

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

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**RESPONDENTS SADLER RANCH, LLC, IRA RENNER, AND MONTIRA
RENNER ANSWERING BRIEF**

District Court Case No. CV1902-348
(Consolidated with Case Nos. CV1902-349 & CV1902-350)

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rules of Appellate Procedure (“NRAP”) 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Sadler Ranch, LLC is a Nevada limited liability company.

Sadler Ranch, LLC was represented in the district court and in administrative proceedings before the Division of Water Resources by:

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TABLE OF CONTENTS

NRAP 26.1 CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
SUMMARY OF THE ARGUMENT	1
FACTUAL AND PROCEDURAL HISTORY	6
I. The Over-Appropriation Of Water Resources In Diamond Valley Was No Accident.	6
II. The Over Pumping By Junior Users Caused Valley Springs To Run Dry.	8
III. Diamond Valley’s Designation As A Critical Management Area.	10
IV. The Development Of The DVGMP.	11
STANDARD OF REVIEW ON APPEAL	14
ARGUMENT	16
I. Prior Appropriation Is The Foundational Doctrine Of Nevada’s Water Laws.	16
A. The Priority Date Of A Water Right Is Its Most Valuable Element.	16
1. The importance of priority	16
2. Junior users cannot deprive senior users of their priority by simple majority vote.	17
B. The Fact That The DVGMP Violates Prior Appropriation Doctrine Is Beyond Dispute.	19
II. NRS 534.037 Does Not Authorize Water Users To Write Their Own Personal Water Law.	20
A. The Plain Language Of NRS 534.037 And 534.110(7) Does Not Abrogate Prior Appropriations.	21

B.	Legislative History Does Not Support Appellants’ Interpretation.	24
1.	AB 419 (2011).	25
2.	SB 81 (2015).	27
3.	SB 73 (2017).	27
C.	Appellants incorrectly conflate the prior appropriation doctrine with the remedy of curtailment.	30
III.	Under The DVGMP Pumping Will Never Be Reduced Below The Perennial Yield Of The Basin.	32
A.	The DVGMP does not contain the “necessary steps” for removal of the CMA designation.	32
B.	The DVGMP authorizes continued groundwater mining of an already depleted basin.	34
IV.	Order 1302 Was Not Supported By Substantial Evidence.	36
A.	Appellants provided no evidence that the DVGMP will result in a stabilization of groundwater levels.	37
B.	Sadler Ranch provided expert evidence demonstrating that groundwater levels will continue to decline under the DVGMP.	39
C.	The State Engineer failed to use the existing Diamond Valley groundwater model to analyze the effects of the plan.	41
V.	The DVGMP Violates Other Mandatory Provisions Of The Water Law.	43
A.	The DVGMP allows water right holders to change their water rights without filing a change application.	44

B.	The DVGMP's water banking provisions violate the requirements of NRS 534.250 – 534.350.	46
C.	The DVGMP unlawfully limits the State Engineer's authority to manage the basin.	48
D.	The DVGMP improperly allows for the continued impairment of pre-statutory water rights.	50
VI.	The DVGMP Violates The Takings Provisions Of The Nevada Constitution.	51
VII.	The State Engineer's Administrative Proceedings Did Not Comply With Statutory Requirements.	52
CONCLUSION		53
CERTIFICATE OF COMPLIANCE		54
CERTIFICATE OF SERVICE		56

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Application of Filippini</i> , 66 Nev. 17, 202 P.2d 535 (1949).....	53
<i>Bacher v. Office of State Eng’r of State of Nev.</i> , 122 Nev. 1110, 146 P.3d 793 (2006).....	37
<i>Bass-Davis v. Davis</i> , 122 Nev. 442, 134 P.3d 103 (2006).....	44
<i>Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.</i> , 106 Nev. 96, 787 P.2d 782 (1990).....	15
<i>Colo. Water Conservation Bd. v. City of Central</i> , 1 25 P.3d 424 (Colo. 2005).....	17
<i>Dudley v. Kerwick</i> , 421 N.E.2d 797 (N.Y. 1981).....	18
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120, 120 S.Ct. 1291 (2000).....	29, 30
<i>Gandy v. State ex rel. Div. of Investigation & Narcotics</i> , 96 Nev. 281, 607 P.2d 581 (1980).....	15
<i>JM v. Dep’t of Family Servs.</i> , 922 P.2d 219 (Wyo. 1996).....	38
<i>Lobdell v. Simpson</i> , 2 Nev. 274 (1866)	16, 20
<i>Maxwell v. State Indus. Ins. Sys.</i> , 109 Nev. 327, 849 P.2d 267 (1993).....	15
<i>McCracken v. Cory</i> , 99 Nev. 471, 664 P.2d 349 (1983)	15
<i>Office of the State Engineer v. Morris</i> , 107 Nev. 699, 819 P.2d. 203 (1991).....	36, 37

<i>Nichols v. McIntosh</i> , 34 P. 278, 280 (Colo. 1893).....	17
<i>Office of State Eng’r, Div. of Water Res. v. Curtis Park Manor Water Users Ass’n</i> , 101 Nev. 30, 692 P.2d 495 (1985).....	15
<i>Ormsby Cnty v. Kearney</i> , 37 Nev. 314, 142 P. 803 (1914).....	16
<i>Orr Ditch & Water Co. v. Justice Court of Reno TP., Washoe Cty.</i> , 64 Nev. 138, 178 P.2d 558 (1947).....	21
<i>Preferred Equities Corp. v. State Eng’r, State of Nev.</i> , 119 Nev. 384, 75 P.3d 380 (2003).....	46
<i>Pyramid Lake Paiute Tribe of Indians v. Ricci</i> , 126 Nev. 521, 245 P.3d, 1145 (2010).....	15
<i>Ranieri v. Catholic Cmty. Servs.</i> , 111 Nev. 1057, 901 P.2d 158 (1995).....	15
<i>Revert v. Ray</i> , 95 Nev. 782, 603 P.2d 262 (1979).....	16, 37
<i>San Luis & Delta-Mendota Water Auth. v. Locke</i> , 776 F.3d 971, 995 (9th Cir. 2014)	42
<i>Sierra Pacific Indus. v. Wilson</i> , 135 Nev. Adv. Op. 13, 440 P.3d 37 (2019).....	15
<i>State Indus. Ins. Sys. v. Shirley</i> , 109 Nev. 351, 849 P.2d 256 (1993).....	15
<i>United States v. Wise</i> , 370 U.S. 405 (1962).....	29
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624, 63 S.Ct. 1178 (1943).....	20

<i>Wilson v. Happy Creek, Inc.</i> , 135 Nev. 301, 448 P.3d 1106 (2019).....	17, 21
---	--------

<i>Whitmore v. Murray City</i> , 154 P.2d 748, 751 (Utah 1944).....	17
--	----

Other Authorities

Gregory J. Hobbs, Jr., <i>Priority: The Most Misunderstood Stick in the Bundle</i> , 32 Env'tl. L. 37, 43 (2002)	17
--	----

<i>Hearing on A.B. 419 Before the Assm. Comm. On Govt. Affairs</i> , 2011 Leg. 76 th Sess. (March 30, 2011).....	26, 33
---	--------

<i>Hearing on A.B. 419 Before the Assm. Comm. On Govt. Affairs</i> , 2011 Leg. 76 th Sess. (May 4, 2011)	26
---	----

<i>Hearing on A.B. 419 Before the Assm. Comm. on Govt. Affairs</i> 2001 Leg., 76th Sess. at 16 (May 23, 2011)	50
---	----

<i>Hearing on S.B. 73 Before the S. Comm. on Nat. Res.</i> , 2017 Leg. 79th Sess. (February 28, 2017).....	28
---	----

<i>Hugh A. Shamberger: Memoirs of a Nevada Engineer and Conservationist</i> at 38, University of Nevada Oral History Project Catalog #019 (1967)	7
---	---

State Engineer Order 1226	10
---------------------------------	----

State Engineer Order 1264	11
---------------------------------	----

State Engineer Ruling 6290	2, 10, 35
----------------------------------	-----------

State Engineer Ruling 6464	43
----------------------------------	----

Stuart Banner, <i>AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN</i> 45 (2011)	17
---	----

U.S. Constitution

U.S. CONST. amend. V	19
----------------------------	----

Nevada Constitution

Nev. Const. art I, § 22	6, 20, 57
Nev. Const. art I, §8	6, 20

Nevada Statutes

NRS 0.025(1)(c)	33
NRS 47.250(3)	44
NRS 233B.135(3)	15
NRS 533.024(1)(c).....	42
NRS 533.075	31
NRS 533.085	16, 50
NRS 533.345	18
NRS 533.370	18
NRS 533.3703	46
NRS 533.382	18
NRS 533.400	31
NRS 533.430	9
NRS 533.460	31
NRS 533.481	31
NRS 533.563	31
NRS 534.020	31
NRS 534.030(4)	49
NRS 534.037	passim
NRS 534.090	31

NRS 534.110(5)	31
NRS 534.110(6)	23, 32
NRS 534.110(7)	3, 4, 11, 22, 23, 24, 31, 32
NRS 534.110(8)	31
NRS 534.120(1)	49
NRS 534.193(1)	31
NRS 534.250(2)	47, 48
NRS 534.260	47, 48

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does NRS 534.037 authorize the State Engineer to approve a groundwater management plan that forcibly confiscates water from senior-priority right holders for the express purpose of re-distributing said water to junior-priority users?
2. Does NRS 534.037 authorize the State Engineer to approve a groundwater management plan that expressly violates other mandatory provisions of Nevada's water law statutes?
3. Did the district court correctly determine that the Diamond Valley Groundwater Management Plan violates Nevada's doctrine of prior appropriation?
4. Did the district court correctly determine that the State Engineer was required to consider the impacts of the Diamond Valley Groundwater Management Plan, a plan that authorizes continued over-pumping of the Diamond Valley basin for at least another 35 years, on holders of pre-statutory vested spring rights?

SUMMARY OF THE ARGUMENT

The position taken by the State Engineer in this case raises an important question – why even have a state official in charge of water administration if he is not going to enforce the law as written and, instead, simply approve whatever a simple majority of water users wants to do regardless of whether it is legal or not?

The simple fact is that the State Engineer's decades-long inaction and mismanagement of the water resources in Diamond Valley has resulted in an environmental catastrophe. For almost 50 years the State Engineer has allowed

junior-priority users to drastically over-pump the basin¹ causing water levels to decline by 100 feet.² This has resulted in the complete drying up of dozens of naturally flowing springs in the basin.³

That the drying up of the valley floor springs was caused primarily by the junior priority pumpers is well-evidenced and beyond reasonable dispute. In fact, Eureka County's own expert gave sworn testimony that at least 78% of the lost spring flow is directly attributable to junior priority pumping.⁴ The State Engineer reviewed all the evidence, including scientific reports, and unequivocally determined that "it is the use of water by the junior water right holders that has conflicted with senior rights."⁵

The district court was acutely aware of the history and background of water issues in Diamond Valley when this case came before it. Over the last seven years, the district court has presided over numerous cases related to the Diamond Valley groundwater dispute. These include cases regarding the State Engineer's issuance of mitigation rights to owners of dried-up springs, a writ petition seeking immediate

¹ JA, Vol. IV, JA0938.

