

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

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

Appellants,

v.

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

Respondents.

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

**JOINT APPENDIX
VOLUME XII**

LEONARD LAW, PC
Debbie Leonard (#8260)
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775-964-4656
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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

DATE	DOCUMENT	VOLUME	PAGE RANGE
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

DATE	DOCUMENT	VOLUME	PAGE RANGE
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

DATE	DOCUMENT	VOLUME	PAGE RANGE
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

DATE	DOCUMENT	VOLUME	PAGE RANGE
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 Intervenor's Notice of Appeal	XII	JA2508-2554
05/14/2020	DNRPCA Intervenor's 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 Intervenor's 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 Intervenor's Ex Parte Motion for Order Shortening Time; Order Granting DNRPCA Intervenor's Motion for Temporary Stay Pending Decision on Intervenor's Motion for Stay Pending Appeal	XIV	JA2803-2807
05/21/2020	Eureka County's Notice of Appeal	XIV	JA2808-2811

DATE	DOCUMENT	VOLUME	PAGE RANGE
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

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10/23/2019	Answering Brief of Eureka County	VIII	JA1675-1785
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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
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12/11/2019	Transcript of Proceedings, Oral Argument Volume II	XI	JA2290-2365
05/28/2019	Unopposed Motion to Extend Time to File the State Engineer's Record on Appeal	I	JA0225-0232

AFFIRMATION

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

Date: September 23, 2020

/s/ Debbie Leonard
Debbie Leonard (Nevada Bar No. 8260)
LEONARD LAW, PC
955 S. Virginia Street, Suite 220
Reno, NV 89502
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Attorney for DNRPCA Appellants

CERTIFICATE OF SERVICE

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

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

1 Case No.: CV1902-348 (consolidated with Case Nos. CV1902-349 and CV-1902-350)

2 Dept. No.: 2

No. _____ FILED

3 APR 30 2020

4
5 ~~By~~ EUREKA COUNTY CLERK

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

8
9 TIMOTHY LEE & CONSTANCE MARIE
10 BAILEY; FRED & CAROLYN BAILEY;
11 IRA R. & MONTIRA RENNER; and
12 SADLER RANCH, LLC;

12 Petitioners,

13 vs.

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

17 Respondent, and

18 EUREKA COUNTY; and DIAMOND
19 NATURAL RESOURCES PROTECTION
20 AND CONSERVATION ASSOCIATION,
21 et al.,

21 Intervenors.

NOTICE OF ENTRY OF ORDER

22
23 TO: All Parties and their Counsel.

24 **PLEASE TAKE NOTICE** that on April 27, 2020, the above entitled court entered its Finding
25 of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review in the above captioned
26 action, a copy of which is attached hereto as Exhibit 1.

27 //

RECEIVED

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APR 30 2020

EUREKA COUNTY CLERK JA2421

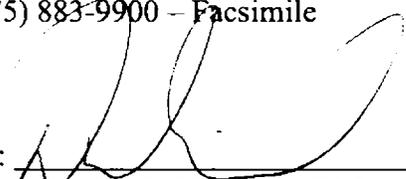
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 - Telephone
(775)883-9900 - Facsimile

AFFIRMATION
Pursuant to NRS 239B.030(4)

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

DATED this 29th day of April, 2020.

TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

By: 

DAVID H. RIGDON, ESQ.
Nevada State Bar No. 13567
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
*Attorneys for Sadler Ranch, LLC and
Ira R. & Montira Renner*

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CERTIFICATE OF SERVICE

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

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

James N. Bolotin, Esq.
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jbolotin@ag.nv.gov

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John E. Marvel, Esq.
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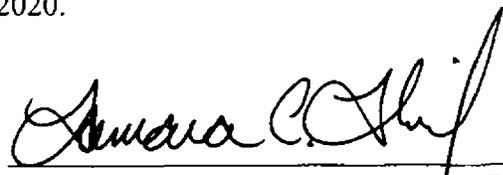
Paul Paschelke, Esq.
First Commerce, LLC
paulpaschelke@firstcommercelc.com

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

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

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

DATED this 29th day of April, 2020.


Employee of TAGGART & TAGGART, LTD.

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EXHIBIT 1

EXHIBIT 1

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RELEVANT PROCEDURAL HISTORY

On January 11, 2019, Jason King, P.E., Nevada State Engineer¹ ("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,² 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

¹Subsequent 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.

²Daniel 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



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, 2019.³ 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 ³On 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 granting 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.⁴ The
12 126,000 af exclude other groundwater rights such as domestic use, stock water, and
13 mining.⁵ The total duty of ground water rights that impact the aquifer is close to 130,265
14 af.⁶ 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.⁷

17 The unbridled pumping in Diamond Valley has caused the groundwater level to
18 decline approximately 2 feet annually since 1960.⁸ 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 ⁴SEROA 3.

23 ⁵*Id.*

24 ⁶*Id.*

25 ⁷*Id.*; State Engineer's answering brief 4-5.

26 ⁸SEROA 59, Water Resource Bulletin no. 35 at 26.

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

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

⁹SEROA 328.

¹⁰State Engineer ruling 6290, 23-31.

¹¹NRS 534.110(7).

¹²NRS 534.037.

¹³SEROA 3, 134-138, 226.

¹⁴The 2019 Nevada Legislature granted relief to domestic wells to withdraw up to 0.5 af 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 534.037.¹⁵ 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").¹⁶ 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.¹⁷ 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."¹⁸ 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."¹⁹ The Young report was "developed in consultation with water users, administrators, and community leaders in Diamond Valley and Humboldt Basin."²⁰ 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."²¹ "If implemented properly, no taking of property rights

¹⁵NRS 534.110(7), SEROA 225.

¹⁶SEROA 226.

¹⁷SEROA 226, 277-475.

¹⁸SEROA 227 N8, 294.

¹⁹Bailey reply addendum 2, SEROA 294.

²⁰Bailey reply addendum 3.

²¹*Id.* at 1.

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occurs.²²

The DVGMP, a hybrid²³ 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.²⁴ Also excluded from the DVGMP are domestic wells, stock water, municipal, commercial groundwater rights and mining groundwater rights without an irrigation source permit.²⁵ The DVGMP applies to permit or certificated underground irrigation permits and underground irrigation rights that have an agricultural base right in Diamond Valley.²⁶

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.²⁷ The spread between the most senior and junior groundwater rights is 20 %.²⁸ 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.²⁹ 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

²²*Id.*

²³SEROA 313.

²⁴SEROA 5, 220, 229, 240-241.

²⁵SEROA 240-241.

²⁶SEROA 11-12, 218, 220, 228-229.

²⁷SEROA 5, 218, 232.

²⁸SEROA 232.

²⁹SEROA 218, 234-235.

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1 share.³⁰ 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.³¹ 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.³² 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.³³ 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 DVGMP³⁴ 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 ³⁰SEROA 232.

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

23 ³²SEROA 499-509.

24 ³³SEROA 234-236, 510 (appendix G to DVGMP).

25 ³⁴*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.³⁵ 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.³⁶

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.³⁷ 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.³⁸ 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.³⁹

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.⁴⁰ It is undisputed by the State Engineer that Sadler Ranch's spring flows have diminished as a

³⁵*Id.*, SEROA 5, 218.

³⁶SEROA 510. See State Engineer's oral argument hearing transcript pg. 152.

³⁷*Id.*

³⁸SEROA 5, 218, 234-235.

³⁹*Id.*

⁴⁰Sadler 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).

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

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

After a public hearing held on October 30, 2018, the State Engineer issued Order 1302. Order 1302 states, "while it 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,' the following analysis demonstrates that the legislature's enactment of NRS 534.037 demonstrates legislative intent to permit action in the alternative to strict priority regulation."⁴⁶ The State Engineer and all intervenors who filed briefs and orally argued this

⁴¹Sadler Ranch opening brief 4, *Id.* 152-164; SEROA 593.

⁴²Bailey opening brief 4, SEROA 500,506.

⁴³Bailey opening brief 4, SEROA 536-538.

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

⁴⁵NRS 534.020.

⁴⁶SEROA 6.

1 case agree that the DVGMP deviates from the prior appropriation doctrine.⁴⁷

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.⁴⁸ The proceedings must be informal and summary.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² When
13 reviewing the State Engineer's findings, factual determinations will not be disturbed on
14 appeal if supported by substantial evidence.⁵³ Substantial evidence has been defined as
15 "that which a reasonable mind might accept as adequate to support a conclusion."⁵⁴ With

16 _____
17 ⁴⁷State Engineer's answering brief 26, DNRPCA intervenors' answering brief 11-13,
18 Eureka County's answering brief 5, 11.

19 ⁴⁸ NRS 533.450(1).

20 ⁴⁹ NRS 533.450(2).

21 ⁵⁰ NRS 533.450(10).

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

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

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

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

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

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

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

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

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

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

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

⁵⁸ Black's Law Dictionary, Arbitrary (10th ed. 2014).

⁵⁹ Black's Law Dictionary, Capricious (10th ed 2014).

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

⁶¹ *In Re State Engineer Ruling no. 5823 at 239*, (internal citations omitted).

⁶² NRS 534.037(3).

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

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

In determining whether to approve a GMP, NRS 534.037(2) requires the State Engineer to consider: (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 domestic wells; (f) whether a groundwater management plan already exists to the basin; (g) any other factors deemed relevant by the State Engineer. The State Engineer must ultimately decide whether a proposed GMP “sets forth the necessary steps for removal of the basin’s designation as a CMA.”⁶⁵ Petitioners argue that (1) the State Engineer failed to consider the NRS 534.037(2) factors, and (2) that the DVGMP failed to demonstrate that decreased pumping over the 35 year life of the plan will result in “stabilized groundwater

⁶³Sadler Ranch opening brief 34; Sadler Ranch opposition to motion in limine filed June 24, 2019; Bailey opposition to motion in limine filed June 24, 2019.

⁶⁴Order granting motion in limine 10.

⁶⁵NRS 534.037(1).

