IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

Electronically Filed
Sep 23 2020 01:56 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 XIV

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 Intervenors' 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 field by Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC and Blanco Ranch, LLC	VI	JA1359-1368
09/04/2019	Order Granting Motion in Limine	VI	JA1369-1378
09/06/2019	Order Granting Motion to Intervene for Diamond Valley Ranch, LLC, American First Federal, Inc., Berg Properties California, LLC and Blanco Ranch, LLC	VI	JA1379-1382
09/16/2019	Opening Brief of Petitioners Sadler Ranch, LLC and Ira R. and Montira Renner	VII	JA1383-1450
09/16/2019	Opening Brief of Bailey Petitioners	VII	JA1451-1490

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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 Intervenors' Notice of Appeal	XII	JA2508-2554
05/14/2020	DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIII	JA2555-2703
05/15/2020	State Engineer Notice of Appeal	XIII	JA2704-2797
05/19/2020	State Engineer Joinder to DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIII	JA2798-2802
05/19/2020	Order Denying DNRPCA Intervenors' Ex Parte Motion for Order Shortening Time; Order Granting DNRPCA Intervenors' Motion for Temporary Stay Pending Decision on Intervenors' Motion for Stay Pending Appeal	XIV	JA2803-2807
05/21/2020	Eureka County's Notice of Appeal	XIV	JA2808-2811

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05/21/2020	Eureka County Joinder to DNRPCA Intervenors' 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 Intervenors' 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 Intervenors' Reply in Support of Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIV	JA2865-2929
06/01/2020	State Engineer's Reply in Support of DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302	XIV	JA2930-2941
06/01/2020	Eureka County's Reply in Support of Motion for Stay Pending Appeal	XIV	JA2942-3008
6/30/2020	Order Denying DNRPCA Intervenors' 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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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
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debbie@leonardlawpc.com

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

NO. _____
FILED
MAY 19 2020
Eureka County Clerk
By _____

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.

ORDER DENYING DNRPCA INTERVENORS' EX PARTE MOTION FOR ORDER SHORTENING TIME; ORDER GRANTING DNRCPA INTERVENORS' MOTION FOR TEMPORARY STAY PENDING DECISION ON INTERVENORS' MOTION FOR STAY PENDING APPEAL

On May 14, 2020, the DNRPCA intervenors filed DNRPCA intervenors motion for stay pending appeal of order granting petitions for judicial review of State Engineer Order 1302; on the same day DNRPCA intervenors filed DNRPCA intervenors' ex parte motion

RECEIVED
MAY 19 2020
Eureka County Clerk

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

for order shortening time on motion for stay of order granting petitions for judicial review of State Engineer Order 1302 pending appeal; on May 15, 2020, petitioners, Timothy Lee Bailey and Constance Marie Bailey and Fred Bailey and Carolyn Bailey filed an opposition of the Baileys to DNRPCA intervenors' ex parte motion for order shortening time on motion for stay of order granting petitions for judicial review of State Engineer Order 1302 pending appeal; on May 15, 2020, petitioners, Sadler Ranch LLC and Ira R. and Montira Renner filed Sadler Ranch, LLC and Ira R. and Montira Renner opposition to DNRPCA intervenors' ex parte motion for order shortening time; on May 18, 2020, the DNRPCA intervenors filed DNRPCA intervenors' reply in support of ex parte motion for order shortening time on motion for stay of order granting petitions for judicial review of State Engineer Order 1302 pending appeal; and on May 19, 2020, the State Engineer filed State Engineer's joinder to DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer Order 1302. The court has reviewed the pleadings and finds that no further briefing or oral argument is required.[1]

The DNRPCA intervenors state that in 2019 the irrigators in Diamond Valley who are subject to the State Engineer approved Diamond Valley groundwater management plan (DVGMP) have taken investment and farm management measures to implement the DVGMP with claimed success.[2] The DNRPCA intervenors further cite that the irrigators subject to the DVGMP have commenced the 2020 irrigation season using the same farming practices in accordance with the DVGMP.[3] The DNRPCA intervenors contend that if a temporary stay pending the court's decision on the motion to stay is not granted that

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[1]7JDCR7(11).

[2]Mot. for stay at 4-8.

[3]*Id.*

pumping will increase in Diamond Valley and the acquifer will suffer.[4] Although the court is not convinced this result would be the case and that other statutory and judicial remedies are available to preclude further acquifer damage, the court finds it reasonable for petitioners to submit their oppositions to the motion to stay and for the State Engineer and the DNRPCA intervenors to file a reply using the time allowed by district court rules.[5] A brief stay of the court's order pending consideration of the motion to stay pending appeal would not cause harm to the petitioners or others in Diamond Valley similarly situated.

Good cause appearing,

IT IS HEREBY ORDERED that the DNRPCA intervenors' ex parte motion for order shortening time on motion for stay is DENIED.

IT IS HEREBY FURTHER ORDERED that the DNRPCA intervenors' ex parte motion for temporary stay of the court's order granting petitions for judicial review of State Engineer Order 1302 pending this Court's decision on the DNRPCA intervenors' ex parte motion for stay pending appeal is GRANTED.

DATED this 19th day of May, 2020.

DISTRICT JUDGE

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

[4] *Id.*

[5] 7JDCR7(6)(9).

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

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

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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.

CERTIFICATE OF SERVICE

The undersigned being an employee of the Eureka County Clerk's Office, hereby certifies that on the 20th day of May, 2020, I personally delivered a true and correct copy of the following:

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

ORDER DENYING DNRPCA INTERVENORS' EX PARTE MOTION FOR ORDER SHORTENING TIME; ORDER GRANTING DNRCPA INTERVENORS' MOTION FOR TEMPORARY STAY PENDING DECISION ON INTERVENORS' MOTION FOR STAY PENDING APPEAL
addressed to:

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Eureka County District Attorney
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Dustin Marvel, Esq.
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Elko, Nevada 89801
johnmarvel@marvellawoffice.com

In the following manner:

[x] regular U.S. mail
[ ] certified U.S. mail
[ ] priority U.S. mail
[ ] overnight UPS
[ ] overnight Federal Express
[x] via email
[ ] hand delivery
[ ] copy placed in agency box located in the Eureka County Clerk's Office

NO. _____

FILED

MAY 21 2020

By Eureka County Clerk

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,

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

Respondents/Intervenors.

_____/

EUREKA COUNTY'S NOTICE OF APPEAL

ALLISON MacKENZIE, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

RECEIVED
MAY 21 2020
Eureka County Clerk

NOTICE IS HEREBY GIVEN, that EUREKA COUNTY, a political subdivision of the State of Nevada, by and through its counsel of record, ALLISON MacKENZIE, LTD. and THEODORE BEUTEL, ESQ., the EUREKA COUNTY DISTRICT ATTORNEY, hereby appeals to the Supreme Court of Nevada from the *Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review* entered in this action on April 27, 2020. Notices of Entry of Order were served in this action on April 29, 2020.

AFFIRMATION

The undersigned does hereby affirm that this document DOES NOT contain the social security number of any person.

DATED this 21st day of May, 2020.

KAREN A. PETERSON, ESQ.
Nevada State Bar No. 0366
ALLISON MacKENZIE, LTD.
402 North Division Street
Carson City, Nevada 89703
(775) 687-0202

~ and ~

EUREKA COUNTY DISTRICT ATTORNEY
701 South Main Street
Post Office Box 190
Eureka, Nevada 89316
(775) 237-5315

BY: _____
THEODORE BEUTEL, ESQ.
Nevada State Bar No. 5222

Attorneys for EUREKA COUNTY

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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, **this document applies to Case Nos. CV1902-348; -349; and -350**; and that on this date, I caused the foregoing document to be served to all parties to this action by:

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

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Courtesy Copy to Chambers:
Hon. Gary D. Fairman
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P.O. Box 151629
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DATED this 21st day of May, 2020.

NANCY FONTENOT

4852-7446-9308, v. 1

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NO. _____

FILED

MAY 21 2020

By Eureka County Clerk

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,

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

Respondents/Intervenors.

_____/

EUREKA COUNTY'S JOINDER TO DNRPCA INTERVENORS' MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302

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EUREKA COUNTY, by and through its counsel of record, ALLISON MacKENZIE, LTD. and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY, hereby joins in DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302, dated May 14, 2020. EUREKA COUNTY also supports the State Engineer's Joinder to DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302 and comments stated therein, dated May 19, 2020.

AFFIRMATION

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

DATED this 21st day of May, 2020.

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

~ and ~

EUREKA COUNTY DISTRICT ATTORNEY
701 South Main Street
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BY: _____
THEODORE BEUTEL, ESQ.
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Attorneys for EUREKA COUNTY

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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, **this document applies to Case Nos. CV1902-348; -349; and -350**; and that on this date, I caused the foregoing document to be served to all parties to this action by:

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Hon. Gary D. Fairman
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DATED this 21st day of May, 2020.

NANCY FONTENOT

4839-3880-6205, v. 1

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NO. _____

FILED

MAY 27 2020

By _____

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

TIMOTHY LEE BAILEY & CONSTANCE MARIE BAILEY, FRED BAILEY & CAROLYN BAILEY, IRA R. RENNER & MONTIRA RENNER, and SADLER RANCH, LLC, Petitioners, vs. TIM WILSON, P.E., Acting State Engineer, DIVISION OF WATER RESOURCES, NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No. CV1902-348 (Consolidated with Case Nos. CV1902-349 and CV-1902-350) **OPPOSITION OF BAILEY PETITIONERS TO DNRPCA INTERVENORS' MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302**
EUREKA COUNTY, NEVADA, DNRPCA INTERVENORS, et al., Intervenors.	

Petitioners TIMOTHY LEE BAILEY & CONSTANCE MARIE BAILEY and FRED BAILEY & CAROLYN BAILEY (hereinafter, the "Baileys"), by and through their undersigned counsel of record, hereby file this Opposition to DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302, and any joinders thereto.

RECEIVED
MAY 27 2020
BY:

This Opposition is based on the following Memorandum of Points and Authorities, all papers and pleadings related to this matter currently on file with the Court, and any oral argument the Court may entertain at hearing of DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302 (hereinafter, the "Motion").

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 11, 2019, the State Engineer adopted and entered Order 1302, approving the Diamond Valley Groundwater Management Plan ("GMP"). On February 11, 2019, the Baileys, and separately Ira R. & Montira Renner and Sadler Ranch, LLC, filed Notices of Appeal and Petitions for Review of State Engineer Order 1302. After briefing and oral arguments, on April 27, 2020, the Court entered its Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review (hereinafter, the "Order"). In its Order, the Court correctly held that, *inter alia*, Order 1302 is arbitrary and capricious due to the GMP's clear violation of Nevada law, and granted the petitions for review, resulting in the reversal of Order 1302 and overturning of the GMP, effective upon the immediate filing on April 29, 2020, of the Baileys' Notice of Entry of Order.

On May 14, 2020, DNRPCA filed its Notice of Appeal of the Order to the Nevada Supreme Court (hereinafter, the "Appeal"). During the pendency of the Appeal, DNRPCA seeks to stay this Court's Order, and therefore return the GMP into full force and effect. Because reinstating the GMP would irreparably harm the Baileys and because DNRPCA is unlikely to prevail on the merits of its appeal of this Court's Order, the Court should deny the Motion.

II. LEGAL ARGUMENT

A. Standard For A Stay Pending Appeal.

DNRPCA argues that while an appeal is pending from a final order that grants, dissolves, or denies an injunction, the district court "may stay, suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Motion at 3

(citing NRCP 62(c)). However, the Court's Order from which DNRPCA appeals is not an injunction, it is an order granting a petition for judicial review of, and overturning, a final agency action. Nor is this Court's Order a final judgment subject to the automatic 30-day stay of enforcement pursuant to NRCP 62(a)(1). In fact, if DNRPCA is correct that this Court's Order provides injunctive relief, then it would be subject to NRCP 62(a)(2)'s exclusion of the automatic stay for orders granting injunctive relief.

Therefore, the standard of review for a stay pending appeal pursuant to Nev. R. App. P. 8(c) is most applicable to the Court's consideration of the Motion. *See e.g. Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Pursuant to NRAP 8(c), the court should generally consider the following factors: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether appellant will suffer irreparable or serious injury if the stay is denied; (3) whether respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits of the appeal. NRAP 8(c). The movant must "present a *substantial case on the merits* when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Fritz Hansen A/S*, 116 Nev. at 659 (emphasis added).

B. The Circumstances Here Do Not Warrant Reinstatement Of The GMP.

DNRPCA cannot show that the balance of equities weighs heavily in favor of granting the stay and reinstating the GMP, and as such, has failed to meet its burden. Therefore, DNRPCA's Motion should be denied.

1. The Baileys Will Suffer Irreparable And Serious Injury If The Stay Is Granted And the Groundwater Management Plan Reinstated.

Due to the GMP's reduction in water rights to "shares," which are further reduced via annual reductions to "allocations" of water per share, the GMP causes the Baileys to suffer serious and irreparable injury when it is in effect. As this Court determined in its Order, the GMP results in the deprivation of property rights, particularly of senior water rights users, and results in other harms to water rights and resources because of its myriad violations of Nevada

law. DNRPCA is simply wrong to allege in the Motion that the Baileys will suffer no harm should the GMP be reinstated.

The GMP irreparably harms the Baileys because it irreparably harms their senior water rights. As the Court found, the GMP's formula for converting water rights to shares "does not give senior right holders all of the water to which their priority permit/certificate entitles [them.]" Order at 8:9–12. As the Court noted, "priority of a water right is the most important feature" and "priority in a water right is property in itself." *Id*. at 25, 26. Therefore, the Court found, "the loss or reduction of *any water* associated with the senior right can *significantly harm* the holder." *Id*. at 26 (emphasis added). The inescapable conclusion this Court came to was that the GMP's mandatory reduction of the amount of water allocated to senior water rights' holders "effectively ignore[s] 150 years of the principle of 'first in time, first in right'…." *Id.* To reinstate the GMP by granting DNRPCA's Motion would therefore reinstate this irreparable harm to the Baileys' senior water rights by denying them the use of these valuable property rights in violation of law.

In addition to the irreparable harm to the Baileys' senior groundwater rights, the Court also found that the GMP impairs the Baileys senior vested water rights in violation of NRS 533.085(1). Order at 23–24. As the Court found, the GMP on its face fails to reduce the harm caused by over-pumping of the aquifer, and therefore aggravates the depleted groundwater basin to the detriment of senior vested surface water rights that depend on the groundwater aquifer. *Id.* DNRPCA claims the Baileys' vested rights are not harmed by the GMP because of the existence of the Baileys' Permit No. 63497, which DNRPCA incorrectly claims is a "mitigation" right. Motion at 11. But that water right is not a mitigation permit. It was not issued pursuant to the State Engineer's mitigation order, it does not fully replace the total amount of the Baileys' vested water right, and its priority date is roughly a century junior to the Baileys' vested water right. Therefore, it cannot mitigate the harm to the Baileys that this Court found would result from the GMP.

This harm to the Baileys water rights is *per se* irreparable harm because it is harm to their property. "Nevada law is clear that appurtenant water rights are a separate stick in the bundle of

rights attendant to real property." *Dermody v. City of Reno*, 113 Nev. 207, 212, 931 P.2d 1354, 1358 (1997); *Adaven Mgmt. v. Mt. Falls Acquisition Corp.*, 124 Nev. 770, 774, 191 P.3d 1189, 1192 (2008). "Real property and its attributes are considered unique and *loss of real property rights generally results in irreparable harm*." *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (emphasis added).

DNRPCA's offer to exclude the Baileys from the reinstatement of the GMP's illegal mandatory reduction of the Baileys' senior water rights does not address additional irreparable harm threatened by the GMP. In addition to the direct irreparable harm to the Baileys' water rights resulting from the reduction of their senior rights to smaller shares and allocations, reinstatement of the GMP would also cause irreparable harm to the Baileys by allowing for unfettered trading of water shares, including by permitting traded shares to be pumped from areas that could harm the Baileys. As this Court found, the GMP will result in another 35 years of overpumping of the Diamond Valley aquifer's 30,000 acre-foot perennial yield. Order at 9. The overpumping of the groundwater aquifer is responsible for the harm to the Baileys' vested water rights, and as the Court correctly found, continued pumping in excess of the perennial yield of the basin harms the Baileys' senior vested water rights. Excluding the Baileys from the GMP's reductions to groundwater permits would not address this irreparable harm to the aquifer and to the Baileys' vested rights.

The Court also ruled that the GMP violates the fundamental doctrine of beneficial use. Order at 21–23. This violation of the beneficial use requirement also causes irreparable harm to the Baileys. The GMP's banking and trading scheme applies not only to certificated water rights that have been put to actual use, but also to permitted water rights that have not been "proved up" by actual use. The GMP therefore violates the fundamental principle of western water law that beneficial use depends on *actual use* of water. Order at 21 (citing *Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793 (2006)). The GMP violates the beneficial use requirement by allowing banking of shares derived from unperfected permitted water rights *and* any water rights not used in a given irrigation season, which can then be transferred to others. Absent the

GMP, water not pumped in one year would not be allowed to be saved and pumped in the future. Should the Court grant the Motion and reinstate the GMP, the Baileys would be irreparably harmed because the owners of banked shares—derived from unused certificated water rights and/or unperfected paper water rights—would be free to transfer them to others, increasing demand on the aquifer and continuing to harm the Baileys' senior water rights, all in violation of Nevada law. For example, after Year 1 (2019) of GMP implementation, there are now approximately 25,614 acre-feet of "banked" water in the aquifer. *See* Exhibit 13 to Motion, CY 2020 Share Ledger, sum of "2019 Banked" column[1]. The new allocations for 2020 allow for 73,702 acre-feet to be pumped. *Id.*, sum of "2020 Allocation" column. Adding those together means that, if the GMP were to be reinstated, there could be 99,316 acre-feet pumped from the aquifer by new allocations and banked water in the 2020 irrigation season alone.

It is likely that another reason the monitoring wells show slight stabilization in the basin water levels (in addition to the fact that mother nature provided substantial precipitation in 2019) is because there was not yet any banked water to be pumped in 2019; there was only the Year 1 allocations. Now, there is banked water that can be pumped in addition to the annual allocation under the GMP, putting the basin at risk of *even more* pumping than historic baseline pumping of approximately 76,000 acre-feet annually. There is no provision in the GMP that limits annual pumping or banking—as long as one can secure an "allocation" it can be pumped today or banked for pumping later. Because the banking of water shares continues to expand the threat of future increased pumping above the new annual water allocations, the GMP constitutes an ongoing threat of irreparable harm.

Reinstatement of the GMP would also threaten irreparable harm to the Baileys by allowing groundwater pumping to be transferred among wells, including brand new wells, without first requiring the completion of statutory procedures meant to protect water rights

[1] Interestingly, the share register does not provide a total amount for this column as it does for others. Nor does it provide a total amount of the "Remaining" column, which would provide the total allocation plus banked water available to be pumped under the GMP.

holders from potential harm from changes in pumping amounts and locations throughout Diamond Valley. *See* Order at 9 (noting that under the GMP, the State Engineer may only review a proposed transfer of the point of diversion or place of use of a water right allocation if the new well could exceed the pumping volume of the original water right or if excess water pumped beyond the volume allowed for an existing well would conflict with existing rights). These procedures are found in, among others, NRS 533.325 and 533.345. As the Court explained, "The State Engineer is required to review a temporary change application regardless of the intended use of the water to determine if it is in the public interest and does not impact the water rights used by others. If a potential negative impact is found, the application could be rejected." Order at 37:7–11. The GMP does away with these statutory review procedures, and the Court therefore correctly found the State Engineer to have acted arbitrarily and capriciously in approving the GMP because it permits violations of these procedural safeguards. Order at 39 ("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*.") (emphasis added). Reinstatement of the GMP's liberal transfer of water rights without the necessary statutory oversight of the State Engineer threatens to irreparably harm the Baileys.

Despite DNRPCA's summary statement to the contrary, reinstatement of the GMP would irreparably harm the Baileys. In addition to the obvious harm to the Baileys' senior groundwater certificates, the GMP also harms the Baileys' senior vested surface water rights by violating the bedrock beneficial use doctrine. DNRPCA's offer to reinstate the GMP but to exclude the Baileys from the GMP's reduction of their senior groundwater rights would nonetheless irreparably harm the Baileys because it would allow others to trade and/or bank their unused water rights in violation of the bedrock beneficial use requirement, and it would allow others to pump groundwater from locations that threaten to irreparably harm the Baileys without first completing the statutory water rights change applications procedures meant to protect against

such harms.[2] The Court should therefore deny the Motion to Stay.

2. The Object Of The Appeal Will Not Be Defeated If The Stay Is Denied.

DNRPCA alleges that absence of a stay could result in increased pumping, which would defeat the purpose of NRS 534.037 and the groundwater management plan process. Motion at 4. DNRPCA also alleges that the GMP was designed to stabilize groundwater levels and economic activity in Diamond Valley. *Id*. It claims that these are the object of the appeal that will be defeated if the GMP is not reactivated during the pendency of the appeal. However, none of this will be permanently defeated during the appeal.

DNRPCA bases its argument on its unfounded claims that the GMP was responsible for estimated reductions in pumping going back several years *before* the GMP was even in effect and that these positive effects will be lost forever if the GMP is not immediately reactivated. It defies reality to claim that the initial implementation of the GMP during the 2019 season—when there were no penalties for non-compliance—could have the retroactive effect of reducing pumping in 2017 and 2018. The truth is that the observed stabilization in the aquifer water level in 2019 reflects the hydrologic reality that mother nature provided substantial precipitation in 2019. It is the natural precipitation, not the GMP, that can be credited with the reduced demand on the aquifer in the recent past. In years when mother nature provides water from the sky, farmers pump less from the ground. These high precipitation years also recharge the aquifer, and combined with the reduced demand for irrigation pumping, contribute to the stabilization of aquifer water levels. Furthermore, in addition to reduced demand because of precipitation, it is

[2] DNRPCA's offer to exclude the Baileys from the GMP's mandatory reductions also suggests that should the Court grant such relief, the Baileys would also be precluded from enjoying any "benefits" of the GMP, such as the alleged water "banked" by the Baileys in 2019. For the record, the Baileys did not request to bank any of their unused water in 2019. Any so-called banked water shown on the 2020 GMP water banking ledger for the Baileys is only a result of the fact that the Baileys did not need to pump their full water duty during the 2019 irrigation season because of the specific hydrologic conditions, namely mother nature provided precipitation that was taken up by the Baileys' crops so that they did not need to beneficially use their entire permitted water rights. The difference in their permitted amounts and their actual pumping was automatically registered as "banked" water. The Baileys would prefer that any water not pumped in 2019 simply be left in the aquifer as conserved water, not available to be traded or sold in order to be removed in the future.

highly likely that a large portion of water "banked" in 2019 is actually the result of the large amount of unperfected paper water rights, which would not have otherwise been pumped had the GMP's trial Year 1 not been implemented.

DNRPCA wrongly assumes that failure to reinstate the GMP will result in more pumping. Under the drought conditions of 2016, pumping for irrigation was approximately 76,000 acre-feet, which served as the baseline pumping for the GMP. Under the GMP, the combination of the water "banked" during the 2019 season and the 2020 share allocations would allow as much as 99,316 acre-feet to be pumped—for any purpose, from any place and at any time in the future, more than 23,000 acre-feet more than in the drought year baseline. In other words, it is the GMP, not the status quo, that threatens to allow increased pumping.

DNRPCA's Motion makes wide-ranging claims about the devastation of the entire way of life in Diamond Valley and Eureka should the Court not reinstate the GMP. The Motion lacks perspective in this regard: the Diamond Valley aquifer, as the Court found, has experienced extreme over-pumping for at least four decades. That over-pumping is the result of the State Engineer's original sin of granting too many groundwater permits and the failure to properly manage the basin under its existing authorities for decades. Now, DNRPCA asks the Court to believe that maintaining this multi-decade status quo for the relatively short time it will take for the appeal to run its course will somehow devastate the Diamond Valley economy and way of life. That argument is a red herring—it relies entirely on DNRPCA's fundamentally flawed assumption that if the GMP is not reinstated, then immediate curtailment by priority will ensue. But, as the Court has explained, there are myriad options available other than the illegal GMP or strict curtailment by priority.

DNRPCA's argument that the object of its appeal will be defeated absent reinstatement of the GMP also lacks the perspective of the long horizon of the GMP itself. Under the GMP, reduction of the new annual allocations does not reach its final amount of 34,000 acre-feet for another three decades. And even then, as described above, that is only a reduction of *new* allocations, but it does not account for the pumping of banked water that would also be taking

place each and every year over and above the new allocations. The GMP, therefore, does not automatically reduce pumping such that failure to reinstate it during appeal risks any immediate damage to the aquifer. The only immediate damage would be experienced by senior water rights holders should the GMP be reinstated.

The object of the appeal is overturning this Court's Order so that the GMP can go into effect to gradually and incrementally reduce demand on the groundwater aquifer over three decades or more by taking water from senior water rights and providing it to junior water rights. The data presented in DNRPCA's Motion does not conclusively demonstrate that the GMP has automatically stabilized groundwater levels, it only reflects the hydrologic reality that 2019 was an exceptionally wet year and resulted in less agricultural demand on the aquifer. It is simply not the case that the absence of the GMP's illegal senior water rights reduction and water marketing scheme during the appeal will defeat the long-term purpose of the GMP should DNRPCA prevail in its appeal. The GMP can simply be reinstated at that time. Additionally, DNRPCA's Motion fails entirely to address the much more likely scenario that the Supreme Court upholds this Court's Order, and the resulting chaos that would ensue had the GMP been in effect during the entire appeal: unlike the present situation where there has been only one trial year of the GMP, there would have been multiple years of banking and trading—resulting in multiple years of violation of fundamental water laws—that would have to be somehow unraveled. Instead, if the Court denies the Motion, the pre-GMP status quo would not result in any complicated water marketing transactions during the pendency of DNRPCA's appeal.

3. DNRPCA Will Not Suffer Irreparable Or Serious Injury If The Stay Is Denied.

The harms alleged to be faced by DNRPCA and the intervenors should the Court not reinstate the GMP are entirely of their own making and do not support the relief requested in the Motion. DNRPCA argues it will suffer irreparable injury should the GMP not be reinstated because of the threat of curtailment by priority and based upon the investments that are alleged to have been made in reliance on the GMP. Motion at 6–7.

It is not at all clear that absent reinstatement of the GMP, immediate curtailment of groundwater use by priority in Diamond Valley will follow. To the contrary, there is still over 50% of the 10 year period under NRS 534.037 for the creation of a GMP that complies with law before the State Engineer is mandated to curtail by priority. There is no indication that the State Engineer would immediately order curtailment while the appeal of this Court's Order is underway, in light of the fact that the over-pumping of Diamond Valley has been occurring for decades without any curtailment by priority. DNRPCA's argument continues with the same logical fallacy that plagued its defense of the GMP before this Court: that the choice is a binary one between either the GMP and its violations of Nevada water law or immediate curtailment by priority. That is simply not the case. The Court's Order simply returned the valley to the status quo that had existed for at least four decades before the GMP's first trial year. Therefore, DNRPCA has failed to meet its burden to show that it will suffer irreparable harm should the Court not grant the Motion to stay the Order pending appeal.

DNRPCA also claims it will suffer irreparable harm if the GMP is not reinstated because many farmers in Diamond Valley made investments in their farming operations in reliance on the GMP. Motion at 7. That, however, is neither irreparable harm nor is it sufficient to reinstate the GMP in light of the obvious legal shortcomings of the GMP. Any investments or farming decisions solely made in order to increase banking of unused water were done at the farmer's own risk. This is particularly true with respect to the DNRPCA Intervenors, who were very much aware of the risk that the GMP would be overturned upon judicial review because they are parties to this review proceeding. The Bailey Petitioners' and others' opposition to the GMP was publicly known for many years before they were able to challenge it. Irrigators are, of course, always encouraged to upgrade their operations to be more efficient, and the Court's Order would not affect that recommendation. DNRPCA's allegation that this Court created chaos because of the appropriate reversal of the GMP lays the blame upon the wrong feet.

Furthermore, none of the investments that may have been made in reliance on the GMP were in fact required to have been made. As the Court is aware, 2019 was the first year of GMP

implementation, and during that first year there is no penalty for non-compliance with the provisions of the GMP. Finally, except for the requirement to install a new meter (which also includes a process for securing a variance to exempt a farmer from that requirement), none of the investments described in the Motion were actually *required* by the GMP.

DNRPCA asserts that the Order has resulted in "considerable uncertainty" among Diamond Valley irrigators as to management of the basin and the rules that govern their water use. Motion at 8. There is no such uncertainty: the GMP is not in effect because this Court reversed the State Engineer's approval of it. The basin is subject to the relevant provisions of the NRS governing groundwater withdrawals, primarily Chapters 533 and 534. If DNRPCA has legal questions about the management of the Diamond Valley basin, those questions are more appropriately directed to their legal counsel and/or the State Engineer. To the extent any uncertainty exists, a stay of the Court's Order and reinstatement of the GMP is not necessary; instead, DNRPCA could simply ask this Court to clarify whether, despite the Court's very clear order reversing the approval of the GMP, the GMP is still in effect.

DNRPCA argues that it will suffer irreparable injury if the GMP is not reinstated because it may call into question whether State Engineer Order Nos. 1305 and 1305a are still in effect. Motion at 8. Again, that is a question for the State Engineer, not this Court; and it is certainly not a justification for reinstating the GMP. Orders 1305 and 1305a were issued by the State Engineer to clarify that unperfected groundwater permits would not be required to request extensions of time to prevent forfeiture in Diamond Valley through July 2024. Reversal of the GMP does not, on its face, alter the State Engineer's decision in Order 1305/1305a to pause forfeiture proceedings for unperfected water permits in Diamond Valley. Instead of reinstatement of the GMP, DNRPCA should instead simply ask the State Engineer to clarify that these orders will remain in effect pending DNRPCA's appeal of this Court's Order.

DNRPCA also argues that absent reinstatement of the GMP, the water manager's "oversight" of the GMP process will be lost. Motion at 10. It is not entirely clear what that oversight entails, and it is highly unlikely that any loss of such oversight would constitute

irreparable harm. The State Engineer has the primary obligation to manage and oversee water use in the basin, and that primary management and oversight will continue uninterrupted on appeal.

4. DNRPCA Is Not Likely To Prevail On The Merits In The Appeal.

DNRPCA argues that the Court's Order is likely to be overturned on appeal because of fundamental errors in the Court's analysis. Motion at 12. DNRPCA's argument is primarily a conclusory restatement of its general argument from its Answering Brief herein that relies on the assumption that curtailment by priority is the only alternative to this specific GMP. The only concrete example of these alleged errors discussed in the Motion is DNRPCA's claim that the Court's Order makes two irreconcilable rulings: that the State Engineer properly determined that the GMP would allow for removal of the CMA designation on the one hand, but that the GMP's failure to bring the aquifer into balance and the resulting harm to the Baileys' and Sadler's vested surface water rights rendered the State Engineer's approval of the GMP arbitrary and capricious. Motion at 11. A true reading of the Court's Order reveals no inconsistency in these determinations. In effect, the Court's Order explains that, pursuant to NRS 534.037, the State Engineer has considerable discretion to make and remove a CMA designation, and to review a GMP to determine whether it will achieve the goal of removing the CMA designation. Order at 15–16. However, that is a different issue than whether the GMP will aggravate or continue adverse impacts to senior vested water rights. That issue was addressed in a different, later section of the Order. *See* Order at 23–25. There, the Court explains that the GMP violates NRS 533.085(1)'s prohibition on impairment of vested rights because it "fails on its face to reduce the harm caused by overpumping and aggravates the depleted water basin." *Id*. at 24. These are two distinct lines of inquiry, and the Court's conclusion that the State Engineer's determination that the GMP will allow removal of the CMA designation is not in conflict with its conclusion that

the GMP illegally impairs vested water rights. Therefore, DNRPCA is not likely to prevail on the merits of its appeal of the Order on this basis.

Furthermore, the Motion does not even attempt to explain how the Court could have possibly made an error in finding that the GMP violates the fundamental principles of prior appropriation and beneficial use. As the Court's Order notes, each of the Respondents has admitted that the GMP violates the prior appropriation doctrine by reducing the water rights of senior water rights holders, and DNRPCA's argument that the Court's ruling is in error simply restates the same points already considered and rejected by the Court. The Court's Order also makes crystal clear that the GMP's banking and trading scheme violates the beneficial use requirement and the statutory requirement that the State Engineer must review each and every proposed change in point of diversion, place of use or manner of use of a water right. Any of these legal deficiencies, by itself, is enough to invalidate the GMP, yet DNRPCA has not addressed either in its Motion.

5. There Is Potential Harm To The Public Interest If GMP Were Reinstated.

The public interest weighs heavily in favor of denying the Motion. Because the GMP was found to violate various provisions of law, this Court reversed and overturned Order 1302, terminating the GMP. DNRPCA now asks the Court to effectively reinstate a patently illegal water management scheme, if not for the entire valley than at least for all water users except the Baileys, Renners, and Sadler Ranch. Because the GMP violates the law and threatens to cause irreparable harm, it would be against the public interest to reinstate it, even if the Petitioners were excluded from the permit reduction mandate.

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III. CONCLUSION

For the foregoing reasons, the Bailey Petitioners respectfully request this Court to deny DNRPCA's Motion based on DNRPCA's failure to meet its burden of granting a stay.

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 May 26, 2020.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that, on May 26, 2020, a true and correct copy of the **OPPOSITION OF BAILEY PETITIONERS TO DNRPCA INTERVENORS' MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302** was sent via electronic mail to the following:

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

Dept. No.: 2

NO. _____ FILED

MAY 27 2020

By _____ Deputy Clerk

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioners,

vs.

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

Respondent, and

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

Intervenors.