² State Engineer Ruling 6290 at 23 ("The evidence demonstrates that a 'cone of depression' of up to 100 feet in southern Diamond Valley is expanding to the north.").

³ State Engineer Ruling 6290 at 31 ("The State Engineer finds Applicants have proven by a preponderance of evidence that the groundwater pumping in southern Diamond Valley is the main cause of decline in groundwater levels at Thompson Spring, which resulted in the spring drying up").

⁴ State Engineer Ruling 6290 at 26 ("The Protestant's expert witnesses were of the opinion that '78 percent of the cause of decline in Shipley Spring is from pumping in southern Diamond Valley'").

⁵ State Engineer Ruling 6290 at 61.

curtailment of pumping, and various proceedings and appeals related to the adjudication of pre-statutory rights under NRS 533.087-533.320. In each of these cases, members of DNRCPA and/or Eureka County have resisted every attempt by senior pre-statutory rights holders to protect their historic ranches and bring pumping in the basin to a sustainable level.

The Diamond Valley Groundwater Management Plan (“DVGMP”) is just the latest attempt by the junior priority pumpers to avoid the consequences of their actions and instead use their greater numbers and political influence to enact a scheme that allows them to continue their exploitative groundwater mining. But, the district court rightly saw this plan for what it was – a plan that fixes only a part the problem, and does so on the backs of senior water right holders.

The DVGMP is fundamentally flawed for seven major reasons. First, the plan violates the fundamental doctrine upon which Nevada’s water laws are built – the doctrine of prior appropriation. This fact is not disputed by Appellants and was explicitly acknowledged by the State Engineer in Order 1302.⁶

Second, as the district court correctly noted, nothing in either the language or history of NRS 534.037 and 534.110(7) authorizes Appellants to discard Nevada’s prior appropriation system and instead create their own, custom-made water law. In fact, the legislative history of the statutes indicates just the opposite – that the Legislature intended to protect prior appropriation doctrine, not subvert it.

⁶ JA Vol. II, JA0319 (“it is acknowledged that the GMP does deviate from the strict application of the prior appropriation doctrine”).

Third, the pumping reductions in the plan will not bring the basin into balance, even at the end of the DVGMP's 35-year planning horizon. NRS 534.037(1) requires the State Engineer to make a determination that the plan "set[s] forth the necessary steps for removal of the basin's designation as a critical management area." Because a critical management area designation is only put in place when a basin's pumping consistently exceeds its perennial yield,⁷ removal of the designation requires pumping be reduced below that level. But the DVGMP never achieves that result. In the final year of the plan, pumping will exceed the perennial yield by 150%.⁸

Fourth, the State Engineer's approval of the DVGMP was not supported by substantial evidence in the record. NRS 534.037(2) requires the State Engineer to analyze the hydrology, physical characteristics, and quality of water in the basin as well as evaluate the locations and spacing of existing wells, including domestic wells. But, Order 1302 is devoid of any such hydrologic or geologic analysis. Order 1302 also fails to analyze the impact that thirty-five more years of continued over-pumping will have on other water users in the basin, including holders of pre-statutory rights and domestic well owners. Without such evidence it was impossible for the State Engineer to determine that the plan "set[s] forth the necessary steps for removal of the basin's designation as a critical management area."⁹

⁷ NRS 534.110(7) (defining a critical management area as one "in which withdrawals of groundwater consistently exceed the perennial yield of the basin.").

⁸ JA Vol. XI, JA2270.

⁹ NRS 534.037(1).

Fifth, several key provisions of the DVGMP directly violate other specific and mandatory requirements of the water law statutes. For example, the DVGMP allows water right holders to change their permitted point of diversion, place of use and manner of use of their rights without filing a mandatory change application. Water users are also exempted from the requirement to file proof that they placed their water to beneficial use. In addition, the DVGMP's water banking provisions directly violate the provisions of NRS 534.250 – 534.350, inclusive. Nothing in the language or history of NRS 534.037 authorizes these deviations.

Sixth, the DVGMP violates constitutional provisions prohibiting the taking of private property for the sole purpose of transferring that property to other private parties.¹⁰ The parties do not dispute that under the DVGMP, water is taken from seniors and redistributed to juniors. In fact, that scheme is the fundamental basis of the plan. And, no compensation is provided to the seniors for this taking.¹¹ A more blatant violation of Nevada's takings laws and jurisprudence is hard to imagine.

Finally, the administrative process employed by the State Engineer to consider and approve the DVGMP failed to follow the requirements of the statute and fundamental standards of due process. NRS 534.037(2) requires the State Engineer to hold a "public hearing" and "take testimony on the plan." But, at the meeting held by the State Engineer, only public comments were allowed. No sworn testimony was taken and no opportunity was provided to affected parties to cross-examine the evidence and reports that the State Engineer relied on.

¹⁰ NEV. CONST. art I, § 22.

¹¹ NEV. CONST. art I, §8.

Any one of these deficiencies, by itself, provides adequate grounds to reject the DVGMP and affirm the district court ruling. Taken together, they create an insurmountable barrier that Appellants simply cannot hurdle. Accordingly, Respondents respectfully request that this appeal be dismissed.

FACTUAL AND PROCEDURAL HISTORY

I. The Over-Appropriation Of Water Resources In Diamond Valley Was No Accident.

Diamond Valley is one of the most over-appropriated and over-pumped basins in Nevada. The groundwater basin has a perennial yield of just 30,000 acre-feet.¹² However, permits have been issued totaling over 126,000 acre-feet.¹³ Since the 1970s, annual pumping has consistently exceeded 2-3 times the available supply.¹⁴ To date, this over-pumping has caused the groundwater level to decline more than 100 feet, resulting in Respondents' naturally flowing springs drying up.¹⁵

Despite Appellants' assertions to the contrary, over-appropriation of the basin was no accident. During the time when most permits to appropriate groundwater were issued, Mr. Hugh Shamberger served respectively as the State Engineer, and the Director of the Department of Conservation and Natural Resources.¹⁶ Mr. Shamberger publicly advocated that Nevada should not limit groundwater use to the perennial yield but, instead, should implement "a program of orderly over-

¹² JA Vol. XI, JA2384:10-11.

¹³ JA Vol. XI, JA2384:8-9.

¹⁴ JA Vol. XI, JA 2384:14-16.

¹⁵ JA Vol. XI, JA 2384:17 – JA 2385:3.

¹⁶ Mr. Shamberger served as State Engineer from June 1951 to June 1957 and then as the first Director of DCNR from June 1957 to 1965.

development” whereby aquifer storage could be exploited “over a period of thirty to forty years” to promote economic development.¹⁷ He declared Diamond Valley to be a success story in this regard, one of “the most successful valleys in which desert land development has been done.”¹⁸

However, just a year after Mr. Shamberger boasted about the success of his experiment in over-appropriation in Diamond Valley, scientists from the United States Geological Survey (“USGS”) sounded the alarm. In 1968, when pumping was just 12,000 acre-feet/annually (afa), the USGS issued a report warning that if pumping in the southern portion of the basin increased beyond that amount groundwater levels would decline precipitously and naturally flowing springs in the northern portion of the basin would dry up.¹⁹ The vast majority of the junior priority permit holders pump their water in the southern portion of the basin. In other words, almost all of the 126,000 acre-feet of permitted rights in the basin have a point of diversion located in the portion of the basin where the USGS cautioned against pumping more than 12,000 acre-feet/year.

The USGS report also noted that the water flowing from the northern springs was fully appropriated and being used by senior priority water rights holders – like Sadler Ranch and Renner.²⁰ The report stated that if pumping was to continue a

¹⁷ *Hugh A. Shamberger: Memoirs of a Nevada Engineer and Conservationist* at 38, University of Nevada Oral History Project Catalog #019 (1967).

¹⁸ *Id.*

¹⁹ JA Vol. II, JA0419 (warning that pumping in excess of 12,000 acre-feet/year in southern Diamond Valley will “decrease the natural discharge from the springs in the North Diamond subarea.”).

²⁰ *Id.*

program would need to be put in place to make these senior priority users whole for the eventual loss of their water.²¹ Despite commissioning the report, the State Engineer failed to heed its warning or develop any program to protect senior users. The USGS report was a public document whose findings were well known to Appellants and their predecessors before they began developing their water rights.

One consequence of the large number of permits issued by the State Engineer is that junior priority users far outnumber senior users. Of the permits the State Engineer has issued, more than 80% are junior in priority based on the 30,000 afa perennial yield.²² This has created a significant political obstacle to proper management of the basin. Attempts to reduce pumping and/or make senior water users whole is met with stiff political opposition from both the junior users and the county government they control.²³

II. The Over Pumping By Junior Users Caused Valley Springs To Run Dry.

The USGS predictions proved prescient. By 1982, the northern valley springs began to run dry. One of the first of these was the Thompson spring, which was closest in proximity to the southern pumping area. In 1982, Mr. Thompson requested the State Engineer take action to protect his rights by enforcing prior appropriation law.²⁴ But, instead of protecting Mr. Thompson's rights, the State

²¹ *Id.*

²² JA Vol. II, JA0316 – JA0317.

²³ *See e.g.* Respondent's Answering Brief at 4-18, *Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736).

²⁴ *See* NRS 533.430 ("Every permit to appropriate water. . . shall be, and the same is hereby declared to be, subject to existing rights.").

Engineer bowed to the wishes of the far more numerous junior priority users and refused to stop the over-pumping.²⁵

At the 1982 hearings regarding Mr. Thompson's request, State Engineer Morros referenced data in the record "which indicate that the pumpage in Diamond Valley is starting to - - is in fact affecting groundwater levels" and "will have adverse effects on the senior rights."²⁶ Despite this admission, he requested a vote of those present as to whether he should take any action.²⁷ After counting the hands, he noted that "everybody seems to be quite content and happy with the situation in Diamond Valley with the exception of Mr. Thompson whose spring has diminished considerably."²⁸ After the hearing, Mr. Morros took no effective action to stop the over-pumping.

Inevitably, southern pumping created a massive cone of depression which is a hole in the aquifer that sucks water from every direction. That hole worked its way north, first drying up the Bailey springs and then hitting the Sadler springs, which are now dry. Despite Appellants' attempt to blame the victims, by claiming the Bailey and Sadler springs ran dry due to self-inflicted harm, the State Engineer has definitively determined that "it is the use of water by the junior water right holders that has conflicted with [Sadler Ranch's] senior rights."²⁹

²⁵ See Appellant's Appendix at AA01814 – AA02050, *Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736) (transcripts of 1982 State Engineer Hearings).

²⁶ *Id.* at AA01962:16-24.

