Farmers Against Curtailment Order
1275 Hwy. 208
Yerington, NV 89447

June 3, 2016

Senator Pete Goicoechea, Chairman
Assemblyman James Oscarson, Vice-Chairman
Senator Aaron D. Ford
Senator Joseph P. Hardy
Assemblywoman Maggie Carlton
Legislative Commission Subcommittee to Study Water
401 S. Carson St.
Carson City, NV 89701

Re: June 7, 2016 Subcommittee Meeting Agenda Item 8

Dear Chairman Goicoechea and members of the subcommittee:

Farmers Against Curtailment Order (FACO) is an organization made up of small farmers that was formed to challenge the State Engineer's proposed curtailments of groundwater pumping in the Mason and Smith Valleys for the 2015 and 2016 irrigation seasons. It has come to our attention that your subcommittee will be hearing a presentation from Brad Johnston regarding water issues in the Mason and Smith Valleys at its June 7 meeting in Dyer, NV. In the litigation over the curtailment orders, Mr. Johnston represented Peri & Sons and argued in favor of curtailment. Even so, both curtailment orders were overturned by Judge Aberasturi

We are concerned that the committee may not receive the full story regarding the positions of FACO and effect of Judge Aberasturi's order. We are also concerned that this subcommittee will be asked to introduce a bill that would reverse what Judge Aberasturi did. We would like to take this opportunity to provide the subcommittee with some background regarding the curtailment orders and the litigation. To ensure that you get the full picture of what happened in this case, a copy of Judge Aberasturi's 2015 injunction his 2016 order are attached. Also, we request the opportunity to speak before the committee at its meeting in July.

The Mason and Smith Valleys have historically relied on water from the Walker River for crop irrigation. During times of drought there is often not enough water available in the river. The solution for many farmers has been to acquire supplemental groundwater rights. These are groundwater rights that can only be pumped if we do not get enough surface water to support our farms. They are our protection against drought and normally are pumped during drought periods. Because of their importance in maintaining an adequate water supply to our farms, each of us has expended a great deal of money on wells and other infrastructure to ensure that we can use these rights when they are needed.

The first time we were informed that the State Engineer was proposing to curtail groundwater pumping was on January 25, 2015 when he held a meeting in Yerington. At the meeting, he showed us a PowerPoint presentation regarding the effect that the drought was having on water levels in Mason and Smith Valleys. Although the presentation included slides indicating that the State Engineer intended to curtail supplemental groundwater rights by 50%, we were not provided with a copy of the proposed curtailment order or given an adequate opportunity to respond. Just a week and a half later, on February 3, 2015, the State Engineer issued the curtailment order for the 2015 irrigation season. The order only applied to owners of supplemental groundwater rights and cut each of those rights by 50% regardless of their priority.

The 2015 curtailment order came as a complete surprise and was issued after most of our members had expended time and money preparing for the 2015 irrigation season. To protect these investments we formed FACO and hired an attorney. Our attorney was successful in getting a preliminary injunction that stopped the proposed curtailment. Judge Aberasturi ruled that the State Engineer violated Nevada water law by ignoring the priority dates of our water rights. The 2015 case was later dismissed since the 2015 irrigation season ended without curtailment.

Before the 2015 case was finished, the State Engineer decided that he was also going to curtail pumping again in 2016. He did this even though farmers in the area had already taken voluntary steps to reduce the amount of water we were using. Pumping in the 2015 season was almost half of the pumping in the 2014 season. At a October 5, 2015 hearing on the 2016 curtailment order, the State Engineer even complimented us on these voluntary efforts but then ignored those efforts when he calculating the amount of the 2016 curtailment.

Just like with the 2015 curtailment order, our attorney filed an appeal of the 2016 curtailment order. This time we were able to get a final ruling before the irrigation season began. In his order, Judge Aberasturi said that the State Engineer could not discriminate between farmers just because their groundwater rights were supplemental. If a curtailment of groundwater pumping is needed, the State Engineer has to treat every farmer (large or small) the same and curtail their water rights based only on the priority date.

We have heard people say that Judge Aberasturi's order means that the State Engineer would have to cut off domestic wells and city water supplies if they have a junior priority to a farmer's water rights. This is not true. Judge Aberasturi said that the State Engineer can prefer some uses of water to others - he just can't discriminate between people who are using water for the same purpose. This means the judge thought the State Engineer can curtail water used only for farming, but he can't cut off some farmers while allowing other farmers with junior priorities to pump their water.

The most troubling aspect of both curtailment orders is the State Engineer's insistence that supplemental groundwater rights are inherently inferior to stand-alone groundwater rights. Even though we won on this issue, our attorney tells us that since Judge Aberasturi's ruling applies only to our case, the State Engineer's view of supplemental water rights could be applied in other basins in the future. If this is true, than the economic value of supplemental rights

throughout the entire state could be effectively undermined. There are many other areas in this state where farmers use supplemental water rights to manage their drought risk. They rely on the priority dates assigned to these rights. Stand-alone rights with junior priority should not trump supplemental rights with senior priority dates. This is wrong and is not what we relied on when we acquired these rights.

We think a groundwater management group of farmers should be formed that can work with all the local water users and the State Engineer. Legislation should be proposed that will create a group that can represent local interests and develop a groundwater management plan for the area. We also think that a new law should be adopted that explains how a groundwater management plan can be developed and what it should contain.

Before you make any decisions that would affect our supplemental groundwater rights, please take into account the devastating impact that this could have on the livelihoods of the hundreds of family farmers that rely on such rights to successfully operate their farms.

Thank you for taking the time to listen to our concerns. Please don't hesitate to contact me if you have any questions or need any additional information.

Sincerely,

Louis Scatena

Louis Scatena

Case No. 15-CV-00227

Dept. II

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

***

FARMERS AGAINST CURTAILMENT ORDER, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

_____/

ORDER GRANTING PRELIMINARY INJUNCTION

THIS MATTER comes before the Court on Farmers Against Curtailment Order, LLC's ("FACO") Motion for Preliminary Injunction. On March 4, 2015, FACO filed a Petition for Judicial Review and Notice of Appeal Order 1250 of the Nevada State Engineer in the above-captioned case. Soon thereafter, on March 9, 2015, FACO filed a Motion for Preliminary Injunction. After the motion was fully briefed by the parties, a hearing on FACO's Motion for Preliminary Injunction was held on March 27, 2015.