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1 levels⁶⁶ based on the evidence presented at and after the public hearing. Petitioners
 2 submit that the DVGMP fails to bring the Diamond Valley basin into equilibrium within 10
 3 years and over pumping will continue even at the 35th year of the plan.⁶⁷ Order 1302,
 4 describes the State Engineer's review of the NRS 534.037(2) factors in relation to the
 5 DVGMP.⁶⁸ The DVGMP's review of the factors is in Appendices D-I.

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

20
 21 _____
 22 ⁶⁶Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief
 15-20.

23 ⁶⁷*Id.*

24 ⁶⁸SEROA 14-17.

25 ⁶⁹SEROA 17-18.

26 ⁷⁰SEROA 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.⁷¹ 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."⁷² 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"⁷³ 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.⁷⁴ The court agrees with petitioners. However, the State Engineer, using his knowledge and experience, and based on the evidence presented at the public hearing,

⁷¹Sadler Ranch opening brief 13.

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

⁷³NRS 534.037(1).

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

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

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

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

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

⁷⁶SEROA 18.

⁷⁷See 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.⁷⁸ 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.⁷⁹ 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,⁸⁰ but "to allow flexibility by users to determine when to use their limited allocation and to encourage water conservative practices."⁸¹ 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.⁸² The court finds the DVGMP is not required to comply with and does not violate NRS 534.250 to NRS 534.340.

⁷⁸NRS 534.250-534.340.

⁷⁹*Id.*

⁸⁰SEROA 8, 9.

⁸¹*Id.*

⁸²SEROA 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 . . .”⁸³ 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.⁸⁴ 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,⁸⁵ or 53.2 percent, was a majority of the permits or certificates in the
 12 basin.⁸⁶ The DVGMP petition was only sent to groundwater permit holders to be
 13 considered and voted upon.⁸⁷ 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.⁸⁸ 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.⁸⁹ The court agrees that all certificate and

19 ⁸³NRS 534.037(1).

20 ⁸⁴SEROA 3.

21 ⁸⁵Those signatures by a confirmed owner of record. *Id.*

22 ⁸⁶SEROA 3.

23 ⁸⁷SEROA 148.

24 ⁸⁸State 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) . . .”

26 ⁸⁹Bailey 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.⁹⁰

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.⁹¹ Under petitioners' interpretation,⁹² if one permit or certificate was owned by 25 owners, there

⁹⁰SEROA 3.

⁹¹SEROA 3.

⁹²Sadler 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.⁹³ 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.

⁹³SEROA 3-4.

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F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

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

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

⁹⁴NRS 533.035.

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

⁹⁶SEROA 232-236, sec. 12,13

⁹⁷SEROA 9.

⁹⁸*Id.*

⁹⁹SEROA 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.¹⁰⁰ 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 1st 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.¹⁰¹ Even though the DVGMP caps the amount of water the first year of the plan at the "ceiling of actual pumping (76,000 afa)",¹⁰² 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

¹⁰⁰SEROA 218, 219, 221, 232-33 3m 461, 465.

¹⁰¹SEROA 467.

¹⁰²SEROA 12.

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

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

It is undisputed that the Baileys and Renners have senior vested surface water rights that have been adversely impacted by the 40 years plus of overpumping¹⁰⁵. Respondent and intervenors agree that the DVGMP was not developed for mitigation purposes, but to reduce pumping, bring equilibrium to the Diamond Valley aquifer in 35 years, and cause the CMA designation to be removed.¹⁰⁶ The State Engineer's position is that the GMP "is not a mitigation plan, and NRS 534.037 does not require the proponents of a groundwater management plan or the State Engineer to consider the alleged effects on surface water rights or mitigate those alleged effects."¹⁰⁷ The State Engineer is wrong. A GMP must consider the effect it will have on surface water rights. In *Pyramid Lake Paiute Tribe v. Ricci* 126 Nev. 531.524 (2010), the Nevada Supreme Court acknowledged the State Engineer's ruling that "[t]he perennial yield of a hydrological basin is the equilibrium amount or maximum amount of water that can be safely used without depleting the source." Moreover, [t]he maximum amount of natural discharge that can be feasibly captured . . . [is the] perennial yield . . . the maximum amount of withdrawal

¹⁰³SEROA 2, 9, 10.

¹⁰⁴SEROA 234; see sec. 13.2

¹⁰⁵Sadler Ranch had impacted senior vested rights that have been mitigated by certificate.

¹⁰⁶State Engineer's answering brief, 36.

¹⁰⁷*Id.*. This position is also shared by the DNRPCA intervenors. DNRPCA answering brief, 24; and Eureka County, Eureka County answering brief, 22.

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

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

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

¹⁰⁸SEROA 510.

¹⁰⁹SEROA 3.

¹¹⁰*Id.*

¹¹¹Permits 82268, 81270, 63497, 81825, 82572, 87661.



1 the end of the plan"¹¹² but that "the pumping reduction rate was selected by agreement of
 2 the GMP authors, . . ."¹¹³ 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.¹¹⁴ 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.¹¹⁵

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*,¹¹⁶ 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.¹¹⁷ The priority of a water right is the most important feature.¹¹⁸ Court's

20 ¹¹²SEROA 16.

21 ¹¹³*Id.*

22 ¹¹⁴Eureka County answering brief 22-23.

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

25 ¹¹⁶749 P.2d 324, 330-34 (Cal 1988) cert. denied 488 U.S. 834 (1988).

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

¹¹⁸See *Gregory J. Hobbs, Jr., Priority*. The Most Misunderstood Stick in the Bundle, 32
 Env'tl .L. 37(2002).

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1 have stated, "priority in a water right [as] property in itself."¹¹⁹ 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,"¹²⁰ the Nevada Supreme Court has stated, "a water
 4 right 'is regarded and protected as real property."¹²¹ 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."¹²² 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."¹²³ 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"¹²⁴
 20 which has allowed a senior right holder to beneficially use all of water allocated in its right

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

22 ¹²⁰*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).

24 ¹²¹*Town of Eureka*, 167.

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

¹²³SEROA 8.

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

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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.¹²⁵ Relying on a New Mexico Supreme Court case,
13 *State Engineer v. Lewis*,¹²⁶ Order 1302 held that NRS 534.037 "demonstrates legislative
14 intent to permit action in the alternative to strict priority regulation."¹²⁷ 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."¹²⁸ 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

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

26 ¹²⁶150 P.3d 375 (N.M. 2006).

¹²⁷SEROA 5.

¹²⁸SEROA 6.

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1 water law in NRS 534.110(6).¹²⁹ 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."¹³⁰ 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."¹³¹ 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."¹³²

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 ¹²⁹SEROA 6-7.

25 ¹³⁰State Engineer's answering brief 25.

26 ¹³¹*Id.* 25-26.

¹³²*Id.* 26.

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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."¹³³ 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,"¹³⁴ 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."¹³⁵ 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),¹³⁶ stating, ".
 10 . . the Legislature deliberately enacted legislation that created an **exception** to the seniority
 11 system in exactly the circumstances that exist here."¹³⁷ (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 534.037.¹³⁸ Now conceded by the State Engineer, the *Lewis* facts and holding are
 19 clearly distinguishable from the present case.¹³⁹ In *Lewis*, a U.S. Supreme Court mandated
 20 settlement agreement was litigated. The *Lewis* plan was presented to, and expressly

21 ¹³³Eureka County's answering brief 12-13.

22 ¹³⁴*Id.*

23 ¹³⁵*Id.* 12.

24 ¹³⁶DNRPCA answering brief 11-12.

25 ¹³⁷*Id.* 11.

26 ¹³⁸State Engineer's answering brief 29-3..

¹³⁹*Id.*

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

The Nevada Supreme court has noted, "our adherence to long-statutory precedent provides stability on which those subject to this State's law are entitled to rely."¹⁴⁴ Every

¹⁴⁰*Lewis*, 376.

¹⁴¹State Engineer's answering brief 29.

¹⁴²*Id.* 30.

¹⁴³53.2percent of the senior priority water right owners did not support the DVGMP.

¹⁴⁴*Happy Creek*, 1116.

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

Clearly, there is no express language in either NRS 534.037 or NRS 534.110(7) stating a GMP can violate the doctrine of prior appropriation or that the doctrine is somehow abrogated. Knowing the long standing legislative and judicial adherence to Nevada's prior appropriation doctrine, the drafters could have easily inserted provisions in the CMA and/or GMP legislation giving the State Engineer the unequivocal authority to deviate from Nevada's "first-in-time, first-in-right" prior appropriation law if that was their intent.

"The legislature is 'presumed not to intend to overturn long-established principles of law' when enacting a statute"¹⁴⁶ When the language of a statute is unambiguous, courts are not to look beyond the statute itself when determining meaning.¹⁴⁷ The court finds that NRS 534.037 is not ambiguous. The court finds that the express language of NRS 534.037 and NRS 534.110(7) do not allow a GMP to violate the doctrine of prior appropriation by

¹⁴⁵Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS 534.020(1).

¹⁴⁶*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).

¹⁴⁷*In re Orpheus Trust*, 124 Nev. 170, 174, 179 P.3d 562 (2008)

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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.¹⁴⁸ 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.¹⁴⁹

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."¹⁵⁰ The court must "look to
 23 legislative history for guidance."¹⁵¹ Such interpretation must be "in light of the policy and

24 ¹⁴⁸Sadler Ranch reply brief 7-9; Bailey opening brief 17-18; SEROA 252-254.

25 ¹⁴⁹SEROA 244-245.

26 ¹⁵⁰*Orpheas Trust*. 174, 175.

¹⁵¹*Id.* 175.

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1 spirit of the law, and the interpretation shall avoid absurd results.”¹⁵² “The court will resolve
 2 any doubt as to the Legislature’s intent in favor of what is reasonable.”¹⁵³

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.”¹⁵⁴ 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.”¹⁵⁵ 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 . . .”¹⁵⁶ is a misinterpretation of the statute, not only facially, but in light of the
 22 legislative history as discussed below.

23 ¹⁵²*Id.*

24 ¹⁵³*Id.*

25 ¹⁵⁴State Engineer’s answering brief 26.

