IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

DIAMOND VALLEY RANCH, LLC; AMERICAN FIRST FEDERAL, INC.; BERG PROPERTIES CALIFORNIA, LLC; BLANCO RANCH, LLC; BETH MILLS, TRUSTEE OF THE MARSHALL FAMILY TRUST;

Electronically Filed
Dec 30 2020 11:34 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 81224

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

Respondents.

APPELLANT STATE ENGINEER'S REPLY BRIEF

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I. INTRODUCTION

Appellant Adam Sullivan,[1] P.E., in his capacity as Acting Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer") serves as the administrator of the Nevada Division of Water Resources ("DWR"). The role is not always enviable, as he is often in the middle of competing interests seeking use of one of Nevada's scarcest natural resources: water. Additionally, the State Engineer must also navigate decisions made by his predecessors, which have long-lasting impacts but may be challenging in hindsight as science evolves. *See* NRS 533.024(1)(c).

Given this context, it is disappointing that Respondents Sadler Ranch, LLC, Ira R. Renner, and Montira Renner ("Sadler/Renner") used the first sentence of their Answering Brief to attack the very existence of the State Engineer's Office while misconstruing the State Engineer's Opening Brief as advocating lawlessness. *See* Sadler/Renner's Answering Brief, p. 1. This is opposed to the State Engineer's clear and

[1] Tim Wilson, P.E., retired as Nevada State Engineer effective November 30, 2020. Adam Sullivan, P.E., was appointed Acting Nevada State Engineer and is automatically substituted as the Appellant in this matter pursuant to NRAP 43(c)(1).

narrow argument that Order No. 1302 approving the Diamond Valley Groundwater Management Plan ("DV GMP") was based on the plain reading and interpretation of the law. At no point did the State Engineer advocate for ignoring the law as written. Rather, at all times, before both the Supreme Court and the district court, the State Engineer has maintained that NRS 534.037 and 534.110(7) ("the GMP statutes") provide the express, unambiguous authority for water users to create a plan like the DV GMP approved in Order No. 1302.

Respondents Timothy Lee Bailey, Constance Marie Bailey, Fred Bailey, and Carolyn Bailey ("the Baileys") and Sadler/Renner promote an interpretation of the GMP statutes that renders the GMP process meaningless by requiring either curtailment or voluntary actions by senior water right holders (*e.g.*, voluntarily reducing their pumping). In a basin like Diamond Valley, such an interpretation would make a GMP impossible, leading to tragic consequences for the community's continued existence. Further, the Baileys incorrectly state that the State Engineer's "only hope is to find support by arguing that the statutes are ambiguous." *See* Baileys' Answering Brief, p. 39. To the contrary, the State Engineer has always maintained that the GMP Statutes are

unambiguous and that Order No. 1302 and the DV GMP comply with the plain language of NRS 534.037 and 534.110(7). *See* State Engineer's Opening Brief, pp. 16, 19, 38, 42–43, 47. The State Engineer only delved into legislative history assuming *arguendo* that the Court might deem the GMP Statutes ambiguous, as the district court performed such an analysis. *Id*., pp. 47–53.

The Legislature intended to provide a solution outside of the rigid principles of prior appropriation, including curtailment, in troublesome groundwater basins where the majority of the holders of permits or certificates can agree upon a GMP. *See* NRS 534.037(1). This solution is particularly meaningful in a basin like Diamond Valley, where agriculture is the way of life and the difference between "junior" and "senior" water rights holders "can be a matter of just a few days." DNRPCA's Opening Brief, p. 7. The water users in Diamond Valley assembled the DV GMP and garnered the necessary majority support pursuant to NRS 534.037(1). JA Vol. II at JA0315–0332; JA Vol. II–V at JA0461–1055.

After complying with the statutory notice and hearing requirements, and considering the necessary factors under NRS 534.037,

the State Engineer determined that the DV GMP "set forth the necessary steps for removal of the basin's designation" as a critical management area ("CMA"). JA Vol. II at JA0315–0332; *see also* NRS 534.037(1). By determining that the DV GMP included the necessary steps to remove Diamond Valley's CMA designation, the State Engineer issued Order No. 1302 approving the DV GMP in full compliance with the GMP Statutes. As the district court recognized, substantial evidence supports this decision. Therefore, the State Engineer again respectfully requests that the Court reverse the district court's order to the extent it granted the petitions for judicial review, and respectfully requests reinstatement of Order No. 1302 and the DV GMP.