FACO alleges that the State Engineer's Curtailment Order 1250 unlawfully interferes with state-issued groundwater rights and will cause substantial, immediate, and irreparable harm to FACO's agricultural property. This Court has authority pursuant to Nevada Rule of Civil Procedure ("NRCP") 65

to issue a preliminary injunction if FACO demonstrates both a substantial likelihood of success on the merits and irreparable injury if the injunction is not granted. *Clark C. School Dist. v. Buchanan,* 112 Nev. 1146, 924 P.2d 716 (Nev. 1996). Having reviewed the motion papers and arguments presented to the Court, the Court hereby issues a preliminary injunction based on the following findings.

Two preliminary matters were raised by the State Engineer. He initially claimed FACO does not have standing to bring this case, and that FACO's petition was not properly served on all parties that may be affected by the Curtailment Order. FACO's testimony established that FACO has standing to bring this action, and the State Engineer acknowledged at the hearing that FACO presented sufficient evidence to prove it has standing to bring this case. Also, FACO established that its service of the petition in this case on the State Engineer properly established this Court's jurisdiction over this matter. *See Desert Valley Water Co. v. State Engineer,* 104 Nev. 718, 720, 766 P2d. 886, 887 (1988).

I. IRREPARABLE HARM

Currently a drought exists in the Walker River watershed and that drought is entering its fourth year. Farmer's in Smith and Mason Valley will rely almost entirely on groundwater this year to irrigate their crops. On February 3, 2015, the State Engineer issued the order that is the subject of this legal challenge (hereinafter the "Curtailment Order"). The State Engineer ordered that in 2015, only 50% of supplemental groundwater rights can be used in Mason and Smith Valley. This cut is unprecedented and amounts to a cut of approximately 71,500 acre feet of water use in Mason Valley and Smith Valley.

The Curtailment Order will also have large economic ramifications in Mason and Smith Valleys. FACO members testified that they will lose profits in 2015 from the loss of 50% of their groundwater rights. FACO members testified that they own supplemental groundwater rights that are subject to the Curtailment Order. FACO members testified that they made investments in their agricultural enterprises in the fall of 2014, and some of those investments will be lost because of the curtailment of 50% of their groundwater rights.

The Court concludes that irreparable harm will occur to FACO and its members from the loss of fifty percent of their supplemental groundwater. The 2015 water year is certainly a drought year, and

farmers expect to receive very little surface water rights from the Walker River. In years like this, supplemental groundwater is critical to making up for the lack of surface water.

Testimony by FACO members established that irreparable harm will occur from cutting agricultural production in half. This will have far reaching economic impact. The Curtailment Order was issued a month before the irrigation season. Large agricultural investments were already made that would not have been made if the order was issued in advance. Farmers had investment-backed expectations in their water rights and the priority of those water rights. They relied on the water they believed they have a right to use in times of drought. They relied on the priority of their water rights and how that priority protects them in time of shortage. If fifty percent of their water rights are taken away, irreparable harm will result.

The failure to use priority in allocating any reduction to pumping the ground water could also cause irreparable injury as the Court finds that the Curtailment Order would result in the taking of property rights. Without the use of priority the State Engineer is in effect transferring water rights temporarily or permanently from one holder to another without compensation or due process. The Court does not believe that there would be an adequate monetary remedy and therefore would cause an irreparable harm.

II. LIKELIHOOD OF SUCCESS OF THE MERITS

A preliminary injunction may be issued to preserve the status quo if the party seeking it shows: (1) that the party enjoys a reasonable "likelihood of success" on the merits; and (2) the party will be subjected to "irreparable harm." *Dixon v. Thatcher,* 103 Nev. 414, 415 (1987). Injunctive relief is extraordinary relief. *Department of Conservation and Natural Resources, Division of Water Resources v. Foley, et al,* 121 Nev. 77, 80 (2005).

This Court finds that FACO is likely to succeed on the merits of its challenge to the Curtailment Order on the legal basis that the Curtailment Order violates the prior appropriation doctrine. The prior appropriation system is based on the principle that senior rights with any designated preferred use have the greatest legal claim to water. When water is short, the most junior water right holders within the designated preferred use are cut off when insufficient water exists to serve them.

Nevada water law codifies the prior appropriation system and limits the State Engineer's power to regulate the use of prior existing water rights to be in conformity with the priority system. NRS 534.110 (6). The State Engineer is not statutorily empowered to redefine priorities of water rights on the basis an emergency exists. The prior appropriation system determines who may still pump water if all pumping is not curtailed. The priority system works whether or not an emergency exists.

The State Engineer has authority under NRS 534.120 (1) to make rules, regulations and orders that are essential for the public welfare. Further, the State Engineer may designate and regulate preferred uses under NRS 534.120 (2). The Court finds that the State Engineer may make rules, regulations and orders affecting certain preferred uses, so long as the rule, regulation or order respects priority within the preferred use.

Priority may have draconian consequences. It requires the State Engineer to determine how much water pumping must be curtailed and then match the lowest priority rights that must be denied water to obtain the level of curtailment determined to be necessary. Those holding the most junior rights will certainly suffer from any curtailment. By curtailing fifty percent of the annual duty of all supplemental groundwater rights to spread the pain, the State Engineer exceeded his statutory authority. Accordingly, FACO has established that it has a reasonable likelihood of success on the merits in this case on this basis alone.

FACO raises two other arguments to support its claim that it has a likelihood of success on the merits. First, FACO argues that the State Engineer's decision to curtail water rights is not supported by substantial evidence. The Court cannot find as a matter of law that FACO has a reasonable likelihood of success on the merits based on this argument. The Court does not have a sufficient record to make its final determination.

The Court heard testimony that the aquifers in question have been declining. FACO disputed the rate of decline and but not the fact that a decline exists. In testimony, the primary witness for the State Engineer stated that he could not identify a standard for a reasonable rate of groundwater decline. Without such a standard, the Court cannot understand how the State Engineer could identify what level of curtailment was needed in order to justify what water rights cannot be served.

Second, FACO argued that the Curtailment Order is invalid because the State Engineer did not give adequate notice or have a proper hearing before issuing the Curtailment Order. The State Engineer argued that the drought created an emergency and, given that emergency, the type of notice and hearing that FACO wants was unnecessary. While the Court recognizes that the State Engineer's argument may have merit that an emergency may limit the constitutional requirements for notice and hearing, the Court questions the State Engineer's definition of emergency in this case. Without a more detailed record, the Court is not prepared to find that FACO has a likelihood of success on the issue of due process.

