IN THE SUPREME COURT OF THE STATE OF NEVADA

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; TIM WILSON P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; et al.,

Appellants,

vs.

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

Respondents.

Electronically Filed
Nov 06 2020 03:59 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 81224

BAILEY RESPONDENTS' MOTION TO EXCEED TYPE-VOLUME LIMITATION

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
DON SPRINGMEYER, ESQ.
Nevada Bar No. 1021
CHRISTOPHER W. MIXSON, ESQ.
Nevada Bar No. 10685
5594-B Longley Lane
Reno, Nevada 89511
Ph: (775) 853-6787 / Fx: (775) 853-6774
cmixson@wrslawyers.com
Attorneys for Bailey Respondents

Respondents, Timothy Lee and Constance Marie Bailey and Fred and Carolyn Bailey ("Bailey Respondents"), by and through their counsel of record, respectfully submit this Motion, pursuant to Nevada Rules of Appellant Procedures 32(a)(7)(D) (hereinafter NRAP 32(a)(7)(D)), for permission to exceed the 14,000-word limit for their Answering Brief. In support, Respondents show diligence and good cause as follows:

1. On September 23, 2020, Appellant Nevada State Engineer filed his Opening Brief herein, which according to its Certificate of Compliance contains 13,675 words.

2. On September 23, 2020, Appellant-Intervenor Diamond Natural Resources Protection and Conservation Area ("DNRPCA") filed its Opening Brief herein, which according to its Certificate of Compliance contains 13,812 words.

3. As described in the Routing Statement of DNRPCA's Opening Brief, this is a case of first impression regarding the interpretation of at least two relatively new statutes in Nevada's water law. The Court's decision in this case is likely to have statewide implications. This case presents an important dispute in a subject matter expressly retained for this Court's review under NRAP 17(b)(9).

4. The Appellants' Opening Briefs present numerous arguments in support of their position that the district court's decision should be reversed, and the undersigned on behalf of the Bailey Respondents has endeavored to consolidate the

Appellants' arguments into as few discrete issues as possible for purposes of preparing the answering brief.

5. The Bailey Respondents' Answering Brief is concise, not repetitive, and does not contain burdensome, irrelevant or immaterial matters or arguments.

6. However, because of the technical nature of the subject matter and the complexity and length of the arguments and issues, the Bailey Respondents are not able to condense their brief to 14,000 words without omitting relevant information necessary for the Court's consideration.

7. The Bailey Respondents' proposed Answering Brief is 19,274 words, not including the prefatory material, certificate of service, and signature block, and the Bailey Respondents therefore request to extend the type-volume limitation by 5,274 words.

8. This Motion is further supported by the accompanying declaration of Christopher W. Mixson, Esq., of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, attached here as Exhibit A.

9. This Motion is timely filed on the deadline to file the Answering Brief, pursuant to NRAP 32(a)(7)(D)(ii).

10. A copy of the Bailey Respondents' Answering Brief is attached to this Motion as Exhibit B.

11. The Answering Brief in Exhibit B complies with the formatting

requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in size 14-point Times New Roman font, and contains 19,274 words.

WHEREFORE, Plaintiffs respectfully request that the Court allow Respondents to file the accompanying Answering Brief.

Respectfully submitted November 6, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: /s/ *Chris Mixson*
CHRISTOPHER W. MIXSON, ESQ.
Nevada Bar No. 10685
5594-B Longley Lane
Reno, Nevada 89511
Ph: (775) 853-6787 / Fx: (775) 853-6774
cmixson@wrslawyers.com

Attorneys for Bailey Respondents

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on November 6, 2020, a true and correct copy of the foregoing **BAILEY RESPONDENTS' MOTION TO EXCEED TYPE-VOLUME LIMITATION** and **DECLARATION OF CHRISTOPHER MIXSON IN SUPPORT OF MOTION TO EXCEED TYPE-VOLUME LIMITATION** 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.

I FURTHER CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, to the following:

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

John E. Marvel, Esq.
Marvel & Marvel, Ltd.
217 Idaho St.
Elko, NV 89801

Dated: November 6, 2020.

By: /s/ *Christie Rehfeld*
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

EXHIBIT “A”

EXHIBIT “A”

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; TIM WILSON P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; et al., Appellants, vs. TIMOTHY LEE BAILEY & CONSTANCE MARIE BAILEY; FRED BAILEY & CAROLYN BAILEY; SADLER RANCH, LLC; IRA R. RENNER & MONTIRA RENNER; et al., Respondents.	**Case No. 81224**

DECLARATION OF CHRISTOPHER W. MIXSON IN SUPPORT OF BAILEY RESPONDENTS' MOTION TO EXCEED TYPE-VOLUME LIMITATION

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
DON SPRINGMEYER, ESQ.
Nevada Bar No. 1021
CHRISTOPHER W. MIXSON, ESQ.
Nevada Bar No. 10685
5594-B Longley Lane
Reno, Nevada 89511
Ph: (775) 853-6787 / Fx: (775) 853-6774
cmixson@wrslawyers.com
Attorneys for Bailey Respondents

I, CHRISTOPHER W. MIXSON, declare as follows:

1. I am a member in good standing of the State Bar of Nevada, and am a partner of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP, counsel of record for Respondents Timothy Lee and Constance Marie Bailey and Fred and Carolyn Bailey, in this action. I make this declaration of personal, firsthand knowledge and, if called and sworn as a witness, I could and would testify competently thereto. I have personal knowledge of the facts stated herein and submit this Declaration in support of the Bailey Respondents' Motion to Exceed Type-Volume Limitation filed simultaneously herewith.

2. On September 23, 2020, Appellant Nevada State Engineer filed his Opening Brief herein, which according to its Certificate of Compliance contains 13,675 words.

3. On September 23, 2020, Appellant-Intervenor Diamond Natural Resources Protection and Conservation Area ("DNRPCA") filed its Opening Brief herein, which according to its Certificate of Compliance contains 13,812 words.

4. This is a case of first impression regarding the interpretation of at least two relatively new statutes in Nevada's water law. The Court's decision in this case is likely to have statewide implications. As such, this case presents an important dispute in a subject matter expressly retained for this Court's review under NRAP 17(b)(9).

5. The Appellants' Opening Briefs present numerous arguments in support of their position that the district court's decision should be reversed, and the undersigned on behalf of the Bailey Respondents has endeavored to consolidate the Appellants' arguments into as few discrete issues as possible for purposes of preparing the answering brief.

6. The Bailey Respondents' Answering Brief is concise, not repetitive, and does not contain burdensome, irrelevant or immaterial matters or arguments.

7. However, because of the technical nature of the subject matter and the complexity and length of the arguments and issues, the Bailey Respondents are not able to condense their brief to 14,000 words without omitting relevant information necessary for the Court's consideration.

8. The Bailey Respondents' proposed Answering Brief is 19,274 words, not including the prefatory material, certificate of service, and signature block, and the Bailey Respondents therefore request to extend the type-volume limitation by 5,274 words.

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

Executed November 6, 2020, at Reno, Nevada.

/s/ Christopher W. Mixson
CHRISTOPHER W. MIXSON, ESQ.

EXHIBIT “B”

EXHIBIT “B”

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIAMOND NATURAL RESOURCES PROTECTION & CONSERVATION ASSOCIATION; TIM WILSON P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; et al.,

Appellants,

vs.

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

Respondents.

Case No. 81224

BAILEY RESPONDENTS' ANSWERING BRIEF

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
DON SPRINGMEYER, ESQ.
Nevada Bar No. 1021
CHRISTOPHER W. MIXSON, ESQ.
Nevada Bar No. 10685
5594-B Longley Lane
Reno, Nevada 89511
Ph: (775) 853-6787 / Fx: (775) 853-6774
cmixson@wrslawyers.com

Attorneys for Bailey Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

MISCELLANEOUS

ROUTING STATEMENT

Pursuant to Nevada Rule of Appellate Procedure (NRAP) 17(a)(8), this matter is presumptively retained by the Nevada Supreme Court because it involves an administrative agency decision involving water.

STATEMENT OF THE ISSUE

1) Whether the district court correctly reversed the Nevada State Engineer decision that approved a groundwater management plan that violated multiple provisions of Nevada water law?

STATEMENT OF FACTS

A. The Diamond Valley

1. The Bailey Family Has Farmed and Ranched in Diamond Valley For Seven Generations

Brothers Elwood and Robert Bailey homesteaded in the west side of Diamond Valley starting in the early 1860s. The Bailey Ranch has been in continuous operation in Diamond Valley since 1863, a year prior to Nevada's statehood. In addition to the original ranch, the Baileys have farmed other parcels in Diamond Valley using groundwater for many decades. This is over a century and a half—spanning seven generations—of ranching and farming by the same family. The Bailey Home Ranch has been recognized as the sixth oldest business operating in the State of Nevada. The Baileys have worked their lands every day for 150 years using Mother Nature as their business partner, and in that period of

time they have developed unquantifiable personal and institutional knowledge of their ranch, farms, and the Diamond Valley area.

The Baileys' senior irrigation groundwater rights for their farming operations, which would be subject to the GMP's annual reductions, include Permit No. 22194 (Cert. 6182) for 537.04 acre-feet annually with a March 7, 1960 priority; Permit 22194 (Cert. 6183) for 622.0 acre-feet annually with a March 7, 1960 priority; Permit 55727 (Cert. 15957) for 20.556 acre-feet annually with a March 7, 1960 priority; Permit 28036 (Cert. 8415) for 277.0 acre-feet annually with a May 3, 1960 priority; Permit 48948 (Cert. 13361) for 478.56 acre-feet with a May 3, 1960 priority; and Permit 28035 (Cert. 8414) for 201.56 acre-feet annually with a January 23, 1974 priority. JA 813, 819.[1] In addition, the Baileys hold several other permitted and/or vested water rights for their ranching operations, stockwatering and other uses which are impacted by the mismanagement of the aquifer but are not subject to the reductions and water-marketing scheme in the GMP.

2. The State of the Aquifer

The State Engineer has estimated that the perennial yield from the Diamond Valley groundwater aquifer (i.e. the amount of groundwater available to be safely pumped each year as estimated by natural replenishment from precipitation) is

[1] References to the 14-volume Joint Appendix will use "JA" followed by the specific page number cited.

30,000 acre-feet ("af") per year. JA 316. However, the State of Nevada, through the State Engineer, has approved water rights permits to pump approximately 126,000 acre-feet per year for irrigation, which does not include other groundwater rights such as domestic use, mining, stockwater, etc. *Id*. When all groundwater permits are considered, the annual demand on the aquifer climbs to approximately 130,625 acre-feet. *Id*. Of the 126,000 af approved to be pumped every year for irrigation, the State Engineer estimates that approximately 76,000 af were pumped in 2016, and that annual pumping has exceeded the 30,000 af perennial yield for at least 40 years. *Id*. But the State Engineer's figures do not tell the whole story—in addition to the total duty of 130,625 acre-feet annual demand from irrigation groundwater rights in Diamond Valley, there are also numerous water rights that historically depended on springs that naturally flowed in the Northern Diamond Valley area that supported vested surface water rights. *See e.g.* JA 372 (remarking on the "observed spring discharge along the west side of the North Diamond subarea," which is pending adjudication).

The extreme over-pumping of the aquifer because of the State's historic mismanagement of the groundwater basin has resulted in the groundwater level declining approximately 2 feet each year since 1960. JA 316; *see also* JA 601 (describing consensus among interested parties that "over allocation by State Engineer has resulted in situation we're in."). This historic mismanagement has

caused the natural springs to decline significanctly. JA 641 ("Groundwater exploitation in the basin has caused the discharge from many springs to decline or cease to flow altogether. The discharge from Big Shipley Hot Springs declined to about 1,500 af/yr and Thompson Spring has ceased to flow."). The Bailey Ranch Spring has also ceased to flow altogether. Ruling at 5 (JA 2385).

B. The Diamond Valley Groundwater Management Plan

1. Development of the GMP

In their Opening Briefs, the Appellants try to paint a picture of a group of local farmers coming together to develop the GMP of their own accord. That narrative is not borne out by the record. In fact, the development of the GMP was started through meetings that were convened by the government (Eureka County), and the ultimate format of the GMP's "unbundling" of property rights and use of an untested free-market water trading scheme was imported into Eureka County from outside.

Although Appellant-Intervenor Eureka County (through the Eureka Conservation District) developed "major portions" of the GMP, after which a so-called 'management plan advisory board' was formed which "took over much of the responsibility" for finishing development of the GMP (JA 540), the GMP is based on the water marketing paper written by Professor Michael Young, *Unbundling Water Rights: A Blueprint for Development of Robust Water*

Allocation Systems in the Western United States (2015) ("Young Paper") (cited in the GMP at JA 540 and reproduced in full at JA 1881). The Young Paper was developed specifically to provide the blueprint and underpinnings of the entire market-based approach taken by the GMP. JA 1882 (the Young Report is "a blueprint for transitioning to robust water rights, allocation, and management systems in the western United States—a blueprint ready for pilot testing in Nevada's Diamond Valley"); *see also* JA 607 (Eureka Co.'s notes from June 11, 2015 meeting explaining that its "recommendations have been influenced significantly by a Blueprint for Western Water Management that builds upon the Australian water sharing and permit unbundling and was presented to us by Prof. Mike Young" in June 2015).