26 ¹⁵⁵SEROA 7.

¹⁵⁶SEROA 8.

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The State Engineer found that the legislative enactment of NRS 537.037, "expressly authorized a procedure to resolve a shortage problem," "the State Engineer assumes that the Legislature was aware of Nevada's prior appropriation doctrine when it enacted NRS 534.037, and . . . interprets the statute as intending to create a solution other than a priority call as the first and only response."¹⁵⁷ It is clear that the Legislature was aware of the prior appropriation doctrine before enacting NRS 534.037 and that the statute allows for a GMP in a particular basin that may not involve curtailment by priority as a workable solution. Yet, nowhere in the Legislative history of AB 419¹⁵⁸ is one word spoken that the proposed legislation will allow for a GMP whereby senior water right holder will have its right to use the full amount of its permit/certificate reduced or that the amount of water that shall be allocated will be on a basis other than by priority. In fact, just the opposite is true. At a Senate Committee on Government Affairs hearing held May 23, 2011, Assemblyman Pete Goicoechea stated:

"That junior users would bear the burden to develop a 'conservation plan that actually brings that water basin back into some compliance."¹⁵⁹

Assemblyman Goicoechea further stated:

"This bill allows people in overappropriated basins ten years to implement a water management plan to get basins in balance. People with junior rights will try to figure out how to conserve enough water under these plans. Water management plans will also limit litigation that occurs before the State Engineer regulates by priority. When the State Engineer regulates by priority, it starts a water war and finger – pointing occurs. This bill gives water right owners ten years to work through those issues."¹⁶⁰

Earlier, at the same committee hearing, Assemblyman Goicoechea gave examples of ways an over appropriated basin could be brought back in to balance through "planting

¹⁵⁷SEROA 7.

¹⁵⁸See DNRPCA intervenors' addendum to answering brief 0079-0092.

¹⁵⁹Minutes of Sen. Committee on Government Affairs, May 23, 2011, at 16.

¹⁶⁰*Id.*

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alternative crops, water conservation, or using different irrigation methods.”¹⁶¹

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.”¹⁶²

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.¹⁶³ “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.”¹⁶⁴ 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.”¹⁶⁵ The doctrine of prior appropriation can logically exist in harmony with NRS 534.037 and 534.110(7) and allow

¹⁶¹ *Id.*

¹⁶² *Id.* at 13.

¹⁶³ *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)

¹⁶⁴ *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134 (2001) (internal citations omitted).

¹⁶⁵ *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.¹⁶⁶ 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, . . ."¹⁶⁷ 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.¹⁶⁸ 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 ¹⁶⁶Sadler Ranch addendum to reply brief, 001

25 ¹⁶⁷*Id.* 003.

26 ¹⁶⁸The 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.

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1 of diversion.¹⁶⁹ "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."¹⁷⁰ 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."¹⁷¹ 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.¹⁷² If a potential negative impact is found, the application could be
 12 rejected.¹⁷³ Other rights' holders who may be affected by the temporary change could
 13 protest the application if notice were given by the State Engineer.¹⁷⁴ 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.¹⁷⁵

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.¹⁷⁶ The DVGMP provides that the groundwater withdrawn from Diamond

19
 20 ¹⁶⁹NRS 533.330

21 ¹⁷⁰NRS 533.345(1).

22 ¹⁷¹NRS 533.345(2).

23 ¹⁷²NRS 533.345(2)(3).

24 ¹⁷³See NRS 533.370(2).

25 ¹⁷⁴NRS 533.360.

26 ¹⁷⁵ The only remedy is a petition for judicial review under NRS 534.450.

¹⁷⁶SEROA 237, sec. 14.7.

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Valley can be used “for any beneficial purpose under Nevada law . . .”¹⁷⁷ 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.¹⁷⁸ The DVGMP allows for the irrigation sourced shares to be used for “any other beneficial purpose under Nevada water law”.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

The DVGMP and Order 1302 state the DVGMP was modeled after NRS 533.345(2)(4).¹⁸² 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.¹⁸³ 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

¹⁷⁷SEROA 234, sec. 13.8.

¹⁷⁸SEROA 228, sec. 8.1

¹⁷⁹SEROA 234, see 13.8.

¹⁸⁰Such beneficial uses could include mining and municipal uses; see NRS 533.030.

¹⁸¹SEROA 237, sec. 14.7, 14.8.

¹⁸²SEROA 237, n.20; SEROA 009.

¹⁸³SEROA 237, sec. 14.7.

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with existing rights.¹⁸⁴ The State Engineer's vital statutory oversight authority to ensure the temporary change is in the public interest or that the change does not impair water rights held by other persons is otherwise lost. The court finds that the DVGMP and Order 1302 violate NRS 533.325 and NRS 533.345, The court finds Order 1302 is arbitrary and capricious.

CONCLUSION

The court has empathy for the plight of the ranchers and farmers in Diamond Valley given the distressed state of the basin's aquifer. It is unfortunate that the State Engineer and/or the Nevada Legislature did not vigorously intervene 40 years ago when effects of over appropriation were first readily apparent.¹⁸⁵ That being said, the DVGMP is contrary to Nevada water laws, laws that this Court will not change. The court is not bound by the State Engineer's interpretation of Nevada water law.

Order 1302 is arbitrary and capricious.

Good cause appearing,

IT IS HEREBY ORDERED that the petition for review of Nevada State Engineer's Order No. 1302 filed by Timothy Lee Bailey and Constance Marie Bailey and Fred Bailey and Carolyn Bailey in case No. CV-1902-350, is GRANTED.

IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by Sadler Ranch in case no. CV-1902-349, is GRANTED.

IT IS HEREBY FURTHER ORDERED that the petition for judicial review filed by Ira R. Renner and Montira Renner in Case No. CV-1902-348, is GRANTED.

¹⁸⁴SEROA 237, sec. 14.9.

¹⁸⁵As noted by Sadler Ranch, in 1982, State Engineer Peter Morros recognized that "what is happening right now in Diamond Valley [declining groundwater levels affecting spring flows] was predicted . . . It was predicted in 1968 . . . almost to the 'T'". 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 23rd day of April, 2020.

Gary D. Fairman
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Affirmation Pursuant to NRS 239B.030(4)

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

DATED April **21**, 2020.

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

By:



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CERTIFICATE OF SERVICE

I hereby certify that on April 29th, 2020, pursuant to the Court's April 25, 2109 Order, a true and correct copy of **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSION OF LAW, ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW** was sent via electronic mail to the following:

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No. _____ FILED

APR 27 2020

By: WJ EUREKA COUNTY CLERK

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Case No. CV-1902-348 consolidated with case nos.
CV-1902-349 and CV-1902-350

Dept No. 2

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

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

Petitioners,

vs.

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

Respondent,

and

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

Intervenors.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, ORDER GRANTING PETITIONS
FOR JUDICIAL REVIEW

RECEIVED

APR 27 2020

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
DISTRICT JUDGE
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RELEVANT PROCEDURAL HISTORY

On January 11, 2019, Jason King, P.E., Nevada State Engineer¹ ("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,² 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

¹Subsequent 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.

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

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the record on appeal in the district court to the State Engineer's record on appeal filed June 7, 2019. On September 16, 2019, the Baileys filed opening brief of Bailey petitioners ("Bailey opening brief"). On October 23, 2019, the State Engineer filed respondent State Engineer's answering brief ("State Engineer's answering brief"). On October 23, 2019, Diamond Natural Resource Protection and Conservation Association ("DNRPCA") filed DNRPCA intervenors' answering brief ("DNRPCA answering brief") and DNRCPA intervenors' addendum to answering brief ("DNRPCA addendum"). Intervenor, Eureka County filed answering brief of Eureka County ("Eureka County's answering brief") on October 23, 2019.³ DNRPCA and Eureka County are collectively referred to a "intervenors". On November 29, 2019, Sadler Ranch filed reply brief of petitioners' Sadler Ranch, LLC and Ira R. and Montira Renner ("Sadler Ranch reply brief") and Sadler Ranch, LLC and Ira R. and Montira Renner's addendum to reply brief ("Sadler Ranch reply addendum"). On November 26, 2019, the Baileys filed reply brief of Bailey petitioners, ("Bailey reply brief").

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

³On September 6, 2019, the court entered an order granting motion to intervene to Diamond Valley Ranch, LLC, a Nevada limited liability company, American First Federal, Inc., a Nevada Corporation, Berg Properties California, LLC, a Nevada limited liability company, and Blanco Ranch, LLC., a Nevada limited liability company. On July 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.

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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.⁴ The
12 126,000 af exclude other groundwater rights such as domestic use, stock water, and
13 mining.⁵ The total duty of ground water rights that impact the aquifer is close to 130,265
14 af.⁶ 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.⁷

17 The unbridled pumping in Diamond Valley has caused the groundwater level to
18 decline approximately 2 feet annually since 1960.⁸ The over pumping by junior irrigators
19 has caused senior claimed vested water rights holders' naturally flowing springs to dry up
20 in northern DiamondValley. Big Shipley Springs, to which Sadler Ranch has a claim of

21 _____
22 ⁴SEROA 3.

23 ⁵*Id.*

24 ⁶*Id.*

25 ⁷*Id.*; State Engineer's answering brief 4-5.

26 ⁸SEROA 59, Water Resource Bulletin no. 35 at 26.

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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.⁹ 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."¹⁰

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.¹¹ 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.¹² 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.¹³ 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,¹⁴ be restricted in that basin to conform to priority rights, unless a

19 _____
 20 ⁹SEROA 328.

21 ¹⁰State Engineer ruling 6290, 23-31.

22 ¹¹NRS 534.110(7).

23 ¹²NRS 534.037.

24 ¹³SEROA 3, 134-138, 226.

25 ¹⁴The 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).

1 groundwater management plan has been approved for the basin pursuant to NRS
2 534.037.¹⁵ This process is curtailment.

