater Management  
22 Plan was required to adhere to, and Ms. Peterson, and this was  
23 echoed by Ms. Leonard, make the argument and it was little bit  
24 surprising to me that the Michael Young paper is different

1 than the Groundwater Management Plan.

2 And I think Ms. Peterson even said the Diamond  
3 Valley Groundwater Management Plan is not an unbundling scheme  
4 and that there are other major differences between the ground  
5 management plan and the Mike Young paper.

6 And, first of all, I would like to point you to  
7 portions of the record that clearly show that Diamond Valley  
8 Groundwater Management Plan was, indeed, developed on the  
9 court concepts from Michael Young, including primarily  
10 unbundling of water rights.

11 And that would be the GMP, itself, on page 10,  
12 which is at -- on the record on appeal at page 227, explicitly  
13 states that the GMP was developed using Michael Young's  
14 concepts and it even provides a footnote 8 in the GMP to the  
15 Michael Young plan.

16 Additionally, on February 24, 2016, the Eureka  
17 conservation district sent a letter to water users in Diamond  
18 Valley, and this is in the record on appeal, page 332. And in  
19 that letter, Eureka Conservation District said to the water  
20 users that they are proposing to use Diamond Valley to pilot  
21 test, quote, "unbundling of water rights."

22 So the key point here is that this -- the Diamond  
23 Valley Groundwater Management Plan is an unbundling and free  
24 market water right scheme, and the only way that they've been

1 able to make that work is to ignore the prior appropriation  
2 doctrine in doing the groundwater share reductions.

3 And the Michael Young plan, itself, was designed  
4 as a voluntary pilot program, but somehow the Diamond Valley  
5 Groundwater Management Plan was converted from this voluntary  
6 pilot program to see if this concept would work into a  
7 mandatory and permanent unbundling and water rights marketing  
8 scheme.

9 And so what they did is the Groundwater  
10 Management Plan takes the core concepts of Michael Young  
11 unbundling free marketing of shares, but they don't use the  
12 sort of nitty-gritty details that Michael Young included, I  
13 think, in his blueprint that were intended to protect the  
14 senior water rights.

15 So, of course, there's been a lot of discussion  
16 about the prior appropriation doctrine and curtailment by  
17 priority, and I guess where I'd like to start here is that  
18 what we heard from Ms. Leonard, I think especially this  
19 morning was a lot of fear mongering about curtailment by  
20 priority, and how there's this binary choice. Either you do  
21 unbundling and water marketing or there's going to be a  
22 curtailment by priority.

23 And the point that the Baileys have been trying  
24 to make in their briefs is that it's not a binary choice. You

1 can have a Groundwater Management Plan that can reduce pumping  
2 in Diamond Valley without resorting to blowing up the prior  
3 appropriation doctrine in favor of unbundling and water  
4 rights.

5 And as I went through yesterday, a lot of these  
6 concepts were developed in 2014 and they did not make it into  
7 the Groundwater Management Plan, as least as mandatory  
8 concepts.

9 I think Ms. Peterson and Ms. Leonard explained  
10 that some of those concepts end up in various places in the  
11 Groundwater Management Plan, but they're not mandatory.  
12 They're aspirational and their goals if they're in there at  
13 all.

14 And so our argument is: If you're going to have  
15 a mandatory Groundwater Management Plan, it cannot -- sorry,  
16 it cannot produce senior water rights in violation of the  
17 prior appropriation doctrine. There are other ways you can  
18 develop a Groundwater Management Plan without destroying the  
19 prior appropriation doctrine.

20 And it's interesting that the Respondents argue,  
21 on the one hand, the only way that this plan, absent the  
22 unbundling scheme, could have -- or the only way the State  
23 Engineer can comply with prior appropriation without this  
24 Groundwater Management Plan is strict curtailment by priority.

1           But then we heard arguments this morning that the  
2 unbundling and the priority factor of converting water rights  
3 to shares actually does conform with prior appropriation. But  
4 that's not curtailment.

5           So I'm a little confused with the respondent's  
6 arguments that, on the one hand, curtailment is the only  
7 remedy that complies with prior appropriation, but then the  
8 Groundwater Management Plan also complies with prior  
9 appropriation because it uses this priority factor to reduce  
10 water rights to shares. Those arguments can't both be true.

11           Ms. Leonard, this morning, made an argument, and  
12 I'm sorry, I can't remember the statutory citation she  
13 provided, but it was a statute that gives the State Engineer  
14 general regulatory authority to issue rules and regulations  
15 and orders dealing with the general welfare.

16           And Ms. Leonard was questioning why it was that  
17 the petitioners have not responded to the availability of the  
18 State Engineer to use this general regulatory authority.

19           And the answer, number one, is the State  
20 Engineer, himself, didn't rely on this statute. It's not  
21 referenced in Order 1302 as providing the legal authority upon  
22 which the State Engineer approves the Groundwater Management  
23 Plan.

24           But second, and more importantly, I think, that

1 statute similar to the Groundwater Management Plan statutes,  
2 it does not provide that the State Engineer, in issuing these  
3 rules and regulations for the general welfare, can actually  
4 ignore other existing doctrine and law such as prior  
5 appropriation of beneficial use.

6 So even had the State Engineer relied on that  
7 statute, it wouldn't have given him the authority he needs to  
8 avoid compliance with prior appropriation.

9 I'd also like to respond to some of the arguments  
10 with respect to the Baileys senior vested surface water  
11 rights. Ms. Peterson argued that the Baileys, I think her  
12 argument is essentially they waived their right to express  
13 their concern that the Groundwater Management Plan doesn't --  
14 does nothing to affect the impacts on their surface water  
15 rights because they have what Ms. Peterson called a mitigation  
16 permit.

17 And, first of all, the Baileys dispute that their  
18 groundwater permit at the Bailey Ranch is a mitigation permit.  
19 It actually -- that permit precedes the time of State Engineer  
20 Order 1226, which provides authority for mitigation permits,  
21 and that permit is also extremely junior priority date. It's  
22 a 1997 groundwater right. So it does not mitigate the impacts  
23 to the Bailey's senior vested surface water rights at the  
24 Bailey Ranch.

1           The other argument that we've heard about why  
2 vested rights should not be considered in reviewing the  
3 Groundwater Management Plan is that the Groundwater Management  
4 Plan is not a mitigation plan. Its purpose was not to  
5 mitigate impacts to senior vest water rights.

6           So the State Engineer didn't have to consider  
7 what the impacts to these senior rights would be under the  
8 Groundwater Management Plan and, you know, whether or not you  
9 want to characterize the GMP as a mitigation plan, you know,  
10 it doesn't really matter.

11           The Baileys aren't asking that they be mitigated  
12 under the GMP. There's an adjudication of the basin that's  
13 ongoing right now where those issues are being decided.

14           What the Baileys are suggesting is that the --  
15 when the State Engineer reviewed the Groundwater Management  
16 Plan, he had a statutory obligation to analyze whether or not  
17 the GMP would continue the adverse impacts to senior vested  
18 groundwater rights. Not whether or not there was mitigation  
19 in the GMP, simply whether or not it was impacting these  
20 rights. And that analysis was not done. They simply stuck  
21 their head in the sand and said, this isn't a mitigation plan  
22 and we can ignore any impacts to vested surface water rights.

23           And finally, Your Honor, I think I want to end  
24 with this. There's been discussion that the Baileys are

1 simply displeased with the Groundwater Management Plan or  
2 that, you know, we should ignore what's happened in the past  
3 and start with a clean slate.

4           And I think it's really important to understand  
5 that this isn't some minor disagreement that the Baileys have  
6 with the Groundwater Management Plan and how the basin's going  
7 to be brought back into balance.

8           This is a fundamental question of whether or not  
9 a Groundwater Management Plan can do away with the  
10 foundational doctrines of prior appropriation and beneficial  
11 use. It's -- the Baileys concern is not that they're  
12 displeased with how quickly the basin comes back into balance,  
13 although those are all ripe issues.

14           Fundamentally, though, this is a question of  
15 whether or not you can take the private property rights of a  
16 senior groundwater right holder and reallocate them across the  
17 entire basin in violation of the prior appropriation doctrine.

18           And we simply believe, Your Honor, the answer to  
19 that must be no, because there is no statutory support for  
20 doing so under the GMP statutes. And with that, I thank you.  
21 I urge you to overrule and reverse the State Engineer Order  
22 1302, and we appreciate your time.

23           THE COURT: Thank you, Mr. Mixson.

24           Before the court leaves the bench this morning, I

1 want to just take a moment to express the Court's appreciation  
2 with respect to all counsel in this case for their  
3 professionalism, their knowledge, the thoroughness at which  
4 these issues have been briefed, and your oral arguments that  
5 you presented today.

6           And all sides of this case have presented  
7 compelling arguments, which the court has listened to, has  
8 reviewed and will continue to review in taking this matter  
9 under advisement.

10           As I indicated to everyone yesterday, the court  
11 will issue a written decision as soon as it possibly can,  
12 given the Court's schedule. Hopefully some matters open up on  
13 this court's calendar that I can get it out as promptly as I'd  
14 like to.

15           With that, the Court's in recess.

16           (Proceedings concluded at 11:14 a.m.)

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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

# DNRPCA Intervenor's Presentation

*Bailey v. Wilson, et al.*  
Case No. CV-1902-348

Hearing: December 10-12, 2019

Appendix F – Preliminary Table of Groundwater Rights and Associated Shares

Permit No.	Cert. No.	Priority Date	MOU	Water Right Duty (Acre-Feet)	Owner of Record	Cumulative Duty	Priority Factor	Shares
30927	11110	<u>3/2/1951</u>	IRR	69.120	CHANEY ASSOCIATES,LYNFORD AND SUSAN MILLER REVOCABLE FAMILY TRUST DATED 12/9/13	69.1200	0.9997	69.1024
44606	12431	3/2/1951	IRR	18.880	LYNFORD & SUSAN MILLER REVOCABLE FAMILY TRUST	88.0000	0.9997	18.8752
44609	12433	3/2/1951	IRR	236.800	LYNFORD & SUSAN MILLER REVOCABLE FAMILY TRUST	324.8000	0.9997	236.7397
48871	13200	9/17/1951	IRR	296.495	GALLAGHER FARMS, LLC; A NEVADA LIMITED LIABILITY COMPANY	621.2950	0.9988	296.1493
70588	18508	9/17/1951	IRR	229.105	GALLAGHER FARMS, LLC; A NEVADA LIMITED LIABILITY COMPANY	850.4000	0.9988	228.8378
14948	6406	3/30/1953	IRD	617.200	DONALD F AND ELIZA M. FAMILY TRUST	1467.6000	0.9967	615.1874
44451	11639	3/30/1953	IRR	576.580	DONALD F. AND LIZA M. PALMORE FAMILY TRUST	2044.1800	0.9967	574.6999
53872	14215	3/30/1953	IRR	617.200	PALMORE FAMILY TRUST	2661.3800	0.9967	615.1874
71748	20006	5/9/1955	IRR	506.800	FRED L. ETCHEGARAY AND JOHN J. ETCHEGARAY, A NEVADA PARTNERSHIP	3168.1800	0.9950	504.2556
77447		3/29/1957	MMD	52.400	RUBY HILL MINING COMPANY, LLC	3220.5800	0.9947	52.1230
77449		3/29/1957	MMD	80.000	RUBY HILL MINING COMPANY, LLC	3300.5800	0.9947	79.5771
83506		3/29/1957	MMD	185.600	RUBY HILL MINING COMPANY, LLC	3486.1800	0.9947	184.6189
18242	6510	8/13/1959	IRR	640.000	ANDERSEN, BONNIE G.,ANDERSEN, HARLOW B.	4126.1800	0.9930	635.4907
72370		8/13/1959	IRR	640.000	ANDERSEN, HARLOW B. & BONNIE G.	4766.1800	0.9930	635.4907
18621	6233	3/7/1960	IRD	412.580	MACHACEK, EUNICE & LAVERNE,RUBY HILL MINING COMPANY, LLC	5178.7600	0.9858	406.7362
18622	6234	3/7/1960	IRD	412.580	MACHACEK, LAVERNE & EUNICE,RUBY HILL MINING COMPANY, LLC	5591.3400	0.9858	406.7362
18623	6205	3/7/1960	IRD	673.231	ERICKSON, TY AND MICHELLE R.; AND ARI AND ALISHA,MACHACEK, JERRY L. & TRINA L.,RUBY HILL MINING COMPANY, LLC	6264.5706	0.9858	663.6949
22194	6182	3/7/1960	IRR	536.000	BAILEY, TIMOTHY LEE AND CONSTANCE MARIE	6800.5706	0.9858	528.4081

22195	6183	3/7/1960	IRR	622.000	BAILEY, TIMOTHY LEE AND CONSTANCE MARIE	7422.5706	0.9858	613.1900
22551	6235	3/7/1960	IRR	439.649	MACHACEK, EUNICE & LAVERNE,RUBY HILL MINING COMPANY, LLC	7862.2200	0.9858	433.4222
22648	6358	3/7/1960	IRR	593.440	BENSON, KENNETH F.,BENSON, PATTI E.	8455.6600	0.9858	585.0345
22921	7874	3/7/1960	IRR	593.440	BENSON, KENNETH F.,BENSON, PATTI E.	9049.1000	0.9858	585.0345
22922	7875	3/7/1960	IRR	279.740	BENSON, PATTI E. AND KENNETH F.	9328.8396	0.9858	275.7773
27976	9084	3/7/1960	IRR	504.480	MARSHALL FAMILY TRUST,RAND, JOSEPH & ELLEN	9833.3196	0.9858	497.3345
36321	10136	3/7/1960	IRR	177.707	BENSON, PATTI E. AND KENNETH F.	10011.0269	0.9858	175.1903
36322	10137	3/7/1960	IRR	188.913	BENSON, PATTI E. AND KENNETH F.	10199.9400	0.9858	186.2373
42891	12226	3/7/1960	IRR	77.165	ERICKSON, TY AND MICHELLE R.; AND ARI AND ALISHA	10277.1048	0.9858	76.0718
55727	15957	3/7/1960	IRR	20.556	BAILEY, CAROLYN,BAILEY, FRED	10297.6608	0.9858	20.2648
64630	16943	3/7/1960	IRR	157.122	ERICKSON, TY AND MICHELLE R.; AND ARI AND ALISHA	10454.7827	0.9858	154.8964
64631	16944	3/7/1960	IRR	157.122	ERICKSON, TY AND MICHELLE R.; AND ARI AND ALISHA	10611.9045	0.9858	154.8964
64632	16945	3/7/1960	IRR	39.031	ERICKSON, TY AND MICHELLE R.; AND ARI AND ALISHA	10650.9360	0.9858	38.4786
86032		3/7/1960	IRR	35.320	BENSON, KENNETH F. AND PATTI E.	10686.2560	0.9858	34.8197
86037		3/7/1960	IRR	159.800	BENSON, KENNETH F. AND PATTI E.	10846.0560	0.9858	157.5366
22982	6191	3/9/1960	IRR	1260.800	AMERICAN FIRST FEDERAL	12106.8560	0.9808	1236.6107
24609	7228	3/14/1960	IRD	1108.140	DIAMOND VALLEY RANCH, LLC,SEWELL, J.H. - LIBERTY LIVESTOCK	13214.9960	0.9791	1084.9336
22352	6309	3/21/1960	IRR	129.280	MARK MOYLE FARMS, LLC	13344.2760	0.9779	126.4255
22353	6310	3/21/1960	IRR	632.000	MARK MOYLE FARMS, LLC	13976.2760	0.9779	618.0455
70940	17146	3/21/1960	IRR	502.720	MARK MOYLE FARMS, LLC	14478.9960	0.9779	491.6200
23803	6521	4/11/1960	IRR	684.800	MILLER, ANTHONY	15163.7960	0.9753	667.8906
83622		4/11/1960	IRR	836.000	LC PROPERTIES	15999.7960	0.9753	815.3571
22566	6561	4/22/1960	IRR	468.000	BUFFHAM, JAMES OR PAMELA,MILLER, LAVON AND KRISTI	16467.7960	0.9704	454.1384
22567	6562	4/22/1960	IRR	468.000	BUFFHAM, JAMES OR PAMELA,MILLER, LAVON AND KRISTI	16935.7960	0.9704	454.1384
23272	6303	4/22/1960	IRR	640.000	BURNHAM FARMS, LLC,BURNHAM, ROBERT O.	17575.7960	0.9704	621.0440
24574	7013	4/22/1960	IRD	680.680	MORRISON, D. LLOYD	18256.4760	0.9704	660.5191
28641	9226	4/22/1960	IRR	640.000	BURNHAM FARMS, LLC	18896.4760	0.9704	621.0440
29405	9671	4/22/1960	IRR	591.320	MORRISON, D. LLOYD	19487.7960	0.9704	573.8059
50963	13183	4/22/1960	IRR	172.000	KOBEH VALLEY RANCH LLC	19659.7960	0.9704	166.9056
57838	15993	4/22/1960	IRR	172.000	KOBEH VALLEY RANCH LLC	19831.7960	0.9704	166.9056