The record herein does not explain why Eureka County decided to employ Mr. Young's water marketing scheme and refused to consider other alternative methods of reducing pumping in Diamond Valley, or who paid for Mr. Young's travel and time. *See e.g.* JA 645–47 (Feb. 24, 2016 Eureka Conservation District letter describing in passive voice that "[i]t has been proposed that Diamond Valley test a new system of water use which is being referred to as the Shares System or 'Unbundling' of water rights."); *see also id.* (informing that Mr. Young would be in attendance at a Feb. 29, 2016 meeting in Eureka); *but see* JA 608 (notes from June 11, 2015 meeting, including remark that "[i]t was suggested that conversion

should follow the allocation regime suggested by the State Engineer."). But what is clear from the record of meetings of Eureka County and others is that by the time they formed the so-called advisory board in February 2016, the dye was cast and Mr. Young's "unbundling" of property rights and water marketing scheme had already been chosen as the sole blueprint for the GMP at least 8 months prior. *See e.g.* JA 590 (summarizing June 11, 2015 meeting where the preliminary GMP "outline/working model" was developed, and the February 29, 2016 meeting where the advisory board was "elected.").

2. Overview of the GMP's Changes to Water Rights and Nevada Water Law

As described in the GMP, it strives to be "a water market-based system meant to provide ultimate flexibility in using water, while incentivizing conservation and allowing willing participants' quick sale, lease, trade, etc. of water in times when needed." JA 540. Chapters 12 and 13 of the GMP (JA 545–49) set forth the core of the water marketing approach taken by Eureka County.

(a) *The GMP Reduces Water Rights to "Shares"*

Pursuant to Chapter 12 of the GMP, each state-issued water right permit subject to the scheme is converted from the existing water right with a fixed annual pumping volume and priority date to a fixed number of "shares," which are then assigned each year an "allocation" of total annual pumping irrespective of the original priority date. JA 545 ("All groundwater rights … shall receive

groundwater Shares according to the formula specified in this Section."). After this conversion of water rights to shares, which do not have priority dates, the use of groundwater in Diamond Valley under the GMP is no longer subject to Nevada's bedrock prior appropriation law, because junior water rights holders' usage is no longer subject to the requirement that senior water rights be fully satisfied first.

The conversion of water right volumes to shares is not 1-for-1 where each acre-foot of water under a permit is converted to one share. Instead, a so-called "priority factor" is applied to each acre-foot of a water rights permit to reduce the ultimate shares awarded, based on an arbitrary range of 1% reduction for the most senior water right to 20% reduction for the most junior water right. JA 545 (providing formula for converting water rights to shares, where Total Volume Water Right x Priority Factor = Total Shares). However, because the "priority factor" is always less than 1, the conversion to shares always results in less than 1 share for each former acre-foot of water. *See e.g.* JA 812–22 (GMP Appx. F, Table of Groundwater Rights and Associated Shares). In Appendix F, even the most senior water right subject to the GMP is only awarded 0.9997 shares per acre-foot. JA 812. The most junior water right is awarded 0.80 shares per acre-foot. JA 822. As described in the following section, senior water rights are further reduced by annually decreasing "allocations" of water per "share".

Employing the arbitrary priority factor such that junior water rights are converted to fewer shares per acre-foot than senior water rights is the GMP's attempt to "take into account" Nevada's bedrock doctrine of prior appropriation. GMP Sec. 12.4 (JA 545). But that attempt has spectacularly failed because merely taking seniority into account by reducing shares granted to senior rights by an arbitrary percentage less than shares granted to junior rights is not good enough to mitigate the reduced pumping required of senior water rights holders described more fully below.

After the conversion of water rights to shares, the pumping and use of groundwater in Diamond Valley under the GMP is no longer subject to Nevada's prior appropriation system. Every share is entitled to pump each year the entire total amount of water allocated to it without regard to seniority.

(b) *All Shares Are Further Reduced Via Annual "Allocations" of Water*

The conversion of water rights to shares described above is not even the biggest violation of the prior appropriation doctrine in the GMP. In addition to reducing senior water rights to fewer shares than one per acre-foot, Chapter 13 of the GMP also drastically reduces senior water rights in violation of prior appropriation by annually reducing the "allocation" of water to each share. JA 547–49 (Chapter 13, "Annual Groundwater Allocations and Groundwater Account"); *see also* JA 823 (GMP Appx. G, Groundwater Allocation and Pumping

Reduction Table, which shows that acre-feet per share allocations are reduced annually, starting at 0.67 acre-feet per share in Year 1 of the GMP to 0.301 acre-feet per share in Year 35 of the GMP). So, in addition to reducing senior water rights to less than one acre-foot per share, the GMP further reduces the water rights by only allocating 66% of the permitted volume to each share in Year 1, down to only 30% of the permitted volume by Year 35.

These drastic reductions apply to all water rights, including senior water rights. The impact of the annual reductions of allocations of water per share on senior rights is best understood by way of example. Assume that the most senior permit in Diamond Valley is for 100 acre-feet per year. Under the GMP, that senior permit would be permanently converted to 99.97 shares (after application of the "priority factor"). With Year 1's allocation of 0.67 acre-feet per share, the senior permit would receive only 66.98 acre-feet (99.97 shares x 0.67 acre-feet/share), instead of its original permitted amount of 100 acre-feet. With Year 35's allocation of 0.301 acre-feet per share, the senior permit would receive only 30.09 acre-feet even though its original permit is for 100 acre-feet. Using the same example of the most junior right with an original permit for 100 acre-feet annually, its allocation under the GMP in Year 35 would be 24.08 acre-feet, only 6 acre-feet less than the most senior. In this way, the GMP reallocates water from the senior water rights to the junior water rights.

(c) *The GMP Creates a Novel Water Banking and Trading Scheme to Store and Sell Unused Allocations*

Under the GMP, this new market based water allocation scheme is managed by placing each annual allocation into an account for each water user. Sec. 13.2 (JA 547). Another drastic departure from Nevada water law is that the GMP scheme allows "banking" of unused water allocations, which can be used in future years. Sec. 13.9 (*id*.). The only restriction the GMP places on the volume of unused water that can be banked is the annual "ET Depreciation" of banked water to account for natural losses (i.e. evapotranspiration, or ET) that may be incurred while the water is stored in the underground aquifer. *Id*.[2]

Next, after reducing groundwater rights when converting to shares, and further severely reducing them when limiting the annual allocation of water to each share, the GMP allows for the unfettered transfer of allocations, both present allocations and banked allocations. Sec. 13.10 (JA 548). This is the market-based approach, which is a completely new and untested scheme for managing the public's water resources in Nevada.

The only limitations on moving groundwater allocations from one well to another well in Diamond Valley, or changing them from one manner of use to

[2] The GMP assigns two separate depreciation factors: in the Southern Diamond Valley the depreciation factor applied annually to banked water is 1%, while in the Northern Diamond Valley the depreciation factor applied annually to banked water is 17%. GMP Appx. I (JA 835).

another manner of use, is the provision of GMP Sec. 14.7 providing that "[t]he State Engineer may disallow additional withdrawals from an existing well that exceeds the volume and flow rate that was initially approved" for that well. JA 550. However, this provision is only applicable "if the State Engineer determines that the additional withdrawal would create a conflict with existing water rights…." *Id*. Furthermore, the GMP limits the time in which the State Engineer may review such water allocation transfers by *deeming the transfer approved* if it is not denied by the State Engineer within 14 days. Sec. 14.8 (JA 550).

As set forth below, this novel trading scheme for water rights violates several provisions of Nevada water law.

C. Nevada State Engineer Order No. 1302

The Petition for Approval of the GMP was presented to the State Engineer on August 20, 2018 (JA 461), and the State Engineer held a public hearing to take comments on the GMP on October 30, 2018 (Transc., JA 966). The State Engineer allowed additional written comments to be submitted through November 2, 2018. JA 848. Thereafter, on January 11, 2019, the State Engineer issued Ruling 1302 approving the GMP. JA 315.

In Ruling 1302, the State Engineer determined that because the "obvious solution to the problem caused by over pumping is to reduce groundwater pumping," the GMP "satisfies the State Engineer that the water levels will reach an

equilibrium." JA 315. While the Baileys do not dispute that reducing groundwater use to the estimated perennial yield may eventually allow for an equilibrium to be reached between aquifer recharge and groundwater pumping, it is the method of the GMP's pumping reductions as applied to senior water rights that violates Nevada law, among other legal violations described more fully below.

The State Engineer was aware of the legal concerns raised by the Baileys and others, but approved the GMP over their objections. The Baileys' primary concern is the GMP's failure to adhere to Nevada's prior appropriation doctrine. In Order 1302, the State Engineer admits that "the GMP *does deviate from the strict application of the prior appropriation doctrine*," but goes on to argue that on the one hand the Nevada Legislature must have intended to allow for a GMP to violate prior appropriation despite no such provision in the relevant statutes, and on the other hand the application of the arbitrary priority factor when converting water rights to shares allows the GMP to "still honor prior appropriation." JA 319–20 (emphasis added).

The Baileys also raised their concern that the GMP violates Nevada water law because it converts unperfected water rights (i.e. "paper" water rights that have never been exercised) to shares without requiring the unperfected paper water rights to show the statutorily mandated "proof of beneficial use." Under Nevada law, a water right must be actually used and a proof of beneficial use filed in order

to formally "perfect" the water right. But under the GMP, unperfected paper water rights are simply converted to shares, which can then be pumped, banked and/or conveyed to others, effectively causing them to be automatically perfected without complying with the statutory mandate that the water right holder file a proof of beneficial use. In Order 1302, the State Engineer argues that there is "not sufficient time" to follow the existing statutory procedures for sorting out unperfected paper water rights, and therefore "the requests to eliminate paper water does not warrant halting this [GMP] process…." JA 323–24.

The Baileys also expressed their concerns that the GMP does nothing to address the adverse impact of the over pumping of the Diamond Valley groundwater aquifer on their groundwater-dependent vested surface water rights. To this, Order 1302 simply argued that "[n]either the plain language nor the legislative history indicate that mitigation of senior surface water rights that have allegedly been adversely affected by groundwater pumping must be mitigated by a GMP." JA 325.

The State Engineer also approved the GMP's provisions that allow groundwater shares or allocations to be transferred among different wells without any of the statutory safeguards that protect others from potential adverse effects of changing the point of diversion or place or manner of use of water rights. The State Engineer argued in Order 1302 that these safeguards were not necessary

because only temporary (for one year or less) transfers of shares and/or allocations are permitted under the GMP. JA 321–22. However, Order 1302 failed to analyze the potential adverse effect of a perpetual temporary transfer of shares to the same changed point of diversion, place of use and/or manner of use, which is possible under the GMP without any further notice or review, in violation of law. Additionally, Order 1302 approved the provision of the GMP that alters Nevada law by providing that any application for a permanent change in point of diversion or place or manner of use of a groundwater appropriation in Diamond Valley is deemed approved by the State Engineer if not denied within fourteen days. JA 321.

The upshot of Order 1302 is that the State Engineer erroneously determined that, despite any such express provisions in the relevant GMP statute, the Nevada Legislature intended that a GMP could violate prior appropriation and other aspects of Nevada water law, and as long as a simple majority of affected water rights holders were willing to vote for a GMP, it can violate the law.

D. The District Court's Ruling

The Baileys filed a petition for judicial review of State Engineer Order No. 1302 in the Seventh Judicial District Court for Eureka County on February 11, 2019. JA 90. Written briefs were filed in the district court in October and November of 2019, and the district court held oral argument on December 10 and

11, 2019. JA 1383–2380 (briefs, presentations, and oral argument transcripts). On April 27, 2020, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting Petitions for Judicial Review (JA 2381–2420) (the "Ruling"), which fully and completely reversed State Engineer Order No. 1302 because of the legal deficiencies of the GMP.

1. The District Court's Factual Findings

In the Ruling, the district court made several key factual findings. The district court described as "undisputed" the fact that "the State Engineer has allowed [severe depletion of the aquifer] to occur for over 40 years without any cessation or reduction" of groundwater pumping. JA 2384. Quoting the GMP itself and the administrative record, the district court found that the GMP was "in large part influenced significantly by a water allocation system using a market based approach similar to that authored by professor Michael Young [***] which describes itself as a blueprint ready for testing in Diamond Valley…." JA 2386.