SADLER RANCH, LLC AND IRA R. & MONTIRA RENNER OPPOSITION TO DNRCPA INTERVENORS' MOTION FOR STAY PENDING APPEAL

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Petitioners SADLER RANCH, LLC, a Nevada limited-liability company ("Sadler Ranch"), and IRA R. & MONTIRA RENNER, husband and wife ("Renner"), by and through their counsel, DAVID H. RIGDON, ESQ. and PAUL G. TAGGART, ESQ., of the law firm of TAGGART & TAGGART, LTD., hereby file this Opposition to DNRCPA Intervenors' Motion for Stay Pending Appeal. This opposition is based on all papers and pleadings relating to this matter currently on file with this Court and any oral argument this Court may entertain.

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MEMORANDUM OF POINTS AND AUTHORITIES

DNRCPA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302 (the "Motion") is nothing more than an attempt to re-litigate the merits of the case using unsubstantiated and unverified extra-record information about the efficacy of the Diamond Valley Groundwater Management Plan ("DVGMP"). But this information has nothing to do with the key point at issue in this case – that the State Engineer's approval of the DVGMP violated Nevada's long-standing doctrine of prior appropriation and was, therefore, arbitrary and capricious. As this Court correctly noted, this key fact was not just undisputed during the course of the litigation, it was openly and explicitly acknowledged by the State Engineer himself.[1] Thus, to succeed on appeal, Respondents[2] bear the heavy burden of convincing the Supreme Court to overturn 150 year-old foundational doctrine of Nevada's water law.[3]

Respondents' burden is made even more difficult by their own prior public statements regarding the legality of the DVGMP. In a 2016 presentation to his peers in the other western states, State Engineer King publicly acknowledged that the DVGMP needed a "statutory change to make [it] legal" and that his office was submitting a bill draft "to do just that."[4] SB 73, introduced in the 2017 Legislature, was the bill draft the State Engineer was referencing. At a hearing on the bill, Dusty Moyle, a member of DNRCPA, testified that passage of SB 73 was a vital and necessary prerequisite for approval of the DVGMP.[5] But SB 73 failed. Another similar bill (SB 269) also failed.[6] So, in addition to having to persuade the Supreme Court to overturn 150 years of Nevada water law without any legislative support for doing so, Respondents must also convince this Court to find the DVGMP is lawful despite their own prior admissions to the contrary. This is not just a high burden; it is an insurmountable one.

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[1] SE ROA 6 ("it is acknowledged that the GMP does deviate from the strict application of the prior appropriation doctrine.").
[2] The use of "Respondents" herein collectively refers to the State Engineer and all Intervenors.
[3] Prior appropriation has been the basis of Nevada water law since statehood. *See Lobdell v. Simpson*, 2 Nev. 274 (1866).
[4] JASON KING, THE AUSTRALIAN APPROACH TO WATER MANAGEMENT A PILOT PROJECT IN DIAMOND VALLEY, NEVADA at Slide 21 (September 26, 2016, Western State Engineer's Annual Conference).
[5] PET ADD 022.
[6] Respondents' position is that even if SB73 or SB269 had been approved, the DVGMP would still be invalid since it would represent a legislative taking of private property without just compensation in violation of Article I, Section 8 of the Nevada Constitution and Amendment V of the United States Constitution. The DVGMP also violates Article 1, Section 22 of the Nevada Constitution which prohibits the taking of private property from one private party for the sole purpose of conveying it to another private party.

DNRCPA alleges that the Court's April 2020 Order has created an emergency in the basin which justifies staying the order during the pendency of the appeal. But, as the Court is well aware, the junior priority irrigators in Diamond Valley have had decades to correct the over-pumping problem and resisted all efforts to do so. What they claim as grounds for an emergency are, in fact, nothing more than the consequences of their own knowing refusal to use water properly. They have unclean hands by having actively resisted the efforts of holders of vested rights to valley springs, like Sadler and Renner, to restore their senior priority water rights. This has been done with the active support of Eureka County, who has consistently used taxpayer money to advance the interests of one group of county citizens over another. On several occasions, this Court has warned Respondents that the ongoing impairment of senior water rights cannot continue. Yet they have ignored these warnings. To now argue an emergency exists, when they knew all along that the DVGMP was not legal and did nothing to address the problems this Court has articulated over and over, rings hollow. The emergency started decades ago when the junior priority irrigators, with the implicit permission of the State Engineer, pumped so much groundwater that they dried up the naturally flowing springs.

Because DNRCPA's likelihood of success on appeal is vanishingly small and the equities in this case favor Petitioners, the request for a stay must be denied. However, should this Court decide to grant the stay, it should require DNRCPA to post a bond of not less than one million dollars to cover damages Petitioners will incur during the pendency of the appeal and, if possible, exempt Petitioners from complying with the otherwise illegal plan during the course of the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

This Court is well versed in the factual background of the water situation in Diamond Valley. For the sake of brevity, Petitioners hereby incorporate the facts already laid out in the numerous pleadings and papers already on file in this case.

With respect to the instant Motion, on April 27, 2020, after a full briefing and a hearing on the merits, this Court issued its Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review (the "April 2020 Order"). The April 2020 Order comprehensively analyzed and decided the issues raised by the parties and constituted a final judgment on the merits pursuant to NRAP 3A(b)(1).

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On April 29, 2020, Petitioners served upon Respondents a Notice of Entry of the April 2020 Order. Service of the Notice initiated the 30-day appeal period under NRAP 4(a)(1).

On May 14, 2020, DNRCPA filed and served its Notice of Appeal. Similar notices were filed by the State Engineer and Eureka County on May 15, 2020, and May 21, 2020, respectively.

Also, on May 15, 2020, DNRCPA filed and served by electronic mail the instant Motion for Stay Pending Appeal. Joinders to the Motion were filed by the State Engineer and Eureka County on May 19, 2020, and May 21, 2020, respectively.

STANDARD OF REVIEW

I. NRAP 8(c)'s Equitable Factors Apply To DNRCPA's Request For A Stay.

The party requesting the stay has the burden of "show[ing] that the balance of equities *weighs heavily* in favor of granting the stay."[7] In reviewing a motion to stay pending appeal, the Court must consider the following equitable factors: (1) whether the object of the appeal will be frustrated if the stay is not granted, (2) whether the party requesting the stay will suffer irreparable harm if the stay is denied, (3) whether the party opposing the stay will suffer irreparable harm if the stay is granted, and (4) whether the party requesting the stay is likely to succeed on the merits of the appeal.[8] None of the four factors carries more weight than the others; however, if one or two factors are especially strong, they may counterbalance the other weaker factors.[9]

Two of the factors require the Court to determine whether parties will suffer irreparable harm. "Irreparable harm is an injury for which compensatory damage is an inadequate remedy."[10] Monetary damages, like those claimed by Respondents, are rarely considered to be irreparable harm. However, because of its unique nature, an impairment or loss of property rights, as will be suffered by Petitioners if the stay is granted, generally constitutes irreparable harm.[11] In Nevada, water rights are "regarded and protected as real property."[12]

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[7] *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added).
[8] NRAP 8(c).
[9] *Id.*
[10] *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 353, 351 P.3d 720, 723 (2015), citing *Dixon v. Thatcher,* 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987) (internal quotations omitted).
[11] *Dixon v. Thatcher,* 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987)
[12] *Application of Filippini,* 66 Nev. 17, 21–22, 202 P.2d 535, 537 (1949).

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DNRCPA cites to *Mikohn Gaming Corp. v Dist. Ct.*[13] to argue that the first stay factor should carry the greatest weight. But *Mikohn Gaming* is factually inapposite and dealt with a specific and exceptional issue – "the unique policies and purposes of arbitration and the interlocutory nature of the appeal."[14] As a petition for judicial review brought under NRS 533.450, the instant case is entirely different than a tort case dispute over enforcement of a binding arbitration clause. Also, the appeal filed by DNRCPA is an appeal from a final determination, not an interlocutory writ petition. Accordingly, *Mikohn Gaming's* over reliance on a single stay factor has little precedential value with respect to the present case.

II. The Court Should Also Take Into Account The Unique Nature Of The Relief Granted In This Case When Determining Whether To Grant A Stay.

DNRCPA's Motion asks this Court to authorize the State Engineer to continue to enforce a groundwater management plan that the Court has already determined is unlawful. Such an outcome would be contrary to the interests of justice.

The nature of the judgment being appealed is an important consideration when determining whether to grant or deny a stay pending appeal. In most civil cases, judgments consist of an award of monetary damages. To maintain the status quo pending appeal, such judgements are normally stayed upon the posting of a supersedeas bond.[15] However, petitions for judicial review filed pursuant to NRS 533.450 are different in nature and kind from the typical civil case. Such cases are themselves appeals of a prior administrative action, not original proceedings initiated in the district court.[16] Accordingly, the only available remedy is an order reversing or remanding the determination of the inferior tribunal – the administrative agency. Such orders are injunctive in nature – prohibiting the administrative agency from taking action to enforce the order being appealed. However, because such cases oftentimes raise novel questions related to the application and interpretation of the relevant governing law, the relief provided by the district court is also declarative in nature – the pronouncement of an answer to a question of law.

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[13] *Mikohn Gaming Corp. v. Dist. Ct.*, 120 Nev. 248, 89 P.3d 36 (2004).
[14] *Id.*
[15] NRCP 62(d).
[16] NRS 533.450(1) (indicating that such actions are brought "in the nature of an appeal").

This Court's April 2020 Order provides both forms of relief – declarative and injunctive. In the Order, the Court provides the first ever judicial exposition on the nature, scope, and effect of NRS 534.037 and NRS 534.110(7) and their relation to the doctrine of prior appropriation.[17] After carefully scrutinizing the relevant statutes and declaring that neither NRS 534.037 nor 534.110(7) exempts groundwater management plans from prior appropriations, the Court then reversed the State Engineer's order approving and adopting the DVGMP.

The overall effect of the reversal is injunctive – prohibiting the State Engineer from enforcing the DVGMP.[18] However, the injunctive relief flows from, and is contingent upon, the declarative relief. This is important because, while the issuance of a stay may be appropriate in cases involving pure injunctive relief, in other cases like this one, the effect of issuing a stay would be to authorize the enforcement of a groundwater management plan that has been determined to be unlawful. In other words, by issuing the stay the Court would, in effect, be granting the State Engineer permission to enforce an otherwise illegal order.

ARGUMENT

None of the factors this Court must consider in this case support the issuance of a stay. First, DNRCPA's appeal lacks merit and is highly unlikely to succeed. Second, the denial of the stay will in no way moot or otherwise frustrate the Supreme Court's ability to hear arguments and render an enforceable decision in this matter. Third, the issuance of a stay will significantly impair Petitioners' vested property rights, which under the law constitutes a *de facto* irreparable injury. Finally, denial of the stay will not harm any party in this case, either individually or collectively, since the State Engineer has adequate tools at his disposal, even without the DVGMP, to limit pumping in the basin.

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[17] These statutes were passed and became effective in 2011. To date, the DVGMP is the only groundwater management plan that has been considered, drafted, and approved under the statutes.

[18] *Kress v. Corey*, 65 Nev. 1, 17, 189 P.2d 352, 360 (1948) (only judgments "which command or permits some acts to be done" justify consideration of a stay).

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I. DNRCPA's Appeal Lacks Merit And Is Unlikely To Succeed.

A. This Court correctly concluded that the DVGMP violates prior appropriation doctrine.

This Court correctly determined that "the DVGMP is contrary to Nevada water laws" and expressly declined Respondents' invitation to alter said laws.[19] This Court did not arrive at this conclusion lightly or hastily. Instead, this Court carefully studied the briefs and arguments of the parties, took the time needed to fully and independently analyze those arguments, and then self-authored a well-reasoned forty-page opinion that addressed each argument in detail.

This Court's conclusion that the DVGMP violates long-standing Nevada water law is self-evident. As this Court notes, the Appellants, including the State Engineer, expressly conceded this point.[20] In fact, in Order 1302, the State Engineer readily acknowledged that "the GMP does deviate from the strict application of the prior appropriation doctrine."[21]

Because the DVGMP's violation of prior appropriations was self-evident, Respondents were left arguing that the Legislature *impliedly* abrogated the doctrine when it authorized the development of groundwater management plans. But, as this Court correctly found, implied repeals of long-standing legal doctrines are heavily disfavored.[22] To determine whether an implied repeal has occurred, courts "look to the text of the statutes, legislative history, the substances of what is covered by both statutes, and when the statutes were amended."[23] This was exactly the analysis undertaken by the Court in this case.

First, this Court looked at the plain text of the statutes and found that there is no express language in the statute abrogating the long-standing prior appropriation doctrine.[24] Instead, this Court determined 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."[25] This Court further found that there was no implied abrogation of the

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[19] April 2020 Order at 39.
[20] *Id.* at 10-11.
[21] SE ROA 6.
[22] *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001). *See also* ANTONIN SCALIA & BYRAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 327-333 (Thompson/West 2012).
[23] *Washington*, 117 Nev. at 739, 30 P.3d at 1137.
[24] April 2020 Order at 30, 31 ("[c]learly, 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.").
[25] *Id.* at 31 (emphasis added).

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prior appropriation statute, noting that "[t]he doctrine of prior appropriation can logically exist in harmony with NRS 534.037 and 534.110(7) and allow for [groundwater management plans] to address the water issues present in a particular CMA basin."[26]

In fact, contrary to Respondents' assertions, forcibly confiscating water from senior appropriators to give to junior appropriators, as occurs under the DVGMP, is not the only or the best method to bring an over-appropriated water basin back into balance. Instead, as the Court noted, other methods exist that are consistent with prior appropriation doctrine.[27] For example, a groundwater management plan can provide a funding mechanism whereby junior appropriators pay to install conservation equipment at the farms of more senior irrigators in exchange for the use of the saved water. Or, junior appropriators could pay into a fund whose proceeds are used to buy out and retire more senior rights. Both of these methods would be fully consistent with the expressed intent of the Legislature that – "[p]eople with *junior rights* will try and figure out how to conserve enough water under these plans."[28]

Second, this Court reviewed the extensive legislative history of the statutes in question and found that "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."[29] In fact, this Court found that "nowhere in the Legislative history of AB 419 is one word spoken that the proposed legislation will allow for a GMP whereby [a] senior 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."[30]

Finally, this Court made note of 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 in AB 419."[31] There is an abundance of Nevada precedent and history supporting this determination.[32]

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[26] *Id.* at 36.
[27] *Id.* at 32-33
[28] Minutes of Sen. Comm. on Government Affairs, May 23, 2011, at 16 (emphasis added).
[29] April 2020 Order at 36.
[30] *Id.* at 34.
[31] *Id.* at 35.
[32] *See e.g. Lobdell v. Simpson*, 2 Nev. 274 (1866); *Jones v. Adams*, 19 Nev. 78, 6 P. 442 (1885); *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 21 P. 317 (1889); *Application of Fillippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949) ("The doctrine of appropriation is the settled law of this state.").

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This Court's careful and exhaustive analysis of the issue significantly reduces the likelihood that Respondents will succeed on appeal. On appeal, DNRCPA bears the nearly insurmountable burden of convincing the Supreme Court that the Legislature *impliedly* repealed the prior appropriation doctrine when it passed the legislation that would become NRS 534.037 and 534.110(7) despite the fact that: (1) nothing in the text of the statutes expresses or implies a desire to repeal prior appropriation, (2) the legislative history of the bill contains not a single word of testimony indicating that the Legislature intended to repeal prior appropriation, and (3) effective groundwater management plans can be developed under the statutes that fully comply with prior appropriation principles.

B. <u>This Court correctly found that the DVGMP directly violated other mandatory water law statutes.</u>

In addition to violating Nevada's 150-year-old prior appropriation doctrine, this Court found that the DVGMP also expressly violates other mandatory provisions of state water law. For example, NRS 533.325 requires a water rights holder to file a change application for any change in the manner of use, place of use, or point of diversion of their water right. Likewise, NRS 533.330 states that each water rights permit can have only one beneficial use. Both of these provisions are mandatory and neither contain any exception for water rights subject to a groundwater management plan.

But the DVGMP essentially converts existing water rights permits into "super permits" by allowing water users to move their water between multiple points of diversion, place the water to use in areas outside of the permitted place of use, and use the water for any beneficial purpose whatsoever without regard for the terms of their permit. No change applications are required to perform these activities. As this Court correctly noted, eliminating the requirement to file such change applications means that other water users, who may be impacted by the proposed change, are deprived of any opportunity to review and object to them. At the very least, this is a due process violation.

Because the DVGMP violates both the prior appropriation doctrine and other mandatory provisions of the water law, this Court correctly held that the State Engineer's approval of the plan was arbitrary and capricious. Having made this determination, if this Court now issues the requested stay, it would effectively be giving the members of DNRCPA permission to wantonly violate state law. Such a result would be unjust and inequitable to all other water uses in the state. Because the DVGMP openly

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violates Nevada water law and actively harms holders of senior water rights, it cannot be allowed to continue and DNRCPA's motion must be denied.

II. The Purpose Of The Appeal Will Not Be Frustrated If The Stay Is Denied.

The ostensible object of DNRCPA's appeal is to have the Supreme Court declare the DVGMP to be legal and valid despite all evidence to the contrary. While this is unlikely to happen, the Supreme Court's review of the case will not be frustrated by a denial of the stay request. No argument raised by the Appellants will become moot. Nor will the denial of the stay in any way limit the ability of the Supreme Court to render an enforceable decision on the merits of the case. If, in the highly unlikely event the Supreme Court reverses this Court's decision and declares the DVGMP to be valid, the State Engineer can easily pick up where he left off and begin enforcing the plan from that point forward.

In its Motion, DNRCPA attempts to transmute the object of the appeal into a claim that the goal of the appeal is to reduce pumping in the basin. Specifically, DNRCPA alleges that during Year 1 of the DVGMP (2019) pumping was reduced from 76,000 acre-feet to 56,339 acre-feet[33] and claims that this progress will be reversed if the stay is denied. But the only support for the alleged reduction in pumping is two extra-record, unsubstantiated declarations.[34] Neither declaration cites to the source of its data or whether such data has been independently verified or affirmed. However, even if true, that data is completely irrelevant to the actual question in this case (whether the provisions of the DVGMP are legal) and also does not support DNRCPA's claim that pumping will increase if a stay is not issued.

By its own terms, compliance with the DVGMP was voluntary in 2019. Accordingly, any pumping reductions achieved that year resulted from voluntary efforts of conservation, not enforcement of the plan. Many water users in the basin have used grant funds from the USDA's National Resource Conservation Service to pay for and install totalizing meters and other conservation equipment at their farms.[35] The terms of the grants require this equipment to be permanently installed and utilized. Accordingly, the irrigators who have taken advantage of these grants have an independent contractual obligation to continue conserving water, even absent the DVGMP. In addition, wasting water is a crime

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[33] Motion at 5.

[34] Motion Exhibit 2 at ¶30 and Exhibit 3 at ¶8.

[35] Motion Exhibit 4 (Marty Plaskett Declaration). Mr. Plaskett's declaration, and DNRCPA's motion, claim that these investments were made by "irrigators in Diamond Valley" (thereby implying that said irrigators paid for them out of their own funds). This Court should be aware that most of these investments were in reality funded by federal grants.

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in Nevada.[36] Therefore, irrigators who fail to maintain their conservation improvements, and thereby willfully waste water, could potentially be charged with a misdemeanor under NRS 533.460.

DNRCPA also misstates the law when it asserts that "[a]bsent the continued validity of the GMP pending appeal, no reduction in pumping will be required."[37] As this Court has previously ruled, "[t]he CMA designation under NRS 534.110(7)(a) does not preclude the State Engineer from ordering curtailment during the 10 year CMA designation" and "NRS 534.110(6) and (7)(a) when read together do not prohibit the State Engineer from ordering curtailment at any time during the 10 year CMA designation."[38] Therefore, even absent the DVGMP, the State Engineer is obligated to manage the basin to ensure the security of senior right holder's water supplies and has full authority issue all orders (including a curtailment order) required to accomplish this purpose.

If the DNRCPA members are truly concerned that without the DVGMP pumping will increase above the 55,000 acre-feet claimed to be pumped in 2019, they can petition the State Engineer to use the tools he already has at his disposal to prevent this. One such tool would be to issue an order limiting pumping in 2020 to 55,000 acre-feet.[39] Holders of water rights junior to this cutoff line could still be allowed to pump any water not used by seniors, as long as total pumping did not exceed 55,000 afa overall. This type of approach is not radical, new, or unique. In fact, this very approach was proposed by the State Engineer in a draft order for management of the Lower White River Flow System. There is no reason why it cannot be adapted and used in Diamond Valley.[40]

Lastly, there is nothing in the Court's April 2020 Order that invalidates the actions taken by irrigators to voluntarily reduce their pumping. In fact, DNRCPA claims that these reductions in pumping occurred in both 2017 and 2018, well before the DVGMP was approved. And, in 2019, compliance with the provisions of the DVGMP was wholly voluntary. If the claimed pumping reductions have occurred on a purely voluntary basis, during a time when the DVGMP was not in effect, there is no

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[36] *See* NRS 533.460 to 533.463.
[37] Motion at 3.
[38] *Order Granting in Part and Denying in Part Motion to Dismiss First Amended Petition for Curtailment in Diamond Valley* at 9-10, *Sadler Ranch v. King*, Seventh Judicial District Court Case No. CV-1409-204 (July 15, 2016).
[39] This is being offered as an example only. Sadler Ranch continues to contend that pumping should be immediately curtailed to the perennial yield of 30,000 afa with 12,000 afa being designated for pumping in the southern portion of the basin and 18,000 afa being designated for the northern portion of the basin in accordance with the scientific findings contained in the 1968 USGS study (SE ROA 21-133).
[40] Exhibit 1 – September 19, 2018, Draft Order at 11 (Section VII(4)).

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reason to believe they will not continue. In short, DNRCPA provides no evidence that a stay is required to maintain the voluntary reductions in pumping that they claim have occurred.

The DVGMP is not the only, or even the best, method to resolve the over-pumping problem in Diamond Valley. Rather, the State Engineer has numerous other tools at his disposal that can be used to accomplish this goal that he can employ immediately. In addition, there is no reason to believe that irrigators will not continue their voluntary conservation efforts, especially given their contractual obligations to do so. Accordingly, the stay should be denied.

III. Respondents Will Be Hamed By Issuance Of A Stay.

Water rights are unique property rights, and the loss or impairment of those rights is a *de facto* irreparable harm.[41] "Any act which destroys or results in a substantial change in property, either physically *or in the character in which it has been held or enjoyed*, does irreparable injury."[42] Impairing senior water rights (including senior vested rights) is regarded as an irreparable injury and "one's right to the use of his property may not be divested even though he might replace that property."[43]

Nowhere in its Motion does DNRCPA address the fact that the plan forcibly takes the private property of one group of individuals (senior right holders) for the purpose of reallocating it to another group (junior right holders). This plan not only violates long-standing prior appropriation doctrine, it also violates the Nevada Constitution which prohibits the government from engaging in a "direct or indirect transfer of any interest in property. . . from one private party to another private party."[44]

The DVGMP clearly changes the character of the senior water rights in the basin. The plan effectively strips the priority status from these rights and reallocates the water under a radical new share allocation scheme. Under this scheme, the owner of 100 acre-feet of senior priority water rights will eventually lose the right to 70% of its water for the sole purpose of providing junior priority water right holders the ability to continue to pump.

DNRCPA asserts that any harm to Petitioners can be mitigated by a judicial order exempting them from the DVGMP while the stay is in effect. While Petitioners concede that this proposal would

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[41] *Dixon v, Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987).
[42] *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 125 (1972) (emphasis added).
[43] *Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971).
[44] Nev. Const. Art 1, Sec. 22(1).

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partially mitigate their potential damages, it is questionable whether either a court or the State Engineer has the authority to unilaterally exempt some water users from the plan while continuing to force others to comply with it. A groundwater management plan must be supported by "a majority of the holders of permits or certificates to appropriate water in the basin."[45] Likewise, any amendments or changes to the plan must "be proposed and approved in the same manner as an original groundwater management plan."[46] Exempting particular water users from the plan's provisions, even temporarily, effectively amends the plan.

Order 1302 affirms that the DVGMP was supported only by a razor-thin majority of water rights holders in the basin (just 53%).[47] This raises the question of whether the plan would have achieved majority support had water users known that they would be required to comply with its terms while other water users would be exempted. No matter how convenient DNRCPA's solution may be, NRS 534.037 appears to require that any proposed exemption be incorporated into the plan, presented to the water users in the basin, and be approved by a majority of those users *before* it could be implemented. Like the development of the DVGMP, DNRCPA's proposed approach to the stay sacrifices compliance with the law to convenience and expediency. However, if the Court determines that a stay is warranted, and that DNRCPA's proposed exemption is lawful, Sadler and Renner request that, in addition to requiring DNRCPA to post a bond, Sadler and Renner be exempted from the DVGMP while the appeal is pending.

Because continued enforcement of a plan that violates the Nevada Constitution, the prior appropriation doctrine, other mandatory provision of state law, and the express terms of the water rights permits issued by the State Engineer, the issuance of a stay would impair Petitioners' vested property rights. In addition, it appears that DNRCPA's proposed alternative remedy would itself violate express provisions of state law. Accordingly, the stay should be denied outright.

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[45] NRS 534.037

[46] NRS 534.037(5).

[47] Respondents continue to contest the validity of the State Engineer's vote count.

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IV. No Party Will Be Harmed By A Denial Of A Stay.

A party seeking a stay must show that they will suffer "irreparable or serious injury" without the stay.[48] An irreparable injury is one that is "incapable of being rectified, restored, remedied, cured, regained, or repaired."[49] The party seeking the stay bears the burden of providing evidence showing a "reasonable probability that *real* injury will occur if the injunction does not issue."[50] In other words, "the injury must be both certain and great; it must be actual and not theoretical."[51] "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."[52]

DNRCPA fails to identify or quantify any real or specific injury that will occur to itself or its members if the stay is denied. Instead, its Motion rehashes arguments made during oral argument and then claims that a denial of the stay will result in general, communal harm to the basin as a whole. But, as explained above, none of the alleged harms will *necessarily* result from denial of the stay. And, as this Court has already noted, the State Engineer has other tools at his disposal to prevent over-pumping in the basin. His refusal to use those tools does not justify forcing senior-priority water users to comply with an otherwise illegal and unconstitutional groundwater management plan.

Because DNRCPA has not, and cannot, show that it will suffer any real or measurable harm as a result of the Court's April 2020 Order, the requested stay must be denied.

V. DNRCPA Should Be Required To Post A Bond If A Stay Is Issued.

To secure a stay in an injunctive relief case, the party requesting it must provide a bond or the court must impose other terms to secure the opposing party's rights.[53] As noted above, the granting of a petition for judicial review under NRS 533.450 is, in essence, a grant of an injunction prohibiting the State Engineer from enforcing or implementing the contested rule or action. In the present case, the effect of this Court's April 2020 Order is to rescind the State Engineer's approval of the DVGMP and enjoin him from using the power of his office to enforce it.[54]

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[48] *Hansen v. Dist. Ct.*, 116 Nev. 650, 658, 6 P.3d 982, 987-88 (2000).
[49] BLACK'S LAW DICTIONARY 958 (10th Ed, 2014) (definition of "irreparable").
[50] *Berryman v. Int'l Bhd. Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966) (emphasis added).
[51] *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C.Cir. 1985).
[52] *Id.*
[53] NRCP 62(c).
[54] Although the Court's Order has the effect of an injunction, the relief granted is actually declarative in nature (declaring that groundwater management plans are not exempt from the prior appropriation doctrine and other mandatory state statutes).

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Importantly, this Court's April 2020 Order maintains the status quo in the basin rather than overturning it. While 2019 was the first year the plan was put into effect, compliance was wholly voluntary. Accordingly, the existing status quo (where pumping is governed by the standard provisions of NRS 533 and NRS 534) remained in place throughout the 2019 irrigation season. The issuance of a stay would upset this status quo by forcing people to comply with a radical plan that upends the prior appropriation system and fundamentally alters their existing property rights.

Issuing a stay, and allowing the plan to continue, would present other problems as well. The DVGMP converts water rights to shares and establishes an elaborate new water trading scheme. The plan effectively commodifies this state's scarce water resources and encourages speculation by creating new tradeable contractual interests. Allowing this scheme to move forward, risks enticing unsuspecting members of the public to purchase shares or otherwise invest in this speculative water trading system only to have such investments invalidated when the Supreme Court inevitably affirms this Court's April 2020 Order.

Because DNRCPA's requested stay will upset the existing status quo, DNRCPA should be required to post a bond to indemnify Petitioners for any damages resulting from enforcement of Order 1302. Also, because harm to vested property rights is a de facto irreparable harm that is difficult to quantify with exactitude, the required bond should be in an amount not less than one million dollars.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that DNRCPA's request for a stay be denied because: (1) it is extremely unlikely that the Supreme Court will decide to overturn Nevada's 150 year-old prior appropriation doctrine and, therefore, DNRCPA's appeal has a low chance of success; (2) the denial of a stay will not frustrate or otherwise moot the appeal; (3) Petitioners will be needlessly harmed if the stay is granted; and (4) as shown above, none of the Respondents will be harmed if the stay is denied. However, if this Court believes that a stay is warranted, such a stay should only be effective upon DNRCPA's posting of a bond of not less than one million dollars.

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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 this 26th day of May, 2020.

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CERTIFICATE OF SERVICE

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

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

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

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

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

DATED this 26th day of May, 2020.

Employee of TAGGART & TAGGART, LTD.

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INDEX OF EXHIBITS

Exhibit Number	Description	Number of Pages
1.	September 2018 Draft State Engineer Order limiting groundwater pumping in several basins in southern Nevada	14

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EXHIBIT 1

EXHIBIT 1

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

DRAFT ORDER #DRAFT

DESIGNATING THE ADMINISTRATION OF ALL WATER RIGHTS WITHIN COYOTE SPRING VALLEY HYDROGRAPHIC BASIN (210), BLACK MOUNTAINS AREA (BASIN 215), GARNET VALLEY (BASIN 216), HIDDEN VALLEY (BASIN 217), CALIFORNIA WASH (BASIN 218), AND MUDDY RIVER SPRINGS AREA (A.K.A. UPPER MOAPA VALLEY) (BASIN 219) AS A SINGLE HYDROGRAPHIC BASIN, LIMITING GROUNDWATER PUMPING, AND HOLDING IN ABEYANCE REVIEW OF FINAL SUBDIVISION MAPS

I. BASIN DESIGNATIONS PURSUANT TO NRS § 534.030

WHEREAS, the Coyote Spring Valley Hydrographic Basin was designated pursuant to Nevada Revised Statute (NRS) § 534.030 by Order 905 dated August 21, 1985, which also declared municipal, power, industrial and domestic uses as preferred uses of the groundwater resource pursuant to NRS § 534.120.

WHEREAS, the Black Mountains Area Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1018 dated November 22, 1989, which also declared municipal, industrial, commercial and power generation purposes is to be considered preferred uses of the groundwater resource pursuant to NRS § 534.120, declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

WHEREAS, the Garnet Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1025 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

DRAFT

WHEREAS, the California Wash Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1026 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

WHEREAS, the Hidden Valley Hydrographic Basin was designated pursuant to NRS § 534.030 by Order 1024 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, and declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

WHEREAS, the Muddy River Springs Area (a.k.a., the Upper Moapa Valley) was partially designated pursuant to NRS § 534.030 by Order 392 dated July 14, 1971 and was fully designated by Order 1023 dated April 24, 1990, which also declared municipal, quasi-municipal, industrial, commercial, mining, stockwater and wildlife purposes as preferred uses pursuant to NRS § 534.120, declared irrigation of land using groundwater to be a non-preferred use, and ordered that applications to appropriate groundwater for irrigation will be denied.

II. ORDERS 1169 AND 1169A

WHEREAS, on March 8, 2002, the State Engineer issued Order 1169 holding in abeyance carbonate-rock aquifer system groundwater applications pending or to be filed in Coyote Spring Valley (Basin 210), Black Mountains Area (Basin 215), Garnet Valley (Basin 216), Hidden Valley (Basin 217), Muddy River Springs Area (a.k.a. Upper Moapa Valley) (Basin 219), Lower Moapa Valley (Basin 220), and ordered an aquifer test of the carbonate-rock aquifer system, which was not well understood, to determine whether additional appropriations could be developed from the carbonate-rock aquifer system.

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WHEREAS, on April 18, 2002, the State Engineer in Ruling 5115, added the California Wash (Basin 218) to the Order 1169 aquifer pumping test basins.

WHEREAS, on November 15, 2010, the Order 1169 aquifer test began whereby the study participants began reporting to the State Engineer on a quarterly basis, the amounts of water being pumped from wells in the carbonate and alluvial aquifer during the aquifer test.

WHEREAS, on December 21, 2012, the State Engineer issued Order 1169A declaring the completion of the aquifer test directed in Order 1169 on December 31, 2012, after a period of 25½ months, and providing the study participants until June 28, 2013, the opportunity to file reports with the State Engineer addressing the information gained from the aquifer test and the water available to applications in the aquifer test basins.

WHEREAS, during the Order 1169 aquifer test, an average of 5,290 acre-feet per year was pumped from carbonate wells in Coyote Spring Valley, and a cumulative total of approximately 10,180 acre-feet per year of water was pumped from the carbonate aquifer throughout the study basins. An additional 3,700 acre-feet per year was pumped from the Muddy River Springs Area alluvial aquifer.

WHEREAS, results of the 2-year test demonstrate that pumping 5,290 acre-feet annually from the carbonate aquifer in Coyote Spring Valley, in addition to the non-study carbonate pumping, caused unprecedented declines in groundwater levels and flows in the Petersen and Peterson East springs, two high-altitude springs, which are considered to be the "canary in the coal mine" springs for the overall condition of the Muddy River. These springs are at the headwaters of the decreed and fully appropriated Muddy River and are the predominate source of water that supplies the habitat of the endangered Moapa Dace, a fish federally listed as an endangered species since 1967.