²⁷ *Id.* at AA01963:1-4.

²⁸ *Id.* at AA01942:4-6.

²⁹ State Engineer Ruling 6290 at 61.

III. Diamond Valley's Designation As A Critical Management Area.

Throughout the more than thirty-year period between 1982 and 2013, the State Engineer took little action to reduce over-pumping in the basin or otherwise protect senior water right holders. Then, in 2013, the State Engineer issued Order 1226 authorizing senior users to apply for mitigation rights.³⁰ As State Engineer King noted at the time, “[w]hen we were here in 2009, again, it was made clear to me that everyone, it seemed, was happy where they were in terms of their crops and the declining water table.”³¹ This statement shows that even in 2009, with massive environmental damage of dozens of springs going dry and an ever decreasing groundwater table, the State Engineer turned a blind eye to the situation at the bequest of the junior right holders. The State Engineer stated in 2013 that he was happy to continue to look the other way, but if a senior water right owner asserted impairment, that would be a *game-changer* and he would no longer be able to avoid taking action.³² However, even after issuing Order 1226, the State Engineer still took no steps to reduce pumping. Further, Eureka County, on behalf of the junior users, continues to litigate against Sadler Ranch’s mitigation rights and has protested mitigation applications filed by the Renners.³³

³⁰ State Engineer Order 1226 at 2.

³¹ Sadler Ranch, LLC and Ira and Montira Renner’s Response to Emergency Motion for Stay, Exhibit at 4 at 28:1-3; *See also* Sadler Ranch, LLC and Ira and Montira Renner’s Response to Emergency Motion for Stay, Exhibit 2 at 81:5-15.

³² Sadler Ranch, LLC and Ira and Montira Renner’s Response to Emergency Motion for Stay Exhibit 4 at 28:4-10 (“It’s an absolute came changer when we get a senior water right holder asserting impairment.”)

³³ *See generally, Eureka Cnty. v. Sadler Ranch, LLC* (Case No. 75736).

With no other remedy, in 2015 Sadler Ranch filed a writ petition to force the State Engineer to follow his mandate to protect senior rights and stop the over-pumping. In response, the State Engineer invoked NRS 534.110(7) and declared the basin a Critical Management Area (“CMA”).³⁴ Declaring the basin a CMA was a defensive litigation move, designed to moot Sadler Ranch’s writ petition while postponing any real action for at least another ten years.³⁵ However, the declaration did have the benefit of forcing the junior water users to develop a groundwater management plan or face being cut off completely at the end of the 10-year period.

IV. The Development Of The DVGMP.

Water users formed a board to guide the development of a plan. Respondent Ira Renner, the owner of the northernmost ranch in the basin, agreed to serve as a representative for the senior, pre-statutory rights holders. He did so in good faith, believing that the impending threat of curtailment would finally force the junior users to take the concerns of the seniors seriously. This proved to be a false hope.

On June 11, 2015, at the State Engineer’s urging,³⁶ the board held a workshop where Mike Young, an Australian academic, presented a proposed scheme to use the groundwater management planning process to “chang[e] our water rights system.”³⁷

³⁴ State Engineer Order 1264 at 5.

³⁵ State Engineer Motion to Dismiss First Amended Petition for Curtailment in Diamond Valley at 3-5, *Sadler Ranch, LLC v. King*, Seventh Judicial District Court Case No. CV-1504-218 (arguing that designation of the basin as a CMA precludes curtailment).

³⁶ JA Vol. XI, JA2247 (referencing audio testimony of Jake Tibbits, Eureka County Natural Resources Director to an interim subcommittee of the Legislature on June 7, 2016).

³⁷ JA Vol. III, JA0607.

This scheme involved stripping existing water rights of their priorities and instead, allocating water based on a redistributionist ‘share’ system.

Young’s scheme works as follows. Under the DVGMP each share originally equaled approximately 1 acre-foot of annual pumping right. The share system was then employed in two steps. The first step was to reduce the number of shares owned on a gradient between the most senior and most junior water owners, with the most senior rights receiving no cutbacks and the most junior right a 20% cutback in the number of shares owned. The second step was to reduce the amount of pumping each share represented. The value of all shares, measured in the amount of pumped water they represented, diminished equally over the life 35-year life of the DVGMP. This reduction in the quantity of water each share represented diminished equally whether they originated from the most senior or most junior water rights.

To see how this works, consider two hypothetical permit holders. One holds the most senior permit with a duty of 100 afa. The second holds the most junior permit, also with a duty of 100 afa. Only 30,000 afa of water is available to be pumped in any given year without depleting the resource (the perennial yield) but the State Engineer issued more than 100,000 afa of permits. So, absent the DVGMP, the senior holder is authorized to pump and use her full 100 afa of water. By contrast, the junior’s permit does not give him a right to pump *any water at all*. This is because the terms of the junior permit, and the principles of prior appropriation, only authorize pumping if water is available that is not already being used by a senior

right holder and, in Diamond Valley, all the available water has already been allocated to, and is being used by, senior users.³⁸

In contrast, under the DVGMP, both permit holders will have their permits converted to shares. The most senior permit holder receives 100 shares. The most junior permit holder receives 80 shares.³⁹ In the first year of the plan, even though she received 100 shares, the senior permit holder only receives an allocation of 67 acre-feet (“af”) of water, or 33 af less than she is otherwise entitled under her permit.⁴⁰ Meanwhile, the junior permit holder, who is legally entitled to nothing, receives 54 af of water.⁴¹ By year 35 of the plan it gets worse, the senior receives only 30 af of her water while the junior gets 24 af.⁴² In other words, the senior, who has a vested legal entitlement to her full 100 afa of water, is forcibly required to give up 70 afa of that entitlement so it can be divided among the junior users who have no legal right to it.⁴³ And the senior receives no compensation for the water taken from her.

Mr. Renner consistently warned his fellow board members that this scheme violates core tenants of Nevada’s water laws, but his concerns were met with outright

³⁸ This is true even though the State Engineer has refused to enforce the permit terms and, instead, allowed the junior users to pump the full amount of their permits. However, his refusal to properly enforce the rules does not give the juniors any legal entitlement to the water they are pumping. Rather, they pump and use that water at the State Engineer’s sufferance which can be withdrawn at any time.

³⁹ JA Vol. III, JA0545.

⁴⁰ JA Vol. XI, JA2198.

⁴¹ JA Vol. XI, JA 2198.

⁴² JA Vol. XI, JA 2198.

⁴³ JA Vol. XI, JA 2198.

hostility and ignored. Other members of the public who raised issues with the proposed scheme were treated in a similarly hostile manner.⁴⁴ Contrary to Appellants' contentions, the record shows that there was no good faith effort to develop a consensus plan that would benefit everyone. Rather, because the junior users were assured that the State Engineer would approve any plan they put forward, and because they had an overwhelming voting advantage, they moved forward with developing a plan based on Mr. Young's Australian scheme that benefited them at the expense of the seniors.

The district court saw this effort for what it was, a naked attempt by junior right holders to take water from seniors without paying for it. The district court correctly noted that:

[T]he result of the DVGMP formula is that senior water rights' holders receive fewer shares than one per acre foot. Thus, senior water rights' holders cannot beneficially use all of the water which their permit/certificate entitles them to use.⁴⁵

Accordingly, the district court struck down the DVGMP on the basis that it violates prior appropriation doctrine. This appeal followed.

STANDARD OF REVIEW ON APPEAL

While courts generally defer to the State Engineer's factual findings, questions of law are reviewed "without deference to the State Engineer's ruling."⁴⁶

⁴⁴ JA Vol. V, JA0997:8-11; JA Vol. V, JA1036:18-21.

⁴⁵ JA Vol. XI, JA2388:12-15.

⁴⁶ *Sierra Pacific Indus. v. Wilson*, 135 Nev. Adv. Op. 13, 440 P.3d 37, 40 (2019) (citing *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010)).

Further, a court may set aside agency determinations that are clearly erroneous when reviewing the record as a whole.⁴⁷

When reviewing factual findings, this court applies the same standard of review as the district court – determining “whether the evidence upon which the [State E]ngineer based his decision supports the order.”⁴⁸ The key question is “whether substantial evidence in the record supports the State Engineer’s decision.”⁴⁹ “Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.”⁵⁰

From the beginning, Nevada’s statutory water law has mandated that pre-statutory water rights cannot be impaired by any action of the State Engineer.⁵¹ Accordingly, the State Engineer “has no discretion to award an appropriator a less amount of water than the facts show [the appropriator] is entitled to.”⁵² When the State Engineer errs in his determination, a claimant may seek “his remedy in the courts.”⁵³

⁴⁷ See, e.g., NRS 233B.135(3); *Ranieri v. Catholic Cmty. Servs.*, 111 Nev. 1057, 901 P.2d 158 (1995); *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 849 P.2d 267 (1993); *State Indus. Ins. Sys. v. Shirley*, 109 Nev. 351, 849 P.2d 256 (1993); *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 787 P.2d 782 (1990); *McCracken v. Cory*, 99 Nev. 471, 664 P.2d 349 (1983); *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 96 Nev. 281, 607 P.2d 581 (1980).

⁴⁸ *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. at 525, 245 P.3d at 1148 (2010).

⁴⁹ *Office of State Eng’r, Div. of Water Res. v. Curtis Park Manor Water Users Ass’n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

⁵⁰ *Pyramid Lake Paiute Tribe of Indians*, 126 Nev. at 525, 245 P.3d at 1148 (internal quotations and citations omitted).

⁵¹ NRS 533.085.

⁵² *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803, 810 (1914).

⁵³ *Ormsby County*, 37 Nev. 314, 142 P. at 810.

In addition, any deference given to the State Engineer’s factual conclusions is pre-conditioned on “the fullness and fairness of the administrative proceedings.”⁵⁴ This Court has stated that a judge should not hesitate to intervene in cases where the State Engineer’s decision “is arbitrary, oppressive, or accompanied by a manifest abuse of discretion.”⁵⁵

ARGUMENT

I. Prior Appropriation Is The Foundational Doctrine Of Nevada’s Water Laws.

Prior appropriation has been the basis of Nevada’s water law since statehood. This doctrine applies a “first in time, first in right” principle to all appropriations of water.⁵⁶ Every water right, whether vested, permitted, or for a domestic well, is assigned a relative priority date. This priority date is an essential component of the water right that cannot be stripped away without damaging the right itself.⁵⁷

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

1. The importance of priority

“[T]o deprive a person of his priority is to deprive him of a most valuable property right.”⁵⁸ The priority date is the most important element in the ‘bundle of rights’ that we refer to as a water right.⁵⁹ This is especially true in the western United

⁵⁴ *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979).

⁵⁵ *Revert*, 95 Nev. at 787, 603 P.2d at 264-265.

⁵⁶ *Lobdell v. Simpson*, 2 Nev. 274, 277 (1866) (“he has the best right who is first in time.”).

⁵⁷ *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 312,, 448 P.3d 1106, 1115 (2019).