The district court agreed with the Baileys that "[t]he conversion of water rights to shares under the DVGMP formula *does not provide for each acre-foot of water under a permit/certificate to be converted to one share*." JA 2387–88 (emphasis added). The district court found "[t]his formula results in a reduction in the ultimate shares allocated based on an arbitrary range of a 1% reduction for the most senior water right to a 20% reduction for the most junior water right" which

"*does not give the senior rights' holders all of the water to which their priority permit/certificate entitles the holders to use for irrigation purposes*." JA 2388 (emphasis added). As stated by the district court:

> Thus, senior water rights' holders cannot beneficially use all of the water which their permit/certificate entitles them to use. The DVGMP reduces the senior water rights by annually reducing their allocation of water for each share.

JA 2388. Finally, because the GMP's timeline of pumping reductions to reach the targeted 34,200 acre-feet per year of pumping for irrigation takes 35 years, the district court found that "[f]or 35 years the pumping in Diamond Valley will exceed the 30,000 af perennial yield." JA 2389.

The district court also found that "[t]he State Engineer and all intervenors who filed briefs and orally argued this case agree that the DVGMP deviates from the prior appropriation doctrine." JA 2391 (citing State Engineer, DNRPCA, and Eureka Co. answering briefs).

2. The District Court's Legal Rulings

The district court's Ruling also makes multiple key legal determinations. The district court found that the State Engineer's Order 1302 properly considered the mandatory factors set forth in NRS 534.037(2) regarding the technical aspects of a groundwater management plan. JA 2393–96. However, the district explained "[t]his finding is narrowly limited…only in relation to the NRS 534.037(2) factors…, *not whether the DVGMP and Order 1302 violates Nevada law in other*

respects." JA 2396, fn 75 (emphasis added). The district court's findings with respect to violations of other aspects of Nevada law are summarized below.

(a) *Violation of the Prior Appropriation Doctrine*

The district court's Ruling recognized "[t]he priority of a water right is the most important feature." JA 2405 (citing G. Hobbs, *Priority: The Most Misunderstood Stick in the Bundle*, 32 Envtl. L. 37 (2002)). The Ruling also recognized that "priority in a water right [is] property in itself." JA 2406 (quoting *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005)). Quoting this Court, the district court's Ruling described how a water right is a real property right, to be protected as such, and that the loss of the priority of a water right can affect the value of that property and potentially amount to the de facto loss of the water right itself. JA 2406 (quoting *Wilson v. Happy Creek*, 135 Nev. Adv. Op. 41, 448 P.3d 1106, 1115 (2019)). Therefore, the district court ruled, "[t]he loss or reduction of any water associated with the senior right can significantly harm the holder." JA 2406.

In recognizing the importance of the relative priority of a water right within Nevada's long-standing prior appropriation water rights system, the district court ruled that the GMP's reduction of water allocated to senior water rights holders "effectively ignor[es] 150 years of the principle of 'first in time, first in right' which has allowed *a senior right holder to beneficially use all of the water*

allocated in its right before any junior right holder can use its water." JA 2406–07 (emphasis added). Therefore, the district court ruled that the GMP and State Engineer Order No. 1302 approving it violate the doctrine of prior appropriation in Nevada. JA 2407.

In determining that the GMP violates the bedrock prior appropriation doctrine, the district court's Ruling goes to great length to analyze and ultimately dispense with the Appellants' arguments that either the text of NRS 534.037, or its legislative history, provide the legal cover necessary for a groundwater management plan to violate Nevada law. JA 2407–16. The district court first found that the text of NRS 534.037 does not include any language that expressly allows for a groundwater management plan to violate the prior appropriation doctrine by reducing the amount of water to which a senior water right holder is entitled. JA 2410. The district court also strongly rejected the State Engineer's argument that, by providing for approval of a groundwater management plan by a simple majority of water users, the statute empowered a simple majority to "vote to deprive a senior right holder's use of all of its water…." JA 2410.

In evaluating whether the legislature intended to repeal prior appropriation with NRS 534.037, despite no such express language, the district court referred to this Court's recent "adherence to long-standing statutory precedent [to provide] stability on which those subject to this State's law are entitled to rely." JA 2410

(quoting *Happy Creek*, 448 P.3d at 1116). In that regard, the district court explained that "[e]very rancher and farmer, until Order 1302, have relied on Nevada's stone etched security that their water right prioirty date entitled them to beneficially use the full amount of a valid water right prior to all those junior." JA 2411. Therefore, the district court ruled that, lacking any express language repealing the doctrine of prior appropriation, NRS 534.037 is not ambiguous and its express language does not allow a groundwater management plan to violate the doctrine of prior appropriation. JA 2411.

Although the district court correctly determined that NRS 534.037 is not ambiguous with respect to the doctrine of prior appropriation, to resolve all doubt the Ruling nonetheless went through the exercise of establishing that the statute did not include an implied repeal of the doctrine. JA 2413–16. The district court discussed the scant legislative history of NRS 534.037, and found that "nowhere…is one word spoken that the proposed legislation will allow for a GMP whereby a senior water right holder will have its right to use the full amount of its permit/certificate reduced or that the amount of water that shall be allocated will be on a basis other than by priority." JA 2414. Finally, the district court found that the Appellants' statutory interpretation was directly contrary to this Court's precedent which strongly disfavors any implied repeal of existing law, and instead,

found that the doctrine of prior appropriation can easily exist in harmony with NRS 534.037 and 534.110(7) governing groundwater management plans. JA 2415–16.

(b) *Violation of the Beneficial Use Doctrine*

The district court also ruled that the GMP violates the statutory requirement of NRS 533.035 that water be placed to a recognized beneficial use. JA 2401. As the district court found, "[b]eneficial use depends on a party actually using the water." JA 2401 (quoting *Bacher v. State Engineer*, 122 Nev. 1110, 1116 (2006)). The district court ruled the GMP violates the beneficial use requirement because it provides a mechanism for the automatic perfection of heretofore unperfected (i.e. unused) water rights through the conversion of all water rights—including unperfected and/or unused rights—to shares. JA 2401. The district court ruled this violates the beneficial use requirement because "permit holders who have done nothing to beneficially use water will receive just as many, if not more, shares of water as will holders of water rights who have placed water to beneficial use." *Id*.[3] The district court correctly described the conversion of unused and/or unperfected water rights to shares as a "gift" to those "who have done nothing to place their water to beneficial use…." JA 2401.

[3] *See also* JA 2401–02 ("Under the DVGMP those permit holders who have never proved up their water by placing it to beneficial use could potentially receive more water than those holders who have placed their water to beneficial use.").

The district court ruled that the GMP also violates the statutory beneficial use requirement of the prior appropriation doctrine because the GMP allows for the non-use of water through the water banking scheme. Ruling at 23 (JA 2403).

(c) *Impairment of Senior Vested Rights*

The district court's Ruling determined that the GMP violates NRS 533.085(1) by impairing senior vested surface water rights. JA 2403. The district court ruled that the State Engineer erroneously determined in Order No. 1302 that the State Engineer need not consider the adverse effects of a groundwater management plan on surface water rights. JA 2403. The district court found that the GMP permits 35 years of "continuous pumping … clearly in excess of the 30,000 af perennial yield…." JA 2404; *see also* JA 2389 ("For 35 years, pumping in Diamond Valley will exceed the 30,000 acre-foot perennial yield."). Therefore, the district court found that "the DVGMP on its face fails to reduce the harm caused by overpumping and aggravates the depleted water basin." JA 2404. That continued decline of the groundwater level, the district court ruled, will have "continuing adverse effects on vested surface water rights," which is a violation of the statutory protection of vested rights in NRS 533.085(1). JA 2405.

(d) *Violation of Statutory Water Rights Change Procedures*

The district court's Ruling found that the GMP's water marketing scheme violates the procedures set forth in NRS 533.325 and 533.345 governing the

change in point of diversion, place of use, and manner of use of water rights. JA 2416–19. The district court described how these statutory procedures require the State Engineer to, among other things, "determine what, if any, potential adverse impact is created by the proposed change in well location, location of the use of the water or manner of the proposed use." JA 2417. The district court ruled that, because under the GMP the State Engineer is not required to investigate these impacts pursuant to his statutory mandate, "[t]he 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." JA 2419. Therefore, the Ruling found that the GMP violates these statutory safeguards. JA 2419.

SUMMARY OF THE ARGUMENT

The district court correctly ruled that the Nevada State Engineer's approval of the Diamond Valley Groundwater Management Plan was arbitrary and capricious because the GMP violates the foundational prior appropriation system of Nevada's water law and because it violates other statutory provisions of the water law. By reallocating water from senior users to junior users, the GMP violates the prior appropriation doctrine because it completely abandons the fundamental priority system of allocating the state's scarce water resources which mandates that junior water rights may only be exercised if senior water rights have

first been fully satisfied. The GMP violates the foundational beneficial use doctrine because it allows unused and/or unperfected water rights permits to be used even if they have not met the statutory requirement that they prove their actual use, and because it allows water rights to be exercised without actual use by the novel "water banking" scheme.

In addition to the novel water banking scheme, the GMP also includes an untested free-market water trading scheme that violates the statutory procedures required for the change in point of diversion, place of use or manner of use of all water rights in Nevada. Finally, the GMP violates the statutory protection of senior, vested surface water rights because it allows for another 35 years of continued over-use of groundwater in Diamond Valley that impairs those senior vested rights.

As the district court correctly found, these deviations from Nevada's foundational water law are not expressly authorized by the plain language of the relevant statutes, and are not implied by any reasonable interpretation of those statutes.

ARGUMENT

The district court correctly ruled that the GMP violates multiple provisions of Nevada law. For the Appellants to prevail on appeal, they must show that each and every violation of law found by the district court was erroneous. If this Court

upholds any single finding of a legal violation in the GMP, the district court's Ruling overturning the State Engineer's approval of the GMP will stand.

I. STANDARD OF REVIEW

The State Engineer is empowered to designate a groundwater basin as a "critical management area" ("CMA") when "withdrawals of groundwater consistently exceed the perennial yield of the basin." NRS 534.110(7). Once a basin has been designated as a CMA, if it remains so designated for 10 consecutive years, the State Engineer "shall order withdrawals … be restricted in that basin to conform to priority rights, unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037." *Id*.

Pursuant to NRS 534.037(1), there is only one procedure by which a groundwater management plan may be approved: submission to the State Engineer by petition "signed by a majority of the holders of permits or certificates to appropriate water in the basin," which must be accompanied by the groundwater management plan that sets forth "the necessary steps for removal of the basin's designation" as a CMA. NRS 534.037(2)(a)–(g) provides a list of mandatory, but not exclusive, factors for the State Engineer to consider when determining whether to approve a GMP, including the hydrology of the basin, the physical characteristics of the basin, the spacing and location of the groundwater withdrawals, water quality, the wells–including domestic wells, whether a GMP

already exists, and any other factor deemed relevant by the State Engineer. NRS 534.037(4) provides that the State Engineer's decision to approve or reject a GMP is subject to judicial review pursuant to NRS 533.450.

None of these statutory provisions governing critical management areas and groundwater management plans sets forth any express statement that a groundwater management plan may ignore other parts of Nevada law, be it water law or any other law.

On appeal, a reviewing court must "determine whether the evidence upon which the engineer based his decision supports the order." *State Engineer v. Morris*, 107 Nev. 699, 701 (1991) (citing *State Engineer v. Curtis Park*, 101 Nev. 30, 32 (1985)). Nonetheless, "[w]ith respect to questions of law…the State Engineer's ruling is persuasive but not controlling. Therefore, [courts] review purely legal questions without deference to the State Engineer's ruling." *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 525 (2010) (quoting *Town of Eureka v. State Engineer*, 108 Nev. 163, 165–66 (1992)). A "court has the authority to undertake an independent review of the State Engineer's statutory construction, without deference to the State Engineer's determination." *Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 188 (2008).

II. THE DISTRICT COURT CORRECTLY RULED THE GMP VIOLATES THE TWO FOUNDATIONS OF NEVADA WATER LAW

The two most egregious violations of law contained in the GMP are its violations of the foundational doctrines of prior appropriation and beneficial use.

A. The Doctrines of Prior Appropriation and Beneficial Use

Nevada, like most Western states, is a prior appropriation state. This unique doctrine has its origins in the Gold Rush of 1849, when miners came west in search of gold and their greatest need was to establish rules governing access in territories that effectively lacked governance. The miners adopted the "first come, first served" principle for their gold claims. *See generally In Re Water of Hallett Creek Stream System*, 749 P.2d 324, 330–34 (Cal. 1988), cert. denied 488 U.S. 824 (1988) (discussing the development of water rights in the West). These western miners also needed rules to govern the allocation of water. Because water was scarce, riparian principles from the eastern United States were of little use to them. Accordingly, the miners applied rules to water rights similar to those governing their access to mining claims, staking hierarchical claims to water by physically taking or diverting what they needed and putting it to use. *See e.g. Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163 (1931) (discussing origins of Nevada water law); *Jones v. Adams*, 19 Nev. 78 (1885). This appropriation of water by being the first to physically divert it and put it to beneficial use became known as the "Prior

Appropriation Doctrine." Miners could "stake a claim" to water by being the first to appropriate it, just as they had done for gold.

