

1 **Case No.** 15-CV-01395
2 15-CV-01396
3 15-CV-01397

4 **Dept. II**

2016 MAR 21 PM 5:13

COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
STATE OF NEVADA
DEPUTY

5 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF LYON

7 ***

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

13 Petitioners,

14 vs.

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

20 Respondent.

AMENDED ORDER
AFTER HEARING

21 FARMERS AGAINST CURTAILMENT
22 ORDER, LLC,

23 Petitioner,

24 vs.

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

Respondent.

1
2 FARMERS AGAINST CURTAILMENT
3 ORDER, LLC,

4 Petitioner,

5 vs.

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

10 Respondent,

11 And,

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

14 Intervening Respondent.
15
16

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

22 On November 25, 2015, FARMERS AGAINST CURTAILMENT ORDER, LLC, hereinafter
23 referred to as "FACO," filed a Petition for Judicial Review. The Petition sought to reverse or remand
24 Order 1268 issued by the Nevada State Engineer regarding water rights in Mason Valley. On December
25 9, 2015, the State Engineer the State Engineer by through the Nevada Attorney General's Office filed a
26 Notice of Intent to Defend.
27
28

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

5
6 On January 19, 2016, the above-entitled Court entered an order that consolidated the three
7 matters. The Parties agreed to the consolidation.

8
9 On December 22, 2015, PERI & SONS, INC and DESERT PEARL FARMS, LLC, hereinafter
10 collectively referred to as "PERI," filed a Motion to Intervene in the matter regarding Order 1268.
11 FACO filed an Opposition on January 11, 2016. The Court granted the Motion on March 13, 2016.

12 Pursuant to a Scheduling Order filed on December 29, 2015, the following the Petitioners filed
13 opening briefs. FULSTONE and FACO filed Opening Briefs on February 5, 2016. PERI filed an
14 Opposition Brief on February 26, 2016. The State Engineer filed an Answering Brief on February 29,
15 2016.

16
17 A hearing was held on March 17, 2016.

18 **I. ISSUES PRESENTED**

19
20 A. Does the State Engineer have authority pursuant to NRS 534.120 (2) to designate a preferred
21 use of water in basins in which the groundwater is being depleted?

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

25 C. Does substantial evidence exist in the record to support the State Engineer's water model
26 used in the two curtailment orders?
27

28 **II. ARGUMENTS**

1 **A. FACO**
2
3

4 FACO argues that State Engineer has no authority to only curtail supplemental irrigation
5 groundwater rights. FACO argues that the State Engineer has no statutory authority to curtail water
6 rights in such a manner under NRS 534.120. FACO argues that rules of statutory construction would
7 limit any language in NRS 534.120 that may be construed as authorizing the State Engineer to set
8 preferential uses as only applying to applications. FACO argues that the State Engineer's past practice
9 does not support such an interpretation. FACO argues that the Nevada Legislature recently refused to
10 grant the State Engineer authority in active management areas. FACO argues that supplemental irrigation
11 water rights do not constitute a use.
12

13 FACO cites to other state court decisions for persuasive authority that preferential uses cannot be
14 applied to previously issued or vested water rights. FACO argues that Texas, Oregon, and California
15 have rejected similar attempts to allow the designation of preferential uses.
16

17 FACO argues that the curtailment orders are not supported by substantial evidence as the State
18 Engineer failed to identify an actual harm. FACO also argues that the proposed levels of curtailment are
19 arbitrary and not based upon recent data. FACO argues that the predictions are insufficient to take away
20 property rights. FACO argues that the State Engineer has better avenues to pursue conservation.
21

22 Finally, FACO argues that the State Engineer mischaracterized how supplemental water rights
23 were issued. FACO disputes the statements used by the State Engineer regarding system yields and
24 perennial yields and the basis upon which supplemental rights were issued.
25

26 **B. FULSTONE**
27
28

1 FULSTONE also argues that the two orders violate the prior appropriation doctrine as rights were
2 not curtailed solely upon the basis of priority. FULSTONE argues that no statutory authority exists to
3 reprioritize supplemental irrigation rights and non-supplemental irrigation rights. The prior appropriation
4 doctrine does not authorize the State Engineer to re-designate priority within the same manner of use.
5 FULSTONE argues that such an interpretation would be in conflict with other sections of NRS 534.120,
6 as well as, NRS 534.110.
7

8 FULSTONE argues that NRS 534.120 does not allow designations of preferred uses after an
9 application has been issued. FULSTONE argues that statutory construction requires such an
10 interpretation. FULSTONE argues that the State Engineer has not previously designated preferred uses
11 in Mason Valley and Smith Valley underground water applications. FULSTONE also points to
12 legislation that was not passed that sought to grant such authority as further supports this position.
13

14 FULSTONE also argues that the Orders create unconstitutional takings. FULSTONE argues that
15 the Orders result in taking property from one water right holder and granting it to another. FULSTONE
16 argues that senior underground water right holders would have protested applications had they known
17 that priority could be switched.
18

19 Finally, FULSTONE argues that the four-foot draw down target is not supported by substantial
20 evidence. FULSTONE argues that fairness cannot provide a basis to determine the level of curtailment.
21

22 **C. STATE ENGINEER**

23 The State Engineer argues that the drought that has occurred over the last four years requires
24 curtailment of underground water rights in Mason Valley and Smith Valley. The State Engineer argues
25 that the four foot curtailment goal protects the aquifer. The State Engineer argues that the water model
26 used represents a science based model that enables the State Engineer to make determinations as to how
27 much water needs to be curtailed to manage the groundwater in Mason Valley and Smith Valley. The
28

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

3
4 The State Engineer argues that NRS 534.120 authorizes the State Engineer to designate
5 supplemental groundwater rights as a non-preferred use. The State Engineer argues that the Legislature
6 only bound the State Engineer to use the specified uses within the statute when acting upon applications.
7 The State Engineer argues that rules of statutory construction requiring the plain meaning of a statute
8 require this construction.

9
10 Additionally, the State Engineer argues that supplemental rights are based upon a unique priority
11 by their very conditions. Supplemental rights are not independent and only exist with conjunctive
12 surface rights and therefore constitute subordinate water rights. The State Engineer submits that
13 authority granted under NRS 534.110 (6) when read in conjunction with NRS 534.120 provide the State
14 Engineer authority to curtail the supplemental rights. No taking occurs as the State Engineer has still
15 respected relative priorities.

16
17 **D. PERI**

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

22
23 This distinction provides a logical basis to subordinate supplemental rights held by one irrigator
24 to primary irrigation rights held by another irrigator during a prolonged drought. Primary rights must be
25 given a higher priority.

26
27 PERI argues that this Court must give deference to the State Engineer's interpretation of statutes
28 contained within NRS Chapter 534. NRS 534.120 (1) grants the State Engineer broad powers in times of

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

3
4 PERI argues that several rules of statutory construction support the State Engineer's interpretation
5 of NRS 534.120 as stated in Order 1267 and Order 1268. Support can be inferred by NRS 534.110, as
6 well. Finally, PERI argues that this Court is not bound by its previous order which granted a preliminary
7 injunction in 2015.

8 I. FINDINGS OF LAW

9 A. STANDARD OF REVIEW

10
11 NRS 533.450 (1) states:

12 Except as otherwise provided in NRS 533.353, any person feeling aggrieved by any order
13 or decision of the State Engineer, acting in person or through the assistants of the State
14 Engineer or the water commissioner, affecting the person's interests, when the order or
15 decision relates to the administration of determined rights or is made pursuant to NRS
16 533.270 to 533.445, inclusive, or NRS 533.481, 534.193, 535.200 or 536.200, may have
17 the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an
18 appeal, which must be initiated in the proper court of the county in which the matters
19 affected or a portion thereof are situated, but on stream systems where a decree of court
20 has been entered, the action must be initiated in the court that entered the decree. The
21 order or decision of the State Engineer remains in full force and effect unless proceedings
22 to review the same are commenced in the proper court within 30 days after the rendition
23 of the order or decision in question and notice thereof is given to the State Engineer as
24 provided in subsection 3.