IT IS HEREBY ORDERED:

1. This Court has jurisdiction over the subject matter of this case, and venue in this district is proper.

2. That FACO has carried its burden of showing (a) reasonable probability of irreparable injury, and (b) the likelihood of success on the merits, and this Preliminary Injunction is GRANTED pursuant to Nevada Rules of Civil Procedure 65, and the inherent equitable powers of this Court.

3. That Curtailment Order 1250 is set aside pending a hearing on the merits of Case No.: 15-CV-00227.

4. That this Court preliminarily ENJOINS the State Engineer its agents, servants, employees, attorneys, and all others in active concert or participation with Defendant, from refusing to allow use of 100% of supplemental water rights in Mason and Smith Valleys.

5. That this Preliminary Injunction shall take effect immediately and shall remain in effect pending a final adjudication on the merits by this Court.

6. Farmers Against Curtailment Order, LLC is directed to file proof of bond, in the amount of $200.00, within ten (10) days of this Order. The bond shall serve as security for all claims with respect to this Preliminary Injunction and any additional injunctive relief ordered by the Court in this Action.

DATED this 30th day of April, 2015

Hon. Leon Aberasturi
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I, Trudy Ingerson, am an employee of The Honorable Leon Aberasturi, District Judge, and that on this date pursuant to NRCP 5(b), I mailed at Yerington, Nevada, a true copy of the foregoing document addressed to:

Paul G. Taggart
108 North Minnesota St.
Carson City, NV
89107

Cassandra Joseph
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV
89701

DATED: This 4th day of ~~April~~ May, 2015.

Trudy Ingerson
Employee of Hon. Leon Aberasturi

Case No. 15-CV-01395
15-CV-01396
15-CV-01397

Dept. II

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COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

***

STEVEN A. FULSTONE, individually and as Trustee of the Steven A. Fulstone 1989 Living Trust, R.N. FULSTONE COMPANY, a Nevada Corporation, CEAS COMPANY, a Nevada Corporation,

Petitioners,

vs.

JASON KING, P.E., in his official capacity As Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RECOURSES

Respondent.

/

FARMERS AGAINST CURTAILMENT ORDER, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES.

Respondent.

/

AMENDED ORDER AFTER HEARING

FARMERS AGAINST CURTAILMENT ORDER, LLC,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent,

And,

PERI & SONS, INC., a Nevada Corporation, DESERT PEARL FARMS, LLC, a Nevada Limited Liability Company,

Intervening Respondent.

_____/

On November 11, 2015, Petitioners STEVEN A. FULSTONE, R.N. FULSTONE COMPANY, and CEAS COMPANY, hereinafter referred to collectively as "FULSTONE," filed a Petition for Review. The Petition sought to reverse or remand Order 1267 issued by the Nevada State Engineer regarding water rights in Smith Valley. On December 9, 2015, the State Engineer, through the Nevada Attorney Generals' Office, filed a Notice of Intent to Defend.

On November 25, 2015, FARMERS AGAINST CURTAILMENT ORDER, LLC, hereinafter referred to as "FACO," filed a Petition for Judicial Review. The Petition sought to reverse or remand Order 1268 issued by the Nevada State Engineer regarding water rights in Mason Valley. On December 9, 2015, the State Engineer the State Engineer by through the Nevada Attorney General's Office filed a Notice of Intent to Defend.

On November 25, 2015, FACO filed a Petition for Judicial Review. The Petition sought to reverse or remand Order 1267 issued by the State Engineer regarding water rights in Smith Valley. On December 9, 2015, the State Engineer the State Engineer by through the Nevada Attorney General's Office filed a Notice of Intent to Defend.

On January 19, 2016, the above-entitled Court entered an order that consolidated the three matters. The Parties agreed to the consolidation.

On December 22, 2015, PERI & SONS, INC and DESERT PEARL FARMS, LLC, hereinafter collectively referred to as "PERI," filed a Motion to Intervene in the matter regarding Order 1268. FACO filed an Opposition on January 11, 2016. The Court granted the Motion on March 13, 2016.

Pursuant to a Scheduling Order filed on December 29, 2015, the following the Petitioners filed opening briefs. FULSTONE and FACO filed Opening Briefs on February 5, 2016. PERI filed an Opposition Brief on February 26, 2016. The State Engineer filed an Answering Brief on February 29, 2016.

A hearing was held on March 17, 2016.

I. ISSUES PRESENTED

A. Does the State Engineer have authority pursuant to NRS 534.120 (2) to designate a preferred use of water in basins in which the groundwater is being depleted?

B. Does the State Engineer have authority pursuant to NRS 534.120 (1) and (2) (a) and (b) to establish a different priority between supplemental and primary underground water rights within the irrigation use?

C. Does substantial evidence exist in the record to support the State Engineer's water model used in the two curtailment orders?

II. ARGUMENTS

A. **FACO**

FACO argues that State Engineer has no authority to only curtail supplemental irrigation groundwater rights. FACO argues that the State Engineer has no statutory authority to curtail water rights in such a manner under NRS 534.120. FACO argues that rules of statutory construction would limit any language in NRS 534.120 that may be construed as authorizing the State Engineer to set preferential uses as only applying to applications. FACO argues that the State Engineer's past practice does not support such an interpretation. FACO argues that the Nevada Legislature recently refused to grant the State Engineer authority in active management areas. FACO argues that supplemental irrigation water rights do not constitute a use.

FACO cites to other state court decisions for persuasive authority that preferential uses cannot be applied to previously issued or vested water rights. FACO argues that Texas, Oregon, and California have rejected similar attempts to allow the designation of preferential uses.

FACO argues that the curtailment orders are not supported by substantial evidence as the State Engineer failed to identify an actual harm. FACO also argues that the proposed levels of curtailment are arbitrary and not based upon recent data. FACO argues that the predictions are insufficient to take away property rights. FACO argues that the State Engineer has better avenues to pursue conservation.

Finally, FACO argues that the State Engineer mischaracterized how supplemental water rights were issued. FACO disputes the statements used by the State Engineer regarding system yields and perennial yields and the basis upon which supplemental rights were issued.