Thus, from its inception, the prior appropriation doctrine incorporated "first in time, first in right" with regard to water rights, with a preference for senior appropriators' rights compared to subsequently acquired junior interests. *See Steptoe*, 53 Nev. at 171–72. Fundamentally, the prior appropriation system allocates water, particularly in times of scarcity, in relation to one's seniority over another. Seniority of water rights is based upon the priority date of the water right, which was assigned at the time the water is first put to beneficial use. This means that the first person to beneficially use water has a senior right to all those who came after them, i.e. "first in time is first in right." The State Engineer's own website recognizes this foundation of our water law:

> Nevada water law is based on two fundamental concepts: prior appropriation and beneficial use. Prior appropriation (also known as 'first in time, first in right') allows for the orderly use of the state's water resources by granting priority to senior water rights. This concept ensures the *senior uses are protected, even as new uses for water are allocated*.

Div. of Water Resources, Water Law Overview, available at http://water.nv.gov/waterlaw.aspx (accessed Oct. 15, 2020) (emphasis added).

The prior appropriation doctrine also includes a "use it or lose it" principle, so that users who are not making beneficial use of their water rights lose them in

order to free the scarce water for use by others. *See generally Hallett Creek*, 749 P.2d at 467.

The central tenets of the historic prior appropriation doctrine therefore include: 1) the right to use water is obtained by a physical removal of it from its natural location, i.e. "diversion" requirement; 2) the scope of water rights are limited to the amount of water put to a beneficial use ("beneficial use" requirement); 3) the priority of senior in time rights ("first in time, first in right" principle); and 4) the water has to in fact be used, or the right was lost ("use it or lose it" principle). *See Jones v. Adams*, 19 Nev. 78 (1885).

Nevada's prior appropriation doctrine and statutory water rights permitting scheme are embodied in NRS Chapters 533 (primarily governing surface water) and 534 (primarily governing groundwater), which authorize the State Engineer to approve water rights applications for recognized beneficial uses.

> The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many western states. In fact, the principle of beneficial use is so well entrenched in our legal lexicon that the Nevada Legislature declared almost a century ago that "beneficial use shall be basis, the measure and the limit of the right to the use of water."

Desert Irrig. Ltd. v. State of Nevada, 113 Nev. 1049, 1059 (1997) (quoting NRS 533.035). Water appropriated pursuant to a permit must be put to beneficial use within ten years. NRS 533.380(1). Thus, as in all prior appropriation states, proof of a legally cognizable beneficial use and actual use are the *sine qua non* for

obtaining a water right permit in Nevada. NRS 533.035 (beneficial use is the overarching standard for allocation of water rights); NRS 533.070 (quantity of water appropriated limited to that which is reasonably required for the beneficial use to be served).

Finally, undergirding Nevada's statutory water rights scheme is the recognition that water belongs to the public, and the state holds title to it in trust for the benefit of its citizens. NRS 533.025 ("The water of all sources of water supply within the boundaries of the State . . . belongs to the public."). Thus, Nevada law also requires such beneficial uses to be consistent with the public interest. *See* NRS 533.370 (directing the State Engineer to determine whether a use of water may threaten to prove detrimental to the public interest).

These are the bedrock, fundamental tenets of Nevada's prior appropriation doctrine, and they have remained so since outside settlers—including Elwood and Robert Bailey—first arrived to the Nevada territory. *Mineral Co. v. Lyon Co.*, 136 Nev. Adv. Op. 58, *6 (Sept. 17, 2020) ("Nevada's water statutes embrace prior appropriation *as a fundamental principle*. Water rights are given 'subject to existing rights,' given dates of priority, and determined based on relative rights.") (emphasis added) (internal citations removed). The district court correctly ruled that because the GMP violates these fundamental tenets of Nevada water law, the State Engineer's approval of the GMP was arbitrary and capricious.

B. The District Court Correctly Ruled that the GMP Violates the Bedrock Doctrine of Prior Appropriation

1. Under the GMP, Junior Water Rights Are Permitted To Continue Pumping While Senior Water Rights Are Not Satisfied

The GMP violates the fundamental tenets of Nevada's water law because it allows junior groundwater users to continue pumping groundwater even though senior groundwater rights are not satisfied first. As explained above, the GMP's permanent share conversion and annual allocation scheme reduces the Baileys' senior groundwater rights each year, starting at a roughly 36% reduction in Year 1 and ending at a roughly 70% reduction by Year 35, while at the same time allowing groundwater rights junior to the Baileys to continue to be exercised. The State Engineer admits as much in Order 1302: "it is acknowledged that the GMP does deviate from the strict application of the prior appropriation doctrine…." JA 319. The so-called "priority factor" used for the conversion of water rights to shares does nothing to alleviate or solve the abject violation of prior appropriation when reducing the allowable pumping of senior groundwater right holders by limiting their "allocations" of water each year. Even using the arbitrary priority factor, the GMP still violates the prior appropriation doctrine by allowing junior water rights to be exercised even though senior water rights are not fully satisfied. The GMP is, in effect, a scheme to reallocate groundwater resources from those with senior water rights to those with junior water rights.

In their opening briefs, the Appellants concede that the GMP fails to adhere to the prior appropriation doctrine. Their argument is therefore not that the GMP conforms to the law, but that the Nevada Legislature *intended* for all groundwater management plans to violate this bedrock law. *See e.g.* DNRPCA Br. at 29–30; SE Br. at 42. But this argument is not supported by the plain language of NRS 534.037 or NRS 534.110(7), which are not ambiguous. And even if the statutes were ambiguous, interpreting them to allow, or require, a groundwater management plan to ignore fundamental tenets of Nevada water law would violate the rules of statutory construction.

2. The Plain Language of NRS 534.037 and NRS 534.110(7) Does Not Include Any Exceptions to the Prior Appropriation Doctrine

As they did below, the Appellants give lip service to the notion that the plain language of the two statutes at issue expressly provide that a groundwater management plan need not comply with Nevada's bedrock doctrine of prior appropriation. DNRPCA Br. at 29; SE Br. at 40. The Appellants' appeals to the plain language, however, entirely fail to analyze the actual text of the statutes and therefore violate the first rule of statutory interpretation. *Mineral Co. v. Lyon Co.*, 136 Nev. Adv. Op. 58, *9 ("When the language of a statute is plain and unambiguous, this court should give that language its ordinary meaning and not go

beyond it.") (quoting *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891 (1989)).

Instead of conceding the obvious fact that the plain language of NRS 534.037 and 534.110(7) do not contain any express language that excludes groundwater management plans from the bedrock prior appropriation system of water laws, the Appellants' arguments with respect to the plain language discuss their mistaken view of the *policy* or *intent* of the statutes, not an analysis of the text itself. SE Br. at 40 (arguing that the "plain language of these statutes *shows the Legislature's intent* to allow local communities" to come up with a plan "other than strict application of prior appropriation"); DNRPCA Br. at 29 (arguing that "the statute…*embodies the Legislature's policy decision* to not enforce the prior appropriation system"). But when the plain language is clear, arguments about the policy or intent are irrelevant because the language, not the intent, controls. *McKay v. Board of Supervisors*, 102 Nev. 644, 648 (1986) ("Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.") (citing *Thompson v. District Court*, 100 Nev. 352, 354 (1984); *Robert E. v. Justice Court*, 99 Nev. 443 (1983)); *see also In re Nev. State Eng. Ruling No. 5823*, 128 Nev. 232, 239 (2012) ("we do not inquire what the legislature meant; we ask only what the statute means") (quoting Oliver Wendell Holmes, Collected Legal Papers 207 (1920)); *Washoe Med. Ctr. v. Second*

Jud. Dist. Ct., 122 Nev. 1298, 1302 (2006); *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95 (2001) ("in circumstances where the statute's language is plain, there is no room for constructive gymnastics, and the court is not permitted to search for meaning beyond the statute itself."). *Bostock v. Clayton Co., Georgia*, 140 S.Ct. 1731, 1754 (July 15, 2020) ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."). As demonstrated below, however, there is no express language in either statute that exempts a groundwater management plan from any provision of law, much less *every* provision of law.

The statutes at issue and which require interpretation are, in relevant part, as follows:

> **NRS 534.037**
>
> 1. In a basin that has been designated as a critical management area by the State Engineer pursuant to subsection 7 of NRS 534.110, a petition for the approval of a groundwater management plan for the basin may be submitted to the State Engineer. The petition must be signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer and must be accompanied by a groundwater management plan which must set forth the necessary steps for removal of the basin's designation as a critical management area.
>
> 2. In determining whether to approve a groundwater management plan submitted pursuant to subsection 1, the State Engineer shall consider, without limitation:
>
> (a) The hydrology of the basin;
>
> (b) The physical characteristics of the basin;

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

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

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

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

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

NRS 534.110(7) The State Engineer:

(a) May designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.

[***]

→ The designation of a basin as a critical management area pursuant to this subsection may be appealed pursuant to NRS 533.450. If a basin has been designated as a critical management area for at least 10 consecutive years, the State Engineer shall order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights, unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037.

For a statute to *unambiguously* permit a GMP to violate Nevada water law, it would need to include very clear language, such as 'A groundwater management plan created pursuant to this act is not required to comply with Nevada's prior appropriation law.' There is, of course, no such language in the above statutes. They simply do not contain any *express language* that exempts a groundwater management plan from existing law. Had the Legislature intended to expressly repeal the prior appropriation doctrine, or any other law, in the context of groundwater management plans, it would have explicitly said so. *State Indus. Ins. Sys. v. Woodall*, 106 Nev. 653, 657 (1990) (had the Legislature intended a

particular result, it "would have indicated as much in the statutes themselves so the judiciary would not be required to divine such a rule out of thin air."). The terms "repeal," "replace," "abrogate," etc. do not appear in either NRS 534.037 or NRS 534.110(7).

The Appellants attempt to get around this by arguing that because NRS 534.110(7) includes an express provision mandating *when* the State Engineer is *mandated* to curtail by priority—namely if a groundwater management plan has not been approved within 10 years of a basin's designation as a critical management area—then a corollary should also be true: regulation by priority is *prohibited* if a groundwater management plan has been approved. DNRPCA argues this "embodies the Legislature's policy decision to ***not*** enforce the prior appropriation system…." DRNPCA Br. at 29; *see also* SE Br. at 41. First, this is not, as the Appellants claim, an argument based on the plain text of the statute—it is an argument that seeks to draw an implication based on the plain text. The statute does not expressly state that the laws of prior appropriation do not apply if a groundwater management plan has been approved; it only expressly states that the State Engineer *shall* curtail water rights by priority if a groundwater management plan has not been approved.

The Appellants' argument reads far too much into the actual text. The only exception created by NRS 534.110(7)'s mandate to curtail by priority absent a

groundwater management plan is to the State Engineer's otherwise discretionary authority to implement curtailment by priority, which is found in the preceding subsection of the same statute. NRS 534.110(6) makes that abundantly clear (with emphasis added): "*Except as otherwise provided in subsection 7*, … the State Engineer *may* order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights." NRS 534.110(7) does not, as Appellants argue, dictate when the State Engineer *cannot* enforce priorities, it dictates when he *must* do so. It is therefore not true, as Appellants claim, that these statutes contain any express legislative direction prohibiting the prior appropriation system's remedy of curtailment by priority if a groundwater management plan has been approved. As the district court correctly found, NRS 534.110(7), by its express terms, does not take away the State Engineer's discretion to implement curtailment during the 10-year period of groundwater management plan development, or any time thereafter. Ruling at 16 (JA 2396).

Second, this argument erroneously conflates the entire prior appropriation system with a single aspect of it, namely the remedy of curtailment by priority. But the prior appropriation system is just that—an entire *system of laws*, and cannot be reduced to a single remedy. NRS 534.110(7) only expressly mentions that single aspect of the entire prior appropriation system, yet the Appellants ask the Court to construe the Legislature's limited direction regarding when the State

Engineer is mandated to curtail by priority as a wholesale reworking of the entire bedrock water law of Nevada. *See e.g.* SE Br. at 47 ("The Legislature clearly envisioned a GMP process whereby a majority of groundwater users could create a plan to reduce pumping *that exists outside of the other strict confines of water law*.") (emphasis added). There is obviously no such authority in the plain text of the statute.

Therefore, the district court correctly ruled that the groundwater management plan statutes do not expressly exclude groundwater management plans from complying with the bedrock prior appropriation doctrine. Ruling at 31–32 (JA 2411–12) ("The court finds that the express language of NRS 534.037 and NRS 534.110(7) do not allow a GMP to violate the doctrine of prior appropriation by reducing the amount of water a senior right holder is entitled to put to beneficial use under its permit/certificate.").