⁵⁸ *Whitmore v. Murray City*, 154 P.2d 748, 751 (Utah 1944).

⁵⁹ Stuart Banner, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 45 (2011) (describing the ‘bundle of rights’ theory of property).

States where water shortages occur with frequency. Because the relative priority date of a water right is so important, Courts have viewed “a priority in a water right [as] property in itself.”⁶⁰ This Court recently reinforced this view stating that “a loss of priority that renders rights useless ‘certainly affects the rights’ value’ and ‘can amount to a de facto loss of rights.’”⁶¹

When a water right holder has a senior priority date, that holder is ensured that he will receive his water *during a time of water shortage*. This makes such rights more valuable than those with junior priority dates. Accordingly, holders of senior rights have a reasonable investment-backed expectation in the security that their priority date provides. Decisions regarding whether and how much to invest in a property are often based on the priority date of the water rights associated therewith precisely because that priority determines whether there will be a dependable source of water *in the event of a shortage*.

2. Junior users cannot deprive senior users of their priority by simple majority vote.

Appellants frame the DVGMP development process as a voluntary collaboration of water right holders working together to find a solution to the over-pumping problem. In reality, the DVGMP is little more than a scheme cooked up

⁶⁰ *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005), *Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893).

⁶¹ *Happy Creek, Inc.*, 135 Nev. at 312, 448 P.3d at 1115 (citing *Andersen Family Assocs.*, 124 Nev. at 190-91, 179 P.3d at 1206) (internal quotations omitted); see also Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 *Envtl. L.* 37, 43 (2002) (“The priority of a water right is . . . its most important . . . feature.”).

by junior right holders to abolish the priority rights of the senior water right holders.⁶² While “[o]ur democratic system of government is founded upon the notion that, in most instances, the views and wishes of the majority are entitled to prevail,”⁶³ this principle does not condone a majority using its voting power to forcibly confiscate the property of a minority group.

The prior appropriation doctrine already allows for the voluntary sale and movement of water rights.⁶⁴ Senior water right holders may voluntarily gift, sell, or lease their rights to a junior user to allow the junior to continue pumping in the event of a shortage. A properly designed groundwater management plan could support such voluntary exchanges. However, a groundwater management plan cannot *force* senior right holders to give up their priorities to benefit juniors.⁶⁵ And even if it could, just compensation would be required.⁶⁶

⁶² The fact that some senior water right holders voted in favor of the plan is not dispositive of this statement. Several individuals hold both junior and senior water rights in the basin. Some of these individuals will end up receiving more water under the GMP than they would just from their senior rights because of the much greater quantity of junior rights that they own. Accordingly, some seniors had an economic incentive to support the plan.

⁶³ *Dudley v. Kerwick*, 421 N.E.2d 797, 802 (N.Y. 1981).

⁶⁴ NRS 533.382, 533.345, 533.370.

⁶⁵ NEV. CONST. art. I, §22(1) (“Public use shall not include the direct or indirect transfer of any interest in property . . . from one private party to another private party.”). The State Engineer has clearly stated that the plan is binding on all irrigation right holders even those who did not sign the petition or vote in favor of the plan. JA 0991:16 - JA 0992:2.

⁶⁶ NEV. CONST. art. I, §8(6) (“Private property shall not be taken for public use without just compensation having first been made”); U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation.”).

During the early stages of development of the DVGMP, some participants thought the plan should include provisions for compensating senior right holders through a “water right buyout program.”⁶⁷ Some juniors even admitted they had opportunities to buy out seniors, but chose not to exercise this option.⁶⁸ Instead, they opted to purchase less expensive junior priority rights and then advocate for a plan that takes water from seniors and redistributes it among the juniors.⁶⁹

Nothing in NRS 534.037 authorizes junior right holders to disregard the priority rights of seniors just because they hold a majority of the voting power. As the esteemed Justice Robert Jackson noted, a person’s fundamental rights, including their property rights, “may not be submitted to a vote” and “depend on the outcome of no election.”⁷⁰ Because the priority date of a water right is valuable property in and of itself, it cannot be stripped away by a simple majority vote.

B. The Fact That The DVGMP Violates Prior Appropriation Doctrine Is Beyond Dispute.

The essence of the prior appropriation doctrine is often expressed as “first in time, first in right.”⁷¹ In this way it operates much like the priority system for mortgages and other debt instruments. If, upon foreclosure of the security backing the debt there is not enough money to pay all lienholders (i.e. there is a shortage),

⁶⁷ JA Vol. III, JA0565, JA Vol. III, JA0566, JA Vol. III, JA0575, JA Vol. III, JA0578.

⁶⁸ JA Vol. V, JA1048:23 (Public Comment of Dusty Moyle).

⁶⁹ JA Vol. V, JA1048:15-16 (Public Comment of Dusty Moyle) (“in the last ten years I’ve been purchasing land and it’s not been senior. It’s been junior.”).

⁷⁰ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185-85 (1943).

⁷¹ *Lobdell v. Simpson*, 2 Nev. 274 (1866) (“he has the best right who is first in time.”).

those with the most senior priority get the full value of their claims paid before junior lienholders get anything.

Order 1302 explicitly acknowledges that the DVGMP violates prior appropriation doctrine.⁷² Under the plan junior water users are allowed to keep pumping water even though seniors are not receiving their full duty. Therefore, this appeal should be dismissed.

II. NRS 534.037 Does Not Authorize Water Users To Write Their Own Personal Water Law.

The prior appropriation doctrine has been a fundamental element of Nevada's common law since statehood.⁷³ As such, any statute deviating from that doctrine must be strictly construed because "[t]he Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute."⁷⁴ Therefore, "if a statute is ambiguous or its meaning uncertain, it should be construed in connection with the common law in force when the statute was enacted."⁷⁵

Nothing in the express language of NRS 534.037 indicates an intent by the Legislature to allow deviations from the prior appropriation doctrine. In fact, the

⁷² JA Vol. II, JA0319 ("the GMP does deviate from the strict application of the prior appropriation doctrine").

⁷³ See *Lobdell v. Simpson*, 2 Nev. 274 (1864) (recognizing and defining prior appropriative rights); see also JAMES H. DAVENPORT, NEVADA WATER LAW 6-12 (Colo. River Comm'n 2003) (describing the common law development of the prior appropriations doctrine in Nevada).

⁷⁴ *Happy Creek, Inc.*, 135 Nev. at 307, 448 P.3d at 1111 (citing *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016) (internal quotations and citations omitted)). See also *Orr Ditch & Water Co. v. Justice Court of Reno TP., Washoe Cty.*, 64 Nev. 138, 164, 178 P.2d 558, 570 (1947).

⁷⁵ *Orr Ditch & Water Co.*, 64 Nev. at 164, 178 P.2d at 570-71.

State Engineer readily admits that “the legislative history contains scarce direction concerning how a plan must be created or what the confines of any plan must be.”⁷⁶ Therefore, to support his conclusion that the *Nevada* Legislature intended to deviate from prior appropriation, he relied exclusively on a *New Mexico* judicial opinion approving a settlement agreement between New Mexico, the United States, and several irrigation districts in an adjudication proceeding.⁷⁷ But, as the district court correctly noted, the New Mexico case is inapposite both legally and factually.⁷⁸

If the Legislature had intended to supplant the well-established doctrine of prior appropriation, it would have adopted clear language expressing that intent. But when such language was proposed, the Legislature rejected it. Accordingly, the State Engineer lacked authority to approve a GMP that deviates from prior appropriation doctrine and Order 1302 is invalid.

A. The Plain Language Of NRS 534.037 And 534.110(7) Does Not Abrogate Prior Appropriations.

The legislation that became NRS 534.037 and 534.110(7) was introduced to the Legislature in 2011 as AB 419. Section 1 of that bill contained the provisions codified as NRS 534.037, while Section 3 contained the language that would become NRS 534.110(7). The title of the bill states that its purpose is to:

[R]equir[e] the State Engineer to designate certain basins as critical management areas in certain circumstances; requir[e] the State Engineer to take certain actions in such

⁷⁶ JA Vol. II, JA0319.

⁷⁷ JA Vol. II, JA0319 - JA0320.

⁷⁸ JA Vol. XI, JA2409:15 - JA2410:19

a basin unless a groundwater management plan has been approved for the basin.

The relevant language in AB 419 that is at issue in this case states:

If a basin has been designated as a critical management area for at least 10 consecutive years, the State Engineer shall order that withdrawals . . . be restricted in that basin to conform to priority rights, unless a groundwater management plan has been approved for the basin pursuant to section 1 of this act.

This language is clear and unambiguous. If a groundwater plan is not adopted within 10 years of designating the basin as a critical management area, the State Engineer *must* order a curtailment by priority.

Appellants claim that the contingent clause “unless a groundwater management plan has been approved” somehow authorizes the state engineer to approve a plan that does not conform to prior appropriation doctrine. They argue that the contingent clause applies to the prepositional phrase “to conform to priority rights” and therefore if a plan is approved, conformance with priority rights is excused. Such a reading violates basic rules of grammar and logic.

Contingent clauses create exceptions to actions. By definition, actions are indicated by verbs and verb clauses, not prepositions. Here, the contingent clause is clearly providing an exception to the mandate that “the State Engineer shall order withdrawals . . . be restricted.”⁷⁹ In other words, if the contingent clause is met, and

⁷⁹ JA Vol. XI, JA2228.

a groundwater management plan has been approved, then the State Engineer is not required to issue an order curtailing pumping.⁸⁰ Otherwise, he is.

This becomes even more clear when NRS 534.110(7) is read side by side with the provision immediately preceding it, NRS 534.110(6).⁸¹ NRS 534.110(6) is the provision of the water law that grants the State Engineer a general power to curtail pumping:

[T]he State Engineer may order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted to conform to priority rights.

The only differences in the language between NRS 534.110(6) and NRS 534.110(7) are the two conditional clauses “If a basin has been designated as a critical management area for at least 10 consecutive years” and “unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037” and the replacement of the discretionary “may” with the mandatory “shall”. This indicates that the contingent clauses are merely describing the conditions under which the State Engineer’s discretionary power becomes a mandatory duty and *not* creating a general exemption to the rule of prior appropriation.

Accordingly, the district court was correct when it stated that “there is no express language in either NRS 534.037 or NRS 534.110(7) stating a GMP can

⁸⁰ Respondents’ assert that the contingent clause only removes the mandatory nature of the action. The State Engineer retains the ability to order a discretionary curtailment even if a groundwater management plan is approved.

⁸¹ JA Vol. XI, JA2227.

violate the doctrine of prior appropriation or that the doctrine is somehow abrogated.”⁸² This conclusion is also consistent with the legislative history.

B. Legislative History Does Not Support Appellants’ Interpretation.

The State Engineer’s novel interpretation of NRS 534.037 conflicts with both legislative history and with his own prior statements. Understanding the timeline of events is crucial to placing the Legislative history in context.