70249	6302	4/22/1960	IRR	1270.800	BURNHAM, ROBERT O.	21102.5960	0.9704	1233.1605
18786	5756	5/2/1960	IRD	640.000	RUTH MARTIN RANCHES, LLC	21742.5960	0.9626	616.0708
18787	5757	5/2/1960	IRD	640.000	RUTH MARTIN RANCHES, LLC	22382.5960	0.9626	616.0708
18788	5758	5/2/1960	IRD	640.000	RUTH MARTIN RANCHES, LLC	23022.5960	0.9626	616.0708
18789	5759	5/2/1960	IRD	640.000	RUTH MARTIN RANCHES, LLC	23662.5960	0.9626	616.0708
18794	6480	5/2/1960	IRD	480.000	MOYLE, DENISE L. AND HICKS, DEANNE M.	24142.5960	0.9626	462.0531
18796	6482	5/2/1960	IRD	640.000	SMITH, CRAIG ALLEN & SHELBA KAY	24782.5960	0.9626	616.0708
18797	6483	5/2/1960	IRD	640.000	SMITH, CRAIG ALLAN & SHELBA KAY	25422.5960	0.9626	616.0708
28036	8415	5/3/1960	IRR	277.000	BAILEY, CAROYLN, BAILEY, FRED	25699.5960	0.9589	265.6139
48948	13361	5/3/1960	IRR	478.560	BAILEY, CAROLYN, BAILEY, FRED	26178.1560	0.9589	458.8887
18802	6024	5/4/1960	IRR	640.000	FRED L. ETCHEGARAY AND JOHN J. ETCHEGARAY, A NEVADA PARTNERSHIP	26818.1560	0.9575	612.8009
18834	5988	5/12/1960	IRR	1276.230	NEWTON, DEBRA L.	28094.3860	0.9545	1218.1188
18835	5987	5/12/1960	IRR	1277.800	NEWTON, DEBRA L.	29372.1860	0.9545	1219.6173
18851	6831	5/16/1960	IRD	512.440	GALLAGHER FARMS, LLC	29884.6260	0.9522	487.9577
70587	18507	5/16/1960	IRR	123.560	GALLAGHER FARMS, LLC; A NEVADA LIMITED LIABILITY COMPANY	30008.1860	0.9522	117.6568
83616		5/16/1960	IRR	544.000	J & T FARMS LLC	30552.1860	0.9522	518.0099
24127	6884	5/18/1960	IRR	640.000	CONAWAY, DALE R., CONAWAY, ELMA G.	31192.1860	0.9491	607.4060
24128	6883	5/18/1960	IRR	640.000	CONAWAY, DALE R., CONAWAY, ELMA G.	31832.1860	0.9491	607.4060
24129	7005	5/18/1960	IRR	620.400	MORRISON, ALBERTA J., MORRISON, DONALD E.	32452.5860	0.9491	588.8042
24130	7006	5/18/1960	IRR	620.400	MORRISON, ALBERTA J., MORRISON, DONALD E.	33072.9860	0.9491	588.8042
24264	6961	6/3/1960	IRR	928.920	BUFFHAM, JAMES OR PAMELA, DIAMOND VALLEY HAY CO., INC.	34001.9060	0.9446	877.4361
24265	6962	6/3/1960	IRR	944.000	BUFFHAM, JAMES OR PAMELA, DIAMOND VALLEY HAY CO., INC.	34945.9060	0.9446	891.6803
57839		6/3/1960	IRR	156.460	KOBEH VALLEY RANCH LLC	35102.3660	0.9446	147.7884
57840		6/3/1960	IRR	156.460	KOBEH VALLEY RANCH LLC	35258.8260	0.9446	147.7884
66062		6/3/1960	IRR	303.080	KOBEH VALLEY RANCH LLC	35561.9060	0.9446	286.2823
18978	6517	6/6/1960	IRD	730.679	BENSON, CRAIG AND KATHRYN, COOPER, CHARLES C.	36292.5848	0.9417	688.0805
80799		6/6/1960	MMD	123.306	BLISS, CHAD D. & ROSIE J.	36415.8908	0.9417	116.1173
81229		6/6/1960	MMD	39.200	BLISS, CHAD D. & ROSIE J.	36455.0908	0.9417	36.9147
81612		6/6/1960	MMD	222.500	GARAVENTA, GARY G AND MELODY I	36677.5908	0.9417	209.5283
81653		6/6/1960	MMD	222.500	GARAVENTA, GARY G AND MELODY I	36900.0908	0.9417	209.5283
83504		6/6/1960	MMD	100.000	BLISS, CHAD D. & ROSIE J.	37000.0908	0.9417	94.1700
87315T		6/6/1960	MMD	123.306	RUBY HILL MINING COMPANY, LLC	37123.3968	0.9417	116.1173



42019	11844	6/6/1960	IRR	325.041	BENSON, CRAIG AND KATHRYN	37448.4380	0.9417	306.0915
18911	6814	6/8/1960	IRD	1176.000	HILL, HOWARD SR.,HILL, KATHY	38624.4380	0.9388	1104.0194
18927	6085	6/14/1960	IRD	640.000	A.G. FARM COMMODITIES, INC.,HOVIOUS, JOHN R.	39264.4380	0.9373	599.8533
18928	6084	6/14/1960	IRD	640.000	A.G. FARM COMMODITIES, INC.,HOVIOUS, JOHN R.	39904.4380	0.9373	599.8533
18975	6488	7/1/1960	IRD	727.280	SESTANOVICH HAY & CATTLE LLC,SESTANOVICH RANCHES	40631.7180	0.9352	680.1615
34950	10550	7/1/1960	IRR	502.720	SESTANOVICH HAY & CATTLE LLC	41134.4380	0.9352	470.1502
18981	6520	7/6/1960	IRD	80.760	BENSON, CRAIG AND KATHRYN,COOPER, ERMYLE R.	41215.1980	0.9338	75.4150
39552	11804	7/6/1960	IRR	552.120	BENSON, CRAIG AND KATHRYN	41767.3180	0.9338	515.5786
39553	11805	7/6/1960	IRR	543.240	BENSON, CRAIG AND KATHRYN	42310.5580	0.9338	507.2863
18988	6163	7/8/1960	IRD	638.000	SESTANOVICH HAY AND CATTLE	42948.5580	0.9314	594.2539
18989	6164	7/8/1960	IRD	640.000	SESTANOVICH HAY & CATTLE LLC	43588.5580	0.9314	596.1168
18999	6734	7/11/1960	IRD	91.200	COOPER, CHARLES E.	43679.7580	0.9278	84.6144
21426	6720	7/11/1960	IRR	640.000	MORRISON, LLOYD & BELINDA FAYE	44319.7580	0.9278	593.7854
21839	6733	7/11/1960	IRR	632.000	BERGENER, LINDA AND DON	44951.7580	0.9278	586.3631
21841	6736	7/11/1960	IRR	632.000	MICHEL & MARGARET ETHCEVERRY FAMILY LP	45583.7580	0.9278	586.3631
21843	6715	7/11/1960	IRR	624.000	MORRISON, LLOYD AND BELINDA FAYE	46207.7580	0.9278	578.9408
21844	6718	7/11/1960	IRR	632.000	M & C HAY MORRISON TRUST DATED MARCH 26, 2016	46839.7580	0.9278	586.3631
42021	11846	7/11/1960	IRR	548.800	M & C HAY MORRISON FAMILY TRUST DATED MARCH 26, 2016	47388.5580	0.9278	509.1710
19014	6860	7/13/1960	IRR	640.000	J & T FARMS, LLC	48028.5580	0.9235	591.0115
83615		7/13/1960	IRR	189.360	J & T FARMS LLC	48217.9180	0.9235	174.8655
83617		7/13/1960	IRR	442.640	J & T FARMS LLC	48660.5580	0.9235	408.7583
19052	5989	7/21/1960	IRD	0.000	NEWTON, DEBRA L.	48660.5580	0.9229	0.0000
19053	5990	7/21/1960	IRR	0.008	NEWTON, DEBRA L.	48660.5660	0.9229	0.0074
19110	6963	8/10/1960	IRD	640.000	MARK MOYLE FARMS, LLC	49300.5660	0.9214	589.6837
19111	6964	8/10/1960	IRD	622.000	MILES, HAROLD R.,MILES, MURIEL M.	49922.5660	0.9214	573.0988
43268	11523	8/12/1960	IRR	782.100	MARK MOYLE FARMS, LLC	50704.6660	0.9196	719.2571
21428	6722	8/22/1960	IRR	465.960	BENSON, PATTI E. AND KENNETH F.	51170.6260	0.9188	428.1229
86035		8/22/1960	IRR	142.040	BENSON, KENNETH F. AND PATTI E.	51312.6660	0.9188	130.5060
19145	6719	8/24/1960	IRD	640.000	MOYLE, JAMES L.,MOYLE, NANCY J.	51952.6660	0.9177	587.3093
24606	7229	9/7/1960	IRD	1232.000	DIAMOND VALLEY RANCH, LLC	53184.6660	0.9157	1128.1652
19191	6824	9/9/1960	IRD	524.300	ANDERSON, JERRY LEE	53708.9660	0.9144	479.4277
19192	6769	9/9/1960	IRD	596.600	HALPIN FAMILY TRUST	54305.5660	0.9144	545.5399
19218	6713	9/23/1960	IRD	362.400	EUREKA MOLY LLC	54667.9660	0.9130	330.8663
19218	6713	9/23/1960	IRD	348.560	MILLER, OWEN J. AND CHERYL	55016.5260	0.9130	318.2306

19218	6713	9/23/1960	IRD	24.720	WALTER, NORBERT AND EILEEN B.	55041.2460	0.9130	22.5690
24607	7043	9/29/1960	IRD	1232.000	DIAMOND VALLEY RANCH, LLC	56273.2460	0.9108	1122.1352
21929	6189	10/6/1960	IRR	630.400	DIAMOND VALLEY RANCH, LLC	56903.6460	0.9083	572.6177
21930	6215	10/6/1960	IRR	635.200	AMERICAN FIRST FEDERAL	57538.8460	0.9083	576.9778
22316	6190	10/6/1960	IRR	628.800	AMERICAN FIRST FEDERAL	58167.6460	0.9083	571.1644
78906		10/6/1960	IRR	584.400	DIAMOND VALLEY RANCH LLC	58752.0460	0.9083	530.8341
21399	6504	10/10/1960	IRR	1013.168	MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LIMITED PARTNERSHIP	59765.2140	0.9053	917.2112
19279	6870	10/17/1960	IRR	332.000	DUBRAY, FERNO L. & CARRIE M., GENERAL MOLY, INC.	60097.2140	0.9045	300.3028
44621	12228	10/17/1960	IRR	0.000	RUBY HILL MINING COMPANY, LLC	60097.2140	0.9045	0.0000
48226	11908	10/17/1960	IRR	300.000	M & C HAY MORRISON FAMILY TRUST DATED MARCH 26, 2016	60397.2140	0.9045	271.3579
64633	16946	10/17/1960	IRR	0.000	ERICKSON, TY AND MICHELLE R.; AND ARI AND ALISHA	60397.2140	0.9045	0.0000
19292	6195	10/24/1960	IRD	559.200	DAMELE FARMS, INC.	60956.4140	0.9024	504.6288
19293	6279	10/24/1960	IRD	529.600	DAMELE FARMS, INC.	61486.0140	0.9024	477.9174
23739	6723	10/24/1960	IRR	9.000	EUREKA MOLLY, LLC	61495.0140	0.9024	8.1217
23739	6723	10/24/1960	IRR	893.760	MILLER, OWEN J. AND CHERYL	62388.7740	0.9024	806.5397
35418	10861	11/2/1960	IRR	4.000	RUBIO, DAVID M., RUBIO, SALLY R.	62392.7740	0.9008	3.6033
47521	11617	11/2/1960	IRR	168.240	ANDERSON, EDWARD B.	62561.0140	0.9008	151.5543
85134		11/2/1960	IRR	240.000	RENNER, IRA R. AND MONTIRA	62801.0140	0.9008	216.1973
19324	6549	11/9/1960	IRD	632.000	SESTANOVICH HAY & CATTLE LLC, WILBANKS, LEROY WINDELL	63433.0140	0.8995	568.4701
19360	6490	11/25/1960	IRD	620.000	ETCHEGARAY FAMILY TRUST	64053.0140	0.8980	556.7626
19361	6491	11/25/1960	IRD	620.000	ETCHEGARAY FAMILY TRUST	64673.0140	0.8980	556.7626
78771		12/5/1960	IRR	362.400	J.W.L. PROPERTIES, LLC	65035.4140	0.8969	325.0356
78774		12/5/1960	IRR	52.000	J.W.L. PROPERTIES, LLC	65087.4140	0.8969	46.6387
19378	7235	12/9/1960	IRR	949.564	MOYLE, DUSTY L.	66036.9779	0.8937	848.6426
19379	6784	12/9/1960	IRD	632.000	MOYLE, DUSTY L.	66668.9779	0.8937	564.8299
19381	6785	12/9/1960	IRR	960.000	MOYLE, DUSTY L.	67628.9779	0.8937	857.9695
24605	7078	12/9/1960	IRR	306.436	MOYLE, DUSTY L.	67935.4140	0.8937	273.8675
19411	7025	12/19/1960	IRD	384.000	HOMESTAKE MINING COMPANY OF CALIFORNIA, RUBY HILL MINING COMPANY, LLC	68319.4140	0.8916	342.3712
73204		12/19/1960	MM	16.000	RUBY HILL MINING COMPANY, LLC	68335.4140	0.8916	14.2655
79706		12/19/1960	MMD	48.000	RUBY HILL MINING COMPANY, LLC	68383.4140	0.8916	42.7964
85646		12/19/1960	MMD	65.000	RUBY HILL MINING COMPANY, LLC	68448.4140	0.8916	57.9535
87314T		12/19/1960	MMD	113.000	RUBY HILL MINING COMPANY, LLC	68561.4140	0.8916	100.7498
19490	6807	1/25/1961	IRD	0.000	SOLARLIOS LLC	68561.4140	0.8914	0.0000
19492	6786	1/27/1961	IRD	624.000	CONLEY, BEVERLY A. AND CONLEY, KENNETH E.	69185.4140	0.8878	553.9950

19492	6786	1/27/1961	IRD	632.000	MOYLE, DUSTY L.	69817.4140	0.8878	561.0975
19500	7464	1/27/1961	IRR	664.400	CONLEY LAND & LIVESTOCK, LLC	70481.8140	0.8878	589.8626
19501	7465	1/27/1961	IRD	657.920	CONLEY LAND & LIVESTOCK, LLC	71139.7340	0.8878	584.1096
19502	7517	1/27/1961	IRR	609.080	CONLEY LAND & LIVESTOCK, LLC	71748.8140	0.8878	540.7488
22217	7576	1/27/1961	IRR	644.280	CONLEY LAND AND LIVESTOCK LLC	72393.0940	0.8878	571.9998
19526	6759	2/3/1961	IRD	1204.000	BAUMAN, JAMES E.,BAUMAN, VERA L.	73597.0940	0.8834	1063.5787
87115T		2/8/1961	IRR	418.670	DIAMOND VALLEY RANCH, LLC	74015.7640	0.8823	369.3948
87116T		2/8/1961	IRR	146.530	DIAMOND VALLEY RANCH, LLC	74162.2940	0.8823	129.2842
87117T		2/8/1961	IRR	468.000	DIAMOND VALLEY RANCH, LLC	74630.2940	0.8823	412.9190
19563	6258	2/13/1961	IRD	1279.480	PLASKETT, TOMMYE J.,PLASKETT, WALTER L.	75909.7740	0.8797	1125.5664
19760	6797	4/18/1961	IRD	1276.000	BURNHAM FARMS, LLC	77185.7740	0.8767	1118.7180
24272	7072	4/18/1961	IRR	640.000	BURNHAM FARMS, LLC,EDEN ESTATES, LLC	77825.7740	0.8767	561.1125
46505	13353	4/18/1961	IRR	510.400	BURNHAM FARMS, LLC	78336.1740	0.8767	447.4872
19904	6484	6/6/1961	IRR	0.000	DIAMOND VALLEY RANCH, LLC	78336.1740	0.8759	0.0000
19965	6764	7/3/1961	IRD	632.000	BAR D LAND & LIVESTOCK, LLC,RAND, JOSEPH L. AND ELLEN M.	78968.1740	0.8733	551.9505
19966	7041	7/3/1961	IRR	218.200	BAR D LAND & LIVESTOCK, LLC,RAND, JOSEPH L. & ELLEN M.	79186.3740	0.8733	190.5627
19971	8082	7/3/1961	IRD	0.000	PLASKETT, TOMMYE J.,PLASKETT, WALTER L.	79186.3740	0.8733	0.0000
19972	6241	7/3/1961	IRR	456.893	PLASKETT, TOMMYE J.,PLASKETT, WALTER L.	79643.2670	0.8733	399.0226
19973	6242	7/3/1961	IRR	456.893	PLASKETT, TOMMYE,PLASKETT, WALTER	80100.1600	0.8733	399.0226
28160	9043	7/3/1961	IRR	0.000	PLASKETT, TOMMYE J.,PLASKETT, WALTER L.	80100.1600	0.8733	0.0000
34948	10615	7/3/1961	IRR	180.287	PLASKETT, TOMMYE J.,PLASKETT, WALTER L.	80280.4468	0.8733	157.4516
46348	11793	7/3/1961	IRR	187.247	PLASKETT, TOMMYE J.,PLASKETT, WALTER L.	80467.6940	0.8733	163.5304
78447		7/3/1961	IRR	0.000	BAR D LAND & LIVESTOCK, LLC	80467.6940	0.8733	0.0000
80581		7/3/1961	IRR	405.800	BAR D LAND & LIVESTOCK, LLC	80873.4940	0.8733	354.4011
20000	6991	7/24/1961	IRD	0.000	MOYLE, DUSTY L.	80873.4940	0.8717	0.0000
78772		7/24/1961	IRR	128.000	J.W.L. PROPERTIES, LLC	81001.4940	0.8717	111.5826
20015	6760	7/28/1961	IRD	0.000	MOYLE, DUSTY L.	81001.4940	0.8716	0.0000
20046	6545	8/23/1961	IRR	640.000	BURNHAM FARMS, LLC	81641.4940	0.8706	557.1988
20087	6173	9/19/1961	IRD	0.000	DIAMOND VALLEY RANCH, LLC	81641.4940	0.8706	0.0000
20088	6227	9/19/1961	IRD	16.000	DIAMOND VALLEY RANCH, LLC	81657.4940	0.8706	13.9294
24262	6959	9/19/1961	IRR	7.540	BUFFHAM, JAMES OR PAMELA,DIAMOND VALLEY HAY CO., INC.	81665.0340	0.8706	6.5642