B. **FULSTONE**

FULSTONE also argues that the two orders violate the prior appropriation doctrine as rights were not curtailed solely upon the basis of priority. FULSTONE argues that no statutory authority exists to reprioritize supplemental irrigation rights and non-supplemental irrigation rights. The prior appropriation doctrine does not authorize the State Engineer to re-designate priority within the same manner of use. FULSTONE argues that such an interpretation would be in conflict with other sections of NRS 534.120, as well as, NRS 534.110.

FULSTONE argues that NRS 534.120 does not allow designations of preferred uses after an application has been issued. FULSTONE argues that statutory construction requires such an interpretation. FULSTONE argues that the State Engineer has not previously designated preferred uses in Mason Valley and Smith Valley underground water applications. FULSTONE also points to legislation that was not passed that sought to grant such authority as further supports this position.

FULSTONE also argues that the Orders create unconstitutional takings. FULSTONE argues that the Orders result in taking property from one water right holder and granting it to another. FULSTONE argues that senior underground water right holders would have protested applications had they known that priority could be switched.

Finally, FULSTONE argues that the four-foot draw down target is not supported by substantial evidence. FULSTONE argues that fairness cannot provide a basis to determine the level of curtailment.

C. STATE ENGINEER

The State Engineer argues that the drought that has occurred over the last four years requires curtailment of underground water rights in Mason Valley and Smith Valley. The State Engineer argues that the four foot curtailment goal protects the aquifer. The State Engineer argues that the water model used represents a science based model that enables the State Engineer to make determinations as to how much water needs to be curtailed to manage the groundwater in Mason Valley and Smith Valley. The

State Engineer argues that the model is scientifically sound and allows the State Engineer to base curtailment on actual river flows which will be determined at a later date.

The State Engineer argues that NRS 534.120 authorizes the State Engineer to designate supplemental groundwater rights as a non-preferred use. The State Engineer argues that the Legislature only bound the State Engineer to use the specified uses within the statute when acting upon applications. The State Engineer argues that rules of statutory construction requiring the plain meaning of a statute require this construction.

Additionally, the State Engineer argues that supplemental rights are based upon a unique priority by their very conditions. Supplemental rights are not independent and only exist with conjunctive surface rights and therefore constitute subordinate water rights. The State Engineer submits that authority granted under NRS 534.110 (6) when read in conjunction with NRS 534.120 provide the State Engineer authority to curtail the supplemental rights. No taking occurs as the State Engineer has still respected relative priorities.

D. PERI

PERI argues that Nevada water law recognizes two distinct classes of underground irrigation rights. The distinction between supplemental underground water rights and primary underground rights is based upon the policy decision that supplemental rights were never intended to be used on an annual basis. Primary underground rights were intended to be used annually.

This distinction provides a logical basis to subordinate supplemental rights held by one irrigator to primary irrigation rights held by another irrigator during a prolonged drought. Primary rights must be given a higher priority.

PERI argues that this Court must give deference to the State Engineer's interpretation of statutes contained within NRS Chapter 534. NRS 534.120 (1) grants the State Engineer broad powers in times of

drought to issue regulations. Such regulations would include distinguishing supplemental rights from primary rights in the context of priority preferred uses.

PERI argues that several rules of statutory construction support the State Engineer's interpretation of NRS 534.120 as stated in Order 1267 and Order 1268. Support can be inferred by NRS 534.110, as well. Finally, PERI argues that this Court is not bound by its previous order which granted a preliminary injunction in 2015.

I. FINDINGS OF LAW

A. STANDARD OF REVIEW

NRS 533.450 (1) states:

> Except as otherwise provided in NRS 533.353, any person feeling aggrieved by any order or decision of the State Engineer, acting in person or through the assistants of the State Engineer or the water commissioner, affecting the person's interests, when the order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, or NRS 533.481, 534.193, 535.200 or 536.200, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated, but on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree. The order or decision of the State Engineer remains in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days after the rendition of the order or decision in question and notice thereof is given to the State Engineer as provided in subsection 3.

NRS 533.450 (10) states that the "decision of the State Engineer is prima facie correct, and the burden of proof is upon the party attacking the same." However, the presumption of correctness does not extend to legal conclusions. In *In re Nevada State Eng'r Ruling 5823*, 277 P.3d 449, 453 (2012), the Nevada Supreme Court held:

> The presumption does not extend to "purely legal questions," such as "the construction of a statute," as to which "the reviewing court may undertake independent review." Even so, this court recognizes the State Engineer's expertise and looks to his interpretation of a Nevada water law statute as persuasive, if not mandatory, authority. Put another way, "[w]hile the State Engineer's interpretation of a statute [may be] persuasive, it is not controlling."

Citing to: *Town of Eureka v. State Engineer,* 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) and, *State v. State Engineer,* 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

In *Pyramid Lake Paiute Tribe of Indians v Washoe County*, 112 Nev. 743, 751 (1996), the Nevada Supreme Court held:

> When reviewing the State Engineer's findings, factual determinations will not be disturbed on appeal if supported by substantial evidence. Moreover, as a general rule, a decision of an administrative agency will not be disturbed unless it is arbitrary and capricious.

Citing to: *State Engineer v. Morris,* 107 Nev. 699, 701 (1991), and *Shetakis Dist. v. State, Dep't Taxation,* 108 Nev. 901, 903 (1992).

In *Morris*, the Nevada Supreme Court held:

> In reviewing findings of the State Engineer we have stated that "neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision."

107 Nev. at 701, citing to *Revert v. Ray,* 95 Nev. 782, 786 (1979).

B. STATUTORY CONSTRUCTION

In *UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA*, v. *NEVADANS FOR SOUND GOVERNMENT*, 120 Nev. 712, 731 (2004), the Nevada Supreme Court held:

> In construing a statute, it is well-established that a court should consider multiple legislative provisions as a whole, and the language of a statute should be given its plain meaning unless doing so "violates the spirit of the act." Thus, when "a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." A statute is ambiguous, however, when it "is capable of being understood in two or more senses by reasonably informed persons." When a statute is ambiguous, a court may look to reason and public policy to determine what the legislature intended. "The meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it." Finally, a statute must be examined as a whole and, if possible, read to give meaning to all of its provisions.

Citations omitted.