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

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

1
2 Citing to: *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) and, *State v.*
3 *State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

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

6
7 When reviewing the State Engineer's findings, factual determinations will not be disturbed
8 on appeal if supported by substantial evidence. Moreover, as a general rule, a decision of
9 an administrative agency will not be disturbed unless it is arbitrary and capricious.

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

12 In *Morris*, the Nevada Supreme Court held:

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

18 107 Nev. at 701, citing to *Revert v. Ray*, 95 Nev. 782, 786 (1979).

19 **B. STATUTORY CONSTRUCTION**

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

22 In construing a statute, it is well-established that a court should consider multiple
23 legislative provisions as a whole, and the language of a statute should be given its plain
24 meaning unless doing so “violates the spirit of the act.” Thus, when “a statute is clear on
25 its face, a court may not go beyond the language of the statute in determining the
26 legislature's intent.” A statute is ambiguous, however, when it “is capable of being
27 understood in two or more senses by reasonably informed persons.” When a statute is
28 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.

1
2 Citations omitted.

3
4 In *Edgington v. Edgington*, 119 Nev. 577, (2003), the Nevada Supreme Court held that “[w]hen
5 construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the
6 statute should be read to give meaning to all of its parts.” Citing to *Building & Constr. Trades v. Public*
7 *Works*, 108 Nev. 605, 610, (1992). In *Building*, the Nevada Supreme Court held:

8
9 When a statute is susceptible to but one natural or honest construction that alone is the
10 construction that can be given. *Randono v. CUNA Mutual Ins. Group*, 106 Nev. 371, 793
11 P.2d 1324 (1990). When construing a specific portion of a statute, the statute should be
12 read as a whole, and, where possible, the statute should be read to give meaning to all of
13 its parts. *Sheriff v. Morris*, 99 Nev. 109, 659 P.2d 852 (1983).

14 The use of the term “and” strongly suggests that there are two separate clauses in a provision.
15 *Levesque v Lynch*, 802 F3d. 152, 154 (2015), citing to *Bruesewitz v Wyeth LLC*, 562 U.S. 223, 236
16 (2011). In *Office Max, Inc. v U.S.*, 428 F 3d. 583, 588-89 (2005), the Sixth Circuit Court of Appeals
17 noted:

18 *First*, dictionary definitions, legal usage guides and case law compel us to start
19 from the premise that “and” usually does not mean “or.” Dictionaries consistently feature
20 a conjunctive definition of “and” as the primary meaning of the word, *see, e.g.*, Webster's
21 Third New International Dictionary 80 (2002) (“along with or together with ... added to or
22 linked to ... as well as”), or the first usage of the word historically, *see Oxford English*
23 *Dictionary* (2d ed., 1989) (“[i]ntroducing a word, clause, or sentence, *which is to be taken*
24 *side by side with, along with, or in addition to, that which precedes it*”); Caleb
25 Nelson, *Originalism* *589 and *Interpretive Conventions*, 70 U. Chi. L.Rev. 519, 519
26 (2003) (“In all living languages, the conventional usages of individual words change over
27 time. For illustrations, one need only consult the Oxford English Dictionary, which
28 arranges its definitions of each word so that they proceed from the earliest usages to those
29 that were introduced more recently.”). *Cf.* Webster's Third New International Dictionary
30 80 (2002) (alternative six of the second definition of “and”: “reference to either or both of
31 two alternatives ... esp[ecially] in legal language when also plainly intended to mean *or*”).

32 Legal usage guides are to the same effect. *See* 1A Norman J. Singer, *Statutes and*
33 *Statutory Construction* § 21.14 at 179–80 (6th ed. 2002) (“Statutory phrases separated by
34 the word ‘and’ are usually to be interpreted in the conjunctive.”); *id.* at 183–84 (“While
35 there may be circumstances which call for an interpretation of the words ‘and’ and ‘or,’
36 ordinarily these words are not interchangeable. The terms ‘and’ and ‘or’ are often misused
37 in drafting statutes.... The literal meaning of these terms should be followed unless it

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

12 Reflecting these traditional assumptions about the meaning of the term, the
13 Supreme Court has said that “and” presumptively should be read in its “ordinary”
14 conjunctive sense unless the “context” in which the term is used or “other provisions of
15 the statute” dictate a contrary interpretation. *See Crooks v. Harrelson*, 282 U.S. 55, 58, 51
16 S.Ct. 49, 75 L.Ed. 156 (1930) (“We find nothing in the context or in other provisions of
17 the statute which warrants the conclusion that the word ‘and’ was used otherwise than in
18 its ordinary sense.”); *United States v. Field*, 255 U.S. 257, 262, 41 S.Ct. 256, 65 L.Ed. 617
19 (1921) (“These conditions are expressed conjunctively; and it would be inadmissible, in
20 construing a taxing act, to read them as if prescribed disjunctively.”); *City of Rome v.*
21 *United States*, 446 U.S. 156, 172, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (“By describing
22 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly
23 intended that a voting practice not be precleared unless *both* discriminatory purpose and
24 effect are absent.”). The federal courts of appeals have done likewise. *See, e.g., Bruce v.*
25 *First Fed. Sav. & Loan Ass'n of Conroe Inc.*, 837 F.2d 712, 715 (5th Cir.1988) (“The word
26 ‘and’ is therefore to be accepted for its conjunctive connotation rather than as a word
27 interchangeable with ‘or’ except where strict grammatical construction will frustrate clear
28 legislative intent.”).

19 C. PRIORITY

20
21 In 1913, the Nevada Legislature declared in legislation approved on March 22, 1913, that, “The
22 water of all sources of water supply within the boundaries of the state, whether above or beneath the
23 surface of the ground, belongs to the public.” Statutes of Nevada, Chapter 140, section 1, p. 192. At the
24 same time, the Legislature created the Office of the State Engineer. *Id.* section 10, p. 194. In section 18
25 of the statute, the Legislature granted the State Engineer authority to determine the relative rights of
26 water users. In sections 31 and 86, the Legislature granted the State Engineer authority to make rules
27 governing the practice and procedure in all contests before his office and to insure the “proper and
28 orderly exercise of the powers herein granted, and the speedy accomplishment of the purposes of the

1 act. Id. p. 201 and 219. The final orders of the State Engineer and the adjudication and determination of
2 the rights of users were “conclusive as to all prior appropriations, and the rights of all existing claimants
3 upon the stream or other body of water lawfully embraced in the adjudication....” Id. section 44, p. 204.
4

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

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

12 Id., section 63, p. 211.

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

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

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

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

22 All underground waters within the boundaries of the state belong to the public, and subject
23 to all existing rights to the use thereof, are subject to appropriation for beneficial use only
24 under the laws of the state relating to the appropriation and the use of water and not
25 otherwise, therefore it is the intention of the legislature, by this act, to prevent the waste of
26 underground waters and the pollution and contamination thereof and provide for the
27 administration of the provisions hereof by the state engineer, who is hereby empowered to
28 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.

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

4 This statute recognized in Section 4 that the State Engineer had to distinguish between well water
5 rights that were acquired before and after March 22, 1913. Id. at p. 275. The statute stated that the State
6 Engineer could not supervise the distribution of waters from wells in which the rights were acquired prior
7 to March 22, 1913, until the rights were adjudicated. The Legislature stated that a legal right to
8 appropriate underground water for beneficial use by means of a well, tunnel, or otherwise could only be
9 acquired after March 22, 1913, by "complying with the provisions of the general water law of this state
10 pertaining to the appropriation of water." Id., Section 9, p. 277. "The date of priority of all
11 appropriations of water from an underground source, mentioned in this section, is the date when
12 application is made in proper form and filed in the office of the state engineer pursuant to the general
13 water laws of this state."
14

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

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

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

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

28 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

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

4 This language is codified in NRS 534.100.

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

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

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

14 Within an area that has been designated by the state engineer, as herein provided for,
15 where in his judgment, the ground-water basin is being depleted, the state engineer in his
16 administrative capacity is herewith empowered to make such rules, regulations and orders
17 as are deemed essential for the welfare of the area involved.

18 In the interest of public welfare, the state engineer is authorized and directed to designate
19 preferred uses of water within the respective areas so designated by him and from which
20 the ground water is being depleted and in acting on applications to appropriate ground
21 water he may designate such preferred uses in different categories with respect to the
22 particular areas involved within the following limits: domestic, municipal, quasi-
23 municipal, industrial, irrigation, mining and stockwatering uses....

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

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

28 ~~{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.*

1
2 Statutes of Nevada, Chapter 265, pp. 1386-87. This language is codified as NRS 534.110 (6) and (7).

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

8
9 During a hearing on A.B. 419, during the 2011 Legislative Session, the following
10 testimony was received:

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

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

23 Truly, everyone is aware that at the point you are issued a water right, it is a priority right.
24 That is Nevada water law. It is first in time, first in right. If you have a junior right, I think
25 this deals with Assemblyman Goedhart's question and exactly how those rights are
26 brought forward. Where did you acquire the right? Typically though, with domestic wells
27 in the state, if you have a parcel created, you have a right to drill a domestic well and I do
28 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

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

3 Id. at p.72.

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

6
7 Generally, “[t]he term ‘water right’ means ... the right to divert water by artificial means
8 for beneficial use from a natural spring or stream.” In Nevada, there are three different
9 types of water rights: vested, permitted, and certificated. First, “vested” rights are those
10 that existed under Nevada's common law before the provisions currently codified in NRS
11 Chapter 533 were enacted in 1913. These rights may not be impaired by statutory law and
12 may be used as granted in the original decree until modified by a later permit. Second,
13 “permitted” rights refer to rights granted after the State Engineer approves a party's
14 “application for water rights.” Such permits grant the right to develop specific amounts of
15 water for a designated purpose. Third, “Certificated” rights are statutory rights granted
16 after a party perfects his or her permitted water rights. In order to perfect
17 permitted water rights, “an applicant must file proof of beneficial use with the State
18 Engineer. Once proof has been filed, the State Engineer will issue a certificate in place of
19 the permit.”

20 Citations Omitted.

21 The *Anderson* Court noted that:

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

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

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

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

23 Lawrence J. MacDonnell, *PRIOR APPROPRIATION: A REASSESSMENT*, 18 U. Denv. Water L. Rev.
24 228, 293 (2015), citing to : James H. Davenport & Craig Bell, *Governmental Interference with the Use*
25 *of Water: When Do Unconstitutional "Takings" Occur?*, 9 U. Denv. Water L. Rev. 1, 23-55 (2005); John
26 D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*,
27 45 U.C. DAVIS L. REV. 931 (2012); John D. Echeverria, *Is Regulation of Water a Constitutional*
28 *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):

1 NRS Chapter 533 prescribes the general requirements that every applicant must meet to
2 appropriate water. Its fundamental requirement, as articulated in NRS 533.030(1), is
3 that water only be appropriated for "beneficial use." In Nevada, beneficial use is "the
4 basis, the measure and the limit of the right to the use of water." The right to use water for
5 a beneficial use depends on a party actually using the water. Under NRS 533.070(1), once
6 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.

7 Emphasis added. No certainty exists that any underground water will actually be used annually.

8 Necessity for the use of underground water must be presupposed as the subsequent condition of lack of a
9 surface water right must occur.

10
11 However, supplemental water rights were and continue to be processed under the same statutes as
12 primary underground water rights. For instance, NRS 534.080 states:

13 1. A legal right to appropriate underground water for beneficial use from an artesian
14 or definable aquifer subsequent to March 22, 1913, or from percolating water, the course
15 and boundaries of which are incapable of determination, subsequent to March 25, 1939,
16 can only be acquired by complying with the provisions of chapter 533 of NRS pertaining
17 to the appropriation of water.

18 2. The State Engineer may, upon written notice sent by registered or certified mail,
19 return receipt requested, advise the owner of a well who is using water therefrom without
20 a permit to appropriate the water to cease using the water until the owner has complied
21 with the laws pertaining to the appropriation of water. If the owner fails to initiate
22 proceedings to secure such a permit within 30 days after the date of the notice, the owner
23 is guilty of a misdemeanor.

24 3. Except as otherwise provided in subsection 4 and NRS 534.180, the date of
25 priority of all appropriations of water from an underground source mentioned in this
26 section is the date when application is made in proper form and filed in the Office of the
27 State Engineer pursuant to the provisions of chapter 533 of NRS.

28 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

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2
3 The Court finds that substantial evidence existed in the record to support the State Engineer's
4 determination that groundwater is being depleted in the Smith Valley Basin and the Mason Valley Basin.
5 The Court finds that substantial evidence exists in the record to support the State Engineer's decision to
6 curtail water rights in the amount sought in the orders. The Court finds that substantial evidence exists in
7 the record to support the water model used by the State Engineer to calculate the amount of water to
8 curtail. However, the Court does not agree that the State Engineer has legal authority to reprioritize
9 irrigation underground water rights on the basis the rights are supplemental.
10

11 The State Engineer may designate and regulate preferred uses under NRS 534.120 (2). The
12 statutory language when read in its whole context indicates that the Legislature gave the State Engineer
13 the authority to designate preferred uses when the groundwater in a basin is being depleted. The
14 language in the original statute passed in 1955 indicates to this Court that the Legislature was concerned
15 about setting preferred uses in a time of drought.
16

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

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

21 The statute states after the conjunction "and":

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

24 Both processes are followed by the last limitation clause:

25 within the following limits: domestic, municipal, quasi-municipal, industrial, irrigation,
26 mining and stockwatering uses....
27
28

1 To read the statute as being controlled by the phrase “in acting on applications” would make the
2 entire first portion surplusage. The Court would have to strike the first “designate” clause and the
3 conjunction “and” to arrive at the reading suggested by FACO and FULSTONE.
4

5 Such a reading also goes against the context of the statute. The Statute in section 6 stated that the
6 Legislature intended the language in section 6 of Senate Bill 104 to immediately follow section 10 of
7 Chapter 178, Statutes of Nevada 1939. The 1955 Legislature was clearly aware of the priority system
8 when it passed Section 6. If the 1955 Legislature had wanted to restrict the designations of preferred uses
9 to new applications, it could have done so without including statutory language that directed the State
10 Engineer to “designate preferred uses of water within the respective areas so designated by him and from
11 which the ground water is being depleted.”
12

13 This represents the opposite of what occurred in *Phillips v Gardner*, 469 P. 2d 42 (Ct. App. Ore.
14 1970). In *Phillips*, a statute designating preferred uses had been adopted in 1893. The Oregon
15 Legislature then adopted a comprehensive priority scheme in 1909. In 1955, the Oregon Legislature
16 passed a statute that specifically prohibited the Water Resources Board from altering priority. The
17 Oregon Court of Appeals determined that the 1909 statute implicitly restricted the 1893 statute’s
18 application to pre-1909 rights.
19

20 Additionally, applying the limitation language to applications only leads to an absurd reading of
21 the statute. This Court understands that the “Last Antecedent Canon of Statutory Construction” would
22 presume such an interpretation. However, this Court will not apply the Last Antecedent Canon as the
23 “Whole Context Canon of Statutory Construction” would apply.
24

25 The Court agrees with the State Engineer that supplemental underground water rights are not the
26 same as primary underground water rights. Supplemental rights are conditional rights based upon the
27 amount of surface water the underground water right holder receives in an irrigation season.
28

1 Supplemental rights also have restrictions on alienation and the place of diversion. The Court agrees that
2 such rights may be considered as subordinate rights.
3

4 However, designation of the rights as being subordinate rights begs the question, "Subordinate to
5 what? The most obvious answer is, "Subordinate to the surface water right." The least obvious answer
6 is, "Subordinate to primary underground water rights." No statutory authority or case law was provided
7 to the Court that the Legislature or State Engineer ever contemplated a priority system that subordinated
8 supplemental underground water rights to later issued primary underground water rights. The adjective
9 "supplemental" does not pertain to a use as defined under Nevada law. NRS 534.080 directs how
10 priority is established for underground water rights at the application stage.
11

12 The Court did review the statutes to determine if the decision to reprioritize can be made pursuant
13 to NRS 534.120 (1) upon a theory that the reprioritization does not create a sub-preferred use but rather it
14 can occur on the basis it protects the welfare of the area involved. This Court finds that NRS 534.120 (2)
15 contains specific language which limits the State Engineer's authority regarding changing the priority
16 system. The specific language must control over the general language.
17

18 The record does not indicate that the State Engineer weighed how such reprioritization would
19 affect the different irrigators. The assumption was that those holding surface rights will get some surface
20 water, so they can make do without the underground water. Such a post hoc assumption is repugnant to
21 the Legislature's previous determination that the priority system protects the welfare of Nevada. The
22 assumption cannot apply to all irrigators as it ignores situations in which the curtailing of any water may
23 force a farmer not to plant.
24

25 For the sake of argument, if reprioritization could occur between supplemental and primary
26 groundwater rights, this Court cannot fathom how such an authority could be exercised on an ad hoc
27
28

1 basis let alone a post hoc basis. Such a reprioritization would be applicable to all basins in Nevada. It
2 would follow that the State Engineer would have to adopt a general regulation applicable statewide.
3

4 The Court does not read NRS 534.110 (7) as conflicting with NRS 534.120 (2) if the State
5 Engineer designates preferred uses in limited times of drought. NRS 534.110 (7) only authorizes the
6 designation of a critical management area in “any basin in which withdrawals of groundwater
7 consistently exceed the perennial yield of the basin.” (emphasis added). At the point that determination
8 occurs, then all appropriators must face strict priority without designated preferred uses. The fact that the
9 Legislature felt compelled to include the domestic use indicates to this Court that the Legislature
10 understood that preferential designations of uses had to be addressed. The two statutes can be read in
11 harmony.
12

13 If a preferred use is properly designated pursuant to NRS 534.120, then no taking occurs of rights
14 issued after 1955 as the holders were on statutory notice that the State Engineer had authority to
15 designate preferred uses in times of drought. The Court would have to reexamine the issue if pre-1955
16 rights were involved in the curtailment. Underground water rights may also have to be treated differently
17 depending upon whether they were recognized prior to 1947, 1939, 1915, and 1913.
18

19 In summary, the Court finds that the State Engineer did not curtail underground water rights in
20 conformity with Nevada law. The State Engineer does not have authority under NRS Chapter 534 to
21 change priority between supplemental underground water rights and primary underground water rights to
22 create a sub-use within the designated use of irrigation. The State Engineer does not have authority
23 under NRS Chapter 534 to change priority between supplemental underground water rights and primary
24 underground water rights under a theory that it is in the welfare of the residents.
25
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1 Based upon the above and good cause appearing, **IT IS HEREBY ADJUDGED, ORDERED**
2 **and DECREED** that the Petitioners' requests that the Court reverse the State Engineer's Orders 1267
3 and 1268 are **GRANTED**.
4

5 DATED: This _____ day of March, 2016.



Hon. LEON ABERASTURI
DISTRICT COURT JUDGE

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2 CERTIFICATE OF SERVICE
3

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

7 Paul G. Taggart, Esq.
8 108 North Minnesota St.
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10 Micheline Fairbank
11 Senior Deputy Attorney General
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16 Brad Johnston, Esq.
17 22 State Route 208
18 Yerington, NV 89447

19 DATED: This 21 day of March, 2016.
20

21 
22 Employee of Hon. Leon Aberasturi
23
24
25
26
27
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