Although not necessary in light of the actual plain text of the statutes, the district court also noted, after discussing the lack of any express statements in support of abrogating the prior appropriation system in the 2011 legislative history of AB 419 (Ruling at 34–35 (JA 2414–15))[4], that even the State Engineer had

[4] In fact, the district court noted that the opposite is true: the 2011 legislative history of AB 419 shows that the bill's sponsor explained that "junior users would bear the burden" and "[p]eople with junior rights will try to figure out how to conserve enough water under these plans." Ruling at 34 (JA 2414) (quoting Min. of Sen. Cmte. on Gov. Affairs at 16 (May 23, 2011)).

previously admitted that the statutes lacked the necessary language to exempt the GMP from the prior appropriation doctrine. Ruling at 36 (JA 2416). The Appellants fault the district court for considering these past statements of the State Engineer because they were made in the context of opining on unpassed legislation (SE Br. at 50), or because they were made in the context of a prior draft GMP (DNRPCA Br. at 42–43), or because the State Engineer is not bound by his prior statements (*id*. at 43).

But the district court's discussion of the State Engineer's prior position that the groundwater management plan statutes, on their own, lacked the authority for the GMP to ignore the prior appropriation system was intended only to lend further support to the notion that the groundwater management plan statutes are not ambiguous, which even the State Engineer at one time recognized. It may be true that the State Engineer's position changed, but it's also true that the State Engineer previously supported the Baileys' and the district court's conclusion that the statutes lack any plain language abrogating the prior appropriation doctrine. Ruling at 36 (JA 2416) ("the fact that the State Engineer specifically sought 2017 legislation [to exempt groundwater management plans from the prior appropriation system] *demonstrates the State Engineer's knowledge that NRS 534.037 and NRS 534.110(7) as enacted did not either expressly or impliedly allow for a GMP to violate Nevada's prior appropriation law*.") (emphasis added). Even if the district

court's consideration of the State Engineer's prior legal interpretation was in error, that error was harmless because it was not the sole, much less the primary, ground upon which the district court reversed Order 1302, and therefore would not have changed the district court's decision to overturn Order 1302.

3. Statutory Interpretation Does Not Evince Any Exceptions to the Prior Appropriation Doctrine

Because NRS 534.037 and 534.110(7) are not ambiguous, it is not necessary to proceed with statutory interpretation to determine whether they authorize departure from Nevada law. *In re Orpheus Trust*, 124 Nev. 170, 174 (2008) (citing *Erwin v. Nevada*, 111 Nev. 1535, 1538–39 (1995)) (when the language of a statute is unambiguous, courts are not to look beyond the statute itself when determining its meaning). Only when a statute is susceptible to more than one reasonable but inconsistent interpretations is the statute ambiguous, and this Court will resort to statutory interpretation in order to discern the intent of the Legislature. *Orpheus Trust* at 174 (citing *Gallagher v. Las Vegas*, 114 Nev. 595, 599 (1998)). However, because the statutes' express language obviously does not provide any such exception, the Appellants' only hope is to find support by arguing that the statutes are ambiguous so that the Court will undertake statutory interpretation either by appeal to legislative history and/or through necessary implication. The district court correctly rejected these arguments as well.

DNRPCA and the State Engineer argue that the Legislature enacted the groundwater management plan statutes in order to avoid the potential harsh results of curtailment by priority in a groundwater basin. Therefore, they argue, the Legislature could not have intended that a groundwater management plan must adhere to the prior appropriation doctrine. DNRPCA Br. at 30; SE Br. at 48–50. Again, this argument conflates the specific remedy of curtailment by priority, with the much broader system of prior appropriation generally. Even if the Legislature hoped to avoid curtailment by priority via groundwater management plans,[5] it does not follow that the Legislature thereby intended that any such plan could violate the very foundations of the State's water laws. The remedy of curtailment by priority is only a part of, and not the entirety of, the prior appropriation system. Yet the Appellants claim that the only way a groundwater management plan can satisfy the Legislature's intent to avoid curtailment is by throwing out the entire body of prior appropriation water law.

The Appellants also argue that the Legislature must have intended to allow a groundwater management plan to violate prior appropriation because to interpret the statutes otherwise would render the them useless. SE Br. at 45; DNRPCA Br.

[5] If Appellants are correct that these statutes were passed because neither the Legislature nor the State Engineer wanted to see curtailment by priority, then it is confounding that the statutes included conditions under which mandatory curtailment by priority is required. It is a peculiar thing to argue that the legislature's intent was to avoid the exact thing it explicitly mandates in the statute.

at 33–34. They argue that the effects of curtailment by priority are draconian and threaten to destroy the entire socioeconomic fabric of Diamond Valley. *Id.* This argument presents a false choice by claiming that the only options available to address the over-appropriation of the Diamond Valley aquifer are to either curtail by priority or to create a groundwater management plan that abolishes the entire prior appropriation system for Diamond Valley. But as the district court correctly explained, there are many other options available that would both meet the legislative intent of the statute to bring water use into balance with nature and not require violating the foundations of the water law.

The district court described several hypothetical solutions that could have been employed in a groundwater management plan that could reduce demand on the aquifer and continue to comply with the prior appropriation system. Ruling at 32 (JA 2412) (describing junior pumping reductions, a voluntary water market scheme, a rotating water use schedule, cancellation of unused water rights, restriction of new wells, a funded water rights purchase program, implementation of best farming practices, equipment upgrades, a shorter irrigation season). The State Engineer responds that the district court's discussion is irrelevant because the State Engineer is only permitted to either grant or deny a petition for approval of a groundwater management plan. SE Br. at 26–28; *see also* DNRPCA Br. at 32 ("the Legislature directed stakeholders, not a court, to develop a GMP"). But this

misses the point: the district court was not claiming it was the State Engineer's role, or the court's, to craft a legally compliant plan; the district court was simply responding to the Appellants' argument—that no plan can work unless it ignores the entire prior appropriation system—by describing concepts that defeat that argument. The State Engineer's argument that he is not permitted to provide input on groundwater management plans is also belied by the fact that the State Engineer did, in fact, provide input during the development of the GMP. SE Br. at 29 ("Rather than acting as a black box, and requiring water users to submit a GMP blindly, the State Engineer and DWR staff were willing to provide expertise when requested.").

4. Implied Repeal of Existing Law is Strongly Disfavored

One of the strongest reasons for rejection of the Appellants' statutory interpretation argument is because of the canon of statutory construction that strongly disfavors finding an implied repeal of existing law. *See e.g.* Ruling at 35 (JA 2415). Repeal by implication is heavily disfavored in Nevada:

> Where express terms of repeal are not used, *the presumption is always against an intention to repeal an earlier statute*, unless there is such inconsistency or repugnancy between the statutes as to preclude the presumption….

W. Realty Co. v. City of Reno, 63 Nev. 330, 344 (1946) (emphasis added) (quoting *Ronnow v. City of Las Vegas*, 57 Nev. 332, 364–65 (1937)); *see also id*. ("Where two statutes are flatly repugnant, the later, as a general rule, supplants the

earlier."); *Washington v. State*, 117 Nev. 735, 739 (2001) (repeal by implication "is heavily disfavored, and we will not consider a statute to be repealed by implication unless there is no other reasonable construction of the two statutes."); *Thomas v. Yellow Cab*, 327 P.3d 518, 521 (2014) ("The presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist."); *Ramsey v. City of N. Las Vegas*, 392 P.3d 614, 629 (Nev. 2017) ("a newer provision impliedly supersedes the older *when the two are irreconcilably repugnant*, such that both cannot stand.") (emphasis added).

For the Court to find that the groundwater management plan statutes repealed Nevada water law by implication, it must first determine that the groundwater management plan statutes and the prior appropriation doctrine are "flatly repugnant" to each other and conflict with each other "to the extent that both cannot logically coexist." That is a very high burden, and the Appellants have failed to meet it.

This is another reason the district court's Ruling included a short discussion of alternative potential groundwater management plans—not because they should have been mandated by the State Engineer in Diamond Valley, but to show by way of example that it is possible to create a plan that harmonizes the prior appropriation doctrine with the legislature's intent to avoid the remedy of strict curtailment by priority. *See e.g.* Ruling at 32 (JA 2412); *see also Hefetz v. Beavor*,

133 Nev. Adv. Rep. 46, 397 P.3d 472, 475 (2017) ("When construing statutes and rules together, this court will, if possible, interpret a rule or statute in harmony with other rules and statutes") (citing/quoting *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418 (2006); *Orion Portfolio Servs. 2, LLC v. County of Clark*, 126 Nev. 397, 403 (2010) ("This court has a duty to construe conflicting statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."). Therefore, the State Engineer in Order 1302 should have interpreted any ambiguity in NRS 534.037 and 534.110(7) in such a way that they are harmonized with the prior appropriation doctrine, not repugnant to it. The State Engineer's failure to do so by approving the anti-prior appropriation GMP constitutes an error of law that the district court correctly concluded was an arbitrary and capricious decision by the State Engineer in Order 1302. Ruling at 35–36 (JA 2415–16) ("The doctrine of prior appropriation can logically exist in harmony with NRS 534.037 and 534.110(7) and allow for GMPs to address the water issues present in a particular CMA basin. The court finds that neither NRS 534.037 nor NRS 534.110(7) are in conflict with the prior appropriation doctrine.").

5. The Seven Statutory Criteria of NRS 534.037 Do Not Stand in the Place of the Prior Appropriation System

The Appellants argue that as long as the State Engineer is satisfied that a groundwater management plan meets the seven technical considerations of NRS

534.037, the plan need not comply with any other provision of the water law. SE Br. at 18 (NRS 534.037 factors are an "adequate safeguard" that "allow the GMP process to exist as a substitute for other remedies in prior existing law"); DNRPCA Br. at 31–32 (NRS 534.037 "ensures orderly basin management … in lieu of enforcing priorities"). This argument is absurd on its face. Not only is there no textual support in either NRS 534.110(7) or NRS 534.037 for this drastic interpretation of law, it ignores the administrative nature of the seven factors that guide the State Engineer's analysis of a groundwater management plan. But the State Engineer is not excused from analyzing whether a groundwater management plan complies with other applicable provisions of law.

The Appellants' argument that the seven technical criteria of NRS 534.037 for the State Engineer's review of a groundwater management plan is an adequate replacement for the entire prior appropriation system of water law in Nevada is also contrary to this Court's recent decision in *Mineral Co. v. Lyon Co.*, where the Court ruled that the public trust doctrine does not abrogate the finality of water rights granted under the prior appropriation system. There, this Court ruled that the public trust doctrine, as important as it may be, does not override the importance of finality in the allocation of water use in the state. "The statutory water scheme in Nevada therefore expressly prohibits reallocating adjudicated water rights that have not been abandoned, forfeited, or otherwise lost pursuant to

an express statutory provision." *Mineral Co. v. Lyon Co.*, 136 Nev. Adv. Op. 58, at *9. Similarly, merely because a groundwater management plan satisfies the technical criteria set forth in NRS 534.037 does not override the importance of the finality afforded to the relative priority of senior water rights. *See id*. ("We note that such recognition of finality is vital in arid states like Nevada. [T]he doctrine of prior appropriation…is itself largely a product of the compelling need for certainty in the holding and use of water rights. [***] To permit reallocation would … undermine the public interest in finality and thus also the management of these resources….") (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). This Court, recognizing the potential "resulting negative impacts on the wildlife, resources, and economy in Mineral County" in refusing to reallocate water rights granted under the prior appropriation system, nonetheless declined "to uproot an entire water system, particularly where finality is firmly rooted in our statutes." *Id*. at *10. It is the same here: the Legislature's creation of a groundwater management plan approval process, including seven technical criteria that must be satisfied in order for the State Engineer to approve a plan, cannot stand in the place of the entire prior appropriation system in Nevada, as the Appellants argue.

DNRPCA also argues that, by "confining the State Engineer to strict enforcement of priorities," the district court "deprived him of the implied powers granted by statute to regulate water for the common good." DNRPCA Br. at 40.

DNRPCA argues that NRS 534.120(1) and (2) confer on the State Engineer an implied power to approve a groundwater management plan that ignores the prior appropriation system of laws if it is necessary "for the welfare of the area involved," as long as the State Engineer finds at groundwater management plan complies with the criteria of NRS 534.037. *Id*. at 41. First, there is, of course, no support in the text of any of the relevant statutes, or any other statutes, for the argument that the State Engineer's *administrative* authority to make rules and regulations for the public welfare includes the *implied* power to approve a groundwater management plan that jettisons the foundations of Nevada's water law.

