IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81224

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

Appellants,

v.

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

Respondents.

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

APPELLANTS' JOINT ANSWER TO PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Diamond Natural Resources Protection and Conservation Association
J&T Farms, LLC
Gallagher Farms, LLC
Jeff Lommori
M&C Hay
Conley Land & Livestock, LLC
James Etcheverry
Nick Etcheverry
Tim Halpin
Sandi Halpin
Diamond Valley Hay Co., 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

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

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

Leonard Law, PC
McDonald Carano LLP

Appellants Eureka County and the Nevada State Engineer are governmental parties and exempt from the requirements of NRAP 26.1(a).

Date: August 24, 2022

/s/ Debbie Leonard

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INTRODUCTION

Through a petition for rehearing that fails to meet NRAP 40's standards, Respondents Sadler Ranch, LLC ("Sadler") and Ira Renner and Montira Renner (collectively, "Renner") blame the Court for their own inability to make an evidentiary record that supports their assertions that the Diamond Valley Groundwater Management Plan ("GMP") impairs vested claims. They also continue to cite matters **outside** the record, thereby confirming there is no specific impairment evidence **in** the record. The Court did not overlook or misapprehend any material fact or law. To the contrary, the Court properly followed the rules of statutory construction to uphold the GMP, comprehensively analyzed the issues presented, and correctly noted the deficiencies in Sadler/Renner's arguments.

In the absence of impairment evidence, Sadler/Renner resort to misrepresentations, hyperbole, and points they previously waived. In the process, they both rehash arguments the Court already correctly rejected and raise new arguments that they never pressed in the district court or on appeal. As a result, there is no basis for rehearing, and their petition should be denied.

ARGUMENT

A. Standard For Rehearing

"[R]ehearings are not granted to review matters that are of no practical consequence." *Matter of Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). Instead, a petition for rehearing will only be granted "when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice." *Id*. (citing NRAP 40(c)(2)). A petition for rehearing may not be used "to reargue matters considered and decided in the court's initial opinion" or to "raise new legal points for the first time on rehearing." *Id*. (citing NRAP 40(c)(1)) (internal citations omitted). Rather, a petition for rehearing should only direct attention "in a concise and non-argumentative manner" to some controlling matter that the court has overlooked or misapprehended. *Matter of Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983).

B. The Court Correctly Concluded That The GMP Does Not Impair Sadler/Renner's Vested Claims

1. The GMP By Itself Is Not "Ipso Facto" Evidence Of Impairment To Sadler/Renner's Vested Claims

The Court correctly determined that Sadler/Renner did not prove their vested claims are impaired. Sadler/Renner cannot overcome their failure to prove impairment by asserting the GMP itself is "ipso facto" evidence because causation

is a factual determination that must be proven on a case-by-case basis. *See Est. of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 858, 265 P.3d 688, 691 (2011); *see also Marshall v. Hyundai Motor Am.*, 334 F.R.D. 36, 57 (S.D.N.Y. 2019) (rejecting "ipso facto" argument because individualized injury must be proven).

Simply because the GMP contemplates that net withdrawals may continue to exceed the perennial yield for 35 years is not evidence that Sadler/Renner's vested claims are impaired. Rather, Sadler/Renner still had to specifically demonstrate that the GMP's implementation impaired *their* rights. *See Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994). Where NRS 534.037 does not include vested rights as a factor the State Engineer must consider,[1] and vested rights are not subject to the GMP, the GMP proponents did not have any "burden" to show non-impairment; the burden lies with Sadler/Renner to show impairment, which they did not do. *See Gibellini*, 110 Nev. at 1206, 885 P.2d at 543.

As the Court noted, "Respondents' appellate briefs … do not cite portions of the administrative record to show that they presented the State Engineer with

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[1] AB 419, as originally proposed, would have required the State Engineer "to consider the relationship between surface water and groundwater in the basin," but that language was amended out of the bill after the First Reprint. II(325, n.42).

evidence to show that the GMP would affect **their specific** surface water rights or that they had not received adequate mitigation rights." Op. n.5 (emphasis added). There is no causal connection in the record establishing interference by any particular well with the exercise of any particular vested spring right. Rather, localized groundwater declines are attributable to multiple factors, including geology, geography, hydrology, well location, the quantity and rate of pumping in relation to natural discharge, and the aquifer's transmissivity and storage. II(402). The record simply establishes that *cumulative* pumping in the basin has contributed, at least in part, to the decline in spring flows. IV(802-814); V(1084, 1131). The purportedly "overlooked" evidence to which Sadler/Renner point states nothing more than that.