WHEREAS, based upon the findings of the aquifer test, the carbonate aquifer underlying Coyote Spring Valley, Garnet Valley, Hidden Valley, Upper

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Moapa Valley, California Wash and the northwest part of the Black Mountains Area[1] ("Lower White River Flow System" or "LWRFS") was acknowledged to have a unique hydrologic connection and share virtually the same supply of water (see attached map).[2]

III. RULINGS 6254, 6255, 6256, 6257, 6258, 6259, 6260, AND 6261

WHEREAS, on January 29, 2014, the State Engineer issued Rulings 6254 and 6255 on pending applications in the Coyote Spring Valley, Ruling 6256 on pending applications in the Garnet Valley, Ruling 6257 on pending applications in the Hidden Valley, Ruling 6259 on pending applications in the Muddy River Springs Area, Ruling 6260 on pending applications in the Black Mountains Area, and Ruling 6258 on pending applications in the California Wash, upholding in part the protests to said applications and denying them on the grounds that there is no unappropriated groundwater at the source of supply, the proposed use would conflict with existing rights, and the proposed use of the water would threaten to prove detrimental to the public interest because it would threaten the water resources upon which the endangered Moapa dace are dependent.

IV. LOWER WHITE RIVER FLOW SYSTEM

WHEREAS, the total water supply to the LWRFS, from subsurface groundwater inflow and local precipitation recharge, is not more than 50,000 acre-feet annually.[3]

WHEREAS, the Muddy River, a fully appropriated surface water source, has its headwaters in the Muddy River Springs Area, or Upper Moapa Valley and has the most senior rights in the LWRFS. Spring discharge in the Muddy River Springs

[1] The area of the Black Mountain Area lying within the Lower White River Flow System is defined as those portions of Sections 29, 30, 31, 32, 33, T.18S., R.64E.: portions of Sections 1, 11, 12, 14, and all of Section 13, T.19S., R.63E.: and portions of Sections 4, 6, 9, 10, 15 and all of Sections 5, 7, 8, 16, 17, 18, T.19S., R.64E., M.D.B.&M.
[2] *See, e.g.* State Engineer Ruling 6254, p. 24, official records in the Office of the State Engineer.
[3] *Id.*

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Area is produced from the regional carbonate aquifer. Prior to groundwater development, the Muddy River flows at the Moapa gage were approximately 34,000 acre-feet annually.[4]

WHEREAS, the alluvial aquifer surrounding the Muddy River ultimately derives virtually all of its water supply from the carbonates, either through spring discharge that infiltrates into the alluvium or through subsurface hydraulic connectivity between the carbonate rocks and the alluvium.[5]

WHEREAS, the State Engineer has determined that pumping of groundwater within the LWRFS has a direct interrelationship with the flow of the decreed and fully appropriated Muddy River, which has the most senior rights.[6]

WHEREAS, since the conclusion of the Order 1169 aquifer test, the State Engineer has jointly managed the water rights within LWRFS.

WHEREAS, the State Engineer, under the joint management of the LWRFS, has not distinguished pumping from wells in the Muddy River Springs Area alluvium from pumping carbonate wells within the LWRFS, although the Muddy River Springs Area basin has consistently been considered among the jointly managed basins.

V. PUMPAGE INVENTORIES AND GROUNDWATER LEVELS

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Coyote Spring Valley, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the

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[4] *See, e.g.*, United States Geological Survey Surface-Water Annual Statistics for the Nation, USGS 09416000 MUDDY RV NR MOAPA, NV, accessed at https://waterdata.usgs.gov/nwis/annual/?search_site_no=09416000&agency_cd=USGS&referred_module=sw&format=sites_selection_links.

[5] *See, e.g.* State Engineer Ruling 6254, pp. 24, official records in the Office of the State Engineer.

[6] *Id.*

annual pumping ranged from approximately 1,800 acre-feet to approximately 3,000 acre-feet, with an average of approximately 2,300 acre-feet annually.[7]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Black Mountains Area, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the annual pumping for the entire basin ranged from approximately 1,000 acre-feet to approximately 2,000 acre-feet, with an average of approximately 1,600 acre-feet annually.[8]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Garnet Valley, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the annual pumping ranged from approximately 1,000 acre-feet to approximately 2,000 acre-feet, with an average of 1,600 acre-feet annually.[9]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the California Wash, and in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, the annual pumping ranged from approximately 100 acre-feet to approximately 300 acre-feet, with an average of approximately 200 acre-feet annually.[10]

WHEREAS, the State Engineer performs annual groundwater pumpage inventories in the Muddy River Springs Area (a.k.a. Upper Moapa Valley), and received reported pumpage data from water right holders, Muddy Valley Water District and Nevada Energy, and in calendar years 2007 through 2010, prior to the

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[7] *See, e.g. Nevada Division of Water Resources, Coyote Spring Valley Hydrographic Basin 13-210 Groundwater Pumpage Inventory*, 2017.
[8] *See*, e.g., *Nevada Division of Water Resources, Black Mountains Area Hydrographic Basin 13-215 Groundwater Pumpage Inventory*, 2017.
[9] *See*, e.g., *Nevada Division of Water Resources, Garnet Valley Hydrographic Basin 13-216 Groundwater Pumpage Inventory*, 2017.
[10] *See*, e.g., *Nevada Division of Water Resources, California Wash Hydrographic Basin 13-218 Groundwater Pumpage Inventory*, 2017.

DRAFT

aquifer test, and 2013 through 2017, after completion of said test, the annual pumping ranged from approximately 3,000 acre-feet to about 7,000 acre-feet, with an average of approximately 5,700 acre-feet annually.[11]

WHEREAS, total groundwater pumpage in Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the Black Mountains Area in calendar years 2007 through 2010, prior to the aquifer test, and 2013 through 2017, after completion of said test, ranged from approximately 9,000 to 14,000, and averaged approximately 11,400 acre-feet annually.

WHEREAS, during the Order 1169 aquifer test, total pumpage increased to approximately 14,000 acre-feet annually and the resulting water-level decline encompassed 1,100 square miles and extended from northern Coyote Spring Valley through the Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area.[12] The water-level decline was estimated to be 1 to 1.6 feet in this area with minor drawdowns of 0.5 feet or less in the northern part of Coyote Spring Valley north of the Kane Springs Wash fault zone.

WHEREAS, during the Order 1169 pump test, the high-altitude (Petersen and Petersen East) springs showed an unprecedented decrease in flow, with the Pedersen spring flow decreasing from 0.22 cubic feet per second (cfs) to 0.08 cfs, and Petersen East spring flow decreasing from 0.12 cfs to 0.08 cfs. Additional springs, the Baldwin and Jones Springs, declined approximately 4% during the test.[13]

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[11] *See*, e.g., *Nevada Division of Water Resources, Muddy River Springs Area (A.K.A. Upper Moapa Valley) Hydrographic Basin 13-219 Groundwater Pumpage Inventory*, 2017.

[12] *See, e.g.*, Ruling 6254. *See also* U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, June 28, 2013, official records in the Office of the State Engineer.

[13] U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications*

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WHEREAS, based upon the analysis of the carbonate aquifer test, it was asserted that pumping at the Order 1169 rate at well MX-5 in Coyote Spring Valley could result in both of the high-altitude springs going dry in 3 years or less.[14]

WHEREAS, in the five years since completion of the aquifer test, ongoing data monitoring shows that groundwater levels and spring flows have remained relatively flat and precipitation has been about average.[15] Groundwater pumping in the LWRFS over the last 3 years has averaged 9,318 acre-feet annually.[16]

WHEREAS, within the LWRFS, there exists more than 40,000 acre-feet of groundwater appropriations.

WHEREAS, NRS 533.024(c) directs the State Engineer "to consider the best available science in rendering decisions concerning the availability of surface and underground sources of water in Nevada."

WHEREAS, NRS 533.024(e) was amended in 2017 to declare the policy of the State to "manage conjunctively the appropriation, use and administration of all waters of this State regardless of the source of the water."

WHEREAS, given that the State Engineer must use the best available science and manage conjunctively the water resources in the LWRFS, consideration of any development of long-term uses that could ultimately be curtailed due to water availability will be examined with great caution.

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Pending Under Order 1169, pp. 43-46, 50-51, June 28, 2013, official records in the Office of the State Engineer. *See also* http://waterdata.usgs.gov/nv/nwis/.

[14] *See, e.g.*, Ruling 6254. *See also* U.S. Fish and Wildlife Service, U.S. Bureau of Land Management and U.S. National Park Service Order 1169A Report, *Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169*, p. 85, June 28, 2013, official records in the Office of the State Engineer.

[15] *See Standardized Precipitation Index*, Nevada Climate Division 4, http://wrcc.dri.edu.

[16] *See, e.g. Nevada Division of Water Resources, Groundwater Pumpage Inventories* for the LWRFS subject basins for the years 2012 through 2017, official records of the Office of the State Engineer.

WHEREAS, assurances regarding the extent of any additional development of the existing appropriations of groundwater within the LWRFS that can occur without adversely affecting the senior rights on the fully decreed Muddy River cannot be made based solely upon the results of the Order 1169 aquifer test.

WHEREAS, based upon the review of the data available to the State Engineer in the years since the conclusion of the aquifer test, it is believed that only a very small portion of the existing rights within the LWRFS may be pumped without adversely impacting the senior rights on the Muddy River or the habitat of the Moapa Dace.

VI. AUTHORITY AND NECESSITY

WHEREAS, as demonstrated by the results of the aquifer test, Coyote Spring Valley, Muddy River Springs Area, Hidden Valley, Garnet Valley, California Wash, and the northwestern part of the Black Mountains Area have a direct hydraulic connection and interact as a single groundwater basin, and as a result must be administered as a single hydrographic basin, including the administration of all water rights based upon the date of priority of such rights in relation to the priority of rights in the other basins.

WHEREAS, pumping approximately 14,000 acre-feet per year, including 5,290 acre-feet per year from Coyote Spring Valley and a total of 10,120 acre-feet from the carbonate aquifer during the pumping test yielded groundwater declines of a foot or more, resulting in an unacceptable loss in spring flow and aquifer storage. In order to not conflict with the senior decreed rights of the Muddy River and negatively affect the Moapa Dace and its habitat, the State Engineer finds that it is necessary to limit pumping to a small percentage of the more than 40,000 acre-feet of appropriated groundwater rights in the LWRFS.

WHEREAS, on the basis that only a small percentage of the total quantity of the appropriated groundwater rights within the LWRFS may be developed, the State Engineer, with the following exception, finds that it is necessary to hold in

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abeyance the review and any decisions relating to any final subdivision or other submission concerning development and construction to the Division of Water Resources seeking a finding that adequate water is available to support the proposed development. The State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate supply of water in perpetuity can be made to the State Engineer's satisfaction.

WHEREAS, through the public workshop process which the State Engineer is engaged in at the time of the issuance of this Order, coupled with the continued monitoring of the LWRFS, is intended to develop a more precise understanding of the amount of sustainable groundwater pumpage that may occur within the LWRFS over the long-term without adverse impacts to the Muddy River and the springs that serve as the headwaters of the Muddy River. Moreover, if groundwater cannot be developed in the LWRFS without conflicts to the senior, decreed Muddy River rights and springs, the State Engineer, through the public workshop process, desires to establish a conjunctive management plan for the LWRFS.

WHEREAS, through continued monitoring of the LWRFS during the pendency of the public workshop process, while maintaining groundwater pumping in an amount not to exceed the current pumping rate of 9,318 acre-feet annually, a more precise understanding of the amount of sustainable groundwater pumpage will be determined.

WHEREAS, the State Engineer is empowered to make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.[17]

WHEREAS, within an area that has been designated by the State Engineer, as provided for in NRS Chapter 534, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her

[17] NRS § 532.120.

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administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.[18]

WHEREAS, the State Engineer finds that additional data relating to the impacts of groundwater pumping from the LWRFS coupled with the public workshop process will allow his office to make a determination as to the appropriate long-term management of groundwater pumping that may occur in the LWRFS by existing holders of water rights without adversely affecting existing senior decreed rights and the endangered Moapa Dace.

VII. ORDER

NOW THEREFORE, the State Engineer orders:

1. The Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the portion of the Black Mountains Area as described in this Order, is herewith designated as a single groundwater basin for purposes of administration of water rights. All water rights within the Lower White River Flow System will be administered based upon their respective date of priorities in relation to other rights within the regional groundwater basin.
2. The total allowable groundwater pumping in the Lower White River Flow System shall not exceed 9,318 acre-feet annually.
3. The date of priority at the limit of 9,318 acre-feet of water rights appropriated within the five-basin carbonate aquifer is within a portion of the water rights bearing a priority date of March 31, 1983.
4. Pumping by water right holders junior to the portion from March 31, 1983, within the 9,318 acre-foot limit, which is in effect as of September 1, 2018, will not be curtailed unless and until unused senior water right pumping exceeds 9,318 acre-feet annually in the Lower White River Flow System.

[18] NRS § 534.120.

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5. That any final subdivision or other submission concerning development and construction submitted to the State Engineer for review shall be held in abeyance pending the conclusion of the public process to determine the total quantity of groundwater that may be developed within the Lower White River Flow System. The State Engineer may review and grant approval of a subdivision or other submission if a showing of an adequate supply of water in perpetuity can be made to the State Engineer's satisfaction.
6. The State Engineer may consider: (1) a Groundwater Management Plan developed by the water right holders within the Lower White River Flow System as an alternative to any prohibition of out of priority junior groundwater pumping; or (2) allowing additional groundwater pumping over the 9,318 acre-foot limit if it can be demonstrated to the satisfaction of the State Engineer that an alternative source of water will be substituted in a timely manner to replace the additional groundwater pumping unless such additional pumping causes a conflict with existing rights.
7. This Order will be considered when examining applications to change the point of diversion from alluvial wells to carbonate wells in the Lower White River Flow System and will be subject to heightened scrutiny for determination of conflict with existing rights.
8. This Order will be considered when examining applications to change the point of diversion, place of use, or manner of use of an existing water right and in examining requests for extension of time for filing Proofs of Completion of Work or Proofs of Application of Water to Beneficial Use and Extensions of Time to Prevent the Working of a Forfeiture filed within the Lower White River Flow System.

DRAFT

JASON KING, P.E.

DRAFT

State Engineer

Dated at Carson City, Nevada this

_____ day of _____, _____.

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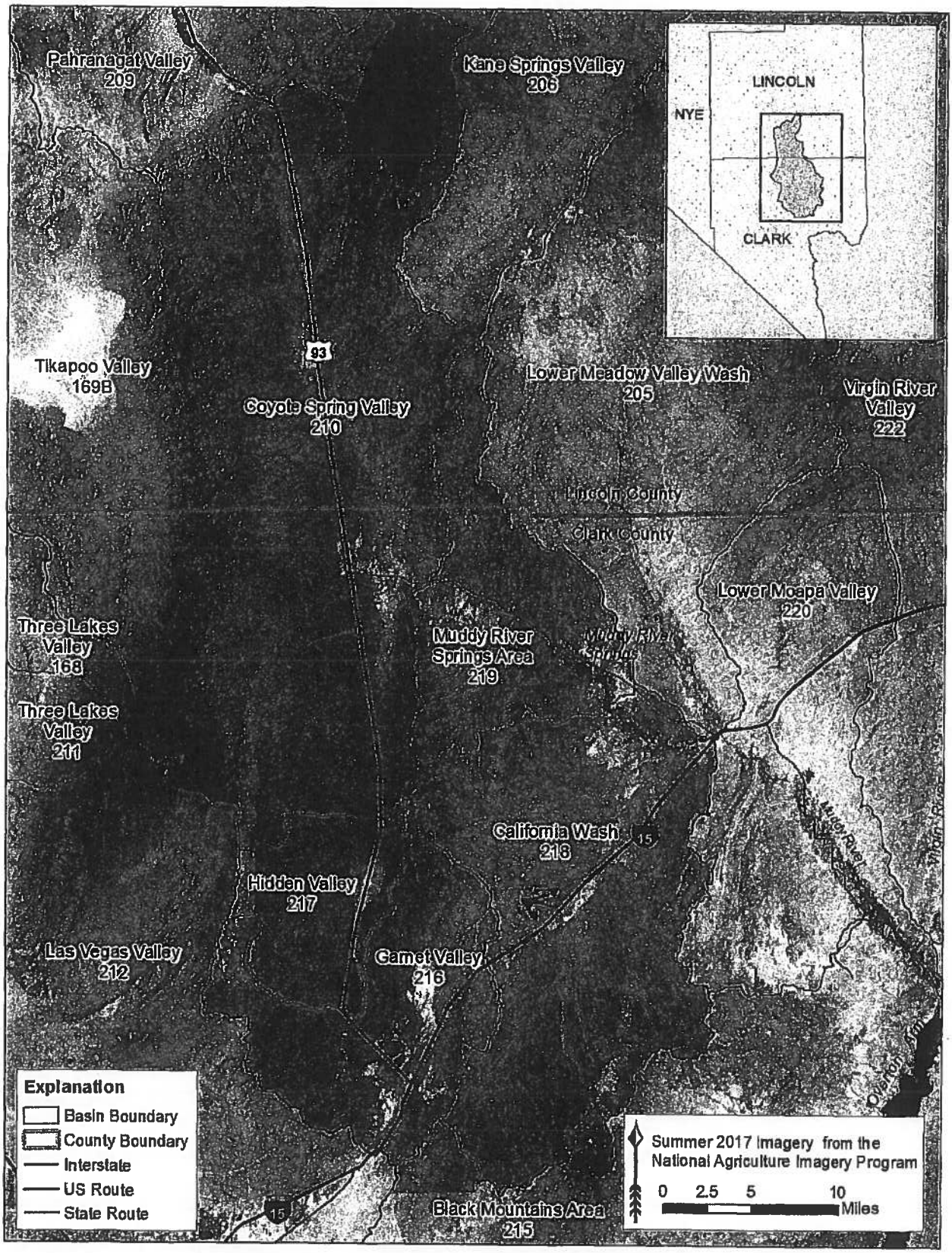
Pahranagat Valley
209
Kane Springs Valley
206
LINCOLN
NYE
CLARK
93
Tikapoo Valley
169B
Coyote Spring Valley
210
Lower Meadow Valley Wash
205
Virgin River
Valley
222
Lincoln County
Clark County
Lower Moapa Valley
220
Three Lakes
Valley
168
Muddy River
Springs Area
219
Three Lakes
Valley
211
California Wash
218
15
Hidden Valley
217
Las Vegas Valley
212
Garnet Valley
216
Black Mountains Area
215
Explanation
Basin Boundary
County Boundary
Interstate
US Route
State Route
Summer 2017 Imagery from the
National Agriculture Imagery Program
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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

JUN 01 2020

Eureka County Clerk

By _____

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

* * *

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

Petitioners,

vs.

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

Respondent.

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

Respondents/Intervenors.

_____/

DNRPCA INTERVENORS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302

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Docket 81224 Document 2020-35059

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 BAUMAN ("DNRPCA Intervenors") file this Reply in Support of their Motion for Stay of Order Granting Petitions for Judicial Review of State Engineer Order 1302 Pending Appeal. This Reply is supported by the following points and authorities and such other matters as the Court may wish to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through competent, admissible evidence, the DNRPCA Intervenors have demonstrated that, absent a stay, the object of their appeal will be frustrated, and they will be irreparably harmed. They also have pointed out legal errors in the Court's order and made a substantial showing on the merits. Respectfully, they believe the Supreme Court will find the GMP complies with the law. Petitioners' oppositions are based on speculation and hyperbole, not evidence of any alleged harm. The balance of the equities weighs in favor of a stay, and Petitioners have not demonstrated otherwise.

II. ARGUMENT

A. The Equities and Public Interest Favor a Stay

The Nevada Supreme Court interpreted the predecessor of NRCP 62(c) to give a district court discretion to exercise its equitable powers to stay the effect of a non-monetary judgment, including an order that vacated an agency decision. *See Nevada Tax Comm'n v. Mackie*, 74 Nev. 273, 274, 330 P.2d 496, 496 (1958) (addressing a motion to stay the execution of a district court judgment, during the pendency of the appeal, that purported to modify a Nevada Tax Commission order revoking a gambling license); *White Pine Power Dist. No. 9 v. Pub. Serv. Comm'n*, 76 Nev. 263, 264, 352 P.2d 256, 256 (1960). Courts interpreting the federal equivalent

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of NRCP 62(c) apply the following four-factor test to stays of non-monetary civil orders and judgments under Federal Rule of Civil Procedure 62(c):

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). "Th[is] standard calls for equitable balancing, much like that required in deciding whether to grant a preliminary injunction or a temporary restraining order." *Venckiene v. United States*, 929 F.3d 843, 853 (7th Cir. 2019); *see Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011). This consideration of the respective equities is essentially incorporated into NRAP 8(c). *See Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (requiring the movant to "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay").

Contrary to the Petitioners' contentions, the equities warrant a stay here. The only Petitioners who hold "senior" rights that are subject to the GMP are the Baileys. ROA 499-501. As the DNRPCA Intervenors pointed out to the Court at oral argument, the Baileys' purported "senior" position exists by happenstance; only a matter of days separates Fred and Carolyn Bailey from the May 12, 1960 cut-off line. ROA 501. Only two months separates the most "senior" Bailey rights from the "junior" appropriators for whom the Baileys evince so much disdain. ROA 499-500. And there are approximately 100 "junior" permits with priority dates that post-date May 12, 1960 by just days, weeks and months. ROA 501-504.

No one working the land in Diamond Valley in May 1960 knew or could have known that breaking away from their farming to file paper work in Carson City a few days later than their neighbors would rob them of 100% of their water permits 50 years later. They cultivated their land and used their water in good-faith reliance upon the State Engineer's approval of their applications. ROA 541, 590, 708, 727, 731-732, 738. Although the permits were issued subject to existing rights on the source, the State Engineer continued to issue permits for new irrigation

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applications for another nearly 20 years in the total approximate amount of 126,000 acre feet. ROA 3, 499-509. The DNRPCA Intervenors had no control over the State Engineer's actions.

For the last decade, they have been working to address the overdraft problem in the basin, including their tireless efforts since 2014 to develop a GMP. Moyle Decl., Motion Ex. 2 at ¶¶7-20. The GMP they created was based on a good-faith interpretation of the Legislature's enactment of the groundwater management plan statute. Plaskett Decl., Motion Ex. 4 at ¶6; Moyle Decl., Motion Ex. 2 at ¶37. It sought to address the overdraft problem while maintaining the social and economic fabric of Eureka County. ROA 228. The GMP proponents studied numerous other frameworks for what a groundwater management plan might entail, including those proposed by the Petitioners and suggested by the Court, and ultimately rejected them as infeasible. Moyle Decl., Motion Ex. 2 at ¶¶23-24. They made significant investments of money and time to implement the GMP the State Engineer approved. Plaskett Decl., Motion Ex. 4 at ¶¶4-7; Moyle Decl., Motion Ex. 2 at ¶37. Had their only option been a groundwater management plan that involved curtailment by priority, they would not have made those investments. Plaskett Decl., Motion Ex. 4 at ¶7-8; Moyle Decl., Motion Ex. 2 at ¶37. Rather, they would have simply continued to use the full amount of their permitted rights until the State Engineer ordered curtailment. *See id.*

Additionally, the Court issued its Order after the 2020 irrigation season already started. Moyle Decl., Motion Ex. 2 at ¶34. Water users made farm plans based on the 2020 share allocations that were already established. Moyle Decl., Motion Ex. 2 at ¶34. Petitioners have failed to identify any equitable reason why the 2020 irrigation season should be disrupted now. *See Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1206 (1971) (reinstating order that allowed professional basketball player to play during the stay because the season had already begun). This is particularly so where Petitioners never sought a stay of the GMP pending their petitions for judicial review. *See* NRS 533.450(5). Given their lack of affirmative conduct to obtain a stay to protect themselves from alleged harm they contend the GMP causes them, the equities weigh against the Petitioners. *See Latta v. W. Inv. Co.*, 173 F.2d 99, 107 (9th Cir. 1949)

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("[e]quity frowns upon stale demands"); *Daly v. Lahontan Mines Co.*, 39 Nev. 14, 158 P. 285, 286 (1916) (equity requires the timely assertion of rights).

Likewise, NRS 534.110(7) requires curtailment by priority to begin on August 25, 2025 if no approved GMP is in effect. ROA 3. Given the years of collective effort that went into developing, drafting and obtaining approval of the GMP, there simply is insufficient time to start over now, and the GMP proponents should not have to engage in that Herculean effort given the merits of their appeal. Moyle Decl., Motion Ex. 2 at ¶¶20, 38. Simply because the Court disagreed with them on the law is not a basis to deny their request for stay. *See NAACP v. Trump*, 321 F.Supp.3d 143, 147 D.D.C. 2018) (partially staying order that vacated agency action because "the fact that the Court has thus far been unpersuaded by [the movant's] case does not preclude the issuance of a stay"). Under these circumstances, the equities favor keeping the GMP in place pending appeal.

B. Petitioners Fail to Provide Any Evidence of Alleged Harm From the GMP

The Baileys are the only Petitioners who can claim any harm to "senior" groundwater rights as a result of the GMP's share allocations, and their opposition fails to provide any evidence that the carve out from the GMP that the DNRPCA Intervenors propose would not rectify that alleged harm. They also fail to provide any evidence that the continued existence of the GMP will harm their vested rights. Nor can they because the Baileys have a groundwater permit that allows them to pump the spring water from a well:

> This permit is issued for the express purpose of allowing this permit to replace the water historically placed to beneficial use under Proof 01104, Certificates 140 and 147 and with the understanding that this right cannot be moved to outside of the spring discharge area as determined by the State Engineer.

Motion Ex. 10. Because this groundwater permit is tied to their vested rights, it is exempted from the GMP. ROA 229. The Baileys have held this permit for over 20 years without any complaint that it did not adequately mitigate their vested claim. Motion Ex. 10. Their assertion that it is not a mitigation right contravenes the permit language and their own admissions, made under oath, that Permit No. 63497 was intended to replace their vested claim:

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Q. And you had a spring on your property, the Bailey Spring?

A. Yes, we did have a spring.

Q. And the Bailey Spring went dry?

A. It went dry. It took 25 years to dry that spring up after the electricity come in.

Q. And then your -- you were granted groundwater rights from the State Engineer; is that correct?

A. Yes. He allowed us to drill a well?

Q. Yes.

A. That's true. He did, yes.

* * *

Q: Now, you did end up getting a water right to replace your spring; right?

A: *That's correct.*

Testimony of Wilfred Bailey, In The Matter Of Applications 81719, 81720, 81825, 82268, 82570, 82571, 82572 and 82573, Nov. 21, 2013 Trans. at 980:10-20, 985:23-24, attached hereto as Ex. 14 (emphasis added). The Baileys even admitted that they, themselves, were responsible, in part, for the drying up of their own spring:

Q. Well, why did it dry up in your opinion?

A. Because we was pumping that water up there.

Q. Pumping water where?

A. Up in the farming area.

Q. Down in the south part of the valley?

A. Yeah.

* * *

Q. What about your spring, why did it dry up?

A. Because of the pumping up in the valley. *I was part of it.*

Q. You have a ranch down there too?

A. A farm, you mean?

Q. A farm.

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A. We had a couple of them.

* * *

Q. Okay. Do you recall what year your spring went dry?

A. Well, we put -- Let's see, we put that pivot in -- I got associated with the fire in '99. We had that pivot established either the year before -- it would be '98 or '97, one of the two, it went dry at that time. It was dry at that time. It went dry…. It got down to the point of where the pond was probably running about, I'll throw it out there, say, two or 300 gallons….

* * *

Q. So did it dry shortly after you put in your irrigation well?

A. It took a while because it always dried it up when you was pumping, but then when you quit pumping, why, it would come back, see. But it never run because we had it dammed off. And you can darn near stop any spring if you put a dam around and raise it high enough because of the way the water stopped the flow.

Testimony of Wilfred Bailey, In The Matter Of Applications 81719, 81720, 81825, 82268, 82570, 82571, 82572 and 82573, Nov. 21, 2013 Trans. at 1001:21-1002:18, 1015:1-1016:4, attached hereto as Ex. 14 (emphasis added).

Renner and Sadler have no senior groundwater permits, and since their junior rights would be subject to 100% curtailment under their own arguments, they cannot claim irreparable harm from the GMP. ROA 228-229, 499-501. As to their vested rights, Sadler holds mitigation permits, and Renner has not yet proven that its application for mitigation rights is justified. Motion Exs. 11-12. Either way, if Petitioners are pumping from wells located within their spring complexes, their alleged harm to their vested rights is self inflicted. It cannot be attributed to the GMP because, with or without the GMP, their own wells will prevent the springs from running.

Due to the proximity of their wells to one another, Petitioners' wells are also interfering with one another's springs. ROA 131; Supplemental Declaration of Dale Bugenig and maps attached thereto, attached hereto as Ex. 16. Sadler's representative asserted that pumping by the other Petitioners interfere with the springs on Sadler Ranch:

Junior pumpers at Romano has caused our spring to decline. Pumping at the Brown Ranch has caused our spring to decline. *Pumping at the Bailey's. There's pumping all around our spring and it's all caused it to decline.* And pumping in the southern Diamond Valley has caused it -- it to decline.

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Testimony of Levi Shoda, Sadler Ranch Manager, In The Matter Of Applications 81719, 81720, 81825, 82268, 82570, 82571, 82572 and 82573, Nov. 22, 2013 Trans. at 1169:3-10, 1172:10-14, attached as Ex. 15 hereto. In that Petitioners are interfering with one another's wells and springs, they cannot attribute alleged damages to the GMP.

Additionally, Bailey admitted that his farm is more productive with the mitigation well than it was with the spring:

> Q. Now, before you got the new well you flood irrigated at your ranch; right?
>
> A. Uh-huh.
>
> Q. And now you can grow alfalfa on the ranch; right?
>
> A. We planted the alfalfa and grass, but the alfalfa is pretty well gone. We're pretty much in grass right now.
>
> Q. Is it a better crop now under the center pivot than you had when you were flood irrigating?
>
> A. *By far.* Grass does better now. In comparison to alfalfa, you get more tonnage with grass. I'm not going to say the general rules, but I'm going to say we cut a little more tonnage with the grass.

Testimony of Wilfred Bailey, In The Matter Of Applications 81719, 81720, 81825, 82268, 82570, 82571, 82572 and 82573, Nov. 21, 2013 Trans. at 1008:12-23, attached hereto as Ex. 14 (emphasis added). In other words, contrary to their claim of harm, the Baileys have benefitted from the replacement well approved in Permit 63497. *See id.*; Motion Ex. 10.

In lieu of actual evidence to prove harm (which they lack), the Petitioners contend that simply because the Court concluded the GMP violated Nevada law and affected their property rights, they are allegedly harmed. The movant for a stay pending appeal is always the losing party, and the court will have always construed the law against that party. That alone does not prohibit a stay or even suggest that a stay will irreparably harm the winning party. *See NAACP*, 321 F.Supp.3d at 147. The Petitioners' hypothetical examples of what *could* happen in the future were the GMP to remain in effect are purely speculative and therefore are not proof of irreparable harm. *See In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm."); *Nevada v. United States*, 364 F. Supp. 3d 1146, 1156 (D. Nev. 2019) (alleged "harms, including environmental

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injury, are too speculative to rise to the level of the required likelihood of irreparable harm"). Moreover, while the GMP is in place, the State Engineer maintains his authority to "make such rules, regulations and orders as are deemed essential for the welfare of the area involved" in the event some type of irreparable harm materializes from the GMP's continued existence. *See* NRS 534.120.

With mitigation rights and the carve-out from the GMP proposed by the DNRPCA Intervenors, there will be no effect on the Petitioners' property rights while the appeal is pending, much less harm that is irreparable. Simply because property rights may be at issue does not by itself constitute irreparable harm. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 901 (2008) (rejecting assertion of irreparable harm from placement of lien on real property). The Petitioners must still prove irreparable harm, which they have not done. *See id.*

The Court has the equitable power to craft a stay to meet the circumstances. *See* NRCP 62(c) (allowing stay pending appeal of a non-monetary judgment on such "other terms that secure the opposing party's rights"); *Haywood*, 401 U.S. at 1206 (noting district court "could fashion whatever relief it deems equitable"). Because no one other than Petitioners claims any harm, the Court need not make an exception to the stay for anyone else. Moreover, carving out Petitioners from the GMP does not constitute an "amendment" to the GMP; it constitutes the exercise of equitable authority. Notwithstanding that the Petitioners have failed to demonstrate any harm, to the extent the Court nevertheless deems them irreparably harmed by nature of their water rights ownership alone, it can exempt them from the GMP during the stay.

C. The DNRPCA Intervenors Have Adequately Demonstrated Irreparable Harm Absent a Stay

Unlike the Petitioners, the DNRPCA Intervenors provided actual evidence of irreparable harm. In arguing otherwise, the Petitioners fail to understand the multi-faceted harm. The declarations submitted in support of the Motion to Stay indicate that the DNRPCA Intervenors made farming decisions in reliance on the 2020 share allocations. Moyle Decl., Motion Ex. 2 at ¶34; Plaskett Decl., Motion Ex. 4 at ¶¶4-6. Moreover, irretrievable investments were made in

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reliance on the DNRPCA Intervenors' good-faith development of a GMP they believed to be consistent with what the Legislature expected when enacting NRS 534.037. Moyle Decl., Motion Ex. 2 at ¶37; Plaskett Decl., Motion Ex. 4 at ¶7. The pumping reductions required by the GMP could not be achieved absent such investments, yet such investments are useless if curtailment is inevitable. Moyle Decl., Motion Ex. 2 at ¶37; Plaskett Decl., Motion Ex. 4 at ¶8.

The Court's Order essentially leaves open only two possible types of GMP models that it deems lawful: (1) a plan that involves voluntary actions by senior right holders (either sale of their water to juniors or implementation of water-efficient irrigation practices encouraged by payments from juniors); or (2) a plan that involves complete curtailment of rights that post-date May 12, 1960. These were considered and rejected by the GMP proponents for a number of reasons, not least of which is that the goal of any GMP was to maintain the viability of the agricultural economy of Eureka County. Moyle Decl., Motion Ex. 2 at ¶¶22-24. Funding for buy-outs was unavailable, and in any event, absent the seniors' willingness to respond to money, curtailment was the only other alternative. Moyle Decl., Motion Ex. 2 at ¶24. A GMP that involved complete or nearly complete curtailment of junior rights was no different than what could be achieved without a GMP in place. *See* NRS 534.110(7). The DNRPCA Intervenors would not have spent years developing the GMP or made significant investments in water-saving technologies if curtailment was a foregone conclusion. Moyle Decl., Motion Ex. 2 at ¶37; Plaskett Decl., Motion Ex. 4 at ¶8.