As noted, NRS 534.037 and 534.110(7) became law in 2011.⁸³ Work on the DVGMP did not begin until February of 2014.⁸⁴ Initially, those efforts focused on conventional strategies for reducing water use.⁸⁵ But in June of 2015 things radically changed. At the behest of the State Engineer, Mike Young, an Australian academic, presented to the water users the share system scheme that would become the basis for the DVGMP.⁸⁶ After his presentation, the working group radically changed the goal of the project from implementing conservation measures to “changing our water rights system.”⁸⁷ At the behest of the working group, in September 2015, Mr. Young published his “Blueprint” on how to apply his share system scheme to Diamond Valley.⁸⁸

⁸² JA Vol. XI, JA2411:11-13.

⁸³ JA Vol. II, JA0562; JA Vol. XI, JA2188.

⁸⁴ JA Vol. XI, JA2188.

⁸⁵ JA Vol. III, JA0566.

⁸⁶ JA Vol. XI, JA2189; JA Vol. XI, JA2247.

⁸⁷ JA Vol. III, JA0607.

⁸⁸ JA Vol. XI, JA2190; JA Vol. XI, JA2240.

Simply put, the Legislature in 2011 could not have contemplated that they were authorizing water users to completely change the water rights system and toss aside prior appropriation because that proposal was not raised until 2015.

In addition, amendments to the 2011 law were proposed by the State Engineer in both 2015 and 2017 but were rejected. In fact, the proposed 2017 amendments were submitted with the specific intent of allowing the DVGMP's share system to be implemented. But, as the following Legislative history will show, when the Legislature was provided a clear opportunity to authorize a deviation from the prior appropriation system, they declined to do so.

1. AB 419 (2011).

AB 419 was introduced by Assemblyman Goicoechea, who is intimately familiar with the history of over-pumping in Diamond Valley. His stated reason for proposing the bill was to force the State Engineer to take action in basins, like Diamond Valley, where unabated over-pumping was happening:

The problem is where we are today, again the State Engineer, and I'm not throwing rocks at the Division of Water Resources, but *the bottom line is we are just not getting it done. We continue to see these basins decline.*⁸⁹

Accordingly, he proposed a bill that would force the State Engineer to curtail pumping. However, if water users could mutually develop a plan to reduce pumping on their own, they could exempt themselves from the mandatory curtailment.

⁸⁹ *Hearing on A.B. 419 Before the Assm. Comm. On Govt. Affairs*, 2011 Leg. 76th Sess. (March 30, 2011) at p. 69 (emphasis added).

But Assemblyman Goicoechea made clear that the burden of any such plan should fall on junior users, not seniors – “People with junior rights will try to figure out how to conserve enough water under these plans.”⁹⁰ Conservation, not reallocation, was to be the focus. As the Assemblyman explained, plans could include “planting alternative crops, water conservation, or using different irrigation methods.”⁹¹ Finally, the plans would be voluntary. As one supporter of the bill testified, “[w]e support the concept of giving parties tools so they can find voluntary ways to reduce overappropriation.”⁹²

After reviewing the full legislative record for AB 419, the district court correctly found that:

[N]owhere in the Legislative history of AB 419 *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 priority.⁹³

This finding is easily confirmed by reading the minutes of the legislative hearing on AB 419. During those hearings, not a single word was spoken evincing an intent to abrogate the prior appropriation doctrine.

⁹⁰ *Hearing on A.B. 419 Before the Sen. Comm. On Govt. Affairs*, 2011 Leg. 76th Sess. (May 23, 2011) at p. 16.

⁹¹ *Hearing on A.B. 419 Before the Sen. Comm. On Govt. Affairs*, 2011 Leg. 76th Sess. (May 23, 2011) at p. 13.

⁹² *Hearing on A.B. 419 Before the Assm. Comm. On Govt. Affairs*, 2011 Leg. 76th Sess. (May 4, 2011) at p. 20.

⁹³ JA Vol. XI, JA2414:7-10 (emphasis added).

2. SB 81 (2015).

In December 2014, before Mr. Young’s Australian Scheme was proposed, the State Engineer submitted SB 81 to the Legislature. The bill proposed to radically change the provisions of the statutes in question. If it had passed, SB 81 would have given the State Engineer broad new powers to limit pumping and irrigation in over-appropriated basins unless a groundwater management plan is approved.⁹⁴ But, like AB 419, SB 81 provided no explicit guidelines for the development of such plans and contained no express language abrogating or altering the prior appropriation system. However, the bill never received the support needed for passage.

3. SB 73 (2017).

After the failure of SB 81, the State Engineer recruited the assistance of Mr. Young who created the “blueprint” that would guide the development of the DVGMP. In 2016, the State Engineer gave a presentation on the proposed DVGMP at the Western State Engineer’s Annual Conference.⁹⁵ After describing the share system at the heart of the plan, State Engineer King stated that this approach would “[n]eed [a] statutory change to make [it] legal” and indicated that his office was submitting a bill draft to the 2017 Legislature “*to do just that.*”⁹⁶ That bill draft became SB 73.

SB 73 proposed significant changes to NRS 534.037. Among these was the addition of a provision that would give the State Engineer permission to approve a

⁹⁴ S.B. 81, 2017 Leg., 78th Sess. (Nev. 2015).

⁹⁵ JA Vol. XI, JA2239.

⁹⁶ JA Vol. XI, JA2241 (emphasis added).

groundwater management plan that “[limits] the quantity of water that may be withdrawn under any permit or certificate or from a domestic well *on a basis other than priority*.”⁹⁷ In effect, the bill would have authorized the State Engineer to approve a plan that does not adhere to prior appropriation doctrine.⁹⁸ A single hearing was held on the bill.⁹⁹ The minutes of that hearing clearly demonstrate that the State Engineer and the proponents of the GMP were asking the Legislature to allow them to implement a plan that deviates from prior appropriation doctrine.¹⁰⁰ The proposed change was opposed on the basis that prior appropriation doctrine created vested property rights that cannot be taken without compensation.¹⁰¹ Accordingly, the Legislature was given a clear policy choice between two positions – maintain prior appropriation or authorize deviations from it. The legislature chose the former and SB 73 failed to pass.

Appellants argue that failed legislation is not a proper tool for legislative interpretation.¹⁰² But the cases they cite are more narrowly tailored and only state that it is not proper to use subsequent failed legislation to determine what *prior*

⁹⁷ S.B. 73 at 3:34-40, Leg., 79th Sess. (Nev. 2017).

⁹⁸ Respondents contend that even if such legislation were passed, the Nevada Constitution’s takings provisions would still bar a plan like the one being considered.

⁹⁹ *Hearing on S.B. 73 Before the S. Comm. on Nat. Res.*, 2017 Leg. 79th Sess. (February 28, 2017).

¹⁰⁰ *Id.* at 9 (Testimony of Jake Tibbitts, Eureka County’s Natural Resource Manager, “The time to fix this problem through strict prior appropriation was 60 years ago when there was a flood of applications. Now 60 years later, the State Engineer is saying we are going to use strict prior appropriation. This is unworkable for a community.”).

¹⁰¹ *Id.* at 14-15.

¹⁰² DNRCPA Opening Brief at 41-42.

legislators intended.¹⁰³ That is not what the district court did in this case. Rather, the district court found that the State Engineer's attempt to change the law reflected *his own* understanding that he lacked authority under NRS 534.037 to approve a plan that violated prior appropriation doctrine.

[T]he fact that the State Engineer specifically sought 2017 legislation authorizing a GMP to be approved that allowed for water to be withdrawn from a CMA basin on a basis other than priority, *demonstrates the State Engineer's knowledge* that NRS 534.037 and NRS 534.110(7) as enacted did not either expressly or impliedly allow for a GMP to violate Nevada's prior appropriation law.¹⁰⁴

Legislative history of this type is often used in a similar manner. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,¹⁰⁵ the United States Supreme Court considered evidence of several pieces of failed legislation to determine that Congress never granted the FDA regulatory authority over tobacco products.¹⁰⁶ If it is appropriate for the highest court in the land to use this type of evidence, the district court could certainly make reference to similar evidence here.

The legislative history in the record makes clear that prior to the issuance of Order 1302, State Engineer King understood that NRS 534.037 did not authorize him to replace strict priority with a share allocation system. State Engineer King admitted to his peers at an annual conference, and attempted to resolve the lack of authority by submitting proposed legislation. But the Legislature refused his request. Then, rather than advise the proponents of the GMP to draft a new plan

¹⁰³ *United States v. Wise*, 370, U.S. 405, 411 (1962).

¹⁰⁴ JA Vol. XI, JA2416:9-14 (emphasis added).

¹⁰⁵ 529 U.S. 120, 120 S.Ct. 1291 (2000).

¹⁰⁶ 529 U.S. at 147-48, 120 S.Ct. at 1308.

consistent with prior appropriation, State Engineer King chose to approve the GMP anyway. Such an action was by definition arbitrary, capricious, and an abuse of discretion.

C. Appellants incorrectly conflate the prior appropriation doctrine with the remedy of curtailment.

In an attempt to support their claim that NRS 534.037's language allows them to discard prior appropriation doctrine, Appellants repeatedly conflate the remedy of curtailment with the doctrine itself. Excess pumping can be curtailed while keeping prior appropriation in place. But placing limits on the exercise of a particular remedy does not, either expressly or impliedly, abrogate the underlying legal doctrine that the remedy enforces. This is especially true when multiple other remedies remain available for enforcement of the doctrine.

Curtailment is just one of many remedies the State Engineer has at his disposal to enforce prior appropriation. And, contrary to DNRCPA's claim, NRS 534.110(7) does not prohibit curtailment if a plan is submitted and approved.

The State Engineer has multiple tools at his disposal to enforce prior appropriation. Curtailment is just one of these tools. Instead of a basin-wide curtailment, the State Engineer can also order a more surgical approach and only limit individual junior pumpers who are interfering with a specific senior right.¹⁰⁷ He can also issue an order prohibiting the drilling of new wells if such wells would

¹⁰⁷ See, e.g., NRS 534.020 (all appropriations of groundwater are subject to existing rights.); NRS 534.110(5) (requiring the State Engineer to impose a condition on every permit stating that withdrawals under the permit may be limited or prohibited to prevent unreasonable adverse effects on existing domestic wells.).

unduly interfere with existing wells.¹⁰⁸ The State Engineer can also establish a rotating schedule for water use, as long as senior rights are not impaired.¹⁰⁹ Another option is to call for proofs of beneficial use and cancel any permits whose owners fail to place their water to use by a particular deadline (a key component of the prior appropriation system).¹¹⁰ In addition, he can punish users who waste water by requiring such users to replace 200 percent of the amount wasted.¹¹¹ Finally, he can declare permits and certificates forfeit where the owners do not regularly place the water to beneficial use.¹¹² All of these options were discussed during the early development of the DVGMP.¹¹³ Limiting the State Engineer from enforcing one of these particular remedies, does not abrogate the priority system or prevent the State Engineer from utilizing a different remedy.