24263	6960	9/19/1961	IRR	7.540	BUFFHAM, JAMES OR PAMELA, DIAMOND VALLEY HAY CO., INC.	81672.5740	0.8706	6.5642
57835		9/19/1961	IRR	0.000	KOBEH VALLEY RANCH LLC	81672.5740	0.8706	0.0000
57836		9/19/1961	IRR	0.000	KOBEH VALLEY RANCH LLC	81672.5740	0.8706	0.0000
20366	6196	3/14/1962	IRR	638.310	MARK MOYLE FARMS, LLC	82310.8840	0.8696	555.0503
21561	6958	3/21/1962	IRR	3.000	EUREKA MOLY LLC	82313.8840	0.8693	2.6080
21561	6958	3/21/1962	IRR	132.560	MILLER, OWEN J. AND CHERYL	82446.4440	0.8693	115.2395
21561	6958	3/21/1962	IRR	24.720	WALTER, NORBERT AND EILEEN B.	82471.1640	0.8693	21.4900
81650		3/21/1962	IRR	106.448	EUREKA MOLY, LLC	82577.6120	0.8693	92.5393
80780		5/23/1962	IRR	0.000	SESTANOVICH HAY & CATTLE LLC	82577.6120	0.8691	0.0000
80781		5/23/1962	IRR	0.000	SESTANOVICH HAY & CATTLE LLC	82577.6120	0.8691	0.0000
20487	7352	5/25/1962	IRR	510.800	BUFFHAM, JAMES OR PAMELA, MARSHALL, REESE W.	83088.4120	0.8682	443.4907
50962	13182	5/25/1962	IRR	129.200	KOBEH VALLEY RANCH LLC	83217.6120	0.8682	112.1750
20565	6942	7/12/1962	IRR	250.000	MINOLETTI, JOHN B. AND NANCY M	83467.6120	0.8677	216.9323
20694	6503	9/6/1962	IRD	0.000	MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LIMITED PARTNERSHIP	83467.6120	0.8677	0.0000
48872	13201	12/10/1962	IRR	203.540	GALLAGHER FARMS, LLC; A NEVADA LIMITED LIABILITY COMPANY	83671.1520	0.8667	176.4103
67172	17329	12/10/1962	IRR	495.070	MARK MOYLE FARMS, LLC	84166.2220	0.8667	429.0824
78568	18992	12/10/1962	IRR	327.800	MARK MOYLE FARMS, LLC	84494.0220	0.8667	284.1077
21085	6485	2/18/1963	IRD	623.600	MILLER, ANTHONY	85117.6220	0.8651	539.4854
43270	11525	8/7/1963	IRR	217.900	MARK MOYLE FARMS, LLC	85335.5220	0.8648	188.4332
83623		8/16/1963	IRR	402.000	LC PROPERTIES	85737.5220	0.8641	347.3811
23738	6529	10/30/1963	IRR	0.000	EUREKA MOLLY, LLC, MILLER, OWEN J. AND CHERYL	85737.5220	0.8641	0.0000
44452	11640	3/4/1964	IRR	637.020	DONLAD F. AND ELIZA M. PALMORE FAMILT TRUST	86374.5420	0.8631	549.8264
40010	10593	8/6/1964	IRR	458.640	THE LYNFORD AND SUSAN MILLER REVOCABLE FAMILY TRUST DATED DEC.9,2013	86833.1820	0.8620	395.3635
40011	10594	8/6/1964	IRR	108.590	BURNHAM FARMS, LLC	86941.7720	0.8620	93.6083
80879	19853	8/6/1964	IRR	249.520	NORTON, WILLIAM H JR AND PATRICIA A	87191.2920	0.8620	215.0948
80880	19854	8/6/1964	IRR	87.280	NORTON, WILLIAM H JR AND PATRICIA A	87278.5720	0.8620	75.2384
79707		10/19/1964	MMD	3.000	RUBY HILL MINING COMPANY, LLC	87281.5720	0.8614	2.5843
83501		10/19/1964	MMD	10.000	RUBY HILL MINING COMPANY, LLC	87291.5720	0.8614	8.6143
83502		10/19/1964	MMD	55.200	RUBY HILL MINING COMPANY, LLC	87346.7720	0.8614	47.5507
83507		10/19/1964	MMD	134.800	RUBY HILL MINING COMPANY, LLC	87481.5720	0.8614	116.1202
85647		10/19/1964	MMD	35.000	RUBY HILL MINING COMPANY, LLC	87516.5720	0.8614	30.1499

68923		10/19/1964	IRR	236.000	RUBY HILL MINING COMPANY, LLC	87752.5720	0.8614	203.2966
83505		2/22/1965	MMD	105.454	RUBY HILL MINING COMPANY, LLC	87858.0256	0.8606	90.7542
85645		2/22/1965	MMD	206.134	RUBY HILL MINING COMPANY, LLC	88064.1600	0.8606	177.4010
50581	12378	12/13/1965	IRR	249.660	EZRA C. LUNDAHL, INC.,SADLER RANCH, LLC	88313.8200	0.8599	214.6807
77083		12/13/1965	IRR	198.290	SADLER RANCH, LLC	88512.1100	0.8599	170.5081
23462	7831	10/28/1966	IRR	0.000	MILLER, ANTHONY	88512.1100	0.8597	0.0000
23711	6794	2/23/1967	IRR	0.000	EUREKA MOLLY, LLC,MILLER, OWEN J. AND CHERYL	88512.1100	0.8597	0.0000
50650	13836	4/17/1967	IRR	640.000	MOYLE, JAMES L.,MOYLE, NANCY JANE	89152.1100	0.8582	549.2645
77666		4/17/1967	IRR	394.120	BAR D LAND & LIVESTOCK, LLC	89546.2300	0.8582	338.2439
83567		4/17/1967	IRR	149.280	BAR D LAND & LIVESTOCK, LLC	89695.5100	0.8582	128.1159
29765	8881	5/15/1967	IRR	656.200	HALPIN FAMILY TRUST	90351.7100	0.8568	562.2453
23893	7695	5/25/1967	IRR	0.000	MILES, HAROLD R.,MILES, MURIEL M.	90351.7100	0.8568	0.0000
23918	8648	6/5/1967	IRR	44.400	NORTON, WILLIAM H. AND SHIRLEY,NORTON, WILLIAM H. JR.	90396.1100	0.8566	38.0315
77646	19847	6/5/1967	IRR	123.600	WILLIAM H NORTON	90519.7100	0.8566	105.8714
80926	19851	6/5/1967	IRR	103.200	NORTON, WILLIAM H JR	90622.9100	0.8566	88.3975
47520	11616	7/13/1967	IRR	638.720	ANDERSON, EDWARD B.	91261.6300	0.8554	546.3471
24214	8174	11/13/1967	IRR	600.320	ANDERSON, EDWARD B.,ANDERSON, JERRY LEE	91861.9500	0.8544	512.9295
28061	8639	12/11/1967	IRR	0.000	BURNHAM FARMS, LLC	91861.9500	0.8544	0.0000
24378	8556	2/22/1968	IRR	0.000	EUREKA MOLY LLC,RUBY HILL RANCH, INC.,SEAN PECK,WALTER, NORBERT AND EILEEN B.	91861.9500	0.8544	0.0000
78905		7/25/1968	IRR	0.000	DIAMOND VALLEY RANCH LLC	91861.9500	0.8544	0.0000
81230		12/30/1968	MMD	0.000	BLISS, CHAD D. & ROSIE J.	91861.9500	0.8544	0.0000
83503		12/30/1968	MMD	0.000	BLISS, CHAD D. & ROSIE J.	91861.9500	0.8544	0.0000
30102	10113	8/27/1969	IRR	890.270	MOYLE, JAMES L.,MOYLE, NANCY JANE	92752.2200	0.8530	759.4145
46287	13993	9/14/1970	IRR	632.000	GROTH, DANIEL E..	93384.2200	0.8516	538.1833
51647	13582	9/14/1970	IRR	578.800	GROTH, DANIEL E.	93963.0200	0.8516	492.8805
26437	11004	12/14/1971	IRR	508.800	ALLEN, ROGER B. & JUDY B.	94471.8200	0.8499	432.4229
47591	11243	12/14/1971	IRR	508.800	ALLEN, ROGER B. & JUDY B.	94980.6200	0.8499	432.4229
26664	8945	4/12/1972	IRR	160.000	KEPHART, MARY A.,KEPHART, RICHARD E.	95140.6200	0.8491	135.8567
56652	14447	4/12/1972	IRR	160.000	KEPHART, MARI A.,KEPHART, RICHARD E.	95300.6200	0.8491	135.8567
29278	9262	4/9/1973	IRR	0.000	BURNHAM FARMS, LLC	95300.6200	0.8490	0.0000
28035	8414	1/23/1974	IRR	201.560	BAILEY, CAROLYN,BAILEY, FRED	95502.1800	0.8487	171.0555
28561	9171	8/1/1974	IRR	520.000	BURNHAM FARMS, LLC	96022.1800	0.8478	440.8737
43271	11526	3/17/1975	IRR	525.615	BERG PROPERTIES CALIFORNIA, LLC	96547.7950	0.8449	444.1084
43272	11527	3/17/1975	IRR	525.615	BERG PROPERTIES CALIFORNIA, LLC	97073.4100	0.8449	444.1084

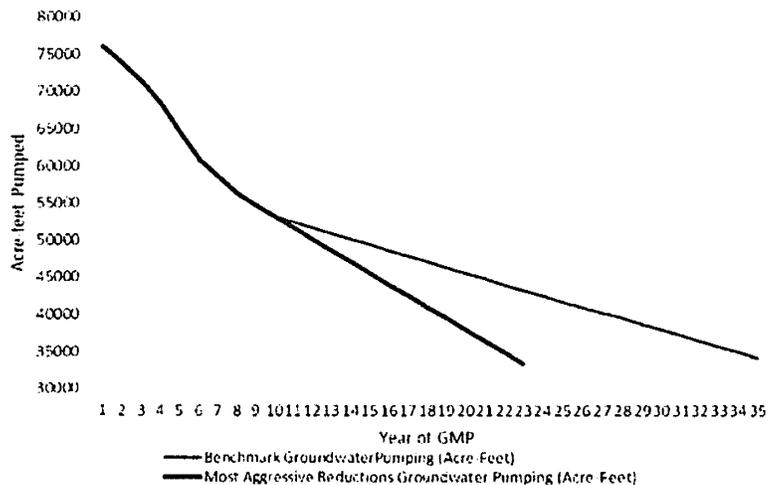
43273	11528	3/17/1975	IRR	514.385	BERG PROPERTIES CALIFORNIA, LLC	97587.7950	0.8449	434.6199
43274	11529	3/17/1975	IRR	514.385	BERG PROPERTIES CALIFORNIA, LLC	98102.1800	0.8449	434.6199
43837	11531	3/17/1975	IRR	111.985	BLANCO RANCH, LLC	98214.1650	0.8449	94.6196
43838	11532	3/17/1975	IRR	111.985	BLANCO RANCH, LLC	98326.1500	0.8449	94.6196
43839	11533	3/17/1975	IRR	109.615	BLANCO RANCH, LLC	98435.7650	0.8449	92.6171
43840	11534	3/17/1975	IRR	109.615	BLANCO RANCH, LLC	98545.3800	0.8449	92.6171
29557	10090	7/29/1975	IRR	487.360	MOYLE, JAMES L. & N. JANE	99032.7400	0.8426	410.6282
43397	11636	7/29/1975	IRR	640.000	MOYLE, JAMES L. & N. JANE	99672.7400	0.8426	539.2359
39156	10716	8/8/1975	IRR	891.855	FRED L. ETCHEGARAY & JOHN J. ETCHEGARAY (PTR), A NEVADA PARTNERSHIP	100564.5946	0.8404	749.4716
55535	14918	8/8/1975	IRR	358.385	FRED L. ETCHEGARAY & JOHN J. ETCHEGARAY (PTR), A NEVADA PARTNERSHIP	100922.9800	0.8404	301.1698
29873	10129	12/24/1975	IRR	194.865	MOYLE, JAMES L., MOYLE, NANCY JANE	101117.8450	0.8396	163.6095
81268		12/24/1975	IRR	194.865	MOYLE, JAMES L AND N JANE	101312.7100	0.8396	163.6095
29895	11107	1/7/1976	IRR	502.640	BLEHM, RONALD W. AND GLADYS A., OLIVIERA, EGIDIO	101815.3500	0.8380	421.2053
30928	11111	1/7/1976	IRR	433.520	CHANEY ASSOCIATES, LYNFORD AND SUSAN MILLER REVOCABLE FAMILY TRUST DATED 12/9/13	102248.8700	0.8380	363.2837
44604	12429	1/7/1976	IRR	137.360	LYNFORD & SUSAN MILLER REVOCABLE FAMILY TRUST	102386.2300	0.8380	115.1058
44605	12430	1/7/1976	IRR	109.760	LYNFORD & SUSAN MILLER REVOCABLE FAMILY TRUST	102495.9900	0.8380	91.9774
49185	13309	6/1/1976	IRR	502.720	MOYLE, DUSTY L.	102998.7100	0.8368	420.6652
40402	11634	6/10/1976	IRR	508.800	MOYLE, DUSTY L.	103507.5100	0.8360	425.3426
30913	11109	12/10/1976	IRR	477.800	MOYLE, DUSTY L.	103985.3100	0.8352	399.0657
50582	12379	12/22/1976	IRR	850.380	EZRA C. LUNDAHL, INC., SADLER RANCH, LLC	104835.6900	0.8333	708.6299
85145		12/22/1976	IRR	703.790	SADLER RANCH LLC	105539.4800	0.8333	586.4750
31062	10132	2/2/1977	IRR	553.680	BAR D LAND & LIVESTOCK, LLC	106093.1600	0.8315	460.3628
31063	10133	2/2/1977	IRR	523.200	BAR D LAND & LIVESTOCK, LLC	106616.3600	0.8315	435.0199
31108	9331	2/17/1977	IRR	541.440	MOYLE, DENISE L. AND HICKS, DEANNE M.	107157.8000	0.8274	447.9760
31110	9333	2/17/1977	IRR	541.440	MOYLE, DENISE L. AND HICKS, DEANNE M.	107699.2400	0.8274	447.9760
31111	9334	2/17/1977	IRR	158.000	MOYLE, DENISE L. AND HICKS, DEANNE M.	107857.2400	0.8274	130.7259
31113	9336	2/17/1977	IRR	533.600	MOYLE, DENISE L. AND HICKS, DEANNE, M	108390.8400	0.8274	441.4893
31114	9337	2/17/1977	IRR	537.600	MOYLE, DENISE L. AND HICKS, DEANNE M.	108928.4400	0.8274	444.7989
76358		2/17/1977	IRR	545.440	MOYLE, DENISE L. AND HICKS, DEANNE M.	109473.8800	0.8274	451.2855
77569		2/17/1977	IRR	326.380	MOYLE, DENISE L. AND HICKS, DEANNE M.	109800.2600	0.8274	270.0399