Moreover, the clock is ticking under NRS 534.110(7). The DNRPCA Intervenors should not be forced to try to develop a new plan where they have presented significant legal arguments that justify the Supreme Court reversing the Court's Order and reinstating the GMP. The holders of a majority of senior rights approved the GMP. ROA 4; Moyle Decl., Ex. 2 at ¶19. The purpose of the appeal will be defeated if the DNRPCA Intervenors are forced to engage in a new planning process if the Supreme Court ultimately accepts the GMP that the State Engineer already approved.

Even if such wasted effort could be justified (it can't), given the extensive energy that went into this GMP, it is clear there is insufficient time to develop a new plan before curtailment

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must start. Moyle Decl., Ex. 2 at ¶¶20, 38. The uncertainty claimed by the DNRPCA Intervenors is whether they should start planning now to pack up and leave Diamond Valley or should continue to invest in their farms, purchase water-saving technologies to reduce their pumping and plan for a future in the community they call home. Eureka County and the Diamond Valley aquifer will suffer from the potential increased pumping that will ensue if the GMP were not in place. Moyle Decl., Motion Ex. 2 at ¶33. Petitioners contend that curtailment by priority would address this concern, but that defeats the purpose of NRS 534.110 and deprives the DNRPCA Intervenors of the benefits afforded under the statute. *See, e.g., New Motor Veh. Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (concluding "that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury"). In sum, the DNRPCA Intervenors have demonstrated irreparable harm.

D. The DNRPCA Intervenors Have Set Forth a Substantial Case on the Merits

Even if the Court disagrees with their arguments, the DNRPCA Intervenors have satisfied the merits requirements to obtain a stay. *See Hansen*, 116 Nev. at 659, 6 P.3d at 987. The Court's conclusion that the GMP complies with NRS 534.037 but impairs vested rights is an attack on the constitutionality of the statute, not on the State Engineer's implementation of the statute. Yet the Petitioners never brought a facial attack on NRS 534.110(7) or NRS 534.037, and the Court did not deem the Legislature's actions unconstitutional. The Petitioners' oppositions do not dispute this. Respectfully, the DNRPCA Intervenors believe the Supreme Court will recognize this flaw.

The DNRPCA Intervenors also submit that the Supreme Court will side with them on the questions of prior appropriation and beneficial use. The Court's Order rendered meaningless NRS 534.110(7) and NRS 534.037 as to Diamond Valley and did not address multiple legal arguments raised by the DNRPCA Intervenors. These included other examples of where the Legislature has strayed from prior appropriation principles. Moreover, the State Engineer has discretion as to whether to institute forfeiture or abandonment proceedings and must first follow certain statutory procedures to do so. *See* NRS 534.090. There are many unexercised rights throughout Nevada. The Petitioners do not contend that the State Engineer's failure to initiate

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forfeiture and abandonment proceedings on every one of those constitutes an abuse of discretion. The State Engineer's logical conclusion that initiating forfeiture and abandonment proceedings prior to GMP approval would have the adverse result of increasing pumping justified his discretionary decision to approve the GMP based on current rights.

This is particularly the case where many of the unexercised rights in Diamond Valley arise from corners that are not being irrigated using center pivots. ROA 465, 467. The reductions in annual share allocations through the life of the GMP means that the unexercised rights cannot be used anyway. ROA 234-235, 510. The State Engineer similarly has discretion to approve the banking and trading provisions under NRS 534.120(2). The DNRPCA Intervenors have presented sufficient merits to warrant a stay. *See Hansen*, 116 Nev. at 659, 6 P.3d at 987.

E. Extra-Record Information Must Be Considered for a Motion to Stay

The Court can and should consider the declarations and other evidence submitted by the DNRPCA Intervenors in support of the stay and reject Petitioners' opposition because they lack any evidence to oppose a stay. In order for a reviewing court to adequately consider the factors governing a stay pending appeal, the movant must provide "specific facts and affidavits supporting assertions that these factors exist." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991); *see Holtzman v. Schlesinger*, 414 U.S. 1304, 1309 and n.10 (1973) (denying application to vacate stay pending writ of certiorari "in light of respondents' failure to produce affidavits" to show irreparable harm "in conjunction with stay application"); *McCulloch v. Jeakins*, 99 Nev. 122, 123-24, 659 P.2d 302, 303 (1983) (requiring district court to conduct hearing into whether a supersedeas bond is warranted). In a different judicial review case of an order issued by the State Engineer, the Nevada Supreme Court recently granted a motion to stay based on a supporting declaration that attested to matters that occurred after the district court's order vacating the State Engineer's action, well outside the administrative record. *See* State Engineer's Motion to Stay in Case No. 77722, supporting declaration and Supreme Court's Order granting stay, attached hereto as Ex. 17.

Ironically, Sadler and Renner take issue with the "extra-record" evidence submitted in support of the motion to stay when they, themselves, improperly relied on matters outside the

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administrative record *when arguing their petitions for judicial review*. Not only did this violate the Court's order in limine, but it violated the most basic principle of judicial review—that the Court is limited to the record before the State Engineer. *See Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1997). In the order in limine, which the Court expressly reaffirmed in the Order granting petitions for judicial review, the Court squarely limited the Court's consideration of the merits to the record on appeal. Yet the Court's order granting the petitions for judicial review repeatedly relied on extra-record information. *See*, *e.g.*, footnotes 10, 19-22, 40, 166-168.

This was a fundamental reversible error. *See Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949. The Petitioners perpetuate that error in their oppositions by citing this extra-record material in support of their "merits" arguments. The Court's review of the merits should have been limited to the record on appeal, but its review of the other factors in a motion to stay must be based on declarations and other evidence. *See Griepentrog*, 945 F.2d at 154. Petitioners' oppositions provide no such evidence, only unsubstantiated assertions. On that basis alone, the stay should be granted and the GMP kept intact.

F. A Bond is Not Justified Where There is No Money Judgment and Petitioners Have Failed to Demonstrate Any Harm From a Stay

Sadler and Renner's request for a $1 million bond is arbitrary, unsupported and lacks a nexus to any alleged harm. "The purpose of security for a stay pending appeal is to protect the *judgment creditor's ability to collect the judgment* if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay." *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005) (emphasis added); *see also Gottwals v. Rencher*, 60 Nev. 35, 46, 92 P.2d 1000, 1004 (1939) (indicating that on principles of equity and justice a "bond is necessary to protect an appellee against *damages* he may sustain by reason of an unsuccessful appeal") (emphasis added). Clearly, in Nevada, a bond is designed to secure a money judgment, which does not exist here.

Even if the Court concludes a bond is appropriate for this case, Petitioners have failed to connect the $1 million amount they seek to potential damages. "[T]he calculation of a bond in a

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case involving a non-monetary judgment is … an estimate of the potential loss that may result during the pendency of the appeal." *In re Weinhold,* 389 B.R. 783, 789 (Bankr. M.D. Fla. 2008). Failure to provide evidence to support claimed damages requires that a request for bond be denied. *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). Petitioners' $1 million number appears to be pulled from thin air; it is entirely arbitrary. It is also unsupported by any evidence. Since the Petitioners claim they are harmed whether or not the GMP is in place, they cannot attribute damages to the GMP alone. Particularly since Eureka County and the State of Nevada are exempted from any bond requirement, a bond should not unfairly become the responsibility of the private-party appellants. *See* NRCP 62(e).

Notably, the fact that the Petitioners request a bond itself demonstrates they lack irreparable harm. "Generally, harm is 'irreparable' if it cannot adequately be remedied by compensatory damages." *Hamm*, 124 Nev. at 297, 183 P.3d at 901. By, on the one hand, crying "irreparable harm" and, on the other hand, demanding a monetary bond, Petitioners are talking out of both sides of their mouth. They cannot be irreparably harmed if money will allegedly solve their problems. *See id.* But Petitioners demonstrate neither irreparable harm nor damages. Because Petitioners fail to prove any monetary damages arising from the GMP, no bond should be required to effectuate a stay.

III. CONCLUSION

The DNRPCA Intervenors have met the standard for a stay and respectfully request that the Court keep the GMP in place pending appeal with no requirement for a bond.

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AFFIRMATION

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

DATED: this 1st day of June, 2020

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CERTIFICATE OF SERVICE

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

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Dated: June 1, 2020

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INDEX OF EXHIBITS
DNRPCA INTERVENORS' REPLY IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL

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EXHIBIT 14

EXHIBIT 14

In The Matter Of:

Applications 81719, 81720, 81825, 82268, 82570, 82571, 82572 and 82573

Public Hearing - Thursday
Vol. 4
November 21, 2013

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Carson City, Nevada 89703

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STATE OF NEVADA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

DIVISION OF WATER RESOURCES

BEFORE SUSAN JOSEPH-TAYLOR, HEARING OFFICER

IN THE MATTER OF APPLICATIONS
81719, 81720, 81825, 82268,
82570, 82571, 82572 and 82573
_____/

TRANSCRIPT OF PROCEEDINGS

PUBLIC HEARING

VOLUME IV

THURSDAY, NOVEMBER 21, 2013

Reported by:

CAPITOL REPORTERS
Certified Court Reporters
BY: CHRISTY JOYCE, NV CCR #625
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APPEARANCES:

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Susan Joseph-Taylor, Deputy Administrator

Malcolm Wilson, Assistant Hearing Officer

Rick Felling, Chief Hydrologist

Kristen Geddes, Hearing Officer
Section of the Division of Water Resources

Steve Walmsley, Water Resource Specialist

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For James Gallagher:	James Gallagher
For Mark Moyle Farms:	Mark Moyle
For Eureka County:	Allison MacKenzie, et al. By: Karen A. Peterson, Esq.
Also present:	Theodore Beutel, Esq. Chairman Ithurralde Vice Chairman Goicoechea Dale Bugenig Jake Tibbitts

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A. On the Home Ranch that she is talking about, my grandparents come in there in the early day. We have proof that they was in there in 1875. We're pretty near sure in our own family that they was in there in the sixties. And there's been six generations on that old ranch. So that's the question?

Q. Yes, that's the question.

A. And we do have prior use of the pond prior to 1800 in the vested right. We did have a vested right.

Q. And you had a spring on your property, the Bailey Spring?

A. Yes, we did have a spring.

Q. And the Bailey Spring went dry?

A. It went dry. It took 25 years to dry that spring up after the electricity come in.

Q. And then your -- you were granted groundwater rights from the State Engineer; is that correct?

A. Yes. He allowed us to drill a well?

Q. Yes.

A. That's true. He did, yes.

Q. And you're not the paperwork guy that keeps track of all the paperwork associated with your water rights, are you?

A. No, I'm not, no.

Q. Your son and daughter-in-law do that; is that

Well, I do remember what I did yesterday. But I won't remember this in a year. So this isn't a memory test, okay. But back in 1982 this transcript says Mr. Bailey, that's you, if I was to apply for an application to drill a new well on the ranch down there, would I have a good chance of getting it or am I in the water basin? Does that help you remember at all?

A. It makes sense, but I can't recall saying that. But if you've got it wrote down there, I'm not going to dispute that I asked that. I don't recall doing it. But it was a good question.

Q. And there was a question about how much of the Diamond Valley was covered with the designation.

A. Yeah. I heard that line chain different times.

Q. And then Mr. Morros said, I can't predetermine action on any application we might make. You mean, would it be subject to denial on the basis of being in the groundwater basin and you say yes. And he says under the present status of the basin as far as the orders that have been issued by the State Engineer. Yes, absolutely. And then you said, I would be denied? And he said if it was in the designated portion of the basin, yes.

Now, you did end up getting a water right to replace your spring; right?

A. That's correct.

Q. Were there springs south of you already dry?
A. See, the Romanos started drying up first because it's closer to the pump -- to the farm, you know. And then Sulphur started first before the Romano, that part of the Romano. But it's the first one that took a hit. And then out in the middle of the valley, why, there was a spring dried off of that, I call it the Thompson Road. And there was a pretty good spring right in that area that started taking a hit on that too. It had a fair amount of water that they -- There was a little house there at one time and they claimed it burned down. I don't ever recall it.
Q. Well, do you know of something called Tule Dam Spring? Have you ever heard of that? No?
A. No, I don't.
Q. But you talked about Sulphur Spring?
A. Are you talking about the Romano on Tule Dam? There is a Tule Dam, but I'm surprised you would know that.
Q. Well, do you remember when it went dry?
A. You mean to put a date on it? I remember it drying up, I sure do.
Q. Well, why did it dry up in your opinion?
A. Because we was pumping that water up there.
Q. Pumping water where?
A. Up in the farming area.
Q. Down in the south part of the valley?

A. Yeah.
Q. And do you think that's why Sulphur Spring dried up?
A. Yes.
Q. Do you think that's why the Romano wells stopped flowing?
A. I'm not sure of that. Because them wells were there a long time and they could deteriorate. Them wells could have rusted in the bottom. And so I'm guessing after -- They can only last so long. So I'm not going to say why some of them dried up or not.
Q. What about your spring, why did it dry up?
A. Because of the pumping up in the valley. I was part of it.
Q. You have a ranch down there too?
A. A farm, you mean?
Q. A farm.
A. We had a couple of them.
Q. All right. Do you think the pumping down south has caused an impact to Shipley Spring?
A. No, I don't.
Q. Really?
A. I don't.
Q. So it could impact Bailey Spring but not Shipley Spring?

Q. Is it still a flowing well?
A. If you let it sit there long enough. It don't flow immediately when you shut the -- When you shut the pump off are you talking about?
Q. Uh-huh.
A. No, it don't.
Q. So it doesn't come back the way it used to when you shut the well off?
A. No, it don't.
Q. Do you have a meter on the well?
A. Yes. It pumps right at 900 under pressure.
Q. Now, before you got the new well you flood irrigated at your ranch; right?
A. Uh-huh.
Q. And now you can grow alfalfa on the ranch; right?
A. We planted the alfalfa and grass, but the alfalfa is pretty well gone. We're pretty much in grass right now.
Q. Is it a better crop now under the center pivot than you had when you were flood irrigating?
A. By far. Grass does better now. In comparison to alfalfa, you get more ton age with grass. I'm not going to say the general rules, but I'm going to say we cut a little more tonnage with the grass.
HEARING OFFICER JOSEPH-TAYLOR: Mr. Taggart, how is this helping us make our decision?

Q. Okay. Do you recall what year your spring went dry?

A. Well, we put -- Let's see, we put that pivot in -- I got associated with the fire in '99. We had that pivot established either the year before -- it would be '98 or '97, one of the two, it went dry at that time. It was dry at that time. It went dry. It got down to the point of where the pond was probably running about, I'll throw it out there, say, two or 300 gallons. But you couldn't do anything with it because if you got 30 below zero and you had to water them cows, it would freeze over and you was out of water. I mean, you couldn't do it. It was actually worthless to you.

But we put the dam in to the point to where it wouldn't run anymore because it was running out in to the pivot and it was just making a mess. So we dammed the water up and it will stop flowing at a certain height, you know. So we just dammed it off to where we couldn't use it anymore.

Q. Would there be any flow from it today if it weren't dammed up?

A. No. They don't raise there no more. It's dry there right now.

Q. So did it dry shortly after you put in your irrigation well?

A. It took a while because it always dried it up when you was pumping, but then when you quit pumping, why, it

would come back, see. But it never run because we had it dammed off. And you can darn near stop any spring if you put a dam around and raise it high enough because of the way the water stopped the flow.

MR. FELLING: Thank you. No more questions.

EXAMINATION

By The State Engineer:

Q. Just a couple, Mr. Bailey. Do you remember the lawsuit that came to some kind of a conclusion in the late forties, 1950s?

A. Yes.

Q. And I think your testimony was perhaps about five years later the Sadler brothers had done a good job in advancing the ranch or the farm and put in some alfalfa; correct?

A. That's correct.

Q. Prior to 1950 -- Prior to 1950 -- Prior to even 1950 did you spend much time on the Sadler Ranch? Do you have first-hand knowledge of the lay of the land?

A. Well, I always went down there with Brandon Gabbs and that sort of stuff, yes, and I would have drove cows through there and worked cows in the field. I always helped him work the cows because I was usually riding a colt and I wanted him to get experience and I wanted him to be around them cows.

STATE OF NEVADA)
)ss.
COUNTY OF WASHOE)

I, CHRISTY Y. JOYCE, Official Certified Court Reporter for the State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, do hereby certify:

That on Thursday, the 21st day of November, 2013, I was present at the Division of Water Resources, Carson City, Nevada, for the purpose of reporting in verbatim stenotype notes the within-entitled public hearing;

That the foregoing transcript, consisting of pages 890 through 1150, inclusive, includes a full, true and correct transcription of my stenotype notes of said public hearing.

Dated at Reno, Nevada, this 16th day of December, 2013.

_____
CHRISTY Y. JOYCE, CCR #625

EXHIBIT 15

EXHIBIT 15

In The Matter Of:

Applications 81719, 81720, 81825, 82268, 82570, 82571, 82572 and 82573

Public Hearing - Friday

Vol. 5

November 22, 2013

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STATE OF NEVADA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

DIVISION OF WATER RESOURCES

BEFORE SUSAN JOSEPH-TAYLOR, HEARING OFFICER

IN THE MATTER OF APPLICATIONS
81719, 81720, 81825, 82268,
82570, 82571, 82572 and 82573
_____ /

TRANSCRIPT OF PROCEEDINGS

PUBLIC HEARING

VOLUME V

FRIDAY, NOVEMBER 22, 2013

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Malcolm Wilson, Assistant Hearing Officer

Rick Felling, Chief Hydrologist

Kristen Geddes, Hearing Officer
Section of the Division of Water Resources

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For Kenneth Benson, Diamond Cattle Company and Etcheverry Family Limited Partnership:	Schroeder Law Offices P. C. By: Therese A. Ure, Esq.
For Diamond Natural Resources Protection and Conservation Association:	Bob Burnham
For James Gallagher:	James Gallagher
For Mark Moyle Farms:	Mark Moyle
For Eureka County:	Allison MacKenzie, et al. By: Karen A. Peterson, Esq.
Also present:	Theodore Beutel, Esq. Chairman Ithurralde Vice Chairman Goicoechea Dale Bugenig Jake Tibbitts

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right.

HEARING OFFICER JOSEPH-TAYLOR: What's your name?

MR. SHODA: My name is Levi Shoda. Last name is S-H-O-D-A. And I'll apologize because I'm not a public speaker.

HEARING OFFICER JOSEPH-TAYLOR: You don't need to apologize, Mr. Shoda.

MR. SHODA: Okay. I'm a rancher. Thank you for letting me speak as well. I am Levi Shoda and I am the operation manager at Sadler Ranch. I grew up in Douglas County in the Carson Valley and I owned a custom hay company and I leased ground for haying and cattle for a number of years before going to Sadler Ranch.

I have seen battles over water rights in Douglas County and what has and is happening to the Sadler Ranch in my opinion is terrible. It's really bad. Now, this ranch has the most senior rights in the Diamond Valley and those rights have clearly been impacted by pumping of junior wells. There maybe other factors in that, but the most predominant factor that we see is that, and we've spent a lot of effort with our professionals to clarify that for us.

So the ranch, Sadler Ranch, is crippled by the decrease in flows from Shipley Spring. And I look at this ranch every day and I have to work very hard to get 170 acres irrigated that we can hay of those meadows today. We are

priority to make us whole, otherwise we will be first to be cut in the curtailment and that just doesn't make any sense to us. Should an adjudication happen to finally decide the extent of our right, we agree with that. An adjudication should happen. And we are there. We are ready to go. We are asking for an adjudication on our ranch.

But what -- should we wait for an adjudication to get the mitigation water? Absolutely not. The injury is obvious to anyone that needs -- and that needs to be fixed right now. Junior pumpers at Romano has caused our spring to decline. Pumping at the Brown Ranch has caused our spring to decline. Pumping at the Bailey's. There's pumping all around our spring and it's all caused it to decline. And pumping in the southern Diamond Valley has caused it -- it to decline. Since everyone else can pump, I don't see why we can't pump.

Now, the county's solution has just been more delay. They delayed in the '60s. They've delayed in the '80s. And it seems to now that they're still delaying. And it's time to do something. Don't let this hearing fall into the past train of inaction of ignoring the problem or denial from delay. Justice delayed is justice denied.

You've seen evidence where State Engineer in 1912 recognized our water rights. You've seen evidence that the courts have recognized our water rights. The county in their protest even recognizes our vested right. So there is no

STATE OF NEVADA)
) ss.
CARSON CITY)

I, MICHEL DOTY LOOMIS, a Certified Court Reporter, do hereby certify;

That on the 22nd day of November, 2013, in Carson City, Nevada, I was present and took stenotype notes of the hearing held before the Nevada Department of Conservation and Natural Resources, Division of Water in the within entitled matter, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1152 through 1418, is a full, true and correct transcription of my stenotype notes of said hearing.

Dated at Carson City, Nevada, this 16th day of December, 2013.

_____
MICHEL DOTY LOOMIS, CCR #228

EXHIBIT 16

EXHIBIT 16

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,

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.

_____/

SUPPLEMENTAL DECLARATION OF DALE C. BUGENIG IN SUPPORT OF DNRPCA INTERVENORS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302

Leonard Law, PC
955 South Virginia Street, Suite 220 | Reno, Nevada 89502
775-964-4656 | Debbie@leonardlawpc.com

I, Dale C. Bugenig, do hereby swear under penalty of perjury that the assertions of this declaration are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this declaration. If called as a witness, I would be competent to testify to these facts.

2. This declaration is offered to authenticate certain documents attached to the DNRPCA Intervenors' Reply in Support of Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302 ("Reply").

3. I am the managing member of Dale C. Bugenig, Consulting Hydrogeologist, LLC. I work out of a field office in Eureka, Nevada.

4. I hold a Bachelor's degree in Geology and earned my Master of Science Degree in Hydrology and Hydrogeology from the University of Nevada, Reno.

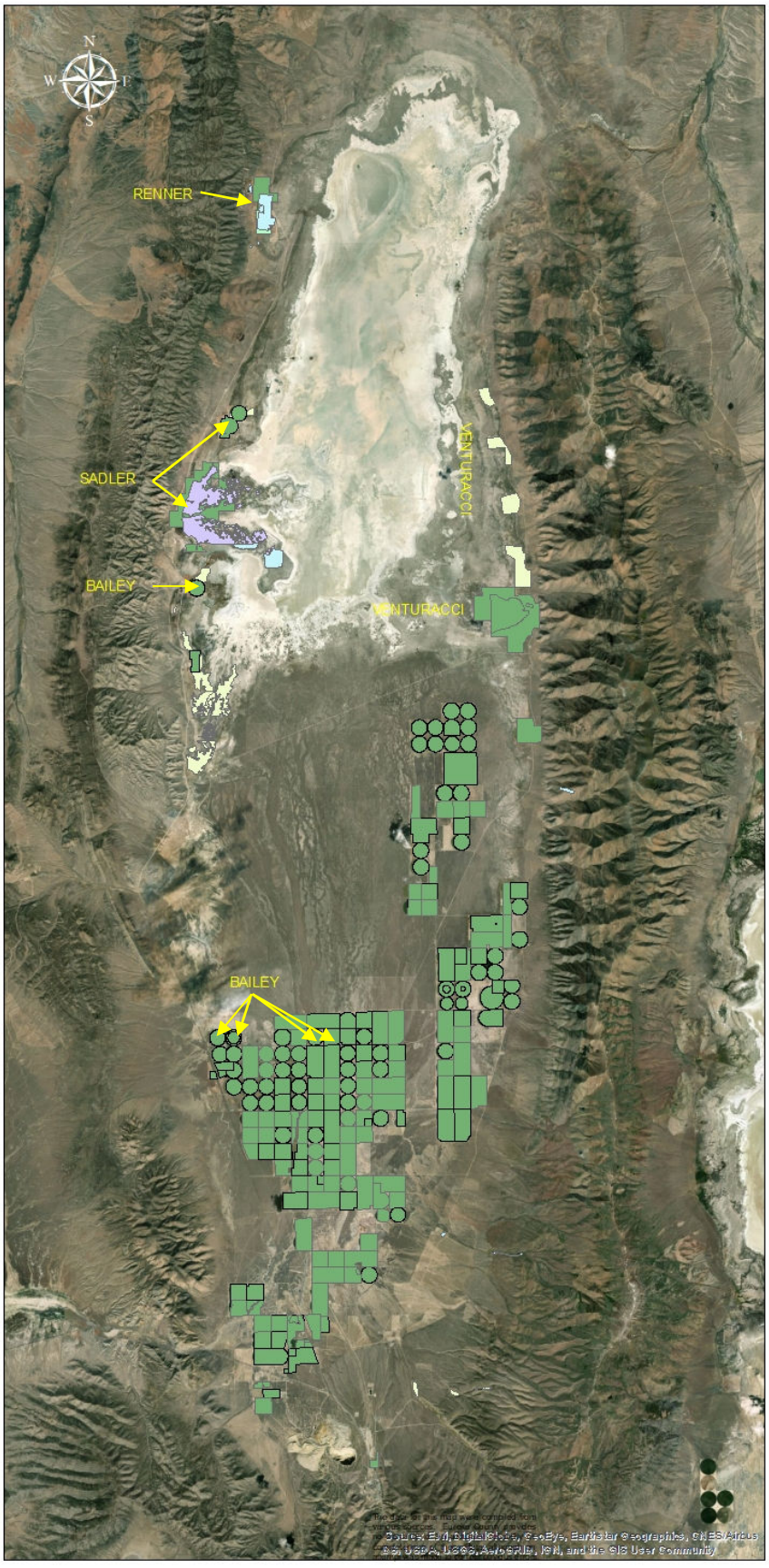
5. I prepared the maps attached hereto using information from the Nevada Division of Water Resources.

6. The maps show the location of surface and underground water rights in the Diamond Valley Hydrographic Basin, including the water rights of Petitioners. The first shows the places of use and the second contains additional detail showing the points of diversion used by the Petitioners.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 1st day of June, 2020.

DALE C. BUGENIG



Explanation

Diamond Valley Irrigation Water Rights

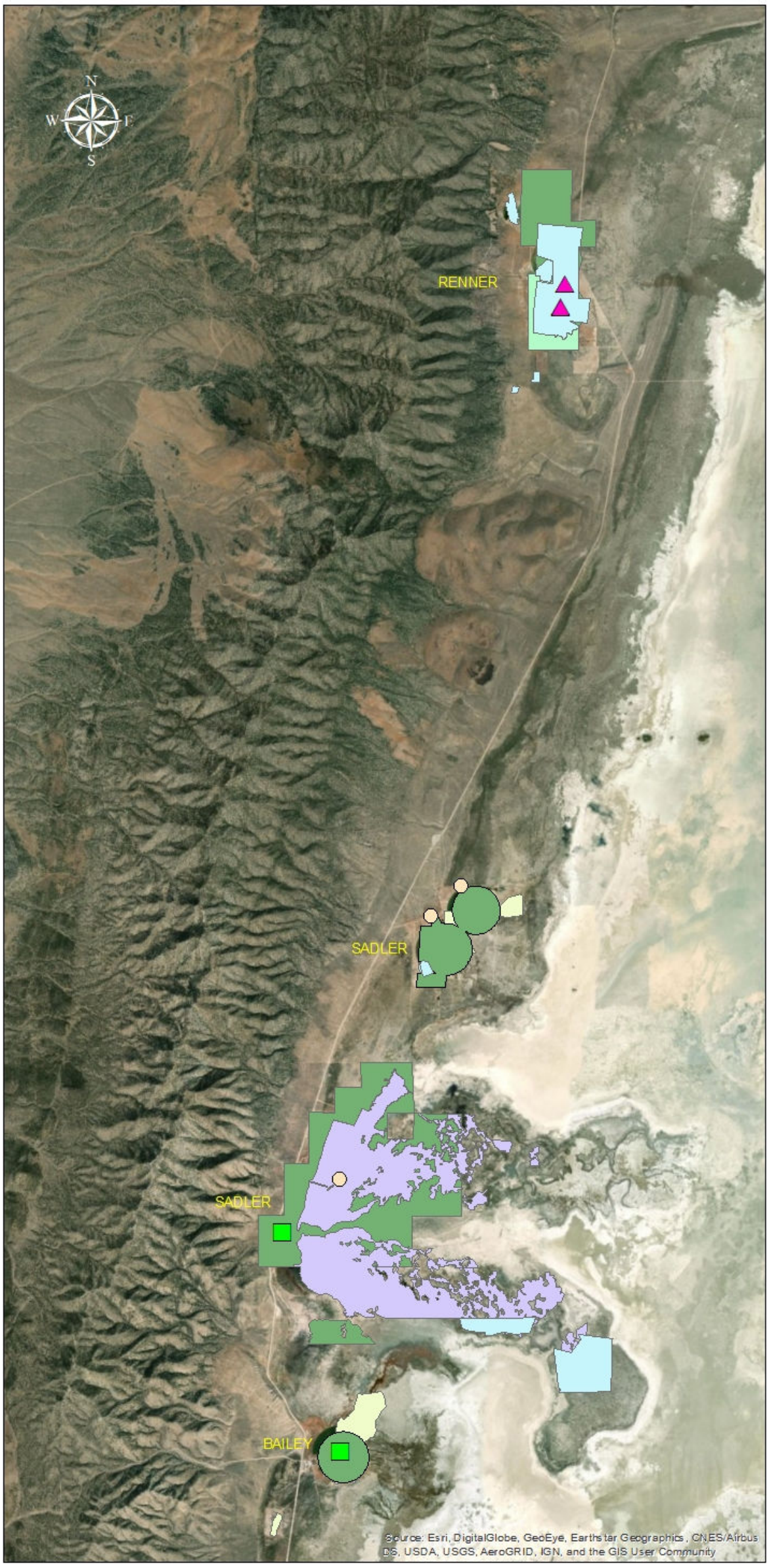
- Underground
- Underground (incl. domestic) - certificate
- Underground, certificate
- Underground, permit
- Lake - vested
- Spring - vested
- Spring - certificate
- Spring - permit

Note: All underground irrigation water rights are indicated by the same green color.

Diamond Valley Irrigation Places of Use

Source: Records of the Nevada Division of Water Resources

Note: Because some Places of Use overlap in part or in total, the color for a particular PoU may obscure all or a portion of other water rights.



Explanation

Points of Diversion

- Irrigation well
- Well - mitigation
- Well - supplemental

Places of Use

- Underground
- Underground (incl. domestic) - certificate
- Underground, certificate
- Underground, permit
- Lake - vested
- Spring - vested
- Spring - certificate
- Spring - permit

Note: All underground irrigation water rights are indicated by the same green color.

Sadler, Bailey & Renner Places of Use Points of Diversion (Wells)

The data for this map were compiled from various sources. Eureka County provides no warranty to the accuracy, reliability or completeness of these data, although an attempt was made to correct obvious errors.

Source: Records of the Nevada Division of Water Resources

Note: Because some Places of Use overlap in part or in total, the color for a particular PoU may obscure all or a portion of other water rights.

EXHIBIT 17

EXHIBIT 17

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Appellants,

vs.

PAHRUMP FAIR WATER, LLC., a Nevada limited-liability company; STEVEN PETERSON, an individual; MICHAEL LACH, an individual; PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an individual,

Respondents.

Electronically Filed
Jan 02 2019 03:53 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 77722

EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY OF DISTRICT COURT'S ORDER GRANTING PETITION FOR JUDICIAL REVIEW PENDING APPEAL PURSUANT TO NRAP 8(a)(2) AND REQUEST FOR ADMINISTRATIVE STAY PENDING DECISION ON UNDERLYING MOTION FOR STAY

IMMEDIATE ACTION REQUESTED

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby moves this Honorable Court on an emergency basis under Nevada Rule of Appellate

Docket 77722 Document 2019-00237

Procedure ("NRAP") 27(e), for a stay of the District Court's Order Granting Petition for Judicial Review pending the State Engineer's appeal of this Order to the Nevada Supreme Court, pursuant to NRAP 8(a). This Motion is based upon the following points and authorities, all pleadings and papers on file in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS AND PROCEDURAL HISTORY FOR STAY

Petitioners Pahrump Fair Water, LLC, Steven Peterson, Michael Lach, Paul Peck, Bruce Jabeour, and Gerald Schulte (collectively, "Pahrump Fair Water"), filed their Petition for Judicial Review in the Fifth Judicial District Court of the State of Nevada seeking the reversal of State Engineer's Amended Order No. 1293A, on or about August 10, 2018. Following a complete briefing on this matter, and oral arguments on November 8, 2018, in Pahrump, Nevada, the Honorable Senior Judge Steven P. Elliott ordered that Pahrump Fair Water's Petition for Judicial Review be granted, and reversed Amended Order No. 1293A. The district court filed the written order granting the Petition for Judicial Review on December 6, 2018, and the Notice of Entry of Order was served on December 6, 2018. *See* Notice of Entry of Order, attached hereto as Exhibit 1. Based on the arguments made to the district court, the State Engineer is appealing the district court's ruling to this honorable Court. The State Engineer also previously sought this requested stay in district court,

however, the district court denied the requested relief, finding that NRAP 8(c) factors did not weigh in favor of the State Engineer's requested stay.

The State Engineer now moves for this stay in this Court based on the same grounds due to concerns about timing and the effects of the district court's Order during the pendency of this appeal, as the district court's Order states that it is effective 5 days after receipt and Nevada Rule of Civil Procedure ("NRCP") 62(a) permits enforcement proceedings to commence following the expiration of 10 days after service of written notice of entry of an order. Prior to the district court's denial of the State Engineer's Motion for Stay at the district court, the State Engineer complied with the district court's Order, issuing his Notice of Reversal of Order 1293A on December 13, 2018, following the district court's denial of a request for a temporary stay pending a determination on the motion for stay during a teleconference held on December 13, 2018. *See* Notice of Reversal of Order 1293A, attached hereto as Exhibit 2.

The State Engineer seeks a stay of the district court's Order, and for Amended Order No. 1293A to remain in effect, during the pendency of this appeal due to the high likelihood that the purpose of the State Engineer's appeal will be defeated if this stay does not issue, as well as the potential irreparable harm to the resource and impending procedural quagmire should additional domestic wells be freely drilled during the pendency of an eventually successful appeal by the State Engineer.