For example, in describing the hydrologic setting of Diamond Valley, GMP Appendix D states, "Groundwater exploitation ***in the basin*** has caused the discharge from many springs to decline or cease to flow altogether" and specifically identifies Thompson Springs and Big Shipley Hot Springs as examples. IV(806) (emphasis added). The district court cited a previous draft of this language to attribute the cause of such diminished flows to "junior irrigators," and Sadler/Renner parrot that assertion in their petition. Pet. at 7, *quoting* XI(2384:18-2385:3), *citing* III(641). Yet neither the cited reference nor anything

else in the record causally links pumping from any particular junior priority well to spring losses, and Sadler, Renner and the Baileys all have agricultural production wells located within or in close proximity to their own and one another's springs, indicating their spring losses are self-inflicted. II(452-453, 458-459); IV(837-839); VI(1258-1265); XIV(2906-2908).

Additionally, the USGS report cited by Sadler/Renner states it is "unknown" whether the reduced springs flows are "in part related to a decrease in precipitation." V(1141). Although they cite to the USGS report as supposed evidence of impairment, Sadler/Renner do not address this point. Pet. 6. The Renners' comment letter on the GMP only expresses their "belief" that the GMP "violates NRS 533 which expressly protects the rights of vested water right holders." Pet. 5, citing IV(0906). That is not evidence of causation.

Importantly, Sadler/Renner submitted an expert report to the State Engineer during the administrative proceeding that said nothing at all about vested rights and failed to causally connect the GMP to any alleged impairment. IV(0933-0944). Rather, the expert opined only that:

> the GMP as written provides insufficient hydrogeological evidence to support the GMP's goals, appears to favor the junior priority water appropriators, will continue to allow for the exploitation of the groundwater resource for the plans [*sic*] duration, and will not

> sufficiently reduce groundwater pumping to remove the CMA designation.

IV(0935-0936). That is not impairment evidence.

Nothing about the State Engineer's procedures prevented Sadler/Renner from presenting any evidence they wished. The State Engineer's alleged "refusal to hold an evidentiary hearing" (Pet. 11-12) was addressed in both the district court and this Court and was rejected both times. *See* State Engineer's OB 30–31, 61–62; Sadler/Renner's AB 52–53. Sadler/Renner cannot blame the State Engineer for their failure or inability to make an adequate evidentiary record to support their contentions.

By resorting to an "ipso facto" argument, Sadler/Renner concede that the "evidence" on which they rely fails to demonstrate individualized injury to "their specific water rights," just as the Court concluded. Op. n.5. In other words, Sadler/Renner's petition confirms the accuracy of, rather than calls into question, the Court's determination. There are no "overlooked" facts or law that warrant rehearing.

2. The Court Correctly Concluded That The GMP's 35-Year Timetable Does Not Impair Vested Rights

In the absence of specific impairment evidence, Sadler/Renner resort to repeating the same flawed argument they urged in their answering brief: that

simply by allowing continued pumping above the perennial yield for 35 years, the GMP impairs vested rights. The "evidence" referenced by Sadler/Renner – i.e., the GMP, USGS reports, and their expert report – establishes only that: (1) the GMP may allow pumping to exceed the perennial yield for 35 years[2]; (2) springs in Diamond Valley have been impacted by historic pumping; and (3) mitigation wells have been drilled. As the Court correctly concluded, that is not specific impairment evidence. Op. n.5.

Even if this "evidence" could be deemed relevant to impairment, Sadler/Renner misrepresent the record when arguing that "[u]ncontested evidence indicates that even the maximum pumping reductions in the GMP do not bring withdrawals in the basin below the perennial yield." Pet. 5. In making this assertion, Sadler/Renner fail to cite the irrigation pumping reduction table that takes into account groundwater recharge, which shows that the consumptive use portion of groundwater withdrawals is projected to fall to the perennial yield in less than 35 years. IV(0838). Because net – not gross – withdrawals from the aquifer determine whether pumping is in balance with the perennial yield, their citation is

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[2] The GMP provides: "If it is determined that the most aggressive pumping reduction schedule is to be followed, net-pumping reaching perennial yield would occur around year 22 of this GMP." IV(548).

misleading for the point they cite it.[3] *See*, *e.g.*, *Bacher v. State Eng'r*, 122 Nev. 1110, 1122, 146 P.3d 793, 801 (2006) (analyzing consumptive use when determining whether water permit was justified).

