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**FILED**

**JUL 30 2012**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

July 25, 2011

To: Clerk of the Supreme Court  
Capitol Complex  
201 South Carson Street  
Carson City, NV 89710

**Supreme Court Case No. 61324**  
District Court Case No.  
CV 1108-155; CV 1108-156; CV1108-157  
CV 1112-165; CV 1202-170

Re: EUREKA COUNTY, A POLITICAL  
SUBDIVISION OF THE STATE OF NEVADA;  
KENNETH BENSON, INDIVIDUALLY;  
DIAMOND CATTLE COMPANY, LLC, A  
NEVADA LIMITED LIABILITY COMPANY;  
AND MICHEL AND MARGARET ANN  
ETCHEVERRY FAMILY, LP, A NEVADA  
REGISTERED FOREIGN LIMITED  
PARTNERSHIP,

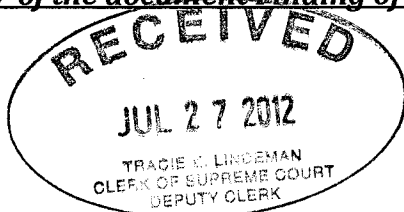
Appellants,

-VS-

STATE ENGINEER, OF NEVADA, OFFICE OF  
THE STATE ENGINEER, DIVISION OF WATER  
RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL RESOURCES,

Respondents.

**Page 47 of the document Finding of Fact, Conclusions of Law, And Order Denying Petitions For  
Judicial Review**



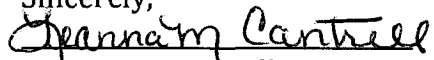
12-23926

Enclosed are six copies of page 47 missing from the document Finding of Fact, Conclusions of Law, And Order Denying Petitions For Judicial Review in the matter referred to above, on an Appeal to the Supreme Court from District Court.

During the copy process our copy machine did not copy this page therefor it is missing from the document referred to above that were sent to your office for appeal.

I apologize for any inconvenience this might have caused your office.

Sincerely,



Leanna M. Cantrell

Eureka County Deputy Court Clerk



applications in the same proceeding and in the sequential order in which they were filed.

1 For the first time on appeal, Eureka County and Conley-Morrison argue that a change  
2 application may not be filed, noticed, considered or approved in the same proceeding as  
3 the underlying application to appropriate it seeks to change. The Court concludes that  
4 Nevada's water law statutes do not prohibit the State Engineer from accepting, noticing,  
5 reviewing, and acting on application to change pending applications to appropriate in  
6 the same proceeding and the State Engineer's decision to do so in this case is not  
7 arbitrary and capricious or contrary to law.  
8

9 As a preliminary matter, the Court concludes that Eureka County and  
10 Conley-Morrison are barred from raising this issue on appeal because they failed to do  
11 so below. Issues a party could have raised in an administrative proceeding should not  
12 be considered for the first time in an original proceeding before the district court.<sup>152</sup>  
13 Raising issues for the first time in a petition for appellate review undermines the  
14 efficiency, fairness and integrity of the proceeding before the State Engineer.<sup>153</sup>  
15

16 Petitioners contend that the Court should forgive their waiver because, as  
17 a general matter, courts may hear "question[s] of law" on appeal that were not raised  
18 below.<sup>154</sup> In deciding whether to forgive a party's waiver, however, the courts have  
19 noted that such forgiveness should be withheld when the lower court is not given "the  
20 opportunity to correct possible errors,"<sup>155</sup> or when forgiving waiver would upset  
21  
22

23 <sup>153</sup> See *State Bd. Of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("Because judicial  
24 review of administrative decisions is limited to the record before the administrative body, we conclude that  
a party waives an argument made for the first time to the district court on judicial review") (footnote omitted).

25 <sup>154</sup> See *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. , , 245 P.3d 542, 544 (2010).

26 <sup>155</sup> *Bunker v. Labor and Indus. Review Comm'n*, 650 N.W.2d 864, 869 (Wis. 2002).

<sup>156</sup> *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n. 9, 989 P.2d 870, 878 (1999).