II. ARGUMENT

A. This Court Should Stay the District Court's Order, Reversing Amended Order 1293A, Pending Appeal

The State Engineer seeks a stay of the district court's Order Granting Petitioner's Petition for Judicial Review. The State Engineer seeks to preserve the status quo during the pendency of this appeal, *i.e.*, continue the prohibition on drilling new domestic wells in the Pahrump Basin without the relinquishment of 2 acre-feet of water rights, pursuant to Amended Order No. 1293A.

In this case, the first factor regarding the potential defeat of the object of the State Engineer's appeal should hold substantial weight. NRAP 8(c)(1). The State Engineer issued Amended Order No. 1293A due to the significant groundwater issues facing the Pahrump Basin, based on studies showing continuing water level declines on the valley floor of the Pahrump Basin, including projecting the failure of thousands of existing wells under existing pumping conditions currently occurring within the basin. *See* State Engineer's Answering Brief, attached hereto as Exhibit 3. These existing conditions are in significant part the result of the Pahrump Basin containing the highest density and proliferation of domestic wells in the State of Nevada. *Id*. It is the State Engineer's position that he is statutorily authorized to issue Amended Order No. 1293A, and that it is necessary to prevent the further proliferation of additional domestic wells that would exacerbate Pahrump's already

troubling groundwater levels, to the detriment of existing holders of water rights and the protected interests of those currently existing domestic wells.

Further, based on this Court's ruling, there is now an outstanding question of whether domestic wells are even subject to the prior appropriation doctrine that has been Nevada's water law since 1885. The district court held that "domestic wells are afforded an exemption from the State Engineer's regulatory purview." Order Granting Petition for Judicial Review, p. 6. Such an exemption is, in effect, a finding that domestic wells hold a superior priority to all other water rights. Allowing additional domestic wells to be drilled, without restriction, during the pendency of the appeal will only compound this issue such that a primary goal of the State Engineer's appeal will be defeated if a stay is not issued.

Since the district court oral argument on November 8, 2018, the State Engineer has received a significant number of Notices of Intent[1] ("NOI") to drill new domestic wells in the Pahrump Basin. *See* Declaration of John Guillory, P.E., Nevada Division of Water Resources, Manager II, Las Vegas Branch Office,

[1] For reference, a query of the State Engineer's well log database, found on the Nevada Division of Water Resources website, shows that approximately 377 domestic wells were drilled in the entire state of Nevada in 2018. The Pahrump Basin is one of 256 groundwater basins in Nevada. Therefore, in just the 55 days between the date of the district court oral argument in this case and the date that the State Engineer filed this Motion for Stay, the State Engineer received 232 NOIs for the Pahrump Basin alone. This number is equivalent to approximately 61.5 percent of the amount of all domestic wells drilled in Nevada in 2018.

attached hereto as Exhibit 4. Should this proliferation of new domestic wells be allowed to proceed, the purpose of the State Engineer's appeal to uphold Amended Order No. 1293A will be defeated. This potential increase in domestic wells, along with the legal entitlement to pump up to 2 acre-feet annually per each domestic well under NRS 534.350(8)(a)(2), will only further compound the extraordinary groundwater declines and threats to existing domestic wells and holders of groundwater rights. This influx of NOIs is the primary reason why the State Engineer requests immediate action on this Emergency Motion.

This result is exactly what the State Engineer sought to prevent when issuing Amended Order No. 1293A under his legal duty to manage Nevada's limited water resources for the benefit of the public. While this Court generally does not hold that one factor under NRAP 8(c) carries more weight than others, the Court previously recognized that if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (*citing Hansen v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000)). In other contexts, specifically regarding an order refusing to compel arbitration, the Nevada Supreme Court held that the first stay factor takes on added significance and generally warrants a stay pending resolution of the appeal. *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38. The other stay factors remain relevant to the Court's analysis, but "absent a strong showing

that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of the appeal." *Id*., 120 Nev. at 251-52, 89 P.3d at 38. This factor is especially strong and justifies the requested stay.

Additionally, the State Engineer, and the State of Nevada as a whole, will suffer irreparable harm should this stay not issue. NRAP 8(c)(2). The issue is twofold. First, should the Supreme Court ultimately reverse this Court's decision and reinstate Amended Order No. 1293A, as noted above, there will have been potentially hundreds, if not thousands, of new domestic wells drilled in violation of Amended Order No. 1293A during the pendency of the appeal. This would lead to procedural disarray, raising significant questions regarding plugging these new wells, who will do the plugging, and who will pay for it. The burden of this problem would fall on the State Engineer. Second, the studies upon which the State Engineer based Amended Order No. 1293A predict continued water level declines and well failures based on existing pumping. Should pumping increase, there is a distinct likelihood that water levels will drop at an increased rate such that it is possible that the Pahrump Basin may drop to an irrecoverable level. The water of all sources of water supply within the boundaries of the State belongs to the public. NRS 533.025. It is the State Engineer's duty to prevent the depletion of designated groundwater basins, like the Pahrump Basin. *See* NRS 534.120. Therefore, Amended Order

No. 1293A should remain in effect until the Nevada Supreme Court reaches a final decision in order to avoid serious, *irreparable* harm to the State Engineer and the State of Nevada.

Conversely, Petitioners will not suffer irreparable harm if this stay is granted. NRAP 8(c)(3). Requiring those seeking to drill new domestic wells in the Pahrump Basin to wait before they drill these new wells without relinquishment of 2 acre-feet of water (in the event the Nevada Supreme Court affirms the district court's decision) is not irreparable harm. The Supreme Court has held that increased costs and delay do not constitute irreparable harm. *See Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. Nonetheless, this factor will generally not play a significant role in the decision whether to issue a stay. *Id*.

Regarding the likelihood of success on the merits factor, NRAP 8(c)(4), this Court has held that where the object of an appeal will be defeated if the stay is denied, a stay is generally warranted; however, "the party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable" particularly where "the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes." *Id*., 120 Nev. at 253, 89 P.3d at 40. Here, the State Engineer is appealing the district court's ruling in good faith, seeking to uphold his legal duties, pursuant to NRS 534.110(8) and NRS 534.120(1), to make such rules and regulations as necessary to prevent the depletion of the Pahrump

Basin via Amended Order No. 1293A, allowing the State Engineer to work towards stabilizing water level declines and limiting well failures, including existing domestic wells, without the need to curtail[2] existing water users.

Despite the district court's finding to the contrary, the State Engineer will argue that he did in fact have authority to issue Amended Order No. 1293A to prohibit the drilling of new domestic wells without the relinquishment of a 2 acre-foot water right, that it was supported by substantial evidence, and that he did not violate due process in issuing the Amended Order. As the district court stated during the hearing on November 8, 2018, this case presents a tight issue. Therefore, the likelihood of success on the merits should not weigh in either side's favor, and should certainly not work in Petitioners' favor to defeat this Motion for Stay.

As shown above, due in large part to the likelihood that the purpose of the State Engineer's appeal will be defeated, either in totality or in part, if this stay does not issue, and because the potential harm to the State Engineer and the State of

[2] Per NRS 534.110(6), the State Engineer has the authority to order that withdrawals, including those from domestic wells, be restricted (or curtailed) to conform to priority rights if the State Engineer's findings indicate that "the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants." NRS 534.080(4) provides that domestic wells have a date of priority equal to the date of completion of the well. Why would the State Engineer want to allow one more domestic well to be drilled in the Pahrump Basin, to serve a home dependent on that water, when that domestic well will be the first one cut off in the event of curtailment? This is the exact situation that the State Engineer tried to prevent by issuing Amended Order No. 1293A.

Nevada as a whole, the State Engineer's Motion for Stay Pending Appeal should be granted.

III. CONCLUSION

For the foregoing reasons, the State Engineer respectfully requests that this Court issue a stay of the district court's Order Granting Petition for Judicial Review pending the instant appeal. Further, given the emergency nature of this Motion and aforementioned timing concerns, the State Engineer respectfully requests a temporary administrative stay pending the briefing and decision on this Motion for Stay.

RESPECTFULLY SUBMITTED this 2nd day of January, 2019.

ADAM PAUL LAXALT
Attorney General

By: /s/ James N. Bolotin
JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: jbolotin@ag.nv.gov
Attorney for Appellant,
State Engineer

NRAP 27(e) CERTIFICATE

I, James N. Bolotin, declare as follows:

1. I am currently employed by the Nevada Office of the Attorney General as a Deputy Attorney General. I am counsel for Appellants named herein.

2. I verify that I have read the foregoing Emergency Motion under NRAP 27(e) for Stay of District Court's Order Granting Petition for Judicial Review Pending Appeal Pursuant to NRAP 8(a)(2) and Request for Administrative Stay Pending Decision on Underlying Motion for Stay, and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. The facts showing the existence and nature of the emergency are set forth in the Motion. As described above, relief is needed as soon as possible to avoid irreparable harm to the State Engineer, the Pahrump Valley Hydrographic Basin, and the State of Nevada as a whole, and to avoid defeating the purpose of the State Engineer's appeal. Immediate action is requested.

4. The relief sought in this Motion was presented to the District Court in a motion filed with the District Court on December 10, 2018. The District Court denied this relief, filing its Order on December 27, 2018, and the State Engineer received the Notice of Entry of this Order on January 2, 2019. The State Engineer is filing this Motion at the earliest possible time.

5. I have made every practicable effort to notify the Supreme Court and opposing counsel of the filing of this Motion. The State Engineer alerted opposing counsel to the filing of this Motion shortly before it was submitted for efiling. I also called the Clerk of Court's Office for the Nevada Supreme Court before filing. A courtesy copy was emailed to all parties.

6. Below are the telephone numbers and office addresses of the known participating attorneys:

Counsel for Pahrump Fair Water, LLC, *et al.*, Respondents

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
T: (775) 882-9900

Executed this 2nd day of January, 2019, in Carson City, Nevada.

/s/ James N. Bolotin
JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 2nd day of January, 2019, I served a copy of the foregoing EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY OF DISTRICT COURT'S ORDER GRANTING PETITION FOR JUDICIAL REVIEW PENDING APPEAL PURSUANT TO NRAP 8(a)(2) AND REQUEST FOR ADMINISTRATIVE STAY PENDING DECISION ON UNDERLYING MOTION FOR STAY, by electronic service to:

Paul G. Taggart, Esq.
David H. Rigdon, Esq.
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703

/s/ Dorene A. Wright

INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Notice of Entry of Order filed December 7, 2018	15
2.	Notice of Reversal of Order 1293A dated December 13, 2018	1
3.	Respondent State Engineer's Answering Brief filed October 12, 2018	36
4.	Declaration of John Guillory, P.E., Nevada Division of Water Resources, Manager II, Las Vegas Branch Office	3

EXHIBIT 4

EXHIBIT 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellants, vs. PAHRUMP FAIR WATER, LLC., a Nevada limited-liability company; STEVEN PETERSON, an individual; MICHAEL LACH, an individual; PAUL PECK, an individual; BRUCE JABEOUR, an individual; and GERALD SCHULTE, an individual, Respondents.	Case No. 77722

DECLARATION OF JOHN GUILLORY, P.E., NEVADA DIVISION OF WATER RESOURCES, MANAGER II, LAS VEGAS BRANCH OFFICE

I, JOHN GUILLORY, P.E., hereby state that the assertions of this declaration are true:

1. I have personal knowledge of the matters asserted herein and am competent to testify thereto, save for those matters asserted on

///

information and belief, and for those matters, I am informed and believe them to be true.

2. I am currently employed by the Nevada Division of Water Resources (DWR), as a Professional Engineer (P.E.), in the position of Manager II for DWR's Las Vegas Branch Office.

3. In connection with the case of *Jason King, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources v. Pahrump Fair Water, LLC., et al.*, Case No. 77722, in the Nevada Supreme Court, on appeal from Case No. CV 39524 in the Fifth Judicial District Court of the State of Nevada, in and for the County of Nye, the Office of the Nevada Attorney General contacted me and requested that I, as a Manager II with DWR experienced with the Pahrump Basin, provide truthful and accurate information relevant to legal briefs that they intend to file with the Court on behalf of DWR and the State Engineer, and for other proper purposes.

4. Since the oral argument before the District Court, held on November 8, 2018, wherein the District Court, from the bench, granted the Petition for Judicial Review and effectively reversed Amended

Order No. 1293A, DWR has received 232 Notices of Intent to Drill new domestic wells in the Pahrump Basin.

Pursuant to NRS 53.045, I hereby certify, under penalty of perjury, that the foregoing is true and correct.

Executed on this 2ND day of January, 2019.

P.E.

JOHN GUILLORY, P.E.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,
Appellant,
vs.
PAHRUMP FAIR WATER, LLC, A NEVADA LIMITED-LIABILTY COMPANY; STEVEN PETERSON, AN INDIVIDUAL; MICHAEL LACH, AN INDIVIDUAL; PAUL PECK, AN INDIVIDUAL; BRUCE JABEOUR, AN INDIVIDUAL; AND GERALD SCHULTE, AN INDIVIDUAL,
Respondents.

No. 77722

FILED

JAN 11 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING STAY AND EXPEDITING APPEAL

This is an appeal from a district court order granting a petition for judicial review in a water law case and reversing State Engineer Order 1293A restricting the drilling of new domestic wells. Appellant State Engineer filed an emergency motion to stay the district court's order pending appeal, and we entered a temporary stay pending receipt and consideration of any opposition, which respondents have now filed. Having considered appellant's motion and supporting documents, respondents' opposition, and appellant's reply under the NRAP 8 factors, we conclude that the balance of harms weighs in favor of a stay. NRAP 8(c). Accordingly, we grant appellant's motion and stay enforcement of the district court's December 6, 2018, order granting judicial review and reversing State Engineer Order 1293A, pending further order of this court.

In light of the stay's potential impacts on respondents, however, we further conclude that this appeal should be expedited. Therefore, appellant shall have until February 15, 2019, to file and serve the opening brief and appendix. NRAP 31(a). Briefing shall thereafter proceed in accordance with NRAP 31(a)(1), but no extensions of time will be granted absent extreme and unforeseeable circumstances.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Steven Elliott, Senior Judge
Attorney General/Carson City
Taggart & Taggart, Ltd.
Nye County Clerk

Eureka County Clerk
JUN 01 2020
RECEIVED

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

Dept. No. 2

NO. _____
FILED
JUN 01 2020
Eureka County Clerk
By _____

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioners,

vs.

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

Respondent,

EUREKA COUNTY; and DNRPCA INTERVENORS,

Intervenors.

STATE ENGINEER'S REPLY IN SUPPORT OF DNRPCA INTERVENORS' MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302

Tim Wilson, P.E., in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Aaron D. Ford and Senior Deputy Attorney General James N. Bolotin, hereby files this Reply in support of the Motion for Stay Pending Appeal filed by Intervenors 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,

Docket 81224 Document 2020-35059

and Bill and Darla Baumann (collectively "DNRPCA"). This Reply is based upon the attached Points and Authorities, the pleadings and papers on file herein, any oral argument this Court may allow, and any other matters this Court may consider.

POINTS AND AUTHORITIES

I. INTRODUCTION

Unquestionably, the object of the appeal is to keep the Diamond Valley Groundwater Management Plan ("DV GMP") in place in order to improve the health of the Diamond Valley groundwater basin, such that the State Engineer can lift the Critical Management Area ("CMA") designation and avoid curtailment by priority. *See* NRS 534.037 and NRS 534.110(7). As shown by DNRPCA in its Motion for Stay Pending Appeal, the DV GMP is succeeding in improving the health of the basin. DNRPCA's Motion for Stay Pending Appeal, pp. 4–5. Thus, prior to the Court's Findings of Fact, Conclusions of Law, Order Granting Petitions for Judicial Review dated April 27, 2020 ("April 2020 Order"), the DV GMP was well on its way to completing the "necessary steps for removal of the basin's designation as a [CMA]." NRS 534.037(1). Despite the allegations and arguments made in the Oppositions filed by Petitioners Timothy Lee Bailey & Constance Marie Bailey and Fred Bailey & Carolyn Bailey ("the Baileys") and Petitioners Sadler Ranch, LLC, and Ira R. & Montira Renner ("Sadler/Renner") (collectively "Petitioners"), it is a fact that the aforementioned object of this appeal will be defeated if the DNRPCA Intervenors' Motion for Stay Pending Appeal is denied.

Sadler/Renner attempt to draw a distinction between the data provided by DNRPCA and the ultimate goal of the appeal, while arguing that there are other tools available to the State Engineer to address the over-pumping of Diamond Valley. *See* Sadler/Renner's Opposition, pp. 10–12. Similarly, the Baileys concede that the object of the appeal will be, at least in part, defeated, arguing that the purpose of the appeal will not be "**permanently** defeated" absent a stay. *See* Baileys' Opposition, p. 8 (emphasis added). Rather, the Baileys argue that the absence of the DV GMP during the appeal will not "defeat the long-term purpose of the GMP" but that the "GMP can simply be

reinstated" should DNRPCA, Eureka County, and the State Engineer prevail in this appeal. Baileys' Opposition, p. 10.

Petitioners seem to ignore the fact that the State Engineer's CMA designation of Diamond Valley on August 25, 2015, started a 10-year clock. NRS 534.110(7); *see also* SE ROA at 134–138. This 10-year clock stopped once the State Engineer approved the DV GMP on January 11, 2019, finding that it set forth the necessary steps for removal of Diamond Valley's CMA designation, pursuant to NRS 534.037(1), after considering the necessary factors pursuant to NRS 534.037(2). SE ROA at 2–19. Deactivating the DV GMP while the case is on appeal at the Nevada Supreme Court leaves the proponents of the DV GMP with choices that are insufficient to truly preserve the purpose of the appeal, as progress towards removal of the CMA designation is lost and the 10-year countdown toward mandatory curtailment looms. *See* NRS 534.110(7).

Additionally, Petitioners have not sufficiently shown that they will be harmed by a stay while this case is on appeal, as their allegations of harm resulting from the stay are speculative in nature. Conversely, the State of Nevada will be harmed if a stay is denied as the State Engineer will be unable to enforce the GMP that he approved pursuant to NRS 534.037. This jeopardizes the progress that has been made in Diamond Valley, representing a threat to the basin's health while forcing the situation closer to requiring the State Engineer to restrict withdrawals to priority rights. Such a result would result in significant harm to Intervenors, and harm the State Engineer's ability to enforce the DV GMP he approved pursuant to statute. The balance of potential harms weighs in favor of a stay in this case while the Supreme Court addresses the legality of the DV GMP and interprets NRS 534.037 and 534.110(7) for the first time. This is especially true given the State Engineer's and Intervenors' openness to an order from this Court that keeps the DV GMP intact but excepts Petitioners from compliance with the GMP during the pendency of the appeal.

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The State Engineer respectfully requests that this Court stay its April 2020 Order pending appeal to the Nevada Supreme Court as the factors of Nevada Rule of Appellate Procedure ("NRAP") 8(c) weigh in favor of the requested stay pending appeal.

II. BACKGROUND

The State Engineer will not belabor the procedural history of this case, as it has been accurately illustrated in DNRPCA's Motion for Stay Pending Appeal and elsewhere in the record. On May 19, 2020, this Court issued an Order denying DNRPCA's Ex Parte Motion for Order Shortening Time, but granting a temporary stay of its April 2020 Order pending a decision on the instant Motion for Stay Pending Appeal. Since DNRPCA filed its Motion for Stay Pending Appeal, the State Engineer and Intervenor Eureka County have filed Notices of Appeal. The State Engineer filed a joinder to the Motion for Stay on May 19, 2020, and Eureka County filed a joinder to the Motion for Stay on May 21, 2020. Petitioners timely filed Oppositions to the Motion for Stay Pending Appeal on May 26, 2020. The State Engineer now timely files this reply in support of DNRPCA's Motion for Stay Pending Appeal.

III. ARGUMENT

A. Legal Standard for a Stay Pending Appeal

The State of Nevada and its agencies are not automatically entitled to a stay of a trial court's judgment on mere filing of a notice of appeal; rather, the government must make a separate and distinct application for a stay of judgment pending appeal. *Clark Cnty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018) (citing *Nelson v. Heer*, 121 Nev. 832, 834 n.4, 122 P.3d 1252, 1253 n.4 (2005); *Public Serv. Comm'n v. First Jud. Dist. Ct.*, 94 Nev. 42, 45–46, 574 P.2d 272, 274 (1978)). Pursuant to NRCP 62(c), when an appeal is taken from a final judgment granting, dissolving, or denying an injunction, the court in its discretion may stay, suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. Pursuant to NRCP 62(e), when an appeal is taken by the State or by

any county, city, town, or other political subdivision of the State, or an officer or agency thereof, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security is required from the appellant.

Before moving for a stay pending appeal at the appellate court, NRAP 8(a)(1) ordinarily requires a party seeking a stay pending appeal to move for such relief first in the district court. Nevada Rule of Appellate Procedure ("NRAP") 8(c) requires the Supreme Court or Court of Appeals to consider the following factors in deciding whether to issue a stay or injunction pending appeal:

> (1) Whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied;
> (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied;
> (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and
> (4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

While the Nevada Supreme Court generally does not hold that one factor carries more weight than others, the Court has recognized that if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citing *Hansen v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000)). In other contexts, specifically regarding an order refusing to compel arbitration, the Nevada Supreme Court has articulated that the first stay factor takes on added significance and generally warrants a stay pending resolution of the appeal. *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38. The other stay factors remain relevant to the Court's analysis, but "absent a strong showing that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of the appeal." *Id.*, 120 Nev. at 251–52, 89 P.3d at 38.

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B. The Balance of Factors under NRAP 8(c) Weighs in Favor of a Stay of the April 2020 Order Pending Appeal

The State Engineer respectfully joins Intervenors in seeking a stay of this Court's April 2020 Order while these parties seek appellate review from the Nevada Supreme Court. Pursuant to NRCP 62(c), it is within this Court's discretion to stay a final judgment that is injunctive in nature during the pendency of an appeal. This Court's April 2020 Order is injunctive in nature, as it can be construed either as preventing the State Engineer from enforcing the DV GMP that he approved pursuant to the requirements of NRS 534.037, or dissolving the injunctive nature of Order No. 1302. While NRCP 62(c) ordinarily requires a bond or other security for such a request, the State Engineer is the administrator of the Nevada Division of Water Resources, an agency of the State of Nevada, and therefore no bond, obligation, or other security is required from the State Engineer. NRCP 62(e).

In this case, the first factor (the threat that the object of the appeal will be defeated if a stay is not issued) should hold substantial weight sufficient to justify the requested stay. As stated in the Introduction above, there are multiple factors at work in this case that would defeat the object of the appeal should the DV GMP be deactivated during the pendency of the appeal. The entire purpose of the development, and subsequent approval, of the DV GMP was so the groundwater users in Diamond Valley could avoid the mandatory curtailment required after 10 consecutive years of a CMA designation in the absence of a GMP adopted pursuant to NRS 534.037. *See* NRS 534.110(7).

The State Engineer issued Order No. 1302 approving the DV GMP after holding the necessary public hearing pursuant to NRS 534.037(3) and considering the necessary factors pursuant to NRS 534.037(2). This Court held that the State Engineer complied with these provisions of the law. *See* April 2020 Order, pp. 12–16. The State Engineer did so after a majority of holders of permits or certificates to appropriate water in Diamond Valley spent years developing the DV GMP and garnering majority support for the plan. *See* DNRPCA's Motion for Stay Pending Appeal, pp 6–7. Deactivating the

DV GMP while this case is being reviewed by the Nevada Supreme Court risks reversing the progress already made under the DV GMP towards improving the health of the basin while simultaneously restarting the 10-year clock towards mandatory curtailment. This represents a significant threat to the DV GMP as a whole, as any setback in the DV GMP's progress impairs the State Engineer's ability to eventually lift the CMA designation pursuant to the terms of the community's GMP. This makes curtailment more likely, and the object of the DV GMP, Order No. 1302, and the instant appeal is to avoid this result.

Additionally, the State Engineer, and the State of Nevada as a whole, will suffer serious, potentially irreparable, harm should this stay not issue. This harm is tied to the increased likelihood of curtailment described above. The purpose of approving the DV GMP was to avoid this result, a result that would cause widespread and irreparable harm throughout Diamond Valley. The State Engineer will comply with this statutorily required management of the basin should the DV GMP and Order No. 1302 ultimately be invalidated by the Nevada Supreme Court, and the community members otherwise fail to succeed in garnering the approval of a different GMP prior to the expiration of NRS 534.110(7)'s 10-year period. However, the State Engineer, and the community as a whole, are irreparably harmed if this harsh result becomes an inevitability while they seek an appeal to keep in place the DV GMP, adopted pursuant to statute, such that the 10-year clock is permanently halted. *New Motor Veh. Bd. of Ca. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S. Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers) (concluding "that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). The purpose of the DV GMP is to set forth the "road to recovery" to avoid curtailment and lift Diamond Valley's CMA Designation. *See* April 2020 Order, p. 15; *see also* NRS 534.037(1). The State Engineer and Intervenors should be allowed to have this road to recovery reviewed by the Supreme Court without simultaneously having the clock tick

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towards mandatory curtailment, threatening irreparable harm that defeats the object of the appeal.

Conversely, Petitioners present hypothetical harms when they allege they will be harmed if a stay is granted during the pendency of the appeal. The reductions in allocations under the GMP that would take place during the relatively short period of time that this case will be at the Nevada Supreme Court are not irreparable in nature. Additionally, the bases of this harm (priority, impairment of vested rights, transfer of water rights) are key contentions on appeal, as the State Engineer and Intervenors intend to argue that these alleged "harms" are actually the result of the DV GMP being approved as intended when the Legislature adopted NRS 534.037 and 534.110(7). Any fluctuations up and down in pumping over the course of the DV GMP are factored into the plan, as the reduction in allocations over the entirety of the plan ultimately mandates reduced pumping from the pre-DV GMP state, thus allowing the State Engineer to lift the CMA designation at the end of the DV GMP's planning horizon. *See* SE ROA at 15–19.

This road to recovery in the DV GMP also will ultimately improve groundwater levels such that vested rights will actually be improved through the life of the DV GMP rather than impaired. Any argument that potential transfers of shares under the DV GMP *could* result in harm is completely speculative and ignores the State Engineer's ability to block such transfers or otherwise require that they adhere to the more stringent statutory process. SE ROA at 8–9, 236–237. These alleged potential harms become even more speculative when the Court considers that the State Engineer and Intervenors have expressed their agreement to have this Court issue a stay order during this appeal that keeps the DV GMP in place but provides an exception for Petitioners from required adherence to the GMP.

Regarding the likelihood of success on the merits factor, the Supreme Court has held that where the object of an appeal will be defeated if the stay is denied, a stay is generally warranted; however, "the party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable" particularly where "the

appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 40. Here, the State Engineer is appealing this Court's ruling in good faith, seeking to uphold his approval of the DV GMP pursuant to statute, in order to improve the health of the Diamond Valley groundwater basin, lift the CMA designation, and avoid curtailment by priority. Despite this Court's finding to the contrary, the State Engineer will argue that he did in fact have authority to approve the DV GMP under the existing tenets of Nevada Water Law. Similarly, DNRPCA has laid out good faith arguments for why the appeal is likely to be successful. *See* DNRPCA's Motion for Stay Pending Appeal. Therefore, the likelihood of success on the merits should not weigh heavily in the Court's analysis, and certainly should not work in Petitioners' favor to defeat DNRPCA's Motion for Stay Pending Appeal.

IV. CONCLUSION

As shown above, there is a high likelihood that the purpose of the appeal will be defeated, either in totality or in part, if this stay does not issue during the pendency of the appeal. Additionally, there is strong possibility of potential irreparable harm to the State Engineer and the State of Nevada as a whole if the DV GMP is inactivated during the pendency of the appeal. The factors under NRAP 8(c) weigh in favor of a stay pending appeal in this case.[1] Therefore, and based on the foregoing, the State Engineer respectfully requests that this Court grant DNRPCA's Motion for Stay Pending Appeal as joined by the State Engineer and Eureka County.

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[1] The State Engineer notes that the Nevada Supreme Court has previously granted a request for stay pending appeal of a district court order granting a petition for judicial review invalidating an order of the State Engineer brought on similar bases. *See* Order Granting Stay and Expediting Appeal, *Tim Wilson, P.E., Nev. State Eng'r v. Pahrump Fair Water, et al.*, Nevada Supreme Court Case No. 77722 Docket 19-01782, filed Jan. 11, 2019. Therefore, Sadler/Renner's argument that a stay in this case would "be granting the State Engineer permission to enforce an otherwise illegal order" is unfounded and not a proper basis for denying the stay. *See* Sadler/Renner's Opposition, p. 6. Rather, it is most often, if not always, the case that the party seeking a stay pending appeal lost at the district court.

AFFIRMATION

The undersigned does hereby affirm that the preceding State Engineer's Reply in Support of DNRPCA Intervenors' Motion for Stay Pending Appeal of Order Granting Petitions for Judicial Review of State Engineer Order 1302 does not contain the social security number of any person.

DATED this 1st day of June, 2020.

AARON D. FORD
Attorney General

By: _____

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 1st day of June, 2020, I served a true and correct copy of the foregoing STATE ENGINEER'S REPLY IN SUPPORT OF DNRPCA INTERVENORS' MOTION FOR STAY PENDING APPEAL OF ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW OF STATE ENGINEER ORDER 1302, said document applies to Case Nos. CV-1902-348, -349 and -350, electronically to:

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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
JUN 01 2020
By _____ Eureka County Clerk

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,

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.

_____/

EUREKA COUNTY'S REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

RECEIVED
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Eureka County Clerk

EUREKA COUNTY, by and through its counsel of record, ALLISON MacKENZIE, LTD. and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY, hereby submits its reply to the Oppositions filed by Petitioners TIMOTHY LEE BAILEY and CONSTANCE MARIE BAILEY, FRED BAILEY and CAROLYN BAILEY, ("Bailey Petitioners") and Petitioners SADLER RANCH, LLC and IRA R. RENNER and MONTIRA RENNER ("Sadler/Renner Petitioners") to the Motion for Stay Pending Appeal filed by Respondents/Intervenors DIAMOND NATURAL RESOURCES PROTECTION AND CONSERVATION ASSOCIATION, et al. ("DNRPCA") and joined in by Respondent, TIM WILSON, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES ("State Engineer") and EUREKA COUNTY.

EUREKA COUNTY joins in the replies filed by the DNRPCA and the State Engineer and provides the following additional argument to the Court in support of issuance of the requested stay.

I. INTRODUCTION

The factors contained in NRAP 8(c) weigh in favor of staying the Court's April 27, 2020 Order ("Order") pending appeal. The objects of the appeals filed by DNRPCA, the State Engineer and EUREKA COUNTY are clearly defeated if a stay is not issued by this Court and the harm is compounded by the 10 year time period contained in NRS 534.110(7) continuing to run during the appeal. With regard to immediate harm, the irrigators in the Diamond Valley Basin have planned their 2020 irrigation season based upon the Diamond Valley Groundwater Management Plan ('GMP") being in effect. It is now June and the irrigation season is almost one-third to halfway done. Any benefits to the irrigators and the groundwater basin resulting from the GMP being in effect for the 2020 irrigation season will be lost if the GMP is halted in mid irrigation season. This is particularly important this year because this is a dry water year.

In discussing harm, Petitioners fail to acknowledge the Diamond Valley irrigators are reducing pumping in good faith pursuant to the GMP, which impacts their own water rights, also invaluable property rights, as part of the necessary steps to remove the critical management area designation for the basin during the pendency of the appeal while Petitioners have the ability to fully

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use their underground rights outside the terms of the GMP.[1] Petitioners' claims of harm with regard to their water rights are non-existent because their vested rights and underground rights can be used during the pendency of the appeal without limitation.[2] Petitioners' allegations of harm from other portions of the GMP remaining in place are speculative at best. Petitioners have presented no evidence of harm to them if the other provisions of the GMP are allowed to remain in effect during the appeals.

Finally, should a stay of the Order be issued by this Court, no bond should be required as EUREKA COUNTY is exempt from such a requirement pursuant to NRCP 62(e).

II. ARGUMENT

A. The NRAP 8(c) Factors Weigh in Favor of a Stay of this Court's Order Pending Appeal.

The factors contained in NRAP 8(c) provide the Court must consider and weigh: 1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; 2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; 3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is denied; and 4) whether appellant/petitioner is likely to prevail on the merits of the appeal or writ petition.

1. The Object of Eureka County's Appeal Will Be Defeated if the Stay is Denied.

Sadler/Renner Petitioners argue that *Mikohn Gaming Corp v. Dist. Ct.*, 120 Nev. 248, 89 P.3d 36 (2004) is not applicable because *Mikhon Gaming* dealt with a "specific and exceptional issue" - - the unique policies and purposes of arbitration and an interlocutory appeal and thus, the facts in that case are distinguishable from the facts in this case. Sadler/Renner Opp., p. 5. However, in the next few paragraph of their Opposition, said Petitioners request the Court take into the account

[1] Vested rights and any underground right tied to a vested claim, including Baileys' mitigation underground right, are not subject to the GMP.

[2] The Bailey Petitioners collectively hold five groundwater rights for stockwater in Diamond Valley. None of their stockwater rights are senior; in fact, their most senior groundwater stockwater right has a priority of August 1964, over 4 years and almost 60,000 acre-feet after the 30,000 acre-foot perennial yield "line." Sadler Ranch also holds a couple stockwater groundwater rights with both being very junior. Stockwater rights are not subject to the GMP and Petitioners are able to fully use these rights.

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the unique nature of the relief granted in this case. *Id. Mikohn Gaming*, while factually different, is still applicable as this case deals with the specific and exceptional issue of whether a GMP may remain in effect to maintain the status quo pending an appeal. Just as the Nevada Supreme Court noted in *Mikohn Gaming* Nevada had a strong policy favoring arbitration, the Legislature provided a unique process for over-drafted basins to remove the critical management area designation of the basin instead of curtailment by priority whereby a majority of permit and certificate holders in a basin petition for approval of a groundwater management plan. That groundwater management plan resulting from the process provided by the Legislature in over-drafted basins should not be disrupted when Petitioners will not be harmed by the requested stay.

