IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

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

Appellants,

v.

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

Respondents.

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

DNRPCA APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in 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.

Diamond Natural Resources Protection and Conservation Association
J&T Farms, LLC
Gallagher Farms, LLC
Conley Land & Livestock, LLC
Diamond Valley Hay Co., Inc.
Mark Moyle Farms, LLC
Sestanovich Hay & Cattle, LLC

None of the entities have a parent corporation, nor is there a publicly held company that owns 10% or more of their stock.

The following law firms have lawyers who appeared on behalf of the Appellants or are expected to appear on their behalf in this Court:

Leonard Law, PC
McDonald Carano LLP

Date: December 23, 2020

/s/ Debbie Leonard
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INTRODUCTION

What is most notable about the answering briefs is not what they say but what they fail to say. The GMP Opponents do not address four key arguments, thereby conceding their merits:

- The district court exceeded the allowable scope of review and relied on impermissible extra-record materials, contrary to its own order in limine;
- The water rights that are subject to the GMP have been, and will continue to be, put to beneficial use;
- There is no record evidence to support the district court's conclusion that the GMP impairs vested rights; and
- Absent complete curtailment by priority, basin-wide groundwater withdrawals can only be reduced to the perennial yield if seniors reduce their pumping as well.

Rather than refute these points, the GMP Opponents double down on the district court's errors. Their briefs rely on documents that were not before the State Engineer. Where they do cite the administrative record, the GMP Opponents grossly misconstrue the evidence. By poisoning the Court's review in this manner, the GMP Opponents admit they cannot meet their burden of demonstrating any legal flaw in Order 1302.

The GMP Opponents fail to address irreconcilable inconsistencies in the district court's analysis. The Legislature's enumeration of specific criteria in NRS 534.037 meant the State Engineer did not need to consider others. The State Engineer's compliance with the statutory requirements, coupled with his broad regulatory authority under NRS 534.120, authorize the GMP.

The GMP Opponents also do not explain how a GMP that satisfies NRS 534.037 can, simply due to its 35-year lifespan, impair vested surface rights. NRS 534.110(7) allows pumping to exceed the perennial yield *for years* while local stakeholders develop a GMP. Nothing in the law suggests, much less requires, that a basin be brought into balance instantaneously. In any event, because the GMP Opponents' wells are drilled directly in their springs, even the complete curtailment they seek will not resume spring flow.

Legislative intent is the foundational inquiry for the Court's interpretation of AB 419. The plain statutory language shows that the Legislature sought to avoid the heavy-handed consequences of priority enforcement, which in Diamond Valley, could wipe out 81% of groundwater rights. Having adopted the prior appropriation doctrine for groundwater, the Legislature was free – through its police powers over the public welfare – to authorize a GMP process that does not strictly adhere to priorities. That is what occurred here.

ARGUMENT

A. The GMP Opponents, Not the Appellants, Have the Burden to Rebut the Prima Facie Correctness of Order 1302

Contrary to their assertions, *the GMP Opponents* bear the burden to demonstrate error in Order 1302, not the other way around. Upon enactment of Nevada's water statute in 1915, the Legislature established that "[t]he decision of the State Engineer ***is prima facie correct***." NRS 533.450(10) (emphasis added); *see* 1915 Nev. Stat. 378. Water law is of such character, the Legislature determined, that the State Engineer's interpretation of it is presumed proper. *See id.*; *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) (recognizing "special character" of water statutes).

For the GMP Opponents to prevail on appeal, they must rebut this presumption. *See id.; see also* Black's Law Dictionary (11th ed. 2019) (defining prima facie to mean "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted"). In other words, the GMP Opponents have the burden to demonstrate – based only on record evidence – that the "prima facie correct" GMP exceeded the State Engineer's authority. They have not done so.

B. The GMP Opponents Concede the Correctness of Key Dispositive Arguments Made by the Appellants

Absent from both answering briefs is any response to four arguments advanced by DNRPCA: (1) the district court exceeded the standard of review by disregarding its own order in limine and relying on matters outside the administrative record (Op.Br. 24-26, 45-47); (2) NRS 534.110(7) expressly authorizes continued multi-year pumping above the perennial yield (Op.Br. 50-52); (3) the permits that are subject to the GMP have been put to beneficial use (Op.Br. 54 and addendum); and (4) absent complete curtailment, basin-wide groundwater withdrawals will only decline to the perennial yield if seniors reduce their pumping too (Op.Br. 32-33).

By failing to oppose these arguments, the GMP Opponents concede their merit. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating party's failure to respond to an argument as a concession that the argument is meritorious); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating failure to respond to an argument as a confession of error).