II. ARGUMENT

A. The GMP Statutes Provide an Unambiguous Solution Outside Strict Prior Appropriation Principles

In his Opening Brief, the State Engineer demonstrated that the plain language of the GMP Statutes unequivocally allows a majority approved GMP to be approved by the State Engineer without strict adherence to the prior appropriation doctrine. State Engineer's Opening Brief, pp. 40–47. This unambiguous authorization is found at

NRS 534.110(7), providing that where a basin remains designated as a CMA for at least 10 straight 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**." (emphasis added). This statutory language authorized the State Engineer's approval of the DV GMP despite the recognition that the DV GMP "does deviate from the strict application of the prior appropriation doctrine." JA Vol. II at JA 0319. The State Engineer also performed an alternative analysis of the legislative history similarly supporting this interpretation "[a]ssuming *arguendo* that the Court finds that the language of NRS 534.037 and NRS 534.110(7) is ambiguous." State Engineer's Opening Brief, pp. 47–50.

Nevertheless, both the Baileys and Sadler/Renner misconstrue and mischaracterize the State Engineer's arguments. The Baileys baselessly allege that State Engineer changed his position, alleging that Appellants' "only hope is to find support by arguing that the statutes are ambiguous." Baileys' Answering Brief, pp. 38–39. As argued extensively in the district court and this Court, including *supra*, the State Engineer maintains that

the plain, unambiguous language of the GMP Statutes supports his decision in Order No. 1302. *See generally* State Engineer's Opening Brief; *see also* JA Vol. VIII at JA1627–1674. The Baileys' allegation to the contrary defies the record in this case.

Similarly, as they did at the district court, Sadler/Renner erroneously allege that the State Engineer "relied exclusively" on a judicial opinion out of New Mexico for the authority to approve the DV GMP in Order No. 1302. Sadler/Renner Answering Brief, p. 20. As is clear from Order No. 1302, and as previously explained at the district court, the reference to *State Eng'r v. Lewis*, 150 P.3d 375 (N.M. 2006), was an "example" of another prior appropriation state "addressing whether a shortage sharing plan violated the prior appropriation doctrine." JA Vol. II at JA0319–0320. The State Engineer never cited the *Lewis* case as binding legal authority for Order No. 1302. Rather, the State Engineer approved the DV GMP in Order No. 1302 based on the language of NRS 534.037 and NRS 534.110(7) as adopted by the Legislature in 2011. JA Vol. II at JA0319–0320.

The State Engineer recognizes that "the legislature will be presumed not to intend to overturn long-established principles of law,

and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication." *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149 (2010) (citing 73 Am. Jur. 2d, *Statutes* § 97 (2001)). Nonetheless, "where the intention to alter or repeal is clearly expressed, it must be given effect by the courts." *Orr Ditch & Water Co. v. Justice Ct. of Reno Twp., Washoe Cty.*, 64 Nev. 138, 164, 178 P.2d 558, 571 (1947). Where this intention exists, it is then presumed that the Legislature did not intend to alter the law "beyond the scope clearly expressed, or fairly implied." *Id.*

The Legislature's intent to exempt the GMP process from strict adherence to prior appropriation principles is clearly expressed in the GMP Statutes. CMA designation starts a 10-year clock towards imposition of prior appropriation's key tenet—restricting withdrawals to conform to priority rights, *i.e.*, curtailment. NRS 534.110(7). The Baileys allege, misleadingly, that the Appellants' position "erroneously conflates the entire prior appropriation system with a single aspect of it, namely the remedy of curtailment by priority." Baileys' Answering Brief, p. 36 (emphasis omitted). Conversely, Sadler/Renner recognize that curtailment by priority during times of shortage is the singular defining

feature of the prior appropriation doctrine. Sadler/Renner Answering Brief, pp. 16–17. However, Sadler/Renner eventually make a similar allegation to the Baileys, arguing that Appellants conflate prior appropriation with the remedy of curtailment. *Id.*, pp. 30–32. Sadler/Renner advance this argument by conflating prior appropriation with other doctrines (including beneficial use) and do so to advance their desire for curtailment in Diamond Valley even with a GMP in place. *Id.*, p. 32 ("[A] discretionary curtailment by priority remains an option even if a [GMP] is adopted.").

While Respondents contort the law to argue otherwise, the U.S. Supreme Court has recognized curtailment as the key element of prior appropriation, defining the doctrine while stating that "[i]n periods of shortage, priority among confirmed rights is determined according to the date of initial diversion." *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 805, 96 S. Ct. 1236, 1240 (1976). As the lynchpin of the prior appropriation doctrine, the Legislature was aware of curtailment when it adopted NRS 534.037 and NRS 534.110(7). *See also* JA Vol. II at JA0319–0321. It is undisputed that the State Engineer had the discretion to curtail groundwater pumping by priority rights in times

of shortage before adoption of the GMP Statutes. *See* NRS 534.110(6). However, in adopting the GMP Statutes, the Legislature created the CMA designation process, whereby the State Engineer may[2] designate as a CMA "any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin." NRS 534.110(7)(a). After a basin holds a CMA designation for at least 10 consecutive years, the State Engineer **must** curtail the basin by priority rights "**unless** a [GMP] has been approved for the basin pursuant to NRS 534.037." NRS 534.110(7).