Moreover, contrary to their assertion, *Pyramid Lake Paiute Tribe of Indians v. Ricci* does not hold that "[t]he perennial yield is established to protect vested surface water rights from impairment by junior pumping." Pet. 5, citing 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010). Although perennial yield "is the equilibrium amount or maximum amount of water that can safely be used without depleting the source," nothing in *Pyramid Lake Paiute Tribe* states that impairment of vested rights is proven without direct evidence. *See id.* at 524, 245 P.3d at 1147. At best, the language cited by Sadler/Renner is dictum. *See id.* And notably, in that case, the Court held that groundwater pumping by the vested surface water rights holder was itself causing any alleged impacts to surface rights, which is likewise occurring here. *See id.*

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[3] This distinction was discussed at oral argument (Trans. 6:21-7:17), and the Court's Opinion did not misapprehend it. Similarly, contrary to Sadler/Renner's assertion (at 13-14), the State Engineer correctly concluded that the GMP's pumping reductions would allow the CMA designation to be lifted. II(0330). The Court's Opinion directly addressed and correctly concluded the State Engineer analyzed the NRS 534.037(2) factors. Op. 17–19.

3. NRS 534.110(7) Authorizes Pumping To Exceed The Perennial Yield, And Sadler/Renner Never Brought A Facial Attack On The Statute

Sadler/Renner's petition fails to address that the GMP statute itself allows continued exceedances of the perennial yield while local stakeholders develop a GMP. NRS 534.110(7). Nothing in the law suggests, much less requires, that a GMP bring a basin into balance instantaneously. *See id.* The only means of doing that would be 100% curtailment of all junior groundwater users, which is contrary to the plain statutory language that creates an exception to curtailment when a GMP has been approved. *See* NRS 534.110(7). To the extent that Sadler/Renner now contend that *any* pumping in excess of the perennial yield impairs their vested claims, they needed to bring a facial attack on the statute at the time it went into effect, which they failed to do.

4. The Court Correctly Rejected The District Court's Faulty Conclusion That The GMP Impaired Vested Rights

Contrary to Sadler/Renner's assertion, the Court rejected, rather than "overlooked" the district court's conclusion that the GMP itself established impairment. Op. 15-16. The district court's analysis was internally inconsistent and unsupported by record evidence. As a result, Sadler/Renner's continued reliance on it simply highlights the shortcomings in their arguments.

When analyzing the GMP for compliance with NRS 534.037(2), the district court specifically upheld the State Engineer's approval of the GMP with a 35-year window of time to remove the basin's CMA designation: "If the State Engineer finds, which he did here, that the DVGMP sets forth the necessary steps for removal of the basin as a CMA, he may approve a GMP even if the DVGMP exceeds a 10 year period." XI(2395:15-17, 2396:6-8 and n.75). Indeed, the district court expressly held that NRS 534.110(7) and NRS 534.037 authorize annual pumping to continue to exceed the perennial yield while the GMP is in place because "[a]n undertaking as immense as bringing a depleted acquifer [*sic*] into balance could easily surpass 10 years depending on the extent of harm to the acquifer [*sic*]." XI(2395:6-7). Sadler/Renner did not challenge that conclusion in their answering brief. Rather, they argued that the GMP – not the statute – purportedly impaired vested rights. Sadler/Renner AB 50-51.

Notwithstanding its conclusion that the GMP complied with NRS 534.110(7) and NRS 534.037(2), the district court struck down the GMP as impairing vested rights precisely *because* the GMP contemplates a 35-year period to reduce pumping to the perennial yield and authorizes continued pumping in excess of the perennial yield in the interim. XI(2404:4-2405:6). This flawed analysis erroneously assumes that if basin-wide pumping were immediately

reduced to the perennial yield, spring flows would be restored. That assumption is wrong because the GMP Opponents have wells located in and near their own and one another's springs. II(452-453, 458-459); IV(837-839); VI(1258-1265). If they continue to pump those wells, water might never flow from the springs because the springs are just a surface expression of the groundwater. II(374). In other words, because of Sadler/Renner's and the Baileys' pumping, even the complete curtailment of all junior priority pumping will not resume spring flow.

Multiple times, the district court made the assertion – unsubstantiated by any record evidence – that "over pumping by junior irrigators has caused senior claimed vested water rights holders' naturally flowing springs to dry up in northern Diamond Valley." XI(2384:28-2385:4; 2405:4-6). To support this proposition, the district court cited to either: (a) nothing[4]; (b) documents in the record that do not state what the district court says they do[5]; or (c) matters outside the record.[6] Yet those are the same citations on which Sadler/Renner now rely (Pet. notes 18, 39-

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[4] For example, XI(2384:18-19, 2389:17-2390:1, 2405:3-5).

[5] For example, XI(2385, n.9).

[6] For example, XI(2385, n.10; 2389, n.40; 2404, n.111).

50), underscoring the Court's correct conclusion that no *record evidence* of the GMP affecting their vested claims exists.[7] Op. n.5.

5. The Oral Argument Colloquy Cited In The Petition Was Not Material To The Court's Decision

Sadler/Renner rest their petition on a quote from the oral argument transcript that is irrelevant to the outcome of the case. To obtain rehearing, a petitioner must demonstrate that the Court "overlooked or misapprehended a **material** fact … or … question of law…." NRAP 40(a)(2) (emphasis added). Sadler/Renner contend the Court "misapprehended facts because counsel did not concede that the record lacks impairment evidence," yet they fail to show that any alleged misapprehension of facts was material to the outcome of the Court's decision. Indeed, the Court's reference to counsel's concessions came **after** its holding and only in response to the dissenting opinions. Op. 16. Counsel's concessions had no bearing on the Court's statutory analysis and conclusions of law on which it decided the case. Op. 7-12.

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[7] To the extent the Court is inclined to look at the extra-record evidence cited by Sadler/Renner and the district court, Appellants ask that the Court likewise review the evidence in support of the motion to stay, which showed, among other things, the GMP Opponents' interference with one another's springs. XIII(2555-2703); XIV(2865-2929). Had Appellants known that the district court and Sadler/Renner would rely on extra-record information, they would have made a robust record of the GMP Opponents' self-inflicted harm.

Even if material, Sadler/Renner do not identify any misapprehension of the oral argument dialogue. The Opinion states, "As noted, during oral argument, 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***." Op. 16 (emphasis added). In their petition, Sadler/Renner interlineate this quote with the words "i.e. impairment evidence," yet that language does not exist in the Opinion. By inserting words into the Opinion that the Court did not itself use, Sadler/Renner set up a strawman argument as a pretext for rehearing.

Moreover, when asked, "[W]hat about [Appellants'] interpretation of the statute is wrong," the very first response Mr. Mixson gave was "the notion of vested rights, of course," which he indicated "Mr. Rigdon is going to address," but then added "and the impairment by the GMP." Trans. 21:25-22:4. Even if some of the ensuing discussion related to beneficial use, the Opinion is not mistaken that the record is devoid of specific evidence that quantified any alleged vested rights impairment by the GMP. Essentially confirming that this proceeding lacks any such evidence, Sadler/Renner's counsel conceded at oral argument that any takings claim "would certainly come later." Trans. 40:24-41:4.

6. Sadler/Renner's Decision To Split Oral Argument Time Binds Them To The Concessions Of The Baileys' Counsel

Whether or not material, Sadler/Renner are bound to the concessions of the attorney they authorized to speak on their behalf. A "lawyer is the client's agent and the acts and omissions of an agent ordinarily return to the principal who hired the faithless agent." *Est. of Adams By & Through Adams v. Fallini*, 132 Nev. 814, 820, 386 P.3d 621, 625 (2016). "A party … is bound by concessions made in its brief or at oral argument." *Hilao v. Est. of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004); *see also Harvey v. State*, 136 Nev. 539, 541 n.2, 473 P.3d 1015, 1017 n.2 (2020) (declining to analyze matters admitted at oral argument).

Here, Sadler/Renner expressly authorized the Baileys' counsel to speak on their behalf. Trans. 20:2-17. As a result, they are bound by any concessions the Baileys' counsel made. *See Hilao*, 393 F.3d at 993. Moreover, oral argument is unpredictable; simply because counsel for Respondents sought to "divide the issues," that was no guarantee that the Court would tailor its questions to the area that each attorney wished to cover. *See* Nev. App. Prac. Manual (2021 ed.) at 11-25 [11:94] ("[B]ecause the court may ask any attorney a question related to the argument as a whole, all attorneys who argue must be prepared to respond to questions about any area of the case.").

Finally, Sadler/Renner's counsel spoke after the Baileys' counsel and could have corrected any concession that was made. In fact, when specifically asked at oral argument "how many pre-statutory rights are we dealing with," Mr. Rigdon failed to answer the question directly and provided no specifics. Trans. 41:15-45:20. Instead, he cited extra-record matters and his own public comments to the State Engineer. *Id.* Those comments, in turn, provided no proof of impairment. Instead, Mr. Rigdon acknowledged that vested claims had already been mitigated and thanked the State Engineer for issuing mitigation permits. V(0975-0978). The grievance he articulated to the State Engineer regarding vested rights was simply that the GMP did not include any provision to repay alleged costs associated with mitigation, which is not required by NRS 534.037. *Id.* That is not impairment of vested rights within the meaning of NRS 533.085 and could have been requested when the mitigation applications were filed.

7. Implementation Of The GMP Will Improve Aquifer Health, Not Harm Vested Rights

The GMP expressly exempts vested rights from its mandates and does not alter the ability of vested claimants to fully exercise their claims from springs or through mitigation groundwater permits. III(542, 553). The GMP also reduces pumping with the goal of stabilizing the water table to benefit all water users,

including those who hold vested claims. III(548). It is illogical for Sadler/Renner to argue that the GMP's mandated cutbacks in groundwater withdrawals will harm vested claims because, absent interference by the GMP Opponents' own wells, a higher local groundwater table would make spring discharge more likely. II(374). The Court correctly concluded that nothing about the GMP prevents a vested claimant from seeking or exercising a mitigation groundwater permit while the GMP is in effect. Op. 11 and n.5.

C. The Court Correctly Concluded That Sadler/Renner "Failed To Preserve Or Assert Any Constitutional Claim" For Review

1. Sadler/Renner Never Advanced A Taking Argument In District Court Or Their Answering Brief

In a last-ditch effort to blame the Court for their own shortcomings, Sadler/Renner, for the first time, mount a facial attack on the constitutionality of NRS 534.037 and NRS 534.110(7). Pet. 14-15. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). An issue is sufficiently preserved for appellate review "where an objection has been fully briefed, the district court has thoroughly explored [it] … and … made a definitive ruling …." *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

Here, Sadler/Renner never mounted a facial attack or pressed a takings argument in the district court, a point Appellants noted repeatedly in their briefing. VII(1520); IX(1786-1816); XIV(2875); DNRPCA OB 51. Sadler/Renner challenged only the State Engineer's approval of the GMP – not the statutes that created the GMP process. VII(1412-1413); Sadler/Renner AB 50-51. The Court aptly noted that "Respondents' briefs" included only "a vague reference to the Takings Clause…." Op. 16. In light of their "fail[ure] to preserve or assert any constitutional claim for [the Court's] review," the Court correctly "decline[d] to address it." *Id.*

2. Sadler/Renner Have Not Ripened A Taking Claim And Conceded A Taking Claim Is Not Part Of This Proceeding

Moreover, because judicial review of an agency decision is not the place to raise a taking claim, any taking arguments are not ripe. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner [cannot] claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), overruled on other grounds by *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (U.S. 2019). Until the Court issues its remittitur, the GMP is technically still under judicial review, and any

taking claim is therefore premature. In concluding that a takings claim was not raised and could not be considered in this case, the Court correctly quoted Sadler/Renner's counsel's statement at oral argument that a takings claim "would certainly come later" in a separate proceeding. Op. 16, *quoting* Trans. 41:3-4.

3. The Court Correctly Concluded That Constitutional Questions Were Not Essential To The Decision

As aptly analyzed in the Opinion, this case is one of statutory interpretation under the plain meaning doctrine. Op. 13, 16. Having found NRS 534.037 and NRS 534.110(7) to be unambiguous, the Court correctly declined to employ the canon of constitutional avoidance. Op. 13, citing *Warger v. Shauers*, 574 U.S. 40, 50 (2014). In other words, the Court did not overlook or misapprehend a constitutional provision but, instead, properly followed the rules of statutory interpretation to conclude that no constitutional provision should be consulted. *Id.*

4. The GMP Does Not Take Private Property; It Regulates A Shared Resource For The Public Welfare Pursuant To The State's Police Power

Even if the Court were to consider Sadler/Renner's waived and unripe takings arguments, they fail on the merits. "'[G]overnment regulation—by definition—involves the adjustment of rights for the public good,'... [and] '[g]overnment hardly could go on if to some extent values incident to property

could not be diminished without paying for every such change in the general law." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979) and *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). Groundwater in Nevada "belong[s] to the public." NRS 534.020. "The general rule is that the Legislature may restrict the use and enjoyment of the state's water resources by exercise of its police power for the preservation of the public health, safety and welfare without compensating the property owner." *Jacobs Ranch, L.L.C. v. Smith*, 148 P.3d 842, 855 (Okla. 2006) (denying takings claim arising from regulatory restriction on groundwater use); *Peterson v. Dep't of Ecology*, 596 P.2d 285, 290 (Wash. 1979) ("The relevant inquiry in such a challenge is whether the regulatory scheme is an exercise of police power rather than one of condemnation. The question is one of social policy which requires the balancing of the public interest in regulating the use of private property against the interests of private landowners not to be encumbered by restrictions on the use of their property.").

The GMP constitutes a reasonable and temporary exercise of State police power in furtherance of the public welfare, not a "reallocation" of property. Senior water rights holders still maintain their right to use water in proportion to their seniority. III(531). The GMP anticipates that restrictions on seniors' water use will

be in place only for the life of the GMP. III(548). No taking exists here. *See Lingle*, 544 U.S. at 548 (rejecting takings claim based on regulation that reduced private party's rental income); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (rejecting takings claim based on temporary development moratorium).

D. The Court Correctly Qualified – Rather Than Abrogated – Existing Law

Sadler/Renner's argument that "changes to a statutory scheme cannot be based on oblique statutory language" is completely new, raised under the pretense of a recent Supreme Court decision that is not determinative. Pet. 16–17. Alternatively, it simply rehashes the same hyperbolic arguments the Court rejected. Contrary to Sadler/Renner's assertion, the Court did not "abrogate prior appropriation for groundwater in Nevada" (Pet. 1) or "rel[y] on a single conditional clause in a single statute to overturn 155 years of water law." Pet. 17. Rather, it soundly interpreted the plain statutory language to conclude the Legislature authorized temporary regulation of all basin groundwater rights for the welfare of a groundwater-dependent community, which was well within the Legislature's authority.

> Water rights are subject to regulation under the police power as is necessary for the general welfare. *See V.L. & S. Co. v. District Court*,

> 42 Nev. 1, 171 P. 166 (1918). As the owner of all water in Nevada, the State has the right to prescribe how water may be used. *In re Waters of Manse Spring*, 60 Nev. 280, 287, 108 P.2d 311, 315 (1940).

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

As to groundwater, the prior appropriation doctrine did not apply in Nevada until 1915. Act of Mar. 24, 1915, ch. 210, 1915 Nev. Stat. 323 (repealed 1939) (now codified in 534.080(3)). Where the Legislature created prior appropriation for groundwater, the Legislature was free to depart from it. The Court did not repeal, abrogate or reverse existing law. It simply followed basic principles of statutory construction to conclude the Legislature chose to deviate from the prior appropriation doctrine in the limited circumstances set forth in NRS 534.110(7) to promote the public welfare:

> We recognize that our opinion will significantly affect water management in Nevada. We are of the belief, however, that – given the arid nature of this State – it is particularly important that we effectuate the plain meaning a statute that encourages the sustainable use of water. *See generally Wilson v. Happy Creek, Inc.*, 135 Nev. 301 311, 448 P.3d 1106, 1114 (2019) (explaining the importance of using water sustainably). The GMP here is a community-based solution to the long-term water shortages that befall Diamond Valley. Because the GMP complies with NRS 534.037 and NRS 534.110(7), it is valid.

Op. 19–20. In other words, Sadler/Renner's arguments were addressed and refuted – not overlooked or misapprehended.

CONCLUSION

Because Sadler/Renner fail to meet the standards for rehearing, their petition should be denied.

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AFFIRMATION

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

Dated August 24, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 4,659 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on August 24, 2022, the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system. All others will be served by first-class mail.

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