Second, DNRPCA misstates the district court's ruling that the State Engineer retains his full regulatory authority even in a basin for which he has approved a groundwater management plan. The district court's discussion was in response to the Appellants' argument below that the Legislature intended to remove the restrictions of prior appropriation, including the State Engineer's authority to enforce them, in a basin that has been designated as a critical management area and for which a groundwater management plan had been approved. Presented with that argument, the district court responded with the proper adjective: ludicrous. *See e.g.* Ruling at 16 (JA 2396). DNRPCA now seeks to use the district court's words in a way they were not intended by arguing that the

district court's recognition that the State Engineer has broad powers to regulate water even when a groundwater management plan has been approved, means that the district court has the *implied* statutory authority to approve a plan that ignores Nevada water law. That, of course, is not what the district court's Ruling meant.

6. *State Engineer v. Lewis* Was Not a Deviation From the Prior Appropriation System

DNRPCA faults the district court for rejecting any reliance on the New Mexico case *State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006) as an alleged example of a court upholding a water management plan that does not adhere to the prior appropriation doctrine. DNRPCA Br. at 43. But the district court correctly determined that *Lewis* was not instructive because it was wholly distinguishable on its facts. Ruling at 29–30 (JA 2409–10).

First, *Lewis* was a challenge to a U.S. Supreme Court-mandated settlement agreement over an interstate stream, the Pecos River in New Mexico and Texas, that would use public funds to resolve interstate water rights conflicts. One stated goal of the settlement agreement was to stay true to the Western prior appropriation doctrine. *Lewis* at 376 ("The present case involves the attempt by the State of New Mexico, the United States, and irrigation entities through a settlement agreement to resolve difficult long-pending water rights issues through public funding, *without offending New Mexico's bedrock doctrine of prior appropriation*, and without resorting to a priority call.") (emphasis added).

Therefore, *Lewis*, unlike the GMP, found a way to both comply with the prior appropriation doctrine and avoid curtailment by priority.

For Diamond Valley there is no settlement agreement mandated by the U.S. Supreme Court. There is no public funding to mitigate impacts to senior groundwater rights, or to otherwise help to resolve the challenges. And there was no attempt by the GMP proponents to avoid offending the bedrock prior appropriation doctrine—the Appellants expressly admit that the GMP does not follow the prior appropriation doctrine. The underlying facts and context of *Lewis* therefore show that it is not applicable to the present circumstances.

Furthermore, the shortage plan at issue in *Lewis* had a much stronger legal basis than the GMP because the *Lewis* plan was codified into law by the New Mexico legislature. *Lewis* at 379 ("A consensus plan was submitted to the New Mexico Legislature, resulting in a substantial appropriation of funds for implementing the key elements of the plan. The plan was essentially endorsed when the legislature enacted [the compliance statute] for the express purpose of achieving compliance with New Mexico's obligations under the compact."). Here, of course, the GMP has not been endorsed or ratified by the Nevada Legislature, so even if there was a deviation from the prior appropriation doctrine in the *Lewis* case (which there was not) that could be fairly determined to have been approved by the New Mexico legislature, there is no fair interpretation that the Nevada

Legislature has sanctioned or ratified the severe departures from Nevada law in the GMP.

The legal posture of *Lewis* is also different than the GMP because *Lewis* was ultimately an adjudication of water rights, i.e. a determination in the first instance of each party's individual water rights. Here, while there is a pending adjudication of Diamond Valley water rights, the State Engineer deliberately refused to wait for it to conclude before approving the GMP. Furthermore, in *Lewis* the individual irrigators who objected to the settlement agreement were not the fee owners of the water rights—those irrigators were part of the Carlsbad Irrigation District, which actually owned the water rights and distributed the water to the individual irrigators. *Lewis* at 388 ("As an irrigation district, the CID's board can act as it, in the exercise of its discretion and judgment, believes best for all members of the CID. Although [the individual objecting irrigators] demand a priority call to shut down junior users until senior users' water entitlements are assured and satisfied, they nowhere provide authority stating that individual CID members are authorized to request and obtain such priority enforcement.") (internal quotations and citations omitted). That is obviously a significant legal difference than Diamond Valley, where the Baileys as senior water rights owners are not subject to or dependent upon delivery of their water by an irrigation district with global ownership of the water rights. That difference is highly relevant because, in *Lewis*, it meant that the

irrigation district was able to enter the settlement agreement, even if it may have had an adverse impact on one or more individual members' water delivery.

Although the court in *Lewis* framed the settlement at issue as "a process more flexible than strict priority enforcement," the Appellants' reliance on that phrase in support of the GMP is misplaced. *See Lewis* at 385. The *Lewis* court's discussion of the flexibility afforded under the settlement agreement was based entirely upon the fact that New Mexico had appropriated substantial funds to purchase water rights to address the shortage:

> By its silence as to strict priority enforcement and *its express intent to attempt resolution through land and water rights purchases through public funding*, we also read the compliance statute as intending the land and water rights purchases, and perhaps other actions, to be a first response to the shortage and Compact compliance concerns, rather than resort to a priority call as a first or exclusive response.

Lewis at 385 (emphasis added). In other words, before curtailing by priority, they would purchase water rights to reduce demand. In that way, strict priority enforcement was not the only option. Here, of course, any notion of a resort to public funding as a primary response to the extreme overappropriation of the Diamond Valley aquifer is conspicuously absent from the GMP. Such public funding was obviously the primary driver of the New Mexico court's determination that the *Lewis* settlement agreement did not violate the prior appropriation doctrine.

There are other significant and important differences between the *Lewis* settlement agreement and the Diamond Valley GMP. The New Mexico court was satisfied that senior water rights holders were protected because of mitigation measures included in the settlement agreement. *Lewis* at 286 ("The relevant provisions [of the New Mexico statutory water law] do not by their terms require strict priority enforcement through a priority call *when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods*.") (emphasis added); *see also id*. ("such a fixed and strict administration is not designated in the constitution or law of New Mexico … where senior users can be protected by other means."). There is additional protection of senior water rights in the *Lewis* settlement agreement because the relevant provisions complained of by the senior water rights users were not automatically and permanently invoked, rather they would only have been invoked if the downstream users in Texas did not receive their water under the interstate compact. *Id*. at 286.

None of the protections of senior rights in the *Lewis* settlement agreement are present in the Diamond Valley GMP. To the contrary, upon the State Engineer's approval of the GMP by Order 1302, the Baileys were subject to immediate and increasingly drastic restrictions in their senior rights to pump groundwater.

Finally, *Lewis* is actually an example of employment of alternative remedies during times of shortage that are neither strict curtailment (or as used there, a "priority call") nor violations of the prior appropriation system. *Lewis*, of course, found both that the plan at issue there complied with prior appropriation and avoided strict curtailment by priority, showing that both can be done. *Lewis* at 376 ("The present case involves … a settlement agreement to resolve difficult long-pending water rights issues … *without offending New Mexico's bedrock doctrine of prior appropriation, and without resorting to a priority call*.") (emphasis added). *Lewis* therefore, in addition to not being applicable on its facts, also does not even stand for the proposition for which the Appellants cite it.

Therefore, the district court correctly declined to imbue the New Mexico *Lewis* case with the precedential value of a state allowing a water shortage plan to wholly deviate from the bedrock prior appropriation system. Without *Lewis*, the Appellants have no other judicial precedent for the fundamental changes they seek to achieve in the GMP.

7. Past Instances of Legislative Changes to the Prior Appropriation Doctrine Each Employed Express Language

DNRPCA argues now, as it did below, that the prior appropriation doctrine is not the "stone-etched" foundation of Nevada's water law that the Baileys claim and that the district court found. In support of this argument, DNRPCA provides two examples of prior legislative acts that altered aspects of the prior appropriation

doctrine. DNRPCA Br. at 36–39. DNRPCA faults the district court's Ruling for not addressing this argument. *Id*. at 39. That may be because those instances are so easily distinguishable from the present dispute.

DNRPCA discusses the passage of a bill that eliminated statutory forfeiture, and drastically altered statutory abandonment, for surface water rights. That bill, known as AB 380 (1999), contained the exact *express terms* accomplishing those limited changes to the prior appropriation doctrine that AB 419 establishing the groundwater management plan authorities lacked. Of course, the question presented here is not *whether* the Legislature can statutorily alter the prior appropriation doctrine (which it undoubtedly can), the question is whether it did so here in the absence of any clear statutory language.

AB 380 was a legislative compromise of a seemingly intractable legal fight among several major stakeholders in the Truckee-Carson River systems. Those stakeholders—the Truckee-Carson Irrigation District, Pyramid Lake Paiute Tribe, City of Fallon, Churchill County and Sierra Pacific Power Company—submitted joint testimony in favor of AB 380 before the Senate Committee on Natural Resources. JA 1931–32 (recounting years of litigation in the federal courts and before the State Engineer regarding claims that numerous irrigation water rights had been forfeited or abandoned, which threatened to consume untold resources of the State of Nevada). So, as explained by the joint stakeholder testimony, AB 380

was intended to "provide a stimulus" for the resolution of the legal challenges and dismissal of the litigation by "provid[ing] a funding mechanism for the acquisition of water rights" and by providing that "surface water rights are not subject to forfeiture and set out specific guidelines regarding abandonment". *Id*. at JA 1934. Specifically, AB 380 provided for the *voluntary acquisition, retirement and abandonment* of 6,500 acres of irrigation surface water rights (approximately 23,000 to 29,000 acre-feet) using funds dedicated for that purpose. *Id*. at JA 1935. Those funds, totaling approximately $13,500,000, were provided by the State of Nevada, the United States and Reno municipal and industrial water users. *Id*. There were, however, strict conditions on the acquisition of water rights using this fund: "Surface water rights are to be acquired *only from willing sellers*." *Id*. (emphasis added). Once 6,500 acres of land and associated water rights had been taken out of use through this program, the litigation and legal challenges would be dismissed. *Id*. at JA 1936. As to the statutory change necessary to effectuate the removal of forfeiture from Nevada's water law, the Legislation did so expressly and clearly by repealing the existing forfeiture law and replacing it with a new provision that "expressly provides that a right to the use of surface water cannot be lost by nonuse alone." *Id*. at JA 1937; *see also id*. at JA 1942.

DNRPCA is correct that AB 380 was a drastic change in law that effected the rejection of one component of the prior appropriation doctrine; but that

rejection was clear and express and its effects on the stakeholders were accepted and mitigated with millions of dollars of funding for voluntary water rights retirements. Here, of course, there is nothing of the sort. As set forth above, the groundwater management plan statutes lack any text repealing the prior appropriation doctrine, or any part of it; no funds have been provided to mitigate the impact of taking of private property rights in water through the mandatory water rights conversion and reduction scheme; and there is nothing voluntary about the water rights reductions of the GMP. The comparison to 1999's AB 380 therefore is quite instructive, but it strongly supports the notion that a drastic change of the underpinnings of Nevada's prior appropriation law must be done clearly, expressly and preferably with an eye toward mitigating the impacts to those who would be harmed by such a change, none of which is the case with respect to the Appellants' claim that the groundwater management plan statutes impliedly repealed prior appropriation in order for the Diamond Valley majority to adopt Mr. Young's market-based water banking scheme that redistributes private property rights.

DNRPCA also discusses the 1955 addition of the "preferred use" statutory authority to the State Engineer's quiver for designated groundwater basins. DNRPCA Br. at 38–39 (citing NRS 534.120(2)). This statute, of course, did not repeal the entirety of the prior appropriation system, it simply allows the State

Engineer, as between pending *applications* for groundwater rights, to grant the one that requests water for a use that the State Engineer has deemed a preferred use. But the preferred use authority by its statutory terms applies only to *applications* for water rights, not to water rights permits or certificates. This is hardly the wholesale abrogation of the prior appropriation system advocated by the Appellants herein.

C. The GMP Violates the Doctrine of Beneficial Use

The beneficial use doctrine serves the hugely important policy goal of allocating the State's scarce water resource to those who will actually *use* it. The GMP violates the beneficial use doctrine by creating a new and untested use of water that does not require *immediate, actual* use, i.e. water banking, and by allowing previously unused water rights (or portions thereof) that have not proven their actual beneficial use to be automatically and permanently perfected by converting them to shares. Neither of these violations of the prior appropriation doctrine are expressly permitted in the language of the groundwater management plan statutes, and the Appellants' legal arguments therefore suffer from the same defects discussed above regarding the priority of water rights.

1. The GMP Violates the Beneficial Use Requirement Because It Automatically Perfects Previously Unperfected Water Rights

Like priority, the beneficial use doctrine is foundational to Nevada's water law. "Beneficial use shall be the basis, the measure and the limit of the right to the

use of water." NRS 533.035; *see also Application of Fillippini*, 66 Nev. 17, 21–22 (1949) ("The term 'water right' means generally *the right to divert water by artificial means for beneficial use* from a natural spring or stream. When we speak of the owner of a 'water right' we use the term in its accepted sense; that is to say, that the owner of a water right does not acquire a property right in the water as such, at least while flowing naturally, but a right gained to use water beneficially which will be regarded and protected as real property.") (emphasis added) (citing *Boyceet ux. v. Killip et ux.*, 184 Ore. 424, 198 P.2d 613 (Ore. 1948); *Nenzel et al. v. Rochester Silver Corp.*, 50 Nev. 352 (1927)). The notion of beneficial use, of course, contains within it the notion of *actual use* of the water right. Thus, a water right permit gives the holder the right to develop her use of the water; but for a water right to become fixed and permanent, the holder must demonstrate that she has actually beneficially used the water right. *See generally* NRS 533.380. Once the proof of beneficial use is filed, the water right is "perfected" for the amount actually beneficially used, and a final water right certificate for only that amount is issued by the State Engineer. NRS 533.425.