C. The GMP Opponents Perpetuate the District Court's Errors by Relying on Extra-Record Material

In reviewing an administrative decision, "this [C]ourt, like the district court, is limited to the record below and to the determination of whether the board acted

arbitrarily or capriciously." *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982); *see King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

The GMP Opponents flout these standards. To demonstrate the extent of their violations, attached is a supplemental addendum containing their briefs with the unauthorized portions struck through. The red line marks out sections that reference extra-record material directly; are not supported by the portions of the record that are cited; fail to cite the record at all; or were not preserved below.[1] The blue line marks out sections that reference portions of the district court's Order that relied on extra-record information. Where an estimated 25% of Sadler/Renner's brief and 10% of Bailey's brief consist of unauthorized material, it is clear the briefs cannot stand on the record alone.

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[1] Many of the GMP Opponents' citations to the joint appendix are not to the administrative record but to their own briefs and presentations or to the district court's order. The Court should not consider contentions that are unsupported by the administrative record. *See* NRAP 28(e)(1); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993).

1. The Court Cannot Consider Legislative Efforts That Post-Date AB 419

Like the district court, the GMP Opponents improperly cite an unpassed 2017 bill as supposed insight into the State Engineer's understanding of AB 419. Generally, a reviewing court may not inquire into "the mental processes of administrative decisionmakers [absent] … a strong showing of bad faith or improper behavior." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-74, (2019), *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1970). Even if that showing is made (which was not here), an extra-record free-for-all is not the appropriate remedy. *See id.*

At oral argument, Eureka County explained in detail how the GMP presented to the State Engineer in late 2018 had substantial changes from the working concept that existed during the 2017 legislative session. X(2134, 2138-2139); XI(2285-2286); *compare* III(530-560). Eureka County further explained that the GMP Opponents falsely characterized a document drafted by one planning process participant in 2017 as having been "adopted" in the GMP, when the opposite was true. XI(2285), referencing III(607-610). Nevertheless, the GMP Opponents perpetuate that falsehood on appeal. (Bailey 4-6; Sadler/Renner 24).

Because the GMP approved in 2019 was not what was being considered in 2017, the 2017 legislation is immaterial.

The Baileys brush this off as "harmless error" (at 38-39), but it went to the heart of the district court's analysis. The district court viewed the 2017 legislative effort as "demonstrat[ing] 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." XI(2416). By ascribing suspicion to the State Engineer's motives, the district court failed to afford Order 1302 the presumption of correctness required by NRS 533.450(10). That was prejudicial. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008).

Sadler/Renner attempt to justify this error by citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). But that case interpreted a statute in the context of subsequently *enacted* legislation not, as occurred here, subsequent unsuccessful legislative efforts. *See id.* While it is common to discern the legislative intent of a statute based on a statutory framework related to a single subject matter, *SIIS v. Bokelman*, 113 Nev. 1116, 1123, 946 P.2d 179, 184 (1997), the Court may not look to failed subsequent legislation because "[s]tatutes are construed by the courts with reference to the

circumstances existing at the time of the passage." *United States v. Wise*, 370 U.S. 405, 411 (1962).

2. The Court Cannot Consider Extra-Record Statements by the State Engineer Because an Agency is Not Bound by *Stare Decisis*

The GMP Opponents ignore the principle that "no binding effect is given to prior administrative determinations." *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). They cite extensively to rulings, transcripts and records from other proceedings and a 2016 conference presentation by the State Engineer as supposed "evidence" that the GMP was unlawful. Setting aside that these are outside the administrative record, they did not obligate the State Engineer to act a particular way when considering the GMP. *See id.*

For every assertion made by the GMP Opponents based on information from other proceedings, there is evidence *in those records* to combat it. Yet this case is about whether substantial evidence *in this record* supports Order 1302. The district court concluded it did, and the Court should not look at non-binding statements from other proceedings to undermine that conclusion.

3. Widespread Reference to Extra-Record Materials Unfairly Prejudices the Appellants for Having Complied With the District Court's Order in Limine

Basic notions of fair play required the district court to provide Appellants notice and an opportunity to supplement the administrative record to ensure an even playing field among the parties. Where a decision maker relies on extra-record facts, it must follow procedures that are "fair under the circumstances." *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (reversing order where administrative board took administrative notice of extra-record facts without notice and opportunity to respond). Moreover, only extra-record facts that are "not subject to reasonable dispute" may be considered. *Id.*, *quoting Castillo–Villagra v. INS*, 972 F.2d 1017, 1027 (9th Cir. 1992).

Here, the district court went beyond simple neglect of essential fairness principles. It *misled* the Appellants by granting the State Engineer's motion in limine and informing the parties that its review would be record-based. VI(1369-1378). Relying on that direction, the Appellants cited only record evidence below. VII(1491-1522). The GMP Opponents, on the other hand, violated the order in limine by citing extensively to non-record materials. IX(1786-1945); X(2155-2184); XI(2185-2278). Rather than disregard those unauthorized references, the district court rested its decision on them. XI(2385-2419); *see* Op.Br. n.5.

An agency review case should not involve a bait and switch in which the party who follows court orders is penalized. Should the Court consider extra-record information, fundamental fairness requires a remand first to the State Engineer so that *all* parties may submit outside evidence into the administrative record.

D. The GMP Opponents Strain Statutory Construction Rules Beyond Reason

1. Legislative Intent is *the* Fundamental Inquiry

Because "[t]he intent of the legislature is ***the controlling factor*** in statutory interpretation," the DNRPCA Appellants properly focused their arguments on it. *County of Clark ex rel. University Med. Ctr. v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998) (emphasis added). It has long been established that "***[t]he leading rule*** for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained will prevail over the literal sense." *Welfare Div. v. Washoe Co. Welfare Dep't*, 88 Nev. 635, 637, 503 P.2d 457, 458 (1972) (emphasis added), *quoting State ex rel. O'Meara v. Ross*, 20 Nev. 61, 63, 14 P. 827, 828 (1887). The legislative intent "must govern" the Court's analysis, and "all rules of construction are mere aids in the ascertainment of such intent." *Thran v. First Jud. Dist. Ct.*, 79 Nev. 176, 180-81, 380 P.2d 297,

300 (1963). Legislative intent may "be determined by examining the circumstances which propelled the enactment of the statute." *Roberts v. State, Univ. of Nevada System*, 104 Nev. 33, 38, 752 P.2d 221, 224 (1988).

As these authorities demonstrate, legislative intent is not a substitute for plain language; it is the lens through which the Court must interpret that language. *Thran*, 79 Nev. at 180-81, 380 P.2d at 300. By authorizing the State Engineer to approve a GMP *in lieu of* priority enforcement, the Legislature clearly sought to avoid the adverse consequences of prior appropriation. *See* NRS 534.110(7). "First in time, first in right" is not just a remedy; it is the prior appropriation doctrine's foundational principle. *See Lobdell v. Hall*, 3 Nev. 507, 514, 517 (1867); *see also Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982) (noting priority is "distinctive feature" of the doctrine). It is why rigid conformance to prior appropriation can be detrimental to the public welfare in groundwater-dependent

communities. With AB 419, the Legislature tasked stakeholders to prevent this consequence.[2] NRS 534.110(7)(b).

2. The Statutory Language Departs From the Prior Appropriation Doctrine

The Legislature expressly authorized a groundwater management plan that *does not* "conform to priority rights."

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

NRS 534.110(7) (emphasis added).

Oddly, to circumvent this plain language, Sadler/Renner argue (at 22-23) that the final clause of the statute is "contingent" and does not affect priority rights. Not only does that assertion lack support, but it contravenes "the last antecedent rule," which "dictates that qualifying words and phrases, ... where no contrary

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[2] The Baileys' contention (at 64-65) that the GMP allows "[m]ajority rule, untethered to the law" is misplaced. The State Engineer has authority to regulate water use in the public welfare. *See* NRS Chapters 533 and 534. To that end, when considering a proposed GMP, NRS 534.037(2) requires the State Engineer to consider enumerated factors plus "[a]ny other factor deemed relevant…." The Baileys' hypothetical scenario regarding trespass to land is not part of the GMP, would be outside the State Engineer's regulatory purview, and is irrelevant here.

intention appears, refer solely to the last antecedent." *J.E. Dunn Nw., Inc. v. Corus Const. Venture, LLC*, 127 Nev. 72, 80, 249 P.3d 501, 506 (2011) (internal quotation omitted).

Sadler/Renner's construction also contradicts NRS 0.025(2), which states:

> Except as otherwise required by the context, text of a statute that:
>
> (a) Follows subsections, paragraphs, subparagraphs or sub-subparagraphs that are introduced by a colon;
> (b) Is not designated as a separate subsection, paragraph, subparagraph or sub-subparagraph; and
> (c) Begins flush to the left margin rather than immediately following the material at the end of the final subsection, paragraph, subparagraph or sub-subparagraph,
>
> applies to the section as a whole, in the case of subsections, or to the subdivision preceding the colon as a whole rather than solely to the subdivision that the text follows. The symbol "⊆" in bills and in Nevada Revised Statutes indicates the beginning of such text.

Id. Because the pertinent language from NRS 534.110(7) follows the arrow, the phrase "unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037" cannot be restricted as suggested by Sadler/Renner. The entire statute should be construed as a whole. *See* NRS 0.025(2); *State v. Eggers*, 36 Nev. 364, 136 P. 104, 106 (1913).

3. The Legislature's Enumerated List of Factors in NRS 534.037 Was All the State Engineer Needed to Consider

The GMP Opponents' position that the State Engineer had to consider a host of issues *other than* what the Legislature included in NRS 534.037 turns principles of statutory construction on their head. Nevada courts follow the maxim "*expressio unius est exclusio alterius*," which means that "the expression of one thing is the exclusion of another." *Harvey v. State*, 136 Nev. Adv. Op. 61, 473 P.3d 1015, 1019 (2020); *see also Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920) ("it is fair to assume that, when the [L]egislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of specifying any?"); *Dep't of Tax. v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("[O]missions of subject matters from statutory provisions are presumed to have been intentional."); *see also Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 102, 392 P.3d 614, 619 (2017) (interpreting constitutional amendment to have deprived voters of the right to recall judges because that previously existing right was not included in amendment's language).