3 Groundwater right holders and vested water right holders began to meet in March,
4 2014, regarding the creation of a Diamond Valley GMP ("DVGMP").¹⁶ The intent of the
5 meetings and any plan was to reduce pumping and stabilize groundwater levels in
6 Diamond Valley to avoid curtailment of water by priority.¹⁷ Although many options were
7 considered, ultimately the DVGMP was in large part "influenced significantly by a water
8 allocation system using a market based approach similar to that authored by professor
9 Michael Young."¹⁸ Professor Young's report, *Unbundling Water Rights: A Blueprint for*
10 *Development of Robust Allocation Systems in the Western United States (2015)* was
11 described by Young as "a blueprint ready for pilot testing in Nevada's Diamond Valley and
12 Humboldt Basins."¹⁹ The Young report was "developed in consultation with water users,
13 administrators, and community leaders in Diamond Valley and Humboldt Basin."²⁰ The
14 Young report describes itself as a "blueprint ready for testing in Diamond Valley" and "if
15 implemented, the blueprint's reforms would convert prior appropriation water rights into
16 systems that stabilize water withdrawals to sustainable limits, allow rapid adjustment to
17 changing water supply conditions, generate diverse income systems, and improve
18 environmental outcomes."²¹ "If implemented properly, no taking of property rights

19 _____
20 ¹⁵NRS 534.110(7), SEROA 225.

21 ¹⁶SEROA 226.

22 ¹⁷SEROA 226, 277-475.

23 ¹⁸SEROA 227 N8, 294.

24 ¹⁹Bailey reply addendum 2, SEROA 294.

25 ²⁰Bailey reply addendum 3.

26 ²¹*Id.* at 1.



occurs.²²

The DVGMP, a hybrid²³ 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.²⁴ Also excluded from the DVGMP are domestic wells, stock water, municipal, commercial groundwater rights and mining groundwater rights without an irrigation source permit.²⁵ The DVGMP applies to permit or certificated underground irrigation permits and underground irrigation rights that have an agricultural base right in Diamond Valley.²⁶

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.²⁷ The spread between the most senior and junior groundwater rights is 20 %.²⁸ 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.²⁹ 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

²²*Id.*

²³SEROA 313.

²⁴SEROA 5, 220, 229, 240-241.

²⁵SEROA 240-241.

²⁶SEROA 11-12, 218, 220, 228-229.

²⁷SEROA 5, 218, 232.

²⁸SEROA 232.

²⁹SEROA 218, 234-235.

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1 share.³⁰ 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.³¹ 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.³² 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.³³ 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 DVGMP³⁴ 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 ³⁰SEROA 232.

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

23 ³²SEROA 499-509.

24 ³³SEROA 234-236, 510 (appendix G to DVGMP).

25 ³⁴*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.³⁵ 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.³⁶

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.³⁷ 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.³⁸ 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.³⁹

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.⁴⁰ It is undisputed by the State Engineer that Sadler Ranch’s spring flows have diminished as a

³⁵*Id.*, SEROA 5, 218.

³⁶SEROA 510. See State Engineer’s oral argument hearing transcript pg. 152.

³⁷*Id.*

³⁸SEROA 5, 218, 234-235.

³⁹*Id.*

⁴⁰Sadler 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).

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

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

After a public hearing held on October 30, 2018, the State Engineer issued Order 1302. Order 1302 states, "while it 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,' the following analysis demonstrates that the legislature's enactment of NRS 534.037 demonstrates legislative intent to permit action in the alternative to strict priority regulation."⁴⁶ The State Engineer and all intervenors who filed briefs and orally argued this

⁴¹Sadler Ranch opening brief 4, *Id.* 152-164; SEROA 593.

⁴²Bailey opening brief 4, SEROA 500,506.

⁴³Bailey opening brief 4, SEROA 536-538.

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

⁴⁵NRS 534.020.

⁴⁶SEROA 6.

1 case agree that the DVGMP deviates from the prior appropriation doctrine.⁴⁷

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.⁴⁸ The proceedings must be informal and summary.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² When
13 reviewing the State Engineer's findings, factual determinations will not be disturbed on
14 appeal if supported by substantial evidence.⁵³ Substantial evidence has been defined as
15 "that which a reasonable mind might accept as adequate to support a conclusion."⁵⁴ With

16
17 ⁴⁷State Engineer's answering brief 26, DNRPCA intervenors' answering brief 11-13,
Eureka County's answering brief 5, 11.

18 ⁴⁸ NRS 533.450(1).

19 ⁴⁹ NRS 533.450(2).

20 ⁵⁰ NRS 533.450(10).

21 ⁵¹ *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 ⁵² *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1997)
(citing *Revert* at 786).

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

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

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1 regard to purely legal questions, the standard of review is de novo.⁵⁵ Findings of an
 2 administrative agency will not be set aside unless they are arbitrary and capricious.⁵⁶ 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.⁵⁷ A finding is
 5 arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by
 6 rules or procedure."⁵⁸ A decision is capricious if it is "contrary to the evidence or
 7 established rules of law."⁵⁹

8 "The State Engineer's ruling on questions of law is persuasive, but not entitled to
 9 deference."⁶⁰ 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.'"⁶¹

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,⁶²
 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 ⁵⁵ *In re Nevada State Engineer Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449
 (2012.)

19 ⁵⁶ *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702
 20 (1991).

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

22 ⁵⁸ Black's Law Dictionary, Arbitrary (10th ed. 2014).

23 ⁵⁹ Black's Law Dictionary, Capricious (10th ed 2014).

24 ⁶⁰ *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019)

25 ⁶¹ *In Re State Engineer Ruling no. 5823 at 239*, (internal citations omitted).

26 ⁶²NRS 534.037(3).



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.⁶³ 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.”⁶⁴ 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.”⁶⁵ 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 ⁶³Sadler 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 ⁶⁴Order granting motion in limine 10.

26 ⁶⁵NRS 534.037(1).

1 levels⁶⁶ based on the evidence presented at and after the public hearing. Petitioners
 2 submit that the DVGMP fails to bring the Diamond Valley basin into equilibrium within 10
 3 years and over pumping will continue even at the 35th year of the plan.⁶⁷ Order 1302,
 4 describes the State Engineer's review of the NRS 534.037(2) factors in relation to the
 5 DVGMP.⁶⁸ The DVGMP's review of the factors is in Appendices D-I.

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

20
 21 _____
 22 ⁶⁶Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief
 15-20.

23 ⁶⁷*Id.*

24 ⁶⁸SEROA 14-17.

25 ⁶⁹SEROA 17-18.

26 ⁷⁰SEROA 17-18, 223, 227-28, 476-496.



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

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

22 ⁷¹Sadler Ranch opening brief 13.

23 ⁷²Minutes of Assmb. Comm. on Gov't Affairs, 69 (March 30, 2011).

24 ⁷³NRS 534.037(1).

25 ⁷⁴Sadler Ranch opening brief 9-18, Bailey opening brief 30-33, Sadler Ranch reply brief
 26 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.⁷⁵

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."⁷⁶ 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.⁷⁷ The court finds the DVGMP does not limit the State Engineer's authority to

22 ⁷⁵This 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 ⁷⁶SEROA 18.

⁷⁷See SEROA 235, sec. 13.13; 246, sec. 26.

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

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

4 An ASR project under Nevada law contemplates the recharge, storage, and
 5 recovery of water for future use for which a permit is required.⁷⁸ The DVGMP does not
 6 include a proposed source of water for recharge into the Diamond Valley aquifer, the
 7 quantity of water proposed to be recharged into the aquifer, nor any stated purpose for
 8 the storage of water for future use.⁷⁹ The DVGMP uses the term "banking" as meaning
 9 unused shares of water in a year may be carried forward or "banked" for use in the
 10 following year if appropriate. The State Engineer held that the DVGMP provision to carry
 11 over water shares for use in a subsequent year was outside the scope of NRS 534.260 to
 12 534.350 as not being a project involving the recharge, storage and recovery of water
 13 subject to statutory regulations,⁸⁰ but "to allow flexibility by users to determine when to use
 14 their limited allocation and to encourage water conservative practices."⁸¹ The State
 15 Engineer's finding is supported by substantial evidence in the record. The court finds the
 16 term "banked" when used in the manner as stated in the DVGMP to mean water shares
 17 that are not used but saved for use in a subsequent year.⁸² The court finds the DVGMP is
 18 not required to comply with and does not violate NRS 534.250 to NRS 534.340.

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⁷⁸NRS 534.250-534.340.

23 ⁷⁹*Id.*

24 ⁸⁰SEROA 8, 9.

25 ⁸¹*Id.*

26 ⁸²SEROA 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 . . .”⁸³ 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.⁸⁴ 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,⁸⁵ or 53.2 percent, was a majority of the permits or certificates in the
 12 basin.⁸⁶ The DVGMP petition was only sent to groundwater permit holders to be
 13 considered and voted upon.⁸⁷ 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.⁸⁸ 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.⁸⁹ The court agrees that all certificate and

19 ⁸³NRS 534.037(1).

20 ⁸⁴SEROA 3.

21 ⁸⁵Those signatures by a confirmed owner of record. *Id.*

22 ⁸⁶SEROA 3.

23 ⁸⁷SEROA 148.

24 ⁸⁸State 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
 534.037(1) . . .”

26 ⁸⁹Bailey 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.⁹⁰

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.⁹¹ Under petitioners' interpretation,⁹² if one permit or certificate was owned by 25 owners, there

⁹⁰SEROA 3.

⁹¹SEROA 3.

⁹²Sadler 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.⁹³ 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.

⁹³SEROA 3-4.

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F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

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

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

⁹⁴NRS 533.035.

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

⁹⁶SEROA 232-236, sec. 12,13

⁹⁷SEROA 9.

⁹⁸*Id.*

⁹⁹SEROA 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.¹⁰⁰ 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 1st 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.¹⁰¹ Even though the DVGMP caps the amount of water the first year of the plan at the "ceiling of actual pumping (76,000 afa)",¹⁰² 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

¹⁰⁰SEROA 218, 219, 221, 232-33 3m 461, 465.

¹⁰¹SEROA 467.

¹⁰²SEROA 12.



1 approximately 50,000 af in Diamond Valley.¹⁰³ The DVGMP also allows the banking of
 2 unperfected paper water rights for future use which can be sold, traded or leased.¹⁰⁴ 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 overpumping¹⁰⁵.
 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.¹⁰⁶ 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."¹⁰⁷ 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

20 _____
 21 ¹⁰³SEROA 2, 9, 10.

22 ¹⁰⁴SEROA 234; see sec. 13.2

23 ¹⁰⁵Sadler Ranch had impacted senior vested rights that have been mitigated by
 certificate.

24 ¹⁰⁶State Engineer's answering brief, 36.

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

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

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

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

¹⁰⁸SEROA 510.

¹⁰⁹SEROA 3.

¹¹⁰*Id.*

¹¹¹Permits 82268, 81270, 63497, 81825, 82572, 87661.



1 the end of the plan"¹¹² but that "the pumping reduction rate was selected by agreement of
 2 the GMP authors, . . ." ¹¹³ 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.¹¹⁴ 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.¹¹⁵

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*,¹¹⁶ 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.¹¹⁷ The priority of a water right is the most important feature.¹¹⁸ Court's

20 ¹¹²SEROA 16.

21 ¹¹³*Id.*

22 ¹¹⁴Eureka County answering brief 22-23.

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

25 ¹¹⁶749 P.2d 324, 330-34 (Cal 1988) cert. denied 488 U.S. 834 (1988).

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

¹¹⁸See *Gregory J. Hobbs, Jr., Priority: The Most Misunderstood Stick in the Bundle*, 32
 Env'tl .L. 37(2002).

1 have stated, "priority in a water right [as] property in itself."¹¹⁹ 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,"¹²⁰ the Nevada Supreme Court has stated, "a water
 4 right 'is regarded and protected as real property.'¹²¹ 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.'¹²² 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."¹²³ 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"¹²⁴
 20 which has allowed a senior right holder to beneficially use all of water allocated in its right

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

22 ¹²⁰*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).

24 ¹²¹*Town of Eureka*, 167.

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

¹²³SEROA 8.

¹²⁴*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.¹²⁵ Relying on a New Mexico Supreme Court case,
13 *State Engineer v. Lewis*,¹²⁶ Order 1302 held that NRS 534.037 "demonstrates legislative
14 intent to permit action in the alternative to strict priority regulation."¹²⁷ 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."¹²⁸ 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

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

26 ¹²⁶150 P.3d 375 (N.M. 2006).

¹²⁷SEROA 5.

¹²⁸SEROA 6.



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1 water law in NRS 534.110(6).¹²⁹ 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.”¹³⁰ 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.”¹³¹ 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.”¹³²

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 ¹²⁹SEROA 6-7.

25 ¹³⁰State Engineer’s answering brief 25.

26 ¹³¹*Id.* 25-26.

¹³²*Id.* 26.

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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.”¹³³ 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,”¹³⁴ 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.”¹³⁵ 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),¹³⁶ stating, “.
 10 . . the Legislature deliberately enacted legislation that created an **exception** to the seniority
 11 system in exactly the circumstances that exist here.”¹³⁷ (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 534.037.¹³⁸ Now conceded by the State Engineer, the *Lewis* facts and holding are
 19 clearly distinguishable from the present case.¹³⁹ In *Lewis*, a U.S. Supreme Court mandated
 20 settlement agreement was litigated. The *Lewis* plan was presented to, and expressly

21 ¹³³Eureka County’s answering brief 12-13.

22 ¹³⁴*Id.*

23 ¹³⁵*Id.* 12.

24 ¹³⁶DNRPCA answering brief 11-12.

25 ¹³⁷*Id.* 11.

26 ¹³⁸State Engineer’s answering brief 29-3..

¹³⁹*Id.*

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1 ratified by the New Mexico Legislature.¹⁴⁰ 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."¹⁴¹ 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."¹⁴² 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.¹⁴³ 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."¹⁴⁴ Every

23 ¹⁴⁰*Lewis*, 376.

24 ¹⁴¹State Engineer's answering brief 29.

25 ¹⁴²*Id.* 30.

26 ¹⁴³53.2percent of the senior priority water right owners did not support the DVGMP.

¹⁴⁴*Happy Creek*, 1116.

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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.¹⁴⁵

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"¹⁴⁶ When the language of a statute is unambiguous, courts
 21 are not to look beyond the statute itself when determining meaning.¹⁴⁷ 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 ¹⁴⁵Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS
 25 534.020(1).

26 ¹⁴⁶*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).

¹⁴⁷*In re Orpheus 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.¹⁴⁸ 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.¹⁴⁹

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."¹⁵⁰ The court must "look to
23 legislative history for guidance."¹⁵¹ Such interpretation must be "in light of the policy and

24 ¹⁴⁸Sadler Ranch reply brief 7-9; Bailey opening brief 17-18; SEROA 252-254.

25 ¹⁴⁹SEROA 244-245.

26 ¹⁵⁰*Orpheas Trust*. 174, 175.

¹⁵¹*Id.* 175.

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



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



1 spirit of the law, and the interpretation shall avoid absurd results.”¹⁵² “The court will resolve
2 any doubt as to the Legislature’s intent in favor of what is reasonable.”¹⁵³

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.”¹⁵⁴ 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.”¹⁵⁵ 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 . . .”¹⁵⁶ is a misinterpretation of the statute, not only facially, but in light of the
22 legislative history as discussed below.

23 ¹⁵² *Id.*

24 ¹⁵³ *Id.*

25 ¹⁵⁴ State Engineer’s answering brief 26.

26 ¹⁵⁵ SEROA 7.

¹⁵⁶ 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.”¹⁵⁷ 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 419¹⁵⁸ 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.”¹⁵⁹

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.”¹⁶⁰

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
26

24 ¹⁵⁷SEROA 7.

25 ¹⁵⁸See DNRPCA intervenors’ addendum to answering brief 0079-0092.

26 ¹⁵⁹Minutes of Sen. Committee on Government Affairs, May 23, 2011, at 16.

¹⁶⁰*Id.*



alternative crops, water conservation, or using different irrigation methods.”¹⁶¹

1 Assemblyman Goicoechea went on to say:

2 “water rights in Nevada are first in time; first in right. The older the water
3 right the higher the priority. We would address the newest permits and work
4 backwards to get basins back into balance. The more aggressive people
5 might be the newer right holders.”¹⁶²

6 No one at any Legislative subcommittee hearings stated or implied that the
7 proposed GMP legislation was “an exception to or otherwise abrogated Nevada’s doctrine
8 of prior appropriation.” The court finds persuasive the steadfast commitment of Nevada’s
9 courts and legislation upholding the doctrine of prior appropriation and the absence of any
10 legislative history to the contrary for AB419.

11 There is a presumption against an intention to impliedly repeal where express terms
12 to repeal are not used.¹⁶³ “When a subsequent statute entirely revises the subject matter
13 contained in a prior statute, and the legislature intended the prior statute to be repealed,
14 the prior statute is considered to be repealed by implication. This practice is heavily
15 disfavored, and we will not consider a statute to be repealed by implication unless there
16 is no other reasonable construction of the two statutes.¹⁶⁴ Not only did NRS 534.034 and
17 NRS 534.110(7) not revise the doctrine of prior appropriation, the Legislature did not even
18 mention the subject.

19 “When construing statutes and rules together, this court will, if possible, interpret a
20 rule or statute in harmony with other rules and statutes.”¹⁶⁵ The doctrine of prior
21 appropriation can logically exist in harmony with NRS 534.037 and 534.110(7) and allow

22 ¹⁶¹ *Id.*

23 ¹⁶² *Id.* at 13.

24 ¹⁶³ *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)

25 ¹⁶⁴ *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134 (2001) (internal citations
26 omitted).

¹⁶⁵ *Hefetz v. Beavor*, 133 Nev. Adv. Op. 46, 197 P.3d 472, 475 (2017) citing *Albion v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006).

SEVENTH JUDICIAL DISTRICT COURT
GARY D. FAIRMAN
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DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
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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.¹⁶⁶ 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, . . ." ¹⁶⁷ 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.¹⁶⁸ 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 ¹⁶⁶Sadler Ranch addendum to reply brief, 001

25 ¹⁶⁷*Id.* 003.

26 ¹⁶⁸The 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.¹⁶⁹ "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."¹⁷⁰ 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."¹⁷¹ 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.¹⁷² If a potential negative impact is found, the application could be
 12 rejected.¹⁷³ Other rights' holders who may be affected by the temporary change could
 13 protest the application if notice were given by the State Engineer.¹⁷⁴ 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.¹⁷⁵

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.¹⁷⁶ The DVGMP provides that the groundwater withdrawn from Diamond

19
 20 ¹⁶⁹NRS 533.330

21 ¹⁷⁰NRS 533.345(1).

22 ¹⁷¹NRS 533.345(2).

23 ¹⁷²NRS 533.345(2)(3).

24 ¹⁷³See NRS 533.370(2).

25 ¹⁷⁴NRS 533.360.

26 ¹⁷⁵ The only remedy is a petition for judicial review under NRS 534.450.

¹⁷⁶SEROA 237, sec. 14.7.





1 Valley can be used “for any beneficial purpose under Nevada law . . .”¹⁷⁷ Under NRS
 2 533.330, “No application shall be for the water of more than one source to be used for more
 3 than one purpose.” The only Diamond Valley water subject to the DVGMP is that which is
 4 subject to permits or certificates issued for irrigation purposes.¹⁷⁸ The DVGMP allows for
 5 the irrigation sourced shares to be used for “any other beneficial purpose under Nevada
 6 water law”.¹⁷⁹ The DVGMP fails to take into consideration that the transferee of the shares
 7 could use the water for other beneficial uses that may consume the entirety of the water
 8 being transferred under the shares without any return water or recharge to the Diamond
 9 Valley basin.¹⁸⁰ Water placed to beneficial use for irrigation results in some return or
 10 recharge to the aquifer. There is no State Engineer oversight on the impact of the transfer
 11 of water shares for the proposed new well or place or manner of use unless the new well
 12 or additional withdrawals from an existing well exceeds the volume or flow rate initially
 13 approved for the base permit.¹⁸¹

14 The DVGMP and Order 1302 state the DVGMP was modeled after NRS
 15 533.345(2)(4).¹⁸² The State Engineer is incorrect. Under the DVGMP, the State Engineer
 16 does not review a different use of the water shares transferred because the DVGMP allows
 17 water shares to be used for any beneficial purpose under Nevada law, not solely for
 18 irrigation purposes.¹⁸³ Under the DVGMP the State Engineer cannot deny the transfer of
 19 shares to an existing well, unless the transfer would exceed the well’s flow rate and conflicts
 20

21 ¹⁷⁷SEROA 234, sec. 13.8.

22 ¹⁷⁸SEROA 228, sec. 8.1

23 ¹⁷⁹SEROA 234, see 13.8.

24 ¹⁸⁰Such beneficial uses could include mining and municipal uses; see NRS 533.030.

25 ¹⁸¹SEROA 237, sec. 14.7, 14.8.

26 ¹⁸²SEROA 237, n.20; SEROA 009.

¹⁸³SEROA 237, sec. 14.7.

SEVENTH JUDICIAL DISTRICT COURT
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WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



1 with existing rights.¹⁸⁴ 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.¹⁸⁵ 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 ¹⁸⁴SEROA 237, sec. 14.9.

23 ¹⁸⁵As 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 23rd 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



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

DEPT. NO.: 2

NO. _____ FILED

MAY 14 2020

By [Signature]
Eureka County Clerk

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

* * *

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

Petitioners,

vs.

**DNRPCA INTERVENORS'
NOTICE OF APPEAL**

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

Respondent.

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

Respondents/Intervenors.

_____ /

1 Notice is hereby given that DIAMOND NATURAL RESOURCES PROTECTION AND
2 CONSERVATION ASSOCIATION, J&T FARMS, GALLAGHER FARMS, JEFF LOMMORI,
3 M&C HAY, CONLEY LAND & LIVESTOCK, LLC, JIM AND NICK ETCHEVERRY, TIM
4 AND SANDIE HALPIN, DIAMOND VALLEY HAY CO., MARK MOYLE FARMS, LLC,
5 D.F. AND E.M. PALMORE FAMILY TRUST, BILL AND PATRICIA NORTON,
6 SESTANOVICH HAY & CATTLE, LLC, JERRY ANDERSON, BILL AND DARLA
7 BAUMAN (“DNRPCA Intervenors”), by and through their attorney of record Debbie Leonard
8 of Leonard Law, PC, hereby appeal to the Supreme Court of Nevada from the Findings of Fact,
9 Conclusions of Law, Order Granting Petitions for Judicial Review. Notice of Entry of Order was
10 entered on April 29, 2020 and is attached hereto as Exhibit 1.

11 **AFFIRMATION**

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

14 DATED: this 14th day of May, 2020

15 LEONARD LAW, PC

16 

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20 775-964-4656
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22 *Attorney for DNRPCA Intervenors*

CERTIFICATE OF SERVICE

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

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Dated: May 14, 2020


Tricia Trevino

EXHIBIT 1

EXHIBIT 1

1 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP**
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7
8 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR THE COUNTY OF EUREKA**

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

13 Petitioners,

14 vs.

15 TIM WILSON, P.E., Acting State
Engineer, DIVISION OF WATER
16 RESOURCES, NEVADA
DEPARTMENT OF CONSERVATION
17 AND NATURAL RESOURCES,

18 Respondent.

19 EUREKA COUNTY, NEVADA,
20 DNRPCA INTERVENORS, et al.,

21 Intervenors.

Case No. CV1902-348

(Consolidated with Case Nos. CV1902-349
and CV-1902-350)

**NOTICE OF ENTRY OF FINDINGS
OF FACT, CONCLUSION OF LAW,
ORDER GRANTING PETITIONS FOR
JUDICIAL REVIEW**

22
23 NOTICE IS HEREBY GIVEN that the **FINDINGS OF FACT, CONCLUSION OF**
24 **LAW, ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW** was entered in
25 the above-captioned matter on the 27th day of April, 2020. A true and correct copy is attached
26 hereto.
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Affirmation Pursuant to NRS 239B.030(4)

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

DATED April 21, 2020.

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

By: 

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Ph: (702) 341-5200 / Fx: (702) 341-5300
Attorneys for Bailey Petitioners

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 29th, 2020, pursuant to the Court’s April 25, 2109
3 Order, a true and correct copy of **NOTICE OF ENTRY OF FINDINGS OF FACT,**
4 **CONCLUSION OF LAW, ORDER GRANTING PETITIONS FOR JUDICIAL**
5 **REVIEW** was sent via electronic mail to the following:

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22 /s/ Christie Rehfeld
23 Christie Rehfeld, an Employee of
24 WOLF, RIFKIN, SHAPIRO, SCHULMAN
25 & RABKIN, LLP
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RELEVANT PROCEDURAL HISTORY

On January 11, 2019, Jason King, P.E., Nevada State Engineer¹ (“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,² 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

¹Subsequent 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.

²Daniel 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





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the record on appeal in the district court to the State Engineer’s record on appeal filed June 7, 2019. On September 16, 2019, the Baileys filed opening brief of Bailey petitioners (“Bailey opening brief”). On October 23, 2019, the State Engineer filed respondent State Engineer’s answering brief (“State Engineer’s answering brief”). On October 23, 2019, Diamond Natural Resource Protection and Conservation Association (“DNRPCA”) filed DNRPCA intervenors’ answering brief (“DNRPCA answering brief”) and DNRPCA intervenors’ addendum to answering brief (“DNRPCA addendum”). Intervenor, Eureka County filed answering brief of Eureka County (“Eureka County’s answering brief”) on October 23, 2019.³ DNRPCA and Eureka County are collectively referred to a “intervenors”. On November 29, 2019, Sadler Ranch filed reply brief of petitioners’ Sadler Ranch, LLC and Ira R. and Montira Renner (“Sadler Ranch reply brief”) and Sadler Ranch, LLC and Ira R. and Montira Renner’s addendum to reply brief (“Sadler Ranch reply addendum”). On November 26, 2019, the Baileys filed reply brief of Bailey petitioners, (“Bailey reply brief”).

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

³On September 6, 2019, the court entered an order granting motion to intervene to Diamond Valley Ranch, LLC, a Nevada limited liability company, American First Federal, Inc., a Nevada Corporation, Berg Properties California, LLC, a Nevada limited liability company, and Blanco Ranch, LLC., a Nevada limited liability company. On July 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.⁴ The
12 126,000 af exclude other groundwater rights such as domestic use, stock water, and
13 mining.⁵ The total duty of ground water rights that impact the acquifer is close to 130,265
14 af.⁶ 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.⁷

17 The unbridled pumping in Diamond Valley has caused the groundwater level to
18 decline approximately 2 feet annually since 1960.⁸ 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 ⁴SEROA 3.

23 ⁵*Id.*

24 ⁶*Id.*

25 ⁷*Id.*; State Engineer's answering brief 4-5.

26 ⁸SEROA 59, Water Resource Bulletin no. 35 at 26.



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

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

⁹SEROA 328.

¹⁰State Engineer ruling 6290, 23-31.

¹¹NRS 534.110(7).

¹²NRS 534.037.

¹³SEROA 3, 134-138, 226.

¹⁴The 2019 Nevada Legislature granted relief to domestic wells to withdraw up to 0.5 af 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.”¹⁵ 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”).¹⁶ 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.¹⁷ 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.”¹⁸ 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.”¹⁹ The Young report was “developed in consultation with water users, administrators, and community leaders in Diamond Valley and Humboldt Basin.”²⁰ 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.”²¹ “If implemented properly, no taking of property rights

¹⁵NRS 534.110(7), SEROA 225.

¹⁶SEROA 226.

¹⁷SEROA 226, 277-475.

¹⁸SEROA 227 N8, 294.

¹⁹Bailey reply addendum 2, SEROA 294.

²⁰Bailey reply addendum 3.

²¹*Id.* at 1.



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occurs."²²

The DVGMP, a hybrid²³ 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.²⁴ Also excluded from the DVGMP are domestic wells, stock water, municipal, commercial groundwater rights and mining groundwater rights without an irrigation source permit.²⁵ The DVGMP applies to permit or certificated underground irrigation permits and underground irrigation rights that have an agricultural base right in Diamond Valley.²⁶

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.²⁷ The spread between the most senior and junior groundwater rights is 20 %.²⁸ 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.²⁹ 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

²²*Id.*

²³SEROA 313.

²⁴SEROA 5, 220, 229, 240-241.

²⁵SEROA 240-241.

²⁶SEROA 11-12, 218, 220, 228-229.

²⁷SEROA 5, 218, 232.

²⁸SEROA 232.

²⁹SEROA 218, 234-235.



1 share.³⁰ 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.³¹ 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.³² 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.³³ 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 DVGMP³⁴ 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 ³⁰SEROA 232.

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

23 ³²SEROA 499-509.

24 ³³SEROA 234-236, 510 (appendix G to DVGMP).

25 ³⁴*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.³⁵ 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.³⁶

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.³⁷ 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.³⁸ 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.³⁹

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.⁴⁰ It is undisputed by the State Engineer that Sadler Ranch’s spring flows have diminished as a

³⁵*Id.*, SEROA 5, 218.

³⁶SEROA 510. See State Engineer’s oral argument hearing transcript pg. 152.

³⁷*Id.*

³⁸SEROA 5, 218, 234-235.

³⁹*Id.*

⁴⁰Sadler 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).



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

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

After a public hearing held on October 30, 2018, the State Engineer issued Order 1302. Order 1302 states, "while it 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,' the following analysis demonstrates that the legislature's enactment of NRS 534.037 demonstrates legislative intent to permit action in the alternative to strict priority regulation."⁴⁶ The State Engineer and all intervenors who filed briefs and orally argued this

⁴¹Sadler Ranch opening brief 4, *Id.* 152-164; SEROA 593.

⁴²Bailey opening brief 4, SEROA 500,506.

⁴³Bailey opening brief 4, SEROA 536-538.

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

⁴⁵NRS 534.020.

⁴⁶SEROA 6.

1 case agree that the DVGMP deviates from the prior appropriation doctrine.⁴⁷

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.⁴⁸ The proceedings must be informal and summary.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² When
13 reviewing the State Engineer's findings, factual determinations will not be disturbed on
14 appeal if supported by substantial evidence.⁵³ Substantial evidence has been defined as
15 "that which a reasonable mind might accept as adequate to support a conclusion."⁵⁴ With

16 _____
17 ⁴⁷State Engineer's answering brief 26, DNRPCA intervenors' answering brief 11-13,
18 Eureka County's answering brief 5, 11.

19 ⁴⁸ NRS 533.450(1).

20 ⁴⁹ NRS 533.450(2).

21 ⁵⁰ NRS 533.450(10).

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

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

25 ⁵³ *State Engineer v. Morris*, 107 Nev. 694, 701, 819 P.2d 203, 205 (1991).

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





1 regard to purely legal questions, the standard of review is de novo.⁵⁵ Findings of an
2 administrative agency will not be set aside unless they are arbitrary and capricious.⁵⁶ 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.⁵⁷ A finding is
5 arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by
6 rules or procedure."⁵⁸ A decision is capricious if it is "contrary to the evidence or
7 established rules of law."⁵⁹

8 "The State Engineer's ruling on questions of law is persuasive, but not entitled to
9 deference."⁶⁰ 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."⁶¹

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,⁶²
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 ⁵⁵ *In re Nevada State Engineer Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449
(2012.)
19 ⁵⁶ *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 697, 702
20 (1991).
21 ⁵⁷ *Shetakis v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992).
22 ⁵⁸ Black's Law Dictionary, Arbitrary (10th ed. 2014).
23 ⁵⁹ Black's Law Dictionary, Capricious (10th ed 2014).
24 ⁶⁰ *Sierra Pac. Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019)
25 ⁶¹ *In Re State Engineer Ruling no. 5823 at 239*, (internal citations omitted).
26 ⁶²NRS 534.037(3).



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

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

In determining whether to approve a GMP, NRS 534.037(2) requires the State Engineer to consider: (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 domestic wells; (f) whether a groundwater management plan already exists to the basin; (g) any other factors deemed relevant by the State Engineer. The State Engineer must ultimately decide whether a proposed GMP “sets forth the necessary steps for removal of the basin’s designation as a CMA.”⁶⁵ Petitioners argue that (1) the State Engineer failed to consider the NRS 534.037(2) factors, and (2) that the DVGMP failed to demonstrate that decreased pumping over the 35 year life of the plan will result in “stabilized groundwater

⁶³Sadler Ranch opening brief 34; Sadler Ranch opposition to motion in limine filed June 24, 2019; Bailey opposition to motion in limine filed June 24, 2019.

⁶⁴Order granting motion in limine 10.

⁶⁵NRS 534.037(1).



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levels”⁶⁶ 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 35th year of the plan.⁶⁷ Order 1302, describes the State Engineer’s review of the NRS 534.037(2) factors in relation to the DVGMP.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.

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

⁶⁷*Id.*

⁶⁸SEROA 14-17.

⁶⁹SEROA 17-18.

⁷⁰SEROA 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.⁷¹ 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."⁷² 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"⁷³ 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.⁷⁴ The court agrees with petitioners. However, the State Engineer, using his knowledge and experience, and based on the evidence presented at the public hearing,

⁷¹Sadler Ranch opening brief 13.

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

⁷³NRS 534.037(1).

⁷⁴Sadler 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.⁷⁵

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."⁷⁶ 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.⁷⁷ The court finds the DVGMP does not limit the State Engineer's authority to

22 ⁷⁵This 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
 Nevada law in other respects..

25 ⁷⁶SEROA 18.

26 ⁷⁷See SEROA 235, sec. 13.13; 246, sec. 26.

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

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

4 An ASR project under Nevada law contemplates the recharge, storage, and
5 recovery of water for future use for which a permit is required.⁷⁸ The DVGMP does not
6 include a proposed source of water for recharge into the Diamond Valley aquifer, the
7 quantity of water proposed to be recharged into the aquifer, nor any stated purpose for
8 the storage of water for future use.⁷⁹ The DVGMP uses the term "banking" as meaning
9 unused shares of water in a year may be carried forward or "banked" for use in the
10 following year if appropriate. The State Engineer held that the DVGMP provision to carry
11 over water shares for use in a subsequent year was outside the scope of NRS 534.260 to
12 534.350 as not being a project involving the recharge, storage and recovery of water
13 subject to statutory regulations,⁸⁰ but "to allow flexibility by users to determine when to use
14 their limited allocation and to encourage water conservative practices."⁸¹ The State
15 Engineer's finding is supported by substantial evidence in the record. The court finds the
16 term "banked" when used in the manner as stated in the DVGMP to mean water shares
17 that are not used but saved for use in a subsequent year.⁸² The court finds the DVGMP is
18 not required to comply with and does not violate NRS 534.250 to NRS 534.340.
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22 ⁷⁸NRS 534.250-534.340.

23 ⁷⁹*Id.*

24 ⁸⁰SEROA 8, 9.

25 ⁸¹*Id.*

26 ⁸²SEROA 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 . . .”⁸³ 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.⁸⁴ 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,⁸⁵ or 53.2 percent, was a majority of the permits or certificates in the
12 basin.⁸⁶ The DVGMP petition was only sent to groundwater permit holders to be
13 considered and voted upon.⁸⁷ 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.⁸⁸ 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.⁸⁹ The court agrees that all certificate and

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⁸³NRS 534.037(1).

20 ⁸⁴SEROA 3.

21 ⁸⁵Those signatures by a confirmed owner of record. *Id.*

22 ⁸⁶SEROA 3.

23 ⁸⁷SEROA 148.

24 ⁸⁸State 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) . . .”

⁸⁹Bailey 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.⁹⁰

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.⁹¹ Under petitioners' interpretation,⁹² if one permit or certificate was owned by 25 owners, there

⁹⁰SEROA 3.

⁹¹SEROA 3.

⁹²Sadler 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.⁹³ 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.

⁹³SEROA 3-4.



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F. ORDER 1302 VIOLATES THE BENEFICIAL USE STATUTE

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

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

⁹⁴NRS 533.035.

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

⁹⁶SEROA 232-236, sec. 12,13

⁹⁷SEROA 9.

⁹⁸*Id.*

⁹⁹SEROA 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.¹⁰⁰ 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 1st 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.¹⁰¹ Even though the DVGMP caps the amount of water the first year of the plan at the "ceiling of actual pumping (76,000 afa)",¹⁰² 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

¹⁰⁰SEROA 218, 219, 221, 232-33 3m 461, 465.

¹⁰¹SEROA 467.

¹⁰²SEROA 12.



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

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

It is undisputed that the Baileys and Renners have senior vested surface water rights that have been adversely impacted by the 40 years plus of overpumping¹⁰⁵. Respondent and intervenors agree that the DVGMP was not developed for mitigation purposes, but to reduce pumping, bring equilibrium to the Diamond Valley aquifer in 35 years, and cause the CMA designation to be removed.¹⁰⁶ The State Engineer's position is that the GMP "is not a mitigation plan, and NRS 534.037 does not require the proponents of a groundwater management plan or the State Engineer to consider the alleged effects on surface water rights or mitigate those alleged effects."¹⁰⁷ The State Engineer is wrong. A GMP must consider the effect it will have on surface water rights. In *Pyramid Lake Paiute Tribe v. Ricci* 126 Nev. 531.524 (2010), the Nevada Supreme Court acknowledged the State Engineer's ruling that "[t]he perennial yield of a hydrological basin is the equilibrium amount or maximum amount of water that can be safely used without depleting the source." Moreover, [t]he maximum amount of natural discharge that can be feasibly captured . . . [is the] perennial yield . . . the maximum amount of withdrawal

¹⁰³SEROA 2, 9, 10.

¹⁰⁴SEROA 234; see sec. 13.2

¹⁰⁵Sadler Ranch had impacted senior vested rights that have been mitigated by certificate.

¹⁰⁶State Engineer's answering brief, 36.

¹⁰⁷*Id.*. This position is also shared by the DNRPCA intervenors. DNRPCA answering brief, 24; and Eureka County, Eureka County answering brief, 22.



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

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

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

¹⁰⁸SEROA 510.

¹⁰⁹SEROA 3.

¹¹⁰*Id.*

¹¹¹Permits 82268, 81270, 63497, 81825, 82572, 87661.



1 the end of the plan”¹¹² but that “the pumping reduction rate was selected by agreement of
2 the GMP authors, . . .”¹¹³ 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.¹¹⁴ 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.¹¹⁵

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*,¹¹⁶ 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.¹¹⁷ The priority of a water right is the most important feature.¹¹⁸ Court’s

20 ¹¹²SEROA 16.

21 ¹¹³*Id.*

22 ¹¹⁴Eureka County answering brief 22-23.

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

25 ¹¹⁶749 P.2d 324, 330-34 (Cal 1988) cert. denied 488 U.S. 834 (1988).

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

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



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

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

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

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

¹²¹ *Town of Eureka*, 167.

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

¹²³ SEROA 8.

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



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

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

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

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

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

¹²⁶150 P.3d 375 (N.M. 2006).

¹²⁷SEROA 5.

¹²⁸SEROA 6.



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

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

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

¹²⁹SEROA 6-7.

¹³⁰State Engineer’s answering brief 25.

¹³¹*Id.* 25-26.

¹³²*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.”¹³³ 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,”¹³⁴ 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.”¹³⁵ 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),¹³⁶ stating, “.
10 . . the Legislature deliberately enacted legislation that created **an exception** to the seniority
11 system in exactly the circumstances that exist here.”¹³⁷ (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 534.037.¹³⁸ Now conceded by the State Engineer, the *Lewis* facts and holding are
19 clearly distinguishable from the present case.¹³⁹ In *Lewis*, a U.S. Supreme Court mandated
20 settlement agreement was litigated. The *Lewis* plan was presented to, and expressly

21 ¹³³Eureka County’s answering brief 12-13.

22 ¹³⁴*Id.*

23 ¹³⁵*Id.* 12.

24 ¹³⁶DNRPCA answering brief 11-12.

25 ¹³⁷*Id.* 11.

26 ¹³⁸State Engineer’s answering brief 29-3..

¹³⁹*Id.*



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

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

¹⁴⁰*Lewis*, 376.

¹⁴¹State Engineer’s answering brief 29.

¹⁴²*Id.* 30.

¹⁴³53.2percent of the senior priority water right owners did not support the DVGMP.

¹⁴⁴*Happy Creek*, 1116.



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

Clearly, there is no express language in either NRS 534.037 or NRS 534.110(7) stating a GMP can violate the doctrine of prior appropriation or that the doctrine is somehow abrogated. Knowing the long standing legislative and judicial adherence to Nevada's prior appropriation doctrine, the drafters could have easily inserted provisions in the CMA and/or GMP legislation giving the State Engineer the unequivocal authority to deviate from Nevada's "first-in-time, first-in-right" prior appropriation law if that was their intent.

"The legislature is 'presumed not to intend to overturn long-established principles of law' when enacting a statute"¹⁴⁶ When the language of a statute is unambiguous, courts are not to look beyond the statute itself when determining meaning.¹⁴⁷ The court finds that NRS 534.037 is not ambiguous. The court finds that the express language of NRS 534.037 and NRS 534.110(7) do not allow a GMP to violate the doctrine of prior appropriation by

¹⁴⁵Sadler Ranch opening brief 4; see certificates/permits in SEROA 499-509; NRS 534.020(1).

¹⁴⁶*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).

¹⁴⁷*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.¹⁴⁸ 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.¹⁴⁹

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."¹⁵⁰ The court must "look to
23 legislative history for guidance."¹⁵¹ Such interpretation must be "in light of the policy and

24 ¹⁴⁸Sadler Ranch reply brief 7-9; Bailey opening brief 17-18; SEROA 252-254.

25 ¹⁴⁹SEROA 244-245.

26 ¹⁵⁰*Orpheas Trust*. 174, 175.

¹⁵¹*Id.* 175.



1 spirit of the law, and the interpretation shall avoid absurd results.”¹⁵² “The court will resolve
2 any doubt as to the Legislature’s intent in favor of what is reasonable.”¹⁵³

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.”¹⁵⁴ 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.”¹⁵⁵ 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 . . .”¹⁵⁶ is a misinterpretation of the statute, not only facially, but in light of the
22 legislative history as discussed below.

23 ¹⁵²*Id.*

24 ¹⁵³*Id.*

25 ¹⁵⁴State Engineer’s answering brief 26.

26 ¹⁵⁵SEROA 7.

¹⁵⁶SEROA 8.



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The State Engineer found that the legislative enactment of NRS 537.037, “expressly authorized a procedure to resolve a shortage problem,” “the State Engineer assumes that the Legislature was aware of Nevada’s prior appropriation doctrine when it enacted NRS 534.037, and . . . interprets the statute as intending to create a solution other than a priority call as the first and only response.”¹⁵⁷ It is clear that the Legislature was aware of the prior appropriation doctrine before enacting NRS 534.037 and that the statute allows for a GMP in a particular basin that may not involve curtailment by priority as a workable solution. Yet, nowhere in the Legislative history of AB 419¹⁵⁸ is one word spoken that the proposed legislation will allow for a GMP whereby senior water right holder will have its right to use the full amount of its permit/certificate reduced or that the amount of water that shall be allocated will be on a basis other than by priority. In fact, just the opposite is true. At a Senate Committee on Government Affairs hearing held May 23, 2011, Assemblyman Pete Goicoechea stated:

“That junior users would bear the burden to develop a ‘conservation plan that actually brings that water basin back into some compliance.’”¹⁵⁹

Assemblyman Goicoechea further stated:

“This bill allows people in overappropriated basins ten years to implement a water management plan to get basins in balance. People with junior rights will try to figure out how to conserve enough water under these plans. Water management plans will also limit litigation that occurs before the State Engineer regulates by priority. When the State Engineer regulates by priority, it starts a water war and finger – pointing occurs. This bill gives water right owners ten years to work through those issues.”¹⁶⁰

Earlier, at the same committee hearing, Assemblyman Goicoechea gave examples of ways an over appropriated basin could be brought back in to balance through “planting

¹⁵⁷SEROA 7.

¹⁵⁸See DNRPCA intervenors’ addendum to answering brief 0079-0092.

¹⁵⁹Minutes of Sen. Committee on Government Affairs, May 23, 2011, at 16.

¹⁶⁰*Id.*

alternative crops, water conservation, or using different irrigation methods.”¹⁶¹

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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.”¹⁶²

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.¹⁶³ “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.”¹⁶⁴ 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.”¹⁶⁵ The doctrine of prior appropriation can logically exist in harmony with NRS 534.037 and 534.110(7) and allow

¹⁶¹ *Id.*

¹⁶² *Id.* at 13.

¹⁶³ *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)

¹⁶⁴ *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134 (2001) (internal citations omitted).

¹⁶⁵ *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).





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for GMP's to address the water issues present in a particular CMA basin. The court finds that neither NRS 534.037 nor NRS 534.110(7) are in conflict with the prior appropriation doctrine.

More compelling evidence exists that the State Engineer knew that NRS 534.037 and NRS 534.110(7) did not abrogate or repeal the doctrine of prior appropriation. On November 16, 2016, Legislative Bill S.B 73 was introduced on behalf of the State Engineer.¹⁶⁶ The proposed legislation sought to modify NRS 534.037 by giving authority to the State Engineer to consider a GMP, "limiting the quantity of water that may be withdrawn under any permit or certificate or from a domestic well on a basis other than priority, . . ." ¹⁶⁷ Although SB 73 was never passed by the Legislature, the fact that the State Engineer specifically sought 2017 legislation authorizing a GMP to be approved that allowed for water to be withdrawn from a CMA basin on a basis other than priority, demonstrates the State Engineer's knowledge that NRS 534.037 and NRS 534.110(7) as enacted did not either expressly or impliedly allow for a GMP to violate Nevada's prior appropriation law.¹⁶⁸ The court finds that the AB 419's Legislative history did not intend to allow either NRS 534.037 or NRS 534.110(7) to repeal, modify, or abrogate Nevada's doctrine of prior appropriation.

I. THE DVGMP VIOLATES NRS 533.325 and NRS 533.345

NRS 533.325 states in pertinent part ". . . any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use, or place of use of water already appropriated, shall before performing any work in connection with such appropriation, change in place of diversion or change in matter or place of use, apply to the State Engineer for a permit to do so." This is so because permits are tied to a single point

¹⁶⁶Sadler Ranch addendum to reply brief, 001

¹⁶⁷*Id.* 003.

¹⁶⁸The 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.¹⁶⁹ “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.”¹⁷⁰ 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.”¹⁷¹ 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.¹⁷² If a potential negative impact is found, the application could be
12 rejected.¹⁷³ Other rights’ holders who may be affected by the temporary change could
13 protest the application if notice were given by the State Engineer.¹⁷⁴ 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.¹⁷⁵

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.¹⁷⁶ The DVGMP provides that the groundwater withdrawn from Diamond

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20 ¹⁶⁹NRS 533.330

21 ¹⁷⁰NRS 533.345(1).

22 ¹⁷¹NRS 533.345(2).

23 ¹⁷²NRS 533.345(2)(3).

24 ¹⁷³See NRS 533.370(2).

25 ¹⁷⁴NRS 533.360.

26 ¹⁷⁵ The only remedy is a petition for judicial review under NRS 534.450.

¹⁷⁶SEROA 237, sec. 14.7.



1 Valley can be used “for any beneficial purpose under Nevada law . . .”¹⁷⁷ Under NRS
2 533.330, “No application shall be for the water of more than one source to be used for more
3 than one purpose.” The only Diamond Valley water subject to the DVGMP is that which is
4 subject to permits or certificates issued for irrigation purposes.¹⁷⁸ The DVGMP allows for
5 the irrigation sourced shares to be used for “any other beneficial purpose under Nevada
6 water law”.¹⁷⁹ The DVGMP fails to take into consideration that the transferee of the shares
7 could use the water for other beneficial uses that may consume the entirety of the water
8 being transferred under the shares without any return water or recharge to the Diamond
9 Valley basin.¹⁸⁰ Water placed to beneficial use for irrigation results in some return or
10 recharge to the aquifer. There is no State Engineer oversight on the impact of the transfer
11 of water shares for the proposed new well or place or manner of use unless the new well
12 or additional withdrawals from an existing well exceeds the volume or flow rate initially
13 approved for the base permit.¹⁸¹

14 The DVGMP and Order 1302 state the DVGMP was modeled after NRS
15 533.345(2)(4).¹⁸² The State Engineer is incorrect. Under the DVGMP, the State Engineer
16 does not review a different use of the water shares transferred because the DVGMP allows
17 water shares to be used for any beneficial purpose under Nevada law, not solely for
18 irrigation purposes.¹⁸³ Under the DVGMP the State Engineer cannot deny the transfer of
19 shares to an existing well, unless the transfer would exceed the well’s flow rate and conflicts

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21 ¹⁷⁷SEROA 234, sec. 13.8.

22 ¹⁷⁸SEROA 228, sec. 8.1

23 ¹⁷⁹SEROA 234, see 13.8.

24 ¹⁸⁰Such beneficial uses could include mining and municipal uses; see NRS 533.030.

25 ¹⁸¹SEROA 237, sec. 14.7, 14.8.

26 ¹⁸²SEROA 237, n.20; SEROA 009.

¹⁸³SEROA 237, sec. 14.7.



1 with existing rights.¹⁸⁴ 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.¹⁸⁵ 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 ¹⁸⁴SEROA 237, sec. 14.9.

23 ¹⁸⁵As 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 23rd 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