78062		2/17/1977	IRR	628.000	MOYLE, DENISE L. AND HICKS, DEANNE M.	110428.2600	0.8274	519.5939
81269		2/17/1977	IRR	207.220	MOYLE, DENISE L. AND HICKS, DEANNE M.	110635.4800	0.8274	171.4494
31454	10708	5/3/1977	IRR	520.000	HALPIN, JAYME L.	111155.4800	0.8233	428.1079
31455	10709	5/3/1977	IRR	512.120	HALPIN, JAYME L.	111667.6000	0.8233	421.6204
81004		5/3/1977	IRR	51.080	HALPIN, JAYME L.	111718.6800	0.8233	42.0534
43269	11524	7/21/1977	IRR	76.800	BLANCO RANCH, LLC	111795.4800	0.8228	63.1940
43836	11530	7/21/1977	IRR	0.000	MARK MOYLE FARMS, LLC	111795.4800	0.8228	0.0000
33018	11069	8/3/1977	IRR	480.000	MARTIN P. & KATHLEEN A. ETCHEVERRY TRUST & ETCHEVERRY, MARK T. & JENNIFER	112275.4800	0.8213	394.2118
33019	11070	8/3/1977	IRR	480.000	MARTIN P. & KATHLEEN A. ETCHEVERRY TRUST & ETCHEVERRY, MARK T. & JENNIFER	112755.4800	0.8213	394.2118
42367	14443	8/3/1977	IRR	40.000	KEPHART, MARI ALICE,KEPHART, RICHARD E.	112795.4800	0.8213	32.8510
42368	14444	8/3/1977	IRR	40.000	KEPHART, MARI ALICE,KEPHART, RICHARD E.	112835.4800	0.8213	32.8510
42369	14445	8/3/1977	IRR	120.000	KEPHART, MARI ALICE,KEPHART, RICHARD E.	112955.4800	0.8213	98.5530
42370	14446	8/3/1977	IRR	120.000	KEPHART, MARI ALICE,KEPHART, RICHARD E.	113075.4800	0.8213	98.5530
33668	9386	9/19/1977	IRR	611.870	WISEHART, LARRY	113687.3500	0.8184	500.7308
33669	9387	9/19/1977	IRR	611.870	WISEHART, LARRY	114299.2200	0.8184	500.7308
33670	10433	9/19/1977	IRR	632.350	WISEHART, LARRY	114931.5700	0.8184	517.4908
33671	9672	9/19/1977	IRR	632.350	WISEHART, LARRY	115563.9200	0.8184	517.4908
33817	12364	9/27/1977	IRR	511.600	BELL, SCOTT THOMAS AND KRISTINE LOUISE,MULFORD, DELLA C. AND DENNY S.	116075.5200	0.8154	417.1440
33818	12365	9/27/1977	IRR	510.800	BELL, SCOTT THOMAS AND KRISTINE LOUISE,MULFORD, DELLA C. AND DENNY S.	116586.3200	0.8154	416.4917
85131		9/27/1977	IRR	33.200	RENNER, IRA R. AND MONTIRA	116619.5200	0.8154	27.0703
85132		9/27/1977	IRR	128.400	RENNER, IRA R. AND MONTIRA	116747.9200	0.8154	104.6937
34561	10529	11/3/1977	IRR	516.010	MARK MOYLE FARMS, LLC	117263.9300	0.8138	419.9168
34562	10530	11/3/1977	IRR	499.480	MARK MOYLE FARMS, LLC	117763.4100	0.8138	406.4651
34596	11007	11/10/1977	IRR	330.628	M & C HAY MORRISON FAMILY TRUST DATED MARCH 26, 2016	118094.0385	0.8126	268.6704
48225	11907	11/10/1977	IRR	317.768	M & C HAY MORRISON FAMILY TRUST DATED MARCH 26, 2016	118411.8060	0.8126	258.2195
73899		11/21/1977	IRR	508.776	DENNIS L WEST & KIM KENNEDY WEST,DENNIS L. WEST & KIM KENNEDY WEST	118920.5820	0.8115	412.8463
78358		11/21/1977	IRR	122.400	DENNIS L WEST AND KIM KENNEDY WEST	119042.9820	0.8115	99.3215
34939	11044	2/3/1978	IRR	520.000	MARK MOYLE FARMS, LLC	119562.9820	0.8105	421.4751
44610	12434	2/3/1978	IRR	0.000	BURNHAM FARMS, LLC	119562.9820	0.8105	0.0000

35009	10225	2/16/1978	IRR	487.560	BENSON, KENNETH F., BENSON, PATTI E.	120050.5420	0.8084	394.1201
35012	12453	2/16/1978	IRR	511.600	ETCHEVERRY, JAMES F., MULFORD, DENNY S. & DELLA C.	120562.1420	0.8084	413.5528
35013	11623	2/16/1978	IRR	546.640	MICHEL & MARGARET ETHCEVERRY FAMILY LP	121108.7820	0.8084	441.8775
39554	11806	2/16/1978	IRR	0.000	BENSON, CRAIG AND KATHRYN	121108.7820	0.8084	0.0000
42020	11845	2/16/1978	IRR	0.000	BENSON, CRAIG AND KATHRYN	121108.7820	0.8084	0.0000
85133		2/16/1978	IRR	128.400	RENNER, IRA R. AND MONTIRA	121237.1820	0.8084	103.7924
86033		2/16/1978	IRR	144.440	BENSON, KENNETH F. AND PATTI E.	121381.6220	0.8084	116.7583
46461	12213	3/17/1978	IRR	576.000	MOYLE, DUSTY L.	121957.6220	0.8059	464.2182
49188	12674	3/17/1978	IRR	502.720	MOYLE, DUSTY L.	122460.3420	0.8059	405.1593
50095	13310	3/17/1978	IRR	508.800	MOYLE, DUSTY L.	122969.1420	0.8059	410.0594
35374	12193	5/2/1978	IRR	108.440	DUBRAY, FERNO L. & CARRIE M.	123077.5820	0.8044	87.2323
35375	12194	5/2/1978	IRR	387.040	DUBRAY, FERNO L. AND CARRIE M., ROUSE, W.E. & BARBARA J.	123464.6220	0.8044	311.3462
49853	12206	5/2/1978	IRR	59.260	DUBRAY, FERNO L. & CARRIE M.	123523.8820	0.8044	47.6705
49854	12207	5/2/1978	IRR	59.260	DUBRAY, FERNO L. & CARRIE M.	123583.1420	0.8044	47.6705
47518	11614	5/12/1978	IRR	463.200	ANDERSON, EDWARD B.	124046.3420	0.8034	372.1461
78773		8/7/1978	IRR	398.400	J.W.L. PROPERTIES, LLC	124444.7420	0.8027	319.8049
78775		8/7/1978	IRR	88.000	J.W.L. PROPERTIES, LLC	124532.7420	0.8027	70.6396
47519	11615	9/13/1978	IRR	0.000	ANDERSON, EDWARD B.	124532.7420	0.8027	0.0000
41883	10476	9/20/1978	IRR	78.400	MILLER, OWEN J. AND CHERYL	124611.1420	0.8025	62.9134
41884	10477	9/20/1978	IRR	78.400	MILLER, OWEN J. AND CHERYL	124689.5420	0.8025	62.9134
36070	10135	10/20/1978	IRR	0.000	MOYLE, JAMES L., MOYLE, NANCY JANE	124689.5420	0.8010	0.0000
40013	10595	10/20/1978	IRR	44.000	THE LYNFORD AND SUSAN MILLER REVOCABLE FAMILY TRUST DATED DEC.9,2013	124733.5420	0.8010	35.2455
40014	10596	10/20/1978	IRR	393.000	BURNHAM FARMS, LLC	125126.5420	0.8010	314.8065
77695	19848	10/20/1978	IRR	469.920	WILLIAM H NORTON	125596.4620	0.8010	376.4221
77696	19849	10/20/1978	IRR	295.120	WILLIAM H NORTON	125891.5820	0.8010	236.4013
80717	19852	10/20/1978	IRR	136.000	NORTON, WILLIAM H JR AND PATRICIA A	126027.5820	0.8010	108.9407
80718	19850	10/20/1978	IRR	135.600	NORTON, WILLIAM H JR	126163.1820	0.8010	108.6203
80881	19855	10/20/1978	IRR	44.000	NORTON, WILLIAM H JR AND PATRICIA A	126207.1820	0.8010	35.2455
44607	12432	12/29/1978	IRR	0.000	LYNFORD & SUSAN MILLER REVOCABLE FAMILY TRUST	126207.1820	0.8000	0.0000
48437	11947	12/29/1978	IRR	0.000	MARK MOYLE FARMS, LLC	126207.1820	0.8000	0.0000
					<b>Total Shares</b>	<b>113513.6415</b>		

## Appendix G – Groundwater Allocation and Pumping Reduction Table

Year of GMP	Benchmark Groundwater Pumping (Acre-Feet)	Benchmark Cumulative Pumping Reduction (%)	Benchmark Water Allocation (AF/Share)		Most Aggressive Cumulative Reduction (%)	Most Aggressive Reductions Groundwater Pumping (Acre-Feet)	Most Aggressive Reductions Water Allocation (AF/Share)
1	76000	0	0.670		0	76000	0.670
2	73720	3	0.649		3	73720	0.649
3	71440	6	0.629		6	71440	0.629
4	68400	10	0.603		10	68400	0.603
5	64600	15	0.569		15	64600	0.569
6	60800	20	0.536		20	60800	0.536
7	58520	23	0.516		23	58520	0.516
8	56240	26	0.495		26	56240	0.495
9	54720	28	0.482		28	54720	0.482
10	53200	30	0.469		30	53200	0.469
11	52440	31	0.462		32	51680	0.455
12	51680	32	0.455		34	50160	0.442
13	50920	33	0.449		36	48640	0.428
14	50160	34	0.442		38	47120	0.415
15	49400	35	0.435		40	45600	0.402
16	48640	36	0.428		42	44080	0.388
17	47880	37	0.422		44	42560	0.375
18	47120	38	0.415		46	41040	0.362
19	46360	39	0.408		48	39520	0.348
20	45600	40	0.402		50	38000	0.335
21	44840	41	0.395		52	36480	0.321
22	44080	42	0.388		54	34960	0.308
23	43320	43	0.382		56	33440	0.295
24	42560	44	0.375				
25	41800	45	0.368				
26	41040	46	0.362				
27	40280	47	0.355				
28	39520	48	0.348				
29	38760	49	0.341				
30	38000	50	0.335				
31	37240	51	0.328				
32	36480	52	0.321				
33	35720	53	0.315				
34	34960	54	0.308				
35	34200	55	0.301				



Note: Annual Allocations are calculated by taking the total pumping allowed in any given year under the GMP and dividing by the total number of Shares, being 113,513.641.

South Diamond Subarea and is limited to wells Diamond Springs Ranch (Renner), the Sadler Ranch, Bailey Ranch, Romano Ranch and Venturacci Ranch.

In addition to water banking, another key feature of the Plan is a planned step-wise reduction in groundwater withdrawals until the consumptive use of groundwater pumped for irrigation reaches the estimated perennial yield of Diamond Valley (30,000 acre-feet per year) currently accepted by the NSE. Assuming the Plan is implemented in the year 2018, scheduled reductions in pumping are shown in Table 1, below. Under the Plan, the goal of reducing irrigation pumping to the perennial yield of the basin is essentially reached in the year 2053.

Table 1.  
Irrigation Pumping Reduction under the Diamond Valley  
Groundwater Management Plan (Consumptive Use Portion)

Year	Model Stress Period	Irrigation Consumptive Use (AF/yr)
2018	64	63399.20
2019	65	62152.80
2020	66	60192.00
2020~	66	60192.00
2021	67	57494.00
2022	68	55328.00
2023	69	53838.40
2024	70	51740.80
2025	71	50342.40
2026	72	48944.00
2027	73	48244.80
2028	74	47545.60
2029	75	46846.40
2030	76	46147.20
2031	77	45448.00
2032	78	44748.80
2033	79	44049.60
2034	80	43350.40
2035	81	42651.20
2036	82	41952.00
2037	83	41252.80
2038	84	40553.60
2039	85	39854.40
2040	86	39155.20
2041	87	38456.00
2042	88	37756.80
2043	89	37057.60
2044	90	36358.40
2045	91	35659.20
2046	92	34960.00

2047	93	34260.80
2048	94	33561.60
2049	95	32862.40
2050	96	32163.20
2051	97	31464.00
2052	98	30764.80
2053	99	30065.60
2054	100	30065.60
2055	101	30065.60
2056	102	30065.60
2057	103	30065.60



The depreciation analysis assumed that 10 percent of the consumptive use portion of the Annual Groundwater Allotment in the schedule above was not pumped (banked) for the first 10 years of the plan. Pumping then resumed at the rates in the schedule. The exception was pumping of current "mitigation rights" at the Sadler, Bailey and Venturacci ranches. These are exempt under the Plan and pumping was assumed to continue at the rates presently allowed by the NSE. For the South Diamond Subarea as a whole, the model calculated an annual depreciation of approximately 0.3 percent per year. For the North Diamond Subarea, annual depreciation was much higher, approximately 17 percent per year. The principal reason for the difference is wells in the North Diamond Subarea are close to discharge areas. Water not pumped in these areas is lost to phreatophyte ET.



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**RELEVANT PROCEDURAL HISTORY**

On January 11, 2019, Jason King, P.E., Nevada State Engineer<sup>1</sup> (“State Engineer”), entered Order #1302 (“Order 1302”). On February 11, 2019, Timothy Lee Bailey and Constance Marie Bailey, husband and wife, and Fred Bailey and Carolyn Bailey, husband and wife (“Bailey” or “Baileys” or “petitioners” where referenced collectively with the Sadler Ranch and Renner petitioners) filed a notice of appeal and petition for review of Nevada State Engineer Order no. 1302 in case no. CV-1902-350. On February 11, 2019, Sadler Ranch, LLC, a Nevada limited liability company, and Daniel S. Venturacci,<sup>2</sup> an individual (“Sadler Ranch” or “petitioners” when used collectively with the Bailey and Renner petitioners) filed a petition for judicial review in case no. CV-1902-349. On February 11, 2019, Ira R. Renner, an individual, and Montira Renner, an individual, (“Renner” or “Renners” or “petitioners” when used collectively with Sadler Ranch and Bailey petitioners) filed a petition for judicial review in case no. CV-1902-348. On February 25, 2019, the State Engineer filed a notice of appearance in the three cases. On March 27, 2019, petitioners and respondent, Tim Wilson, P.E., acting State Engineer, Division of Water Resources, Department of Conservation and Natural Resources (“State Engineer”) filed a stipulation and order to consolidate cases whereby case no. CV-1902-348 (Renner) was consolidated with case no. CV-1902-349 (Sadler Ranch) and with case no. CV-1902-350 (Bailey). On June 7, 2019, the State Engineer filed a summary of record on appeal (“SE ROA”). On September 16, 2019, Sadler Ranch and Renners filed opening brief of petitioners’ Sadler Ranch, LLC and Ira R. and Montira Renner (“Sadler Ranch opening brief”). On September 4, 2019, the court entered an order granting motion in limine limiting

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<sup>1</sup>Subsequent to issuing order no. 1302, Mr. King retired from this position, and Timothy Wilson, P.E. became the acting Nevada State Engineer and the State Engineer.

<sup>2</sup>Daniel S. Venturacci filed a notice of withdrawal of petition on June 14, 2019.

SEVENTH JUDICIAL DISTRICT COURT  
GARY D. FAIRMAN  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA





1 the record on appeal in the district court to the State Engineer's record on appeal filed June  
2 7, 2019. On September 16, 2019, the Baileys filed opening brief of Bailey petitioners  
3 ("Bailey opening brief"). On October 23, 2019, the State Engineer filed respondent State  
4 Engineer's answering brief ("State Engineer's answering brief"). On October 23, 2019,  
5 Diamond Natural Resource Protection and Conservation Association ("DNRPCA") filed  
6 DNRPCA intervenors' answering brief ("DNRPCA answering brief") and DNRCPA  
7 intervenors' addendum to answering brief ("DNRPCA addendum"). Intervenor, Eureka  
8 County filed answering brief of Eureka County ("Eureka County's answering brief") on  
9 October 23, 2019.<sup>3</sup> DNRPCA and Eureka County are collectively referred to a  
10 "intervenors". On November 29, 2019, Sadler Ranch filed reply brief of petitioners' Sadler  
11 Ranch, LLC and Ira R. and Montira Renner ("Sadler Ranch reply brief") and Sadler Ranch,  
12 LLC and Ira R. and Montira Renner's addendum to reply brief ("Sadler Ranch reply  
13 addendum"). On November 26, 2019, the Baileys filed reply brief of Bailey petitioners,  
14 ("Bailey reply brief").

15 On December 10-11, 2019, oral arguments were held at the Eureka Opera House,  
16 Eureka, Nevada. Sadler Ranch and the Renners were represented by David H. Rigdon,  
17 Esq., the Baileys were represented by Christopher W. Mixon, Esq., the State Engineer was  
18 represented by Deputy Attorney General, James Bolotin, Esq., Eureka County was  
19 represented by Karen Peterson, Esq., and the DNRPCA intervenors were represented by  
20 Debbie Leonard, Esq. The court has reviewed the SEROA, the parties' briefs, all papers  
21 and pleadings on file in these consolidated cases, the applicable law and facts, and makes

22 <sup>3</sup>On September 6, 2019, the court entered an order granting motion to intervene to  
23 Diamond Valley Ranch, LLC, a Nevada limited liability company, American First  
24 Federal, Inc., a Nevada Corporation, Berg Properties California, LLC, a Nevada limited  
25 liability company, and Blanco Ranch, LLC., a Nevada limited liability company. On July  
26 3, 2019, Beth Mills, trustee of the Marshall Family Trust, filed a motion to intervene.  
The court never entered an order egranting her motion to intervene. The motion was  
timely filed without opposition. The court thus grants Beth Mills' motion to intervene.  
None of these intervenors filed briefs in this case.

1 the following findings of fact and conclusions of law.

2 II

3 FACTUAL HISTORY

4 It is a matter of accepted knowledge that Nevada currently has and at all relevant  
5 times has always had an arid climate. Its also undisputed that the Diamond Valley aquifer  
6 has been severely depleted through over appropriation of underground water for irrigation  
7 which the State Engineer has allowed to occur for over 40 years without any cessation or  
8 reduction. The State Engineer has issued permits and certificates that have allowed  
9 irrigators the right to pump approximately 126,000 acre feet ("af") of water per year from  
10 the Diamond Valley aquifer in Eureka County and Elko County which has an estimated  
11 perennial yield of only 30,000 af of water that can be safely pumped each year.<sup>4</sup> The  
12 126,000 af exclude other groundwater rights such as domestic use, stock water, and  
13 mining.<sup>5</sup> The total duty of ground water rights that impact the aquifer is close to 130,265  
14 af.<sup>6</sup> Of the 126,000 af approved for irrigation pumping, the State Engineer estimates  
15 approximately 76,000 af were pumped in 2016, with the annual Diamond Valley pumping  
16 exceeding 30,000 af for over of 40 years.<sup>7</sup>

17 The unbridled pumping in Diamond Valley has caused the groundwater level to  
18 decline approximately 2 feet annually since 1960.<sup>8</sup> The over pumping by junior irrigators  
19 has caused senior claimed vested water rights holders' naturally flowing springs to dry up  
20 in northern Diamond Valley. Big Shipley Springs, to which Sadler Ranch has a claim of

21 \_\_\_\_\_  
22 <sup>4</sup>SEROA 3.