This is a clear expression from the Legislature that the GMP need not adhere strictly to the contours of prior appropriation. Specifically, the Legislature incentivized cooperation amongst water users in a CMA by mandating curtailment **unless** a majority of permit or certificate holders in the CMA submit and garner approval from the State Engineer for a GMP. Again, by arguing that a GMP must strictly comply with prior appropriation, Respondents advocate for an interpretation that renders

[2] The GMP Statutes also include a provision for mandatory CMA designation where "withdrawals of groundwater consistently exceed the perennial yield of the basin upon receipt of a petition for such designation which is signed by a majority of the holders of certificates or permits to appropriate water in the basin that are on file in the Office of the State Engineer." NRS 534.110(7)(b).

the GMP Statutes utterly meaningless, removing the only incentive for water users to create a GMP. *See* State Engineer's Opening Brief, p. 45.

Water users are incentivized to create a GMP that can garner majority support because it will save them from curtailment and its societal and economic repercussions. Under Respondents' interpretation, this incentive is absent, and the GMP process becomes a mirage, creating an image of relief from curtailment, but is instead curtailment by another name. Respondents also dismiss, or outright ignore, that the DV GMP honors prior appropriation by employing a priority factor such that senior priority water right holders have an advantage under the DV GMP. JA Vol. II–III at JA0318–0321, JA0531–0532, JA0545–0546; *see also* Baileys' Answering Brief, pp. 7–9.

Respondents pay lip service to the idea that there are other mechanisms whereby a GMP could comply with prior appropriation without requiring curtailment. Sadler/Renner Answering Brief, p. 18; Baileys' Answering Brief, pp. 40–42. However, these other options all depend on voluntary actions from senior water right holders in order to succeed. In Diamond Valley, this would remove the set reductions in pumping under the DV GMP, causing uncertainty that would jeopardize

the GMP's success and possibly prevent the State Engineer from finding that it includes the necessary steps for removal of the CMA designation. *See* NRS 534.037(1).

Lastly, despite Respondents' bluster regarding the State Engineer's interpretation of the GMP Statutes, the clear statutory language in NRS 534.037(1) only requires approval from a simple "majority of the holders of permits or certificates to appropriate water in the basin." Baileys' Answering Brief, pp. 14, 18, 64–65; Sadler/Renner Answering Brief, pp. 17–19. Respondents also dismiss that the DV GMP, as approved by the necessary simple majority, included support from a substantial number of senior priority water right holders—with Sadler/Renner downplaying this fact and the Baileys completely ignoring it. *See* DNRPCA's Opening Brief, pp. 14–15; *see also* Sadler/Renner Answering Brief, p. 18. Respondents' disagreement with the "simple majority" requirement is improperly lodged as a criticism of the DV GMP. This criticism actually amounts to an attack on NRS 534.037 itself, brought improperly as a challenge to Order No. 1302 under NRS 533.450. The language of NRS 534.037(1) is clear: a GMP only requires the support from a simple majority of holders of permits or certificates in a

CMA. The DV GMP received the requisite level of support. JA Vol. II at JA0316; JA Vol. III at JA0480–0529.

Respondents argue for an interpretation of the GMP Statutes that renders the GMP process unworkable, mandating curtailment by another name. This Court should reject these arguments. The Legislature incentivized local cooperation on GMPs, like that in Diamond Valley, by mandating curtailment unless a GMP is approved by the State Engineer within 10 years of the basin's CMA designation. NRS 534.110(7). This is an unambiguous expression of the Legislature's intent to exempt a GMP from compliance with the rigidity of prior appropriation when it meets the other requirements of NRS 534.037. The DV GMP, and its approval by the State Engineer in Order No. 1302, complied with the plain language of NRS 534.037 and 534.110(7).

B. Order No. 1302 and the DV GMP Do Not Violate the Doctrine of Beneficial Use or Other Provisions of Nevada Water Law

The State Engineer's Opening Brief addressed the district court's erroneous determination that Order No. 1302 and the DV GMP violated aspects of Nevada water law other than prior appropriation. State

Engineer's Opening Brief, pp. 25–40, 53–61. These errors included the district court's findings that the DV GMP ran afoul of the doctrine of beneficial use, impaired vested rights in violation of NRS 533.085, and violated NRS 533.325 and 533.345. *Id.* Unsurprisingly, Respondents argue that the district court correctly found that Order No. 1302 violated these aspects of Nevada water law such that it was proper to grant their petitions for judicial review. Baileys' Answering Brief, pp. 57–64, 66–79; Sadler/Renner Answering Brief, pp. 43–48, 50–51.

In reality, these are parts of the DV GMP that Respondents simply dislike and upon which Respondents were outvoted. This dislike is insufficient to show a violation of the law, and no violation has occurred. While the State Engineer addresses each of these issues again briefly below, in the interests of economy and compliance with type-volume limitation found in NRAP 32(a)(7)(A)(ii), the State Engineer also incorporates by reference those arguments from his Opening Brief. State Engineer's Opening Brief, pp. 25–40, 53–61.

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1. Order No. 1302 and the DV GMP comply with the doctrine of beneficial use and NRS 533.035

The Baileys again argue that the DV GMP "automatically perfects previously unperfected water rights" and that the DV GMP's water banking components are either not a beneficial use or "an entirely new beneficial use." Baileys' Answering Brief, pp. 57–63; *see also* JA Vol. VII at JA1478–1482. The Baileys' arguments illustrate a fundamental misreading of the relevant statutes and a mischaracterization of the DV GMP.

While the State Engineer addressed this argument in his Opening Brief, the Baileys double down alleging that the DV GMP "automatically" perfects "paper" water rights. Baileys' Answering Brief, pp. 57–61. However, the Baileys never address the State Engineer's showing that uncertificated water rights can still be pumped and are therefore not necessarily "paper" water rights, nor do they address the clear statutory language that gives holders of permits and certificates the same rights under a GMP. *See* NRS 534.037. Rather, the Baileys' only recognition that permits are in fact being pumped is through an improper attempt to shift the burden to the State Engineer to "quantify the amount of unused

water rights subject to the [DV GMP]." Baileys' Answering Brief, p. 59; *see also* NRS 533.450(10) ("The decision of the State Engineer is prima facie correct, and the burden of proof is upon the party attacking the same.").

In painting all permits with a broad brush of impropriety, the Baileys are advocating for a version of the GMP Statutes they desire rather than interpreting the language as written. Neither NRS 534.037 nor NRS 534.110(7) differentiate between permits and certificates; in fact, both statutes treat permits and certificates equally for purposes of CMAs and GMPs. NRS 534.037 ("The petition must be signed by a majority of the holders of **permits or certificates** to appropriate water.") (emphasis added); NRS 534.110(7) (A petition for CMA designation must be signed by "a majority of holders of **certificates or permits** to appropriate water.") (emphasis added). Just as some permits are being pumped, some certificates are not. *See* State Engineer's Opening Brief, pp. 34–35. The Baileys' false dichotomy between permits and certificates for purposes of a GMP is directly contradicted by the unambiguous language of the operative statutes.

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While the Baileys have many suggestions for what the State Engineer "should" have done, none of these suggestions were required by statute or approved by the necessary majority. *See* Baileys' Answering Brief, p. 62. The State Engineer's role, per NRS 534.037, was to determine whether the majority approved DV GMP "set forth the necessary steps for removal of the basin's designation as a [CMA]." By focusing on reductions in pumping starting at the ceiling of actual pumping, rather than differentiating between permits and certificates, the State Engineer determined that pumping will be reduced under the DV GMP to where the State Engineer could lift the CMA designation. This does not create a "new" type of beneficial use but rather allows flexibility to beneficially use Diamond Valley's scarce groundwater while reducing pumping overall.

The district court erred in finding that the DV GMP and Order No. 1302 violate the doctrine of beneficial use.

2. Order No. 1302 and the DV GMP comply with NRS 533.085(1)

Like the district court, Respondents erroneously attribute the alleged effects of existing overpumping on pre-statutory (or "vested")

water rights as a proper basis for reversing Order No. 1302. Baileys' Answering Brief, pp. 74–79; Sadler/Renner Answering Brief, pp. 50–51. Again, this conclusion is nonsensical. This interpretation of the law would require every GMP to include immediate curtailment, or risk "impairing" vested rights over the course of a plan specifically designed to reduce pumping over time. This conclusion is especially confounding where the district court simultaneously found "[i]f the State Engineer finds . . . that the DVGMP sets forth the necessary steps for removal of the basin as a CMA, he may approve a GMP even if the DVGMP exceeds a 10 year period." JA Vol. XI at JA2395.

Again, it is the current pumping that is negatively affecting Diamond Valley's water levels; the DV GMP is specifically designed to reduce pumping and improve groundwater levels. State Engineer's Answering Brief, pp. 37–40. This reduction in pumping is a benefit, rather than an impairment, to all groundwater rights including vested rights. A conclusion to the contrary does not make sense and again turns the GMP process into curtailment by another name, including the same devastating effects to local communities. The State Engineer requests that this Court reverse this erroneous finding by the district court.

3. The DV GMP's provisions for movement of water rights comply with existing law

The State Engineer's Opening Brief addressed each of Respondents' arguments attacking the temporary change provisions of the DV GMP. *See* State Engineer's Opening Brief, pp. 53–61; *see also* Baileys' Answering Brief, pp. 66–74; Sadler/Renner Answering Brief, pp. 44–46. Not wishing to retread the same arguments, the State Engineer incorporates those arguments from his Opening Brief.

However, it bears repeating that the DV GMP was created by the water users of Diamond Valley and agreed to by a majority of permit or certificate holders. DNRPCA Opening Brief, pp. 18–20. The DV GMP was not the wholesale adoption of "Mr. Young's blueprint" as alleged by the Baileys, nor does it change the permanent change application process of NRS 533.325, as alleged by Sadler/Renner. *See id.*; *see also* Baileys' Answering Brief, pp. 66–74; Sadler/Renner Answering Brief, pp. 44–46. The temporary change process under Sections 14.8 and 14.9 of the DV GMP is nearly identical to that found at NRS 533.345(2)–(4), the only difference being the 14-day period for the State Engineer to determine if the proposed change "may not be in the public interest or may impair the

water rights held by other persons." JA Vol. III at JA0550. The DV GMP specifically provides that existing procedures for change applications under NRS 533 and 534 apply to "new wells or additional withdrawals for periods exceeding one (1) year," *i.e.*, permanent changes under NRS 533.325 and 533.370. *Id.*

The DV GMP does impose a 14-day deadline on the State Engineer to take action on temporary transfers to new wells or additional withdrawals from existing wells that exceed initially approved volume and flow rate. The DV GMP also allows changes in the manner of use to those other than irrigation. However, these provisions were approved by the requisite majority of water users and by the State Engineer pursuant to NRS 534.037. The State Engineer is not abdicating his responsibilities by acting within this timeframe, and the potential change of some rights to fully consumptive uses does not render the DV GMP unlawful. Rather, all of these general alleged harms (*e.g.*, attacks on the 14-day period; changes to fully consumptive uses) are speculative. Respondents failed to present any evidence during the administrative process showing actual harm from these components. Should anyone, including Respondents, actually feel aggrieved by one of the State Engineer's

future decisions related to changes under the DV GMP, they may appeal that decision under NRS 533.450. In the absence of such alleged aggrievement, Respondents' allegations are completely speculative and an improper basis for overturning Order No. 1302 and the DV GMP.

C. Sadler/Renner Raise Other Issues that the District Court Properly Rejected

Sadler/Renner dedicate a significant portion of their Answering Brief to reasserting arguments that the district court soundly rejected. *See* Sadler/Renner Answering Brief, pp. 46–53; *see also* JA Vol. XI at JA2392–2400. Further, Sadler/Renner now allege that the DV GMP violates the takings provisions of the Nevada Constitution, despite never substantively raising this issue at the district court and despite it being an inappropriate claim to bring under NRS 533.450. Sadler/Renner Answering Brief, pp. 51–52. This Court should reject these arguments.

It is arguable that Sadler/Renner failed to preserve these issues for appeal by failing to file their own cross-appeal. It is true that a respondent may "without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument." *Ford v. Showboat Operating Co.*, 110 Nev. 752,

755, 877 P.2d 546, 548 (1994) (citing *In re Robinson*, 921 F.2d 252, 253 (10th Cir. 1990)). However, a respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal. *Id.* (citing *Trustees of Atlanta v. So. Stress Wire Corp.*, 724 F.2d 1458, 1459 (11th Cir. 1983)).

Nonetheless, the district court properly rejected Sadler/Renner's arguments regarding the Aquifer Storage and Recovery ("ASR") Statutes, alleged limitations on the State Engineer's authority, and the propriety of the administrative proceedings. JA Vol. XI at JA2392–2400. This Court should similarly reject these arguments. Further, the takings allegation should be rejected by this Court as it was not formally raised in the proceedings below and was therefore never addressed by the district court. Additionally, such an allegation should also be rejected as it is improperly raised in a judicial review proceeding.

1. The ASR Statutes are irrelevant and are not violated by Order No. 1302 or the DV GMP

Sadler/Renner's arguments alleging violations of the ASR Statutes are completely meritless, and the district court properly rejected them. JA Vol. XI at JA2397. This honorable Court should do the same.