The object of EUREKA COUNTY's appeal is to uphold State Engineer's Order 1302 approving the GMP pursuant to NRS 534.037 which reduces pumping and promotes recovery of the groundwater basin, and compliance with the 10 year period for GMP approval before mandatory curtailment by priority is required pursuant to NRS 534.110(7).[3] Halting the GMP while an appeal is pending extinguishes the steps taken by the Diamond Valley irrigators under NRS 534.037 to comply with NRS 534.110(7) to remove the critical management area designation of the Diamond Valley basin and avoid mandatory curtailment by priority of their water rights. If no stay is granted and the GMP is upheld by the appellate court, Diamond Valley irrigators will have lost the benefits from the GMP being in place to remove the basin from its critical management area designation – which the Court agreed would be accomplished by the GMP approved by the State Engineer in Order 1302. *See* Order at 13-16. Just as the arbitration clause would be rendered meaningless if a stay failed to issue in *Mikohn Gaming*, the reduced pumping benefits resulting from the GMP would no longer be in effect while an appeal is pending and the 10 year time frame in NRS 534.110(7) would continue to run. Thus, by failing to issue a stay of the Order, this Court would render the purpose of EUREKA COUNTY's appeal meaningless.

[3] The Sadler/Renner Petitioners statement that EUREKA COUNTY is advancing the interests of one group of county citizens over another is misplaced. Unanimity in any public process is virtually impossible. EUREKA COUNTY's object of the appeal it to uphold Order 1302 and the water rights holder-driven process that led to that Order, including support of the GMP by a majority of both junior and senior water rights holders. Of the 30,000 acre feet of "senior" rights in the basin, 18,700 afa, or about 64%, signed the GMP petition. Some senior water right holders who did not sign the petition provided public comments in favor of the GMP boosting the documented senior water right support of the GMP to above 70%.

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2. Respondents and Intervenors Will Suffer Irreparable Harm if the Stay is Denied.

Petitioners assert the Diamond Valley irrigators will not suffer any harm and this Court's Order "simply returned the valley to the status quo that had existed for at least four decades before the GMP's first trial year." *See* Bailey Opp., p. 11. EUREKA COUNTY disagrees. The status quo for this basin is that it was designated a critical management area by the State Engineer on August 25, 2015. No Diamond Valley irrigators appealed from that designation by the State Engineer, including Petitioners. Based upon that designation, the State Engineer must order curtailment by priority if no GMP is approved within 10 years. Based upon the basin's designation, the Diamond Valley irrigators spent years working to develop a GMP that would meet the requirements of NRS 534.037 to get their groundwater basin removed from the critical management area designation, obtain approval of the GMP by a majority of permit and certificate holders in the basin, obtain the State Engineer's approval of the GMP, and then in the last year, notwithstanding that Petitioners appealed the State Engineer's approval of the GMP, put the GMP into effect. The benefits to the basin from the GMP's reduced pumping will be lost if no stay is granted for the years that the appeals will take, with the 10 year mandatory curtailment by priority deadline growing closer and closer and no plan in place to remove the critical management area designation.

The status quo that existed during the time before the GMP went into effect was harmful to the hydrographic basin as Petitioners acknowledge. Returning to that status quo while the critical management area designation is in place would result in continued harm to the groundwater basin with no attempt to reduce pumping as the Diamond Valley irrigators have attempted through the GMP. Failure to maintain the GMP in place causes continued harm to the basin and irreparably harms the Diamond Valley irrigators who have taken the above steps to remove their groundwater basin as a critical management area and avoid mandatory curtailment by priority.

3. Petitioners Will Not Suffer Irreparable Harm Should the GMP Remain in Place.

Petitioners argue that they will suffer irreparable harm if the GMP continues to remain in place pending the appeals. The Sadler/Renner Petitioners appear to concede they are not harmed with regard to their water rights and use of those rights if they are exempted from the GMP during

the appeal process. Sadler/Renner Opp., pp. 12-13. Their arguments of harm go to the merits of the legal issues on appeal or if they can be exempted from the GMP pending the appeals. *Id.* The legal arguments on the merits of the appeal are not an appropriate showing of harm for purposes of a stay.

The Bailey Petitioners do not directly address the harm issue if they are exempted from the GMP and can fully use their underground water rights pending the appeals. Again, the GMP is not applicable to the Baileys' junior underground stockwater rights, vested rights and their underground mitigation right to replace their vested right.[4]

Baileys contend that, regardless of the exemption, their senior groundwater rights would be irreparably affected because the GMP "would allow others to pump groundwater from locations that threaten to irreparably harm the Baileys without first completing the statutory water rights change applications procedures meant to protect against such harms." Bailey Opp., pp. 7-8. This assertion is without basis. First, there is no concrete evidence presented by the Baileys that to date anyone attempted to change locations of water right pumping under the GMP, let alone that there was any impact from such a change to the Baileys' water rights. Second, there is no evidence the State Engineer would not perform the required analysis under the GMP within 14 days and deny a change if the change would impair or conflict with the water rights of others. The fact that someone may file a change application under the GMP sometime in the future is not evidence of harm to the Baileys. Third, there are not sufficient acreages of irrigable private land in Diamond Valley, especially near or adjacent to Baileys' existing water rights, in which substantial water could be transferred under the GMP. Thus, any claim of harm to Baileys at this point with regard to change applications is speculative.

The State Engineer determined the GMP was consistent with existing change application statutes and did nothing more than what was allowed under existing law for temporary and permanent change applications. SE ROA at 8-9, citing GMP §§ 14.8 and 14.9 which are found at SE

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[4] The Court has repeatedly recognized that Baileys were granted a mitigation right by the State Engineer in 1997. *See* Case No. CV-1409-204, *Sadler Ranch, Petitioner, vs. Jason King, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, Respondent*, Findings of Fact, Conclusions of Law, And Order Partially Granting Petition for Judicial Review, issued Feb 12, 2016 at 14-15, 25; Findings of Fact, Conclusions of Law; Order Partially Granting Supplemental Petition for Judicial Review; Order for Issuance of Mitigation Rights Permit; Order Partially Denying Supplemental Petition of Judicial Review, issued March 23, 2018 at 23-25. Copies of said Orders are attached for the convenience of the Court and parties.

ROA at 237. The State Engineer found GMP § 14.8 was not a significant departure from existing law and it was unpersuasive that § 14.8 diminishes State Engineer and public review. SE ROA at 9. The State Engineer found that with respect to increased diversions or new wells, additional withdrawals exceeding one year[5] or where the State Engineer determined within the 14 calendar days the change may not be in the public interest or may impair rights of other persons, the existing procedures in NRS Chapter 533 and 534 shall apply. SE ROA at 8-9. The Bailey Petitioners' arguments regarding harm from change applications under the GMP are without merit.

4. Likely to Prevail on the Merits.

Sadler/Renner Petitioners argue the DNRCPA's, and by extension EUREKA COUNTY's, likelihood of success of the appeal is "nearly insurmountable." Sadler/Renner Opp., p. 9. The Nevada Supreme Court has found that "when moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits, the movant must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting a stay." *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P. 3d 982, 987 (2000). DNRPCA, the State Engineer and EUREKA COUNTY have demonstrated the balance of equities weighs heavily in favor of granting a stay in this instance and have presented a substantial case on the merits with a serious legal question involved to demonstrate that a stay should be granted. Sadler/Renner acknowledge as much in their Opposition by noting the Diamond Valley basin is the first basin designated as a critical management area in Nevada, this case is the first to review NRS 534.037 and 534.110(7) and this case is the first to review a GMP approved by the State Engineer. Sadler/Renner Opp., p. 6 and footnote 17. The fourth factor under NRAP 8(c) has been satisfied.

B. No Bond is Required if a Stay is Granted.

Petitioners argue that if a stay is issued, Respondents should be required to post a bond. Generally, the requirement of a bond relates to the appeal of a money judgment under NRCP 62. *See generally, Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 (2005). NRCP 62(e) provides an exception from the general requirement of a supersedeas or other bond or other security in granting a stay.

[5] The GMP does not allow serial one year changes. The GMP states that these increased diversions or new wells are "not to exceed one (1) year."

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NRCP 62(e) provides "when an appeal is taken by the State or by any county, city, town, or other political subdivision of the State, or an officer or agency thereof, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security is required from the appellant." In *Clark County Office of Coroner/Medical Examiner v. Las Vegas Review Journal*, 134 Nev. 174, 177, 415 P. 3d 16, 19 (2018), the Nevada Supreme Court found that local government appellants are generally entitled to a stay of a money judgment pending appeal without posting a supersedeas bond or other security.

Petitioners did not address the bond issue based upon Eureka County's Joinder in the Motion for Stay. It is also unclear how the Court would even calculate the amount for a reasonable bond because Sadler/Renner acknowledge they ask for an unquantifiable amount to "indemnify Petitioners for any damages resulting from enforcement of Order 1302." Sadler/Renner Opp. p. 15. Indemnification for unspecified damages is clearly not the purpose of a bond for a stay. In any event, if a stay is granted, EUREKA COUNTY is not required to post a bond or security pursuant to NRCP 62(e).

III. CONCLUSION

The balance of equities weighs in favor of issuing a stay of the Court's Order and to allow the GMP to remain in place pending the appeals. If this Court stays its Order pending the appeals, no bond should be required as provided in NRCP 62(e).

IV. AFFIRMATION

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

DATED this 1st day of June, 2020.

KAREN A. PETERSON, ESQ.
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~ and ~

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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, **this document applies to Case Nos. CV1902-348; -349; and -350**; and that on this date, I caused the foregoing document to be served to all parties to this action by:

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Courtesy Copy to Chambers:
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DATED this 1st day of June, 2020.

NANCY FONTENOT

4830-9892-6526, v. 1

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Attachment to Eureka County's Reply

NO.
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FEB 12 2016
Eureka County Clerk
By

RECEIVED
FEB 12 2016
Eureka County
Clerk & Treasurer

Case No. CV-1409-204

Dept No. 2

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

******

SADLER RANCH, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER PARTIALLY GRANTING PETITION FOR JUDICIAL REVIEW

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

PROCEDURAL HISTORY

Before the court is the petition for judicial review filed on September 12, 2014, by Sadler Ranch LLC ("Sadler Ranch"). On February 13, 2015, Sadler Ranch filed petitioner's opening brief ("opening brief"). Respondent Jason King, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, ("State Engineer") filed the summary of record on appeal ("ROA") and respondent's answering brief ("answering brief") on April 17, 2015. Eureka County filed Eureka County's brief on April 17, 2015. On May 23, 2015, the Sadler Ranch reply brief ("reply brief") was filed. On June 3, 2015, Eureka County filed a notice that it was not participating in the oral argument. Oral argument was heard on June 9, 2015, at the

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Eureka County Courthouse. Paul Taggart, Esq. appeared for Sadler Ranch and Jerry M. Snyder, Esq. Senior Deputy Attorney General, appeared for theState Engineer. The court having reviewed the ROA and having considered the arguments of the parties, the applicable law and facts, and all papers and pleadings on file in this case, makes the following findings of fact and conclusions of law and grants Sadler Ranch's petition for judicial review.

FACTUAL HISTORY

Sadler Ranch was established in Diamond Valley, Eureka County, Nevada, in the mid 1800's. The sources of water for Sadler Ranch were Big Shipley Springs (sometimes referred to as Shipley Springs, Shipley Spring) and Indian Camp Springs., collectively ("the springs"). The ranch is approximately 3,000 acres. During the late 1800's the ranch was productive and supported Governor Reinhold Sadler's store in Eureka and butcher shops.[1] The springs flowed into a large pond and then provided water to meadowland and pasture for livestock grazing, cultivating fields of hay and alfalfa for winter feed, a large garden, stock watering and domestic use.[2] From the 1920's through the 1940's the ranch continued active operations including the growing and sale of alfalfa, wheat, barley, oats, vegetables, poultry, eggs, ice, and muskrat supported by a system of permanent water ditches that irrigated the fields.[3] One of Governor Sadler's sons, Alfred Sadler, bought the ranch from his father's corporation and the governor's other son, Edgar Sadler, managed the ranch.[4] After Alfred Sadler's death in 1944, Alfred and Edgar Sadler's children litigated ranch ownership at the conclusion of which most of the ranch

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[1]ROA 1221; ROA 1229-1238, ROA 4368.

[2]ROA 845-850, 913.

[3]ROA 845-850, 904-906.

[4]*Id.*

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cattle were sold.[5] Cattle were grazed on the ranch from 1918 through 1946.[6] The ranch continued to operate during the 1950's and 60's with it being sold in 1975.[7] Sadler Ranch has continued operating to the present.

Sadler Ranch historically irrigated approximately 2,000 acres as noted on the township card in the State Engineer's office in water rights file nos. 4273 and 2679.[8] Sadler Ranch's claim of vested water rights for irrigation and stock watering are pre-statutory vested rights as to Big Shipley Springs and Indian Camp Springs.[9] Since 1913, the State Engineer's position has been that all of the water from Big Shipley Springs was appropriated under the vested right. By letter dated September 23, 1913, the State Engineer denied application 2679 to appropriate water from Big Shipley Spring ". . .on the grounds that there was no unappropriated water in that source."[10] "The fact that the water is used beneficially under a title dating back beyond 1905 is sufficient for this office to consider the water right as valid."[11] On March 30, 2012, Sadler Ranch filed for a mitigation application, permits 81719 and 81720,[12] and a change application, permit 82268, was filed on November 2, 2012, to change the point of diversion of water from the Big Shipley Spring Complex from the spring head to an underground induction well that captures the

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[5] *Id.*

[6] ROA 910.

[7] *Id.*

[8] ROA 914.

[9] ROA 140-153.

[10] ROA 1325.

[11] *Id.*

[12] Sadler Ranch's petition does not challenge the State Engineer's finding of redundancy as to application 81719. See ROA 044. This order does not address the State Engineer's denial of application 81719. See ROA 061. Ruling 6290 is affirmed as to the State Engineer's denial of application 81719.

same surface water.[13] Application 82268 sought to change the point of diversion of Sadler Ranch's claimed vested water right by several hundred feet.[14] Sadler Ranch claimed historic evidence shows that Shipley Spring once flowed between 11 and 15 cubic feet per second ("cfs"), a flow rate between 7,964 to 10,860 acre feet per year. A 1912 court stipulation showed the Shipley Springs flows were 15 cubic feet per second ("cfs").[15] Pending an adjudication of its vested rights claim, Sadler Ranch sought 7,454 acre feet of water to mitigate the loss of both Big Shipley and Indian Camp Springs. In ruling 6290 the State Engineer found 7-8 cfs as the best discharge estimate from Shipley Spring and 1.5 cfs a conservative estimate of discharge from Indian Camp Springs prior to extensive ground water development.[16]

In ruling 6290, the State Engineer found that the Diamond Valley hydrographic basin is significantly over appropriated because the State Engineer has issued ground water permits in excess of the ground water that is available for appropriation.[17] The State Engineer found Diamond Valley has an estimated perennial yield of approximately 30,000 acre-feet annually, but the State Engineer had issued in excess of 130,000 acre-feet of ground water rights to junior water rights holders in the 1960's pursuant to the Desert Land Entry Act of 1877.[18] In July 1978, the State Engineer ordered that all applications filed after December 31, 1978, to appropriate Diamond Valley

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[13]ROA 001, 006.

[14]*Id.*

[15]ROA 1339-1349.

[16]ROA 034, 039.

[17]ROA 010-011.

[18]ROA 011.

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ground water for irrigation be denied.[19] Sadler Ranch and the State Engineer agree that Sadler Ranch appropriated water from Big Shipley Springs and Indian Camp Springs prior to 1905, thus establishing an unadjudicated vested water right.[20] Sadler Ranch and the State Engineer further agree that over pumping in Diamond Valley has sharply reduced the flow rate from Big Shipley Springs and Indian Camp Springs.[21] The State Engineer acknowledges that in 2011, 96,000 acre feet of water was pumped from Diamond Valley with the perennial yield of the basin being approximately 30,000 acre feet annually.[22] Ruling 6290 found that Sadler Ranch is not requesting a "new" appropriation of ground water, but rather is requesting a new method of obtaining ground water by seeking to drill a well to obtain the ground water that formerly discharged at the springs upon which it claims a pre-statutory vested water right.[23] The State Engineer agrees that if Sadler Ranch's proofs of vested claims are valid, those rights must be protected from impairment pursuant to NRS 533.370.[24] The State Engineer concluded that since the flow of Big Shipley Springs and Indian Camp Springs has been reduced due to overpumping of the ground water in the basin, that Sadler Ranch was entitled to a ground water permit mitigating the loss caused by the reduction of the amount of water flowing from Big Shipley Springs and Indian Camp Springs.[25]

DISCUSSION

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[19]ROA 012.

[20]Answering brief at 3; opening brief at 2-3.

[21]*Id.*

[22]Answering brief at 1.

[23]Answering brief at 1-2.

[24]ROA 056.

[25]Answering brief at 1.

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STANDARD OF REVIEW

A party aggrieved by any order or decision of the State Engineer may have the order or decision reviewed in a proceeding for that purpose in the nature of an appeal.[26] The proceedings must be informal and summary.[27] On appeal, the State Engineer's decision or ruling is prima facie correct, and the burden of proof is upon the person challenging the decision.[28] The court will not pass upon the credibility of witnesses or reweigh the evidence, nor substitute its judgment for that of the State Engineer.[29] With respect to questions of fact, the reviewing court must limit its determination to whether substantial evidence in the record supports the State Engineer's decision.[30] Substantial evidence has been defined as "that which a reasonable mind might accept as adequate to support a conclusion."[31] When reviewing the State Engineer's findings, factual determinations will not be disturbed on appeal if supported by substantial evidence.[32] With regard to purely legal questions, the standard of review is de novo.[33] The Nevada Supreme Court has held that "an agency charged with the duty of administering an act is impliedly clothed with power to construe it as necessary precedent to administrative action," and "great deference should be given to the agency's interpretation when it is

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[26]NRS 533.450(1).

[27]NRS 533.450(2).

[28]NRS 533.450(10).

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

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

[31]*City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

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

[33]In re Nevada State Engineer Ruling No. 5823, 277 P.3d 449, 128 Nev. Adv. Op. 22, (2012).

within the language of the statute."[34] The State Engineer's interpretation of a regulation or statute does not control if the plain language of the provision compels an alternative interpretation.[35] 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.[36]

The State Engineer asserts he has the discretion under the circumstances of this case to base Sadler Ranch's mitigation right on the amount of water needed to replace the historical productive benefit that Sadler Ranch derived from the appropriated water.[37] Sadler Ranch asserts the State Engineer is required to grant a mitigation right to replace all water Sadler Ranch appropriated for beneficial use prior to 1905.[38]

Nevada water law provides that vested water rights shall not be impaired.[39] Specifically, NRS 533.085(1) reads as follows:

> (1) Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

A vested right is "a right to use water that has become fixed either by actual diversion and application to beneficial use or by appropriation according to the manner

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[34] *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citing *Clark Co. Sc. Dist. V. Local Gov't*, 90 Nev. 442, 446 530 P.2d 114, 117 (1974).

[35] *Anderson Family Assocs. v. State Engineer*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008).

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

[37] Answering brief 3-4.

[38] *Id.*

[39] NRS 533.085.

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provided by the water law.[40]

NRS 533.370(2) reads as follows:

> Except as otherwise provided in subsection 10, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

This statute requires the State Engineer to protect senior water rights holders from applications or requests for permits when there is no unappropriated water in the proposed source of supply or if the proposed use or change conflicts with existing rights. NRS 534.110 allows the State Engineer to prescribe all necessary regulations to administer chapter 534 regarding underground water and wells, however his authority is limited such that he may only issue permits if it is determined there is unappropriated water in the affected area and only if the rights of holders of existing appropriations can be satisfied.[41] According to the State Engineer, "Nevada's water statute evinces clear policy preference in favor of protecting pre-statutory vested water rights and that vested rights of person to the water shall not be impaired."[42] The State Engineer has discretion to issue a mitigation permit but maintains his scope of authority in issuing a mitigation permit is not defined by Nevada water law[43] and that he is not required to issue a ground water permit

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[40]In re Fillippini, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949).

[41]NRS 534.110(1)(3)(5).

[42]Answering brief at 7.

[43]*Id.* at 1.

to replace all the water lost by Sadler Ranch.[44] Although the State Engineer cites NRS 533.085 as protecting vested rights from impairment, he relies on NRS 534.120(1) as giving him the discretion to formulate his decision in ruling 6290.

NRS 534.120(1) states

> Within an area that has been designated by the State Engineer, as provided for in this chapter, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.

The State Engineer asserts that NRS 534.120(1) allows him to base Sadler Ranch's mitigation right on the amount of water needed to replace the actual productive capacity of the water Sadler Ranch placed to beneficial use prior to 1905[45] and that he has the discretion to grant a mitigation right that was sufficient to achieve the same "agricultural production levels that its predecessor had been able to achieve when the water was first placed to beneficial use."[46] The State Engineer acknowledges this method of calculating Sadler Ranch's mitigation right is not expressly authorized by statute but that NRS 534.120 gives him broad discretion when calculating mitigation rights under ruling 6290.[47] This Court disagrees.

The State Engineer has allowed over appropriation of ground water to continue for decades upon decades in the Diamond Valley basin. In ruling 6290 the State Engineer found:

> "The Diamond Valley Hydrographic Basin is significantly over-appropriated due to the fact that groundwater permits and actual groundwater pumping far exceed the perennial yield of the basin. Diamond Valley has an estimated

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[44] *Id.* at 7.

[45] *Id.* at 7, 9.

[46] *Id.* at 9.

[47] *Id.* at 9.

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> perennial yield of approximately 30,000 acre-feet annually, but over 130,000 acre-feet of groundwater rights were issued prior to the tenure of the current State Engineer. In 2011, over 96,000 acre-feet of groundwater was actually pumped from the basin."[48]

The State Engineer's answering brief at pg. 8, note 3, citing ruling 6290 states:

> "The Basin is over appropriated because, in the 1950's and 1960's, the State Engineer granted a number of water permits issued to farmers settling property in Nevada pursuant to the Desert Land Entry Act of 1877. On a statewide basis, only 18 percent of Desert Land Entries were ultimately successful. The State Engineer granted water permits in Diamond Valley on the assumption that these failure rates would apply. However, in Diamond Valley, where electricity became available for pumping, the success rate of Desert Land Entries was much higher." ROA at 11.

It is evident the State Engineer's unbridled granting of junior water permits has caused Sadler Ranch's senior water rights to be impaired contrary to the express provisions of NRS 533.085. There is nothing in the record where either party disputes (1) that the ground water permits in southern Diamond Valley exceed the perennial yield of Diamond Valley, (2) for decades, ground water pumping in southern Diamond Valley has exceeded the perennial yield of Diamond Valley, (3) pumping of ground water in southern Diamond Valley has caused basin-wide ground water declines causing water draw downs in excess of 100' in some areas, (4) the cone of depression from the 100 foot declines in southern Diamond Valley has moved north, likewise causing draw downs in the water table northward in Diamond Valley, and (5) the resulting northerly expansion of the cone of depression has caused springs to dry up including springs to the south of the playa in Diamond Valley, Thompson's Spring, Bailey Spring, Sulpher Spring and Tule Dam Spring. Critical to this case is the undisputed evidence that pumping of ground water in Southern Diamond Valley has caused Sadler Ranch's Shipley Springs flow to decline and Indian

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[48]ROA 010-011, footnotes omitted.

Camp Springs to cease flowing.[49]

ARBITRARY AND CAPRICIOUS ACTS OF THE STATE ENGINEER

PROTECTIONS AFFORDED TO SENIOR WATER RIGHTS HOLDERS

The State Engineer's reliance on NRS 534.120(1) that in designated basins he "may make such rule, regulations, and orders as are deemed essential for the welfare of the area involved" has not yet been addressed by the Nevada Supreme Court as giving the State Engineer the authority to issue rulings contrary to long standing established water law in Nevada. Nevada is a prior appropriation state and this doctrine protects senior water rights holders from those holding junior water rights.[50] Surrounding western states have also protected the first in time first in right doctrine.[51] The State Engineer does not dispute the prior appropriation doctrine as being firmly established in Nevada. He acknowledges that "because Sadler Ranch established that it has an unadjudicated pre-statutory interest in surface water from Big Shipley Springs and Indian Camp Springs, denying Sadler Ranch any remedy for the loss of this resource is contrary to one of the fundamental tenants underlying Nevada water law – the principal of priority, that the appropriator who is first in time is first in right."[52] Yet the determination of the State Engineer in reliance on NRS 534.120(1) violates these fundamental tenants. A vested water right holder is protected from junior appropriators and the senior holder is entitled

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[49]Answering brief at 1-2; ROA 956, 961, 967, 971; 1655; 1697; ROA 2617, 2623, 2627; 4731:22-4732:1; 5627:5-7.

[50]*Prosole et al. v. Steamboat Canal Co.*, 37 Nev. 154, 160, 140 Pac. 720, 722 (1914).

[51]See *Senior v. Anderson*, 130 Cal. 296, 62 P.563 (Cal. 1900); *City of Pasadena v. City of Alhambra*, 23 Cal. 2d 908, 207 P.2d 17 (Cal. 1949); *Vogel v. Minnesota Canal & Reservoir Co.*, 47 Colo. 534, 107 P.1108 (Colo 1910); *Beecher v. Cassia Creek Irr. Co.* 66 Ida 201, 154 P.2d 507 (Idaho 1944).

[52]Answering brief at 9.

to the specific quantity of water that was actually diverted and applied to beneficial use.[53] NRS 533.070(1) provides that the quantity of water is determined by beneficial use. The first appropriator has the right to insist that the water continue to flow to his headgate as it did when the appropriation was first made.[54] A water right holder's specific quantity of flow must be allowed to remain in the water course, and be available at the diversion ditch so that the water may be applied to the established place of use.[55] Senior appropriators of water are entitled to protection against material infringement of their water rights by subsequent appropriators from tributaries.[56] The source of water for Big Shipley Springs is the same ground system that is the source of water for the junior water right holders in southern Diamond Valley.[57] In *Pyramid Lake Paiute Tribe v. Orr Ditch*, the 9th Circuit interpreted Nevada water law as prohibiting ground water pumping that adversely affects senior surface water rights.[58] Although this federal case is not binding in this state court litigation, its reasoning is sound and persuasive. A maxim of water law is that a junior water permit is issued on the condition that it is subject to existing rights on the source.[59]

QUANTIFICATION OF SADLER RANCH'S MITIGATION RIGHT

Ruling 6290 found "that 7-8 cfs is the best estimate of discharge from Shipley Spring prior to extensive ground water development and that 1.5 CFS is a conservative

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[53] *Ortel v. Stone*, 119 Wash. 500, 205 P.1055 (Wash. 1922).

[54] *Carson v. Hoges*, 39 Or. 97, 65 P.814 (Or. 1901).

[55] *Lower Kings River Water Ditch Co. v. Kings River & Fresno*, 60 Cal. 408, 1882 WL1759 (Cal. 1882).

[56] *Josslyn v. Daly*, 15 Idaho 137, 96 P.568 (Idaho 1908).

[57] ROA 055-058.

[58] 600 F.3d 1152, 1158-59 (9th Cir. 2010).

[59] *Salmon River Canal Co., Ltd v. Bell Brand Ranches*, 564 F.2d 1244 (9th Cir. 1977); See ruling 6290, the State Engineer issued junior water right permits in priority to the claimed pre-statutory vested water rights and subject to existing rights. ROA 018.

estimate of the discharge by Indian Springs."[60] 1.5 CFS is 1,086 acre feet annually("afa"). The State Engineer approved 3 cfs for applications 81720 and 3 cfs for application 82268.[61] The State Engineer agreed with the expert testimony and evidence presented by Eureka County that pre-development flows of Shipley Springs were approximately 7-8 CFS (5,100 to 5,800 afa).[62] The combined total acre feet annually being up to 6,878. In spite of these findings, the State Engineer impaired Sadler Ranch's pre-statutory claim of vested rights[63] by awarding Sadler Ranch a mitigation water right consisting of a combined duty of only 975 acre feet annually for applications 81720 and 82268[64] based on a modern hay production formula, which as discussed below he cannot do.

Ruling 6290 is premised on the State Engineer's determination that he has the discretion to fully replace a senior water right that has been impaired by junior water right pumpers. The State Engineer agrees Sadler Ranch has the right to seek a mitigation permit for its loss of surface water,[65] finds Sadler Ranch has a claim of pre-statutory vested rights of up to 6878 afa of flow from Big Shipley Springs and Indian Camp Springs, but uses NRS 534.120(1) to create a method for calculation of water rights never before used by the State Engineer in Nevada, the hay production method, which limited Sadler Ranch's mitigation replacement water right to 975 afa based on modern practices.[66] Contrary to the State Engineer's position, the Nevada Supreme Court in *Ormsby County v. Kearney*,

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[60]ROA 039.

[61]ROA 061.

[62]ROA 034.

[63]ROA at 045; Vested rights cannot be impaired. *Ormsby County v. Kearney*, 37 Nev. 314, 142 P.2d 803 (1914).

[64]ROA 061.

[65]Answering brief at 4-8.

[66]ROA 042, 061-062.

stated that "nothing in the act shall be deemed to impair these vested rights. . ." "they shall not be diminished in quantity or value."[67] The court went on to hold that Nevada's water law "gives the State Engineer no discretion to award and appropriate a less amount of water than the facts show he is entitled to or give him later relative priority."[68] Given the protection Nevada has afforded to vested water rights holders, the State Engineer's finding that Sadler Ranch was entitled to only 975 afa with the most junior priority based on a modern hay production method of calculation is contrary to the law and his authority, and is arbitrary.

The State Engineer's use of a modern hay production method to quantify Sadler Ranch's mitigation right is inconsistent with a prior mitigation rights case in Diamond Valley. Application 63497 filed by Wilfred Bailey, et al, on October 10, 1997, requested 2 cfs of ground water to irrigate 126 acres to replace water lost from Mr. Bailey's vested spring rights at Bailey Spring.[69] The State Engineer approved permit 63497 for 2cfs not to exceed 504 acre-feet (4 acre feet per acre on 126 acres). The allocation of water in the Bailey application was based on the quantity of water which Mr. Bailey claimed a vested right. No modern hay production calculus was used by the State Engineer in the Bailey application. Sadler Ranch seeks to mitigate its claimed vested rights to the water lost at Big Shipley Springs and Indian Camp Springs through its request for ground water. The court sees no distinction between the applications of Sadler Ranch and Wilfred Bailey. The State Engineer has not cited any authority or basis to support treating the applications differently. The State Engineer asserts, ". . . petitioners do not provide any authority that requires the State Engineer to issue a ground water permit allowing a surface right holder

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[67] *Ormsby County*, at 352.

[68] *Id.*

[69] ROA 2597-2604.

a ground water right to replace a surface water resource damaged as a result of ground water pumping by junior appropriators."[70] The State Engineer's prior ruling in the Bailey application , Nevada's statutory protection for senior water rights holders and case law provides the precedent and authority to grant a mitigation right as applied for by Sadler Ranch.[71]

It is clear that substantial evidence in the record established the minimum quantity of water flowing from Big Shipley Springs and Indian Camp Springs and that Sadler Ranch beneficially used the water.[72] Substantial evidence in the record established Sadler Ranch's priority, period of use, its distribution system, and its manner of use of the claimed of vested water rights, in a thoroughly vetted administrative hearing. Substantial evidence was presented that Sadler Ranch's claim of vested rights showed a quantity of water of up to 6878 afa and that Sadler Ranch's pre-statutory beneficial use was not less than all of the water flowing from the springs. Notwithstanding protection provided to senior water rights holders in Nevada, and the State Engineer's prior resolution of the Wilfred Bailey mitigation permit in Diamond Valley,[73] the State Engineer chose to ". . . create a ruling to balance Sadler Ranch's vested claim to water from the springs against the public interest in protecting ground water resources in Diamond Valley and the rights of junior appropriators, even if such a ruling is not explicitly authorized by statute."[74] This

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[70]Answering brief at 8.

[71]Permit 63497 was not issued based on modern hay production methods as in ruling 6290.

[72]The State Engineer found Sadler Ranch had up to 6878 afa from the springs prior to extensive ground water development. ROA 028, 031, 034, 039.

[73]Nowhere in the State's answering brief or at oral argument did the State Engineer contend there was any distinction between the Bailey permit and Sadler Ranch's case to support a deviation from the method and calculation of the replacement right he granted in the Wilfred Bailey permit.

[74]Answering brief at 2.

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ruling was based on the State Engineer's perceived discretion under NRS 534.120(1). The court finds he does not have this discretion. The State Engineer's allocation of 975 afa based upon his interpretation of the discretion he derives from NRS 534.120(1) allowing him to grant mitigation replacement rights based on modern modern hay production method is arbitrary and capricious. Ruling 6290 is even more problematic considering the State Engineer's inconsistent position in the recent Diamond Valley case, Etcheverry Family, LP v. State Engineer, Case No. 1207-178 – wherein this Court considered whether the State Engineer can mitigate a senior water rights holder and the State Engineer advocated:

> The State Engineer has consistently interpreted a conflict with existing rights under NRS 533.370(2) to occur when a senior water right holder's beneficial use cannot be satisfied due to the junior water right holder's use. In addition, mitigation has consistently meant actions that ensure the senior water right can be satisfied. The State Engineer disagrees with the arguments raised by Eureka that the two small springs must be mitigated with water allocated to the mine. The specific measures will be determined when impacts manifest, however as an example, the mine could install a shallow well and pumping system for Etcheverry to bring water to the surface from the same aquifer source that the springs normally come from.[75]

The State Engineer's position in Eureka County v. State Engineer was further advocated on appeal to the Nevada Supreme Court in case nos. 61324 and 63258[76] as follows:

> An existing water right is protected so long as the owner of the right receives the full quantity of water to which he is entitled under the water right. Conflicts with existing water rights do not occur as long as senior appropriators receive the full quantity of water to which they are entitled. It is wholly consistent with Nevada water law for the State Engineer to order replacement of water from either the same or a different source in order to satisfy the rights of senior appropriators. Such mitigation measures

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[75]Sadler Ranch opening brief, Ex. 2 at 11-12.