In *Edgington v. Edgington*, 119 Nev. 577, (2003), the Nevada Supreme Court held that "[w]hen construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts." Citing to *Building & Constr. Trades v. Public Works,* 108 Nev. 605, 610, (1992). In *Building,* the Nevada Supreme Court held:

> When a statute is susceptible to but one natural or honest construction that alone is the construction that can be given. Randono v. CUNA Mutual Ins. Group, 106 Nev. 371, 793 P.2d 1324 (1990). When construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts. *Sheriff v. Morris,* 99 Nev. 109, 659 P.2d 852 (1983).

The use of the term "and" strongly suggests that there are two separate clauses in a provision. *Levesque v Lynch*, 802 F3d. 152, 154 (2015), citing to *Bruesewitz v Wyeth LLC*, 562 U.S. 223, 236 (2011). In *Office Max, Inc. v U.S.*, 428 F 3d. 583, 588-89 (2005), the Sixth Circuit Court of Appeals noted:

> *First,* dictionary definitions, legal usage guides and case law compel us to start from the premise that "and" usually does not mean "or." Dictionaries consistently feature a conjunctive definition of "and" as the primary meaning of the word, *see, e.g.,* Webster's Third New International Dictionary 80 (2002) ("along with or together with ... added to or linked to ... as well as"), or the first usage of the word historically, *see* Oxford English Dictionary (2d ed., 1989) ("[i]ntroducing a word, clause, or sentence, *which is to be taken side by side with, along with,* or *in addition to,* that which precedes it"); Caleb Nelson, *Originalism *589 and Interpretive Conventions,* 70 U. Chi. L.Rev. 519, 519 (2003) ("In all living languages, the conventional usages of individual words change over time. For illustrations, one need only consult the Oxford English Dictionary, which arranges its definitions of each word so that they proceed from the earliest usages to those that were introduced more recently."). *Cf.* Webster's Third New International Dictionary 80 (2002) (alternative six of the second definition of "and": "reference to either or both of two alternatives ... esp[ecially] in legal language when also plainly intended to mean *or* ").
>
> Legal usage guides are to the same effect. *See* 1A Norman J. Singer, Statutes and Statutory Construction § 21.14 at 179–80 (6th ed. 2002) ("Statutory phrases separated by the word 'and' are usually to be interpreted in the conjunctive."); *id.* at 183–84 ("While there may be circumstances which call for an interpretation of the words 'and' and 'or,' ordinarily these words are not interchangeable. The terms 'and' and 'or' are often misused in drafting statutes.... The literal meaning of these terms should be followed unless it

renders the statute inoperable or the meaning becomes questionable."); 1 *Bouvier's Law Dictionary and Concise Encyclopedia* 194–95 (3d Revision 1914) ("A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first. It is said to be equivalent to 'as well as.' "); *id.* at 195 ("It is sometimes construed as meaning 'or.' "); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 55 (2d ed. 1995) ("Oddly, *and* is frequently misused for *or* where a single noun, or one of two nouns, is called for.... Sloppy drafting sometimes leads courts to recognize that *and* in a given context means *or,* much to the chagrin of some judges.") (quoting MacDonald v. Pan Am. World Airways, Inc., 859 F.2d 742, 746 (9th Cir.1988)) (Kozinski, J., dissenting) ("We give our language, and our language-dependent legal system, a body blow when we hold that it is reasonable to read 'or' for 'and.' ").

Reflecting these traditional assumptions about the meaning of the term, the Supreme Court has said that "and" presumptively should be read in its "ordinary" conjunctive sense unless the "context" in which the term is used or "other provisions of the statute" dictate a contrary interpretation. *See Crooks v. Harrelson,* 282 U.S. 55, 58, 51 S.Ct. 49, 75 L.Ed. 156 (1930) ("We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word 'and' was used otherwise than in its ordinary sense."); *United States v. Field,* 255 U.S. 257, 262, 41 S.Ct. 256, 65 L.Ed. 617 (1921) ("These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively."); *City of Rome v. United States,* 446 U.S. 156, 172, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) ("By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent."). The federal courts of appeals have done likewise. *See, e.g., Bruce v. First Fed. Sav. & Loan Ass'n of Conroe Inc.,* 837 F.2d 712, 715 (5th Cir.1988) ("The word 'and' is therefore to be accepted for its conjunctive connotation rather than as a word interchangeable with 'or' except where strict grammatical construction will frustrate clear legislative intent.").

C. PRIORITY

In 1913, the Nevada Legislature declared in legislation approved on March 22, 1913, that, "The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public." Statutes of Nevada, Chapter 140, section 1, p. 192. At the same time, the Legislature created the Office of the State Engineer. Id. section 10, p. 194. In section 18 of the statute, the Legislature granted the State Engineer authority to determine the relative rights of water users. In sections 31 and 86, the Legislature granted the State Engineer authority to make rules governing the practice and procedure in all contests before his office and to insure the "proper and orderly exercise of the powers herein granted, and the speedy accomplishment of the purposes of the

act. Id. p. 201 and 219. The final orders of the State Engineer and the adjudication and determination of the rights of users were "conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the adjudication...." Id. section 44, p. 204.

The 1913 Legislature required any person seeking to appropriate water to file an application with the State Engineer. Id. section 59, p. 208. The application required the applicant to delineate the use. Id. p. 209. The Legislature stated that:

> [W]here there is no unappropriated water in the proposed source of supply, or where the proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interests, it shall be the duty of the state engineer to reject said application and refuse to issue the permit asked for."

Id., section 63, p. 211.

In 1915, The Nevada Legislature passed an act regarding the "conservation of underground waters." Statutes of Nevada, Chapter 210, p. 323. Section 1 stated:

> All underground waters, save and except percolating water, the course and boundaries of which are incapable of determination, are hereby declared to be subject to appropriation under the laws of the state relating to the appropriation and use of water.

The statute provided that the District Attorney could take action to ensure that wells were properly constructed and water was not wasted. Id. Sections 3-7.

In 1939, the Nevada Legislature passed legislation specifically concerning the underground waters within the State of Nevada. Statutes of Nevada, Chapter 178, p. 274. The Legislature declared:

> All underground waters within the boundaries of the state belong to the public, and subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of the state relating to the appropriation and the use of water and not otherwise, therefore it is the intention of the legislature, by this act, to prevent the waste of underground waters and the pollution and contamination thereof and provide for the administration of the provisions hereof by the state engineer, who is hereby empowered to make such rules and regulations within the terms of this act as may be necessary for the proper execution of the provisions of this act.