Often, a water right permit is issued but the owner never actually develops the water right and water under the permit is never put to beneficial use, and thus is never perfected. This is known colloquially as a "paper" water right. As the Appellants describe, a paper water right can exist as both all or a portion of a

newly granted water right permit, or all or a portion of a permit that was granted to change a previously certificated water right. In Diamond Valley in 2016, for example, there were approximately 50,000 acre-feet worth of water rights that may not have been exercised. Order 1302 at 2 (JA 316) ("Approximately 126,000 acre-feet annually (afa) of irrigation groundwater rights are appropriated in Diamond Valley, and as of 2016, groundwater pumping was estimated to be 76,000 afa."). Although not all 50,000 acre-feet water rights are correctly referred to as "paper water rights," some amount of the groundwater irrigation water rights in Diamond Valley are paper water rights that are not actually being beneficially used. The GMP and the State Engineer failed to quantify the amount of unused water rights subject to the GMP that were converted to shares.

The GMP converts all irrigation groundwater rights, including unperfected paper water rights that have not proven their beneficial use, into shares and assigns them annual pumping allocations. GMP Sec. 18.1 (JA 553–54) (expressly excluding only vested irrigation, stockwater, municipal, commercial, and mining water rights from the GMP); *see also* Order 1302 at 9–10 (JA 323–24). By converting paper groundwater rights to shares and assigning them annual allocations, the GMP allows the holders of paper water rights to exercise the newly created "water banking" provisions of the GMP. As explained above, once an allocation is banked, it is available to be freely transferred to any other account-

holder to be withdrawn from the aquifer at any point in the future and from any other well in Diamond Valley. Therefore, upon conversion to shares and then banking the annual allocations to those shares, an unperfected paper water right has now been "exercised" and stored for later use. In other words, water banking itself has become a beneficial use of water, without any statutory amendment by the Legislature or other necessary legal act to confirm a new beneficial use—and, more importantly, without ever having actually diverted and used the water to perfect the water right.

This is an extraordinary and fundamental change to Nevada water law, and is a violation of the beneficial use doctrine. As set forth above, "proving up" a water right to convert it from a permit to a certificate requires actually beneficially using the water granted under the permit. *See also* NRS 533.045 ("Right to divert ceases when necessity for use does not exist. *When the necessity for the use of water does not exist, the right to divert it ceases*, and no person shall be permitted to divert or use the waters of this State except at such times as the water is required for a beneficial purpose.") (emphasis added). Except that now, under the GMP in Diamond Valley, that is no longer the case. Under the GMP, shares and allocations to the aquifer can now be "banked" in the aquifer itself instead of being pumped and beneficially used.

When an unperfected paper water right is converted to shares and the allocations are banked, it is theoretically put to beneficial use without ever having actually been put to beneficial use. This violates a bedrock principal of prior appropriation law. The district court correctly refused to condone it. Ruling at 21 (JA 2401) ("permit holders who have done nothing to beneficially use water will receive just as many, if not more, shares of water as will holders of water rights who have placed water to beneficial use.").

In their briefs, the Appellants claim that by including paper water rights in the GMP, they removed the incentive to pump additional water to perfect those unused water rights. SE Br. at 36; DNRPCA Br. at 55. Thus, argue the Appellants, requiring the GMP to exclude unused paper water rights would create a disincentive to water conservation, defeating the goal of the groundwater management plan statutes. This argument is another red herring: by *including* previously unused water rights, the GMP creates a pathway for them to be pumped in the future in the form of banked water allocations. The conservation achieved by banking previously unused water is therefore illusory—that water will be pumped in the future.

It was arbitrary and capricious for the State Engineer to approve the GMP without even attempting to quantify the effects on perfected water certificate holders through the allowance of shares for unused paper water rights. For

example, the State Engineer should have determined how quickly the GMP's goal of basin equilibrium could have been reached had the GMP refused to allow any shares for unused paper water rights. Similarly, the State Engineer should have analyzed whether perfected, certificated water right holders could have been granted additional shares for their water rights, while achieving the same aquifer equilibrium in the same 35 year period, by reducing the shares granted to unperfected water rights. Instead, the State Engineer approved the GMP's punishment of certificated water rights holders by awarding paper water rights holders shares for water rights that have never been put to beneficial use.

2. The GMP's Water Banking Scheme Violates Nevada's Beneficial Use Requirement

As set forth above, the GMP allows banking of unused annual water allocations. This banking scheme violates Nevada's beneficial use doctrine because it allows for water rights to be used for water banking, which is not a recognized beneficial use under Nevada law.

Acceptable and recognized beneficial uses are defined both by statute and by "longstanding custom." *See State v. Morros*, 104 Nev. 709, 716 (1988). Water banking, being a novel concept in Nevada, enjoys neither statutory support nor longstanding custom as a beneficial use of water. While Nevada law recognizes water storage, including underground aquifer storage, as a beneficial use of water,

in all cases such water storage requires a separate permit from the State Engineer. *See e.g.* NRS 533.335(3)(a); NRS 533.340(6).

In approving the GMP, the State Engineer either approved a use of water that is not a beneficial use, or condoned the creation of an entirely new beneficial use which is based neither on longstanding custom nor on creation by the legislature via statute. This is a violation of the doctrine of beneficial use, and therefore a violation of a bedrock principal of Nevada's water law.

Furthermore, the State Engineer failed to make any finding with respect to the scientific or practical necessity of this novel water banking scheme. For example, the purpose of the GMP is to reduce the stress on the aquifer to allow an equilibrium to be reached between groundwater pumping and natural recharge. But it is not at all clear, and certainly no argument has been presented by the Appellants, that the water banking scheme is necessary or helpful for reaching this goal. To the contrary, the water banking scheme unnecessarily extends the time it will take to restore the equilibrium because it will result in additional water being pumped each year in excess of the annual allocations when banked water is pumped. Order 1302 arbitrarily, and with no factual findings, approves the water banking scheme of the GMP despite this obvious shortcoming.

D. Consent of a Simple Majority Is Not an Appropriate Standard to Measure the Legality of a Groundwater Management Plan

While the local stakeholder process for development of a GMP is obviously meant to provide for some flexibility, that flexibility is based on a recognition that each groundwater basin will have different, localized conditions and challenges. But that does not mean the solution to those challenges can be so flexible as to violate the law as long as a slim majority consents to the violations. Yet this is precisely the argument made by the Appellants. SE Br. at 47 (arguing that legislative intent is "a GMP process whereby a majority of groundwater users could create a plan to reduce pumping that exists outside of the other strict confines of water law."); *id*. at 43 (the only constraint on the features of a groundwater management plan is majority consent reaching the support of the majority "will ferret out any infeasible ideas"); DNRPCA Br. At 35 ("The Legislature set the buy-in level at a 'majority' of permit and certificate holders; that is precisely the authorizing language").

The Appellants' position would allow the State Engineer to approve a groundwater management plan that violates *any* provision of Nevada law if such a violation were able to garner the support of a simple majority. This argument is absurd because it is impossible to determine where it would end: a groundwater management plan could allow farmers to trespass on each other's private property; or require that farmers dedicate some portion of their groundwater rights to

municipal and industrial purposes; or require water rights holders to dedicate a portion of their water rights to a neighbor with less productive land. There is no end—according to the Appellants' logic, as long as NRS 534.037 does not expressly apply a specific provision of the law, the majority can violate it. That, of course, cannot be what the Legislature intended.

Majority rule, untethered to the law, cannot have been the intent of the Legislature in creating the groundwater management plan authorities. The district court correctly refused to approve the GMP on this basis. Ruling at 30 (JA 2410) (under Appellants' theory of majority rule, "a majority of junior right holders, who, by their collective knowing over appropriation of a water basin, combined with the State Engineer's neglectful acquiescence, can vote to deprive a senior right holder's use of all of its water, thus enabling the junior holders who created the crisis to continue to irrigate by using water which they were never entitled use. This is simply wrong.").

Furthermore, the Appellants' continued claims that the GMP has majority support, in addition to having no relevance for the legality of the GMP, should be viewed with extreme skepticism, especially in light of the fact that many of those who likely have voted in favor of the GMP are owners of the unperfected paper water rights who receive a windfall under its scheme.

III. THE GMP VIOLATES OTHER PROVISIONS OF STATE LAW

In addition to violating the bedrock doctrines of prior appropriation and beneficial use, the GMP also violates the statutory provisions that govern changes to existing water rights for the protection of others, and it violates the statutory mandate that bars any impairment of senior vested water rights. The district court correctly overturned the State Engineer's approval of the GMP for these reasons as well. Ruling at 36–39 (JA 2416–19) (ruling that the GMP cannot remove the State Engineer's statutory oversight of water rights changes); *id*. at 23–25 (JA 2403–05) (ruling that the GMP cannot simply ignore potential adverse effects on senior vested surface water rights).

A. The GMP Automatically Permits Changes in Points of Diversion and Places and Manners of Use of Water Rights in Violation of Nevada Statute

The GMP deviates from Nevada water law by allowing changes in the point of diversion, place of use and/or manner of use of water rights without complying with the mandatory provisions of Nevada statute. GMP Sec. 13.10 (JA 548) provides that "[a]ll or part of any Allocation in any individual Groundwater Account may be transferred to any other individual groundwater account," and GMP Sec. 13.8 (JA 547) provides that "[g]roundwater subject to this GMP may be withdrawn from Diamond Valley for any beneficial purpose under Nevada law as long as the groundwater use is linked to and withdrawn from a Groundwater

Account with a positive balance". Therefore, under the GMP once groundwater rights are converted to shares and given an annual allocation of water, those allocations are freely transferrable to any other well (existing or new), any other place of use, and/or any other purpose within Diamond Valley, and the State Engineer's authority to enforce existing laws meant to protect against adverse impacts of such changes is drastically hamstrung. As described further below, this is precisely the "free market" water trading scheme described in Mr. Young's blueprint.

Under current law, specifically NRS 533.325, 533.345 and 533.370(2), before changing the well location, place of use or manner of use of a water right, the owner must file a formal change application for the State Engineer's approval of the proposed change. A change application is required so that the State Engineer can analyze the potential effects of changing the location of the well, changing the location of the use of the water, and/or changing the manner of use of the water. *See e.g.* NRS 533.370(2) ("where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as 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."). These procedures, in addition to providing a safeguard against adverse

impacts to other water rights, also provide an important public and transparent procedure, which the GMP completely abandons.

The GMP drastically alters the existing statutory water rights change application process. *See e.g.* GMP Sec. 9.2 (JA 542) (limiting State Engineer's ability to analyze potential impacts of moving groundwater pumping and use around Diamond Valley to only those procedures provided for in Sec. 14 of the GMP). Pursuant to Sec. 14 of the GMP, the State Engineer is prohibited from interfering with the transfer of shares or allocations to an existing well, unless the transfer would both a) cause the proposed new use to exceed the approved volume of the new location's existing well, and b) that exceedance of the original volume "would conflict with existing rights." GMP Sec. 14.7 (JA 550). But the GMP requires the State Engineer to complete any review and analysis within 14 days, after which the transfer of the allocation or share to the new well location, place of use or manner of use is "deemed approved." GMP Sec. 14.8 (JA 550). Only if the State Engineer is able to act within this arbitrary 14 day deadline does the GMP then allow the State Engineer to proceed with the statutory change application process. GMP Sec. 14.9 (JA 550).

The Appellants claim that this is not a violation of the mandatory change application statutes because it is "akin to temporary changes" under existing law (SE Br. at 55) and "adequately aligned" with the statutory procedures (DNRPCA

Br. at 57). The district court correctly found that "close" is not good enough when it comes to the State Engineer's statutory obligation to analyze proposed changes in water rights, and proposed new wells, for, among other things, the potential to adversely impact other water rights.

> [Under existing law, 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. Other rights' holders who may be affected by the temporary change could protest the application if notice were given by the State Engineer. [But] no protest and notice provisions at the administrative level exist in the DVGMP for a temporary change of use, or place of use, or manner of use for less than one year.
> Under the DVGMP, the State Engineer is not required to investigate a proposed change in the place or manner of use and the transfer becomes automatic after 14 days from submission.

Ruling at 37 (JA 2417); *see also id*. at 38 (JA 2418) ("Under the DVGMP the State Engineer does not review a different use of the water shares transferred").