[76]Case nos. 61324 and 63258 reversed the District Court on other grounds. Eureka County et al. v. The State Engineer of Nevada, 131 Nev. Adv Op. 84 (2015).

maximize beneficial use.[77]

It is undisputed that (1) the established flows from Big Shipley Springs and Indian Camp Spring were up to 6878 afa prior to junior appropriation overpumping, (2) Sadler Ranch first placed the water to beneficial use prior to 1905, and (3) the State Engineer acknowledges Sadler Ranch's pre-statutory use of all water flowing from Big Shipley Springs.[78] The State Engineer's position in prior Eureka County's cases is that the proper mitigation right is to provide the senior water users with the "full quantity of water to which they are entitled." To now deviate from this position and use a modern hay production method of calculation to quantify water resulting in a mitigation right less than Sadler Ranch's claimed vested water right cannot be sustained. NRS 533.085 protects Sadler Ranch's vested rights to the use of the water, yet ruling 6290 did not replace Sadler Ranch's claimed vested rights to the quantity of water claimed but diminished its right. The State Engineer has not cited one application where he has recognized pre-statutory spring flows which were beneficially used, yet quantified a replacement right sought from the same source by reducing the quantity of water based on a modern hay production formula.[79] Water rights quantification must be based on beneficial use.[80]

Further, ruling 6290 requires Sadler Ranch to change its historic ranch operation and water delivery system from flood irrigation to pivot distribution at Sadler Ranch's sole expense.[81] This is unconscionable. The State Engineer calculated the duty

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[77]Sadler Ranch opening brief, ex. 3 at pg 14-15, 29.

[78]ROA 1325.

[79]Sadler Ranch's change application merely moved the point diversion by several 100 feet so it could access its claimed vested right from the same underground source.

[80]NRS 533.070.

[81]ROA 031-045.

for the Sadler Ranch pasture by applying a duty of 1 acre feet per acre,[82] when the State Engineer's crop inventories fixed the Diamond Valley Basin duty average at 4 afa.[83] Wilfred Bailey was granted 2 cfs not to exceed 504 acre feet (4 afa for 126 acres).[84] The State Engineer disregarded Sadler Ranch's expert, Mike Buschelman's, 4.7 acre-feet as the duty based upon efficiency for flood irrigation which Mr. Buschelman considered because this delivery system was historically used by Sadler Ranch.[85] Instead, the State Engineer found "mitigation rights, which will allow for on-demand pumping from a well, should be based on modern practices, which require less water per acre of land irrigated."[86] Ruling 6290's allocation of 975 afa failed to consider Sadler Ranch's historic livestock operation focusing only on hay production and its other uses for the water. The evidence of its cattle operations appears unconroverted at a minimum of 638 head of cattle on the ranch in 1946 and maximum number of head on the ranch in 1949 at 1050.[87]

Ruling 6290's 975 afa mitigation right compels Sadler Ranch to change a flood irrigated ranch with cattle grazing to a center pivot alfalfa farm with no cattle grazing. The hay production method of calculation also forces Sadler Ranch to limit its future use solely to alfalfa farming. This limited use is contrary to Sadler Ranch's undisputed historical use consisting of cattle grazing, grain production, a garden, hay and pasture grass. Without being able to water pasture land and meadows, Sadler Ranch's livestock operation becomes non existent. By calculating the mitigation right on what a modern

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[82]ROA 044

[83]ROA 2412-2500.

[84]ROA 2597-2604.

[85]ROA 042.

[86]*Id.*

[87]ROA 910.

pivot system would deliver, the State Engineer caused Sadler Ranch to change its historical flood irrigation manner of use on its meadows much of which was uneven and unsuitable for a pivot irrigation system to the outlay of a significant financial investment and incur annual electrical costs to drive the pumps. The court finds the installation of a pivot system limits Sadler Ranch's use to only growing alfalfa and not grazing, and historic uses on Sadler Ranch. The State Engineer cites no authority and the court has found none that NRS 534.120(1) gives the State Engineer the power to in effect order a senior water rights holder to change its historic ranching operations, limit its crop type, change its irrigation delivery system and invest substantial financial resources to develop a pivot system of water delivery in place of its historical flood irrigation practice under circumstances where the State Engineer has caused a senior water right holder's damage by allowing the over appropriation of water through repeatedly granting permits to junior water rights holders.

The court finds the State Engineer has no authority to use the hay production method of calculation to establish a mitigation right. The State Engineer has abused his discretion using the modern hay production method of calculation to grant a mitigation right. Ruling 6290 was arbitrary and capricious. To measure and limit Sadler Ranch's replacement water right based on modern agricultural practices[88] is reducing the amount of water Sadler Ranch claims a vested right to the quantity of water it put to beneficial use at the time of the claimed right. This Court finds the reasoning of the Oregon court in *In Re Alhouse Creek* to be sound when it stated to use modern "conditions to measure out at the place of diversion the exact amount which a claimant is entitled to actually put on the land is for all practical purposes equivalent to admitting a right and at the same time

[88]ROA 042.

denying part of it."[89] By recognizing but not granting Sadler Ranch's claim of vested rights and limiting its quantity of water by the hay production formula the State Engineer admitted Sadler Ranch's claim of vested rights and then denied its right to take water claimed under the vested right which he cannot do.[90]

STATE ENGINEER FAILED TO FOLLOW THE PRIOR APPROPRIATION DOCTRINE

Sadler Ranch possesses a claim of senior water rights to the junior appropriators in south Diamond Valley. Its senior rights have been impaired by the over appropriation. The prior appropriation doctrine establishes Sadler Ranch as being first in time and first in right.[91] The State Engineer recognized the flow from Big Shipley Springs and Indian Camp Springs to be over 6,878 afa and that Sadler Ranch has a pre 1905 claimed vested water right.[92] By not following the prior appropriation doctrine the grant of only 975 afa was arbitrary in view of his position that a mitigation right must be equal to the quantity of water the original right is entitled[93] The State Engineer's reliance on NRS 534.120(1) is not persuasive. His general authority to manage a groundwater basin by enacting rules and regulations does not allow him to ignore Nevada's prior appropriation law and the specific protections afforded to senior water rights holders by the plain language of NRS 533.085 and NRS 533.370(2). Having done so in ruling 6290, his decision is arbitrary and capricious.[94]

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[89]85 OR 224, 162 P.1072 (OR 1917).

[90]See *Humboldt Land & Cattle Company*, 14 F.2d 650, 653 (D. Nev. 1926).

[91]*Prosole v. Steamboat Canal Co.*, 37 Nev. 159, 140 Pac. 720, 722 (1914); Answering brief at 9.

[92]ROA at 034, 039.

[93]*Eureka County v. State Engineer*, Supreme Court case 61324, State Engineer's answering brief at 14-15, Wilfred Bailey permit 63497.

[94]See *In Re Manse Springs*, 60 Nev. 280, 290, 108 P.2d 311, 315 (1940).

STATE ENGINEER HAS NO EQUITABLE POWERS

The State Engineer entered ruling 6290 using implied powers under NRS 534.120(1). Ruling 6290 allowed junior appropriators in Diamond Valley to impair Sadler Ranch's claim of vested water rights and replaced unadjudicated vested water rights with a right providing for a reduced quantity of water and priority. This is an equitable resolution. The Nevada's Supreme Court has held the State Engineer has no such equitable powers.[95] The State Engineer's use of discretion to enter a ruling in contradiction to Nevada's long standing statutory mandate is misplaced.

THE STATE ENGINEER ARBITRARILY REDUCED SADLER RANCH'S CLAIM OF VESTED RIGHT IN APPLICATION 82268

NRS 533.345(1) reads:

> Every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer.

Sadler Ranch application 82268 requested a change of the point of diversion by several hundred feet for 7,454 acre-feet of spring water to an induction well from the same source[96] as the original claimed vested water right. The State Engineer agreed that the new point of diversion would access the same source of water as the original appropriation.[97] Application 82268 was approved for 975 acre-feet of water – the same quantity he approved for Sadler Ranch's mitigation permit under application 81720. The State Engineer based the quantification of water for permit 82268 on the same reasoning

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[95]See *Englemann v. Westergard*, 98 Nev. 348, 351-53, 647 P.2d 385, 388-89 (1982); *Bailey v. State of Nevada*, 95 Nev. 378 594 P.2d 734 (1979). In both cases the Nevada Supreme Court held that the State Engineer must follow his administrative duties under the statutes and recognized the district court's exertion of their equitable powers.

[96]ROA 154-159, 1390.

[97]ROA 056-057.

he applied to permit 81720 – that the quantity of water " . . . is to mitigate the loss of spring discharge necessary to produce the amount of historical crop production, as may be produced today using modern and efficient irrigation practices."[98] Application 82268 is not unique. Application 82268 is similar to numerous other applications moving the point of diversion of surface water to an induction well.[99] The State Engineer has approved change applications for unajudicated vested rights.[100] The court finds there is no basis to grant Sadler Ranch's change of the point of diversion premised upon modern hay production formula.

Based upon this Court's finding that the State Engineer's use of the hay production formula to calculate Sadler Ranch's mitigation permit was in violation of precedent, as well as statutory and case law, the court adopts the same findings made regarding permit 81720 and rejects the hay production method to calculate the amount of acre-feet of water to be granted to Sadler Ranch through application 82268 to change the point of diversion.

PRIORITY OF SADLER RANCH'S VESTED WATER RIGHTS

Ruling 6290 found Sadler Ranch's "priority date of the 'new' appropriations as being the date the applications were filed in the Office of the State Engineer otherwise the State Engineer is adjusting the right and violating the water law."[101] The State Engineer also found " . . . the applications are not requesting a 'new' appropriation of groundwater, but rather are requesting a new method of obtaining groundwater that formerly discharged at the springs upon which they claim pre-statutory vested water

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[98]ROA 062.

[99]ROA 3860-3918.

[100]ROA 3919-3937.

[101]ROA 058.

rights."[102] The State Engineer concluded the priority issue stating, " the State Engineer finds the permit terms should reflect the preliminary finding as to the priority date of the pre-statutory vested right they mitigate or change . . ."[103] Sadler Ranch must not lose priority as to its claim of vested rights simply because it applied to access the same water source it historically used by a different method (permit 81270) and sought to a change of point of diversion a few hundred feet to access the same source of water through the installation of an induction well (permit 82268). If the priority date is established as the date the applications were filed with the State Engineer the effect of the loss of priority places permit no. 81270 and 82268 behind to the junior appropriators that caused the harm to Sadler Ranch through over pumping in Diamond Valley. Such a result clearly impairs Sadler Ranch's claim of vested rights in violation of NRS 533.085 (1). Sadler Ranch cannot be relegated to such a detriment. Should junior appropriators in Diamond Valley be subject to curtailment in the future, Sadler Ranch's priority would be the most junior of all appropriations and be the first to be adversely affected. Although not addressing the same issue before this Court, the Nevada Supreme Court in *Anderson Family Assocs. v. State Engineer*,[104] held in a case involving cancellation of a permit to change a point of diversion of vested water rights and subsequent reinstatement, that the cancellation of Carson City's permit and later reinstatement did not affect Carson City's underlying vested rights and the City did not lose the priority attached to its vested rights because such a result would be an impairment of vested rights in violation of NRS 533.085(1).

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[102]ROA at 56.

[103]ROA 58-59.

[104]124 Nev. 182, 179 P.3d 1201 (2008).

This Court finds that Sadler Ranch's claim of vested rights retains its priority with respect to permit 81720 and permit 82268.[105] The filing of a change in the point of diversion of a holder of a senior water right cannot lower its priority simply because a change application is filed and granted.[106] The court finds Sadler Ranch must retain a priority date of its claim of pre-statutory right it is seeking to mitigate and change.

Sadler Ranch maintains this Court should issue a mitigation right or a decree adjudicating its claim of vested rights based on the evidence presented. The court disagrees. No doubt a wealth of evidence was presented during the administrative hearing process to enable the State Engineer to calculate Sadler Ranch's pre-1905 claim of vested rights. The State Engineer has the knowledge and expertise to make findings as to Sadler Ranch's mitigation right and to adjudicate Sadler Ranch's claim of vested rights which he had refused to do to date.[107] The court does not believe that remand to the State Engineer to enter a further ruling would be pointless or meaningless,[108] even if the agency's decision applied the wrong rule of law or was procedurally deficient.[109] Given the gravity of the water supply issue for irrigators in the Diamond Valley basin it is imperative that Sadler Ranch's mitigation right be immediately established by the State Engineer consistent with

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[105] *Id. at 189.*

[106] A new appropriation does not occur when the water to be appropriated is water from the same source as the water right that is being mitigated. *Tempelton v. Pecos Valley Artesian Conservation Dist.* 65 N.M. 59, 67-68 (N.M. 1958). *Herrington v. State ex rel Office of the State Eng'r* 139 N.M. 368, 371-375 (N.M. 2006).

[107] See case no. CV-1503-213, Sadler Ranch. LLC v. Jason King , P.E. Nevada State Engineer, petition for judicial review filed March 13, 2015, ex. 1 letter from State Engineer dated February 10, 2015, denying Sadler Ranch's request to adjudicate Big Shipley Hot Springs and Indian Camp Springs.

[108] See *People of Illinois v. I.C.C.*, 772 F.2d 1341, 1349 (7th Cir. 1983); *NLRB v. Wyman - Gordon Co.*, 394 U.S. 759, 766 (1969)

[109] *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 895 F. Supp. 316, 319 (P.D.C. 1995).

this order.

The court finds that Sadler Ranch is entitled to a mitigation right to be calculated under Nevada's existing water law and the State Engineer's precedent in Diamond Valley in the Wilfred Bailey case - that is for the State Engineer to determine Sadler Ranch's mitigation right based on the amount of water Sadler Ranch appropriated prior to 1905 based on beneficial use and the doctrine of prior appropriation.

Good cause appearing,

IT IS HEREBY ORDERED that the State Engineer's use of the modern hay production method of calculation of Sadler Ranch's mitigation right used in application no. 81720 and no. 82268 is rejected.

IT IS HEREBY FURTHER ORDERED that this case be remanded to the State Engineer to establish Sadler Ranch's mitigation right to be calculated based on the amount of water Sadler Ranch appropriated to beneficial use prior to 1905. To this extent Sadler Ranch's petition for judicial review is PARTIALLY GRANTED.

IT IS HEREBY FURTHER ORDERED that the State Engineer immediately initiate the administrative process to establish Sadler Ranch's mitigation right consistent with this order.

IT IS HEREBY FURTHER ORDERED that all evidence entered into the record for applications 81719, 81720, and 82268, be used by the State Engineer to establish Sadler Ranch's mitigation right without necessity of further hearings before the State Engineer to have that evidence considered.

IT IS HEREBY FURTHER ORDERED that Ruling 6290's denial of application 81719 as being redundant to application 82268 is AFFIRMED.

IT IS HEREBY FURTHER ORDERED that any further administrative hearings to comply with this order be held on or before August 1, 2016.

DATED this 10th day of February, 2016.

Gary D. Fairman

DISTRICT JUDGE

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

NO. _____ FILED

MAR 23 2018

Eureka County Clerk

By _____

Case No. CV-1409-204

Dept No. 2

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

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SADLER RANCH, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW; ORDER PARTIALLY GRANTING SUPPLEMENTAL PETITION FOR JUDICIAL REVIEW; ORDER FOR ISSUANCE OF MITIGATION RIGHTS PERMIT; ORDER PARTIALLY DENYING SUPPLEMENTAL PETITION FOR JUDICIAL REVIEW

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

PROCEDURAL HISTORY

On September 12, 2014, by Sadler Ranch LLC ("Sadler Ranch") filed a petition for judicial review. On February 13, 2015, Sadler Ranch filed petitioner's opening brief ("opening brief"). Respondent Jason King, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, ("State Engineer") filed the summary of record on appeal ("ROA") and respondent's answering brief ("answering brief") on April 17, 2015. Eureka County filed Eureka County's brief on April 17, 2015. On May 23, 2015, the Sadler Ranch reply brief ("reply brief") was filed. On June 3, 2015, Eureka County filed a notice that it was not participating in the oral argument. Oral argument was heard on June 9, 2015, at the Eureka County Courthouse. On

February 12, 2016, this Court entered findings of fact, conclusions of law, and order partially granting petition for judicial review ("2016 order"). On November 1, 2016, the State Engineer issued Ruling 6371. On November 14, 2016, the State Engineer filed notice of State Engineer Ruling 6371. On November 30, 2016, Sadler Ranch filed a supplemental petition for judicial review ("supplemental petition"). On April 28, 2017, Sadler Ranch filed Sadler Ranch, LLC's opening brief in support of supplemental petition for judicial review ("2017 supplemental opening brief") and a supplemental record on appeal. The State Engineer filed respondent's answering brief on June 29, 2017, ("State Engineer's 2017 answering brief"). On July 7,2017, Eureka County filed an answering brief of Eureka County ("Eureka's 2017 answering brief"). Oral argument was heard on August 1, 2017, at the Eureka County Courthouse. Paul G. Taggart, Esq. and David H. Rigdon, Esq. appeared for Sadler Ranch, Justina A. Caviglia, Esq., Deputy Attorney general, appeared for the State Engineer, and Karen A. Peterson Esq. and Theodore Beutel, Esq., Eureka County District Attorney, appeared for Eureka County. The court having reviewed the ROA and supplemental ROA and having considered the arguments of the parties, all papers and pleadings on file in this case, and the applicable law and facts, makes the following findings of fact and conclusions of law.

FACTUAL HISTORY

Sadler Ranch was established in Diamond Valley, Eureka County, Nevada, in the mid 1800's. The sources of water for Sadler Ranch were Big Shipley Spring (sometimes referred to as Shipley Springs, Shipley Spring) and Indian Camp Spring, collectively ("the springs"). The ranch is approximately 3,000 acres. During the late 1800's the ranch was productive and supported Governor Reinhold Sadler's store in Eureka and butcher shops.[1] Big Shipley Spring flowed into a large pond and then

[1] SEROA 1221, 1229-1238, 4368.

provided water by flood irrigation to meadowland and pasture by means of dams and miles of ditches with the water not confined to any one channel[2] for the purpose of livestock grazing, cultivating fields of hay and alfalfa for winter feed, a large garden, stock watering and domestic use.[3] Some of the water also flowed off of the property in the winter (January, February and March) and was used by the Frank Romano ranch, an adjoining ranch, and later the Eccles ranch, for the purpose of flood irrigating. From the 1920's through the 1940's the ranch continued active operations including the growing and sale of alfalfa, wheat, barley, oats, vegetables, poultry, eggs, ice, and muskrat supported by the system of permanent water ditches that irrigated the fields.[4] One of Governor Sadler's sons, Alfred Sadler, bought the ranch from his father's corporation and the governor's other son, Edgar Sadler, managed the ranch.[5] After Alfred Sadler's death in 1944, Alfred and Edgar Sadler's children litigated ranch ownership at the conclusion of which most of the ranch cattle were sold.[6] Cattle were grazed on the ranch from 1918 through 1946.[7] The ranch continued to operate during the 1950's and 60's with it being sold in 1975.[8] Sadler Ranch has continued operating to the present.

The State Engineer's records show that Sadler Ranch historically irrigated approximately 2,000 acres as noted on the township card in the State Engineer's office in

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[2] SEROA 1345-1348; SEROA 1391-1392, SEROA 1394; SEROA 5879-5881.

[3] *Id.* 845-850, 913.

[4] *Id.* 845-850, 904-906.

[5] *Id.*

[6] *Id.*

[7] *Id.* 910.

[8] *Id.*

water rights file nos. 4273 and 2679.[9] Sadler Ranch's claim of vested water rights for irrigation and stock watering are pre-statutory vested rights as to Big Shipley Spring and Indian Camp Spring.[10] Since 1913, until the current litigation commenced, the State Engineer's position has been that all of the water from Big Shipley Spring was appropriated under the vested right.[11] State Engineer's records indicate that in 1912, H.M. Payne, a State Engineer's office employee, estimated approximateley 8 cubic feet per second (cfs) to be the Big Shipley Spring flow.[12] By letter dated September 23, 1913, the State Engineer denied application 2679 to appropriate water from Big Shipley Spring ". . .on the grounds that there was no unappropriated water in that source."[13] In the September 23, 1913 letter the State Engineer clearly expressed, "The water, amounting to approximately 7 or 8 cubic feet per second, is ditched to several parts of the ranch known as the "Sadler Ranch" and is and for crops in the sections designated in your application to be irrigated."[14] In a letter dated November 29, 1913, the State Engineer formally denied application 2679," . . . on the ground that the waters of Big Shipley Spring are entirely appropriated at this time" and because the applicant failed to timely submit additional evidence in support of the application (emphasis added).[15] The State Engineer went on to state "the fact that the water is used beneficially under a title dating back

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[9] *Id.* 914.

[10] *Id.* 140-153.

[11] *Id.* 1324-1325.

[12] *Id.* 1391-1392, 1394.

[13] *Id.* 1325.

[14] *Id.*

[15] *Id.* 1324.

beyond 1905 is sufficient for this office to consider the water right as valid."[16]

The case of *Romano v. Sadler* was settled by a 1913 stipulation[17] which provided 5cfs of water to Romano from January 1 to April 1 each year which was approximately one-third of the total Big Shipley Spring flow.[18] Sadler Ranch retained approximately 10 cfs of water being the remainder of the spring flow. This stipulation was used by the State Engineer issue permit 4273 to Matilda Eccles[19] and to award Sadler Ranch the 702.6 acre feet of water that was used between January 1 and April 1 on Romano's lower field.[20]

On March 30, 2012, Sadler Ranch filed for a mitigation application, permits 81719 and 81720, and on November 2, 2012, it filed for a change application, permit 82268, to change the point of diversion of water from the Big Shipley Spring Complex spring head to an underground induction well that captures the same surface water.[21] Application 82268 sought to change the point of diversion of Sadler Ranch's claimed vested water right by several hundred feet.[22] Sadler Ranch claimed historic evidence shows that Big Shipley Spring once flowed between 11 and 15 cubic feet per second ("cfs"), a flow rate between 7,964 to 10,860 acre feet per year. The Romano v. Sadler stipulation stated the Big Shipley Spring flows were approximately 15 cubic feet per

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[16] *Id.*

[17] *Id.* 1345-48. Romano was an adjoining landowner to Sadler Ranch.

[18] *Id.*

[19] *Id.* 5881, 5885-86.

[20] *Id.* 5885, 5888.

[21] *Id.* 001, 006.

[22] *Id.*

second ("cfs").[23] Pending an adjudication of its vested rights claim, Sadler Ranch sought 7,454 acre feet of water to mitigate the loss of both Big Shipley Spring and Indian Camp Springs. In ruling 6290 ("6290") the State Engineer found 7-8 cfs as the best discharge estimate from Big Shipley Spring and 1.5 cfs a conservative estimate of discharge from Indian Camp Springs prior to extensive ground water development.[24]

In 6290, the State Engineer found that the Diamond Valley hydrographic basin is significantly over appropriated because the State Engineer has issued ground water permits in excess of the ground water that is available for appropriation.[25] The State Engineer found Diamond Valley has an estimated perennial yield of approximately 30,000 acre-feet annually, but the State Engineer had issued in excess of 130,000 acre-feet of ground water rights to junior water rights holders in the 1960's pursuant to the Desert Land Entry Act of 1877.[26] In July 1978, the State Engineer ordered that all applications filed after December 31, 1978, to appropriate Diamond Valley ground water for irrigation be denied.[27] Sadler Ranch and the State Engineer agree that Sadler Ranch appropriated water from Big Shipley Spring prior to 1905, thus establishing an unadjudicated vested water right.[28] Sadler Ranch and the State Engineer further agree that over pumping in Diamond Valley has sharply reduced the flow rate from Big Shipley Spring and Indian Camp Springs.[29] The State Engineer acknowledges that in 2011, 96,000 acre feet of water

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[23] *Id.* 1346-1349.

[24] *Id.* 034, 039.

[25] *Id.* 010-011.

[26] *Id.* 011.

[27] *Id.* 012.

[28] Respondents' answering brief (answering brief") filed April 17, 2015, at 3; Sadler Ranch's opening brief ("opening brief") filed February 13, 2015, at 2-3.

[29] *Id.*

was pumped from Diamond Valley with the perennial yield of the basin being approximately 30,000 acre feet annually.[30] Ruling 6290 found that Sadler Ranch is not requesting a "new" appropriation of ground water, but rather is requesting a new method of obtaining ground water by seeking to drill a well to obtain the ground water that formerly discharged at the springs upon which it claims a pre-statutory vested water right.[31] The State Engineer agrees that if Sadler Ranch's proofs of vested claims are valid, those rights must be protected from impairment pursuant to NRS 533.370.[32] The State Engineer also found that since the flow of Big Shipley Spring and Indian Camp Spring has been reduced due to overpumping of the ground water in the basin, that Sadler Ranch was entitled to a ground water permit mitigating the loss caused by the reduction of the amount of water flowing from Big Shipley Spring and Indian Camp Spring.[33]

RULING 6371

In ruling 6371, "the State Engineer agrees that the waters of Big Shipley Spring are fully appropriated;"[34] . . . but "disagrees with Applicant's interpretation that the diversion rate expanded over the entire year is the amount of water placed to beneficial use by Sadler Ranch prior to 1905."[35] Yet, the State Engineer acknowledges that there is water use throughout the year on Sadler Ranch, relying in part on the *Romano v. Sadler* stipulation to make this finding.[36] In 6290, the State Engineer made a similar finding,

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[30] Answering brief at 1.

[31] Answering brief at 1-2.

[32] SEROA 056.

[33] Answering brief at 1.

[34] SEROA 5882.

[35] *Id.*

[36] *Id.* 5881.

based on Reinhold "Reiny" Sadler's ("Sadler") 1976 deposition testimony regarding Sadler Ranch's winter use of water.[37] In 6371, the State Engineer quantified Sadler Ranch's vested rights claim "based solely upon the evidence of what was placed to beneficial use prior to 1905 for irrigation during both the normal growing season and during winter and for watering livestock."[38] As discussed below, in 6371, the State Engineer ignored the evidence of Sadler Ranch's winter use of water and his previous finding in 6290 of Sadler Ranch's winter use of water when he quantified Sadler Ranch's mitigation right based on a 158 day growing season.[39]

To find that Sadler Ranch did not place all of the appropriated water to beneficial use year round prior to 1905,[40] the State Engineer relied on portions of Sadler's 1976 deposition, observing that, "it is clear there were times when water flowed off the Sadler Ranch and was not always beneficially used."[41] The State Engineer also focused on Sadler's testimony that water flowed off the land and into a pond on 80 acres Sadler owned, that the water runs all the time and that "its not like these creeks coming out of the Rubys that will dry up," concluding that Sadler's testimony implied a continuous flow of water that was needed had to be sent somewhere when it was not being used.[42] The State Engineer also relied on the proof of beneficial use filing for Eccles' 1917 permit 4273, certificate 964, and correspondence between C.F. DeArmond and the State Engineer.[43]

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[37] *Id.* 036.

[38] State Engineer's 2017 answering brief at 14.

[39] SEROA 5882-85.

[40] *Id.* 5885.

[41] *Id.*

[42] *Id.* 5884.

[43] SEROA 5793-96; although this correspondence was made part of the supplemental administrative record on appeal, it was not addressed at the administrative level.

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

Permit 4273 sought to appropriate winter use of Big Shipley Spring water from January 1 through April 1 of each year on the Eccles Ranch.[44] This was winter water that flowed off of Sadler Ranch. In 1913, the State Engineer, after investigation, denied Application 2679 for surplus Big Shipley Spring water, finding that 7 to 8 cubic feet per second of water was ditched to several parts of the Sadler Ranch for crops and that the water of Big Shipley Spring was entirely appropriated by Sadler Ranch.[45] Now, over 100 years later, the State Engineer relies upon snipits of evidence to find that pre-1905 there was excess Big Shipley Spring water which Sadler Ranch did not appropriate, stating, "that while the water was placed to use over much of the Ranch and throughout the year, the full flow could not always be used beneficially; therefore, the State Engineer finds that the duty of water placed to beneficial use is not the full diversion rate expanded over the entire year, but a lesser amount based on when and how the water was applied."[46] To estimate the duty of water Sadler Ranch placed to beneficial use prior to 1905, the State Engineer's new methodology in 6371 "considers a year of irrigation and other uses."[47]

The State Engineer calculated the duty of Sadler Ranch's mitigation rights for the "original Sadler Ranch irrigation"[48] by using the growing season for crops in Diamond Valley,[49] specifically, the growing season for pasture grass at 158 days, being a medium between alfalfa's growing season at 163 days and grass hay at 144 days.[50]

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[44] This is the same water allocated for winter use in the 1913 Romano v. Sadler stipulation.

[45] SEROA 1324-1325.

[46] *Id.* 5881, 5885.

[47] *Id.* 5885.

[48] *Id.* 5886.

[49] *Id.*

[50] *Id.*

According to the State Engineer, this is the amount of water that could be diverted over the length of time in the growing season and thus would be the limit of the water that Sadler Ranch could place to beneficial use.[51] To arrive at the amount of water Sadler Ranch placed to beneficial use the State Engineer then multiplied the Big Shipley Spring diversion rate of 7.02cfs[52] by 1.98348 AF/cfs/day and then multiplied the product by 158 days to equal 2,220 acre feet (af) for the season, including conveyance loss.[53] In contradiction, the State Engineer made a finding in 6290 that Sadler Ranch used the water year round on its fields, not just for a 158 day growing season.[54] In 6290, the State Engineer again relied upon Sadler's 1976 deposition testimony[55] that Sadler Ranch's hay grass and natural grass meadows were served by a myriad of ditches conveying water throughout the year over much of the ranch.[56] Although the State Engineer states that he included conveyance losses in his calculation in 6371,[57] no calculus was given for Sadler Ranch's soil conditions, water storage, that Sadler Ranch's pre-1905 flood irrigation methods differ in efficiency from modern pivot distribution,[58] the extensive ditch transportation system and the time of year, specifically winter application, when water was historically applied to various areas of Sadler Ranch in order to quantify Sadler Ranch's water based on a 158 day growing season. Nowhere in 6371 is there any indication that

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[51] *Id.* 5886, 5888.

[52] *Id.* 5885-86.

[53] The diversion rate of Big Shipley Spring as found by the State Engineer; *Id.* at 11. The diversion rate found in 6290 was between 7 and 8 cfs.

[54] SEROA 036.

[55] *Id.*

[56] *Id.* 018.

[57] *Id.* 5888.

[58] NRS 533.070(2).

the State Engineer's use of a 158 day growing season to calculate Sadler Ranch's pre-1905 beneficial use included water used both during the normal growing season and during winter as stated by the State Engineer he would consider in making this determination.[59] The State Engineer failed to consider substantial evidence in the record of when and how Sadler Ranch applied its water pre-1905.

This Court previously found that the State Engineer established a duty of water of 4 acre feet per acre in the Wilfred Bailey mitigation application 63497 based on the quantity of water which Mr. Bailey claimed a vested right, with the court noting that the State Engineer has not cited any authority or basis to treat the Sadler Ranch and Bailey applications differently.[60] This Court found that the Bailey mitigation case established a precedent related to the historically quantified 4 acre feet per acre duty of water the State Engineer had consistently used for Diamond Valley applications.[61] The State Engineer, while acknowledging this precedent, did not follow Bailey in establishing Sadler Ranch's mitigation right in 6371.[62] For that matter, he did not even follow his previous finding in 6290 that the Diamond Valley duty of water was 3 acre feet per acre annually using "modern irrigation practices."[63] Instead, by using a 158 day growing season, the State Engineer fixed Sadler Ranch's duty at 1.7 acre feet per acre[64] in 6371 and failed, in the face of substantial evidence, to allocate any water to Sadler Ranch for winter use over its

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[59] State Engineer's 2017 answering brief at 14.

[60] 2016 order at 17.

[61] SEROA 5871.

[62] *Id.* 5871-73.

[63] *Id.* 043.

[64] This duty calculation argued by Sadler Ranch is not contested by the State Engineer or Eureka County in briefing or at oral argument.

1700 acres of pasture grass and hay grass.[65]

DISCUSSION

The issue before the court in the petition for judicial review of 6290 was whether the State Engineer had discretion to base Sadler Ranch's mitigation right on the amount of water needed to replace the historical productive benefit that Sadler Ranch derived from the appropriated water,[66] or whether the State Engineer was required to grant a mitigation right to replace all water Sadler Ranch appropriated for beneficial use prior to 1905.[67] This Court found that 6290 was improperly based on a modern day production method of calculation to quantify Sadler Ranch's mitigation right. Throughout its opening and reply briefs, Sadler Ranch repeatedly asserts that it placed to beneficial use all of the water flowing from Big Shipley Spring and Indian Camp Spring.[68] In 6290, not once did the State Engineer dispute this assertion or the evidence in the record on appeal supporting Sadler Ranch's position that it beneficially used all of the Big Shipley Spring and Indian Camp Spring water prior to 1905.[69] Instead, the State Engineer relied on his perceived discretion to fashion Sadler Ranch's mitigation right on a formula not based on Nevada statutes or case law which was rejected by this Court.

Although the State Engineer previously found that Sadler Ranch used all of the Big Shipley Spring water over much of the ranch throughout the year prior to 1905,[70] he recalculated Sadler Ranch's mitigation right in 6371 by using a 158 day growing season

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[65] SEROA 5886.

[66] 2016 order at 7, answering brief at 3-4.

[67] 2016 order at 7,

[68] Opening brief at 1, 10, 13-17, reply brief at 5, 10, 16.

[69] See answering brief.

[70] SEROA 5882; SEROA 036; SEROA 1324-25.

analysis based on his new determination that Sadler Ranch did not beneficially use all of the water flowing from Big Shipley Spring throughout the year and used no water from Indian Camp Spring water for irrigation on the original Sadler Ranch.[71] (emphasis added) The court disagrees with the State Engineer's finding as to Big Shipley Spring. There is not substantial evidence in the record to support the State Engineer's decision. To the contrary, substantial evidence in the record demonstrates Sadler Ranch's pre statutory beneficial use of all of the water from Big Shipley Spring throughout the year. As discussed below, the State Engineer quantified the amount of water placed to beneficial use on a minutia of evidence, some of which was taken out of context, arbitrarily disregarding the remainder of the extensive historical evidence, his findings previously made in 6290, his findings made in 1913, and without any indication in 6371 that he considered the factors listed in NRS 533.070(2).

