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It was the best of times; it was the worst of times: A tale of two cases.

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An aerial satellite photograph of a desert city, likely Pahrump, Nevada. The city is characterized by a dense grid of streets and is situated in a valley. A prominent winding river or dry wash flows through the landscape, particularly on the left side. The surrounding terrain is arid and hilly. Two road markers are visible: a shield-shaped marker with the number '372' and a rectangular marker with the number '160'.

Pahrump Fair Water – A Domestic Well Conundrum

Order 1293A – Domestic Well Prohibition

- Pahrump Basin Perennial Yield 20,000 afa
- Permitted Rights (2017) total 59,175 afa
- 11,280 existing domestic wells (2017) = 22,560 afa commitment
- Domestic well concentration as great as 469 domestic wells per square mile
- Potential for as many as 8,000 additional new domestic wells or 16,000 afa additional commitment.

**New exempt domestic wells
PROHIBITED without the
relinquishment of 2-acre feet
permitted right**

	59,175	Permitted Rights
	+ 22,560	Domestic Well Commitments
Total	81,735	Existing Groundwater Commitments
	+ 16,000	Additional Domestic Wells
Total	97,735	Potential Total Groundwater Commitments
	- 20,000	Perennial Yield
	(77,735)	POTENTIAL OVER COMMITMENT

Wilson v. Pahrump Fair Water, LLC, 481 P.3d 853 (Nev. 2021)

- **Unanimous 7-0 decision**
- Significant case addressing several substantive Nevada Water Law issues.
- Prior appropriation does not guarantee sufficient water to meet every demand.
- State Engineer's statutory authority extends to drilling of wells that would cause interference with existing wells.
- Reinforces and clearly establishes deference to State Engineer's technical decisions:

“When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential” because such conclusions are “within [the agency's] area of special expertise, at the frontiers of science.”

Wilson, 481 P.3d at 858 (internal citations omitted).

Wilson v. Pahrump Fair Water, LLC, 481 P.3d 853 (Nev. 2021)

- Domestic wells are not exempt from Nevada's statutory requirements, including the doctrine of prior appropriation.
- An administrative hearing was not required –

Order No. 1293A does not limit established water rights, instead only imposing a condition on the drilling of new domestic wells in the designated basin—wells for which permit applications had not even been filed. And, under Nevada's system of prior appropriation, the owner of land does not have an established property right in the untapped groundwater lying thereunder.

Wilson, 481 P.3d at 859.

Diamond Valley Groundwater Management Plan – The Good, The Bad & The Ugly



NRS 534.110(7)

The State Engineer:

(a) May designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin.

(b) Shall designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin upon receipt of a petition for such a designation which is signed by a majority of the holders of certificates or permits to appropriate water in the basin that are on file in the Office of the State Engineer.

→ The designation of a basin as a critical management area pursuant to this subsection may be appealed pursuant to NRS 533.450. If a basin has been designated as a critical management area for at least 10 consecutive years, except as otherwise provided in subsection 9, the State Engineer shall order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights, unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037.

Critical Management Area Criteria

- Withdrawals consistently exceed perennial yield-
 - Permissive to be designated by State Engineer, or
 - Mandatory where a petition signed by majority of water right holders submitted to the State Engineer.
- 10-year Timeclock -
 - Mandatory curtailment by priority if no Groundwater Management Plan adopted and approved within 10 years of CMA designation.

Groundwater Management Plan Criteria

- Petition to approve Groundwater Management Plan-
 - Signed by majority of water right holders,
 - Plan must include steps to remove CMA designation.
- State Engineer's Review
 - 7 considerations, including
 - Basin hydrology and Physical characteristics
 - Geographic spacing and location of wells
 - Basin water quality
 - Well location & spacing
 - Whether there is an existing GMP
 - Any other relevant factor

NRS 534.037

1. In a basin that has been designated as a critical management area ... a petition for the approval of a groundwater management plan for the basin may be submitted to the State Engineer. The petition must be signed by a majority of the holders of permits or certificates to appropriate water in the basin ... and must be accompanied by a groundwater management plan which must set forth the necessary steps for removal of the basin's designation as a critical management area.

2. In determining whether to approve a groundwater management plan submitted pursuant to subsection 1, the State Engineer shall consider, without limitation:

- (a) The hydrology of the basin;
- (b) The physical characteristics of the basin;
- (c) The geographic spacing and location of the withdrawals of groundwater in the basin;
- (d) The quality of the water in the basin;
- (e) The wells located in the basin, including, without limitation, domestic wells;
- (f) Whether a groundwater management plan already exists for the basin; and
- (g) Any other factor deemed relevant by the State Engineer.

The Good

Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC, 511 P.3d 1003 (Nev. 2022)

- State Engineer's approval of the Diamond Valley Groundwater Management Plan (DVGMP) was upheld by a slim majority (4-3).
- Nevada's statutory water law scheme may impair nonvested, statutorily appropriated, water rights.
- Decision limited to basins designated as a Critical Management Area.
- Reinforces that if regulation by priority were to be the only alternative, adoption of the law would be unnecessary.
- Any takings/inverse condemnation claims were premature.
- State Engineer's approval of the GMP was supported by substantial evidence.
- Court would not alter the State Engineer's factual findings regarding scientifically complex matters.
- **Strict adherence to the prior appropriation doctrine not required.**

The Good

Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC, 511 P.3d 1003 (Nev. 2022)

“We recognize that our opinion will significantly affect water management in Nevada. We are of the belief, however, that—given the arid nature of this State—it is particularly important that we effectuate the plain meaning of a statute that encourages the sustainable use of water.”

Diamond Nat. Res. Prot., 511 P.3d at 1012.

The Bad

Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC, 511 P.3d 1003 (Nev. 2022)

- Two dissents focused differently on the issues: Takings & Statutory Interpretation
- **Justice Parraguirre dissent (joined by Justice Silver)**
 - The GMP fails to take into consideration impacts to vested surface water rights, thus results in an impairment to those vested rights.
 - Deviation from the prior appropriation doctrine, a foundational principal in Nevada's water law cannot be inferred from the statute.
 - The statute is ambiguous as it can be read in two separate ways:
 - As the majority and State Engineer interpreted the statute, or
 - The State Engineer can choose not to regulate by priority for 10 years, allowing junior priority users an opportunity to develop a mechanism to reduce use and bring balance to the basin.
- The result is an unconstitutional taking of a private right by reallocating Senior rights to junior users.
- The GMP violates the beneficial use mandates under Nevada law.

The Bad

Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC, 511 P.3d 1003 (Nev. 2022)

- **Justice Pickering dissent (joined by Justice Silver)**
 - Reallocation of water from senior users to junior users violates constitutional principals and results in a taking without just compensation and the GMP violates the beneficial use element of the prior appropriation doctrine.
 - Strict statutory construction does not support the majority's reading of the statute.

This reading disregards conventional rules of grammar and syntax. ... “Unless” is a subordinating conjunction that “introduces a clause that is dependent on the independent clause.” ... And the priority-rights clause is not an independent clause because it has no object. ...The unless clause therefore necessarily refers back to the closest (and only) independent clause in the sentence—“the State Engineer shall order that withdrawals ... be restricted in that basin to conform to priority rights” ... see also Castleman v. Internet Money Ltd., 546 S.W.3d 684, 690 (Tex. 2018) (noting that “properly placed commas” usually signal that a conditional clause applies to the entire series that precedes it). ... It does not (and grammatically cannot be read to) condition the application of the prior appropriation doctrine—let alone the beneficial use doctrine—on the absence of a GMP.

The Ugly

Diamond Nat. Res. Prot. & Conservation Ass'n v. Diamond Valley Ranch, LLC, 511 P.3d 1003 (Nev. 2022)

- Strong insinuations relating to Constitutional takings by the dissenting opinions are a concern.
- Senate Bill 113 (2023), which is expected to become law, will fundamentally alter the GMP statute.
 - Require that “senior” holders who do not sign a petition to approve a GMP are not required to participate in the provisions of the GMP.
 - Creates a degree of uncertainty as the obligation to participate in a GMP is dictated by the perennial yield determined by the State Engineer, which can be altered, thus requiring previously identified “senior” users who did not sign the GMP to participate in the GMP.
 - Establishes a more stringent requirement for the 10-year time period and requires the State Engineer to conduct reviews every decade.
 - Provides for the dissolution of a groundwater management plan.

Questions?

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