Id., Section 1, p. 274. The act did not apply to the use of underground water for domestic purposes where the draught did not exceed two gallons per minute. Id., Section 3, pp. 274-75. NRS 534.020 contains the codification of this language.

This statute recognized in Section 4 that the State Engineer had to distinguish between well water rights that were acquired before and after March 22, 1913. Id. at p. 275. The statute stated that the State Engineer could not supervise the distribution of waters from wells in which the rights were acquired prior to March 22, 1913, until the rights were adjudicated. The Legislature stated that a legal right to appropriate underground water for beneficial use by means of a well, tunnel, or otherwise could only be acquired after March 22, 1913, by "complying with the provisions of the general water law of this state pertaining to the appropriation of water." Id., Section 9, p. 277. "The date of priority of all appropriations of water from an underground source, mentioned in this section, is the date when application is made in proper form and filed in the office of the state engineer pursuant to the general water laws of this state."

In Section 10 of the act, the 1939 Legislature stated:

> The state engineer shall administer this act and shall prescribe all necessary rules and regulations within the terms of this act for such administration. The state engineer may require periodical statements of water elevations, water used and acreage on which water was used from all holders of permits and claimants of vested rights; may upon his own initiation conduct pumping tests to determine if over-pumping is indicated, to determine the specific capacity of the aquifers and to determine permeability characteristics; he shall determine if there is unappropriated water in the area affected and shall issue permits only if such determination is affirmative. The state engineer at any time may hold a hearing on his own motion, or upon petition signed by representative body of users of underground water in any area or subarea, to determine whether the water supply within such area or subarea is adequate for the needs of all the permittees and all vested-right claimants, and if the determination is negative the state engineer shall order that withdrawals be restricted to conform to priority rights during the period of shortage.

Id., Section 10, p. 278. The Statute was effective on March 25, 1939.

In 1947, The Nevada Legislature amended the 1939 legislation. In Chapter 43, section 12, the Legislature stated:

> Existing water rights to the use of underground water are hereby recognized. For the purpose of this act a vested right is a water right on underground water acquired from an

> artesian well or from a definable aquifer prior to March 22, 1913, and an underground water right on percolating water, the course and boundaries of which are incapable of determination, acquired prior to March 25, 1939....

This language is codified in NRS 534.100.

In 1955, the Legislature addressed underground water again. Statutes of Nevada, Chapter 212, p. 328. In section 5, p. 331, previous legislation was amended to include the following language:

> The state engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the ground-water supply may not be adequate for the needs of all permittees and all vested-right claimants, and if his findings so indicate the state engineer may order that withdrawals be restricted to conform to priority rights.

In section 6, p. 332, the Legislature included the following new language and indicated that it was to follow language adopted in Statutes of Nevada, Chapter 178:

> Within an area that has been designated by the state engineer, as herein provided for, where in his judgment, the ground-water basin is being depleted, the state engineer in his administrative capacity is herewith empowered to make such rules, regulations and orders as are deemed essential for the welfare of the area involved.
>
> In the interest of public welfare, the state engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted and in acting on applications to appropriate ground water he may designate such preferred uses in different categories with respect to the particular areas involved within the following limits: domestic, municipal, quasi-municipal, industrial, irrigation, mining and stockwatering uses....

This language was codified as NRS 534.120 (1) and (2).

The 2011 Legislature enacted legislation regarding critical management basins and the withdrawal of rights based upon priority but attempted to state that domestic wells were subject to the priority withdrawal system:

> ~~[The]~~ ***Except as otherwise provided in subsection 7, the*** State Engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate for the needs of all permittees and all vested-right claimants, and if the findings of the State Engineer so indicate, the State Engineer may order that withdrawals, ***including, without limitation, withdrawals from domestic wells,*** be restricted to conform to priority rights.

Statutes of Nevada, Chapter 265, pp. 1386-87. This language is codified as NRS 534.110 (6) and (7).

NRS 534.110 (6) and (7) authorize the State Engineer to designate a basin as a critical management area when "withdrawals of ground water consistently exceed the perennial yields of the basin." The State Engineer shall order that withdrawals take place once a basin has been designated as a critical management area for at least 10 consecutive years unless a groundwater management plan has been approved. NRS 534.110 (7) (b).

During a hearing on A.B. 419, during the 2011 Legislative Session, the following testimony was received:

> The State Engineer must hold a hearing on the management plan which is brought forward under NRS Chapter 534 and approve that groundwater management plan for a critical management area. Again, I am just walking Assembly Committee on Government Affairs March 30, 2011 Page 68 through this very rapidly. I think there is another point and it is on page 5, line 37 of the bill. I think it does something to reinforce what we heard in the last bill and that is that the State Engineer may order that withdrawal, including, without limitations, withdrawals from domestic wells. Technically, within NRS Chapter 534, and I want to make sure the Committee understands, when he moves into a groundwater basin, he is required to regulate by priority. We do have priority numbers assigned to domestic wells. They also will be regulated with the language in this bill. I want to make sure everyone understands that. I know that will be a big issue in some areas.

Assembly Committee on Government Affairs March 30, 2011 Page 68. Further testimony included:

> Truly, everyone is aware that at the point you are issued a water right, it is a priority right. That is Nevada water law. It is first in time, first in right. If you have a junior right, I think this deals with Assemblyman Goedhart's question and exactly how those rights are brought forward. Where did you acquire the right? Typically though, with domestic wells in the state, if you have a parcel created, you have a right to drill a domestic well and I do not think anyone argues that. But at the point they have to start adjusting the perennial yield of that basin, this bill just says domestic wells have to be included in that. Yes, you probably could be caught up in that and have a junior water right that the State Engineer would consider suspending but, on the flip side, how is he going to suspend your domestic well permit if you do not have municipal water available to you or some other avenue? There is no doubt domestic is a higher priority use, than say, agricultural, so I think he would have to deal with the manner of use that was concerned. You cannot displace that homeowner and say, "Okay, all you domestics are gone but we are going to let Mr. Goedhart go ahead and pump his water to use for his cows or his dairy." It becomes an

> issue of the highest and best manner of use, which is another piece of it. Then it probably becomes a taking from Mr. Goedhart. And he would probably sue.

Id. at p.72.

In *Andersen Family Associates v. Hugh Ricci*, P.E.,124 Nev. 182, 188-89 (2008), the Nevada Supreme Court discussed the three types of water rights:

> Generally, "[t]he term 'water right' means ... the right to divert water by artificial means for beneficial use from a natural spring or stream." In Nevada, there are three different types of water rights: vested, permitted, and certificated. First, "vested" rights are those that existed under Nevada's common law before the provisions currently codified in NRS Chapter 533 were enacted in 1913. These rights may not be impaired by statutory law and may be used as granted in the original decree until modified by a later permit. Second, "permitted" rights refer to rights granted after the State Engineer approves a party's "application for water rights." Such permits grant the right to develop specific amounts of water for a designated purpose. Third, "Certificated" rights are statutory rights granted after a party perfects his or her permitted water rights. In order to perfect permitted water rights, "an applicant must file proof of beneficial use with the State Engineer. Once proof has been filed, the State Engineer will issue a certificate in place of the permit."

Citations Omitted.

The *Anderson* Court noted that:

> Still, we further recognized that vested rights were not subject to impairment by statute: The greater portion of the water rights upon the streams of the state were acquired before any statute was passed prescribing a method of appropriation. Such rights have uniformly been recognized by the courts as being vested under the common law of the state. *Nothing in the act shall be deemed to impair these vested rights; that is, they shall not be diminished in quantity or value.* As they are all prior in time to water rights secured in accordance with later statutory provisions, such priorities must be recognized.

Id., citing to *Ormsby County v Kearney*, 37 Nev. 314, 142 P. 803 (1914). The *Anderson Court* noted that the loss of priority "certainly affects the right's value." 124 Nev. at 190. The *Anderson* Court noted that the loss of priority could amount to a "de facto loss of rights depending on water flow." Id.

Anderson, concerned vested water rights. The holding may or may not apply to permitted and certificated water rights as well. One commentary the Court reviewed stated:

> The courts have been mixed on applying takings law to governmental regulation that reduces the quantity of water historically available under a water right. Under ordinary regulatory takings law, the exercise of legislatively-authorized regulatory authority that only incidentally affects the exercise of water rights should not run afoul of the Fifth and Fourteenth Amendment limitation on governmental takings of private property, as now outlined by the US Supreme Court. Law and regulation regularly affect the uses of property. So long as the exercise of regulatory authority does not totally eliminate use of the property, the courts have not been inclined to find the exercise of governmental legal authority to constitute a regulatory taking. Some courts, however, have apparently followed the other prong of this analysis under which physical taking of some discrete portion of property for some public purpose without compensation is determined to constitute a taking. This approach misconstrues the nature of a water right and assumes the holder of the right has some property right in the water itself. In fact, a water right only authorizes diversion and use of water in compliance with law. To the degree new legal regulations place limitations on the historical manner in which the water right has been used, including amounts of water that have been diverted, the use must adjust accordingly. State authority in this area seems especially evident since states are regarded as the legal owners of the water resources within their boundaries. Consequently, states have authority to enact laws regulating the manner in which water rights are used. To date, states have been remarkably unwilling to exercise this authority. The recommendations offered here are among the things that states might consider to bring their prior appropriation laws up to date.

Lawrence J. MacDonnell, *PRIOR APPROPRIATION: A REASSESSMENT*, 18 U. Denv. Water L. Rev. 228, 293 (2015), citing to : James H. Davenport &Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional "Takings" Occur?*, 9 U.Denv. Water L. Rev. 1, 23-55 (2005); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931 (2012); John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 VT. J. ENVTL.L. 579 (2010); Douglas L. Grant, *ESA Reductions in Reclamation of Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331, 1361-71 (2006); Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2002); John D. Leshy, *A Conversation about Takings and Water Rights*, 83 TEX. L. REV. 1985 (2005); Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 SANTA CLARA L. REV. 365 (2011).

Supplemental underground water rights are conditional water rights. The holder of the right has no stated quantity of water promised. The right is subordinate to the quantity of surface water used. The holder of supplemental underground water rights may receive no underground water, some underground water, or a full allocation of underground water.

As the Nevada Supreme Court stated in *Bacher v. Office of State Engineer of State of Nevada*, 122 Nev. 1110, 1116 (2006):

> NRS Chapter 533 prescribes the general requirements that every applicant must meet to appropriate water. Its fundamental requirement, as articulated in NRS 533.030(1), is that water only be appropriated for "beneficial use." In Nevada, beneficial use is "the basis, the measure and the limit of the right to the use of water." The right to use water for a beneficial use depends on a party actually using the water. Under NRS 533.070(1), once beneficial use is established, "[t]he quantity of water ... appropriated ... shall be limited to such water as shall reasonably be required for the beneficial use to be served." Once the party's "necessity for the use of water" ceases to exist, "the right to divert [the water] ceases" as well.

Emphasis added. No certainty exists that any underground water will actually be used annually. Necessity for the use of underground water must be presupposed as the subsequent condition of lack of a surface water right must occur.

However, supplemental water rights were and continue to be processed under the same statutes as primary underground water rights. For instance, NRS 534.080 states:

> 1. A legal right to appropriate underground water for beneficial use from an artesian or definable aquifer subsequent to March 22, 1913, or from percolating water, the course and boundaries of which are incapable of determination, subsequent to March 25, 1939, can only be acquired by complying with the provisions of chapter 533 of NRS pertaining to the appropriation of water.
> 2. The State Engineer may, upon written notice sent by registered or certified mail, return receipt requested, advise the owner of a well who is using water therefrom without a permit to appropriate the water to cease using the water until the owner has complied with the laws pertaining to the appropriation of water. If the owner fails to initiate proceedings to secure such a permit within 30 days after the date of the notice, the owner is guilty of a misdemeanor.
> 3. Except as otherwise provided in subsection 4 and NRS 534.180, the date of priority of all appropriations of water from an underground source mentioned in this section is the date when application is made in proper form and filed in the Office of the State Engineer pursuant to the provisions of chapter 533 of NRS.
> 4. The date of priority for the use of underground water from a well for domestic purposes where the draught does not exceed 2 acre-feet per year is the date of completion of the well as:
> (a) Recorded by the well driller on the log the well driller files with the State Engineer pursuant to NRS 534.170; or
> (b) Demonstrated through any other documentation or evidence specified by the State Engineer.

II. CONCLUSIONS OF LAW

The Court finds that substantial evidence existed in the record to support the State Engineer's determination that groundwater is being depleted in the Smith Valley Basin and the Mason Valley Basin. The Court finds that substantial evidence exists in the record to support the State Engineer's decision to curtail water rights in the amount sought in the orders. The Court finds that substantial evidence exists in the record to support the water model used by the State Engineer to calculate the amount of water to curtail. However, the Court does not agree that the State Engineer has legal authority to reprioritize irrigation underground water rights on the basis the rights are supplemental.

The State Engineer may designate and regulate preferred uses under NRS 534.120 (2). The statutory language when read in its whole context indicates that the Legislature gave the State Engineer the authority to designate preferred uses when the groundwater in a basin is being depleted. The language in the original statute passed in 1955 indicates to this Court that the Legislature was concerned about setting preferred uses in a time of drought.

The Statutes of Nevada, Chapter 178, Section 6 states prior to the conjunction "and":

> In the interest of public welfare, the state engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted....

The statute states after the conjunction "and":

> in acting on applications to appropriate ground water he may designate such preferred uses in different categories with respect to the particular areas involved...

Both processes are followed by the last limitation clause:

> within the following limits: domestic, municipal, quasi-municipal, industrial, irrigation, mining and stockwatering uses....

To read the statute as being controlled by the phrase "in acting on applications" would make the entire first portion surplusage. The Court would have to strike the first "designate" clause and the conjunction "and" to arrive at the reading suggested by FACO and FULSTONE.

Such a reading also goes against the context of the statute. The Statute in section 6 stated that the Legislature intended the language in section 6 of Senate Bill 104 to immediately follow section 10 of Chapter 178, Statutes of Nevada 1939. The 1955 Legislature was clearly aware of the priority system when it passed Section 6. If the 1955 Legislature had wanted to restrict the designations of preferred uses to new applications, it could have done so without including statutory language that directed the State Engineer to "designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted."

This represents the opposite of what occurred in *Phillips v Gardner*, 469 P. 2d 42 (Ct. App. Ore. 1970). In *Phillips*, a statute designating preferred uses had been adopted in 1893. The Oregon Legislature then adopted a comprehensive priority scheme in 1909. In 1955, the Oregon Legislature passed a statute that specifically prohibited the Water Resources Board from altering priority. The Oregon Court of Appeals determined that the 1909 statute implicitly restricted the 1893 statute's application to pre-1909 rights.

Additionally, applying the limitation language to applications only leads to an absurd reading of the statute. This Court understands that the "Last Antecedent Canon of Statutory Construction" would presume such an interpretation. However, this Court will not apply the Last Antecedent Canon as the "Whole Context Canon of Statutory Construction" would apply.

The Court agrees with the State Engineer that supplemental underground water rights are not the same as primary underground water rights. Supplemental rights are conditional rights based upon the amount of surface water the underground water right holder receives in an irrigation season.

Supplemental rights also have restrictions on alienation and the place of diversion. The Court agrees that such rights may be considered as subordinate rights.

However, designation of the rights as being subordinate rights begs the question, "Subordinate to what? The most obvious answer is, "Subordinate to the surface water right." The least obvious answer is, "Subordinate to primary underground water rights." No statutory authority or case law was provided to the Court that the Legislature or State Engineer ever contemplated a priority system that subordinated supplemental underground water rights to later issued primary underground water rights. The adjective "supplemental" does not pertain to a use as defined under Nevada law. NRS 534.080 directs how priority is established for underground water rights at the application stage.

The Court did review the statutes to determine if the decision to reprioritize can be made pursuant to NRS 534.120 (1) upon a theory that the reprioritization does not create a sub-preferred use but rather it can occur on the basis it protects the welfare of the area involved. This Court finds that NRS 534.120 (2) contains specific language which limits the State Engineer's authority regarding changing the priority system. The specific language must control over the general language.

The record does not indicate that the State Engineer weighed how such reprioritization would affect the different irrigators. The assumption was that those holding surface rights will get some surface water, so they can make do without the underground water. Such a post hoc assumption is repugnant to the Legislature's previous determination that the priority system protects the welfare of Nevada. The assumption cannot apply to all irrigators as it ignores situations in which the curtailing of any water may force a farmer not to plant.

For the sake of argument, if reprioritization could occur between supplemental and primary groundwater rights, this Court cannot fathom how such an authority could be exercised on an ad hoc

basis let alone a post hoc basis. Such a reprioritization would be applicable to all basins in Nevada. It would follow that the State Engineer would have to adopt a general regulation applicable statewide.

The Court does not read NRS 534.110 (7) as conflicting with NRS 534.120 (2) if the State Engineer designates preferred uses in limited times of drought. NRS 534.110 (7) only authorizes the designation of a critical management area in "any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin." (emphasis added). At the point that determination occurs, then all appropriators must face strict priority without designated preferred uses. The fact that the Legislature felt compelled to include the domestic use indicates to this Court that the Legislature understood that preferential designations of uses had to be addressed. The two statutes can be read in harmony.

If a preferred use is properly designated pursuant to NRS 534.120, then no taking occurs of rights issued after 1955 as the holders were on statutory notice that the State Engineer had authority to designate preferred uses in times of drought. The Court would have to reexamine the issue if pre-1955 rights were involved in the curtailment. Underground water rights may also have to be treated differently depending upon whether they were recognized prior to 1947, 1939, 1915, and 1913.

In summary, the Court finds that the State Engineer did not curtail underground water rights in conformity with Nevada law. The State Engineer does not have authority under NRS Chapter 534 to change priority between supplemental underground water rights and primary underground water rights to create a sub-use within the designated use of irrigation. The State Engineer does not have authority under NRS Chapter 534 to change priority between supplemental underground water rights and primary underground water rights under a theory that it is in the welfare of the residents.

Based upon the above and good cause appearing, **IT IS HEREBY ADJUDGED, ORDERED and DECREED** that the Petitioners' requests that the Court reverse the State Engineer's Orders 1267 and 1268 are **GRANTED.**

DATED: This _____ day of March, 2016.

Hon. LEON ABERASTURI
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I, Joe Dreyer, am an employee of The Honorable Leon Aberasturi, and that on this date pursuant to NRCP 5(b), I mailed at Yerington, Nevada, a true copy of the foregoing document addressed to:

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DATED: This 21 day of March, 2016.

Employee of Hon. Leon Aberasturi