The purpose of the State Engineer's review of an application to change the point of diversion or manner or purpose of use of a water right is to determine whether the proposed change will have an adverse impact on any other user of water. NRS 533.370(2). That is true of temporary water rights changes as well as permanent changes. For example, moving groundwater pumping to a new well can cause the localized groundwater level to drop because of the new or additional pumping from the well, which can impact other nearby wells. This is precisely the

type of impact typically analyzed by the State Engineer when presented with a groundwater change application, whether temporary or permanent. Under the GMP, these potential impacts are purposefully intended to not be considered, which is precisely the point of the property rights "unbundling" scheme adopted by the GMP:

> A key limitation of the current, bundled system is that each water right is fairly unique, and great care must be taken to assess the legal risks associated with existing rights (and potential trades) and to ensure that beneficial use is maintained. In many cases [under the existing statutes], the decisions associated with the trade get locked up in expensive legal proceedings that run for many years. As a general rule, water markets in the western United States have high transaction costs. The driving concept of this blueprint is that existing water rights be unbundled into their component parts. Among other things, unbundling increases the fungibility of each component. As fungibility increases, each component becomes easier to value, monitor, and trade.

Young Paper at 10–11 (JA 1892–93); *see also id*. at 7 (JA 1889) ("The challenges of water management in arid landscapes … [include] the inability of current water governance to allow transfers of water to those who value it most."); *id*. at 1 ("willing buyers and sellers are able to trade with one another with dramatically reduced transaction costs. 'Liquid markets' emerge."); *id*. ("low-cost trading … is possible only when existing water right arrangements are converted into ones that are designed to achieve these goals."); *id*. at 13 (JA 1895) ("Once a plan has been finalized, third parties … cannot stop trades or allocations made in a manner consistent with plan rules."). It is precisely the statutory technical analysis

required to be undertaken by the State Engineer when presented with a water rights change application that the GMP is designed to avoid.

It is obvious that the potential to overlook impacts to other water users when undertaking the immediate and "low-cost" trading of shares and allocations is not a bug in the GMP, it is a feature. The GMP's ease of water trading is specifically designed to reduce the potential for the State Engineer to make a determination that a trade could impact another water user. For example, by deeming a proposed water transfer approved if the State Engineer takes no action on the proposal within 14 days, the GMP could, and arguably is designed to, allow a proposed transfer to go forward even though it would, in fact, impair another right or adversely impact the public interest. *Compare* DNRPCA Br. at 57 ("Under the GMP…the State Engineer *may disallow* a withdrawal that conflicts with existing water rights.") with NRS 533.345(2)(b) and (c) (State Engineer can only approve a temporary change application if he affirmatively determines it is in the public interest and does not impair others' rights). This is all in direct violation of the letter, spirit and intent of the requirements of NRS 533.325 and NRS 533.370(2) that the State Engineer analyze all proposed changes in the point of diversion or place or manner of use for potential impacts and conflict with existing water rights and affirmatively find that the proposed change will not have adverse impacts.

Interestingly, the Young Paper suggests that water be freely tradeable without having to rely on subsequent "conflicts analysis" for each trade. *See generally* Young Paper at 13 (JA 1895). However, Mr. Young's proposal is based upon the necessity that, before allowing for the unfettered trade of water shares or allocations, there must first be an advance analysis and final determination made with respect to the potential impact of such trades on other water rights:

> For an unbundled water rights system to operate, water resource management plans need to be prescriptive and dictate outcomes. If, for example, a plan prescribes that the exchange rate for the transfer of water from one location to another is 0.8, there should be no opportunity for a third party to oppose a transfer provided that the exchange rate used is 0.8. If, however, a plan simply states that transfers should cause no harm to third parties, there is opportunity for the transfer process to hold up a transfer due to the vagueness of language about the exchange rate that need to be made and so on.

Young Paper at 13 (JA 1895). Of course, the Diamond Valley GMP failed to take this advice from Mr. Young for setting up the newly created water-marketing scheme. The GMP took the simple part of Mr. Young's scheme—allowing for essentially unfettered transfer of water pumping around Diamond Valley with little oversight—but failed to undertake the more complicated task required by Nevada statute of analyzing how such transfers may impact other users. Mr. Young's free and easy water transfer scheme relies on undertaking the hard work of determining in advance how much to restrict future transfers to account for potential adverse impacts of changing the point of diversion or place or manner of use of the water

appropriations; but the GMP failed to do that, instead it simply allows all temporary transfers unless the State Engineer can determine the potential for harm within a truncated 14-day review period. Allowing changes in water rights without analyzing potential impacts violates Nevada law. It is not clear that Mr. Young's approach of a basin-wide pre-transfer impacts analysis would comply with law, but it is very clear that the GMP's process of not analyzing impacts for temporary changes certainly does not.

The Appellants argue that the State Engineer undertook this necessary public interest and conflicts analysis when he granted the original groundwater permits, and therefore the GMP appropriately limits that review for future water trades. DNRPCA Br. at 57; SE Br. at 59. But that misses the point of the mandatory water rights change statutes—to take a fresh look at the potential for a change in water use to have an adverse impact on another water right or the public interest. If the State Engineer's original granting of a permit were sufficient to ensure this protection, then there would be no need to conduct the analysis for proposed water rights changes mandated by NRS 533.325, NRS 533.345, and NRS 533.370(2).

The Appellants also take issue with the district court's discussion, by way of example, of the potential for a change of an irrigation use to a fully consumptive use to impact the recovery of the groundwater aquifer through reduced or eliminated recharge of water after application to the land for farming. *See* Ruling

at 38 (JA 2418); DNRPCA Br. at 59; SE Br. at 60. DNRPCA argues that, "as a practical matter," this type of change is unlikely to occur because "most rights" subject to the GMP are currently used for irrigation. *Id*. But that argument ignores that, as Mr. Young's Report makes clear, the entire purpose of the unbundling scheme is to cleave water rights from the statutory change procedures so that they can be more easily changed to other uses. The district court's example illustrates the risk of doing so—a risk which only the Legislature, not the State Engineer, is permitted to impose on the water users in Diamond Valley.

B. The GMP Exacerbates Adverse Impacts to Senior Vested Surface Water Rights in Diamond Valley

In addition to the impacts to the Baileys' senior groundwater rights, the GMP also allows the adverse impacts to Fred and Carolyn Bailey's vested surface water rights to continue. The GMP, and the State Engineer's approval in Order 1302, simply ignore the impacts to senior vested groundwater-dependent surface water rights in Diamond Valley. The district court correctly found that the State Engineer may not ignore the impacts of the GMP on senior vested surface water rights. Ruling at 23–25 (JA 2403–05).

The Bailey Ranch operations historically relied on surface water springs in and around the ranch, which springs depended on the groundwater conditions of the Diamond Valley aquifer at the time Elwood and Robert Bailey made their homestead in the early 1860s. The Bailey Ranch also has relied on other

groundwater-dependent surface water sources, which are set forth in the Bailey's vested water rights on file with the Office of the State Engineer.

But those surface water rights have been adversely impacted to the point that they are no longer satisfied because of the over pumping of the groundwater aquifer in Diamond Valley. Not only does the GMP not resolve the adverse impacts to the Bailey's senior vested surface water rights, it will protract those impacts because it countenances the continued lowering of the water table for at least the next 35 years. Ruling at 9 (JA 2389) ("For 35 years the pumping in Diamond Valley will exceed the 30,000 af perennial yield."); *id*. at 24 (JA 2404) ("The DVGMP on its face fails to reduce the harm caused by overpumping and aggravates the depleted water basin."). This violates NRS 533.085(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") and NRS 534.100(1) ("Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913").

At the end of the 35 years of annual reductions of allocations of water awarded per share, the total annual allocations—not including carried-over banked

water allocations and uses not subject to the GMP—would provide for 34,200 acre-feet to be pumped annually for irrigation. GMP, Appx. G (JA 823). This is 4,200 acre-feet more than the estimated perennial yield of 30,000 acre-feet for the Diamond Valley aquifer. There is, then, no dispute that the GMP permits the continued draw down of the aquifer because it permits pumping to exceed natural annual recharge. *See e.g.* Order 1302 at 15 (JA 326) ("water levels will stabilize when recharge equals discharge," but "the amount of transitional storage consumed before a new equilibrium state is reached may affect the depth to water"). The stated goal of the GMP is "stabilization of water levels," and not recovery of the historic depth of the aquifer necessary to restore and serve vested senior surface water rights. *Id*. Therefore, not only does the GMP fail to protect vested senior surface water rights, it also allows the groundwater to continue to be mined during the 35 year process. The district court therefore correctly concluded that the State Engineer's approval of the GMP was arbitrary and capricious because it countenances continued adverse impacts to the Bailey's senior vested surface water rights in violation of NRS 533.085(1). Ruling at 25 (JA 2405).

The Appellants argue that the district court's Ruling erroneously imposes legal requirements on the GMP that are not contained in within NRS 534.037 (SE Br. at 37–38) and that the district court's Ruling makes factual findings that are not supported by any evidence in the record (DNRPCA Br. at 45). The Appellants

also argue that the GMP will result in improvement of the groundwater aquifer, and then draw the erroneous conclusion that it therefore does not harm senior vested water rights (SE Br. at 38–39; DNRPCA Br. at 47–48) or that if it does, then any challenge to the GMP is actually a constitutional challenge to NRS 534.037's failure to expressly require the State Engineer to consider vested rights (DNRPCA Br. at 50–51).

As set forth above, NRS 534.037 does not encompass the entire legal limitations of a groundwater management plan—instead, it sets forth the technical considerations that the State Engineer must analyze when reviewing a proposed plan. The Legislature was not required to include in NRS 534.037 a reference to each and every provision of law that a groundwater management plan is required to adhere to, as the State Engineer's argument suggests. By not expressly requiring a groundwater management plan to immediately reduce pumping to the perennial yield, NRS 534.037 does not, as DNRPCA argues, authorize impairment of vested rights in violation of NRS 533.085(1). DNRPCA Br. at 50–51.

As to their dissatisfaction with the district court's factual determination that the GMP will allow continued adverse impacts to senior vested water rights, the Appellants' dispute is with simple math. The State Engineer has determined that the perennial yield of the Diamond Valley aquifer is 30,000 acre-feet. Ruling 1302 at 2 (JA 316). The State Engineer concedes that allowing pumping in excess of

that amount will continue the adverse impacts on the aquifer because he concedes that reducing pumping, in and of itself, will begin to reverse this trend. Order 1302 at 15 (JA 329) ("The GMP is based on the simple fact that groundwater pumping is the cause of declining water levels…."). The district court's conclusion is therefore simply that the pumping reductions, which take place over 35 years and never actually result in reducing annual pumping to the perennial yield, will allow for the continuation of the conditions that cause the adverse impacts to senior vested surface water rights. The district court correctly ruled that the State Engineer's refusal to consider this was a violation of the statutory bar on impairment of vested rights.

The Appellants claim that the Respondents' own groundwater pumping contributes to this condition is a misdirection. But the Bailey's groundwater permit for their ranch is necessary because of the State Engineer's decades-long refusal to confront the problem he created in Diamond Valley by approving vastly more groundwater rights than the aquifer is capable of serving over the long term. The overpumping of the southern portion of the Diamond Valley aquifer came first.

Finally, it may be true that the 35-year pumping reductions set forth in the GMP will *slow* the decline of the aquifer, but there is no evidence in the record that it will stabilize or stop the further decline of the aquifer upon which the Bailey's

senior vested rights depend over the next 35 years. Therefore, in the context of vested water rights, the GMP does nothing but exacerbate the impairment for at least another 35 years.

CONCLUSION

For the foregoing reasons, the Bailey Respondents respectfully urge the Court to affirm the district court's ruling reversing Nevada State Engineer Order No. 1302 because the Diamond Valley Groundwater Management Plan violates Nevada law.

Respectfully submitted November 6, 2020.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: /s/ *Chris Mixson*
CHRISTOPHER W. MIXSON, ESQ.
Nevada Bar No. 10685
5594-B Longley Lane
Reno, Nevada 89511
Attorneys for Bailey Respondents

NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that I heave read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the Record on Appeal or Appendix where the matter relied on is to be found. In lieu of the certification required by NRAP 32(a)(4)–(6), the undersigned has filed this brief subsequently with a motion exceed the statutory page and/or word limit. I understand I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated November 6, 2020.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: /s/ *Chris Mixson*
CHRISTOPHER W. MIXSON, ESQ.
Nevada Bar No. 10685
5594-B Longley Lane
Reno, Nevada 89511
Attorneys for Bailey Respondents

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on November 6, 2020, a true and correct copy of the foregoing **ANSWERING BRIEF OF BAILEY RESPONDENTS** 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.

I FURTHER CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, to the following:

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

John E. Marvel, Esq.
Marvel & Marvel, Ltd.
217 Idaho St.
Elko, NV 89801

Dated: November 6, 2020.

By: /s/ *Christie Rehfeld*
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP