Case No. 81224

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jul 19 2022 03:39 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

Appellants,

vs.

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

Respondents.

Docket 81224 Document 2022-22710

RESPONDENTS SADLER RANCH, LLC, IRA RENNER, AND MONTIRA RENNER PETITION FOR REHEARING

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

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SADLER RANCH AND RENNER PETITION FOR REHEARING

Respondents Sadler Ranch and Renner respectfully request rehearing for three reasons. First, the Majority incorrectly concluded the Diamond Valley Groundwater Management Plan ("GMP") will not impair vested water rights. The record clearly contains that evidence, and an evidentiary hearing is needed if more detailed impairment evidence is required. Second, Nevada's Constitution *prohibits*, regardless of compensation, the taking of private property for the purpose of redistributing that property to other private property owners. Third, this Court's Majority Opinion makes a *major change* – abrogating prior appropriation for groundwater in Nevada – without the quantum of legislative clarity that is required for such a landmark reversal.

ISSUES

1. Since counsel did not concede that the record lacks impairment evidence, did the Majority overlook or misapprehend the record when

    a. the record contains uncontested evidence of impairment,

    b. the District Court found the GMP will impair vested rights,

    c. the State Engineer prohibited more specific impairment evidence from being in the record, and

    d. the Majority erroneously concluded the State Engineer completed his own analysis of impairment, when he did not?

2. Did the Majority overlook a controlling provision of the Nevada Constitution when it concluded that compensation is a remedy for a taking of private property for redistribution to other private parties?

3. Did the Majority improperly allow an oblique provision of law to make a major change to the long-standing prior appropriation system in Nevada?

ARGUMENT

Rehearing is merited if this Court: (1) "overlooked or misapprehended a material fact in the record or a material question of law", or (2) "failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case."[1] The Majority Opinion overlooked and misapprehended the record when it overturned the District Court's order, and upheld State Engineer's approval of the GMP.[2] For the following reasons, rehearing is merited.

I. The Majority Misapprehended Facts Because Counsel Did Not Concede That The Record Lacks Impairment Evidence.

The Majority correctly found that Nevada water law prohibits a GMP from impairing vested water rights.[3] But then the Majority incorrectly relied, in part, on three statements made by Bailey's counsel during oral argument[4] to conclude that "respondents' conceded that they never presented any evidence to the State Engineer or the District Court to show that the GMP here affected their vested water rights [i.e. impairment evidence]."[5] The transcript from the Supreme Court oral argument

[1] NRAP 40(c)(2).
[2] Majority Op. at 6, 12 n.5, 16.
[3] Majority Op. at 11-13. NRS 533.085 (Nevada's statutory water right scheme shall not impair pre-statutory [i.e., vested] water rights.).
[4] Majority Op. at 6.
[5] Majority Op. at 16.

demonstrates these statements *were not* related to impairment evidence.[6] The following dispositive portion of the transcript demonstrates this Court was probing a distinctly different issue – the quantification of water permits that were never placed to beneficial use:[7]

> Mr. Mixson: . . . the problem with the *beneficial use violations of the GMP* is that, for example, these unused permits, or unused portions of permits, are given full allocations and shares . . . [e]ven though the holder of that permit has not proven its actual ability to put the water to *beneficial use*.
>
> The Court (C.J. Hardesty): . . . was there a calculation made of the water rights that were incorporated in the GMP . . . for which . . . appropriate consideration of the *proof of beneficial use* had not been accomplished? . . .
>
> Mr. Mixson: I um, understand your question. And the answer is **no. It was not quantified**. I think that is one of the fundamental deficiencies in the state engineer's . . . factual determination.
>
> The Court (C.J. Hardesty): And did you request that when the state engineer was developing the plan?
>
> . . .
>
> Mr. Mixson: No. **They didn't raise it as an issue in their written comments**.
>
> . . .
>
> The Court (C.J. Hardesty): So did you raise a calculus of the type were talking about to the district court?
>
> Mr. Mixson: . . . **I don't think** we – **it was raised as a specific issue** that the state engineer should have calculated . . .[8]

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[6] Supreme Court Oral Argument Transcript ("Tr.") at 25:24-32:2 (attached as Exhibit 1) (emphasis added).

[7] The specific statements that the Majority quoted to are shown in bold text.

[8] Tr. at 25:24-28:3 (emphasis added).

The quotes that the Majority relies upon are actually answers related to Nevada's beneficial use doctrine,[9] not the impairment of vested rights.[10] Baileys' counsel argued that the GMP violates the beneficial use doctrine.[11] Chief Justice Hardesty questioned whether the record contained a quantification of the permits that were not placed to beneficial use.[12] Bailey's counsel acknowledged that no specific quantification exists.[13] Thus, the concessions referenced by the Majority were only related to beneficial use quantification.

Further, statements by Bailey's counsel cannot constitute admissions by Sadler Ranch or Renner. Sadler Ranch and Renner were represented by separate counsel. Statements by Bailey's counsel are not "deliberate, clear, unequivocal statements by" Sadler Ranch and Renner.[14] Nor can statements by Bailey's counsel constitute a "concrete fact within that party's knowledge" about Sadler Ranch and Renner.[15]

Because the alleged concessions were material to the Majority's analysis, rehearing is warranted.

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[9] NRS 533.035 (beneficial use is the "basis, the measure and the limit of the right to use water").
[10] Tr. at 25:24-32:2.
[11] Tr. at 26:1-6.
[12] Tr. at 26:6-14, 26:19-20.
[13] Tr. at 26:15-18.
[14] *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011).
[15] *Id.* 127 Nev. at 343, 255 P.3d at 276; *see also, In re Barker*, 839 F.3d 1189, 1195 (9th Cir. 2016) (an admission is binding against the party who made it); 32 C.S.J., Evidence § 552 (2022) ("an admission of one party is not binding on, or evidence against, a coparty").

A. The Majority Misapprehended Facts Because The Record Contains Undisputed Evidence That The GMP Will Impair Vested Rights.

1. GMP Impairs Vested Rights Because It Allows Pumping Above The Perennial Yield And Continued Groundwater Drawdown.

Uncontested evidence indicates that even the maximum pumping reductions in the GMP do not bring withdrawals in the basin below the perennial yield.[16] The perennial yield is established to protect vested surface water rights from impairment by junior pumping.[17] The failure of the GMP to reduce pumping to the perennial yield is an *ipso facto* impairment to vested rights. In Diamond Valley, the impairment from pumping above the perennial yield is even more clear. Groundwater and spring sources in Diamond Valley are hydrologically connected.[18] Evidence clearly shows that many springs (including on Sadler Ranch) are dry because of over-pumping, while others (including Renner) are in imminent danger of the same fate.[19]

The specific evidence shows that the perennial yield of Diamond Valley is 30,000 acre-feet annually ("afa"), but the pumping will only be reduced to 43,500 afa under the GMP.[20] At least four exhibits in the record - (1) the GMP,[21] (2) a 1968

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[16] App. vol. IV at JA0823.
[17] *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010).
[18] App. vol. XI at JA2384-2385, *citing* App. vol. III at JA0641.
[19] *Id*.; App. vol. IV at JA0906.
[20] App. vol. V at JA0988; *see also* App. vol. IV at JA0933-944.
[21] Tr. at 52:13-15. The GMP is in the record at App. vols. III-IV at JA0530-840.

USGS study (aka Harrill report),[22] (3) a 2016 USGS study,[23] and (4) the Turnipseed Engineering report[24] - show that the GMP's maximum pumping reductions will never bring withdrawals below the perennial yield, thereby impairing vested rights.[25]

Sadler Ranch and Renner provided this information to the State Engineer.[26] Additionally, during public comment (the only input allowed by the State Engineer), their expert stated that the level of groundwater mining authorized *under the plan* will cause the permanent depletion of an additional 2.5 million acre-feet from the groundwater aquifer.[27] Further, Sadler Ranch and Renner provided photographs that show fissures on their land from subsidence caused by over-pumping.[28] The fissures capture water that could otherwise be used, thereby causing impairment.

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[22] Tr. at 52:22-25. The Harrill report is located in the record at App. vol. II at JA0333-446.

[23] Tr. at 52:9-11. The 2016 USGS study is in the record at App. vol. V at JA1056-1152.

[24] Tr. at 52:25-53:10. The Turnipseed Engineering report is in the record at App. vol. IV at JA0933-944.

[25] As noted during oral argument the 2016 USGS report states that the basin is out of balance by more than 61,000 afa, but the plan only reduces pumping to approximately 41,000 afa leaving a continuing imbalance of 20,000 afa. Tr. at 52:9-15. Likewise, the Turnipseed Engineering report concluded that the GMP "will not sufficiently reduce groundwater pumping to remove the CMA designation." App. vol. IV at JA0935-936. *See also* App. vol. XI at JA2270.

[26] App. vol. V at JA0975-976, 984, 986, 988-989, 1034-1036, 1037.

[27] App. vol. V at JA0988. *See* Sadler/Renner Answering Br. at 40-41.

[28] App. vol. IV at JA0919, 946-954. Sadler Ranch specifically referenced evidence of its claim of harm from subsidence, which the State Engineer excluded from the record provided the District Court. *Id*. at JA0919 n.35. Others also provided photographic evidence of subsidence across the basin. *Id*. at JA0962-965. *See also, Id*. at JA0955.

Importantly, the GMP itself recognizes that vested rights are harmed by "groundwater exploitation" from junior pumping.[29] Even with mitigation water rights, as groundwater levels continue to decline, vested water right owners are forced to incur greater power and maintenance costs to access water from lower depths.[30] Proponents of the plan did not counter these arguments or present any evidence of non-impairment.

2. Impairment Evidence Was Properly Referenced In Briefing And During Oral Argument.

Even though the Majority Opinion states that Sadler Ranch, Renner, and Bailey failed to cite to this evidence,[31] the evidence was cited in briefs and at oral argument.[32] Sadler Ranch and Renner made specific reference to at least four exhibits in the record: (1) the GMP,[33] (2) a 1968 USGS study (aka Harrill report),[34]

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[29] App. vol. III at JA0641; App. vol. IV at JA0806.

[30] The State Engineer has granted several permits to allow the pumping of groundwater to 'mitigate' the impairment for lost springs, but those permits do not make vested rights whole. App. vol. II at JA0452-459. Even where 'mitigation' rights have been awarded, evidence was offered that vested rights remain impaired. *See* Sadler/Renner Answering Br. at 50-51; App. vol. V at JA 0975:17-JA0976:2, 984:10-16, 1034:21-1035:17; App. vol. XI at JA2337:5-8; 2338:17-2339:9, 2404:13-2405:6.

[31] Majority Op. at 12 n.5.

[32] Sadler/Renner Answering Br. at 2, 6, 8-9 (supported by citations in footnotes 2-5, 12-15, 25-29); Sadler/Renner Answering Br. at 32-36, 39-41, 50-51 (supported by citations in footnotes 118-132, 146-156, 182-183); Tr. at 53:4-10.

[33] Tr. at 52:13-15. The GMP is in the record at App. vols III-IV at JA0530-840.

[34] Tr. at 52:22-25. The Harrill report is located in the record at App. vol. II at JA0333-446.

(3) a 2016 USGS study,[35] and (4) the Turnipseed Engineering report.[36] Bailey also referenced impairment evidence in briefing.[37] When Sadler Ranch and Renner's counsel referenced this evidence during oral argument, he noted that *at the end of the plan* the pumping deficit remains above 20,000 afa.[38] Thus, impairment evidence clearly exists and was properly referenced.[39]

The Majority overlooked or misapprehended this evidence of impairment to vested rights. Therefore, rehearing is merited.

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[35] Tr. at 52:9-11. The 2016 USGS study is in the record at App. vol. V at JA1056-1152.

[36] Tr. at 52:25-53:10. The Turnipseed Engineering report is in the record at App. vol. IV at JA0933-944.

[37] Bailey Answering Br. at 21, 74-78 (citing App. vol. II at JA0329, App. vol. XI at JA2403-2405).

[38] Tr. at 52:7-20.

[39] This case is distinguishable from *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720 (1993). In *Allianz*, the Court found that the evidence presented at trial did not support the allegations in the case, proving respondents made false allegations, and that the opening brief on appeal contained no cites to the record or the appendix. *Id.*, 109 Nev. at 996, 860 P.2d at 724. As explained herein, Sadler Ranch and Renner presented evidence at the State Engineer's hearing that the GMP harms vested rights, the District Court cited to the record in finding that the GMP harms vested rights, the opposing parties admitted the pumping under the GMP continues to harm vested rights, and all briefs and oral arguments by respondents included cites to evidence of impairment. *See* App. vol. IV at JA0919, 946-954; App. vol. V at JA0975-976, 984, 986, 988-989, 1034-1036, 1037. App. vol. VII at JA1390-1394, 1407:3-1408:3, 1412:7-1413:12; App. vol. IX at JA1794:3-1795:12, 1809:15-1810:15; App. vol. XI at JA2384-2385, 2389-2390, 2403-2405; Sadler/Renner Answering Br. at 32-36, 39-41, 50-51; Tr. at 52-53.

B. The Majority Overlooked The Fact The District Court Found That The GMP Will Impair Vested Rights.

The District Court found the GMP will impair vested rights because the GMP's "annual pumping allocation will certainly cause the aquifer groundwater level to decline with continuing adverse effects on vested surface water rights."[40] After its review of the uncontested evidence,[41] the District Court found that: 1) the State Engineer cannot approve a plan that impairs vested rights;[42] 2) all parties agree that pumping above the perennial yield impairs vested water rights;[43] and 3) all parties agree that the GMP authorizes continued pumping above the perennial yield.[44] The District Court relied upon the uncontested fact that the plan at best reduces pumping to 150% of the perennial yield.[45] Thus, "for 35 years the pumping in Diamond Valley [under the GMP] will exceed the 30,000 af perennial yield."[46] As such, the District Court concluded that "the [GMP] and Order 1302 impairs senior vested rights" and thus "Order 1302 is arbitrary and capricious."[47]

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[40] App. vol. XI at JA2405:3-5 ("The [GMP]'s annual pumping allocation will certainly cause the aquifer groundwater level to decline with continuing adverse effects on vested surface water rights.").
[41] App. vol. XI at JA2403:4-2405:7.
[42] App. vol. XI at JA2404:4-12.
[43] App. vol. XI at JA2384-2385, *citing* App. vol. III at JA0641 and Ruling 6290, 23-31. *See also* App. vol. XI at JA2389:1-3.
[44] App. vol. XI at JA2389:1-3, 2403:5-2404:3, 2404:12-2405:7. *See also* App. vol. IV at JA0823 (the pumping chart in the GMP never reduces pumping below 30,000 afa even without accounting for the rights excluded from the plan).
[45] At the end of the plan, pumping exceeds the yield by 4,200 afa. Pumping from rights not including in the plan add over 11,400 afa. Pumping thus totals 45,600 afa under the GMP in a basin with a yield of 30,000 afa. App. vol. XI at JA2404:13-18.
[46] App. vol. XI at JA2389:1-3.
[47] App. vol. XI at JA 2405:5-7.

The District Court's impairment finding was supported by substantial evidence because the District Court relied upon admissions of the State Engineer in Ruling 6290, and admissions in the GMP, that vested rights are impaired by groundwater pumping above the perennial yield.[48] These admissions are bolstered by the evidence of impairment provided by Sadler Ranch, Renner, and Bailey.[49] Since the District Court's findings are unrefuted and supported by substantial evidence,[50] rehearing is warranted to uphold the District Court's finding that the GMP will impair vested water rights.

Alternatively, rehearing is merited for this Court to remand with instructions that the GMP be amended to include pumping restrictions that do not cause impairment with vested rights.

C. The Completeness Of The Record About How The GMP Impairs Vested Rights Was Tainted By The State Engineer's Refusal To Hold An Evidentiary Hearing.

Sadler Ranch and Renner alleged below that NRS 534.037 required the State Engineer to hold a hearing "to take testimony" on the GMP.[51] The record clearly shows that the State Engineer did not hold an evidentiary hearing regarding the

[48] App. vol. XI at JA2384-2385, *citing* App. vol. III at JA0641 and Ruling 6290, 23-31. *See also* App. vol. XI at JA2389:1-3.
[49] App. vol. XI at JA2389:15-2390:12; App. vol. IV at JA0919, 933-955, 962-965; App. vol. V at JA0975-976, 984, 986, 988-989, 1034-1036, 1037.
[50] App. vol. XI at JA2389:1-3, 2403:5-2404:3, 2404:12-2405:7.
[51] Sadler/Renner Answering Br. at 52-53.

GMP.[52] Even though the State Engineer's own regulations specify that public comment is not "testimony,"[53] his office only allowed public comment, not the introduction of testimony or evidence.[54] No witnesses were allowed, no cross-examination was allowed, and no procedures existed for submitting, authenticating, or objecting to evidence.[55]

This Court's review of a State Engineer decision "presupposes the fullness and fairness of the administrative proceedings."[56] When the State Engineer denies a full and fair opportunity to be heard, this Court should not hesitate to intervene.[57] Such intervention is clearly merited here, since the Majority expected more detailed evidence about how the GMP will affect "specific surface water rights."[58] The State Engineer tainted the record by not allowing Sadler Ranch's expert to testify about

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[52] App. vol. V at JA0968:9-16. Note, the failure to cite the record in *Allianz* was relevant to sanctions against attorneys, and is based on a Supreme Court Rule that no longer exists and appears to be replaced by less strict provisions under NRAP 28. *Allianz*, supra, 109 Nev. at 997, 860 P.2d at 725 citing *Skinner v. State*, 83 Nev. 380, 384 n.4, 432 P.2d 675, 677 n.4 (1967) (relying upon SCR 23(1), which was repealed in 1973, and previously held that "a brief must designate the page and line, or the folio, in the record where the evidence or matter referred to may be found, and in case of failure to do so the court may ignore the point made"). Even if the record was not properly cited in a brief, as noted in *Skinner*, this Court may consider the uncited argument when "it concerns important rights of appellant, not counsel." *Skinner*, 83 Nev. at 384, 432 P.2d at 677.

[53] NAC 533.240(1).

[54] App. vol. V at JA0968:9-16 (describing the meeting procedures which only allowed participants to "give public comment").

[55] App. vol. XI at JA2272.

[56] *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979).

[57] *Id*.

[58] Majority Op. at 12 n.5.

the "extent to which the GMP affected respondents vested water rights."[59] Then, the State Engineer doubled-down when he excluded relevant impairment evidence from the record on appeal to preclude Sadler Ranch and Renner from using that evidence at the District Court.[60]

Additionally, the burden should not be placed on vested water rights owners to prove impairment from a GMP. Rather, the proponents of the plan have the burden to prove non-impairment.[61] The proponents offered no such evidence, except to claim the plan does not require pre-statutory right holders to participate in pumping reductions.[62] This solitary retort can hardly overcome the overwhelming and undisputed evidence that the GMP perpetuates the drawdown in Diamond Valley, and continues to impair vested water rights.[63]

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[59] *Id*.

[60] *See* App. vol. VI at JA1286-1314 App. vol. V at JA0970:13-15. This evidence included a model on file at the State Engineer's office (App. vol. IV at JA0923-924), a report of land subsidence cited by Sadler Ranch (*Id*. at JA0919), and evidence of harm to vested rights in the State Engineer files (Ruling 6290, App. vol. II at JA0452-459). *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."). App. vol. VI at JA1369-1378.

[61] NRS 534.037 (a GMP must set forth the necessary steps for removal of the CMA designation); NRS 534.110(7) (State Engineer "shall designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin"); *JM v. Dep't of Family Servs.*, 922 P.2d 219, 221 (Wyo. 1996) (citing BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 7.8 (2d ed. 1984)).

[62] App. vol. VII at JA1518:21-23. *See generally* App. vol. V at JA0966-1055. *See specifically* App. vol. V at JA0975:7-16 (noting that the only evidence submitted by the plan proponents for review was the GMP itself).

[63] Tr. at 44:6-21.

The Majority declined to address the tainted record based on a misapprehension of an undisputed and material fact in the record (that an evidentiary hearing was not held) and a material question of law (that NRS 533.037 required evidence to be taken in the form of "testimony").[64] The tainted record was raised below and to this Court.[65] Therefore, rehearing is merited for this Court to amend its disposition and remand with instructions that a proper evidentiary hearing be held.

D. The Majority Misapprehended The State Engineer's Consideration Of The NRS 534.037 Factors.

The Majority misapprehended the facts in the record when it concluded that the State Engineer found the GMP "would reduce withdrawals *to* the Basin's perennial yield,"[66] as required by NRS 534.037. The State Engineer did not make that conclusion; he only noted that pumping under the plan will lead to "groundwater pumping *approaching* the perennial yield."[67] This State Engineer finding prompted the District Court to conclude the GMP does *not* bring pumping below the perennial yield.[68]

The Majority also misapprehended the record regarding the State Engineer's consideration of the NRS 534.037 factors.[69] The Majority incorrectly believed that the State Engineer "methodically considered the NRS 534.037 factors" including a

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[64] Majority Op. at 10 n.3.
[65] *See* Sadler/Renner Answering Br. at 5, 52-53. *See also* App. vol. IX at JA1813:11-1814:9; App. vol. VII at JA1422:13-1423:6.
[66] Majority Op. at 18 (emphasis added).
[67] App. vol. I at JA0115 (emphasis added).
[68] App. vol. I at JA0030; App. vol. XI at JA2389:1-3, 2393-2394, 2404:12-2405:6.
[69] Majority Op. at 17-18.

hydrologic analysis.[70] He did not. Sadler Ranch and Renner raised this issue before the District Court,[71] and pointed out that the State Engineer expressly conceded that no hydrologic analysis of the plan was *ever* performed.[72] The State Engineer relied on only the GMP's description of the NRS 534.037 factors,[73] which was drafted *before* the GMP pumping reductions were established.[74] The District Court agreed that the State Engineer did not perform his own analysis.[75] Specifically, the District Court found that the "State Engineer admits that neither groundwater modeling nor hydro geologic analysis were the basis for the DVGMP."[76] Therefore, rehearing is merited.

II. The GMP Violates Nevada's Constitutional Prohibition Of Takings That Redistribute Private Property From One Private Party To Another.

The Majority also failed to consider a controlling provision of the Nevada Constitution, even though this issue was raised by Sadler Ranch and Renner.[77] Nev.

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[70] Majority Op. at 17-18.
[71] App. vol. VII at JA1398 n.59, 1796:2-4, 1808:7-1811:15. The issue was also raised before this Court. Sadler/Renner Answering Br. at 4, 41-43.
[72] App. vol. I at JA0027 ("Groundwater modeling and hydrologic analysis are not the basis for the GMP's determination of pumping reduction rates and target pumping totals at the end of the plan.").
[73] *Id*. at JA0029 ("The State Engineer finds that Appendix D to the GMP sufficiently describes [the NRS 534.037 factors].").
[74] App. vol. XI at JA2339-2341 (discussing how Appellants' counsel admitted during the District Court hearing that Appendix D was written *before* the rest of the GMP and thus could not be considered a methodical analysis of its effects.). *See Eureka Cnty. v. State Eng'r*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015) (State Engineer decisions must be made upon presently known evidence).
[75] App. vol. XI at JA2404:12-2405:6.
[76] App. vol. XI at JA2404:18-20.
[77] Majority Op. at 16; Sadler/Renner Answering Br. at 51-52.

Const. Art. 1, Sec. 22, controls a dispositive issue in this case because it *prohibits* any branch of state government from effectuating the redistribution of private property, irrespective of whether compensation is paid. Redistribution of property rights is at the heart of the GMP.[78] If NRS 534.037 and 534.110(7) unambiguously authorize the taking of the real property rights of one person (senior right holders) and giving them to another (juniors), the statutes are facially unconstitutional.[79]

The Nevada Constitution prohibits the State from confiscating private property unless that property is being taken for a "public use."[80] The Constitution further states that a redistribution of property between private parties is not a "public use."[81] This provision is directly controlling and dispositive here, and the Majority failed to address it.[82] Instead, the Majority concluded that if a taking did occur, compensation would be an adequate remedy.[83] However, compensation cannot overcome a taking that is prohibited because Article 1, Section 22, unambiguously prohibits all branches of state government, including the Legislature and this Court, from adopting, approving, reinstating, or enforcing any GMP that has the effect of

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[78] Majority Op. at 4-5.

[79] Nev. Const. Art. 1, Sec. 22. Water rights are clearly real property. *Application of Filippini*, 66 Nev. 17, 202 P.3d 535 (1949) (water rights are regarded *and protected* as real property); *Wilson v. Happy Creek*, 135 Nev. 301, 313, 448 P.3d 1106, 1115 (2019) (the priority of a water right is its most important feature).

[80] Nev. Const. Art. 1, Sec. 8(3).

[81] Nev. Const. Art. 1, Sec. 22.

[82] This issue was raised in the Sadler/Renner Answering Brief at 51-52.

[83] As the Majority notes (Majority Op. at 12 n.5), and Respondents conceded (Tr. at 40:24-41:4), *claims for compensation* may be brought and decided in a subsequent inverse condemnation action. Such an action presumes, however, that the taking does not violate Art. 1, Sec. 22.

redistributing property between private individuals.[84] Therefore, rehearing should be granted to consider Article 1, Section 22's dispositive effect.

III. Major Changes To A Statutory Scheme Cannot Be Based On Oblique Statutory Language.

After the Majority issued its opinion, the U.S. Supreme Court held that "oblique or elliptical language" cannot be used to make fundamental changes to a statutory scheme.[85] Here, the Majority relied on a single conditional clause in a single statute to overturn 155 years of water law, turning management of Nevada's most precious resource over to a simple majority of water users who are over-pumping a basin.[86] The Majority Opinion reverses prior appropriation for groundwater in Nevada[87] at the only time it matters – in a shortage.[88] Statutes that deviate from a long-standing doctrine should be strictly construed because "[t]he Legislature is presumed not to intend to overturn long-established principles of law

[84] Nev. Const. Art. 1, Sec. 22(1) ("Public use" excludes transfer "from one private party to another private party.").
[85] *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. 2587 (2022).
[86] Majority Op. at 10.
[87] Majority Op. at 19.
[88] Sadler/Renner Answering Br. at 16-32. *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). Note, Prior appropriation was not, and has never been, an obstacle to good water management. The problem in Diamond Valley is based on decades of non-action by the State Engineer, and not the failure of the prior appropriation doctrine. App. vol. XI at JA2384-2385.

when enacting a statute."[89] The Legislature never discussed or approved a repeal of the entire statutory scheme that codified long-standing common law.[90] Therefore, Sadler Ranch and Renner respectfully request that this Court grant rehearing and invite briefing from amici's to fully consider the statewide impacts of such a momentous decision.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that rehearing be granted.

[89] *Happy Creek, Inc.*, 135 Nev. at 307, 448 P.3d at 1111. *See also Orr Ditch & Water Co. v. Justice Court of Reno TP., Washoe Cty.*, 64 Nev. 138, 164, 178 P.2d 558, 570 (1947).

[90] Importantly, the Majority did not just exempt GMP's from prior appropriation doctrine, it also found that by including a single phrase in a statute the Legislature exempted GMP's from *all other statutory provisions* of the groundwater law including: (1) the beneficial use doctrine, (2) requirements that water be diverted from a single point, used at a specific place, for a specific use, and (3) permitting and change application requirements. Majority Op. at 10-11, 19; Sadler/Renner Answering Br. at 43-51.

AFFIRMATION

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

DATED this 19th day of July 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 petition complies with the page/volume limitations of NRAP 40(b)(3) because the petition contains no more than 4,667 words excluding the title page, affirmation, this certificate of compliance, and the certificate of service.

3. Finally, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(b).

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

DATED this 19th day of July 2022.

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CERTIFICATE OF SERVICE

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

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EXHIBIT INDEX

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1.	Supreme Court Oral Argument Transcript	96

EXHIBIT 1

EXHIBIT 1

In the Matter Of:

Diamond Valley Groundwater Management

AUDIO-RECORDED HEARING

Job Number: 892679

TRANSCRIPT OF AUDIO-RECORDED

HEARING BEFORE THE EN BANC COURT, CHIEF JUSTICE HARDESTY PRESIDING

IN THE MATTER OF DIAMOND NAT. RES. PROT. AND CONSERVATION ASSOCIATION V. DIAMOND VALLEY RANCH, LLC

JUNE 2, 2022

Job No. 892679

[Part 1]

MS. LEONARD: And I wish to reserve 10 minutes of my time for rebuttal.

THE COURT: Fine. Thank you, Ms. Leonard.

MS. LEONARD: Good morning, Your Honors, and may it please the Court. My name is Debbie Leonard on behalf of the appellants. Also present in the courtroom today are some of the Diamond Valley farmers whose livelihoods are at stake in this matter.

May 12th, 1960, that is a critical date in Diamond Valley because it represents the difference between a prospering agricultural community and the loss of many livelihoods with associated effects on Eureka County. Why is that?

Throughout the 1960s, many people were starting to farm in Diamond Valley and obtaining permits from the state engineer to appropriate groundwater. People were successful in working the land, and Diamond Valley thrived. But Diamond Valley has been more successful than the aquifer can sustain.

The state engineer has determined that 30,000 acre feet annually is the basin's perennial yield. And May 12th, 1960 is the date on which the state engineer had cumulatively issued 30,000 acre feet of

groundwater appropriations. As a result, May 12th, 1960 became a line of demarcation between senior and junior appropriators.

So under strict application of the prior appropriation doctrine, those water rights that postdate May 12th, 1960 would be cut off in a process known as curtailment. So what would that look like?

Well, I refer the Court to Appendix F of the GMP, and you will see two things on there. First you will see that 81 percent of the permits that have been issued for groundwater in Diamond Valley fall below this cutoff line. So curtailment would gravely affect many people and also Eureka County.

The second thing you will see is the sheer number of appropriations that occurred around the -- within a small window of time, 1960 to 1961. Meaning that the juniors, some of whom come within just days of the cutoff line, and have been diligently working the land for 60 years under dually issued permits would lose everything.

So why do I start with this? Well, this is the problem the legislature was trying to solve in 2011 when it passed AB419. They wanted to address over-appropriation and the impacts on the groundwater resources. But they also wanted to avoid the

devastating impacts of curtailment by priority in groundwater basins if it were strictly enforced.

This legislative intent is the lens through which the Court must view the statute. The district court made no effort to analyze the legislative intent, it only speculated as to what the legislature did not intend.

THE COURT: Well, if they intended, uh, to affect, uh -- uh, invested rights, wouldn't they have said so? Uh, if they wanted to affect prior appropriation, they could've expressly, uh, said that in the statutes, uh, throughout chapter 533 and 534. Uh, make it very clear, prior appropriation, first in time, first in line.

MS. LEONARD: So I think the -- let's look at the statutory language. Because I think it -- they do say that specifically. They say that -- well, first of all, AB419 created this critical management area designation that did not previously exist.

And then if a basin has been designated a critical management area for at least 10 consecutive years, the legislative required the state engineer to limit withdrawals, uh, to restrict them to conform to priority rights. And this is the key language, unless a groundwater management plan has been approved for

the basin pursuant to NRS 534.037.

So this language expressly authorizes an engineer to not conform to priority rights, but only in very limited circumstances. Where there's a CMA designation, and so long as the groundwater management plan complies with this language of the statute, uh, in NRS 534.037. And if you turn to that, I think it's important to see what these limited circumstances of making an exception to prior appropriation, what they look like.

First, the legislature said, uh, it allowed a simple majority of permit and certificate holders to petition for approval of a GMP. So the legislature said, you know, prior appropriation presents this intractable problem of how do we address the situation we're in where the resources are affected, but there are, um -- but if we enforce strict appropriation, it would be devastating? And they said -- the legislature said, let's put the onus on the local community to come up with a solution that works for them.

[Part 2]

MS. LEONARD: Now the legislature, uh, by

requiring majority approval, it made it clear it did not expect everybody to be on board. Uh, the legislature could have set the number higher than a majority, it could have required all the senior right holders to, uh, have signed on to a petition. But that's not what it did.

And this G- -- GMP though, I think it's important to note that it wasn't approved just by a simple majority. It was approved by a majority of senior right holders. So the only seniors to have challenged the GMP in all of Diamond Valley are the Baileys, and they are a respondent here.

Sadler Ranch and the Renners are not senior groundwater users, uh, of rights that are subject to the GMP. So I just want to make that clear that the only seniors to challenge it are one of the respondents here. So, um, importantly, also the GMP honors priorities, it has this priority factor that was a major point of debate during the GMP development process. And it was what a majority could agreed to.

THE COURT: Let me pause you there though. Um, first of all, the GMP never equalizes, not even in 35 years, the over-pumping issue. You're still not underwater, but, um, over the approp- -- the -- the amount that basin can sustain, even 35 years from now.

Um, so could you comment on that, and how that fits in the statutory scheme, and your discussion of the legislators' object here?

MS. LEONARD: Sure. Um, the GMP does bring the basin into balance within 35 years. The, um -- the benchmark reduction table, that I think Your Honor was referring to, is not accounting for, um, recharging to the aquifer. So it doesn't, uh -- the ca- -- when when you look at just consumptive use, and that -- um, there's actually another table that's located, and, um, I think it's at, um, joint appendix volume 4, pages 838 to 839.

It'll show you that when you take into account consumptive use, only then -- and -- and recharging to the aquifer, then it will bring the basin within 30,000 acre feet, uh, within the timeframe set forth in the -- in the GMP.

THE COURT: But it -- that point is reached in 35 years. So there are 35 years in which it's in imbalance.

MS. LEONARD: That is correct. Um, that -- there are benchmark reductions, they might be more aggressive. But under the table that is, uh, in the appendix and in the GMP, it would take 35 years.

Now the -- the district court said that that

complies with the statute. And if you look at the statutory language, it makes very clear that you don't have to bring it back -- a basin into balance right away. And of course, that makes sense because if you were to -- going to that would be curtailment -- 100 percent curtailment immediately, which is what the legislature was trying to avoid. Um --

THE COURT: So could it be 100 years?

MS. LEONARD: Um, I think, Your Honor, that brings into -- into focus the next point that I wanted to make, is that there are very -- uh, the legislature set very, um, sturdy guardrails by which the state engineer was -- should approve a GMP, and has to take into account a number of factors. And the criteria are listed. Um, but the hydrology, the physical characteristics of the basin.

So your question with regard to 100 years, would -- um, it would be on a case by case basis, based on the hydrology, the geology, the we- -- the withdrawals, the -- an individual basin, um, what can it -- wha- -- what is appropriate for that basin.

THE COURT: Now, it was striking reading the record in the Harold report from 1960 where exactly -- where it was viewed that we would be, and that we were then. And yet we're taking another 35 years forward

into the future. And it's difficult, um, and -- and there's no money there for the senior water rights holders. The state has not committed any money. So the Lewis case seems distinguishable on its face to me.

MS. LEONARD: Your -- Your Honor mentioned a number of things. I think the very first thing that you mentioned with regard to -- I -- I would characterize it as how we got to this situation. I think the legislature was very clear that it wasn't interested in looking backwards. It wanted to look forward.

And so it wasn't, you know, criticizing the state engineer for how it -- things had been managed in the past. It was saying, this is the situation, how are we going to solve it? And, uh, I think it's a very forward-looking piece. Um, with regard to money for the seniors, I -- I want to be very clear that, uh, the legislature has had and has modified the prior appropriation doctrine under certain circumstances.

I think that, um, the most recent change, the 2019 amendment to NRS 5344.110, regarding domestic well holders is a really good example of this. Because what that says is that, um, even if the state engineer curtails priorit- -- by priority in a basin, such that a senior, for example, irrigator would get zero, a

domes- -- junior domestic well owner could still pump.

And that is a -- a perfect example of where the -- the legislature, as a policy matter, prioritized that we don't want domestic well owners to, uh -- to suffer, and so we are going to make sure they get water even when something's curtailed.

THE COURT: But that one -- that's more explicit though than they've been in this statute.

MS. LEONARD: I absolutely agree with you on that. Um, but I think the key thing to keep in mind is the legislature recognized that individual basins have very specific, you know, characteristics, be they, um, hydrology, geology, social, economic, where the wells are located, all sorts of different things. Um, and the legislature really put this in the hands of local people. I think that's very clear, that's where the majority language comes into play.

It's -- it basically said, figure it out. And, um -- and so I think the -- where it's -- where the language specifically says that the state engineer does not have to conform to priorities. While it's not as specific as the domestic well statute, I think it is certainly in line with where elsewhere the legislature has departed from prior appropriation in limited circumstances.

THE COURT: Is it your contention that the statute deserves a plain meaning reading, and that supports your position? Or are you saying it's ambiguous and we need to resort to legislative history?

MS. LEONARD: I think the plain meaning of the statute is clear when it says, unless a GMP has been approved, uh, pursuant to the statute, that there's -- the state -- state engineer does not have to conform to priorities. I think that is clear that it allows for a GMP, just as we're seeing, as we see here.

THE COURT: I'm taking up a lot of your time. But could you walk me through the plain language analysis that you believe is so clear?

MS. LEONARD: Uh, yes, Your Honor. So the -- um, if you look at this -- the language, it says, 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. Comma, unless.

And then after unless it says, unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037. Now, if the legislature

just wanted to have the state engineer curtail by priority, it didn't need to do anything because that was already the law. If it wanted to just get the state engineer acting more quickly, it could have just created this critical management area designation and not provided for the GMP process.

It would have just stopped there. Right? Said, state engineer, get it done, designate them as critical management areas, and give -- and then 10 years later, you have to start curtailing, get them time to get their affairs in order. But that's not what it did. It's this whole new process of a GMP that it didn't have to provide for and that didn't exist in the law before. And so, um --

THE COURT: But aren't -- aren't there things that a GMP can do other than, um, overturn priorities? In other words, the fact that it allowed for a groundwater management plan, why does that necessarily imply that that's an -- an intent to, um, allow variation from priorities?

MS. LEONARD: Uh, well, I think a number of things, uh, would address that. First that it says, a principle of statutory construction that when the statute says -- provides -- creates criteria, has language that specifies how things should be done,

that it's at the exclusion of other things. So I think that's sort of the -- the basic premise.

I think there's also a practical piece of this too. That the, um -- as a practical matter, the seniors consume all 30,000 acre feet. If they don't change their behavior, the only way that you can get a basin into balance is by 100 percent curtailment. So that's the status quo.

The legislature clearly wanted to do something different than that. And so it doesn't matter if the juniors conserve 10 percent, 20 percent, 80, 90 percent, even if they're conserving 99.9 percent, which is essentially curtailment by another name, you're still exceeding the perennial yield. So again, it goes back to, why did the legislature create this new process that didn't exist in the law?

THE COURT: Well, couldn't it be, uh -- uh, for instance, uh, trying to encourage, uh, community-based solutions? And in doing that, uh -- uh, trying to get the senior holders to work with the junior holders? And is it -- why isn't it possible for that to happen?

Senior, uh, holders and the junior holders get together and say, here's a, uh -- a groundwater management plan that doesn't affect prior appropriations, but we're all -- it may affect prior

appropriations, but we all agree to this?

MS. LEONARD: Well, I think a key, uh, response to that is that one of the criteria that the -- the legislature put out -- put in this -- the legislation is that it -- the plan has to take the steps necessary to remove the CMA designation. If you're relying exclusively on voluntary reductions by seniors, you can't get there, because they don't have to voluntarily do anything.

So if you present to the state engineer a GMP that says, well, we hope to work together with the seniors to get them to reduce their pumping, you're not going to be able to say, or the state engineer won't be able to say, I can tell that this is going to take the necessary steps to reducing for the --

THE COURT: But for the overall health of the basin, why can't they do that?

MS. LEONARD: They certainly can do that.

THE COURT: They would be interested, I'm sure, in making sure the basin was healthy, the senior holders.

MS. LEONARD: Well, I think -- Your Honor, I think that's making assumptions as to how people might act. But I can tell you that my clients worked for years, and years, and years to try to put together a

plan that worked for everyone. They explored all sorts of ideas, they, you know, retained consultants and experts in economics to help them figure out what is a potential solution here.

This is what a majority came up with. And I -- I -- again, I emphasize that that's all that the legislature required. It just said, majority. And as an example of what you just raised, it could have said, and we need to include all the seniors too. And that's not what they said.

So that's why I continue to go back to the notion that they made this exception to the prior appropriation doctrine. Um, and it's not out of line with other things that a legislature has done with regard to the prior appropriation doctrine.

THE COURT: Ms. Leonard, I have two questions I wanted --

MS. LEONARD: Sure.

THE COURT: -- to raise with you, and I know, uh, time is running. Um, the first has to do with NRS 534.037. By the way, the statutory scheme is another example, from my perspective, of the state engineer being put in a extremely awkward position, um, to help, uh, resolve and mitigate challenges that exist between senior and junior, uh, right holders.

Um, of concern to me was subsection G. Uh, when applying the factors on the establishment of the GMP it states, any other factor deemed relevant by the state engineer, um, A was there -- were there other factors, uh, that were reflected in the record that the state engineer used in approving this?

Uh, and B, uh, if so, what would be the source of those, would they be adopted regulations, um, where do they come from?

MS. LEONARD: So, Your Honor, I -- to -- to be candid, I don't recall specifically in the order whether the state engineer addressed other, um, thing -- well, I -- I can give you an example of where the state engineer said -- thought it was important that, uh, this GMP does recognize priorities.

THE COURT: Mm-hmm.

MS. LEONARD: Um, the state engineer also, um, you know, thought it was important to, um -- that this -- that this was what the community came together and was able to, um -- to come up with, and that they had worked very hard on it, and taken into consideration a lot of I -- a lot of things.

To get to that result, I think it's very clear the state engineer relied on the record in front of him either written submissions, uh, the petition for

the GMP, public comments, the hearing that he held. Um, I think it's clear that he only relied on the record in front of him.

THE COURT: Then the second question I had, um, there's been some arguments made that this scheme that was adopted by the legislature, uh, for the GMP process, uh, may be unconstitutional as a -- as a taking. Is that an issue that we need to get into in a petition for judicial review?

It seems to me that, uh, the question in a petition for judicial review is to interpret and understand the statute under which the program was adopted. Uh, if someone has a problem with it from a taking standpoint, that should be a separate action.

MS. LEONARD: Right.

THE COURT: Uh, and so I -- we -- we are all lathered up in a lot of the paperwork that's been filed with this Court and with the district court over, uh, constitutional rights. But I'm not sure that this is the appropriate venue to litigate or decide that question.

So if -- if Bailey, for example, has a, uh, legitimate basis for a taking claim, uh, assuming that, uh, we approved, uh, the state engineer's action here, it would seem like that taking claim is

something that would be the -- the subject of a different matter another day.

MS. LEONARD: I 100 percent agree with you that this is not the appropriate place to be consider- -- considering a taking claim for a couple of reasons. One is it is a petition for judicial review --

THE COURT: Mm-hmm.

MS. LEONARD: -- uh, in which there's not a claim, so to speak, for taking.

THE COURT: Mm-hmm.

MS. LEONARD: The, um -- and the second is because really, they didn't press it below. Uh, the respondents did not press a taking below. They mentioned it in there PJR, but they did not ever really advance that argument in front of the district court.

But I do not think it's within the realm of what this Court needs to decide. I think the district court said, substantial evidence supported this decision, and the state engineer complied with the statutory requirements. That should be enough to affirm.

THE COURT: I said I had two questions, but I have a third.

MS. LEONARD: Okay.

THE COURT: So perhaps you can confer with the

state engineer's counsel, unless you know. Have there been any other GMPs adopted for other basins throughout the state, or is this the only one?

MS. LEONARD: This is the only one. This --

THE COURT: First and only, I guess.

MS. LEONARD: First and only. And it's the first basin to be designated as a critical management area.

THE COURT: But there are, as we know from lots of sources, many other basins in which the, uh, priority of the yield is exceeded by the amount of, uh, rights, uh, authorized.

MS. LEONARD: That is correct. That the Court's decision is going to have impacts far beyond Diamond Valley.

THE COURT: And I think there are curtailments in some other basins, even, that are -- that are running their course. Is that right?

MS. LEONARD: I -- I can't tell you what the current state of curtailment orders are. But I can tell you that obviously, this has been a very light year on precipitation and snowpack. Um, and it's -- it's going to have a big effect on -- on the resource and the associated water users in the state.

THE COURT: All right. Uh, you're at 6:26, I'll add three minutes to your rebuttal time, and we'll add

three minutes to, uh, respondent's time. Uh, are you ready to proceed? Okay. Are you taking all the time Mr. Mixson? Or --

MR. MIXSON: Uh, I will be taking -- we -- we've agreed -- Mr. Rigdon and I have agreed to split our time.

THE COURT: Okay.

MR. MIXSON: So I intended to take 15, and I -- I -- I'll stick with that despite the extra three, which I appreciate.

THE COURT: Okay.

MR. MIXSON: And we've also agreed to divide the issues. I will be addressing prior appropriation and if time allows, beneficial use doctrine. And Mr. Rigdon will address the impairment of senior invested water rights and other statutory violations.

THE COURT: Okay.

MR. MIXSON: So may it please the Court, there's no dispute that the Diamond Valley groundwater aquifer is in dire shape. There's also no dispute that the primary cause of this condition is the state engineer's failure for at least a half a century to regulate overpumping of groundwater in the basin.

The groundwater management plan for Diamond Valley attempts to create an entirely new water system

applicable only in Diamond Valley that reallocates water from senior water rights to junior water rights. And none of the parties, including the appellants, dispute that the GMP violates the prior appropriation doctrine.

So the core of this case is whether the state engineer is permitted to approve a groundwater management plan that violates Nevada's fundamental prior appropriation doctrine, and fundamental beneficial use doctrine, simply because a majority of water users in the basin voted to do so.

THE COURT: Well, counsel, um, under Ms. Leonard's characterization of the, uh, statute and her view of the plain meaning of the statute, uh, it does seem to be all inclusive. Uh, the language says, shall order that withdrawals, it doesn't say what types, it says withdrawals.

Then it says, including without limitation to domestic wells. That -- it would be an obvious inclusion because of the handling of domest- -- domestic wells different than, uh, water rights. Be restricted in that the basin to conform to priority rights. It seems to be all withdrawals.

MR. MIXSON: So --

THE COURT: What about that interpretation of the

statute is wrong?

MR. MIXSON: Well, by, um, the notion of vested rights, of course, Mr. Rigdon is going to address, and the impairment by the GMP. But with respect to the --

THE COURT: Well, we got to start with the interpretation of the statute. So if you don't mind --

MR. MIXSON: With respect to the -- with the -- an interpretation of 534.110, I think what Ms. Leonard's discussion, uh, ignores is subsection six. And you have to read the statute as a whole. I'd note you have to read those two subsections together.

Subsection six says, if the state engineer designates a groundwater basin and the conditions allow, he may curtail water rights by priority. That -- that existed before AB419 in 2011. In 2011 AB419 adds -- to subsection six, it adds, except as otherwise provided in subsection seven. Then adds subsection seven.

Subsection seven says, if the state engineer or if the basin is designated as a critical management area, the state engineer shall curtail water rights by priority if it's been designated for 10 years, unless he approves a GMP. The shall in subsection seven is what's important. It creates mandatory curtailment that didn't exist.

THE COURT: But why -- why -- why shouldn't we evaluate the -- that language on a ratable reduction? Which is kind of what the GMP did here, as opposed to, uh, a priority reduction? If you, uh, reserve all of the perennial yield for the seniors, there's no reduction to the seniors whatsoever. The language you're referencing seems to me to imply, uh, or even state that the -- there's going to be a ratable reduction of priorities throughout the basin?

MR. MIXSON: Well, I -- I -- I don't read the language as -- as implying, uh, permission to reduce senior rights on the backs of providing water for junior --

THE COURT: Well, I understand you don't read it that way. But I'm asking why isn't it reasonable to read it as a reduction, uh, on a ratable basis, on an aliquot basis?

MR. MIXSON: Because that doesn't comport with the prior appropriation doctrine. The prior appropriation doctrine in Nevada says that senior rights are entitled to the full use of their water in times of shortage.

THE COURT: Well, I think the subsections you referenced are contemplating that there could be a reduction based on the priorities. And I'm wondering

why that couldn't be read.

MR. MIXSON: I -- I just don't -- I don't see that in the language. It says, the state engineer shall curtail by priority, unless there's a GMP, in subsection seven.

THE COURT: So one of the things you were going to talk about, I think, had to do with, uh -- uh, in establishing the GMP, whether there was an appropriate evaluation of a beneficial use. Uh, it -- was that one of the topics you were going to address?

MR. MIXSON: Yes, Your Honor.

THE COURT: Why don't we get to that? Because I think that's a significant issue here --

MR. MIXSON: Okay.

THE COURT: -- as well.

THE COURT: Before you move on, I have a question about subparagraph six that you just alluded to. It speaks to, in the permissive may curtail by priority. Um, what else is contemplated that the state engineer could do, default in his duty to get the bal- -- basin imbalance? I mean, what do you think, if you didn't have paragraph seven, would be an option to curtailment under paragraph six?

MR. MIXSON: An option in the alternative to curtailment?

THE COURT: Yes.

MR. MIXSON: Well, I think that, um, the state engineer -- well, under the Nevada Water law statutes, there -- are there are many ways to enforce the prior appropriation doctrine other than strict curtailing by priority.

For example, and this gets to the beneficial use question, water rights permits issued by the state engineer are essentially provisional. And in order to prove up your permit so that you can get a -- a final certificate, you have to put your water right to use under the provisional permit. And you're only given a certificate for the amount of water that you are capable and do put to beneficial use.

So a provisional permit can result in a certificate with less water. And by -- if the state engineer would enforce the cancellation of unused water permits, or unused portions of water permits, he could reduce the amount of water rights and the demand on the aquifer. That is one example of a non-curtailment remedy.

THE COURT: And your -- your argument here is this GMP actually does the opposite.

MR. MIXSON: Correct. So un- -- so under the -- the problem with the beneficial use violations of the

GMP is that, for example, these unused permits, or unused portions of permits, are given full allocations and shares under the groundwater management plan. Even though the holder of that permit has not proven its actual ability to put the water to beneficial use.

THE COURT: Mr. Mixson, was there a calculation made of the water rights that were incorporated in the GMP, uh, for which, um -- uh, appropriate consideration of the proof of beneficial use had not been accomplished? Uh, I'm trying to quantify this issue and the relationship between the plan that was adopted versus the plan that might have been adopted had, as part of the considerations under the factors here, incorporated, uh -- uh, that, uh, calculus?

MR. MIXSON: I, um, understand your question. And the answer is no. It was not quantified. I think that is one of the fundamental deficiencies in the state engineer's -- in factual determination --

THE COURT: And did you request that when the state engineer was developing the plan?

MR. MIXSON: I did not personally. I had --

THE COURT: Who did --?

MR. MIXSON: [inaudible] clients.

THE COURT: Your clients.

MR. MIXSON: No. They didn't raise it as an issue

in their written comments.

THE COURT: Uh-huh.

MR. MIXSON: But they're laypersons, and so their comments didn't specifically demand or request that the state engineer actually quantify the, uh -- uh, amount of permits that have not yet been put to beneficial --

THE COURT: So this gets to my question about the proof of beneficial issue. I'm intrigued by the argument, and I can understand the seniors' concern, just as you've articulated it to Justice Pickering. But if it wasn't quantified, if it wasn't laid out in the record, if it wasn't an alternative calculus, uh, for the state engineer to consider, was it waived?

MR. MIXSON: Was it waived by --

THE COURT: As in --

MR. MIXSON: -- the challenger?

THE COURT: Yes. Right.

MR. MIXSON: I don't think it would have been waived, because it was not a formal legal proceeding, it was a public hearing to take public comments.

THE COURT: Yeah.

MR. MIXSON: Not testimony under oath.

THE COURT: So did you raise a calculus of the type we're talking about to the district court?

MR. MIXSON: Um, I don't think we -- it was raised as a specific issue that the state engineer should have calculated. Although, um --

THE COURT: Because it seemed like --

MR. MIXSON: But it might [ph] be, I did. Because I honestly just can't remember, is all.

THE COURT: There's a lot of paperwork here. So I appreciate the challenges in remembering this. But I -- I didn't see it really float up as a intriguing issue until it got to us.

MR. MIXSON: If I could -- if I could just run through. I hate to do numbers in front of you. But --

THE COURT: Sure, no.

MR. MIXSON: The state engineer did --

THE COURT: Some people have accused me of being a bean counter. That's all [inaudible]

MR. MIXSON: On -- on paper, there are approximately 126,000 acre feet --

THE COURT: Mm-hmm.

MR. MIXSON: -- of irrigation permits granted by the state engineer.

THE COURT: Mm-hmm.

MR. MIXSON: In 2016, which is sort of the benchmark number that's been used by the GMP and by the state engineer, there was approximately 76,000

acre feet pumped from the basin for irrigation.

THE COURT: Mm-hmm.

MR. MIXSON: That the difference between the 126,000 acre feet on paper permits, and the 76,000 acre feet that was pumped in 2016, is 50,000 acre feet --

THE COURT: Mm-hmm.

MR. MIXSON: -- of water rights on paper that were not used. Some portion of that 50,000, presumably, it's a significant portion of this, I'll calculate it below, is water that is -- has not been put to beneficial use, may never be put to beneficial use, because it's incapable --

THE COURT: Mm-hmm.

MR. MIXSON: -- of being put to beneficial use. So I -- I -- I can't --

THE COURT: I get that argument, Mr. Mixson, I was intrigued by it. But I'm trying to understand whether it's appropriate for us to -- to deal with that. The calculus you've just gone through, I don't think it's something that was developed, uh, perhaps understandably, with the process in front of the state engineer, but in front of the district court either. Right?

MR. MIXSON: Those numbers were certainly brought

to the district court's opin- -- uh, attention.

THE COURT: Yeah.

MR. MIXSON: The calculus of the unused permits, and the portions of the unused permits is -- is something that at least from my perspective, and on behalf of my clients, is the state engineer's sole obligation. The -- the Baileys are not capable of gathering the information to make that determination.

THE COURT: So under which of the factors in 534.037 do you think the state engineer should take into consideration? Uh, I could see some that would apply. Uh, but is there one in particular that you -- or maybe more than one?

MR. MIXSON: Well, obviously, G -- other, um, applies. And then --

THE COURT: We've been down that catch-all [ph] -- -

MR. MIXSON: And then, um, you know, a -- the hydrology of the basin, arguably. But let me address the factors in 534.037 subsection two.

THE COURT: Sure.

MR. MIXSON: The -- the appellants' argument is what -- the state engineer having been provided a groundwater management plan a- -- approved by a majority of the water users in the basin, all he's

required to do is consider the factors under subsection two of that statute.

And if he determines that it -- the groundwater management plan could result in removal of the CMA designation, he can approve it. They say that's the end of the story. But I want to draw your attention to these factors.

These are not legal. These are scientific and hydrologic factors that are obviously within the purview of the state engineer. But none of these -- it references or sets forth a legal standard, hydrology of the basin, physical characteristics of the basin, geographic spacing of the wells, water quality, um, whether the plan already exists, none of these are legal.

So when the appellants say, if the state engineer considers these, that's the end of the story. That is fundamentally what the district court rejected. And he said, no, you have to also look at whether the groundwater management plan complies with the rest of the water law, not just the technical factors under subsection two, of 534- -- 4.037.

And so to me, that -- their argument therefore falls apart. Because the groundwater management plan, it's conceded, does violate the prior appropriation

doctrine. And of course, I argue it violates the beneficial use doctrine.

THE COURT: Do you acknowledge that the legislature could, if it wanted, allow groundwater management plans that don't strictly follow priorities?

MR. MIXSON: I -- I fully, uh, agree that had the legislature wanted to exempt groundwater management plans --

THE COURT: Okay.

MR. MIXSON: -- from existing law, they could do so with the express language in the statute.

THE COURT: Okay.

MR. MIXSON: But we are talking about fundamental prior appropriation doctrine for Nevada, and if the legislature is going to waive that doctrine for a groundwater management plan, it must do so expressly with express terms in the statute, which it did not do here.

THE COURT: If I may, why -- but why isn't unless express?

MR. MIXSON: Unless is an express exception to the mandatory curtailment of subsection seven of 534.110. It's not an exception to the entire prior appropriation doctrine. Under 534.110, subsection six,

there is still permissive curtailment at the discretion of the state engineer. So that unless a GMP is approved as -- only as an exception to 534.110, subsection seven, A and B which are critical management area.

THE COURT: So what's the point of allowing the groundwater management plan?

MR. MIXSON: Just that --

THE COURT: What -- what kinds of things can a groundwater management plan do if it doesn't have the opportunity to adjust, say, the prior appropriation?

MR. MIXSON: So, um, the goal as stated in the statute, 534.037, is to allow for the state engineer to remove a critical management area designation. That's the statutory goal.

THE COURT: Right.

MR. MIXSON: And -- and presumably, that means, uh, reducing pumping to somewhere at or at least very close to the sustainable yield of the basin. And how can you do that while still, um, staying true to the prior appropriation doctrine?

THE COURT: Right.

MR. MIXSON: Well, as in the State Engineer v. Lewis case from New Mexico, the common way it's done is to state when -- when they create the problem, puts

up the money to solve the problem, and you could have a voluntary water rights buyout and retirement program using public funding or funding from any other source.

THE COURT: So a majority of the citizens can vote and say, we think the state should pay us to give up our water rights. And the state engineer would approve that. Is that your idea?

MR. MIXSON: The idea -- well, yeah. I mean, I can't force the -- the state, obviously, to do that. But they -- they could say -- it could be a component of a plan. And another component of a plan could be, uh, cancellation of unused permits, and you -- and you start to piece together various components.

THE COURT: Okay.

MR. MIXSON: And so --

THE COURT: I mean, cancellation of unused permits isn't going to solve the problem, because not only is it over-appropriated on paper, it's actually being overused. Right?

MR. MIXSON: Yes.

THE COURT: Okay.

MR. MIXSON: But -- but if you -- if you begin to -- to bleed out [ph] the unused water rights, and you begin to address the problem through voluntary conservation measures, you could also potentially, um,

have mandatory, um, irrigation efficiencies on the farm.

You could have man- -- you know, for example, we're not disputing in the groundwater management plan the requirement that all the farmers put an upgraded meter on their system, so that we're measuring water accurately. Um, it's sort of an unstated rule in the water law that once you start measuring water, use goes down.

And so you start to piece together various components of a plan that are voluntary with respect to senior rights, but you need to incentivize them to reduce water. But you cannot take water away from senior rights under the current appropriation doctrine and give it to junior rights.

THE COURT: No water?

MR. MIXSON: Not under -- not if you stay true to the prior appropriation doctrine. They're entitled to the full use of their water under the prior appropriation doctrine.

THE COURT: Unless the legislature qualifies that.

MR. MIXSON: Correct.

THE COURT: Okay.

THE COURT: Do you agree with Ms. Leonard that

this plan achieves equipoise such that the CMA designation would be removed in 35 years?

MR. MIXSON: Well, um, the -- the district court agreed with the state engineer based on the factors under 534.037, subsection two, the scientific factors. And, uh, the Baileys had- -- hadn't challenged the district court's determination. But, um, I think it is still sort of an open question whether this plan -- because remember, the 34,000 acre feet that, um, it allows to be pumped at year 35 doesn't include domestic wells and other water rights such as money. So the -- the pumping demand on the basin is going to be higher even than the 34,000.

THE COURT: Do you -- do we have a number for that?

MR. MIXSON: Um, I don't have it off the top of my head. But I think, uh --

THE COURT: It's in the record.

MR. MIXSON: I think it may be in the record.

THE COURT: Thank you.

MR. MIXSON: Okay. I've, um -- I'm at the end of my time. So the Baileys request that the Court affirm the district court's decision. And thank you.

THE COURT: All right. Thank you, Mr. Mixson. Morning, Mr. Rigdon. How are you?

MR. RIGDON: Doing well, Mr. Chief Justice. Thank you very much.

THE COURT: Um, would you like the three minutes I allocated to your colleague? Uh --

MR. RIGDON: Absolutely.

THE COURT: I figured you would.

MR. RIGDON: Thank you, Mr. Chief Justice. And may it please the Court, I'm here today with my co-counsel, uh, Mr. Paul Taggart. And with my -- uh, one of my clients, uh, Ira [inaudible]

THE COURT: Mm-hmm.

MR. RIGDON: Uh, importantly, uh, Ira was actually a member of the committee that was charged with coming up with a groundwater management plan. Uh, unfortunately, uh, they were not able to reach, uh, unanimity on this. And, uh, he ends up in the position that he's in today. But he's put a lot of work into trying to come up with the ways that we've been talking about.

And -- and just to really quickly tag on before I get into my presentation, to some of the questions that were just being asked. One of the ways that groundwater management plans could be adopted without upsetting prior appropriation, and it's done all over the west, juniors can come in and incentivize seniors

to save water.

So they can help the seniors put on water conservation equipment, they can help them line ditches, they can help them do this type of stuff. And then the water saved, because the juniors incentivized them to do that, goes to the seniors. That is the kind of hardware in groundwater management plans, and what the legislature was expecting from groundwater management plans.

But why do that hard work when you can just take the water from the seniors, and not -- and not do any incentive to have -- voluntarily come in with a plan? And that's what happened in this case, uh, because the juniors vastly outnumber the seniors here. And they just voted their way into a plan to take -- take -- take the priority rates. And -- and -- and that's what's going to happen.

THE COURT: I mean, didn't the state engineer -- I mean, I understand. So the juniors may come in and vote majority. Yeah, let's take the water from the seniors, yay. But it's got to be approved by the state engineer. So it's not just a majority rule, they have to then have a state engineer who presumably is representing the public interest to say, is this a reasonable plan? And he determined it was.

MR. RIGDON: It -- uh, that's true. The state -- state engineer did say that it was a reasonable plan. But the state engineer was -- was guided by the fact that it was a plan that was -- the majority wanted. And -- and you see throughout his order he talks about, well, this is what a majority of the people want, therefore, that's what's in the public interest and that's what I'm going to do. Uh, and -- uh, and -- and unfortunately, that's just the political reality of the situation. Uh --

THE COURT: Ca- -- can it be determined that it's in the pub- -- that -- let me back up. Is your position that he can't determine it's in the public interest if it would infringe on the priority?

MR. RIGDON: If it would infringe on prior appropriations. This -- this doesn't just infringe upon prior appropriations. This infringes on prior appropriations doctrine, which is a fundamental doctrine of groundwater law. It infringe -- it -- it infringes on the beneficial use doctrine, which is a vital doctrine, as -- as Mr. Mixson pointed out.

And it also -- well, the part that I was going to discuss is it infringes upon what we call the non-impairment doctrine. Where pre-statutory water rights are protected from any kind of impairment of their

rights, uh, from any state engineer action or any -- any application of the code. And this plan violates that non-impairment doctrine as well as the other two doctrines.

So what we have here is an argument from the appellants that this one statute basically allows them to ignore all the other water laws and statutes in the state. That -- that can't be the result. That can't be what the legislature intended without specific and clear language, uh, in -- in the legislation.

THE COURT: Help us here --

MR. RIGDON: And this regards one point that, uh, Chief Justice raised with regards to, is this the right form to bring up takings issues?

THE COURT: Mm-hmm.

MR. RIGDON: We're arguing here about statutory interpretation. One of the primary doctrines that's standard for interpretation is, where possible, if there's two readings of a statute, the one that doesn't implicate constitutional concerns is the better one. Our reading of the statute doesn't implicate constitutional concerns. The reason we're raising the takings issue is because there's does.

THE COURT: Well, maybe that's the consequence. I mean, your clients may have a takings claim if -- if

we agree that the GMP was appropriated or authorized by the statute, and that's the action that was taken.

MR. RIGDON: Uh, ab- -- absolutely. And that would come -- that would certainly come later.

THE COURT: Yeah.

MR. RIGDON: But for the purposes of determining what the statute means, again, when there's two -- there's -- why not avoid that constitutional --

THE COURT: Yeah.

MR. RIGDON: -- question altogether and go right to the interpretation that doesn't even require us to reach that?

THE COURT: Are you advocating --? I apologize. Go ahead.

THE COURT: In this instance, how many pre-statutory rights are we dealing with? Are we dealing with pre-1913 ha- -- what's the -- the split on the rights here, the date -- the priority dates in these rights?

MR. RIGDON: Well, that's very good question. Because you heard that the -- the plan actually does bring the basin in balance, and -- and it absolutely does not. And -- and this is why it does not. The numbers she referred to that are in Appendix G of the plan only cover the water rights that are covered by

the plan.

So the water rights covered by the plan pumping is brought down to 34,200 acre feet at the end of 35 years, after another 35 years of groundwater [inaudible] but that doesn't include the more than 6,500 acre feet of pre-statutory water rights that would've had to get replacement water from the aquifer, because all their springs have run dry, uh, through this process

For -- for 40 years, they've watched their springs run dry. The Renners haven't even received replacement water yet. They're the most northern -- they're the northernmost spring, their spring is still running, although it's starting to go down every year. Those that groundwater finally reaches them.

Sadlers received replacement water because, uh, their spring ran completely dry. The Baileys also had some replacement water because their springs ran completely dry. Um, and so that's not even accounted for in the plan. So --

THE COURT: And -- and that's pending in the, um -- the decree litigation over this. Is that right? Is -- or is that part of this record as well?

MR. RIGDON: Yeah. Those are two cases going on, uh, current. Uh, as -- as you know. Because we had

that case that --

THE COURT: Yeah.

MR. RIGDON: -- that you recently dismissed about the -- about the replacement water rights. Um, and that -- that the -- uh, the numbers I've given you are the numbers from that adjudication. There's at least --

THE COURT: Were -- were those advocated or debated in this record?

MR. RIGDON: Yes. It was.

THE COURT: Okay.

MR. RIGDON: It was ab- -- it -- it absolutely was. And -- and I -- I know that, because I'm the one who did that. I -- I was at that public comment meeting on behalf of my clients. I brought up that issue at that public comment meeting, and brought it up at the district court, and now we're bringing it up here. So --

THE COURT: So you're saying that, like, the big Shipley Spring is in play in this litigation as additional on top of the 34,000?

MR. RIGDON: Absolutely.

THE COURT: Okay. Thank you.

MR. RIGDON: Absolutely. So the non-impairment doctrine, which is what I was originally going to

file, is -- is one of the most fundamental doctrines of groundwater law. It's found in NRS 533.085. And it simply states, as I said, nothing in the water law can -- can work its way to restrict or impair the ability to protect for water right laws.

Here the argument is, well, they've received replacement water, we're not cutting any water use of theirs, so therefore, we're not impairing. But that ignores one simple fact. And that ignores the fact that this plan -- so we've got 40 years, over four decades of water level declines. This plan continues that for another 35 years, another three and a half decades of -- of consistent groundwater climate, and consistent overpumping in the basin.

Meaning that water levels continue to go down. Our clients already had -- some of our clients have already had to pay for replacement wells, pumps, electricity to bring the water out of the ground. Uh, the Renners are going to be facing that situation, and there is not one thing in this plan to make them whole.

THE COURT: They argue that it is the, um, northern users use of the groundwater, that they injured themselves in effect by drilling wells too close to the springs. Now, I don't know what the state

of the evidence is on that. But they -- they contradict your point that they're to blame for that, essentially.

MR. RIGDON: Well, respectfully, that -- they did not argue that in this proceeding.

THE COURT: Okay.

MR. RIGDON: And that was never preserved as an issue in this particular case. That was an issue in regard to the -- the replacement water case. And they're attempting to make it an issue in regards to the judication. Uh, but that has actually been definitively decided by the state engineer. And they never appealed that decision or the ruling 290 that the state engineer issued that said that the cause of the groundwater decline was the junior pumping to stop.

THE COURT: So -- so you would say where they refer to that in their briefs here that that -- that lacks record support?

MR. RIGDON: Correct.

THE COURT: Okay. Thank you.

MR. RIGDON: So the other thing I want to bring up is this would set a dangerous statewide precedent. This letter actually acknowledged that this is not limited by the val- -- this issue is not limited by

the value. This is a law of general applic- -- applicability throughout the state.

The prior appropriation doctrine is only viable, is -- is only important when there's a shortage, when a basin is being overpumped, that's the only time it's important. If the -- if it's not being overpumped, it doesn't matter what somebody's prior use are, because everybody gets their water. It's only when they're being overpumped.

And so if we're going to say that the basins that are being overpumped, you can come in and get a CMA, and then the doctrine of prior [inaudible] management code violates the prior appropriation, then we effectively don't have prior appropriation as stated in law, at least respect -- with respect to groundwater.

If the legislature intended that result, they would have made that clear. But the district court did look into legislative history, the district court did an investigation into the -- the passage of AB419.

And in its order -- and in -- in this order, the district court said it couldn't find one word, not one word by any of the people who -- any of the sponsors of the bill, any of the legislators, any of the people who testified on the bill, supporting an

interpretation that -- uh, that they meant to overturn prior appropriations.

In fact, in the statements we do have on the record, we have Assemblyman [inaudible] who was the sponsor of the bill, he specifically said, it is -- as -- as I mentioned earlier, it is up to the juniors to figure out how to grade the incentives to conserve water in order to, uh, make these plans works.

THE COURT: Uh, are you asserting the statute is ambiguous? Because other- -- if it's not, we don't get the legislative history.

MR. RIGDON: I -- I - I don't believe it's ambiguous. But, um, they're different on the opposite reading of -- of what Ms. Leonard providing. Uh, I -- I agree completely with Mr. Mixson's review of the statute. We have -- what we have is you have subsection six was in the law prior to AB419.

They copied the exact language from subsection six, brought it down to subsection seven, changed the may to a shall, and created -- and -- and added a precedent and an antecedent -- an- -- antecedent condition. The precedent condition was CMA for 10 years. The antecedent condition was unless a groundwater management plan is approved.

All those conditions were doing is -- is -- is

changing the -- were the conditions under which the may doesn't have to change to a shall. That's all it was doing. And that way -- and that's why they used that -- that -- copied that exact language from subsection six. And that's why subsection six is so important.

THE COURT: From the standpoint of your argument, the non-impairment argument, are you saying that if we were to interpret, um -- uh, the groundwater management plan statute, uh, 534.110(7) the way that's advocated by appellants in this case, that that interpretation would be contrary to the provisions in the water code that assure protection of, uh, prior -- prior -- prior rights?

MR. RIGDON: That's absolutely correct, sir.

THE COURT: Those statutes are irreconcilably in conflict.

MR. RIGDON: I -- I -- I -- I do agree with that, Your Honor. And -- and -- and where's --

THE COURT: So if --

MR. RIGDON: -- the evidence of that?

THE COURT: But it -- but if we were to conclude that that was the case, uh, it does seem like the legislature can adjust the water code with respect to other senior wa- -- water rights holders.

MR. RIGDON: Uh, if that were the case, there -- there's a potential that they -- that they could.

THE COURT: Mm-hmm.

MR. RIGDON: Uh, again, uh, if they did, it would still then have maybe a right takings issue at that point.

THE COURT: Yeah. Well, maybe. But the point you're making about non-impairment is, those prior statutory ri- -- rights, uh, can't be adjusted by subsequent statutory modifications.

MR. RIGDON: Corr- --

THE COURT: Yeah.

MR. RIGDON: Correct. They -- they -- they definitely cannot. That -- that's definitely correct.

THE COURT: Mm-hmm.

MR. RIGDON: Um, and -- and -- and the evidence that the legislature did not want to im- -- impair, at least as for the water rights. In passing this legislation, you know, is something that go -- his whole statement on his purpose for introducing this bill.

He said -- he said that the -- that the purpose of the bill was to -- is that -- he said, perennial yield is what we are striving for. The state engineer is not getting it done. This is actually his quote

from the -- from the legislative record. State engineer is not getting it done, we continue to see these basins decline, his purpose was to bring the basins back into balance.

And where do we see that? In the actual text in 534.037, you have those factors, but you also have above that the one mandatory requirement that every GMP must follow. And that is it must contain the necessary steps for removal of the -- the critical management area designation. Since the management area designation is placed there, when pumping exceeds perennial yield, logically, that means that -- that it must contain the steps to bring the basin into balance to avoid pumping below perennial yield. This plan on its face does not meet that, and that harms the pre-statutory right courts.

Because again, they're the ones who've been bearing the brunt and -- and -- and -- and taking the burden of all this overpumping. They've had their -- their previously free flowing springs that were tremend- -- not -- not just tremendous resources for their lands, but tremendous ecological resources in this basin. They -- they've had to watch for 40 years as they slowly decline, and dry up, and blow away.

THE COURT: Mr. -- excuse me, go ahead.

THE COURT: So you -- do you and Mr. Mixson disagree on whether or not Judge Fairman correctly concluded that the GMP brings the ba- -- the basin into balance?

MR. RIGDON: I -- I -- I -- I disagree to a point. So what Judge Fairman was -- was -- Judge Fairman was looking, this is the water area, so all the areas not for interpretation, Judge Fairman was looking at this in a [inaudible] standard.

THE COURT: Right.

MR. RIGDON: With regard to substantial evidence of whether to the basin back into balance, he was looking at it from the substantial evidence standard. And -- and he was trying -- trying very hard to be deferential to the state engineer, and -- and -- and he was. Where I think the district court erred in that is that there's not a single piece of evidence in the record that shows that this will bring the basin into balance.

And there's multiple pieces of evidence on the record from scientific sources, the USGS, currency and engineering, , uh -- uh, the -- the Harold report that you mentioned, uh, that show that it won't bring the basin into balance. And so -- and so while the -- the district court was being deferential to the state

engineer on that factual issue, I believe that that reference was in place.

THE COURT: But those references are to the, uh -- the reason it won't bring it into balance from your perspective is because of the pre-statutory water rights.

MR. RIGDON: Uh, because those pre-statutory waterways would be pumped. So what we'll -- I'll just go through the quick pieces of evidence. Uh, the USGS in 2016 did a report and they said the basin is -- is out of balance by 61,000 acre feet --

THE COURT: Mm-hmm.

MR. RIGDON: -- in their report. The pumping reductions in the plan only amount to a little over 40,000. Uh, when you -- when you -- when you look at the face of the plan, you know, this -- if you add the 6,500 acre feet of the other water rights being pumped on top of the -- the 34,200, you have over 40,000, yet probably only 30,000 available. That's really easy math.

THE COURT: Mm-hmm.

MR. RIGDON: Um, the -- the Herald [ph] report, which actually indicates that there might be an even lower perennial yield for the southern half of the basin. Um, and then -- and then we -- we were the only

people who hired an expert, we hired Turnipseed Engineering to, uh -- for the -- for the public comment meeting.

And -- and we had Turnipseed engineering look at the question, what was the -- that's the only expert that has looked at the question of whether the pumping reduction will bring the basin back to balance, looked at that specific question. And -- and -- and they determined that it wouldn't, and we submitted that for the record. That's -- that's probably in the record.

Uh, and so -- so there's all this evidence there. And then there's no evidence on the other side, uh, other than the state engineers personal opinion that, uh -- that it will somehow bring the basin into balance.

THE COURT: Counsel, uh, if I could ask, you spoke a moment ago about legislative intent. And -- and, um, in regard to the district court's order, they seem to rely on the unpassed legislation in SB73 as indicative of legislative intent somehow. And if we're to find that to be an error, how does that affect our analysis of the overall propriety of the district court's order?

MR. RIGDON: Respectfully, I don't think that's what the district court is doing. I know that's what

they -- they've said the district court was doing. The district court took into account the failed legislation, not to determine what the legislative intent in 2011 was, um, with regard to passing the law.

They looked at the failed 2000 leg- -- 10 -- the 2017 legislation to determine what the state engineer's prior understanding of that law was, and that it was inconsistent with his current, uh, advocacy of how the law should be in theory. So that was the purpose of the district court looking at that 2017 legislation.

THE COURT: Thank you.

MR. RIGDON: And sir, we respectfully ask that not only do you affirm the district court, but you make it clear, there's four more years that they have to develop a GMP. Uh, we ask that you make it clear that the GMP has to comply with prior appropriations and has to, um -- uh, make the -- make the seniors whole, make the [inaudible] whole, and bring the basin back into balance. And thank you very much.

MS. LEONARD: Your Honors, I want to address three principal things. I want to address beneficial use, I want to address vested rights. But I want to start with a really important distinction between

surface water and groundwater that the district court didn't really address, and the respondents didn't really address.

I think everyone's clear that curtailment occurs when there's a shortage. With surface water, the existence of a shortage is seasonal, it depends on precipitation and snowpack, um, and the resulting stream flows. And so whether and when rights might be curtailed depends on where you are on the spectrum of priorities.

Some years you might get nothing, some years, you might get something, and some years, you might get a lot more. And it just depends on -- on the stream flows. Um, and management of priorities for surface water is pretty easy, you open and close head gates.

Groundwater is way different. For groundwater, water availability is determined by the perennial yield, which in and of itself is determined by multiple complex hydraulic -- hydrologic and geologic factors. And, um, a shortage means that all rights in excess of the perennial yield cannot be exercised. And, um, so if they -- based on a more or less permanent aquifer condition of what does this basin sustain?

So the, um, pump - the aquifer response to

pumping, or to the cessation of pumping, it's complicated. And this explains why the legislature gave the state engineer very broad authority in this, uh, legislation. Because it's highly technical, it is within his expertise. He has hydrologists, geologists, hydrogeologists, and all sorts of technical people supporting him.

And so this notion that the respondents raise that they have the only expert is really, uh, disingenuous, I believe, because the state engineer's office is full of experts. And it's squarely within the broad discretion of the state engineer to decide when and whether this, uh, basin is going to come into balance such that the critical management area, um, designation can be removed.

And, um, it's -- this legislation is also clear that it -- is consistent with legislation that already exists in NRS 534.120. Where the legislature has given the state engineer very broad authority to administer basins, um, and make such rules, regulations, and orders as are deemed essential for the welfare of the area involved.

So the state engineer gets to consider the public welfare. You don't see this in surface water. And I think it goes back to the complexity of groundwater

basins and why this -- the legislature needs to leave certain things up to the legislate- -- excuse me. To the state engineer's discretion.

Um, let me turn to vested rights, uh, because I want to, um, address this. First of all, it's clear vested rights are not subject to the GMP. And the district court's conclusion with regard to vested rights, but somehow because there is a timeframe in which the basin will -- the pumping will continue to exceed the perennial yield, that the district court concluded that in and of itself violates the -- the vested rights, uh -- pre-existing vested rights.

But if that interpretation were accepted, then the statute itself AB419 is what would be unconstitutional because the statute itself clearly allows for continued withdrawals in excess of the perennial yield for at least 10 years, and it doesn't set a time limit on the state engineer at all. Other than that tenure window, uh, where he has to limit withdrawals if there's no GMP.

So, um, I think that argument falls short that -- that the respondents advance. It's also illogical that a GMP that is going to reduce pumping to the perennial yield would somehow worsen the condition of the aquifer. Which is what the argument is that they're

making, is saying that the GMP will -- will make the status quo worse, and therefore impairs vested rights.

Um, the district court's conclusion would -- in this regard is not supported by any record evidence. I would note that my colleagues for the respondents were very loose on what they were referencing, uh, in terms of what is in the, quote, record, because they're referencing other litigation that my clients never had the opportunity in this -- to create a record in this case to respond to that.

Um, and -- and so I don't believe, uh, if you look at our opening brief on page 46, there are references regarding, uh, vested rights. And, um, I -- that was the -- the best we could do thinking that the district court was going to just stick to the administrative record, which it ended up not doing. Uh, but that was what we have in the record for that issue.

THE COURT: On this point, um, I asked Mr. Rigdon about whether, uh, the statute creating the GMP, uh, is in conflict with, uh, the water code that declares pre-statutory rights, uh, protections.

Uh, what about that?

MS. LEONARD: Well, I don't think there is anything in this record that ties any junior pumping,

in particular, any well and shows a -- a causal effect on any particular senior right. There is the USGS report that attributes overall pumping in the basin, which would mean senior and junior rights.

THE COURT: Well, did Mr. Turnipseed's report conclude, as represented here today, uh, that the, uh -- uh, prior appropriation rights would be impaired, uh, from the GMP?

MS. LEONARD: I'm sor- -- are you talking about vested rights or prior appropriation?

THE COURT: Prior appropriation.

MS. LEONARD: And so -- can you repeat your question, Your Honor?

THE COURT: Did Mr. Turnipseed's report, as represented by Mr. Rigdon, indicate that the prior appropriated rights, pre-statutory rights would be impaired by the GMP?

MS. LEONARD: Your Honor, I don't think it matters, because the substantial evidence standard doesn't take into account whether other evidence --

THE COURT: I'm just asking if that was his opinion.

MS. LEONARD: I don't recall specifically his opinion. But I --

THE COURT: But I'm assuming you don't -- so your

response to that argument is, you don't think it matters?

MS. LEONARD: Well, Your Honor, I don't think it matters, because substantial evidence standard has these -- what the state engineer -- if there's substantial evidence to support the state engineer, that is sufficient.

THE COURT: That is --

MS. LEONARD: If there's contrary evidence that the state engineer does not -- might not agree with, it doesn't make a difference with regard to the substantial evidence standard.

THE COURT: On a broader basis, can the legislature, by statute, uh, impair prior appropriation or pre-statutory rights by a statute?

MS. LEONARD: I -- I think that it -- that it -- the -- I think there are pre-existing constitutional rights that have to be protected. So I would say, no. That by statute, it cannot. But I think that you have to have a causal effect.

THE COURT: So under your plain reading of the statute that you shared with Justice Pickering earlier in the opening, uh, when you talk about -- when the statute talks about withdrawals, uh, and I share your point about, uh -- or understand your point that

that's pretty wide, and encompasses all withdrawals, that would not include, uh, pre-statutory, uh, rights.

MS. LEONARD: No. I think it's very clear that the GMP cannot impair statutor- -- or, excuse me. Pre-statutory rights.

THE COURT: Yeah.

MS. LEONARD: Vested rights. We're not making the argument that it can, and we don't think there's any record evidence that shows that it does.

THE COURT: Okay

MS. LEONARD: The state of a district court said, simply because pumping is going to continue beyond the perennial yield, that that -- that there's a direct causal connection with -- with, uh, vested rights.

But because you have respondents pumping wells near their springs, or in their springs, even if there were curtailment of all the juniors by 100 percent, down to zero, it -- tomorrow where the perennial yield is -- is only 30,000 acre feet, that's all that's going to be pumped. You don't -- there's -- there's no evidence that those springs are going to come back.

So there -- this statute on its face does not, uh, impair vested rights. Uh, but it's -- it's certainly allow -- it -- it doesn't -- you need the evidence to show that cause --

THE COURT: So I wanted to clarify something, because I may have misunderstood something Mr. Rigdon said. What are the total vested rights in the basin?

MS. LEONARD: The total amount? I -- I don't remember the number in particular.

THE COURT: He -- he said 6,000. But I wasn't sure if that was just his client or the full basin.

MS. LEONARD: Yeah. I don't remember the number specifically.

THE COURT: All right. Thank you.

THE COURT: And just to -- sorry, to be clear. And -- and, uh, when Justice Pickering was talking to you earlier about whether the plan would result in balance after 35 years or not, and I believe the point was made by respondents that if -- if the GMP doesn't take into account the pre-statutory rights, then in fact, it wouldn't be, like -- does that affect your analysis and whether this meets the requirements for a GMP?

MS. LEONARD: I have two responses to that. One is, that's a highly technical question. That is squarely within the discretion of the state engineer of what the -- how the -- the aquifer will respond to the GMP. Um, the -- the other, uh -- and my other response just left my head.

THE COURT: I understand.

THE COURT: Ms. Leonard, if I could ask, um, I -- I think you mentioned earlier you're going to get to this, but I wanted to comment on it. The first thing I would say is, in an era when people are so polarized in their beliefs and opinions, I think it's commendable that all the people in this space have been willing to collaboratively work towards solving their issues.

But the state engineer's order still obviously has to comply with the law. How can banking water constitute beneficial use under our statutes?

MS. LEONARD: Your Honor, banking -- banking water is -- is just, uh, a matter of not withdrawing it in one year for use in the next year. It is not, uh -- it -- it is and will be put to beneficial use, um, is the banking of it is not the end use of it. So I think that their argument with regard to that is, um -- is -- is a little misleading.

Because I think that the -- the notion and the idea is that we, uh, want to make water most efficiently used. This is a shortcoming of the prior appropriation doctrine. It also requires use it or lose it. Which is a problem, uh, in terms of cons- -- conserving water. And so the GMP tries to address that

-- that element of prior appropriation by saying, don't use it just because you have to, you -- you know, save it for when you need it.

THE COURT: But doesn't that , uh, I mean, going back to beneficial use, uh, under the GMP that's been proposed, you've got those holders that haven't been putting their water to beneficial use that are going to get shares in this, uh -- this plan. And they can bank, they can sell, but yet they haven't made beneficial use of, uh, the water. How does that comport with what you just said?

MS. LEONARD: So, um, I think that there -- this notion that these waterways have never been put to beneficial use is a false premise. Because --

THE COURT: But then there was an indication by the, uh, state engineer, I believe, um, that it would be a notice issue and a delay issue to, uh, notify these people that haven't been putting their rights to, uh, use. Um --

MS. LEONARD: So --

THE COURT: And it would encourage those folks to come forward and say I'd better start pumping, which affects the basin as well.

MS. LEONARD: Well, and that goes back to the broad discretion given to the state engineer who made

the logical conclusion that if you -- if he starts initiating forfeiture and abandonment proceedings now, that it will have the perverse result of increasing pumping in an already compromised basin.

And as you pointed out, uh, that it could have a, uh -- it could take years to solve the administrative and legal proceedings that the statute doesn't afford.

So, um, there are other things I can say with regard to beneficial use, but my time is up. I appreciate the Court's time. And I -- I again want the Court -- Court to go back to the purpose of the statute, um, is -- needs to, um -- would -- it would begin a no effect if a GMP must strictly conform to priorities. So --

THE COURT: Do my colleagues have any additional questions for counsel? All right. Seeing none, uh, the Court would like to extend its thanks and appreciation to Ms. Leonard and her colleagues, Mr. Mixson, Mr. Rigdon, uh, Mr. Taggart.

Uh, I'm sure you are writing notes. Um, thank you all for your excellent arguments today, and your exceptional briefing in the case. Uh, the matter will stand.

I, Chris Naaden, a transcriber, hereby declare under penalty of perjury that to the best of my ability the above 65 pages contain a full, true and correct transcription of the tape-recording that I received regarding the event listed on the caption on page 1.

I further declare that I have no interest in the event of the action.

June 27, 2022

Chris Naaden

(Diamond National v. Diamond Valley Ranch hearing, 6-2-22)

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