Regardless of terminology used in the record by others, the State Engineer affirmatively found that the DV GMP is **not** an ASR program and was not required to comply with NRS 534.250–340. JA Vol. II at JA0322–0323. Specifically, the DV GMP "allows unused allocations [of existing groundwater] to be carried over and banked for use in a subsequent year to increase the amount of water the rights holder can use in the next year" whereas "a typical [ASR] project is operated by **injecting and infiltrating water from a surface source** into the aquifer for the purpose of accumulating storage for future use." JA Vol. II at JA0323 (emphasis added).

A brief look at the ASR statutes makes it clear that they are inapplicable to the DV GMP's water banking system. A key provision of these statutes is to use a different source of water for recharge of a basin. *See* NRS 534.250(2)(b); NRS 534.260(7) and (8); NRS 534.300(1). Here, the DV GMP allows unused allocations (*i.e.*, water already in the basin) to remain in the aquifer and be carried over for use in a subsequent year "to increase the amount of water the rights holder can use in the next year." JA Vol. II at JA0323. This serves the primary goal of the DV GMP to reduce pumping in Diamond Valley by "allow[ing] flexibility by users

to determine when to use their limited allocation and to encourage water conservation practices" while the banked allocation "is subject to depreciation in the amount that is carried over to account for natural losses over time." *Id*.

The GMP does not include or even compare to an ASR program but rather complies fully with NRS 534.037; therefore, it was not required to meet the requirements of NRS 534.250–340. The district court properly rejected this argument from Sadler/Renner, and the State Engineer respectfully requests that this Court similarly reject it.

2. The State Engineer retained his authority to manage the basin

Likewise, the district court properly rejected Sadler/Renner's meritless allegation that the DV GMP is an unlawful limitation on the State Engineer's authority to manage the basin. JA Vol. XI at JA2396–2397. The district court correctly found the State Engineer retains his authority to manage the Diamond Valley basin as NRS 534.120(1) provides the State Engineer with discretion to "make such rules, regulations and orders as are deemed essential for the welfare of the area involved." *Id*. at JA2396. Thus, the State Engineer retains his ability to

manage the basin through the statutory authority in NRS 534.120(1), and the DV GMP in no way inhibits the exercise of this authority. Furthermore, despite NRS 534.037 showing clear legislative intent for a community to come up with its own plan for managing groundwater withdrawals, the State Engineer expressly retained his authority to enforce Nevada water law in both Order No. 1302 and the DV GMP itself. JA Vol. II at JA0330–0331; JA Vol. III at JA0533, JA0535, JA0542, JA0546, JA0549, JA0553, JA0555.

Sadler/Renner's allegations regarding the State Engineer's continuing authority are plainly contradicted by statute as well as the express terms of Order No. 1302 and the DV GMP. The State Engineer respectfully requests that this Court, like the district court before it, reject this argument.

3. The State Engineer's administrative proceeding complied with NRS 534.037 and due process

Sadler/Renner close their Answering Brief by once again attacking the administrative proceedings (specifically the October 30, 2018, public hearing in Eureka, Nevada) prior to the State Engineer's approval of the DV GMP in Order No. 1302. Sadler/Renner Answering Brief, pp. 52–53.

JA Vol. XI at JA2392–2393. This is the third time that Sadler/Renner have raised this meritless contention, as the district court also previously rejected this allegation in granting the State Engineer's motion in limine prior to the merits briefing. JA Vol. VI at JA1369–1378. The district court correctly affirmed its prior finding that Respondents were afforded due process in the public hearing and that the State Engineer complied with NRS 534.037(3). JA Vol. XI at JA 2392–2393; *see also* JA Vol. VI at JA1378 (the district court found that the State Engineer's "public hearing process to consider the GMP under NRS 534.037 provided notice and the opportunity for anyone to be heard and to offer evidence, thus satisfying the due process standards."). This Court should similarly reject this allegation from Sadler/Renner.

Sadler/Renner's only cited authority in its Answering Brief is to NAC 533.240, a regulation that applies only to protest hearings. *See generally* NAC 533.110–533.380. Per NAC 533.070, a protest hearing is defined as "a hearing before the State Engineer on a protest against an application to appropriate water or to change the place of diversion, manner of use or place of use of an existing water right." The hearing held prior to approval of a GMP, like the one held on October 30, 2018, in

Eureka, Nevada, is not a protest hearing but is a separate, statutorily required hearing pursuant to NRS 534.037(3). NAC 533.240 is simply irrelevant to NRS 534.037.

All evidence in the record shows that the October 30, 2018, public hearing provided notice and an opportunity to be heard and offer evidence to anyone who so desired. JA Vol. II at JA0317, JA0319–0331; JA Vol. V at JA0966–1055. Thus, as the district court found, the State Engineer's administrative process complied with NRS 534.037(3) and the standards of due process. This Court should again affirm this finding and reject Sadler/Renner's arguments.