23 <sup>5</sup>*Id.*

24 <sup>6</sup>*Id.*

25 <sup>7</sup>*Id.*; State Engineer's answering brief 4-5.

26 <sup>8</sup>SEROA 59, Water Resource Bulletin no. 35 at 26.





1 vested rights, Thompson Springs and other springs in northern Diamond Valley have either  
2 ceased flowing, as is the case of the Bailey Ranch Spring, or have suffered greatly  
3 diminished flow.<sup>9</sup> In Ruling 6290, State Engineer King extensively discussed diminished  
4 spring flow in Diamond Valley concluding that “ground water pumping in southern Diamond  
5 Valley is the main cause of stress on groundwater levels in the valley.”<sup>10</sup>

6 To address statewide over appropriation issues, the Nevada Legislature passed  
7 Assembly Bill (“AB”) 419 in 2011, which established a critical management area (“CMA”)  
8 designation process. Changes to NRS 534.110 allowed the State Engineer to designate  
9 CMA basins where withdrawals of groundwater had consistently exceeded the perennial  
10 yield of the basin.<sup>11</sup> The Legislature also enacted NRS 534.037 in 2011, establishing a  
11 procedure for the holders of permits and certificates in a basin to create a groundwater  
12 management plan (“GMP”) setting forth the necessary steps to resolve the conditions  
13 causing the groundwater basin’s CMA designation and remove the basin as a CMA.<sup>12</sup> On  
14 August 25, 2015, the State Engineer issued Order no. 1264 designating the Diamond  
15 Valley hydrologic basin (“Diamond Valley”) as the Nevada’s first CMA.<sup>13</sup> As a result of the  
16 CMA designation, if Diamond Valley remains a CMA for 10 consecutive years, the State  
17 Engineer shall order that withdrawals of water, “including, without limitation, withdrawals  
18 from domestic wells,<sup>14</sup> be restricted in that basin to conform to priority rights, unless a

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20 <sup>9</sup>SEROA 328.

21 <sup>10</sup>State Engineer ruling 6290, 23-31.

22 <sup>11</sup>NRS 534.110(7).

23 <sup>12</sup>NRS 534.037.

24 <sup>13</sup>SEROA 3, 134-138, 226.

25 <sup>14</sup>The 2019 Nevada Legislature granted relief to domestic wells to withdraw up to 0.5 af  
26 of water annually where withdrawals are restricted to conform to priority rights by either  
court order or the State Engineer. Assembly Bill, 95; NRS 534.110(9).



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groundwater management plan has been approved for the basin pursuant to NRS 534.037.”<sup>15</sup> This process is curtailment.

Groundwater right holders and vested water right holders began to meet in March, 2014, regarding the creation of a Diamond Valley GMP (“DVGMP”).<sup>16</sup> The intent of the meetings and any plan was to reduce pumping and stabilize groundwater levels in Diamond Valley to avoid curtailment of water by priority.<sup>17</sup> Although many options were considered, ultimately the DVGMP was in large part “influenced significantly by a water allocation system using a market based approach similar to that authored by professor Michael Young.”<sup>18</sup> Professor Young’s report, *Unbundling Water Rights: A Blueprint for Development of Robust Allocation Systems in the Western United States* (2015) was described by Young as “a blueprint ready for pilot testing in Nevada’s Diamond Valley and Humboldt Basins.”<sup>19</sup> The Young report was “developed in consultation with water users, administrators, and community leaders in Diamond Valley and Humboldt Basin.”<sup>20</sup> The Young report describes itself as a “blueprint ready for testing in Diamond Valley” and “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 systems, and improve environmental outcomes.”<sup>21</sup> “If implemented properly, no taking of property rights

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<sup>15</sup>NRS 534.110(7), SEROA 225.

<sup>16</sup>SEROA 226.

<sup>17</sup>SEROA 226, 277-475.

<sup>18</sup>SEROA 227 N8, 294.

<sup>19</sup>Bailey reply addendum 2, SEROA 294.

<sup>20</sup>Bailey reply addendum 3.

<sup>21</sup>*Id.* at 1.



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occurs."<sup>22</sup>

The DVGMP, a hybrid<sup>23</sup> of Professor Young's blueprint, excludes and does not apply to vested water rights, including spring vested rights, that have been mitigated with groundwater rights by the State Engineer, court order, ruling or decree.<sup>24</sup> Also excluded from the DVGMP are domestic wells, stock water, municipal, commercial groundwater rights and mining groundwater rights without an irrigation source permit.<sup>25</sup> The DVGMP applies to permit or certificated underground irrigation permits and underground irrigation rights that have an agricultural base right in Diamond Valley.<sup>26</sup>

The DVGMP water share formula factors a priority to the permit/certificate underground irrigation rights and converts the rights into a fixed number of shares.<sup>27</sup> The spread between the most senior and junior groundwater rights is 20 %.<sup>28</sup> The shares are used on a year-to-year basis and groundwater is allocated to each share annually in a measurement of acre-feet per share. Existing shares for each water right are fixed and water rights users may continue to use water in proportion to their water rights and seniority.<sup>29</sup> The conversion of water rights to shares under the DVGMP formula does not provide for each acre-foot of water under a permit/certificate to be converted to one

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<sup>22</sup> *Id.*

<sup>23</sup> SEROA 313.

<sup>24</sup> SEROA 5, 220, 229, 240-241.

<sup>25</sup> SEROA 240-241.

<sup>26</sup> SEROA 11-12, 218, 220, 228-229.

<sup>27</sup> SEROA 5, 218, 232.

<sup>28</sup> SEROA 232.

<sup>29</sup> SEROA 218, 234-235.



1 share.<sup>30</sup> Using a “priority factor” applied to each acre foot of a water right in a permit or  
2 certificate, the most senior water right receives a priority factor of 1.0 and the most junior  
3 right receives a priority factor of 0.80. This formula results in a reduction in the ultimate  
4 shares allocated based on an arbitrary range of a 1% reduction for the most senior water  
5 right to a 20% reduction for the most junior water right.<sup>31</sup> With the “priority factor” always  
6 being less than 1, the share conversion always results in less than 1 share for each former  
7 acre foot of water as illustrated in Appendix F to the DVGMP.<sup>32</sup> The priority factor causes  
8 junior water rights to be converted to fewer shares per acre-foot than senior water rights’  
9 holders. Significantly, the formula of taking priority as a basis to reduce the shares  
10 awarded to senior rights’ holders by using a designated percentage less than the shares  
11 granted to the junior rights’ holders does not give the senior rights’ holders all of the water  
12 to which their priority permit/certificate entitles the holders to use for irrigation purposes.  
13 The result of the DVGMP formula is that senior water rights’ holders receive fewer shares  
14 than one per acre foot. Thus, senior water rights’ holders cannot beneficially use all of the  
15 water which their permit/certificate entitles them to use. The DVGMP reduces the senior  
16 water rights by annually reducing their allocation of water for each share.<sup>33</sup> Ultimately, for  
17 the most senior user, the acre-feet per share allocations are reduced from 67 acre-feet per  
18 share in year 1 to 30 acre feet per share in year 35 of the DVGMP<sup>34</sup> and for the most junior  
19 user, allocations are reduced from 54 acre feet in year 1 to 24 acre feet in year 35 of the

20 <sup>30</sup>SEROA 232.

21 <sup>31</sup>*Id.*; The DVGMP formula is: total volume of water right X priority factor = total  
22 groundwater shares.

23 <sup>32</sup>SEROA 499-509.

24 <sup>33</sup>SEROA 234-236, 510 (appendix G to DVGMP).

25 <sup>34</sup>*Id.* For example, in the Bailey’s case, their 5 senior groundwater rights entitle them to  
26 use 1,934.116 af. In the first year of the DVGMP they are reduced to 1,250.4969 af,  
and by year 35, the Baileys are reduced to 467.7960 af.



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DVGMP.<sup>35</sup> The DVGMP proposes a gradual reduction in pumping to a level of 34,200 af at the end of 35 years. For 35 years the pumping in Diamond Valley will exceed the 30,000 af perennial yield.<sup>36</sup>

The DVGMP provides that all annual allocations of water be placed in to an account for each water user and allows the “banking” of unused water in future years, subject to the annual Evapotranspiration “(ET)” depreciation of the banked water which accounts for natural losses of water while the water is stored in an underground aquifer.<sup>37</sup> The DVGMP allows the current water allocations and the banked allocations of the water shares to be used, sold, or traded among the water share holders in Diamond Valley for purposes other than irrigation so long as the base right is tied to irrigation.<sup>38</sup> The DVGMP authorizes the State Engineer to review a share transfer among holders or an allocation to a new well or place or manner of use if the transfer would cause the new well to exceed the pumping volume of the original water right permitted for the well or if the excess of water pumped beyond the original amount of volume allowed for the well conflicted with existing rights.<sup>39</sup>

Sadler Ranch claims pre-statutory vested rights to the waters flowing from springs that are senior in priority to all permits/certificates issued by the State Engineer.<sup>40</sup> It is undisputed by the State Engineer that Sadler Ranch’s spring flows have diminished as a

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<sup>35</sup>*Id.*, SEROA 5, 218.

<sup>36</sup>SEROA 510. See State Engineer’s oral argument hearing transcript pg. 152.

<sup>37</sup>*Id.*

<sup>38</sup>SEROA 5, 218, 234-235.

<sup>39</sup>*Id.*

<sup>40</sup>Sadler Ranch opening brief 4, Order of Determination at 164-175, In the Matter of the Determination of the Relative Rights in and to all Waters of Diamond Valley, Hydrographic Basin no. 10-153, Elko and Eureka Counties, Nevada (January 31, 2020).



1 result of over-pumping by junior irrigators in southern Diamond Valley. The Renners, who  
2 also have a senior priority date, are experiencing impacts to their springs due to continual  
3 groundwater declines.<sup>41</sup> The Baileys hold senior irrigation groundwater rights consisting of  
4 Permit no. 22194 (cert. 6182) for 537.04 afa with a March 7, 1960 priority; Permit 22194  
5 (cert. 6183) for 622.0 afa with a March 7, 1960 priority; Permit 55727 (cert. 15957) for  
6 20.556 afa with a March 7, 1960 priority; Permit 28036 (cert. 8415) for 244.0 afa with a  
7 May 3, 1960 priority; Permit 48948 (cert. 13361) for 478.56 afa with a May 3, 1960 priority;  
8 and Permit 28035 (cert. 8414) for 201.56 afa with a January 23, 1974 priority.<sup>42</sup> The  
9 Baileys also claim vested and/or permitted water rights and stock water rights.<sup>43</sup>

10 All permits/certificates issued by the State Engineer have the cautionary language,  
11 "this permit is issued subject to all existing rights on the source."<sup>44</sup> In Nevada, all  
12 appropriations of groundwater are "subject to existing rights to the use thereof."<sup>45</sup>

13 After a public hearing held on October 30, 2018, the State Engineer issued Order  
14 1302. Order 1302 states, "while it is acknowledged that the GMP does deviate from the  
15 strict application of the prior appropriation doctrine with respect to 'first in time, first in right,'  
16 the following analysis demonstrates that the legislature's enactment of NRS 534.037  
17 demonstrates legislative intent to permit action in the alternative to strict priority  
18 regulation."<sup>46</sup> The State Engineer and all intervenors who filed briefs and orally argued this  
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21 <sup>41</sup>Sadler Ranch opening brief 4, *Id.* 152-164; SEROA 593.

22 <sup>42</sup>Bailey opening brief 4, SEROA 500,506.

23 <sup>43</sup>Bailey opening brief 4, SEROA 536-538.

24 <sup>44</sup>Sadler Ranch opening brief 4; see certificates/permits listed in SEROA 499-509.

25 <sup>45</sup>NRS 534.020.

26 <sup>46</sup>SEROA 6.



1 case agree that the DVGMP deviates from the prior appropriation doctrine.<sup>47</sup>

2 III

3 DISCUSSION

4 STANDARD OF REVIEW

5 A party aggrieved by any order or decision of the State Engineer may have  
6 the order or decision reviewed in a proceeding for that purpose in the nature of an  
7 appeal.<sup>48</sup> The proceedings must be informal and summary.<sup>49</sup> On appeal, the State  
8 Engineer's decision or ruling is prima facie correct, and the burden of proof is upon the  
9 person challenging the decision.<sup>50</sup> The court will not pass upon the credibility of witnesses  
10 or reweigh the evidence, nor substitute its judgment for that of the State Engineer.<sup>51</sup> With  
11 respect to questions of fact, the reviewing court must limit its determination to whether  
12 substantial evidence in the record supports the State Engineer's decision.<sup>52</sup> When  
13 reviewing the State Engineer's findings, factual determinations will not be disturbed on  
14 appeal if supported by substantial evidence.<sup>53</sup> Substantial evidence has been defined as  
15 "that which a reasonable mind might accept as adequate to support a conclusion."<sup>54</sup> With

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17 <sup>47</sup>State Engineer's answering brief 26, DNRPCA intervenors' answering brief 11-13,  
Eureka County's answering brief 5, 11.

18 <sup>48</sup> NRS 533.450(1).

19 <sup>49</sup> NRS 533.450(2).

20 <sup>50</sup> NRS 533.450(10).

21 <sup>51</sup> *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1974) (citing *N. Las Vegas v.*  
22 *Pub. Serv. Comm'n*, 83 Nev. 279, 429 P.2d 66 (1967)).

23 <sup>52</sup> *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1997)  
(citing *Revert* at 786).

24 <sup>53</sup> *State Engineer v. Morris*, 107 Nev. 694, 701, 819 P.2d 203, 205 (1991).

25 <sup>54</sup> *Bacher v. State Engineer*, 122, Nev. 1110, 1121, 146 P.3d 793, 800 (2006). (internal  
26 citations omitted).



1 regard to purely legal questions, the standard of review is de novo.<sup>55</sup> Findings of an  
2 administrative agency will not be set aside unless they are arbitrary and capricious.<sup>56</sup> The  
3 court must review the evidence in order to determine whether the agency's decision was  
4 arbitrary or capricious and was thus an abuse of the agency's discretion.<sup>57</sup> A finding is  
5 arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by  
6 rules or procedure."<sup>58</sup> A decision is capricious if it is "contrary to the evidence or  
7 established rules of law."<sup>59</sup>

8 "The State Engineer's ruling on questions of law is persuasive, but not entitled to  
9 deference."<sup>60</sup> The presumption of correctness accorded to a State Engineer's decision  
10 "does not extend to 'purely legal questions, such as 'the construction of a statute, as to  
11 which the reviewing court may undertake independent review."<sup>61</sup>

12 A. THE STATE ENGINEER'S PUBLIC HEARING AFFORDED PETITIONERS DUE  
13 PROCESS

14 On October 30, 2018, the State Engineer, after giving notice required by statute,<sup>62</sup>  
15 held a public hearing in Eureka, Nevada. The public hearing was followed by a written  
16 public comment period ending November 2, 2018. On June 11, 2019, the State Engineer  
17 filed a motion in limine which was briefed by all parties. Sadler Ranch, the Renners, and

18 <sup>55</sup> *In re Nevada State Engineer Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449 (2012.)

19 <sup>56</sup> *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1991).

20 <sup>57</sup> *Shetakis v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992).

21 <sup>58</sup> Black's Law Dictionary, Arbitrary (10<sup>th</sup> ed. 2014).

22 <sup>59</sup> Black's Law Dictionary, Capricious (10<sup>th</sup> ed 2014).

23 <sup>60</sup> *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019)

24 <sup>61</sup> *In Re State Engineer Ruling no. 5823 at 239*, (internal citations omitted).

25 <sup>62</sup>NRS 534.037(3).

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1 the Baileys argued that their due process rights were violated, alleging the State Engineer  
2 failed to hold a proper evidentiary hearing where witnesses could be subject to cross-  
3 examination and evidence challenged.<sup>63</sup> This Court entered an order granting motion in  
4 limine on September 4, 2019. In its order, the court specifically found that “the public  
5 hearing process to consider the GMP under NRS 534.035 provided notice and the  
6 opportunity for anyone to be heard and to offer evidence, thus satisfying due process  
7 standards.”<sup>64</sup> The court’s position has not changed. The court incorporates the entirety  
8 of the order granting motion in limine in these findings of fact and conclusions of law. The  
9 court finds that petitioners were afforded due process in the public hearing held on October  
10 18, 2018, pursuant to NRS 534.037(3).