However, even if elimination of a remedy also abrogated the legal doctrine the remedy enforces, that is not what NRS 534.110(7) does. Nowhere in the language of NRS 534.110(7) is the State Engineer prohibited from ordering a *discretionary* curtailment under NRS 534.110(6), even if a groundwater management plan is approved. Instead, the statute simply says that the State Engineer is not *required* to impose that remedy. All NRS 534.110(7) did was take the language of NRS 534.110(6) and make it mandatory if: (1) a basin is designated as a CMA, and (2) no groundwater management plan is approved.

¹⁰⁸ NRS 534.110(8).

¹⁰⁹ NRS 533.075.

¹¹⁰ NRS 533.400.

¹¹¹ NRS 534.193(1), 533.460, 533.563, 533.481.

¹¹² NRS 534.090.

¹¹³ JA Vol. III, JA0572.

Accordingly, curtailment by priority has not been removed from the State Engineer’s toolbox of remedies. And because a discretionary curtailment by priority remains an option even if a plan is adopted, the contingent language in NRS 534.110(7) cannot be presumed to have abrogated the prior appropriation doctrine.

III. Under The DVGMP Pumping Will Never Be Reduced Below The Perennial Yield Of The Basin.

A. The DVGMP does not contain the “necessary steps” for removal of the CMA designation.

While NRS 534.037 does not provide much guidance on how to draft a plan, it does contain one fundamental requirement that all plans must meet. They “must set forth the necessary steps for removal of the basin’s designation as a critical management area.”¹¹⁴ The use of the word “must” makes the requirement mandatory.¹¹⁵

Because a CMA designation is established when “withdrawals of groundwater consistently exceed the perennial yield of the basin”,¹¹⁶ to remove a CMA designation requires a showing that withdrawals (all withdrawals not just pumping regulated by a plan) are consistently below the perennial yield. This was made clear by Assemblyman Goicoechea when he proposed AB 419:

Perennial yield, typically, is the amount of usable water from a groundwater aquifer that can be economically

¹¹⁴ NRS 534.037(1).

¹¹⁵ See NRS 0.025(1)(c) (“Must expresses a requirement when . . . [t]he subject is a thing.” Here the subject in the relevant statutory provision is a clearly thing and not a person – the groundwater management plan. Accordingly, the use of the term must in the statute denotes an absolute requirement.).

¹¹⁶ NRS 534.110(7).

withdrawn and consumed each year for an indefinite period of time without impacting the water table in that basin. That is perennial yield. *That is what we are striving for.*¹¹⁷

But, by its own terms, the DVGMP does not accomplish that goal.

The perennial yield of the basin has been established at 30,000 acre-feet/year.¹¹⁸ However, in the DVGMP's final year (year 35) the plan allows 34,200 acre-feet of pumping¹¹⁹ and that figure does not include withdrawals related to domestic wells, municipal water rights, commercial and industrial rights, mining rights, and pre-statutory water rights.¹²⁰ When those users are added in, total withdrawals in year 35 will exceed 45,000 acre-feet, or 150% of the perennial yield.¹²¹ This means that groundwater levels in the basin will continue to decline with no end in sight.

Neither the DVGMP, nor Order 1302, contain any analysis of how the pumping reductions in the plan will affect water levels in the basin. Therefore, there is no scientific evidence in the record to support a conclusion that the DVGMP will result in the removal of the CMA designation. Without such evidence, the approval of the DVGMP was arbitrary, capricious, and an abuse of the State Engineer's discretion.

¹¹⁷ *Hearing on A.B. 419 Before the Assemb. Comm. on Gov't Affairs* 2001 Leg., 76th Sess. at 68 (March 30, 2011) (emphasis added).

¹¹⁸ JA Vol. XI, JA2270.

¹¹⁹ JA Vol. IV, JA0823.

¹²⁰ JA Vol. III, JA0542.

¹²¹ JA Vol. XI, JA2270.

B. The DVGMP authorizes continued groundwater mining of an already depleted basin.

There is no question that the Diamond Valley aquifer has been depleted as a result of over-pumping. In 1968, James Harrill, an engineer with the USGS, determined that the perennial yield of the entire basin was up to 30,000 acre-feet/annually.¹²² But the State Engineer issued 150,000 acre-feet worth of pumping permits, mostly clustered in the southern half of the basin.¹²³ In 1968, pumping totaled only 12,000 acre-feet/year (less than half the perennial yield). However, because that pumping was taking place primarily in a highly concentrated area, far from where the natural sources of discharge were located, depletion of the aquifer was already occurring.¹²⁴

Harrill estimated that the total amount of water in the upper 100 feet of saturated alluvium (i.e., the water considered to be available for pumping as “transitional storage”) in the southern sub-basin was approximately 2,000,000 acre-feet.¹²⁵ Harrill further estimated that if pumping in the sub basin was capped and limited to the then-existing 12,000 acre-feet/year, equilibrium (the stabilization of groundwater levels) would take 300 to 400 years to achieve and result in 3,000,000 acre-feet being permanently withdrawn from the aquifer.¹²⁶ This would result in a groundwater decline of 200 feet.¹²⁷ Harrill further warned that if pumping in the

¹²² JA Vol. II, JA0340.

¹²³ JA Vol. II, JA0340.

¹²⁴ JA Vol. II, JA0340 (indicating that 60,000 acre-feet of water had already been permanently depleted from the aquifer).

¹²⁵ JA Vol. II, JA0340.

¹²⁶ JA Vol. II, JA 0340.

¹²⁷ JA Vol. II, JA 0340.

southern portion of the basin increased beyond 12,000 acre-feet/annually, equilibrium would never be achieved (i.e., groundwater levels would never stabilize).¹²⁸

Harrill's predictions were prophetic. The State Engineer allowed pumping in the southern part of the valley to increase not just far beyond Harrill's 12,000 acre-foot limit, but also well beyond the 30,000 acre-foot perennial yield. According to the State Engineer, pumping in the 1980s reached a level of 125,000 acre-feet/year and as of 2014 was still exceeding 90,000 acre-feet/year.¹²⁹ This resulted in groundwater declines of more than 100 feet and the permanent depletion of over 1,750,000 acre-feet of water from the aquifer.¹³⁰

Instead of stopping the over-pumping, the DVGMP allows it to continue indefinitely. During the thirty-five-year planning horizon, the DVGMP allows the permanent removal of an additional 750,000 acre-feet of water from the aquifer – 500,000 acre-feet more than what Harrill estimated was available for use as transitional storage.¹³¹

In addition, most of the pumping under the DVGMP will remain concentrated in the southern sub basin where Harrill determined that equilibrium will never be reached if pumping exceeds 12,000 acre-feet/year.¹³² Accordingly, even if the DVGMP is fully implemented and strictly enforced, water levels will not stabilize.

¹²⁸ JA Vol. II, JA 0340.

¹²⁹ State Engineer Ruling 6290 at 30.

¹³⁰ JA Vol. IV, JA0937.

¹³¹ JA Vol. IV, JA 0937.

¹³² JA Vol. II, JA 0340.

Simply put, the DVGMP does not fix the problem and, therefore, will not result in removal of the CMA designation. Because of this, the plan does not meet the statutory criteria of NRS 534.037(1) and, thus, the district court's ruling should be affirmed.

IV. Order 1302 Was Not Supported By Substantial Evidence.

All decisions of the State Engineer must be based on substantial evidence in the record.¹³³ Substantial evidence is “that which a ‘reasonable mind might accept as adequate to support a conclusion.’”¹³⁴ Where factual findings of the State Engineer are “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record” the resulting action “constitutes an arbitrary and capricious abuse of discretion.”¹³⁵ Furthermore evidence the State Engineer relies on in making his determination must be “presently known” and made available to the public in such a manner that members of the public have a full opportunity “to challenge the evidence.”¹³⁶ Finally, the State Engineer may not use *post hoc* rationalizations to justify his action.¹³⁷

Here, the proponents of the DVGMP provided no evidence showing the plan contains the necessary steps to halt groundwater declines and thereby remove the

¹³³ *Office of the State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d. 203, 205 (1991) (stating that a reviewing court must “determine whether the evidence upon which the State Engineer based his decision supports the order.”).

¹³⁴ *Bacher v. Office of State Eng’r of State of Nev.*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State Emp’t Sec. Dep’t v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

¹³⁵ *Morris*, 107 Nev. at 702, 819 P.2d at 205.

¹³⁶ *Eureka Cnty v. State Engineer*, 131 Nev. 846, 856, 359 P.3d. 1114, 1121 (2015).

¹³⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

CMA designation. Meanwhile, Sadler Ranch retained an expert who thoroughly analyzed the DVGMP and determined that the pumping reductions will neither stem the ongoing groundwater level declines nor result in removal of the CMA designation.¹³⁸ In addition, despite having the tools to do so, the State Engineer failed to perform any independent technical analysis regarding what effect the pumping reductions in the GMP will have on future groundwater levels. In short, the only scientific evidence in the record related to whether the proposed pumping reductions are adequate was Sadler Ranch's undisputed expert report stating that they are not. Because of this, the State Engineer's approval of the GMP was not supported by substantial evidence.

A. Appellants provided no evidence that the DVGMP will result in a stabilization of groundwater levels.

“The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof.”¹³⁹ Accordingly, Appellants bore the burden of proving that implementation of the DVGMP will result in stabilized groundwater levels. They failed to meet this burden. At the October 30, 2018 public meeting, the proponents gave no presentation describing the elements of the DVGMP or how it will be implemented.¹⁴⁰ They also did not have a single expert witness review the GMP and testify as to its scientific soundness.¹⁴¹ In addition, the GMP, itself, does not include

¹³⁸ JA 0987:12 - JA 0990:10; JA 0933 - JA 0944.

¹³⁹ *JM v. Dep't of Family Servs.*, 922 P.2d 219, 221 (Wyo. 1996) (citing BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 7.8 (2d ed. 1984)).

¹⁴⁰ *See generally* JA 0988 - JA 1055.

¹⁴¹ *Id.*

any scientific or hydrologic analysis regarding how the proposed reductions in pumping will affect the basin's long-term water budget.¹⁴² While the DVGMP does state that its primary goal is removal of the CMA designation,¹⁴³ there is nothing to show that the plan will actually meet that goal. In short, the administrative record is devoid of scientific or technical evidence supporting the DVGMP's approval.

In Order 1302, the State Engineer acknowledges that the pumping reductions were established by "agreement of the GMP authors" and "selected from existing published values" rather than by scientific analysis.¹⁴⁴ No mention is made of what published sources were used or why certain values were chosen over others. Nor is any independent water budget analysis included in either the DVGMP or Order 1302. Given the uncertainty and disagreement regarding how much water can safely be pumped from each of the sub basins, or the valley as a whole,¹⁴⁵ the lack of any discussion or analysis in Order 1302 regarding how the pumping levels were established or whether they will result in stabilization of groundwater levels is disturbing. Absent such evidence and analysis, the State Engineer's decision to approve the DVGMP was both arbitrary and capricious.

¹⁴² See generally JA 0530 - JA 0840.

¹⁴³ JA Vol. III, JA0541.

¹⁴⁴ JA Vol. II, JA0329.

¹⁴⁵ The GMP acknowledges this uncertainty. See JA Vol. IV, JA0793 (noting various estimates of perennial yield that differ by as much as 60%); JA Vol. IV, JA0799 (noting the uncertainty associated with estimating how much water is being pumped in the basin); JA Vol. IV, JA0801 & JA Vol. IV, JA0806 (noting that pumping of stockwater and mitigation rights is unknown which contributes the uncertainty in knowing how much water is being pumped overall).

B. Sadler Ranch provided expert evidence demonstrating that groundwater levels will continue to decline under the DVGMP.

Unlike Appellants, Sadler Ranch retained a recognized expert who fully analyzed the DVGMP – Mr. David Hillis, a licensed professional engineer and water rights surveyor. At Sadler Ranch’s request, Mr. Hillis reviewed the plan and produced a report of his conclusions.¹⁴⁶ Mr. Hillis concluded that the GMP: (1) provides insufficient hydrogeological evidence, (2) favors junior priority water rights holders at the expense of seniors, (3) allows continued exploitation of the groundwater resource, and (4) “will not sufficiently reduce groundwater pumping to remove the CMA designation.”¹⁴⁷ Mr. Hillis’ report was the only expert analysis of the DVGMP submitted during the administrative proceedings and was undisputed.

In addition to his expert report, Mr. Hillis was present and provided comments at the October 30, 2018 meeting.¹⁴⁸ Mr. Hillis informed the State Engineer that “[t]here is no substantial technical evidence to show that the pumping levels, although they will be reduced over time, will actually result in the balance coming back – the basin coming back within balance.”¹⁴⁹ He also noted that the GMP does not contain any objective triggers or thresholds to guide future management decisions.¹⁵⁰

In Order 1302 the State Engineer responds to this latter concern by stating that “the plan to reduce pumping, monitor the effects on water levels, and then adjust

¹⁴⁶ JA Vol. IV, JA0933 - JA0944.

¹⁴⁷ JA Vol. IV, JA 0935 - JA0936.

¹⁴⁸ JA Vol. V, JA 0987:12 - JA0990:10.

¹⁴⁹ JA Vol. V, JA0987:21-24.

¹⁵⁰ JA Vol. V, JA0987:24 - JA0988:2.

pumping reductions is a sound approach to achieving the goal of stabilizing water levels.”¹⁵¹ The DVGMP does not do that. The plan contains no description of a monitoring network, no definitions or objective standards to compare the results to, and no identified management actions that will be triggered based on those results. Also, contrary to the State Engineer’s assertion, the DVGMP does not give him flexibility to adjust pumping levels in response to monitoring data. Instead, the plan affirmatively prohibits the State Engineer from deviating from the listed pumping reductions during the first ten years of the plan (meaning he can’t respond to monitoring data at all), and then severely limits his ability to adjust pumping reductions thereafter.¹⁵² Accordingly, even if the data shows that the pumping reductions are not working, the State Engineer is handcuffed in how he can respond. This limitation improperly divests the State Engineer of his statutory duties.

Finally, Mr. Hillis indicated that he reviewed the prior USGS reports in the basin and stated that those reports “show that even with the reduction that groundwater mining will still be occurring *even at the end of the plan*.”¹⁵³ Mr. Hillis based this conclusion, in part, on the fact that the DVGMP exempts a significant amount of groundwater pumping from the plan. When this pumping is added to the pumping authorized in the DVGMP, Mr. Hillis estimated that total authorized

¹⁵¹ JA Vol. II, JA0330.

¹⁵² JA Vol. III, JA0548 (GMP Section 13.13 – “Allocations shall be firmly set for the first ten years of the GMP . . . after Year 10, annual Allocations cannot exceed a cumulative adjustment of plus or minus (+/-) two (2) percent (%).”).

¹⁵³ JA Vol. V, JA0988:6-8.

pumping in year 35 would exceed 40,000 acre-feet.¹⁵⁴ Mr. Hillis further stated that the permanent removal of 2,500,000 acre-feet of water from the aquifer (as proposed by the GMP) represents “an extreme volume of water.”¹⁵⁵ Mr. Hillis informed the State Engineer that “[a]t the conclusion, the plan will also not reduce the withdrawals below the perennial yield in the basin.”¹⁵⁶ These conclusions were undisputed by any other party at the meeting. Accordingly, the only expert evidence in the administrative record indicates that the DVGMP will *not* bring the basin back into balance or stop groundwater declines.

C. The State Engineer failed to use the existing Diamond Valley groundwater model to analyze the effects of the plan.

The Nevada Legislature has directed the State Engineer to “consider the best available science in rendering decisions concerning the available surface and underground sources in Nevada.”¹⁵⁷ The term “best available science” is a term of art describing the quality and the availability of scientific evidence that should be considered by an administrative agency. “An agency complies with the best available science standard so long as it does not ignore available studies, even if it

¹⁵⁴ JA Vol. V, JA0988:8-10. These exempt water rights include, without limitation, mitigation permits issued to holders of pre-statutory spring rights that dried up as a result of pumping (Sadler, Venturacci, and Bailey), municipal permits held by Eureka County, pumping from domestic wells, and mining permits that did not have an irrigation base right. These permits have a combined total duty in excess of 9,500 acre-feet annually.

¹⁵⁵ JA Vol. V, JA0988:21-24. To put this number into perspective, in 2015 groundwater pumping for *all* uses in the entire State of Nevada totaled just 1,400,000 acre-feet. Nevada Division of Water Resources, 2015 Statewide Groundwater Pumpage Inventory at 1.

¹⁵⁶ JA Vol. V, JA0989:1-2.

¹⁵⁷ NRS 533.024(1)(c).

disagrees with or discredits them.”¹⁵⁸ An agency cannot disregard available scientific evidence that is in some way better than other scientific evidence the agency relies upon.¹⁵⁹

To meet this requirement, the State Engineer has regularly required applicants to conduct groundwater modeling studies before approving their applications. Because the DVGMP allows water to be freely moved around the basin, and to be used for different purposes,¹⁶⁰ it should have been treated in the same manner, and held to the same standards, as a proposed water rights change application. With change applications of this magnitude, the State Engineer’s practice is to require groundwater model simulations showing that the proposed pumping will not negatively impact other water right holders.¹⁶¹

This is especially true in areas like Diamond Valley, where a peer-reviewed regional groundwater model has already been developed. This model was used to evaluate, among other things, the effects of proposed pumping under change applications filed by Kobreh Valley Ranch for the Mt. Hope mining project.¹⁶² In fact, the model was designed to be used for the very purpose needed here – to simulate how various pumping scenarios will affect groundwater levels.

¹⁵⁸ *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014).

¹⁵⁹ *Id.*

¹⁶⁰ *See* JA Vol. III, JA0547 (Section 13.8 states that “[g]roundwater subject to this GMP may be withdrawn from Diamond Valley for any beneficial purpose under Nevada law.”)

¹⁶¹ State Engineer Ruling 6464 at 18; State Engineer Ruling 6446 at 9-10.

¹⁶² State Engineer Ruling 6464 at 18.

Both the proponents of the DVGMP and the State Engineer had access to this groundwater model, but chose not to use it. The only reasonable inference that can be drawn from this failure to use the best and most accurate scientific analysis tool available is that the proponents instinctively know that model simulations will confirm: (1) Harrill's 1968 conclusion that equilibrium will never be reached if pumping exceeds 12,000 acre-feet/annually in the southern sub-basin, and (2) Hillis' conclusions that the GMP "will not sufficiently reduce groundwater pumping to remove the CMA designation."¹⁶³ By failing to use the groundwater model to evaluate the DVGMP, the State Engineer violated the express legislative directive to use the best available scientific tools at his disposal and thereby abused his discretion.

V. The DVGMP Violates Other Mandatory Provisions Of The Water Law.

The Legislature's invitation to allow water users to develop a groundwater management plan in lieu of curtailment does not give such users, or the State Engineer, carte blanche authority to write their own water law or ignore the mandatory requirements of other water statutes. Here, the DVGMP violates multiple provisions of Nevada's statutory water law. First, the plan authorizes water users to change their permitted points of diversion, manner of use, and place of use without filing a change application. Second, the DVGMP's water banking provisions do not comply with the requirements of NRS 534.250 – 534.350. Third, the plan

¹⁶³ See *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006) ("When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced.").

unlawfully circumscribes the State Engineer’s authority to manage the basin. Lastly, the plan authorizes the junior pumpers to continue to impair pre-statutory rights in violation of NRS 533.085.

A. The DVGMP allows water right holders to change their water rights without filing a change application.

An essential component of the DVGMP is the ability of shareholders to freely transfer and sell their water allocations to other users. The DVGMP states that these allocations can be used for “any beneficial purpose under Nevada law”¹⁶⁴ despite the fact that the underlying permits expressly limit use of the water to irrigation. In effect, this illegally converts state-issued water rights permits, with well-defined places and manners of use, into “super” permits whose water can be used anywhere in the basin for any purpose whatsoever.

Under NRS 533.325 “any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, *shall* . . . apply to the State Engineer for a permit to do so.”¹⁶⁵ Under NRS 533.345 an application requesting to change an existing water right “*must* contain such information as may be necessary to a full understanding of the proposed change.”¹⁶⁶ The purpose for requiring an applicant to submit a change application is to ensure that the changes being proposed will not negatively impact other water users in the basin. Both statutes use the mandatory language “shall” and

¹⁶⁴ JA Vol. III, JA0547 (Section 13.8).

¹⁶⁵ Emphasis added.

¹⁶⁶ Emphasis added.

“must.”¹⁶⁷ Because these requirements are mandatory, the State Engineer has no authority to waive them. In addition, NRS 533.330 provides that “[n]o application shall be for the water of more than one source *to be used for more than one purpose*.”¹⁶⁸ In other words, each particular use of water must be authorized by a separate permit. Again, the statute uses the mandatory language “shall.”

Here, the permits being converted into “shares” clearly identify the authorized use (irrigation). The DVGMP cannot violate these express permit terms by authorizing different manners of use. Water permits for irrigation differ from other permits because the use is not fully consumptive. Instead, a portion of the water filters back through the soil and thereby recharges the basin.¹⁶⁹ By contrast, other beneficial uses, like industrial, mining, and municipal, generally consume the full duty of the appropriated water. NRS 533.3703 expressly requires the State Engineer to consider such changes in consumptive use. Allowing irrigation water to be used for these other purposes without any duty adjustment to account for consumptive use violates existing water management practice, may result in new appropriations of water where no unappropriated water exists, and could result in even greater impacts to the aquifer.

The State Engineer does not have the authority to waive the statutory requirement that a water user must submit an application before making a change to

¹⁶⁷ See NRS 0.025(1)(c) & (d) (“ ‘Must’ expresses a requirement”; “ ‘Shall’ imposes a duty to act.”).

¹⁶⁸ Emphasis added.

¹⁶⁹ JA Vol. IV, JA0799.

the place of diversion, place of use, or manner of use of an existing water right.¹⁷⁰ Nor does he have the authority to allow permit holders to use their allocated water for anything other than the use for which the permit was approved. Accordingly, the State Engineer lacked the authority to approve the DVGMP.

B. The DVGMP's water banking provisions violate the requirements of NRS 534.250 – 534.350.

The DVGMP establishes an aquifer storage and recovery (“ASR”) program under which water users in Diamond Valley can “bank” their unused water allocations from one year and use them in subsequent years.¹⁷¹ In DVGMP Appendix I, Mr. Bugenig, a consulting hydrogeologist, expressly acknowledges that this program falls under the regulatory purview of Nevada’s ASR statutes:

Water banking, or saving un-pumped groundwater for use in a subsequent year or years, is a type of aquifer storage of recovery (ASR) program regulated by the Nevada State Engineer.¹⁷²

Under Nevada law, an ASR project must: (1) be properly permitted, (2) demonstrate that the water being stored is available for appropriation, and (3) be hydrologically feasible. The ASR banking program proposed in the draft GMP fails to meet any of these criteria.

¹⁷⁰ *Preferred Equities Corp. v. State Eng’r, State of Nev.*, 119 Nev. 384, 388, 75 P.3d 380, 383 (2003) (The State Engineer’s authority is strictly limited by the water law’s express provisions).

¹⁷¹ JA Vol. III, JA0547 (Section 13.9).

¹⁷² JA Vol. IV, JA0835 (emphasis added).

NRS 534.250(1) requires that “[a]ny person desiring to operate a [ASR] project must first make an application to, and obtain from, the State Engineer a permit to operate such a project.” The permit application must include, among other things, evidence of technical and financial feasibility, an identification of the source, quality, and quantity of water to be banked, the legal basis for acquiring and using the water in the project, and a hydrologic study demonstrating that the project is feasible and will not cause harm to other users of water in the basin.¹⁷³ To approve any such application, the State Engineer must make factual determinations that: (1) the applicant has the technical and financial capability to operate the project, (2) the applicant has a right to use the proposed source of water for recharge, (3) the project is hydrologically feasible, and (4) the project will not cause harm to other users of water.¹⁷⁴

The submission of the DVGMP to the State Engineer did not relieve the proponents of the requirement to file an application to operate an ASR project. First and foremost, the DVGMP did not include the mandatory information required by NRS 534.260. Second, the plan was not noticed and published pursuant to the requirements of NRS 534.270. Finally, Mr. Bugenig’s “Memo,” that the DVGMP describes as a “Groundwater Flow Modeling Report,” addresses only one specific issue related to the ASR banking program – the depreciation factors used in the DVGMP. The Memo does not include any analysis showing that the banking

¹⁷³ NRS 534.260.

¹⁷⁴ NRS 534.250(2).

program is hydrologically feasible, or that the “banked” water actually exists to store for later use.

Because the proper procedures have not been followed to establish an ASR banking program under Nevada law, and because this program is an “essential” component of the proposed DVGMP,¹⁷⁵ the State Engineer’s approval of the plan was arbitrary, capricious, and an abuse of discretion.

C. The DVGMP unlawfully limits the State Engineer’s authority to manage the basin.

The DVGMP artificially limits the State Engineer’s discretion to determine how much pumping should be reduced in order to stabilize groundwater levels. Under the plan, the State Engineer is strictly prohibited from deviating from the benchmark reductions during the first ten years.¹⁷⁶ Then, after that ten-year period expires, the State Engineer is only allowed to increase or decrease pumping reductions by a maximum of 2% per year.¹⁷⁷ This means that even if groundwater levels continue to decline, and even if such declines have catastrophic results, the State Engineer will be prohibited from taking action to correct the problem. Such provisions represent an unlawful intrusion on the State Engineer’s authority to regulate the groundwater basin in a manner that protects both the environment and senior water right holders.

¹⁷⁵ JA Vol. IV, JA0835 (“The ability to “bank” the unused portion of an Annual Groundwater Allocation is an essential part of the Diamond Valley Groundwater Management Plan.”).

¹⁷⁶ JA Vol. III, JA0548 (Section 13.13).

¹⁷⁷ *Id.*

The Legislature has granted the State Engineer the power to “supervise” all groundwater wells within a basin (except domestic wells)¹⁷⁸ and “make such rules, regulations and orders as are deemed necessary essential for the welfare of the area involved.”¹⁷⁹ In addition, the Legislature has authorized the State Engineer to curtail pumping in basins when “average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees.”¹⁸⁰ The State Engineer is without authority to bargain away these duties.

With the adoption of NRS 534.037 and NRS 534.110(7), the Legislature permissively allowed the State Engineer to consider approving a DVGMP in lieu of curtailment. However, the Legislature did not, either expressly or impliedly, state that a plan can excuse the State Engineer from exercising his general regulatory authority or limit the manner in which he may do so. The purpose of a groundwater management plan is to provide water right holders an opportunity to take voluntary, collective action to limit *their own* pumping in a manner that benefits everyone.¹⁸¹ The Legislature did not authorize proponents of a plan to create an entirely new regulatory scheme whereby they exempt themselves from both State Engineer regulation and mandatory provisions of the water law.

¹⁷⁸ NRS 534.030(4).

¹⁷⁹ NRS 534.120(1).

¹⁸⁰ NRS 534.110(6).

¹⁸¹ *Hearing on A.B. 419 Before the Assm. Comm. on Govt. Affairs* 2001 Leg., 76th Sess. at 16 (May 23, 2011) (Testimony of Assemblyman Goicoechea) (“This bill allows people in overappropriated basins ten years to implement a water management plan to get basins back into balance. *People with junior right will try and figure out how to conserve enough water under these plans.*”) (emphasis added).

D. The DVGMP improperly allows for the continued impairment of pre-statutory water rights.

Under NRS 533.085, the State Engineer is prohibited from taking any action that would impair a pre-statutory water right. As described above, the State Engineer has already violated this provision by allowing the basin to become over-appropriated and then taking no action to fix the problem for over 40-years. Now the State Engineer is again violating NRS 533.085 by approving a groundwater management plan that authorizes continued over-pumping and depletion of the aquifer for at least another 35-years.

The State Engineer argues that because (1) the DVGMP reduces overall pumping, and (2) the State Engineer has issued mitigation water permits to pre-statutory right holders, the plan does not impair those pre-statutory rights. However, as shown by Sadler Ranch's expert witness, allowing 35 more years of over-pumping will cause even further groundwater declines that will negatively impact pre-statutory right holders.

Just because the State Engineer has allowed the owners of the dried-up springs to pump water as a mitigation measure does not mean these users have been made whole. They have not. They are now required to pay significant sums to construct, maintain, and operate their new wells. And these sums will only increase under the DVGMP as the well pumps need to continually be lowered in response to ongoing water level declines. Yet, the DVGMP contains no reimbursement provisions to cover these losses.

As the district court correctly noted:

The DVGMP authorizes continuous pumping beginning with 76,000 af in year one, reducing pumping to 34,200 af at the end of 35 years, clearly in excess of the 30,000 af perennial yield in the Diamond Valley Aquifer. The DVGMP and Order 1302 acknowledge that there will be ongoing additional withdrawals of water from the basin of approximately 5,000 af annually of non-irrigation permits. Venturacci, Sadler Ranch and the Bailey's are entitled to withdraw an approximate 6,400 af annually. The State Engineer admits that neither groundwater modeling nor hydrogeologic analysis were the basis for the DVGMP's "determination of pumping reduction rates and target pumping at the end of the plan" but that "the pumping reduction rate was selected by agreement of the GMP authors, . . ."¹⁸²

Because of this, the district court correctly found that:

The DVGMP's annual pumping allocation will certainly cause the aquifer groundwater level to decline with continuing adverse effects on vested surface rights.¹⁸³

Accordingly, the district court ruled that "the DVGMP and Order 1302 impair senior vested rights."¹⁸⁴ This was not only the correct determination, it was the only one that could be made based on the evidence in the record.

Because Order 1302 allows for a continued and ongoing impairment of senior pre-statutory rights in violation of NRS 533.085, the district court's decision must be affirmed.

VI. The DVGMP Violates The Takings Provisions Of The Nevada Constitution.

In 2006 and 2008 the citizens of Nevada adopted the People's Initiative to Stop the Taking of Our Land ("PISTOL") which added provisions to the Nevada

¹⁸² JA Vol. XI, JA2404:13 - JA 2405:2 (internal citations omitted).

¹⁸³ JA Vol. XI, JA2405:3-5.

¹⁸⁴ JA Vol. XI, JA2405:5-6.

Constitution prohibiting a government agency from taking property from one private party for the purpose of transferring it to another private party.¹⁸⁵ But that is exactly what the DVGMP does. Under the DVGMP water belonging to senior water rights holders is forcibly taken from them and reallocated to junior users. Both the senior users whose water is taken and junior users who receive it are private parties. However, the State Engineer, a government agent, will be enforcing this involuntary transfer under penalty of law.

This Court has established that water rights are a form of private property that are afforded all the constitutional and legal protections of real property.¹⁸⁶ This includes the PISTOL protections. Accordingly, neither the State Engineer nor Eureka County has any authority to approve or implement a groundwater management plan that redistributes already issued water rights by stripping them of their relative priorities.

VII. The State Engineer’s Administrative Proceedings Did Not Comply With Statutory Requirements.

Under NRS 534.037, the State Engineer is required to hold a public hearing “to take testimony” on a proposed groundwater management plan. The State Engineer’s own regulations clearly state that “public commentary is not considered testimony” and that “[a]ll testimony of witnesses appearing on behalf of a party must be given under oath or affirmation.”¹⁸⁷ Further, these same regulations require that

¹⁸⁵ NEV. CONST. Art I, § 22

¹⁸⁶ *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949).

¹⁸⁷ NAC 533.240(1).

parties have a right to cross-examine witnesses called by opposing parties.¹⁸⁸ No party disputes that, at the October 30, 2018, public comment meeting, no evidentiary presentation was made by the plan proponents, no commenter was sworn under oath, and no cross-examination was allowed. Accordingly, the meeting did not meet the requirements of the statute.

CONCLUSION

For the reasons stated herein, Sadler Ranch respectfully requests that this Court dismiss this appeal and affirm the district court's decision.

AFFIRMATION

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

DATED this 6th day of November, 2019.

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¹⁸⁸ NAC 533.240(4).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answering brief 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 this answering brief has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this answering brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 13,998 words.

3. Finally, I hereby certify that I have read this entire answering brief, and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

///

I understand that I may be subject to sanctions in the event that the accompanying answering brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of November, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document as follows:

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