4. Sadler/Renner's takings argument is improperly raised in this proceeding

While the prior issues in this section were already rejected by the district court, Sadler/Renner now substantively argue for the first time that the DV GMP and Order No. 1302 violate the Nevada Constitution's takings provisions and protections provided by PISTOL ("the People's Initiative to Stop the Taking of Our Land"). Sadler/Renner Answering Brief, pp. 51–52. Sadler/Renner previously alluded to this allegation in passing, but never formally argued takings as a basis for overturning

Order No. 1302. *See* JA Vol. I at JA0007; JA Vol. VII at JA1412; JA Vol. IX at JA1805. Accordingly, the district court never addressed this issue. *See generally* JA Vol. XI at JA2381–2420. By failing to substantively make this argument at the district court, and doing so for the first time on appeal, Sadler/Renner have waived this argument and it is not appropriate for appellate review. *See Hampe v. Foote*, 118 Nev. 405, 409 n.10, 47 P.3d 438, 440 n.10 (2002), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

Further, NRS 533.450 is an improper vehicle for takings claims. Under NRS 533.450(1), the district court acts in an appellate capacity. Takings claims must be brought as original actions given the fact dependent, discovery intensive nature of such claims. *See* NRS 37.055–37.200. It is improper to decide such claims based on an administrative record in an appellate proceeding.

Additionally, any alleged takings claim is not ripe. Under NRS 533.450, the threshold determination for any court is to determine whether substantial evidence supports the State Engineer's decision and whether he acted arbitrarily and capriciously. *See Pyramid Lake Paiute*

Tribe v. Washoe Cty., 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (internal citations omitted). If the Court reverses the district court's order and reinstates Order No. 1302 and the DV GMP, then Sadler/Renner *may* be able to assert a taking claim in a new action. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) ("*Williamson*")[3] (A taking claim is not ripe unless and until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."). Nonetheless, the State Engineer maintains that Order No. 1302 does not result in a taking and does not violate the takings provisions of the Nevada Constitution. Rather, Order

[3] While the U.S. Supreme Court's decision in *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2169, 204 L. Ed. 558 (2019) ("*Knick*") partially overruled *Williamson*, the Supreme Court did not overrule *Williamson* in its entirety. *Williamson* "articulated two independent ripeness requirements for regulatory takings claims." *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1163 (9th Cir. 2020). The first required "a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186. The second required plaintiffs to first seek compensation for the alleged taking using "the procedures the State ha[d] provided for doing so." *Id.* at 194. *Knick* only overruled the second, "state-litigation requirement . . ." *Knick*, 139 S. Ct. at 2179; *id.* at 2169 ("Knick does not question the validity of this finality requirement, which is not at issue here"); *Pakdel*, 952 F.3d at 1163 ("*Knick* left this finality requirement untouched, so that aspect of *Williamson County* remains good law").

No. 1302 approving the DV GMP is an example of the State Engineer following the Legislature's clear intent in the GMP Statutes, enacted pursuant to the police power, in accordance with the public's ownership of Nevada's waters. *See* NRS 533.025.

Sadler/Renner failed to preserve the takings issue for appeal. Regardless, such a takings claim is improperly raised in the first instance during these judicial review proceedings. Such a claim is not proper, if at all, until the alleged government action is final, which is not the case here. For these reasons, the State Engineer respectfully requests that this Court reject Sadler/Renner's takings argument.

D. Respondents Concede that the District Court Erred by Considering Extra-Record Evidence by Failing to Address Appellants' Arguments

Both the State Engineer and the DNRPCA Appellants, as joined by Eureka County, alleged error by the district court in considering extra-record evidence in its order despite previously granting the State Engineer's motion in limine and ordering "that all evidence in this matter shall be limited to the State Engineer's record on appeal, as filed by the State Engineer." JA Vol. VI at JA1378; *see also* State Engineer's Opening

Brief, pp. 61–65; DNRPCA's Opening Brief, pp. 24–26. Neither the Baileys nor Sadler/Renner addressed this argument from Appellants in their Answering Briefs, and neither Respondent even mentioned the State Engineer's motion in limine or the related district court order. *See generally* Baileys' Answering Brief; Sadler/Renner Answering Brief. In fact, Sadler/Renner cited to the same extra-record evidence in its Answering Brief, not mentioning Appellants' objection to this evidence as being outside the State Engineer's record and in violation of the district court's prior order. *See* Sadler/Renner Answering Brief, pp. 27, 29–30.

Where a party on appeal fails to respond to an argument, that party concedes that the argument is meritorious. *See Dickinson v. Sunshine Moving of Am., Inc.*, 456 P.3d 602 (table), 2020 WL 582351, Docket No. 78136, filed Feb. 5, 2020 (unpublished disposition) (citing *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious)); *see also Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the failure to respond to an argument as a confession of error).

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Respondents failed to address Appellants' arguments regarding the district court's erroneous decision to disregard its prior order granting the State Engineer's motion in limine. In fact, neither the Baileys nor Sadler/Renner addressed this prior order from the district court at all. In doing so, Respondents concede that the Appellants' arguments are meritorious and that the district court erred in considering extra-record evidence.

E. The State Engineer's Determination that the DV GMP Set Forth the Necessary Steps for Removal of the CMA Designation was a Discretionary Act Supported by Substantial Evidence

Despite findings that Order No. 1302 violated other aspects of the law (which the State Engineer strongly disputes), the district court soundly held that the State Engineer fully complied with all requirements of NRS 534.037 in approving the DV GMP. JA Vol. XI at JA2392–2400. Yet, Sadler/Renner now argue that the DV GMP does not contain the necessary steps for removal of Diamond Valley's CMA Designation and that Order No. 1302 was not supported by substantial

evidence.[4] Sadler/Renner Answering Brief, pp. 32–43. Sadler/Renner misstate the requirements for the State Engineer to approve a GMP and make a direct plea for this Court to reweigh evidence in contravention of binding precedent. *See Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

Despite the relevant statutes being unambiguous, Sadler/Renner delve into legislative history to read requirements into NRS 534.037 that do not exist in the plain language of the statute. Sadler/Renner Answering Brief, pp. 32–33. Just like the initial CMA designation, the determination that the DV GMP included the necessary steps for removal of the CMA designation was within the sound discretion of the State Engineer. NRS 534.037(1); NRS 534.110(7). The key determination in imposing or removing a CMA designation is whether "withdrawals of groundwater **consistently** exceed the perennial yield." NRS 534.110(7) (emphasis added). The State Engineer specifically addressed this in Order No. 1302, finding that "existing evidence used by the State Engineer to designate the basin a CMA demonstrates that there are wide

[4] The Baileys make similar arguments when discussing alleged impairment of vested rights and an alleged lack of evidence regarding the DV GMP's efficacy. Baileys' Answering Brief, pp. 78–79.

variations in annual pumping." JA Vol. II at JA0330. These variations in annual pumping, combined with the significant pumping reductions under the DV GMP and other evidence in the record, was substantial evidence supporting the State Engineer's determination that the DV GMP included the necessary steps to halt the **consistent** overpumping in Diamond Valley. JA Vol. II–VI at JA0308–1265. Thus, the DV GMP set forth the necessary steps for removal of Diamond Valley's CMA designation.

Further, Sadler/Renner go through a lengthy analysis regarding the evidence provided by participants during the October 30, 2018, public hearing. Sadler/Renner Answering Brief, pp. 36–43. Specifically, Sadler/Renner argue extensively why its preferred evidence was better than that of others, and why it necessitated their desired result. *Id*. These arguments were specifically rejected by the State Engineer in Order No. 1302. JA Vol. II at JA0328–0332. Sadler/Renner make an outright request that this Court substitute its judgment for that of the State Engineer, reweigh the evidence, and pass upon the credibility of witnesses, with little to no mention that the State Engineer expressly rejected these arguments in Order No. 1302. Sadler/Renner Answering

Brief, pp. 32–43. These requested analyses are prohibited by binding precedent and should be rejected by this Court. *Bacher v. Office of State Eng'r*, 122 Nev. 1110, 1120–1121, 146 P.3d 793, 800 (2006) (citing *Revert*, 95 Nev. at 786, 603 P.2d at 264)).

Importantly, Sadler/Renner made this similar plea to the district court, who properly rejected it, finding that that "there is substantial evidence in the record to support the State Engineer's approval of the DVGMP as achieving the goal of removing the Diamond Valley basin from CMA status" and that "there is substantial evidence in the record to support the State Engineer's findings that the DVGMP contained the necessary relevant factors in NRS 534.037(2) to approve the DVGMP." JA Vol. XI at JA2395–2396. This Court should do the same and reject this argument from Sadler/Renner.

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III. CONCLUSION

Based on the foregoing, the State Engineer once again respectfully requests that the Court reverse the district court's order and reinstate Order No. 1302 and the DV GMP.

RESPECTFULLY SUBMITTED this 30th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

1. 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 10 in 14 pitch Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,752 words.

3. Finally, I hereby certify that I have read this appellate 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)(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 brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 30th day of December, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 30th day of December, 2020, I served a copy of the foregoing APPELLANT STATE ENGINEER'S REPLY BRIEF, by the Nevada Supreme Court's EFlex Electronic Filing System to:

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