11 B. THE STATE ENGINEER CONSIDERED APPLICABLE NRS 534.037(2) FACTORS  
12 PRIOR TO APPROVING THE DVGMP

13 In determining whether to approve a GMP, NRS 534.037(2) requires the State  
14 Engineer to consider: (a) the hydrology of the basin; (b) the physical characteristics of the  
15 basin; (c) the geographic spacing and location of the withdrawals of groundwater in the  
16 basin; (d) the quality of the water in the basin; (e) the wells located in the basin, including  
17 domestic wells; (f) whether a groundwater management plan already exists to the basin;  
18 (g) any other factors deemed relevant by the State Engineer. The State Engineer must  
19 ultimately decide whether a proposed GMP “sets forth the necessary steps for removal of  
20 the basin’s designation as a CMA.<sup>65</sup> Petitioners argue that (1) the State Engineer failed to  
21 consider the NRS 534.037(2) factors, and (2) that the DVGMP failed to demonstrate that  
22 decreased pumping over the 35 year life of the plan will result in “stabilized groundwater

23 <sup>63</sup>Sadler Ranch opening brief 34; Sadler Ranch opposition to motion in limine filed June  
24 24, 2019; Bailey opposition to motion in limine filed June 24, 2019.

25 <sup>64</sup>Order granting motion in limine 10.

26 <sup>65</sup>NRS 534.037(1).



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levels<sup>66</sup> based on the evidence presented at and after the public hearing. Petitioners submit that the DVGMP fails to bring the Diamond Valley basin into equilibrium within 10 years and over pumping will continue even at the 35<sup>th</sup> year of the plan.<sup>67</sup> Order 1302, describes the State Engineer's review of the NRS 534.037(2) factors in relation to the DVGMP.<sup>68</sup> The DVGMP's review of the factors is in Appendices D-I.

The State Engineer specifically rejected petitioners' arguments that the DVGMP failed to reach an equilibrium, that groundwater modeling and hydro geologic analysis must be the basis for the DVGMP's determination of pumping reduction rates and pumping totals at the plan's end date, and that the DVGMP pumping reductions would not bring withdrawals to the perennial yield.<sup>69</sup> The record shows that the State Engineer considered evidence of the NRS 534.037(2) factors as set forth in appendix D to the DVGMP.<sup>70</sup> Sadler Ranch's assertion that their expert, David Hillis' report questioning DVGMP's viability should be accepted by the State Engineer does not require the State Engineer to accept Mr. Hillis' findings and conclusions. The State Engineer was satisfied that the DVGMP would cause the Diamond Valley basin to be removed as a CMA at the end of 35 years. The State Engineer is not required to undertake an extensive factor analysis in his order if he is otherwise satisfied that sufficient facts and analysis are presented in the petition and the proposed DVGMP from which he could make a determination whether to approve or reject the DVGMP.

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<sup>66</sup>Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief 15-20.

<sup>67</sup>*Id.*

<sup>68</sup>SEROA 14-17.

<sup>69</sup>SEROA 17-18.

<sup>70</sup>SEROA 17-18, 223, 227-28, 476-496.



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Petitioners' contention that "the Legislature determined that a GMP should accomplish its goals within ten years, not thirty-five" is misplaced.<sup>71</sup> First, NRS 534.110(7) states that if a basin has been designated as a CMA for 10 consecutive years, the State Engineer shall order withdrawals based on priority, **unless** a GMP has been approved pursuant to NRS 534.037 (emphasis added). NRS 534.110(7) does not state a GMP must accomplish the goal of equilibrium in a CMA basin within 10 years from the GMP approval. An undertaking as immense as bringing a depleted aquifer into balance could easily surpass 10 years depending on the extent of harm to the aquifer. Sadler Ranch misconstrues Assemblyman Goicoechea's statement to the Legislature that, "[again] you have ten years to accomplish your road to recovery."<sup>72</sup> The court views Assemblyman Goicoechea's words as meaning that once a basin is designated as a CMA, a 10 year clock starts wherein a GMP must be approved within the 10 year period, and if not, curtailment by priority must be initiated by the State Engineer. A GMP "must set forth the necessary steps for removal of the basin's designation as a critical management area"<sup>73</sup> not that equilibrium in the CMA basin must be accomplished within 10 years. If the State Engineer finds, which he did here, that the DVGMP sets forth the necessary steps for removal of the basin as a CMA, he may approve a GMP even if the DVGMP exceeds a 10 year period.

Petitioners claim the DVGMP will allow for continued depletion of the Diamond Valley aquifer.<sup>74</sup> The court agrees with petitioners. However, the State Engineer, using his knowledge and experience, and based on the evidence presented at the public hearing,

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<sup>71</sup>Sadler Ranch opening brief 13.

<sup>72</sup>Minutes of Assmb. Comm. on Gov't Affairs, 69 (March 30, 2011).

<sup>73</sup>NRS 534.037(1).

<sup>74</sup>Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief 15-20.



1 including the DVGMP and appendices, rejected petitioners' arguments that the DVGMP  
2 would not enable the basin to be removed as a CMA. Again, this Court will not reweigh  
3 the evidence presented nor substitute its judgment for that of the State Engineer. The  
4 court finds that there is substantial evidence in the record to support the State Engineer's  
5 approval of the DVGMP as achieving the goal of removing the Diamond Valley basin from  
6 CMA status. The court finds that there is substantial evidence in the record to support the  
7 State Engineer's findings that the DVGMP contained the necessary relevant factors in NRS  
8 534.037(2) to approve the DVGMP.<sup>75</sup>

9 C. THE STATE ENGINEER RETAINS HIS AUTHORITY TO MANAGE THE DIAMOND  
10 VALLEY BASIN

11 Notwithstanding his approval of the DVGMP, the State Engineer is not precluded  
12 from taking any necessary steps in his discretion to protect the Diamond Valley aquifer,  
13 including, ordering curtailment by priority, at any time during the life of the DVGMP if he  
14 finds that the aquifer is being further damaged. NRS 534.120(1) gives the State Engineer  
15 discretion to "make such rules, regulations and orders as are deemed essential for the  
16 welfare of the area involved." Order 1302 specifically found the DVGMP did not waive "any  
17 authority of the State Engineer to enforce Nevada water law."<sup>76</sup> It would be ludicrous to  
18 find that the State Engineer was prohibited from taking whatever action was necessary to  
19 prevent a catastrophic result in Diamond Valley during the life of the DVGMP, including  
20 curtailment, regardless of the provisions built into the DVGMP that otherwise trigger his  
21 plan review.<sup>77</sup> The court finds the DVGMP does not limit the State Engineer's authority to

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22 <sup>75</sup>This finding is narrowly limited to the State Engineer's fact finding only in relation to  
23 the NRS 534.037(2) factors and that he found the DVGMP would allow the basin to be  
24 removed as a CMA after 35 years, not whether the DVGMP and Order 1302 violates  
25 Nevada law in other respects..

26 <sup>76</sup>SEROA 18.

<sup>77</sup>See SEROA 235, sec. 13.13; 246, sec. 26.



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manage the Diamond Valley basin pursuant to NRS 534.120(1).

D. ORDER 1302 DOES NOT VIOLATE NEVADA'S AQUIFER STORAGE RECOVERY ("ASR") STATUTE

An ASR project under Nevada law contemplates the recharge, storage, and recovery of water for future use for which a permit is required.<sup>78</sup> The DVGMP does not include a proposed source of water for recharge into the Diamond Valley aquifer, the quantity of water proposed to be recharged into the aquifer, nor any stated purpose for the storage of water for future use.<sup>79</sup> The DVGMP uses the term "banking" as meaning unused shares of water in a year may be carried forward or "banked" for use in the following year if appropriate. The State Engineer held that the DVGMP provision to carry over water shares for use in a subsequent year was outside the scope of NRS 534.260 to 534.350 as not being a project involving the recharge, storage and recovery of water subject to statutory regulations,<sup>80</sup> but "to allow flexibility by users to determine when to use their limited allocation and to encourage water conservative practices."<sup>81</sup> The State Engineer's finding is supported by substantial evidence in the record. The court finds the term "banked" when used in the manner as stated in the DVGMP to mean water shares that are not used but saved for use in a subsequent year.<sup>82</sup> The court finds the DVGMP is not required to comply with and does not violate NRS 534.250 to NRS 534.340.

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<sup>78</sup>NRS 534.250-534.340.

<sup>79</sup>*Id.*

<sup>80</sup>SEROA 8, 9.

<sup>81</sup>*Id.*

<sup>82</sup>SEROA 234, sec. 13.9.



1 E. PETITIONERS FAILED TO SHOW THAT A VIOLATION OF NRS 534.037(1)  
2 WHEN SEEKING PETITION APPROVAL AFFECTED THE VOTE RESULT

3 A GMP petition submitted to the State Engineer for approval “. . . must be signed  
4 by a majority of the holders of permits or certificates to appropriate water in the basin that  
5 are on file in the Office of the State Engineer . . .”<sup>83</sup> The DVGMP petition was thus required  
6 to be signed by a majority of the holders of permits or certificates for surface rights, stock  
7 water rights, and underground rights in the Diamond Valley basin.

8 Order 1302 found there were 419 water right permits or certificates in the Diamond  
9 Valley basin at the time the DVGMP petition was filed.<sup>84</sup> By limiting the computation to  
10 those signatures from a confirmed owner of record, the State Engineer found 223 of 419  
11 permits or certificates,<sup>85</sup> or 53.2 percent, was a majority of the permits or certificates in the  
12 basin.<sup>86</sup> The DVGMP petition was only sent to groundwater permit holders to be  
13 considered and voted upon.<sup>87</sup> The State Engineer argues that since the procedure for  
14 approving a GMP is found in Chapter 534 related to underground water that only  
15 permit/certificate holders for underground irrigation were required to vote.<sup>88</sup> This position  
16 misconstrues the clear language of NRS 534.037(1) . The Baileys assert that the DVGMP  
17 petition should have been submitted to all vested and surface right or other permit and  
18 certificate holders for consideration and vote.<sup>89</sup> The court agrees that all certificate and

19 \_\_\_\_\_  
<sup>83</sup>NRS 534.037(1).

20 <sup>84</sup>SEROA 3.

21 <sup>85</sup>Those signatures by a confirmed owner of record. *Id.*

22 <sup>86</sup>SEROA 3.

23 <sup>87</sup>SEROA 148.

24 <sup>88</sup>State Engineer’s answering brief 25, “. . . surface water rights and vested rights were  
25 properly omitted from the State Engineer’s calculation for majority approval under NRS  
26 534.037(1) . . .”

<sup>89</sup>Bailey opening brief 33-34, Bailey reply brief 17-19.



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permit holders should have had the petition submitted to them. However, NRS 534.037(1) does not require a petition to be submitted to vested right holders. NRS 534.037(1) does not restrict petition approval to only underground permit or certificate holders. The exclusion of all surface permit and certificate holders or other certificate holders from considering whether to approve the DVGMP or not was incorrect and violated NRS 534.037(1). The court so finds. But, petitioners have not shown that they or other holders of permits or certificates to appropriate water in the basin were not included in the State Engineer's count of 419 water right permits or certificates in the Diamond Valley basin.<sup>90</sup>

There is no evidence in the ROA that the State Engineer excluded any holders of permits or certificates in the 419 count. Although petitioners and others similarly situated may not have been presented with the petition to approve the DVGMP, the fact that they would not have signed the petition is irrelevant as a majority of the holders of permits or certificates in the basin did sign the petition. The court finds substantial evidence in the record to support the State Engineer's determination that the petition was signed by a majority of the permit or certificate holders in the Diamond Valley basin.

At the oral argument hearing, Sadler Ranch and the Renners untimely challenged the accuracy of the vote approving the DVGMP petition. First, they contend that NRS 534.037(1) requires that votes be counted by the number of people who own the permits/certificates, not the number of permits. The statute's focus is counting by the permit/certificates. The State Engineer limited his count to the permits and certificates, and compared petition signatures with the confirmed owner of record in his office files.<sup>91</sup> Under petitioners' interpretation,<sup>92</sup> if one permit or certificate was owned by 25 owners, there

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<sup>90</sup>SEROA 3.

<sup>91</sup>SEROA 3.

<sup>92</sup>Sadler Ranch's example was that the Moyle Family has 5 people who own 50 permits thereafter the State Engineer should have only counted 5 votes instead of 50.



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should be 25 votes counted. This method of assigning votes improperly places the vote calculation on the number of owners of certificates or permits rather than the number of permits or certificates in the Diamond Valley basin. The court rejects Sadler Ranch's and the Renner's interpretation of the method by which votes must be counted under NRS 534.037(1). Second, they contend the record fails to support how the State Engineer verified petition signatures or what rights were counted as eligible to vote. The court is satisfied that the State Engineer reviewed his office's records, confirmed the owner(s) of record with the signatures on the petition as representing the owner(s) of record in his office, and then counted the permits or certificates, not the owners of the certificates or permits.<sup>93</sup> Third, Sadler Ranch and the Renners state some signatures were not by the owner of record. There is no requirement under the NRS 534.037(1) that an individual representing a permit or certificate holder could not sign the petition for the holder. No challenges exist in the record by any permit or certificate holders claiming that their vote was fraudulently cast by someone not authorized to vote on their behalf. Fourth, Sadler Ranch and the Renners suggest that the permit or certificate should not have been counted if only signed by 1 of the owners of record. Again, nothing in the statute requires the petition be signed by each owner of a permit or certificate. Again, there are no challenges in record from any co-owners alleging the vote of their certificate or permit was invalid because not all of the record owners signed the petition. Last, they cite that the DVGMP tally sheet had double and triple counted votes. This may be so, but the State Engineer's method of calculation represented the true count of votes. Sadler Ranch's and the Renner's objections are rejected. The court finds substantial evidence in the record to support the State Engineer.

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<sup>93</sup>SEROA 3-4.



F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

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2 In Nevada, “beneficial use shall be the basis, the measure and the limit of the right  
3 to the use of the water”<sup>94</sup> “Beneficial use depends on a party actually using the water.”<sup>95</sup>  
4 The DVGMP does not require prior beneficial use of water in order for a permit holder to  
5 receive shares under the DVGMP formula.<sup>96</sup> Petitioners contend that any permits or  
6 certificates that are in abandonment status should not be allowed water shares. The State  
7 Engineer found that because “. . . time is of the essence for rights holders to get a GMP  
8 approved” . . . “it would be a lengthy process to pursue abandonment.”<sup>97</sup> The State  
9 Engineer also cites the notice of non-use provisions required by NRS 534.090 as  
10 potentially causing owners of unused water rights to resume beneficial use, and  
11 exacerbate the water conditions in Diamond Valley.<sup>98</sup> The court agrees such a situation  
12 could occur, however, the State Engineer’s analysis fails to address that permit holders  
13 who have done nothing to beneficially use water will receive just as many, if not more,  
14 shares of water will as holders of water rights who have placed water to beneficial use.  
15 The GMP gifts to permit holders, who have done nothing to place their water to beneficial  
16 use, valuable water shares to trade, lease, or sell to others in Diamond Valley.

17 Of the 126,000 af of water rights in Diamond Valley, currently there is only 76,000  
18 af of actual beneficial use.<sup>99</sup> Under the DVGMP those permit holders who have never  
19 proved up their water by placing it to beneficial use could potentially receive more water

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21 <sup>94</sup>NRS 533.035.

22 <sup>95</sup>*Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793 (2006).

23 <sup>96</sup>SEROA 232-236, sec. 12,13

24 <sup>97</sup>SEROA 9.

25 <sup>98</sup>*Id.*

26 <sup>99</sup>SEROA 2.



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than those holders who have placed their water to beneficial use. The DVGMP allocates the total amount of 76,000 af actually being pumped to 126,000 af of irrigation ground water rights in good standing in Diamond Valley all of which will receive shares under the DVGMP formula.<sup>100</sup> By example, a farmer with a center pivot on a 160 acre parcel at 4 af per acre would be permitted for 640 af. Upon prove up, if he actually watered less than the 160 acre parcel because watering by using a center pivot does not water the 4 corners of a parcel, he may only prove up the water right for 512 af and receives a certificate for this amount. Another farmer in Diamond Valley, who has a 160 acre parcel at 4 af per acre but who has never proved up the beneficial use of the water and stands in a forfeiture status, receives the full 640 af of water. In the 1<sup>st</sup> year of the DVGMP, the farmer who has a permit for 640 af, but never has proved it up through beneficial use, actually received 85 af more water than the farmer who proved up beneficial use on the same size parcel. When transferred into shares under the DVGMP, the farmer who has not proved up his permit receives windfall of water shares to sell or trade. The DVGMP acknowledges that some water rights in good standing have not been used and tied to corners of irrigation circles and that most, but not all, "paper water" is tied to currently used certificates or permits.<sup>101</sup> Even though the DVGMP caps the amount of water the first year of the plan at the "ceiling of actual pumping (76,000 afa)",<sup>102</sup> it remains that the 76,000 afa will be allocated to some permits who have not proved up beneficial use.

Under Nevada water law, a certificate, vested, or perfected water right holder enjoys the right to and must beneficially use all of the water it has proved up. The DVGMP rewards permit holders who have not placed water to beneficial use, of which there are

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<sup>100</sup>SEROA 218, 219, 221, 232-33 3m 461, 465.

<sup>101</sup>SEROA 467.

<sup>102</sup>SEROA 12.



1 approximately 50,000 af in Diamond Valley.<sup>103</sup> The DVGMP also allows the banking of  
2 unperfected paper water rights for future use which can be sold, traded or leased.<sup>104</sup> The  
3 court finds that Order 1302 violates the NRS 533.035. The court finds Order 1302 is  
4 arbitrary and capricious.

5 G. THE DVGMP IMPAIRS VESTED RIGHTS IN VIOLATION OF NRS 533.085(1)

6 It is undisputed that the Baileys and Renners have senior vested surface water  
7 rights that have been adversely impacted by the 40 years plus of overpumping<sup>105</sup>.  
8 Respondent and intervenors agree that the DVGMP was not developed for mitigation  
9 purposes, but to reduce pumping, bring equilibrium to the Diamond Valley aquifer in 35  
10 years, and cause the CMA designation to be removed.<sup>106</sup> The State Engineer's position  
11 is that the GMP "is not a mitigation plan, and NRS 534.037 does not require the  
12 proponents of a groundwater management plan or the State Engineer to consider the  
13 alleged effects on surface water rights or mitigate those alleged effects."<sup>107</sup> The State  
14 Engineer is wrong. A GMP must consider the effect it will have on surface water rights.  
15 In *Pyramid Lake Paiute Tribe v. Ricci* 126 Nev. 531.524 (2010), the Nevada Supreme  
16 Court acknowledged the State Engineer's ruling that "[t]he perennial yield of a hydrological  
17 basin is the equilibrium amount or maximum amount of water that can be safely used  
18 without depleting the source." Moreover, [t]he maximum amount of natural discharge that  
19 can be feasibly captured . . . [is the] perennial yield . . . the maximum amount of withdrawal

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21 <sup>103</sup>SEROA 2, 9, 10.

22 <sup>104</sup>SEROA 234; see sec. 13.2

23 <sup>105</sup>Sadler Ranch had impacted senior vested rights that have been mitigated by  
24 certificate.

24 <sup>106</sup>State Engineer's answering brief, 36.

25 <sup>107</sup>*Id.*. This position is also shared by the DNRPCA intervenors. DNRPCA answering  
26 brief, 24; and Eureka County, Eureka County answering brief, 22.



1 above which over appropriation occurs.” *State Engineer v. Morris*, 107 Nev. 699 703  
2 (1991).The DVGMP on its face fails to reduce the harm caused by overpumping and  
3 aggravates the depleted water basin.

4 A GMP developed under NRS 534.037 is not required to mitigate adversely affected  
5 surface water rights, but it cannot impair those rights.NRS 533.085(1) provides, “nothing  
6 contained in this chapter shall impair the vested right of any person to the use of water, nor  
7 shall the right of any person to take and use water be impaired or affected by any of the  
8 provisions of this chapter where appropriations have been initiated in accordance with law  
9 prior to March 22, 2013.” NRS 534.100 reads, “Existing water rights to the use of  
10 underground water are hereby recognized. For the purpose of this chapter a vested right  
11 is a water right on underground water acquired from an artesian or definable aquifer prior  
12 to March 22, 1913.”

13 The DVGMP authorizes continuous pumping beginning with 76,000 af in year one,  
14 reducing pumping to 34,200 af at the end of 35 years,<sup>108</sup> clearly in excess of the 30,000 af  
15 perennial yield in the Diamond Valley aquifer.<sup>109</sup> The DVGMP and Order 1302  
16 acknowledge that there will be ongoing additional withdrawals of water from the basin of  
17 approximately 5,000 af annually of non-irrigation permits.<sup>110</sup> Venturacci, Sadler Ranch and  
18 the Bailey’s are entitled to withdraw an approximate 6,400 af annually.<sup>111</sup> The State  
19 Engineer admits that neither groundwater modeling nor hydro geologic analysis were the  
20 basis for the DVGMP’s “determination of pumping reduction rates and target pumping at  
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23 <sup>108</sup>SEROA 510.

24 <sup>109</sup>SEROA 3.

25 <sup>110</sup>*Id.*

26 <sup>111</sup>Permits 82268, 81270, 63497, 81825, 82572, 87661.



1 the end of the plan”<sup>112</sup> but that “the pumping reduction rate was selected by agreement of  
2 the GMP authors, . . .”<sup>113</sup> The State Engineer’s reasoning that NRS 534.037 does not  
3 require a GMP “to consider alleged effects on surface water rights” is a misunderstanding  
4 of Nevada’s water law. The DVGMP’s annual pumping allocation will certainly cause the  
5 aquifer groundwater level to decline with continuing adverse effects on vested surface  
6 rights. The court finds that the DVGMP and Order 1302 impair senior vested rights. The  
7 court finds that Order 1302 is arbitrary and capricious.

8 **ESTOPPEL ISSUE**

9 Contrary to the position of Eureka County, petitioners are not estopped from making  
10 claims that the DVGMP impacts their vested rights.<sup>114</sup> No facts are present in the ROA that  
11 any respondent relied to their detriment upon representations or any petitioners or that any  
12 other estoppel elements are present in the ROA.<sup>115</sup>

13 I. **ORDER 1302 VIOLATES NEVADA’S DOCTRINE OF PRIOR APPROPRIATION**

14 The history of prior appropriation in the Western states dates to the mid-1800’s and  
15 has been well chronicled in case law. Notably, In *Re Water of Hallett Creek Stream*  
16 *System*,<sup>116</sup> discusses at length the development, of the doctrine of prior appropriation, “first  
17 in time, first in right”, with its genesis linked to the early California gold miners’ use of water  
18 and a local rule of priority as to the use of water. Nevada has long recognized the law of  
19 prior appropriation.<sup>117</sup> The priority of a water right is the most important feature.<sup>118</sup> Court’s

20 <sup>112</sup>SEROA 16.

21 <sup>113</sup>*Id.*

22 <sup>114</sup>Eureka County answering brief 22-23.

23 <sup>115</sup>*Torres v. Nev. Direct Ins. Co.*, 131 Nev. 531, 539, 353 P.3d 1203 (2015). (internal  
24 citations omitted).

25 <sup>116</sup>749 P.2d 324, 330-34 (Cal 1988) cert. denied 488 U.S. 834 (1988).

26 <sup>117</sup>*Steptoe Livestock Co. v. Gulley*, 53 Nev 163, 171-173, 205 P.772 (1931); *Jones v. Adams* 19 Nev. 78, 87, (1885).

<sup>118</sup>See *Gregory J. Hobbs, Jr., Priority: The Most Misunderstood Stick in the Bundle*, 32  
Envtl .L. 37(2002).



1 have stated, “priority in a water right [as] property in itself.”<sup>119</sup> Although, “. . . those holding  
2 certificates, vested, or perfected water rights do not own or acquire title to the water, they  
3 merely enjoy the right to beneficial use,”<sup>120</sup> the Nevada Supreme Court has stated, “a water  
4 right ‘is regarded and protected as real property.’”<sup>121</sup> The Nevada Supreme Court  
5 recognized as well established precedent “that a loss of priority that renders rights useless  
6 ‘certainly affects the rights’ value and ‘can amount to a defacto loss of rights.’”<sup>122</sup> The prior  
7 appropriation doctrine ensures that the senior appropriator who has put its water to  
8 beneficial use has a right to put all of the water under its permit/certificate to use and that  
9 right is senior to all water rights holders who are junior. This doctrine becomes critically  
10 important during times of water scarcity, whether temporary, or as a result of prolonged  
11 drought. This is certainly the case in Diamond Valley. With the security attached to a  
12 senior priority right to beneficially use all of the water associated with the right also comes  
13 obvious financial value not only to the current water right holder, but to any future owner  
14 of that senior right. The loss or reduction of any water associated with the senior right can  
15 significantly harm the holder.

16 The State Engineer found that, “the GMP still honors prior appropriation by  
17 allocating senior rights a higher priority than junior rights.”<sup>123</sup> The court disagrees. The  
18 DVGMP reduces the amount of water it allocates to senior rights’ holders in the formula  
19 for shares effectively ignoring 150 years of the principle of “first in time, first in right”<sup>124</sup>  
20 which has allowed a senior right holder to beneficially use all of water allocated in its right

21 <sup>119</sup>*Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005).

22 <sup>120</sup>*Sierra Pac. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40, (2019), citing *Desert*  
23 *Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 994 P.2d 835, 842 (1997).

24 <sup>121</sup>*Town of Eureka*, 167.

25 <sup>122</sup>*Wilson v. Happy Creek*, 135 Nev. Adv. Op. 41, 448 P.3d 1106, 1115 (2019) (internal  
26 citations omitted).

<sup>123</sup>SEROA 8.

<sup>124</sup>*Ormsby County v. Kearny*, 37 Nev. 314, 142 P. 803, 820 (1914).

1 before any junior right holder can use its water right. The DVGMP allows the senior right  
2 holder a higher priority to use less water.

3 The court finds that the DVGMP formula for water shares that reduces the amount  
4 of water to which a senior water rights' holder is entitled to use violates the doctrine of prior  
5 appropriation in Nevada. The court finds that Order 1302 violates the doctrine of prior  
6 appropriation in Nevada. The court thus finds that Order 1302 is arbitrary and capricious.

7 H. THE LEGISLATIVE HISTORY OF NRS 534.037 and 534.110(7) DOES NOT  
8 DEMONSTRATE AN INTENT TO MODIFY THE DOCTRINE OF PRIOR  
9 APPROPRIATION IN NEVADA

10 As stated above, the doctrine of prior appropriation has existed in Nevada water law  
11 for in excess of 150 years. The DVGMP reduces the annual allocation of water rights to  
12 both junior and senior rights holders.<sup>125</sup> Relying on a New Mexico Supreme Court case,  
13 *State Engineer v. Lewis*,<sup>126</sup> Order 1302 held that NRS 534.037 “demonstrates legislative  
14 intent to permit action in the alternative to strict priority regulation.”<sup>127</sup> Order 1302 states  
15 that, “. . . in enacting NRS 534.037, the Nevada legislature expressly authorized a  
16 procedure to resolve a shortage problem . And, likewise, the State Engineer assumes that  
17 the Legislature was aware of prior appropriation when it enacted NRS 534.037, and the  
18 State Engineer interprets the statute as intending to create a solution other than a priority  
19 call as the first and only response.”<sup>128</sup> The State Engineer further found that, “Nothing in  
20 the legislative history of A.B. 419 or the text of NRS 534.037 suggests that reductions in  
21 pumping have to be borne by the junior rights holders alone – if that were the case, the  
22 State Engineer could simply curtail junior rights – a power already granted by pre-existing

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24 <sup>125</sup>SEROA 499-526, appendix F is the preliminary table of all rights subject to the  
25 DVGMP and the share calculation for each right.

26 <sup>126</sup>150 P.3d 375 (N.M. 2006).

<sup>127</sup>SEROA 5.

<sup>128</sup>SEROA 6.





1 water law in NRS 534.110(6).<sup>129</sup> The State Engineer argues the plain language of NRS  
2 534.037 and NRS 534.110(7) “shows the legislature’s intent to allow local communities to  
3 come together and agree upon a solution for groundwater management other than strict  
4 application of prior appropriation, such as the Diamond Valley GMP.”<sup>130</sup> His reasoning is  
5 that since NRS 534.110(7) requires junior priority rights to be curtailed in favor of senior  
6 priority rights where a basin has been designated a CMA for at least 10 years, the  
7 legislature provided an exception to the curtailment requirement and the application of the  
8 prior appropriation doctrine where “ a groundwater management plan has been approved  
9 for the basin pursuant to NRS 534.037.”<sup>131</sup> Order 1302 held that “NRS 534.037 illustrates  
10 the unambiguous intent of the Legislature to allow a community to find its own solution to  
11 water shortage, including “out-of-the-box solutions,” “to resolve conditions leading to a  
12 CMA designation.”<sup>132</sup>

13 The community based solution approved by the State Engineer allows junior rights’  
14 holders who, by over pumping for more than 40 years have created the water shortage in  
15 Diamond Valley, to be able to approve a GMP that dictates to senior rights’ holders that  
16 they can no longer use the full amount of their senior rights. This is unreasonable. Taking  
17 it a step further, using the State Engineer’s analysis, a majority vote of water  
18 permits/certificates in Diamond Valley could approve a GMP whereby the senior rights  
19 holders are subject to a formula reducing their water rights by an even greater percentage  
20 of water than in the current DVGMP.

21 The State Engineer’s position is shared by the intervenors. Eureka County asserts  
22 (1) NRS 534.110(6) and (7) are not ambiguous; (2)that subsection (7) is a specific, special  
23 statute authorizing CMA’s which controls over subsection (6), a general subsection for

24 <sup>129</sup>SEROA 6-7.

25 <sup>130</sup>State Engineer’s answering brief 25.

26 <sup>131</sup>*Id.* 25-26.

<sup>132</sup>*Id.* 26.



1 CMA designated basins; and (3) thus regulation by priority is not required for at least 10  
2 consecutive years for a CMA designated basin “unless a groundwater management plan  
3 has been approved for the basin in that time frame.”<sup>133</sup> Eureka County maintains that  
4 subsection NRS 534.110(7) “is a plain and clear ‘exception’ to the general discretionary  
5 curtailment provision in subsection 6,”<sup>134</sup> concluding that “NRS 534.110(7) does not require  
6 the State Engineer to order senior rights be fulfilled before junior rights in the critical  
7 management area for at least 10 consecutive years after the designation.”<sup>135</sup> DNRPCA  
8 intervenors advocate that a community based GMP deviating from water right regulation  
9 contrary to the prior appropriation doctrine is authorized by NRS 534.110(7),<sup>136</sup> stating, “.  
10 .. the Legislature deliberately enacted legislation that created **an exception** to the seniority  
11 system in exactly the circumstances that exist here.”<sup>137</sup> (Emphasis added). The State  
12 Engineer and intervenors further agree that if a GMP has been approved, that the State  
13 Engineer cannot order any curtailment by priority for at least 10 years from the date the  
14 basin was designated a CMA. The foregoing interpretations, if sustained, would turn 150  
15 years of Nevada water law into chaos.

16 The State Engineer and intervenors have misinterpreted NRS 534.037 by using the  
17 *Lewis* case as either authority for or as being “instructive” as to the legislative intent behind  
18 NRS 534.037.<sup>138</sup> Now conceded by the State Engineer, the *Lewis* facts and holding are  
19 clearly distinguishable from the present case.<sup>139</sup> In *Lewis*, a U.S. Supreme Court mandated  
20 settlement agreement was litigated. The *Lewis* plan was presented to, and expressly

21 <sup>133</sup>Eureka County’s answering brief 12-13.

22 <sup>134</sup>*Id.*

23 <sup>135</sup>*Id.* 12.

24 <sup>136</sup>DNRPCA answering brief 11-12.

25 <sup>137</sup>*Id.* 11.

26 <sup>138</sup>State Engineer’s answering brief 29-3..

<sup>139</sup>*Id.*



1 ratified by the New Mexico Legislature.<sup>140</sup> The DVGMP has never been presented to or  
2 ratified by the Nevada Legislature. The State Engineer now claims the *Lewis* case is an  
3 example “that shows another state has utilized an innovative solution in order to resolve  
4 water shortages.” The State Engineer analyzes that, “NRS 534.037 was expressly ratified  
5 by the Nevada Legislature, and has a clear intent to allow local water users to agree to a  
6 solution other than curtailment by priority.”<sup>141</sup> Critically, there is no language, either express  
7 or implied in NRS 534.037, that allows for a GMP to be approved by a majority of right  
8 holders in a CMA that reduces the amount of water to which a senior right holder is entitled  
9 to beneficially use. The State Engineer amazingly argues that “Baileys, Sadler Ranch, and  
10 the Renners provide no authority for someone in the minority (*i.e. someone who did not*  
11 *want the GMP approved*) in a basin where a groundwater management plan is approved  
12 to act outside of the plan that was agreed to, per statute, by a majority of the holders of  
13 water permits and certificates, nor do they legitimately challenge the language of the  
14 statute providing for a simple majority to create a basin-wide groundwater management  
15 plan.”<sup>142</sup> By the State Engineer’s analysis of the legislative intent of NRS 534.037, a  
16 majority of junior right holders, who, by their collective knowing over appropriation of a  
17 water basin, combined with the State Engineer’s neglectful acquiescence, can vote to  
18 deprive a senior right holder’s use of all of its water, thus enabling the junior holders who  
19 created the crisis to continue to irrigate by using water which they were never entitled to  
20 use.<sup>143</sup> This is simply wrong.

21 The Nevada Supreme court has noted, “our adherence to long-statutory precedent  
22 provides stability on which those subject to this State’s law are entitled to rely.”<sup>144</sup> Every

23 <sup>140</sup>*Lewis*, 376.

24 <sup>141</sup>State Engineer’s answering brief 29.

25 <sup>142</sup>*Id.* 30.

26 <sup>143</sup>53.2percent of the senior priority water right owners did not support the DVGMP.

<sup>144</sup>*Happy Creek*, 1116.



1 water right holder under Nevada law was, and is, entitled to rely on the priority date of a  
2 valid water right they own to place all of the water under its right to beneficial use. Neither  
3 Nevada Supreme Court nor the Legislature have ever waived from this legal precedent.  
4 Nevada ranchers and farmers have always valued and defended their water right priority.  
5 Every rancher and farmer, until Order 1302, have relied on Nevada's stone etched security  
6 that their water right priority date entitled them to beneficially use the full amount of a valid  
7 water right prior to all those junior. Every Nevada rancher and farmer has known and  
8 presumably understood that if their water right was junior to others, that the senior right  
9 holder was entitled to satisfy the full amount of the senior right before the junior holder  
10 would be satisfied, even if it meant the junior holder had less water or no water at all to  
11 place to beneficial use.<sup>145</sup>

12 Clearly, there is no express language in either NRS 534.037 or NRS 534.110(7)  
13 stating a GMP can violate the doctrine of prior appropriation or that the doctrine is  
14 somehow abrogated. Knowing the long standing legislative and judicial adherence to  
15 Nevada's prior appropriation doctrine, the drafters could have easily inserted provisions in  
16 the CMA and/or GMP legislation giving the State Engineer the unequivocal authority to  
17 deviate from Nevada's "first-in-time, first-in-right" prior appropriation law if that was their  
18 intent.