With the enactment of AB 419, the Legislature created a new statutory structure related to CMA designation and groundwater management plan

development where none had existed before.[3] For a groundwater management plan to substitute for priority enforcement, the Legislature required four things:

(1) a majority of permit and certificate holders petition the State Engineer for its approval (NRS 534.037(1));

(2) the plan set forth the necessary steps to remove the basin's CMA designation (NRS 534.037(1));

(3) the State Engineer consider, without limitation, the six specific statutory considerations enumerated in NRS 534.037(2) and "[a]ny other factor deemed relevant by the State Engineer"; and

(4) the State Engineer hold a public hearing according to NRS 534.037(3).

AB 419 could have required the State Engineer to consider other factors but did not. Instead, it specified that a groundwater management plan be approved solely "pursuant to NRS 534.037." NRS 534.110(7). The Legislature's decision to limit groundwater management plan approval to just these criteria evinces its intent to omit others. *See Ex parte Arascada*, 44 Nev. at 35, 189 P. at 620. Because, as

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[3] In that AB 419 is a first-of-its-kind statute, there is no judicial precedent that is directly on point, leaving legislative intent to inform the Court's statutory interpretation. *See Thran*, 79 Nev. at 180-81, 380 P.2d at 300. Having addressed a different statutory directive, *State Engineer v. Lewis*, 150 P.3d 375 (N.M. 2006), is simply illustrative of another State's effort to address the shortcomings of prior appropriation and is not intended to be authoritative of AB 419.

the district court acknowledged, the statutory standards were satisfied, Order 1302 should be affirmed. II(331); XI(2393-2396).

4. The GMP Opponents Frustrate AB 419's Purpose

When specified statutory criteria advance a certain policy direction, they "impl[y] against anything contrary to it which would frustrate or disappoint the purpose of that provision." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (quotation omitted). The GMP Opponents' insistence that a GMP enforce priorities frustrates the statute's clear purpose to ***not*** enforce priorities. *See* NRS 534.110(7). Had the Legislature wanted the result advocated by the GMP Opponents, it would have done nothing.

Importantly, the GMP did not "jettison" prior appropriation altogether, as the GMP Opponents charge. It contains a priority factor that assigns shares according to priority, accounting for the narrow span in priority dates among water users. III(545); IV(812-822). The priority factor addresses the critical fact that the GMP Opponents ignore: No matter how much the juniors conserve, install low-water-use equipment, adopt best management practices, offer to purchase senior rights, and squeeze the most out of every gallon of water, basin pumping will never decline to the perennial yield unless the seniors reduce their water use too. Basin-

wide water use will always be at least 30,000 afa before the juniors pump a single drop because the senior permits authorize 30,000 afa of pumping. IV(812-814).

The statutory construction espoused by the GMP Opponents can only result in complete curtailment of all junior rights, which undermines the legislative purpose and renders AB 419 meaningless. For that reason, the State Engineer properly concluded that the priority factor was an appropriate way to respect priorities while solving the intractable problem that the prior appropriation doctrine presents. *See Blackjack Bonding v. City of Las Vegas Mun. Ct.*, 116 Nev. 1213, 1219, 14 P.3d 1275, 1279 (2000) ("when a … statute gives a general power, it also grants by implication every particular power necessary for the exercise of that power"); *see also United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 892 (D. Nev. 1980) (declining to apply "pure theory of priority rights" in the face of "practical realities").

E. Having Created the Priority System for Groundwater Rights, the Legislature Can Modify It

1. The State's Police Power Allows the Legislature to Create Exceptions to Prior Appropriation to Protect Public Welfare

As construed by Appellants, AB 419 did not "repeal" the prior appropriation doctrine – it authorizes temporary regulation of all basin groundwater rights for the

welfare of a groundwater-dependent community, which was well within the Legislature's authority.

> Water rights are subject to regulation under the police power as is necessary for the general welfare. *See V.L. & S. Co. v. District Court*, 42 Nev. 1, 171 P. 166 (1918). As the owner of all water in Nevada, the State has the right to prescribe how water may be used. *In re Waters of Manse Spring*, 60 Nev. 280, 287, 108 P.2d 311, 315 (1940).

Town of Eureka v. State Eng'r, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992). "Where the public interest is thus significantly involved, the preferment of that interest over the property interest of the individual even to the extent of its destruction is a distinguishing characteristic of the exercise of the police power." *Sw. Eng'g Co. v. Ernst*, 291 P.2d 764, 768 (Ariz. 1955). "Legislation with respect to water affects the public welfare and the right to legislate in regard to its use and conservation is referable to the police power of the state." *In re Maas*, 27 P.2d 373, 374 (Cal. 1933).

As the GMP Opponents acknowledge, the Legislature is free to change the State's water law and has previously altered the prior appropriation doctrine. (Bailey 54-57). The fact that those circumstances differed in specifics from AB 419 does not detract from the conclusion that prior appropriation is not as entrenched in the GMP legislation as the GMP Opponents contend.

2. The Shared Nature of the Groundwater Resource Makes it Particularly Apt for Additional Regulation to Protect Groundwater-Dependent Communities

This is especially the case for groundwater, for which prior appropriation is wholly a creature of statute. Early on, the State recognized the absolute dominion principle, where ownership of the overlying land gave rise to ownership in the underlying groundwater. *Strait v. Brown*, 16 Nev. 317, 323 (1881); *Mosier v. Caldwell*, 7 Nev. 363, 367 (1872). The Legislature radically departed from that doctrine when it passed the State's water statutes in 1913, 1915 and 1939, ultimately making all groundwater subject to prior appropriation. Act of Mar. 22, 1913, ch. 140, 1913 Nev. Stat. 192; Act of Mar. 24, 1915, ch. 210, § 1, 1915 Nev. Stat. 323 (repealed 1939); Underground Waters Act, ch. 178, §1, 1939 Nev. Stat. 274 (codified, as amended, NRS 534.020).

In 1955, the Legislature added the following language:

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

NRS 534.120(1). No comparable statutory provision exists for surface water. "There is a compelling government interest in regulating groundwater for the

public welfare." *Knight v. Grimes*, 127 N.W.2d 708, 711 (S.D. 1964); *see Town of Eureka*, 108 Nev. at 167, 826 P.2d at 950 (recognizing that the Legislature may retroactively impose limits on groundwater rights).

Because groundwater is subject to considerable regulatory authority that surface water is not, the Court should not give much weight to the GMP Opponents' recitation of the 150-year common law history of prior appropriation for *surface water*. Being usufructuary, having been granted by statute, and being limited by AB 419 and NRS 534.120, the groundwater permits that are subject to the GMP are far from immutable.[4] *See id.*

In practice, implementation of priority enforcement in a groundwater basin differs dramatically from surface water. Under the prior appropriation doctrine, curtailment occurs during times of "shortage." *See Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 805 (1976). As to surface water, this condition only exists during a low run-off year when there is inadequate flow to satisfy all diversions. With groundwater, however, a "shortage" may exist because the State

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[4] Even had the prior appropriation system for groundwater originated in the common law, nothing prevents a state from modifying its common law water rules. *See United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899); *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 21 P. 317, 322 (1889) (replacing riparian doctrine with prior appropriation).

Engineer historically issued more permits than a basin can support, based upon the objectives and information available at the time of permit issuance. This means there can be a perpetual "shortage" to satisfy appropriations that post-date when total basin appropriations exceeded the perennial yield, which in Diamond Valley was May 12, 1960. II(317). As a result, unlike surface water, groundwater curtailment would not be episodic based on a given year's run-off. Rather, it could require permanent cessation of all junior pumping, resulting in grave social and economic consequences to a groundwater-dependent community.

The GMP Opponents' reference to *Mineral County v. Lyon County* is misplaced because that case involved the question of whether ***adjudicated pre-statutory*** surface water rights could be reallocated to satisfy the State's public trust obligations. 136 Nev. Adv. Op. 58, 473 P.3d 418, 430 (2020). The GMP applies only to ***post***-statutory groundwater rights that were issued solely by legislative authority over a public resource. Nevertheless, *Mineral County* reiterates that under NRS 534.120, "the State Engineer is permitted to declare preferred uses and regulate groundwater in the interest of the public welfare." 473 P.3d at 427.

The GMP is not permanent; it is anticipated to remain in effect for 35 years until the CMA status can be lifted, although conditions could warrant removal of the CMA designation before then. As more data become available from the GMP's

metering and monitoring mandates, the State Engineer could conclude that the sustainable yield is more than what the GMP's benchmark reductions allow. III(548). Indeed, a recent USGS study estimates the perennial yield to be 35,000 afa. II(330). Importation of groundwater from elsewhere (which has been proposed) could improve the aquifer condition sooner than expected. I(216); III(541). The GMP is designed to respond to those possibilities. III(546, 548).

F. The GMP Opponents Ask the Court to Substitute its Judgment for the State Engineer and Disregard the Substantial Record Evidence That Supports Order 1302

1. The GMP Complies With the Beneficial Use Requirement

The GMP Opponents' arguments regarding beneficial use are notably silent on a key point made in DNRPCA's opening brief: the permits that are subject to the GMP relate to change applications of certificated base rights for which proofs of beneficial use were filed years ago. (Op.Br. 54 and addendum). There is no factual support for their erroneous assertion that beneficial use has not been established.

The GMP's conservation strategy that allows water to be banked for a subsequent season (as opposed to pumping it to satisfy the prior appropriation doctrine's "use it or lose it" requirement) ensures the water will be put to beneficial use rather than wasted. *See* A. Dan Tarlock, The Future of Prior Appropriation in

the New West, 41 NAT. RES. J. 769, 770–71 (2001) ("perpetual 'use it or lose it rights' … generally encourage inefficient … uses…."); *see also id.* at 780-81 (describing inefficiencies of prior appropriation). The same is true of the State Engineer's decision to not undertake forfeiture and abandonment proceedings prior to the GMP's implementation. II(323-324). As the State Engineer concluded, doing so would have the perverse result of *increasing* pumping, which is antithetical to the purpose of NRS 534.110(7) and the health of the Diamond Valley aquifer. II(323-324). That decision did not violate the beneficial use requirement and should not be second guessed by a reviewing court.

2. The Existence of Other Evidence Does Not Negate the Validity of the State Engineer's Decision

"[J]ust because there was conflicting evidence does not compel interference with the [decision maker's] decision so long as the decision was supported by substantial evidence." *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990). The Court's job is to evaluate whether substantial evidence supports the agency's decision, not whether there is substantial evidence to support a contrary decision. *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 836 n.36, 138 P.3d 486, 497 (2006). This is because the administrative body alone, not a reviewing court, is

entitled to weigh the evidence for and against a decision. *Clark Cty. Liquor & Gaming*, 106 Nev. at 99, 787 P.2d at 784.

The answering briefs attack specific technical conclusions made by the State Engineer, with Sadler/Renner placing much weight on the testimony and report of their expert. (Sadler/Renner 37-43). But the record is clear that the State Engineer considered and rejected it. II(329-332). What they couch as alleged statutory "violations" are within the State Engineer's discretionary decision-making authority. NRS 534.120. In essence, they ask the Court to reweigh the evidence and substitute its judgment for the State Engineer, which is clearly outside the scope of review. *See Clark Cty. Liquor & Gaming*, 106 Nev. at 99, 787 P.2d at 784. Because the State Engineer's findings and conclusions are supported by substantial evidence, opposing evidence is irrelevant.

3. The GMP Sets Forth the Necessary Steps for Removal of the CMA Designation

The GMP Opponents contend the GMP does not demonstrate with certainty that groundwater withdrawals will decrease below the perennial yield of the basin, but certainty is not required. *See* NRS 534.037(2). The GMP need only demonstrate "steps" in that direction. *Id.* To the extent the Court deems the statutory language unclear on this point, the legislative history indicates that the

bill's sponsor wanted to see movement towards bringing a basin back into balance but recognized that complete aquifer recovery may not be possible. VII(1605).

The GMP sets out precisely the recovery plan the Legislature wanted. It starts reductions immediately and continues those reductions on an annual basis until the consumptive use decreases below the perennial yield. IV(823, 839).[5] The State Engineer correctly noted that water usage in Diamond Valley can fluctuate, and the CMA designation is only warranted when withdrawals "consistently" exceed the perennial yield. II(329-330). He also noted that because irrigation and mining rights that have an irrigation base right consume the most water, they were appropriately the GMP's focus. II(331). The Court should not substitute its judgment for the State Engineer's determination that the GMP takes the necessary steps towards lifting the CMA designation.

4. The GMP Preserves the State Engineer's Authority to Manage Water Transfers in the Basin

Nothing in the GMP improperly limits the State Engineer's authority to oversee the transfer of a water allocation from one well to another. The flexibility

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[5] The 34,000 afa reached in Year 35 on the benchmark reduction table (GMP Appendix G) represents gross pumping and does not account for recharge. IV(823). The table found at GMP Appendix I considers consumptive use, showing that net withdrawals after recharge will be 30,000 afa. IV(839).

afforded by the GMP to move water to different points of diversion and places of use promotes water efficiency while reducing overall pumping amounts. III(549).

The GMP Opponents do not dispute that the district court erroneously interpreted the law when concluding that temporary change applications require notice and opportunity to protest. To sidestep that error, the Baileys speculate that the GMP could authorize a "perpetual temporary transfer," but the GMP is clear that for any change that exceeds a one-year period, the provisions of NRS 533.370 apply. III(550). The GMP requires the State Engineer to analyze every temporary movement of an annual allocation. III(550).

Importantly, the GMP mandates metering and centralized data collection, which will be tracked by the on-site water manager. III(550-522); IV(810). The State Engineer will have more information than ever to identify and mitigate any conflicts, if they occur, and make adjustments as needed based upon the best available data. I(329-330); III(550-522).

Should the GMP Opponents believe in the future that the State Engineer is not performing an adequate conflicts analysis, they can bring an as-applied challenge at that time. "That the regulation may be invalid as applied in [certain] cases … does not mean that the regulation is facially invalid because it is without statutory authority." *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183,

188 (1991). "[T]he fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule" facially invalid. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991); *see also EPA v. EME Homer City Generation, L.P. (EME Homer)*, 572 U.S. 489, 524 (2014) ("The possibility that the rule, in uncommon particular applications, might exceed [the agency]'s statutory authority does not warrant judicial condemnation of the rule in its entirety." Because the GMP Opponents' challenges are based on speculation, not actual harm, they should be rejected.

5. Proposals for an Alternative GMP Are Unworkable and Not Supported by the Majority of Permit and Certificate Holders

The GMP Opponents parrot the district court's list of "hypothetical solutions that could have been employed in a groundwater management plan" but fail to address the fundamental obstacle that renders them infeasible: pumping can only be reduced to the perennial yield in two circumstances: (1) complete curtailment of the 81% of permits that post-date May 12, 1960 (which the Legislature sought to avoid); or (2) regulation of all water users, including the "seniors" whose permits pre-date May 12, 1960 (which is incorporated into the GMP). By ignoring this point, the GMP Opponents acknowledge that the "hypothetical solutions" are not

solutions at all. They are the district court's effort to undermine the will of the Legislature and substitute its judgment for the State Engineer.

Moreover, they do not meet two statutory requirements – approval by a majority of permit and certificate holders and removal of the basin's CMA designation. The GMP planning process explored other strategies to solve the overdraft problem in Diamond Valley, including among others: "a study of the financial feasibility of a General Improvement District (GID) to execute a water management program to enhance the sustainability of underground water supply and storage for Basin 153"; a "study of potential water use set-aside programs"; a shortened irrigation season; and a search for funding sources for a water "buy out" program. III(575, 578, 601). None of these individually or collectively garnered majority support of permit and certificate holders and therefore were not incorporated into the GMP. III(530-560).

Setting aside that it is not the role of a court to craft a groundwater management plan, the district court's proposals – as endorsed by the GMP Opponents – will not free the basin from the CMA designation. Mere "reduction" of pumping by all juniors would not solve overappropriation because withdrawals would still exceed the perennial yield unless those reductions are 100% (i.e., complete curtailment). A rotating water use schedule or shortened irrigation season

will not decrease pumping; they merely change when the pumping occurs. Cancellation of unused water rights will not reduce pumping since they are not contributing to the current volume of pumping. Because over pumping has occurred from existing wells, restricting new well drilling will not change the volume of water that is already being pumped.[6]

A funded water rights purchase program was explored in two economic studies and ultimately not incorporated into the GMP. III(575, 578, 601). Isolated water purchases from senior rights holders will not remove the CMA designation, will not protect the welfare of the community as a whole, and could result in rodent and weed problems on retired farmland that would spread to neighboring properties. V(994, 1026).

Through the GMP's annual reductions in allocations, water users are forced to implement more efficient farming practices to make do with less. IV(823). *How* to achieve the GMP's reductions is left to the individual water user. III(547-549). The GMP incorporates a voluntary water market, allowing leases, trades and sales to make up for shortfalls in an annual allocation. III(547-549). These plan elements

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[6] With or without the GMP, the State Engineer retains the authority to restrict the drilling of new wells. NRS 534.110(8).

were properly crafted by local stakeholders according to the statutory mandates. The district court could not create its own GMP.

G. The Court May Not Consider a Taking Claim

1. The GMP Opponents Never Advanced A Taking Argument in District Court and Have Not Ripened a Taking Claim

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). An issue is sufficiently preserved for appellate review "where an objection has been fully briefed, the district court has thoroughly explored [it] … and … made a definitive ruling …." *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002). Because no takings argument was pressed below or addressed by the district court, this Court should decline to address it.

Moreover, because there is not yet a final order upholding the GMP, and judicial review of an agency decision is not the place to raise a taking claim, the GMP Opponents' taking arguments are not ripe. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner [cannot] claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton*

Bank of Johnson City, 473 U.S. 172, 195 (1985), overruled on other grounds by *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (U.S. 2019). The GMP is still under judicial review and has been effectively vacated by the district court. Any taking claim is therefore premature.

2. The GMP Does Not Take Private Property; it Regulates a Shared Resource for the Public Welfare Pursuant to the State's Police Power

Even if the Court could consider the GMP Opponents' waived and unripe takings arguments, they fail on the merits. "'[G]overnment regulation—by definition—involves the adjustment of rights for the public good,'... [and] '[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979) and *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). Groundwater in Nevada "belong[s] to the public." NRS 534.020. "The general rule is that the Legislature may restrict the use and enjoyment of the state's water resources by exercise of its police power for the preservation of the public health, safety and welfare without compensating the property owner." *Jacobs Ranch, L.L.C. v. Smith*, 148 P.3d 842, 855 (Okla. 2006) (denying takings claim arising from regulatory restriction on groundwater use); *Peterson v. Dep't of Ecology*, 596

P.2d 285, 290 (Wash. 1979) ("The relevant inquiry in such a challenge is whether the regulatory scheme is an exercise of police power rather than one of condemnation. The question is one of social policy which requires the balancing of the public interest in regulating the use of private property against the interests of private landowners not to be encumbered by restrictions on the use of their property.").

The GMP constitutes a reasonable and temporary exercise of State police power in furtherance of the public welfare, not a "reallocation" of property. Senior water rights holders still maintain their right to use water in proportion to their seniority. III(531). The GMP anticipates that restrictions on seniors' water use will be in place only for the life of the GMP. III(548). No taking exists here. *See Lingle*, 544 U.S. at 548 (rejecting takings claim based on regulation that reduced private party's rental income); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (rejecting takings claim based on temporary development moratorium).

Sadler/Renner's citation to *Colorado Water Conserv. Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005), for the proposition that "[a] priority in a water right is property in itself" does not alter this conclusion. That case involved the interpretation of a specific and unrelated Colorado statute related to plans for

augmentation of existing rights. *See id.* Even if priority is part of a property right, the Legislature may still regulate groundwater withdrawals in the public welfare without effecting a taking. *See Lingle*, 544 U.S. at 548.

CONCLUSION

By failing to counter key arguments, the GMP Opponents concede their merits. The State Engineer's approval of the GMP complied with all statutory requirements and was supported by substantial evidence in the record. The Court cannot reweigh that evidence, consider extra-record information or substitute its judgment for the State Engineer. As a result, the district court should be reversed, Order 1302 affirmed, and the GMP reinstated.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Date: December 23, 2020

/s/ Debbie Leonard

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CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,995 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page 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 this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Date: December 23, 2020

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CERTIFICATE OF SERVICE

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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

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

Appellants,

v.

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

Respondents.

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

DNRPCA APPELLANTS' SUPPLEMENTAL ADDENDUM TO REPLY BRIEF

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Respondents.

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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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 basin[1] 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

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[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]

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[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.

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[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

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[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~~

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[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]

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[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]

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[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]

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[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

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[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 that 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]

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[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]

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[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

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[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~~

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[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]

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[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),

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[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

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[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

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[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]~~

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[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.

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[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*

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[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~~

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[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.

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[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

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[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 pumping[119] 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.

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[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

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[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.~~

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[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

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[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.

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[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

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[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

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[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

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[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 Kobeh 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.

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[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

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[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.

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[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.

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[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.

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[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.

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CERTIFICATE OF SERVICE

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Case No. 81224

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ROUTING STATEMENT

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

STATEMENT OF THE ISSUE

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

STATEMENT OF FACTS

A. The Diamond Valley

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

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

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

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

2. The State of the Aquifer

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

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

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

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

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

B. The Diamond Valley Groundwater Management Plan

1. Development of the GMP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Nevada State Engineer Order No. 1302

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

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

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

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

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

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

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

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

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

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

D. The District Court's Ruling

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

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

1. The District Court's Factual Findings

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

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

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

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

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

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

2. The District Court's Legal Rulings

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

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

(a) *Violation of the Prior Appropriation Doctrine*

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

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

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

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

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

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

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

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

(b) *Violation of the Beneficial Use Doctrine*

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

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

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

(c) *Impairment of Senior Vested Rights*

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

ARGUMENT

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

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

I. STANDARD OF REVIEW

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

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

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

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

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

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

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

A. The Doctrines of Prior Appropriation and Beneficial Use

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NRS 534.110(7) The State Engineer:

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

[***]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Implied Repeal of Existing Law is Strongly Disfavored

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The GMP Violates the Doctrine of Beneficial Use

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE GMP VIOLATES OTHER PROVISIONS OF STATE LAW

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

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

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

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

Under current law, specifically NRS 533.325, 533.345 and 533.370(2), before changing the well location, place of use or manner of use of a water right, the owner must file a formal change application for the State Engineer's approval of the proposed change. A change application is required so that the State Engineer can analyze the potential effects of changing the location of the well, changing the location of the use of the water, and/or changing the manner of use of the water. *See e.g.* NRS 533.370(2) ("where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit."). These procedures, in addition to providing a safeguard against adverse

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

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

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

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

> [Under existing law, the] State Engineer is required to review a temporary change application regardless of the intended use of the water to determine if it is in the public interest and does not impact the water rights used by others. If a potential negative impact is found, the application could be rejected. Other rights' holders who may be affected by the temporary change could protest the application if notice were given by the State Engineer. [But] no protest and notice provisions at the administrative level exist in the DVGMP for a temporary change of use, or place of use, or manner of use for less than one year.
> Under the DVGMP, the State Engineer is not required to investigate a proposed change in the place or manner of use and the transfer becomes automatic after 14 days from submission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But those surface water rights have been adversely impacted to the point that they are no longer satisfied because of the over pumping of the groundwater aquifer in Diamond Valley. Not only does the GMP not resolve the adverse impacts to the Bailey's senior vested surface water rights, it will protract those impacts because it countenances the continued lowering of the water table for at least the next 35 years. Ruling at 9 (JA 2389) ("For 35 years the pumping in Diamond Valley will exceed the 30,000 af perennial yield."); *id*. at 24 (JA 2404) ("The DVGMP on its face fails to reduce the harm caused by overpumping and aggravates the depleted water basin."). This violates NRS 533.085(1) ("Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913") and NRS 534.100(1) ("Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913").

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted November 6, 2020.

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

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

Dated November 6, 2020.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on November 6, 2020, a true and correct copy of the foregoing **ANSWERING BRIEF OF BAILEY RESPONDENTS** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system.

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

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