STANDARD OF REVIEW

A party aggrieved by any order or decision of the State Engineer may have the order or decision reviewed in a proceeding for that purpose in the nature of an appeal.[72] The proceedings must be informal and summary.[73] On appeal, the State Engineer's decision or ruling is prima facie correct, and the burden of proof is upon the person challenging the decision.[74] The court will not pass upon the credibility of witnesses or reweigh the evidence, nor substitute its judgment for that of the State Engineer.[75] With respect to questions of fact, the reviewing court must limit its determination to whether

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[71] *Id.* at 12-22.

[72] NRS 533.450(1).

[73] NRS 533.450(2).

[74] NRS 533.450(10).

[75] *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)).

substantial evidence in the record supports the State Engineer's decision.[75] When reviewing the State Engineer's findings, factual determinations will not be disturbed on appeal if supported by substantial evidence.[77] Substantial evidence has been defined as "that which a reasonable mind might accept as adequate to support a conclusion."[78] With regard to purely legal questions, the standard of review is de novo.[79] 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.[80] Findings of an administrative agency will not be set aside unless they are arbitrary and capricious.[81] A finding is arbitrary if "it is made without consideration of or regard for facts, circumstances fixed by rules or procedure."[82] A decision is capricious if it is "contrary to the evidence or established rules of law."[83]

The State Engineer has no powers to grant equitable relief.[84] In some circumstances the district court has the power to grant equitable relief when water rights

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

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

[78] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

[79] In re Nevada State Engineer Ruling No. 5823, 277 P.3d 449, 128 Nev. Adv. Op. 22, (2012).

[80] *Shefakis v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992).

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

[82] Black's law dictionary 125 (10th ed. 2014).

[83] *Id. at 254.*

[84] *Engleman v. Westergard*, 98 Nev. 348, 351-53, 647 P.2d 385, 388-89.

are at issue.[85]

Nevada water law provides that vested water rights shall not be impaired.[86] Specifically, NRS 533.085(1) reads as follows:

> (1) Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

A vested right is "a right to use water that has become fixed either by actual diversion and application to beneficial use or by appropriation according to the manner provided by the water law.[87]

NRS 533.370(2) reads as follows:

> Except as otherwise provided in subsection 10, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on thosee grounds, the new application may be denied without publication.

This statute requires the State Engineer to protect senior water rights holders from applications or requests for permits when there is no unappropriated water in the proposed source of supply or if the proposed use or change conflicts with existing rights. NRS 534.110 allows the State Engineer to prescribe all necessary regulations to administer chapter 534 regarding underground water and wells, however his authority is limited such that he may only issue permits if it is determined there is unappropriated water in the affected area and only if the rights of holders of existing appropriations can be

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[85] *Great Basin Water Network v. State Engineer*, 126 Nev. 187, 199, 234 P.3d 912, 919 (2010).

[86] NRS 533.085.

[87] In re Fillippini, 66 Nev. 17, 22, 202, P.2d 535, 537 (1949).

satisfied.[88] According to the State Engineer, "Nevada's water statute evinces clear policy preference in favor of protecting pre-statutory vested water rights and that vested rights of any person to the water shall not be impaired."[89]

From the beginning of this case, the State Engineer's intent has been to fashion an equitable remedy "to create a ruling to balance Sadler Ranch's vested claim to water from the springs against the public interest in protecting ground water resources in Diamond Valley and the rights of junior appropriators, . . ."[90] (Emphasis added). After 40 plus years of allowing Diamond Valley to be over appropriated, it is clear that the State Engineer has chosen this case to attempt to mitigate some of the harm caused in Diamond Valley by junior appropriators. Such a burden cannot be placed on the back of Sadler Ranch given the paucity of evidence that the State Engineer relied upon to establish Sadler Ranch's mitigation right in 6371 and his failure to consider the factors in NRS 533.070(2).[91]

RULING 6371 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

The State Engineer relied on four individually and/or cumulatively considered pieces of evidence which this Court finds (1) are insufficient to conclude that Sadler Ranch did not place all of the water flowing from Big Shipley Spring to beneficial use prior to 1905; and (2) in fact supply substantial evidence of Sadler Ranch's pre-1905 beneficial use of all of the water flowing from Big Shipley Spring.

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[88] NRS 534.110(1)(3)(5).

[89] Answering brief at 7.

[90] Answering brief at 2.

[91] Factors include irrigation duty requirements for flood irrigation in Diamond Valley, growing season, type of culture, reasonable transportation losses of water, reservoir evaporation loss of water, and other data as addressed in this order.

(1) 1913 Romano v. Sadler Stipulation[92]

The Romano v. Sadler stipulation provided that 5cfs of flow from Big Shipley Spring be supplied by Sadler to Romano between January 1 and April 1,[93] being the excess winter water from Big Shipley Spring. The flow was "... about one-third of the total flow of said said Big Spring, . . ."[94] In 1917, Matilda Eccles, Romano's successor, filed application 4273 for the 5cfs of water allocated in the Romano v. Sadler stipulation.[95] Nothing in the Romano v. Sadler stipulation, or in the Eccles' application, suggests that the 5cfs was considered waste or excess water which Sadler Ranch did not otherwise beneficially use during the remainder of the year. Eccles' application was for the winter use of water, from January 1 to April 1. Edgar Sadler supported Eccles' application stating that Sadler had been providing 5cfs to Eccles. The use of the winter water enabled Romano, and subsequently Eccles, to flood irrigate their land. The stipulation recognized that if Sadler Ranch's excess winter flow of water was not diverted to Romano's land during the winter that the flow would discharge on desert lands "at the outskirts" of Sadler Ranch's land and be wasted.[96] The stipulation provided, " . . . the flooding and irrigation of said lands in said months and in the quantity hereinabove described produces sufficient water for the crop of plaintiff herein, and that without the flooding and irrigating of said lands of plaintiff during said months no crop may be produced thereon and that said lands become valueless. . ."[97] Obviously, no crops were grown during the winter, however, water

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[92] SEROA 1345-1348.

[93] *Id.* 346.

[94] *Id.*

[95] *Id.* 5880.

[96] *Id.* 1347.

[97] *Id.* 1346.

was beneficially used during the winter by Sadler Ranch's adjacent landowners, Romano and Eccles, to seep into their soil to produce hay and/or meadow grass harvested later in the year. Eccles was eventually given 4.8 cfs of water to winter irrigate 480 acres between January 1 and April.[98] As previously found by the State Engineer, substantial evidence exists in the record that Sadler Ranch also used winter water from Big Shipley Spring to flood irrigate as the water also flowed over its meadows, froze, and seeped into the soil on Sadler Ranch during the winter and spring sufficient to allow Sadler Ranch to grow hay and meadow grass.[99] Although finding that Sadler Ranch used Big Shipley Spring water throughout the year,[100] as stated earlier, the growing season method of calculation used in 6371 does not give any consideration to Sadler Ranch's winter use of water and the quantity of water necessary to produce hay grass and meadow grass on its approximate 1,700 acres.

The Romano v. Sadler stipulation, when read as a whole, clearly does not support the State Engineer's findings and conclusion that Sadler Ranch only used water during a 158 day growing season and did not otherwise beneficially use water flowing from Big Shipley Spring during the winter. In fact, the stipulation contradicts the State Engineer's findings. The court finds the Romano v. Sadler stipulation is substantial evidence of Sadler Ranch's beneficial use of Big Shipley Spring water during the winter.

(2) Reinhold Sadler's 1976 Deposition Testimony

The State Engineer relied upon portions of Sadler's deposition in finding that Sadler Ranch could not always beneficially use the Big Shipley Spring water."[101] The

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[98] State Engineer's 2017 answering brief at 13-14.

[99] SEROA 036.

[100] *Id.* 5885.

[101] *Id.* 5882-85.

State Engineer noted "it is clear there were times when the water flowed off the Sadler Ranch and was not always beneficially used."[102] The State Engineer found that the Big Shipley Spring water ran off of the ranch after irrigating the fields.[103] While these findings may be true if made in isolation of the other evidence, they are clearly erroneous in the context of 6371. The findings fail to consider that, when read as a whole, Sadler's testimony identifies the specific "times" of the year when the water flowed off the ranch into a pond on 80 acres of the ranch. The evidence plainly shows that the times when water flowed off of Sadler Ranch were in wet winters, when the water flow was increased by mountain run-off, but when there was not a wet winter, the Big Shipley Spring water for the most part remained on Sadler Ranch all of the time.[104] Sadler testified that the water run-off from wet winters, including mountain run-off, would dry up in June.[105] He further testified that Sadler Ranch water was also used for winter irrigation, as was the case with Romano and Eccles.[106] The totality of Sadler's testimony is that in the winter, excess water from Big Shipley Spring together with mountain run-off flowed into the 80 acre pond and some of it flowed off the ranch, consistent with the Romano v. Sadler stipulation for Romano's use of 5cfs of winter water.[107] The State Engineer's consideration of Sadler's testimony reveals that he cherry picked portions of the deposition out of the context of the whole. The only reasonable conclusion that can be drawn from Sadler's testimony is that Sadler Ranch used winter water to irrigate as the State Engineer previously found in

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[102] *Id.* 5884.

[103] *Id.* 5873.

[104] *Id.* 3714-15.

[105] *Id.*

[106] *Id.* 3723-24.

[107] See permit 4273, SEROA 1376-80.

6290.[108] Nowhere in 6371 does the State Engineer give any consideration to the evidence that Sadler Ranch irrigated its acreage of meadows and pasture in the winter and he clearly disregarded his previous findings in 6290.[109]

As is discussed below, to compute Sadler Ranch's amount of water, the State Engineer used a 158 day growing season for pasture grass to calculate Sadler Ranch's quantity at 2,200 afs for the season.[110] If Romano, and then Eccles, used and was certificated for winter water to grow their crops, logic dictates that the neighbor, Sadler Ranch, also flood irrigated in the winter to grow its pasture grass or grass hay. By fixing Sadler's quantity of water on a 158 day growing season the State Engineer ignored significant other evidence in the record as to Sadler Ranch's winter use of irrigation water outside of stock water and domestic use.[111] The State Engineer's finding that the Romano v. Sadler stipulation allowing Romano's use of winter water "could not be to the detriment of Sadler's stock water and domestic use of water"[112] completely ignored the evidence in the record of Sadler Ranch's winter flood irrigation and his previous finding in 6290 that Sadler Ranch winter irrigated meadow sloughs to harvest up to 725 acres of meadow hay and pasture land.[113]

The court finds Sadler's testimony, when considered with other evidence in the record addressed in this order, is substantial evidence of Sadler Ranch's winter use of Big Shipley Spring water. It is clearly arbitrary and capricious for the State Engineer to

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[108] SEROA 018, 036.

[109] See NRS 533.070(2).

[110] SEROA 5886-87.

[111] *Id.* 5887.

[112] *Id.* 5881.

[113] *Id.* 035-036.

ignore and disregard this evidence and not make findings that included the amount of winter water Sadler Ranch used based upon a consideration of the substantial evidence in the record as found by this Court and the NRS 533.070(2) factors.

(3) Failure To Consider All Evidence In The State Engineer's Record For Application 2679

The State Engineer denied application 2679 on November 29, 1013, for 45 cfs, between March and October, a period of 245 days, being all surplus water from Big Shipley Spring "because Sadler Ranch was already being irrigated by Big Shipley Spring under the pre-1905 water right and, additionally, because no response was received from the Applicant to a request by the State Engineer to provide evidence against denial.[114] The denial letter unequivocally stated ". . . the waters of Big Shipley Spring are entirely appropriated at this time . . ."[115] In a letter dated September 23, 1913, regarding the same application, the State Engineer stated ". . . I have made an examination of the premises and estimated the amount of water available from Big Shipley Spring and the result of my investigation is such as to lead me to list your application for denial, on the ground that there is no unappropriated water in that source."[116] "The fact that the water is used beneficially under a title dating back beyond the year 1905 is sufficient for this to consider the water right as valid."[117] The two letters clearly show that in 1913, the State Engineer's unequivocal position was that prior to 1905 Sadler Ranch was beneficially using all of the water from Big Shipley Spring. The State Engineer and Eureka County engage in a

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[114] SEROA 5880, citing to State Engineer's letter dated November 29, 2013. SEROA 1324.

[115] *Id.* 1324; see application 2679, SEROA 3821-22.

[116] *Id.*1325.

[117] *Id.* 1326.

strained interpretation of the two letters,[118] not supported by the letters' plain and unambiguous language. The court finds the State Engineer's September 28, and November 29, 1913, letters, are substantial evidence in the record (1) that all the water from Big Shipley Spring was being appropriated by Sadler Ranch under a pre-1905 vested rights claim, and (2) that the water is beneficially used. (emphasis added). In 1913, had the State Engineer's investigation found that all of the Big Shipley Spring water was not entirely appropriated and/or beneficially used or that there was waste or other surplus water flowing from Big Shipley Spring, it is reasonable to assume that he certainly would have advised the applicant of its potential availability rather than to state that no water was available for appropriation. Rather than give substance and support to his findings and representations in 1913 based upon his investigation at a time when the over appropriation crisis in Diamond Valley did not exist, it is abundantly clear that the State Engineer ignored his office's previous crucial findings regarding Big Shipley Spring.

The court finds the State Engineer's failure to consider his own prior findings is a complete disregard of the evidence, not a weighing and assignment of credibility to evidence as argued by Eureka County[119] and the State Engineer.[120]

The State Engineer fails to establish any reasonable basis to now use only a growing season of 158 days to calculate Sadler Ranch's quantity of water[121] and to disregard the statutory factors in NRS 553.070(2). The evidence in the record the State Engineer did consider credible, such as the Romano v. Sadler stipulation, the Eccles' permit application and certificate, Sadler's deposition testimony, as well as his findings of

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[118] SEROA 5881; Eureka's 2017 answering brief at 17-18.

[119] Eureka's 2017 answering brief at 15.

[120] State Engineer's 2017 answering brief at 10.

[121] SEROA 5886.

winter use of water in 6290, clearly support Sadler Ranch's year round beneficial use of all the Big Shipley Spring water. The State Engineer's disregard of substantial evidence in the record of Sadler Ranch's year round beneficial use of water and the NRS 533.070(2) factors, is fatal to his findings and conclusions in 6371, rendering his decision arbitrary and capricious.

The State Engineer argues that Sadler Ranch has asked for the full amount of Big Shipley Spring flow and that it is not entitled to the full amount for flow "merely because it flows through its property."[122] The court agrees with this proposition. However, the court finds that substantial evidence in the record established that pre-1905 Sadler Ranch placed to beneficial use the full amount of the Big Shipley Spring flow.

(4) The State Engineer Failed To Follow This Court's Order To Use The Precedent Established in the Wilfred Bailey Mitigation Application Case and His Precedent in Diamond Valley

The State Engineer asserts he followed this Court's order regarding the Bailey precedent in fixing Sadler Ranch's duty of water.[123] He did not follow this Court's order. In 6290, the State Engineer found that the Diamond Valley duty of water is 3 acre-feet per acre of land irrigated for alfalfa through more efficient modern irrigation practices using pivot sprinkler application of water to alfalfa.[124] Sadler Ranch historically flood irrigated pre-1905 upon which its vested right claim is based. In the Wilfred Bailey mitigation rights case, the State Engineer used Diamond Valley's historic duty of water of 4 acre-feet per acre of land in issuing permit 63497 in 1997 for a pivot sprinkler distribution system,[125] not for flood irrigation. In 2008, Bailey was issued a certificate which reduced

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[122] State Engineer's 2017 answering brief at 11.

[123] SEROA 5871-73, State Engineer's 2017 answering brief at 20-21.

[124] SEROA 043.

[125] *Id.* 2597-2601.

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the duty to 3.39 acre-feet of water per acre per season[126] based upon the amount of water Bailey actually placed to beneficial use.[127] In 6371, the State Engineer used a 158 day growing season to establish the amount of water Sadler Ranch placed to beneficial use stating,[128] "the amount of water that could be diverted over the length of time in the growing season would be the limit of the water that could be placed to beneficial use."[129] By using this method, the State Engineer failed to follow his precedent of using 4 acre feet per acre duty as in the Bailey case, the 4 acre feet per acre duty he had used in all other previous applications in Diamond Valley and the average duty of acre feet per acre in his Diamond Valley crop inventories. He also ignored his previous finding in 6290 of 3 acre feet per acre duty of water in Diamond Valley using modern irrigation systems. The State Engineer's calculation of water for Sadler Ranch amounted to approximately 1.7 acre feet per acre duty of water. The State Engineer's inconsistencies in this case are disturbing.

The court finds that since Sadler Ranch historically flood irrigated, the State Engineer's use of 3 acre feet per acre for a Diamond Valley duty of water he computed for modern pivot irrigation is not supported by substantial evidence in the record. The court finds the historic use of 4 acre feet per acre duty the State Engineer used in the Bailey case is the precedent to use in this less efficient flood irrigation mitigation right case. Since this case does not establish Sadler Ranch's claim for vested rights, and is for a mitigation certificate, Sadler Ranch must be allowed the opportunity to prove up a duty of water not to exceed 4 acre feet per acre up to 5,100 acre feet per year for the 1,731 acres

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[126] *Id.* 2598, 2602. The court notes that certificates may be issued at a lower duty per acre based upon the amount of water the applicant was able to prove it actually applied to beneficial use.

[127] *Id.*

[128] *Id.* 5886.

[129] *Id.*

the Sadler Ranch historically irrigated. Based upon the agreement of the parties at oral argument, substantial evidence exists in the record that the pre-1905 flow from Big Shipley Spring was 7.02 cfs.[130] In all likelihood Sadler Ranch did not apply 4 acre feet per acre on 1,731 acres year round as this equates to 6,924 acre feet which exceeds Big Shipley Spring flow of 5,100 acre feet annually.[131] If all of the water was used by Sadler Ranch on 1,731 acres or on some lessor acreage, for 365 days per year the maximum amount of water from Big Shipley Spring Sadler Ranch could use is 5,100 acre feet annually based on a spring flow of 7.02cfs. Sadler ranch must have the opportunity to prove use of up to 5,100 acre feet of water annually pursuant to a permit issued by the State Engineer based on Sadler Ranch's application. The court finds that Sadler Ranch has not quantified other winter uses of water such as ice making. Substantial evidence exists in the record to support the State Engineer's decision not to fix Sadler Ranch's quantity of water for any other winter use for this mitigation right application, other than for winter water use for agricultural purposes.

INDIAN CAMP SPRING

In earlier briefing, Sadler Ranch and the State Engineer agreed that Sadler Ranch appropriated water from Indian Camp Spring,[132] the amount of which was in dispute. In 6290 the State Engineer found 1.5 cfs to be a conservative estimate of Indian Camp Spring and "insufficient evidence to support that 40 or more acres of land was irrigated prior to 1905, and that at best, only 15 acres were irrigated sometime prior to 1961."[133] In 6371, the State Engineer reexamined and expanded on the facts he found significant,

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[130] *Id.* 5878, ruling 6290 at 34 finding the pre-development flow as being 7.02 cfs; September 23, 1913, letter from State Engineer regarding application 2679, ROA 1325; acknowledged by all counsel at the oral argument.

[131] The diversion rate of 1cfs is equal to 723.97 acre-feet per year. Big Shipley Spring's diversion rate is 7.02 cfs. 723.97 multiplied by 7.02 cfs equals 5,100 acre feet per year (afa). At the oral argument, none of the parties objected to this calculus for use in Sadler Ranch's mitigation right application.

[132] Sadler Ranch's opening brief filed February 13, 2015, at 2-3; respondent's answering brief filed April 17, 2015, at 3.

[133] SEROA 039.

finding that there is insufficient evidence of beneficial use of water appropriated from Indian Camp Spring prior to 1905.[134] Eureka County agrees with the State Engineer.[135] The State Engineer reviewed evidence of the post 1905 development use of water to compare with the evidence of pre-1905 use. The record demonstrates that Native Americans who were occupying a part of Sadler Ranch used water from Indian Camp Spring on Sadler Ranch's 40 acre parcel after 1905.[136] The State Engineer's consideration of evidence in the record confirmed there was no beneficial use by Sadler Ranch's predecessors in interest prior to 1905.[137] The court finds substantial evidence in the record that supports the State Engineer's decision concerning Indian Camp Spring. The court sustains the State Engineer's findings and conclusion with respect to Indian Camp Spring.

PRIORITY OF MITIGATION RIGHT

In its 2016 order, this Court held that, "Sadler Ranch must not lose its priority date as to its claim of vested rights simply because it applied to access the same water source it historically used by a different method (permit 81270) and sought to change the point of diversion a few hundred feet to access the same source of water through the installation of an induction well (permit 82268)."[138] This Court was and is concerned that Sadler Ranch does not lose any claim of its vested right priority to junior appropriators in Diamond Valley by virtue of the issuance of a mitigation certificate to it through the current application process.[139] The State Engineer in 6371, and in his 2017 answering brief, argues that he is required to comply with NRS 533.085(1), NRS 534.080(3) and this

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[134] *Id.* 5890.

[135] Eureka County's 2017 answering brief at 21-22.

[136] SEROA 3706-3741, 1229-1238.

[137] *Id.* 5889-90.

[138] 2016 order at 28.

[139] *Id.*

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Court's 2016 order.[140] In 6371, the State Engineer found that permit 82268 will retain the priority date of the base right, proof of appropriation V-03289, being 1873 for a 2, 216.1 afa portion and January 1, 1892 for the other 702.6 afs portion.[141] Regarding permit 81270, the State Engineer argues that this "application was granted with the condition that it could be exercised whenever permit 82268 is in priority."[142] In order to comply with NRS 533.085(1) and NRS 534.080(3) the State Engineer conditioned permit 81270 to be exercised when proof of appropriation V-03289 is in priority. With Sadler Ranch's change application permit 82268 priority date remaining the same as Sadler Ranch's base right,[143] the court finds Sadler Ranch is sufficiently protected such that in the event of curtailment in Diamond Valley, its claim of vested rights to Big Shipley Spring of 1873 and 1892 will not be diminished or jeopardized, but will retain priority over all other junior appropriators.

The court affirms the State Engineer's decision concerning the priority dates of the applications and the protection afforded to Sadler Ranch in the event of curtailment.[144] The court further finds that Sadler Ranch's claim of vested rights and its priority to Big Shipley Spring are protected by priority against junior appropriators and not impaired by the State Engineer's ruling 6371.[145]

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[140] See NRS 533.085(1). State Engineer's 2017 answering brief at 19-20; SEROA 5890.

[141] SEROA 5890.

[142] State Engineer's 2017 answering brief at 19-20.

[143] SEROA 5890-91.

[144] *Id.*

[145] *Anderson Family Associates v. Hugh Ricci, P.E.* 124 Nev. 182, 189-90 179 P.3d 1201, 1207-8 (2008).

COURT'S AUTHORITY TO AWARD A SPECIFIC QUANTITY OF WATER FOR SADLER RANCH'S MITIGATION RIGHT APPLICATION

The Nevada Supreme Court has previously held that the district court has the power to grant equitable relief when water rights are at issue.[146] The judicial history of this case is that it has been administered by the State Engineer twice. The State Engineer has failed to follow the law and has ignored or disregarded substantial evidence in the record in his two decisions resulting in his decisions being arbitrary and capricious and an abuse of his discretion. This Court found in its 2016 order that remand to the State Engineer was proper, this Court believing at that time the State Engineer would follow the law and consider the substantial evidence in the record. The State Engineer failed in this regard in issuing ruling 6371. In most cases, the district court is limited to a determination of whether the State Engineer's decision is supported by Nevada law and is supported by substantial evidence in the record. If the court finds to the contrary, the case would be remanded to the State Engineer "for a full and fair determination."[147] The court finds the statutory remedy and procedure providing for the State Engineer to consider and reconsider Sadler Ranch's mitigation application has been ineffective. Considering the State Engineer's failure, after two attempts, to follow the law, that he has ignored or disregarded substantial evidence in the record, and his failure to follow this Court's 2016 order, the court finds that it would be futile to again remand this case to the State Engineer for another ruling. This is a case clearly appropriate for the court to use its equitable power. In addition to this case's administrative and judicial history, further support for the court to use its equitable power is found in the unique nature of this proceeding. Since the evidence of Sadler Ranch's vested rights claim is that upon which a mitigation permit and certificate will be issued is also evidence that will ultimately be heard and its vested rights

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[146] *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 199, 234 P.3d (2010), citing *Englemann v. Westergard*, 98 Nev. 348, 351, 647 P.2d 385 (1982); *State Engineer v. American Nat'l Ins. Co.* 88 Nev. 424, 426, 498 P.2d 1329 (1972), *Bailey v. State of Nevada*, 95 Nev. 378, 382-83, 594 P.2d 754, 737 (1979).

[147] *Revert v. Ray*, 95 Nev. 782, 787-88, 603 P.2d 262 (1980).

decreed by the district court,[148] it is reasonable for the court to now use its equitable powers to quantify Sadler Ranch's mitigation right based on its vested rights claim.

Good cause appearing,

IT IS HEREBY ORDERED that the State Engineer's method of calculation of Sadler Ranch's mitigation rights by using the growing season for a pasture grass crop in Diamond Valley at 158 days ignored and disregarded substantial evidence in the record of Sadler Ranch's use of winter water from Big Shipley Spring for irrigation purposes over 1,731 acres of land.

IT IS HEREBY FURTHER ORDERED that the State Engineer's failure to consider the factors in NRS 533.070(2) in the calculation Sadler Ranch's mitigation water right was arbitrary and capricious.

IT IS HEREBY FURTHER ORDERED that the State Engineer's finding that the flow of Big Shipley Spring prior to 1905 was 7.02 cubic feet per second (cfs) equaling 5,100 acre feet annually (afa), is supported by substantial evidence in the record.

IT IS HEREBY FURTHER ORDERED that the total combined duty of water for permit 4273, certificate 964, providing for a diversion from Big Shipley Spring from January 1 through April 1 of each year; permit 81270; permit 82268; and any remaining discharge from Big Shipley Spring shall not exceed 5,100 afa, and the total combined rate of diversion shall not exceed 7.02 cfs and that the priority dated for permit 4273, certificate 964 is January 2, 1917, permit 81720 is March 30, 2012, and permit 82268 is 1873 for a 4,397.4 afa portion and January 1, 1892, for the remaining 702.6 afs portion and to this extent Sadler Ranch's supplemental petition for judicial review is PARTIALLY GRANTED.

IT IS HEREBY FURTHER ORDERED that permit 82268 be issued to change the point of diversion of all of the waters appropriated under Proof of Appropriation V-03289, for 7.02 cfs, not to exceed 5,100 afa, and approval of permit 82268 abrogates said base right. The priority dates for permit 82268 are 1873 for a 4,397.4 afa portion and

[148] NRS 533.170, NRS 533.185.

January 1, 1892, for the remaining 702.6 afs portion.

IT IS HEREBY FURTHER ORDERED that permit 81270 be issued as a mitigation right for 7.02 cfs for supplemental irrigation purposes, but the duty shall not exceed 5,100 afa, and it is issued with the understanding that the point of diversion cannot be moved outside of the spring discharge area as determined by the State Engineer.

IT IS HEREBY FURTHER ORDERED that the priority date for permit 81720 is March 30, 2012, but permit 81720 is totally supplemental to permit 82268 and may be exercised as an alternate point of diversion whenever permit 82268 is in priority due to the unique nature of permit 81720 as a mitigation right to mitigate any loss of flow to Big Shipley Spring by junior appropriators.

IT IS HEREBY ORDERED that the total combined duty of water under permit 4273, certificate 964; permit 81720; and permit 82268 and any remaining discharge from Big Shipley Spring shall not exceed 5,100 afa.

IT IS HEREBY FURTHER ORDERED that the mitigation right is subject payment of the statutory permit fees.

IT IS HEREBY FURTHER ORDERED that the Sadler Ranch's mitigation right is senior to the rights of all junior appropriators in Diamond Valley.

IT IS HEREBY FURTHER ORDERED that the State Engineer's decision denying Sadler Ranch's mitigation right claim to Indian Camp Spring in AFFIRMED and to this extent Sadler Ranch's supplemental petition for judicial review is PARTIALLY DENIED.

DATED this 21st day of March, 2018.

Gary D. Fairman

DISTRICT JUDGE

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

NO. _____
FILED
JUN 30 2020
Eureka County Clerk
BY _____

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

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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.

ORDER DENYING DNRPCA INTERVENORS' MOTION FOR STAY PENDING APPEAL

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

RECEIVED
JUN 30 2020
Eureka County Clerk

PROCEDURAL BACKGROUND

On April 27, 2020, this Court entered findings of fact, conclusions of law, and order granting petitions for judicial review ("order granting petitions for judicial review"). On May 14, 2020, the DNRPCA intervenors filed a notice of appeal of order to the Nevada Supreme Court ("appeal"). On May 14, 2020, DNRPCA intervenors filed a motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("DNRPCA motion for stay"), On May 19, 2020, the State Engineer filed his joinder to DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("State Engineer's joinder"). On May 21, 2020, Eureka County filed Eureka County's joinder to DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302. On May 26, 2020, Timothy Lee Bailey and Constance Marie Bailey and Fred Bailey and Carolyn Bailey ("Baileys") filed an opposition of Bailey petitioners to DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("Bailey's opposition"). On May 26, 2020, Sadler Ranch, LLC and Ira R. and Montira Renner filed Sadler Ranch and Ira R. and Montira Renner's opposition to motion for stay pending appeal ("Sadler Ranch and Renner opposition"). On June 1, 2020, DNRPCA intervenors filed DNRPCA intervenors' reply in support of motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("DNRPCA reply"). On June 1, 2020, the State Engineer filed State Engineer's reply in support of DNRPCA intervenors' motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302 ("State Engineer's reply"). On June 1, 2020, Eureka County filed Eureka County's reply in support of motion for stay pending appeal ("Eureka County's reply").

The court has reviewed the pleadings and no further briefing or oral argument is

required.[1]

DISCUSSION

APPLICABLE LAW

In deciding whether to grant a motion to stay pending appeal the Nevada Supreme Court considers four factors which this Court must also consider, they being: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether appellants will suffer irreparable or serious injury if the stay is denied; (3) whether respondents will suffer irreparable harm or serious injury if the stay is granted; and (4) whether appellants are likely to prevail on the merits in the appeal.[2] A movant does not always have to show a probability of success on the merits, but the movant must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.[3]

THE OBJECT OF THE APPEAL

The object of the appeal will not be defeated if the stay is denied. The object of the DNRPCA appeal is to overturn this Court's order granting petitions for judicial review which reversed State Engineer's order 1302 approving the DVGMP. DNRPCA, Eureka County, the State Engineer and the petitioners offer divergent reasons in support of and against the Diamond Valley ground water management plan's ("DVGMP") effective stabilization of the aquifer during the first year of the DVGMP. It is premature to confirm that the DVGMP is actually resulting in less impact on the Diamond Valley acquifer based only on the 2019 growing season. If this Court denied the DNRPCA motion for stay, DNRPCA's assumption that Diamond Valley pumping will increase without the DVGMP is misplaced. Currently the

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[1]7JDCR7(11).

[2]*Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982 (2000).

[3]*Id.* at 659, citing *Ruiz v. Estelle*, 650 F.2d 535, 565 (5th Cir. 1981).

banked water share provisions under the DVGMP combined with the 2020 water share allocations, if fully used, could exceed the 2016 76,000 acre feet base line pumping in Diamond Valley that was used for the DVGMP. Evidence exists that the DVGMP is actually increasing the volume of water removed from the acquifer rather than reducing at this time. If the respondent and intervenors prevail on appeal, the DVGMP can be reinstated at that time. The court finds the object of the appeal will not be defeated if the motion for stay is denied.

IRREPARABLE OR SERIOUS HARM

DNRPCA claims it will suffer irreparable or serious injury if the court does not reinstate the DVGMP pending an appellate decision because of possible curtailment by priority and that farm owners have made significant financial investments in reliance on the DVGMP. All irrigation water conservation investments incurred by any Diamond Valley farmers are clearly warranted considering the well known water deficiency in Diamond Valley stretching over 40 years. Any water and crop conservation improvements were necessary even if no GMP was in place. However, it was misguided for any farmers to make their water conservation investments as alleged solely on the validity of the DVGMP, particularly since the DVGMP has been the subject of opposition by the same senior water rights holders who prevailed to date in this action. As stated in the court's order granting petitions for judicial review, the junior irrigators have a variety of other alternatives available to them short of curtailment by priority in addition to the measures they have taken to date.

If this Courts's order granting petitions for judicial review is affirmed on appeal, there remains 5 years of the 10 year period during which another GMP consistent with Nevada law can be implemented. Irreparable or serious harm to appellants has not been demonstrated.

It appears that petitioners would suffer serious or irreparable harm if the stay were granted. Respondents have offered to exempt petitioners from the DVGMP during the

appellate period. But continued trading of water shares, use of banked water shares, and continued over pumping of the Diamond Valley aquifer for up to an additional 30 years will have an adverse impact on petitioners' senior certificated rights, as well as, their vested rights.

LIKELIHOOD OF SUCCESS ON THE MERITS

The State Engineer, DNRPCA, Eureka County have not demonstrated that they are likely to prevail on the merits. Movants must "present a substantial case on the merits when a serious legal question is involved and show the balance of equities weighs heavily in favor of granting stay."[4] Movants have not presented a substantial case on the merits challenging the serious legal question that the DVGMP violated long standing Nevada law as found by this Court. The motion for stay pending appeal must be denied.

Good cause appearing,

IT IS HEREBY ORDERED that DNRPCA's motion for stay pending appeal of order granting petitions for judicial review of State Engineer order 1302, and the joinder by Eureka County and the State Engineer are DENIED.

DATED this 30th day of June, 2020.

DISTRICT JUDGE

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

[4] *Id.* at 658-59.