19 "The legislature is 'presumed not to intend to overturn long-established principles  
20 of law' when enacting a statute"<sup>146</sup> When the language of a statute is unambiguous, courts  
21 are not to look beyond the statute itself when determining meaning.<sup>147</sup> The court finds that  
22 NRS 534.037 is not ambiguous. The court finds that the express language of NRS 534.037  
23 and NRS 534.110(7) do not allow a GMP to violate the doctrine of prior appropriation by

24 <sup>145</sup>Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS  
25 534.020(1).

26 <sup>146</sup>*Happy Creek*, 1111, citing *Shadow Wood Homeowners Ass'n. v. N.Y. Cmty. Bancorp. Inc.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016).

<sup>147</sup>*In re Orpheaus Trust*, 124 Nev. 170, 174, 179 P.3d 562 (2008)

1 reducing the amount of water a senior right holder is entitled to put to beneficial use under  
2 its permit/certificate.

3 The State Engineer and intervenors contend that once a GMP is approved, the  
4 State Engineer is not required to order curtailment by priority. This is true, provided a viable  
5 GMP without curtailment can be implemented in a CMA basin. However, there is no  
6 language in either NRS 534.110(7) or NRS 534.037 that prohibits or restricts some  
7 measure of curtailment by priority as part of a GMP. Likewise, should a GMP prove  
8 ineffective, there is no statutory language prohibiting curtailment during the term of the  
9 GMP or even during the 10 year period from when a basin is designated a CMA if such  
10 action is necessary to prevent continuing harm to an aquifer in crisis as exists in Diamond  
11 Valley. Sadler Ranch, the Renners, and the Baileys offered a number of possible plan  
12 alternatives that would not violate the prior appropriation doctrine, including, but not limited  
13 to, junior pumping reduction, a rotating water use schedule, cancellation of permits if calls  
14 for proof of beneficial use demonstrate non-use, restriction of new well pumping, establish  
15 a water market for the trade of water shares, a funded water rights purchase program,  
16 implementation of best farming practices, upgrade to more efficient sprinklers, and a  
17 shorter irrigation system.<sup>148</sup> Many of these alternatives were also considered by the  
18 Diamond Valley water users in developing the DVGMP and are recommendations, but not  
19 requirements of the DVGMP.<sup>149</sup>

20 “When a statute is susceptible to more than one reasonable, but inconsistent  
21 interpretation, the statute is ambiguous,” requiring the court “to look to statutory  
22 interpretation in order to discern the intent of the Legislature.”<sup>150</sup> The court must “look to  
23 legislative history for guidance.”<sup>151</sup> Such interpretation must be “in light of the policy and

24 <sup>148</sup>Sadler Ranch reply brief 7-9; Bailey opening brief 17-18; SEROA 252-254.

25 <sup>149</sup>SEROA 244-245.

26 <sup>150</sup>*Orpheas Trust*. 174, 175.

<sup>151</sup>*Id.* 175.





1 spirit of the law, and the interpretation shall avoid absurd results.”<sup>152</sup> “The court will resolve  
2 any doubt as to the Legislature’s intent in favor of what is reasonable.”<sup>153</sup>

3 Assuming arguendo, that NRS 534.037 and NRS 534.110(7) are ambiguous, the  
4 only reasonable interpretation is that the Nevada Legislature did not intend for the two  
5 statutes to allow a GMP to be implemented in that would violate Nevada’s doctrine of prior  
6 appropriation. As stated earlier, a GMP may employ any number of remedies to address  
7 a water crisis depending on the cause of a water basin’s decline, its hydrology, number of  
8 affected rights’ holders, together with any other of factors which may be specific to a  
9 particular CMA designated basin. These remedies could yield to the doctrine of prior  
10 appropriation, yet be effective given the particular circumstances of a CMA basin. But in  
11 some CMA basins, curtailment may be a necessary element of a GMP. Respondents  
12 assert that “NRS 534.037 illustrates the unambiguous intent of the Legislature to provide  
13 water users in a particular basin with the ability to come up with a community based  
14 solution to address a water shortage problem.”<sup>154</sup> The court agrees. Order 1302 observes  
15 that “the legislative history contains scarce direction concerning how a plan must be  
16 created or what the confines of any plan must be.”<sup>155</sup> Again, the court agrees. Yet, there  
17 is nothing in NRS 534.037’s legislative history that lends to an interpretation that a GMP  
18 can provide for senior water rights to be abrogated by junior permit and certificate holders  
19 whose conduct caused the CMA to be designated. The State Engineer’s finding that, “. . .  
20 NRS 534.037(1) does not require a GMP to impose reductions solely against junior  
21 rights . . .”<sup>156</sup> is a misinterpretation of the statute, not only facially, but in light of the  
22 legislative history as discussed below.

23 <sup>152</sup>*Id.*

24 <sup>153</sup>*Id.*

25 <sup>154</sup>State Engineer’s answering brief 26.

26 <sup>155</sup>SEROA 7.

<sup>156</sup>SEROA 8.



1 The State Engineer found that the legislative enactment of NRS 537.037, “expressly  
2 authorized a procedure to resolve a shortage problem,” “the State Engineer assumes that  
3 the Legislature was aware of Nevada’s prior appropriation doctrine when it enacted NRS  
4 534.037, and . . . interprets the statute as intending to create a solution other than a priority  
5 call as the first and only response.”<sup>157</sup> It is clear that the Legislature was aware of the prior  
6 appropriation doctrine before enacting NRS 534.037 and that the statute allows for a GMP  
7 in a particular basin that may not involve curtailment by priority as a workable solution. Yet,  
8 nowhere in the Legislative history of AB 419<sup>158</sup> is one word spoken that the proposed  
9 legislation will allow for a GMP whereby senior water right holder will have its right to use  
10 the full amount of its permit/certificate reduced or that the amount of water that shall be  
11 allocated will be on a basis other than by priority. In fact, just the opposite is true. At a  
12 Senate Committee on Government Affairs hearing held May 23, 2011, Assemblyman Pete  
13 Goicoechea stated:

14 “That junior users would bear the burden to develop a ‘conservation plan that  
15 actually brings that water basin back into some compliance.’”<sup>159</sup>

16 Assemblyman Goicoechea further stated:

17 “This bill allows people in overappropriated basins ten years to implement a  
18 water management plan to get basins in balance. People with junior rights  
19 will try to figure out how to conserve enough water under these plans. Water  
20 management plans will also limit litigation that occurs before the State  
21 Engineer regulates by priority. When the State Engineer regulates by  
22 priority, it starts a water war and finger – pointing occurs. This bill gives  
23 water right owners ten years to work through those issues.”<sup>160</sup>

24 Earlier, at the same committee hearing, Assemblyman Goicoechea gave examples  
25 of ways an over appropriated basin could be brought back in to balance through “planting  
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24 <sup>157</sup>SEROA 7.

25 <sup>158</sup>See DNRPCA intervenors’ addendum to answering brief 0079-0092.

26 <sup>159</sup>Minutes of Sen. Committee on Government Affairs, May 23, 2011, at 16.

<sup>160</sup>*Id.*



alternative crops, water conservation, or using different irrigation methods.”<sup>161</sup>

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Assemblyman Goicoechea went on to say:

“water rights in Nevada are first in time; first in right. The older the water right the higher the priority. We would address the newest permits and work backwards to get basins back into balance. The more aggressive people might be the newer right holders.”<sup>162</sup>

No one at any Legislative subcommittee hearings stated or implied that the proposed GMP legislation was “an exception to or otherwise abrogated Nevada’s doctrine of prior appropriation.” The court finds persuasive the steadfast commitment of Nevada’s courts and legislation upholding the doctrine of prior appropriation and the absence of any legislative history to the contrary for AB419.

There is a presumption against an intention to impliedly repeal where express terms to repeal are not used.<sup>163</sup> “When a subsequent statute entirely revises the subject matter contained in a prior statute, and the legislature intended the prior statute to be repealed, the prior statute is considered to be repealed by implication. This practice is heavily disfavored, and we will not consider a statute to be repealed by implication unless there is no other reasonable construction of the two statutes.”<sup>164</sup> Not only did NRS 534.034 and NRS 534.110(7) not revise the doctrine of prior appropriation, the Legislature did not even mention the subject.

“When construing statutes and rules together, this court will, if possible, interpret a rule or statute in harmony with other rules and statutes.”<sup>165</sup> The doctrine of prior appropriation can logically exist in harmony with NRS 534.037 and 534.110(7) and allow

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 13.

<sup>163</sup> *W. Realty Co. V City of Reno*, 63 Nev. 330, 344 (1946). citing *Ronnan v. City of Las Vegas*, 57, Nev, 332, 364-65 (1937)

<sup>164</sup> *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134 (2001) (internal citations omitted).

<sup>165</sup> *Hefetz v. Beavor*, 133 Nev. Adv. Op. 46, 197 P.3d 472, 475 (2017) citing *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).



1 for GMP's to address the water issues present in a particular CMA basin. The court finds  
2 that neither NRS 534.037 nor NRS 534.110(7) are in conflict with the prior appropriation  
3 doctrine.

4 More compelling evidence exists that the State Engineer knew that NRS 534.037  
5 and NRS 534.110(7) did not abrogate or repeal the doctrine of prior appropriation. On  
6 November 16, 2016, Legislative Bill S.B 73 was introduced on behalf of the State  
7 Engineer.<sup>166</sup> The proposed legislation sought to modify NRS 534.037 by giving authority  
8 to the State Engineer to consider a GMP, "limiting the quantity of water that may be  
9 withdrawn under any permit or certificate or from a domestic well on a basis other than  
10 priority, . . ." <sup>167</sup> Although SB 73 was never passed by the Legislature, the fact that the  
11 State Engineer specifically sought 2017 legislation authorizing a GMP to be approved that  
12 allowed for water to be withdrawn from a CMA basin on a basis other than priority,  
13 demonstrates the State Engineer's knowledge that NRS 534.037 and NRS 534.110(7) as  
14 enacted did not either expressly or impliedly allow for a GMP to violate Nevada's prior  
15 appropriation law.<sup>168</sup> The court finds that the AB 419's Legislative history did not intend to  
16 allow either NRS 534.037 or NRS 534.110(7) to repeal, modify, or abrogate Nevada's  
17 doctrine of prior appropriation.

18 I. THE DVGMP VIOLATES NRS 533.325 and NRS 533.345

19 NRS 533.325 states in pertinent part ". . . any person who wishes to appropriate any  
20 of the public waters, or to change the place of diversion, manner of use, or place of use of  
21 water already appropriated, shall before performing any work in connection with such  
22 appropriation, change in place of diversion or change in matter or place of use, apply to the  
23 State Engineer for a permit to do so." This is so because permits are tied to a single point

24 <sup>166</sup>Sadler Ranch addendum to reply brief, 001

25 <sup>167</sup>*Id.* 003.

26 <sup>168</sup>The State Engineer's knowledge that the DVGMP violated the doctrine of prior appropriation was also evidenced by his presentation at the 2016 Western States Engineer's Annual Conference. See Sadler Ranch opening brief, ex. 1, slide 21.



1 of diversion.<sup>169</sup> "Every application for a permit to change the place of diversion, manner of  
2 use or place of use of water already appropriated must contain such information as may be  
3 necessary to a full understanding of the proposed change, as may be required by the State  
4 Engineer."<sup>170</sup> The State Engineer can approve a temporary change if, among other  
5 requirements, "the temporary change does not impair the water rights held by other  
6 persons."<sup>171</sup> The filing of an application under NRS 533.325 allows the State Engineer to  
7 determine what, if any, potential adverse impact is created by the proposed change in well  
8 location, location of the use of the water or manner of the proposed use. The State  
9 Engineer is required to review a temporary change application regardless of the intended  
10 use of the water to determine if it is in the public interest and does not impact the water  
11 rights used by others.<sup>172</sup> If a potential negative impact is found, the application could be  
12 rejected.<sup>173</sup> Other rights' holders who may be affected by the temporary change could  
13 protest the application if notice were given by the State Engineer.<sup>174</sup> No protest and notice  
14 provisions at the administrative level exist in the DVGMP for a temporary change of use, or  
15 place of use, or manner of use for less than one year.<sup>175</sup>

16 Under the DVGMP, the State Engineer is not required to investigate a proposed  
17 change in the place or manner of use and the transfer becomes automatic after 14 days  
18 from submission.<sup>176</sup> The DVGMP provides that the groundwater withdrawn from Diamond

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20 <sup>169</sup>NRS 533.330

21 <sup>170</sup>NRS 533.345(1).

22 <sup>171</sup>NRS 533.345(2).

23 <sup>172</sup>NRS 533.345(2)(3).

24 <sup>173</sup>See NRS 533.370(2).

25 <sup>174</sup>NRS 533.360.

26 <sup>175</sup> The only remedy is a petition for judicial review under NRS 534.450.

<sup>176</sup>SEROA 237, sec. 14.7.



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Valley can be used “for any beneficial purpose under Nevada law . . .”<sup>177</sup> Under NRS 533.330, “No application shall be for the water of more than one source to be used for more than one purpose.” The only Diamond Valley water subject to the DVGMP is that which is subject to permits or certificates issued for irrigation purposes.<sup>178</sup> The DVGMP allows for the irrigation sourced shares to be used for “any other beneficial purpose under Nevada water law”.<sup>179</sup> The DVGMP fails to take into consideration that the transferee of the shares could use the water for other beneficial uses that may consume the entirety of the water being transferred under the shares without any return water or recharge to the Diamond Valley basin.<sup>180</sup> Water placed to beneficial use for irrigation results in some return or recharge to the aquifer. There is no State Engineer oversight on the impact of the transfer of water shares for the proposed new well or place or manner of use unless the new well or additional withdrawals from an existing well exceeds the volume or flow rate initially approved for the base permit.<sup>181</sup>

The DVGMP and Order 1302 state the DVGMP was modeled after NRS 533.345(2)(4).<sup>182</sup> The State Engineer is incorrect. Under the DVGMP, the State Engineer does not review a different use of the water shares transferred because the DVGMP allows water shares to be used for any beneficial purpose under Nevada law, not solely for irrigation purposes.<sup>183</sup> Under the DVGMP the State Engineer cannot deny the transfer of shares to an existing well, unless the transfer would exceed the well’s flow rate and conflicts

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<sup>177</sup>SEROA 234, sec. 13.8.

<sup>178</sup>SEROA 228, sec. 8.1

<sup>179</sup>SEROA 234, see 13.8.

<sup>180</sup>Such beneficial uses could include mining and municipal uses; see NRS 533.030.

<sup>181</sup>SEROA 237, sec. 14.7, 14.8.

<sup>182</sup>SEROA 237, n.20; SEROA 009.

<sup>183</sup>SEROA 237, sec. 14.7.

1 with existing rights.<sup>184</sup> The State Engineer's vital statutory oversight authority to ensure the  
2 temporary change is in the public interest or that the change does not impair water rights  
3 held by other persons is otherwise lost. The court finds that the DVGMP and Order 1302.  
4 violate NRS 533.325 and NRS 533.345, The court finds Order 1302 is arbitrary and  
5 capricious.

### 6 CONCLUSION

7 The court has empathy for the plight of the ranchers and farmers in Diamond Valley  
8 given the distressed state of the basin's aquifer. It is unfortunate that the State Engineer  
9 and/or the Nevada Legislature did not vigorously intervene 40 years ago when effects of  
10 over appropriation were first readily apparent.<sup>185</sup> That being said, the DVGMP is contrary  
11 to Nevada water laws, laws that this Court will not change. The court is not bound by the  
12 State Engineer's interpretation of Nevada water law.

13 Order 1302 is arbitrary and capricious.

14 Good cause appearing,

15 IT IS HEREBY ORDERED that the petition for review of Nevada State Engineer's  
16 Order No. 1302 filed by Timothy Lee Bailey and Constance Marie Bailey and Fred Bailey  
17 and Carolyn Bailey in case No. CV-1902-350, is GRANTED.

18 IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by  
19 Sadler Ranch in case no. CV-1902-349, is GRANTED.

20 IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by Ira  
21 R. Renner and Montira Renner in Case No. CV-1902-348, is GRANTED.

22 <sup>184</sup>SEROA 237, sec. 14.9.

23 <sup>185</sup>As noted by Sadler Ranch, in 1982, State Engineer Peter Morros recognized that  
24 "what is happening right now in Diamond Valley [declining groundwater levels affecting  
25 spring flows] was predicted . . . It was predicted in 1968 . . . almost to the 'T'".  
26 Transcript of proceedings at 42; 17-22, In the Matter of Evidence and Testimony  
Concerning Possible Curtailment of Pumpage of Groundwater in Diamond Valley,  
Eureka, Nevada (May 24, 1982). Morros also stated "there was a tremendous amount  
of pressure put on the State Engineer's Office to issue permits, far in excess of what we  
had identified at the time was their perennial yield." *Id.* at 41, 1.6-10. Sadler Ranch  
opening brief, 2-3.



DATED this 23<sup>rd</sup> day of April, 2020.

  
DISTRICT JUDGE

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SEVENTH JUDICIAL DISTRICT COURT  
GARY D. FAIRMAN  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA

