

SADLER SUPP_3

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**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

IN THE MATTER OF THE DETERMINATION
OF THE RELATIVE RIGHTS IN AND TO ALL
WATERS OF DIAMOND VALLEY,
HYDROGRAPHIC BASIN NO. 10-153, ELKO
AND EUREKA COUNTIES, NEVADA.

**SADLER RANCH LLC'S OBJECTIONS TO
THE PRELIMINARY ORDER OF DETERMINATION**

COMES NOW, SADLER RANCH, LLC ("Sadler Ranch") by and through its attorneys of record, PAUL G. TAGGART, ESQ. and DAVID H. RIGDON, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby respectfully submits its objections, pursuant to NRS 533.145, to the Nevada State Engineer's August 30, 2018, Preliminary Order of Determination ("Preliminary Order")

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INTRODUCTION

Diamond Valley is currently the most over-appropriated and over-pumped groundwater basin in the State of Nevada. This over-pumping of the groundwater basin has had a significant impact on the surface water resources in the basin including the many natural springs along the eastern and western edges of the valley and the ephemeral canyon streams that conduct water from the surrounding mountain ranges to the valley floor. Most of the springs have diminished or completely dried up. Meanwhile, land subsidence associated with a lowered groundwater table has opened fissures along the edges of the basin that have captured and redirected the flow of the canyon springs.

Electricity was not brought to Diamond Valley until the late 1950s. Because of the lack of electricity, all ranching and farming prior to 1905 used water from naturally flowing springs. Water from these springs was diverted into open ditches and conveyed (sometimes for miles) to other lands where it was used to flood irrigate crops and meadow grasses. Conveyance losses and

losses of water due to flood irrigation of fields and meadows are all considered beneficial uses of water that were recognized under Nevada's pre-statutory water law as establishing appropriative rights.

The Sadler Ranch is one of the oldest continuously operated ranches in central Nevada. Former governor Reinhold Sadler established the ranch was established in the mid-1800s. The main ranch encompasses almost 4,000 acres of land which includes two major springs – the Big Shipley Spring and the Indian Camp Spring while the Brown Ranch has almost 1,000 acres of land that includes the Eva Spring. Historically, these springs provided enough water to support all operations of the ranches.

PROCDEURAL BACKGROUND

On October 8, 1982, the State Engineer issued Order 800 commencing the Diamond Valley adjudication proceedings. On November 18, 1982, the State Engineer issued Order 802 setting a deadline of February 10, 1984, for individuals with claims of rights to file their proofs of appropriation. On December 23, 1983, the State Engineer extended this deadline to February 10, 1985. On January 25, 1985, the State Engineer again extended the deadline to August 12, 1985.

After the period for filing proofs expired, the adjudication proceedings stalled and no further action was taken until June 11, 2014, when Sadler Ranch requested that the State Engineer adjudicate its rights to two particular springs. On August 21, 2015, the State Engineer issued Order 1263 reviving the dormant basin-wide adjudication proceedings. On October 16, 2015, the State Engineer issued Order 1266 establishing a new deadline for the filing of proofs of May 31, 2016. On March 8, 2016, the State Engineer denied a request from the United States Bureau of Land Management (“BLM”) to extend the time for the filing of proofs.

On June 6, 2017, the State Engineer entered into a settlement agreement with Sadler Ranch concerning the adjudication proceedings. The agreement required the State Engineer to issue a preliminary order of determination no later than August 30, 2018, and a final order of

determination no later than January 31, 2020. On August 30, 2018, the State Engineer issued the instant Preliminary Order.

STANDARD OF REVIEW

I. The Adjudication Process

The adjudication of claims of vested water rights is governed by NRS Chapter 533. Pursuant to NRS 533.085(1), vested rights to take and use water that were initiated in accordance with Nevada’s water laws prior to 1913 cannot be impaired by the State Engineer or by the application or enforcement of any of the provisions contained in NRS Chapter 533. Under NRS 533.090 the State Engineer has authority to initiate proceedings to determine the relative rights of various claimants to the use of water from a particular source. Once that process is initiated, the State Engineer is required to issue an order setting a deadline for the taking of proofs of appropriation from claimants,¹ investigate the sources of water and the proofs of appropriation,² and issue a preliminary order of determination “establishing the several rights of claimants to the waters.”³

“Any person claiming any interest in the stream system involved in the determination of the relative rights to the use of the water . . . may object to any finding, part or portion of the preliminary order of determination made by the State Engineer.”⁴ Such objections must be filed within 30 days after the evidence and proofs have been opened to public inspection and must “state with reasonable certainty the grounds of the objection.”⁵

The requirement to state the grounds of the objections with “reasonable certainty” is similar to the “short and plain statement of the claim” standard used for the filing of a civil complaint.⁶ The Nevada Supreme Court has interpreted this to be a “notice pleading” standard.⁷ Under notice

¹ NRS 533.110.

² NRS 533.100.

³ NRS 533.140.

⁴ NRS 533.145(1).

⁵ NRS 533.145(1) & (2).

⁶ See NRCP 8(a).

⁷ *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

pleading a petitioner is only required to provide “adequate notice of the nature of the claim.”⁸ Such notice must set forth the facts which support a legal theory, but does not need to use precise legalese when describing the grievance.⁹ Rather, the pleadings are to be “liberally construed to place into issue such matters which are fairly noticed.”¹⁰ Accordingly, as long as objections to a preliminary order of determination provide clear notice of the issues that will be raised at the hearing on the objections, they are legally sufficient.

II. Standards for Reviewing Proofs of Appropriation

Vested rights to surface water sources are those rights for which the construction of the works of diversion were initiated prior to 1905.¹¹ The quantity of a claim is based on the water placed to beneficial use using the irrigation practices of that time period. The Nevada Supreme Court has held that the adjudication process outlined in the statutory water law cannot impair an established vested right and that such rights “shall not be diminished in quantity or value.”¹² Accordingly, the State Engineer is without discretion to recognize a vested appropriation at an amount less than what the evidence in the record shows was beneficially used or to assign a more junior priority date to such a claim.¹³

If substantial evidence demonstrates that water was placed to beneficial use on a particular property using flood irrigation and open conveyance ditches, the State Engineer must recognize the quantity of water necessary to accomplish this task regardless of whether he believes that such practices are inefficient or that the same quantity of acreage can be adequately irrigated with less water under modern irrigation practices. The key question when evaluating each proof is how much water was needed to irrigate the claimed lands under historic conditions.

⁸ *Id.*

⁹ *Liston v. Las Vegas Metro. Police Dep’t*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

¹⁰ *Hay*, 100 Nev. at 198, 678 P.2d at 674.

¹¹ See page 1 of SUMMARY OF STATUTORY PROCEDURES FOR FILING CLAIMS OF VESTED RIGHTS, MAKING APPLICATION FOR A WATER RIGHT AND A SUMMARY OF FEES OF THE STATE ENGINEER, revised April 2018.

¹² *Ormsby County*, at 352.

¹³ *Id.*

OBJECTIONS

I. General Objections Related to All Sadler Ranch Proofs of Appropriation.

Following is a list of general objections and issues Sadler Ranch has regarding the Preliminary Order. These objections should not be interpreted to be a complete list of all objections made or held by Sadler Ranch regarding the Preliminary Order or any final order issued by the State Engineer. Sadler Ranch reserves the right to put forth more evidence to support the objections listed below, including, but not limited to testimony, documentary evidence, affidavits, and ancient records. Additional evidence will be supplied by Sadler Ranch during a hearing held by the State Engineer to further prove up its claims.

A. The irrigation duties established in the Preliminary Order are insufficient and do not reflect the irrigation practices in use prior to 1905.

On page 10 of the Preliminary Order, the State Engineer determined that the duty of water required to be diverted from all of the various sources in Diamond Valley is 3.0 acre-feet per acre (“af/a”) for harvest crop, 2.0 af/a for meadow/pasture, and 0.75 af/a for diversified pasture. However, there is no evidence on record to support these duties or to justify the reduction of the duties claimed by the several vested water right owners in their respective proofs. Evidence in the proof files, other State Engineer permit files, and evidence submitted as part of this adjudication indicate a much higher duty of water and a varied duty dependent on the unique conditions present at each irrigator’s property (topography, soil type, distance between water source and irrigated acreage, etc.). For example, the Ophir Creek Decree recognizes a Class B culture of “Meadow Pasture” and assigns it a duty of 4 af/acre.¹⁴

The duty determinations in the Preliminary Order do not consider important factors which are necessary to grow the different types of crops. These factors include irrigation efficiency and transmission losses. The Preliminary Order indicates that the duties consider conveyance losses, but there are no determinations of conveyance losses for the Sadler Ranch properties. Instead, the

¹⁴ Ophir Creek Decree at 7.

duty determinations appear to be based on 100% irrigation efficiency, or greater. These findings do not consider the historic irrigation practices which were in place when the water was first put to beneficial use at Sadler Ranch.

The evidence submitted with the proofs indicate that a great quantity of water was used by the appropriators to produce crops in Diamond Valley. Specifically, other reputable sources indicate that the NIWR for the various crops in Diamond Valley is much higher than the estimates the State Engineer used. For example, the Preliminary Order uses an NIWR (Net Irrigation Water Requirement) of 2.0 af/a for meadow/pasture crop while in other basins the State Engineer has used NIWR's of 3.1 af/a for highly managed pasture grass and 2.5 af/a for low managed pasture grass (a difference of 25 – 55%). Proof owners also supplied the State Engineer with evidence of perennial yields of the various sources of water, such as spring flow measurements, and evidence of the portion of the supply that was beneficially used. All evidence of duty on record supports the duty set forth in the filed proofs, and there is ample evidence that these duty numbers are reasonable.

The State Engineer's published NIWR for harvest crop in Diamond Valley is 2.5 af/acre. The Preliminary Order provides a total duty for harvest crop of 3.0 af/acre. This leaves only 0.5 af/acre for conveyance and other losses despite the fact that many of the irrigated lands are located far from the spring or creek source. Substantial evidence in the record actually supports a duty of 4 to 4.5 af/acre of vested duty for harvest crops. Additionally, the State Engineer has historically issued permits for statutory water rights based on a duty of 4 af/acre. Certificates issued in Diamond Valley based on the actual application of water to harvest crops are greater than 3 af/acre. These statutory permits and certificates were issued based on a more efficient center-pivot method of irrigation rather than the flood irrigation techniques that were historically used before the introduction of electricity.

As noted above, the duty set forth in the Preliminary Order for meadow and pasture land is insufficient to irrigate the crop type specified, even if the irrigation practice was 100% efficient. Again, permits and certificates issued by the State Engineer usually indicate a duty of 4 af/acre for

such pasture and meadow irrigation during the irrigation season. Winter water rights issued in the basin, which historically use less water than crops grown in the irrigation season, indicate a duty of 3 af/acre.

Finally, the Preliminary Order set the duty for diversified pasture at 0.75 af/acre. There is no support in the record for this determination. The 0.75 af/acre duty for diversified pasture is less than half than the lowest published NIWR in Diamond Valley (2 af/acre for low managed pasture grass). When individualized conveyance losses are factored in, this will often lead to an absurd mathematical result (a negative quantity of water being available to support plant growth). There is simply no evidence on record to support the State Engineer's estimated duties while substantial evidence exists to support the duties claimed under the various proofs.

Choosing a duty based solely on an estimated NIWR does not provide a claimant with the actual amount of water they historically placed to beneficial use. Rather, the State Engineer's decision severely limits the amount of water a claimant is entitled to under Nevada water law.

The Preliminary Order should have included an individual claim-by-claim determination of conveyance losses associated with historic farming and ranching practices at the claimed place of use. Instead, the Preliminary Order assumes that all the claims had the same level of conveyance losses for each irrigated acre regardless of the size of the property, the proximity of the source of water to the irrigated acreage, or the topography and soils conditions present. The failure to make individualized determinations of irrigation duties for each property, based on that property's unique characteristics, results in under-estimating the quantity of water placed to beneficial use prior to 1905.

Accordingly, Sadler Ranch objects to the irrigation duties applied to its claims in the Preliminary Order.

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B. The POD fails to consider substantial evidence regarding historic beneficial use.

Voluminous evidence was submitted with the proofs documenting the unique irrigation methods and historic uses of water on the ranch. Because the springs discharged warm water, it could be placed to use on the property year-round. During winter, water was conveyed to lands further away from the spring where it was dammed and allowed to freeze. Then, in the spring, as the ice melted, it provided a water supply for leaching salts from the soil as well as jump-starting crop growth. Despite this, the only winter water use the State Engineer recognized in the Preliminary Order is the 5 cfs used by Romano (which a 1913 court order indicated was only a third of the water that flowed from the spring) and stock-water for cattle.

This year-round beneficial use of the water was verified by Payne in 1912 who noted that 3,000 acres were under cultivation and that “in the winter time the water is turned down through Sadler’s ranch.” In addition, a 1928 tax appraisal showed a total ranch size of 3,120 acres, only 250 of which was given a valueless appraisal. None of this evidence was analyzed in the Preliminary Order.

Accordingly, Sadler Ranch objects to the State Engineer’s characterization, classification, and determinations of seasons and manners of use of water on the ranch.

II. Objections Related To Specific Proofs Of Appropriation.

A. V-02658 (Eva Spring)

V-02658 seeks recognition of pre-statutory use of water from Eva Spring for irrigation of 81.66 acres of harvest meadow hay, 126.92 acres of meadow, and 0.90 acres of garden with a total duty of 942.66 afs. The Preliminary Order recognizes only 81.42 acres used for harvest meadow hay with a total duty of 244.2 afs. Both the proof of appropriation and the Preliminary Order recognize a priority date of 1873.

The field investigation report for V-02658 states that “[a]ll of the claimed acreage located in the SE 1/4 NE 1/4 and S 1/2 of Section 7, and the SW 1/4 NW 1/4 of Section 8, are located on

BLM land." This is only partially correct. The NE 1/4 and the NW 1/4 of section 7 are not BLM land but is, in fact, owned by Sadler Ranch. Regardless of this mistake, it is well-established that a vested right can arise where an appropriator places water to beneficial use on BLM owned property. Accordingly, it is inappropriate to reduce the recognized amount of irrigated acreage based on a claim that the land was owned by the BLM at the time it was irrigated. In the Preliminary Order the State Engineer expressly states that "the claims for irrigation wherein portions of the places of use claimed are lands controlled by the federal government are viable claims unless otherwise determined in this Order."¹⁵ Despite this, with respect to the water from Eva Spring, the Preliminary Order artificially limits the place of use to Sadler Ranch's private property and also fails to account for historic beneficial use documented by aerial photography.

In addition, the Preliminary Order misidentifies water shown as irrigating certain pasture land on the 1969 proof map as "tail or waste water" that will not be recognized with a diversion rate or duty."¹⁶ This determination is both legally and factually incorrect. This is property that received managed water flow, where the pasture was beneficially used for cattle forage. Accordingly, the water applied to this property was appropriated from the spring and should be included within the overall duty.

The use of Harrill's 1965 reported spring discharge is also questionable. As noted in the State Engineer's field investigation, the 1965 measurement was made five years after groundwater development started that "could have had an impact on the discharge of the spring." This suggests that the natural, pre-development flow of the spring was likely much higher. The Preliminary Order also ignores other, more accurate measurements of spring flow.

Finally, the Preliminary Order summarily rejects the 2016 amended map submitted by Sadler Ranch, and the evidence associated therewith, without any analysis other than noting that the 1969 map appears to better match the 1946 aerial photography. The evidence submitted with the 2016 amended map is substantial and should have been fully evaluated.

¹⁵ Preliminary Order, p. 12.

¹⁶ Preliminary Order, p. 143.

Sadler Ranch objects to the findings contained in the Preliminary Order related to Eva Spring to the extent that those findings conflict with the evidence and claims submitted with proof V-02658.

B. V-03289 (Big Shipley)

V-03289 seeks recognition of pre-statutory use of water from Big Shipley Spring for irrigation of 1,914.5 acres with a diversion rate of 15 cfs. The Preliminary Order recognizes 1,064.43 acres of harvest and 367.16 acres of meadow on the main ranch and 148.75 acres of harvest and 115.96 acres of meadow on the Romano portion of the ranch (a total of 1,696.3 acres) as well as stock water for 720 cattle, mules, and horses. The priority date for the main ranch and the stock water is 1873 while the priority date for the Romano portion is 1892. The total combined duty for all these uses is 5,037.32 afs. The Preliminary Order places seasonal limitations on the water. The season of use for the Romano water is January 1 – April 1. The season of use for the main ranch water is April 2 – November 30. The season of use for the stock water is December 1 to December 31.

The Preliminary Order uses an estimate of pre-development flow for the Big Shipley Spring of 7.02 cfs despite the fact that there are several measurements, estimates, and court documents showing that the natural, pre-development flow of the springs was in the range of 12-15 cfs. In particular the Preliminary Order adopts a diversion rate based on 1965 measurements made by Harrill several years after groundwater development locally began to have an effect on spring flows while ignoring other measurements. The Preliminary Order also fails to recognize the historic irrigation practices at the ranch that placed the water from the spring to multiple beneficial uses on a year-round basis.

The Preliminary Order also references that V-03289 has been abrogated by Permit 82268, filed on November 2, 2012 and incorrectly states that Permit 82268 has a duty of only 2,918.7 afs. The Preliminary Order fails to note that Permit 82268 has been litigated multiple times and there is a current court order that increases the duty of the permit to 5,100 afs, not 2,918.7 afs.

The Preliminary Order appears to be little more than a recital of evidence from the proceedings for Permit 82268 rather than an independent determination of the historical use of water at the Sadler Ranch. Substantial evidence submitted with the proof related to the diversion rate, historical irrigation practices, places and manners of use, and season of use have been ignored or discounted. Permit 82268 is a mitigation water right designed to make up for the loss of flow to the Big Shipley Spring. The quantity of water identified in the application for the permit was intended merely to provide a stopgap while this adjudication proceeded. Accordingly, the duty of the permit is not indicative of the full historic use of water on the Sadler Ranch and should not be used as evidence of such. The Preliminary Order also mischaracterizes the historical types and extent of cultivated crops on the Sadler Ranch property.

Sadler Ranch also objects to the priority dates and seasons of use assigned to the claims and to the fact that different priority dates and seasons of use were assigned to water used on the Romano portions of the ranch. In addition, the State Engineer's characterization of water flowing to the Romano portion of the ranch as "tail water" is factually incorrect.

Sadler Ranch objects to the findings contained in the Preliminary Order related to Big Shipley Spring to the extent that those findings conflict with the evidence and claims submitted with proof V-03289.

C. V-03290 (Indian Camp)

V-03290 seeks recognition of pre-statutory use of water from Indian Camp Spring for irrigation of 104.78 acres of harvest alfalfa/meadow hay and 65.24 acres of meadow with a diversion rate of 1.0 cfs. The Preliminary Order rejects this claim outright.

Flows from Indian Camp Spring historically irrigated the above described property while also comingling with the waters of Big Shipley Spring to irrigate land on the main ranch. In rejecting V-03290, the Preliminary Order ignores substantial evidence in the record demonstrating that water from Indian Camp Spring was placed to beneficial use prior to 1905. This evidence

includes, but is not limited to, pre-1905 maps showing that a residence was constructed on the site and property records showing that the property was held in private ownership.

The State Engineer's own field investigation indicates that water from the spring complex was diverted to the claimed area of irrigation and active efforts were made to keep the water flowing as over-pumping of groundwater in other areas of the basin began to impact the spring flow. The field investigation notes that water was diverted into a main ditch and then conveyed to the place of use using a series of smaller ditches. Evidence of those ditches can still be seen on-site. Sadler Ranch objects to all findings in the Preliminary Order related to Indian Camp Spring.

D. V-10918 (Shipley #2)

V-10918 seeks recognition of pre-statutory use of water from Shipley Spring #2 for irrigation of 1,914.5 acres of alfalfa meadow hay and meadow with a diversion rate of 1.0 cfs. The place of use for this claim is the same as the place of use for the Big Shipley Spring. The Preliminary Order rejects the irrigation portion of the claim but recognizes year-round use of water from the spring to water 700 cattle and 20 horses with a priority date of 1873.

The field investigation contradicts the determination made in the Preliminary Order. The investigation notes that water flowing from the spring "would have only flowed into Ditch No. 3 where it would have been comingled with only that portion of water to be irrigated by said ditch." However, the State Engineer states that there is no "evidence of ditches or other water courses from this [point of diversion] connecting it to the ranch's ditch system."¹⁷ The Preliminary Order also ignores other substantial evidence of pre-1905 beneficial use submitted in support of the claim. Evidence also shows that a portion of water from Shipley #2 comingled with water from the main spring and was used to irrigate areas of the ranch.

Sadler Ranch objects to all findings in the Preliminary Order with respect to the irrigation portion of the proof V-10918.

¹⁷ Preliminary Order, p. 147.

E. Stock Water Proofs

Sadler Ranch submitted numerous proofs of appropriation for stock water both individually and in conjunction with the Bailey Ranch. In some cases, multiple stock water springs were identified in the same quarter/quarter section, but the Preliminary Order only recognized one spring source for each of these sections. In addition, the Preliminary Order incorrectly identifies some springs as being outside Sadler Ranch's grazing allotments. Finally, Sadler Ranch objects to the numbers and type of stock recognized in the Preliminary Order

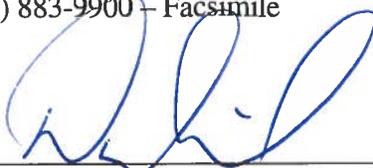
To the extent that the findings in the Preliminary Order are inconsistent with the claimed number and types of stock, or with the quantities of water available at the various sources, Sadler Ranch objects to such findings.

CONCLUSION

For the reasons stated above, and other that may arise during the course of these proceedings, Sadler Ranch hereby objects to the State Engineer's Preliminary Order of Determination.¹⁸

Respectfully submitted this 7th day of November, 2018.

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¹⁸ Sadler Ranch reserves the right to amend its filed proofs and these objections during the course of these proceedings.

EXHIBIT INDEX

<u>Exhibit</u>	<u>Description</u>
1.	Affidavit of David H. Rigdon, Esq.

EXHIBIT 1

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