

FEB 02 2012

Eureka County Clerk  
By *Lannan Cantrell*

CASE NO.: CV1202-170  
DEPT. NO.: 2  
SCHROEDER LAW OFFICES, P.C.  
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Therese A. Ure, Nevada State Bar #10255  
Cortney D. Duke, Nevada State Bar #10573  
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Reno, Nevada 89509-1515  
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[counsel@water-law.com](mailto:counsel@water-law.com)  
*Attorneys for the Petitioners*

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF EUREKA

KENNETH F. BENSON, an individual,  
DIAMOND CATTLE COMPANY, LLC, a  
Nevada Limited Liability Company, and  
MICHEL AND MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
Registered Foreign Limited Partnership,

Petitioners,

v.

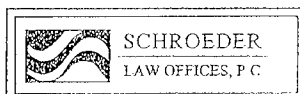
STATE ENGINEER, OF NEVADA,  
OFFICE OF THE STATE ENGINEER,  
DIVISION OF WATER RESOURCES,  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES,

Respondent.

PETITION FOR JUDICIAL REVIEW

COME NOW Petitioners KENNETH F. BENSON, DIAMOND CATTLE COMPANY,  
LLC, and MICHEL AND MARGARET ANN ETCHVERRY FAMILY LIMITED  
PARTNERSHIP (collectively referred to herein as "Petitioners"), by and through their attorneys  
of record, Schroeder Law Offices, P.C., and file and petition this Court for judicial review.

///



1 Petitioners petition and allege as follows:

2 JURISDICTION AND PARTIES

3 1. Kenneth F. Benson ("Benson") is a water right holder in Diamond Valley,  
4 Nevada.

5 2. Diamond Cattle Company, LLC ("Diamond Cattle"), a Nevada limited liability  
6 company, is an agricultural operator in Diamond and Kobeh Valley, Nevada, whose managing  
7 members include Mark and Martin Etcheverry. Martin Etcheverry is a general partner in Michel  
8 and Margaret Ann Etcheverry Family LP.

9 3. Michel and Margaret Ann Etcheverry Family LP ("Etcheverry LP"), a foreign  
10 limited partnership registered in Nevada, is a landowner and water right holder in Kobeh Valley,  
11 Nevada, and in Diamond Valley, Nevada.

12 4. Respondent NEVADA STATE ENGINEER ("STATE ENGINEER") is an agent  
13 of the State of Nevada who, together with the Office of the State Engineer, Division of Water  
14 Resources, Department of Conservation and Natural Resources, regulates the water use in the  
15 State.

16 5. A Notice of this Petition has been or will be served on the Nevada State Engineer  
17 and on all persons affected by permits issued in relation to Ruling #6127 of the State Engineer  
18 pursuant to NRS 533.450(3).

19 6. This Court has jurisdiction to address this petition under NRS 533.450 and NRS  
20 233B.

21 7. Venue is proper under NRS 533.450. The Applications are appurtenant to lands  
22 in Eureka County.

23 8. Petitioners have exhausted their administrative remedies.

24 REQUEST FOR CONSOLIDATION

25 9. Petitioners seek to have this action consolidated with Case Nos. CV 1112-165,  
26 CV 1112-164, CV 1108-155, CV 1108-156, and CV 1108-157.

1 10. Petitioners submitted briefing that relates to the agency errors as stated and  
2 alleged herein on January 13, 2012 within the Petitioners Kenneth F. Benson, Diamond Cattle  
3 Company LLC, and Michel and Margaret Ann Etcheverry Family LP's Opening Brief filed  
4 under consolidated Case Nos. CV 1112-165, CV 1112-164, CV 1108-155, CV 1108-156, and  
5 CV 1108-157.

#### 6 DECISIONS

7 11. Between May of 2005 and June of 2010, numerous applications to appropriate  
8 underground water and to change the point of diversion, place of use, and/or manner of use were  
9 filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively herein the  
10 "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to  
11 Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for a proposed  
12 molybdenum mine, known as the Mount Hope Mine Project, requiring underground water for  
13 mining and milling and dewatering purposes.

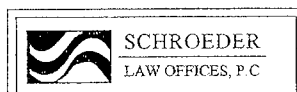
14 12. The Applications, a combination of applications for new appropriations of water  
15 and applications to change the point of diversion, place of use, and/or manner of use of existing  
16 water rights, requested a total combined duty under all of the Applications of 11,300 acre feet  
17 annually (afa).

18 13. Public administrative hearings were held on the Applications before the STATE  
19 ENGINEER on December 6, 7, 9, and 10, 2010, and May 10, 2011.

20 14. On July 15, 2011, the STATE ENGINEER issued Ruling 6127 granting the  
21 majority of the Applications subject to certain terms and conditions.

22 15. On August 11, 2011, Petitioners filed their Petition for Judicial Review  
23 challenging Ruling 6127, designated Case No. CV-1108-157, before this Court.

24 16. On December 1, 2011, the STATE ENGINEER issued the following permits to  
25 the Applicant: 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551,  
26 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998,



1 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746,  
2 76989, and 76990.

3 17. On December 13, 2011, the STATE ENGINEER issued the following permits to  
4 the Applicant: 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917,  
5 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930,  
6 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, and 79942.

7 18. On December 14, 2011, the STATE ENGINEER issued Permit 78424 to the  
8 Applicant.

9 19. On December 30, 2011, Petitioners filed a Petition for Judicial Review on permit  
10 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587,  
11 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000,  
12 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, 76990,  
13 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919,  
14 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932,  
15 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, 79942, and 78424, designated  
16 Case No. CV-1112-165, before this Court.

17 20. On January 12, 2012, Petitioners filed a First Amended Petition for Judicial  
18 Review in Case No. CV-1112-165.

19 21. On January 4, 2012, the STATE ENGINEER issued Amended Permits 76008,  
20 76802, 76803, 76804, 76805, and 78424. These permits are collectively referred to herein as  
21 "Permits."

22 AGENCY ERROR(S)

23 22. The terms and conditions in the Permits issued by the STATE ENGINEER are  
24 different from and/or inconsistent with Ruling 6127 issued by the STATE ENGINEER.

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26 ///

1           23.     The STATE ENGINEER's actions in issuing Permits with a total combined duty  
2 in excess of the total combined duty of 11,300 afa approved by the STATE ENGINEER in  
3 Ruling 6127 is arbitrary and capricious.

4           24.     The STATE ENGINEER manifestly abused his discretion by failing to include in  
5 the permit terms for Permits 76008, 76802, 76803, 76804, 76805, and 78424 a requirement that  
6 any excess water produced pursuant to those permits that is not consumed within the Diamond  
7 Valley Hydrographic Basin must be returned to the Diamond Valley groundwater aquifer, a  
8 permit term which the STATE ENGINEER explicitly stated and required in Ruling 6127.

9           25.     The STATE ENGINEER's issuance of the Permits with the allowance that the  
10 Applicant can divert additional water upon a showing that the additional diversion will not  
11 exceed the consumptive use is inconsistent with Ruling 6127 that limited all changes of irrigation  
12 rights to their respective consumptive uses.

13           26.     The action of the STATE ENGINEER by issuing the Permits with terms and  
14 conditions different from and/or inconsistent with Ruling 6127 is arbitrary and capricious,  
15 contrary to and affected by error of law, without any rational basis, beyond the legitimate  
16 exercise of power and authority of the STATE ENGINEER, and has resulted in a denial of due  
17 process to Petitioners, all to the detriment and damage of Petitioners.

18                               REQUEST FOR RELIEF

19           WHEREFORE, Petitioner requests judgment as follows:

20           1.     The Court to vacate and remand the Amended Permits numbered: 76008, 76802,  
21 76803, 76804, 76805, and 78424 to the STATE ENGINEER with instructions to deny the  
22 underlying applications; and

23     ///

24     ///

25     ///

26     ///




1        2.        Award such other and further relief as seems just and proper.

2        Pursuant to NRS 233B-133(4), a hearing is requested in this matter.

3  
4        DATED this 1<sup>st</sup> day of February, 2012.

SCHROEDER LAW OFFICE, P.C.

5          
6        Laura A. Schroeder, NSB #3595  
7        Therese A. Ure, NSB #10255  
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13        Email: [counsel@water-law.com](mailto:counsel@water-law.com)  
14        *Attorneys for the Petitioners*




**AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
***PETITION FOR JUDICIAL REVIEW*** does not contain the social security number of any  
person.

DATED this 1<sup>st</sup> day of February, 2012.

SCHROEDER LAW OFFICE, P.C.



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*Attorneys for Petitioners*



JAN 17 2012

Eureka County Clerk  
by *Heather Campbell*

CASE NO.: CV1112-165

DEPT. NO.: 2

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[counsel@water-law.com](mailto:counsel@water-law.com)*Attorneys for the Petitioners*

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

KENNETH F. BENSON, an individual,  
DIAMOND CATTLE COMPANY, LLC, a  
Nevada Limited Liability Company, and  
MICHEL AND MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
Registered Foreign Limited Partnership,

Petitioners,

v.

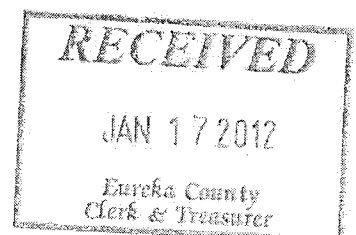
STATE ENGINEER, OF NEVADA,  
OFFICE OF THE STATE ENGINEER,  
DIVISION OF WATER RESOURCES,  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES,

Respondent.

**FIRST AMENDED PETITION FOR  
JUDICIAL REVIEW**

COME NOW Petitioners KENNETH F. BENSON, DIAMOND CATTLE COMPANY,  
LLC, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LIMITED  
PARTNERSHIP (collectively referred to herein as "Petitioners"), by and through their attorneys  
of record, Schroeder Law Offices, P.C., and file this first amended petition for judicial review  
including Permit 79939.

///





Petitioners petition and allege as follows:

## JURISDICTION AND PARTIES

1. Kenneth F. Benson (“Benson”) is a water right holder in Diamond Valley, Nevada.

2. Diamond Cattle Company, LLC (“Diamond Cattle”), a Nevada limited liability company, is an agricultural operator in Diamond and Kobeh Valley, Nevada, whose managing members include Mark and Martin Etcheverry. Martin Etcheverry is a general partner in Michel and Margaret Ann Etcheverry Family LP.

3. Michel and Margaret Ann Etcheverry Family LP (“Etcheverry LP”), a foreign limited partnership registered in Nevada, is a landowner and water right holder in Kobeh Valley, Nevada.

4. Respondent NEVADA STATE ENGINEER (“STATE ENGINEER”) is an agent of the State of Nevada who, together with the Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, regulates the water use in the State.

5. A Notice of this Petition has been or will be served on the Nevada State Engineer and on all persons affected by permits issued in relation to Ruling #6127 of the State Engineer pursuant to NRS 533.450(3).

6. This Court has jurisdiction to address this petition under NRS 533.450 and NRS 233B.

7. Venue is proper under NRS 533.450. The Applications are appurtenant to lands in Eureka County.

8. Petitioners have exhausted their administrative remedies

## REQUEST FOR CONSOLIDATION

9. Petitioners seek to have this action consolidated with Case Nos. CV 1112-164, CV 1108-155, CV 1108-156, and CV 1108-157.



DECISIONS

10. Between May of 2005 and June of 2010, numerous applications to appropriate underground water and to change the point of diversion, place of use, and/or manner of use were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively herein the "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for a proposed molybdenum mine, known as the Mount Hope Mine Project, requiring underground water for mining and milling and dewatering purposes.

11. The Applications, a combination of applications for new appropriations of water and applications to change the point of diversion, place of use, and/or manner of use of existing water rights, requested a total combined duty under all of the Applications of 11,300 acre feet annually (afa).

12. Public administrative hearings were held on the Applications before the STATE ENGINEER on December 6, 7, 9, and 10, 2010, and May 10, 2011.

13. On July 15, 2011, the STATE ENGINEER issued Ruling 6127 granting the majority of the Applications subject to certain terms and conditions.

14. On August 11, 2011, Petitioners filed their Petition for Judicial Review challenging Ruling 6127, designated Case No. CV-1108-157, before this Court.

15. On December 1, 2011, the STATE ENGINEER issued the following permits to the Applicant: 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, and 76990.

16. On December 13, 2011, the STATE ENGINEER issued the following permits to the Applicant: 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917,

///



1 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930,  
2 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, and 79942.

3 17. On December 14, 2011, the STATE ENGINEER issued Permit 78424 to the  
4 Applicant. All of the permits issued on December 1, 2011, December 13, 2011, and December  
5 14, 2011 are collectively referred to herein as "Permits".

6 AGENCY ERROR(S)

7 18. The terms and conditions in the Permits issued by the STATE ENGINEER are  
8 different from and/or inconsistent with Ruling 6127 issued by the STATE ENGINEER.

9 19. The STATE ENGINEER's actions in issuing Permits with a total combined duty  
10 in excess of the total combined duty of 11,300 afa approved by the STATE ENGINEER in  
11 Ruling 6127 is arbitrary and capricious.

12 20. The STATE ENGINEER manifestly abused his discretion by failing to include in  
13 the permit terms for Permits 76005, 76006, 76008, 76009, 76802, 76803, 76804, 76805, and  
14 78424 a requirement that any excess water produced pursuant to those permits that is not  
15 consumed within the Diamond Valley Hydrographic Basin must be returned to the Diamond  
16 Valley groundwater aquifer, a permit term which the STATE ENGINEER explicitly stated and  
17 required in Ruling 6127.

18 21. The STATE ENGINEER's issuance of the Permits with the allowance that the  
19 Applicant can divert additional water upon a showing that the additional diversion will not  
20 exceed the consumptive use is inconsistent with Ruling 6127 that limited all changes of irrigation  
21 rights to their respective consumptive uses.

22 22. The STATE ENGINEER's issuance of the Permits with an approximately 90,000  
23 acre place of use is contrary to the substantial evidence in the record and is thus arbitrary and  
24 capricious and constitutes an abuse of discretion.

25 ///

26 ///



23. The substantial evidence in the record established that the change applications for certain water rights were forfeited; thus, the STATE ENGINEER's issuance of those Permits is contrary to the substantial evidence.

24. The action of the STATE ENGINEER by issuing the Permits with terms and conditions different from and/or inconsistent with Ruling 6127 are arbitrary and capricious, contrary to and affected by error of law, without any rational basis, beyond the legitimate exercise of power and authority of the STATE ENGINEER, and have resulted in a denial of due process to Petitioners, all to the detriment and damage of Petitioners.

## REQUEST FOR RELIEF

WHEREFORE, Petitioner requests judgment as follows:

1. The Court remand Permits numbered: 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, 76990, 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, 79942, and 78424 to the STATE ENGINEER with instructions to deny the underlying applications; and

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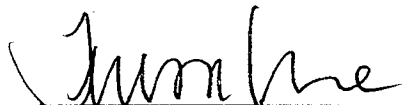


1 **AFFIRMATION**

2 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
3 **FIRST AMENDED PETITION FOR JUDICIAL REVIEW** does not contain the social security  
4 number of any person.

5  
6 DATED this 12th day of January, 2012.

SCHROEDER LAW OFFICE, P.C.

7 

8 Laura A. Schroeder, NSB #3595  
9 Therese A. Ure, NSB #10255  
10 440 Marsh Ave.  
11 Reno, NV 89509  
12 (775) 786-8800  
13 FAX: (877) 600-4971  
14 Email: [counsel@water-law.com](mailto:counsel@water-law.com)  
15 *Attorneys for Petitioners*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of January, 2012, I caused a copy of the foregoing:  
***FIRST AMENDED PETITION FOR JUDICIAL REVIEW*** to be served by US Mail on the following parties:

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Woodburn and Wedge  
6100 Neil Road, Ste. 500  
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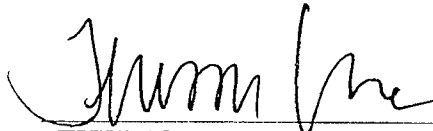
Ross E. de Lipkau, Esq.  
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Eureka County District Attorney  
701 South Main Street  
P.O. Box 190  
Eureka, Nevada 89316

Nevada State Engineer  
901 South Stewart Street  
Carson City, NV 89701

Dated this 12<sup>th</sup> day of January, 2012.



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*Attorneys for Protestant Kenneth F. Benson,  
Diamond Cattle Company LLC, and Etcheverry  
Family LP*



AUG 11 2011

Eureka County Clerk  
By Heather Cantrell

CASE NO.: CY1108-157

DEPT. NO.: 2

SCHROEDER LAW OFFICES, P.C.  
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[counsel@water-law.com](mailto:counsel@water-law.com)  
*Attorneys for the Petitioners*

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF EUREKA

KENNETH F. BENSON, an individual,  
DIAMOND CATTLE COMPANY, LLC, a  
Nevada Limited Liability Company, and  
MICHEL AND MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
Registered Foreign Limited Partnership,  
Petitioners,

v.

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

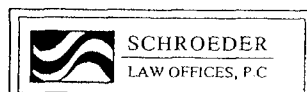
Respondent.

**PETITION FOR JUDICIAL REVIEW**

COMES NOW, Petitioners, KENNETH F. BENSON, DIAMOND CATTLE  
COMPANY, LLC, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY  
LIMITED PARTNERSHIP (collectively referred to herein as "Petitioners"), by and through their  
attorneys of record, Schroeder Law Offices, P.C., and petitions and alleges as follows:

///

///





## JURISDICTION AND PARTIES

1. Kenneth F. Benson ("Benson") is a water right holder in Diamond Valley, Nevada.

2. Diamond Cattle Company, LLC ("Diamond Cattle"), a Nevada limited liability company, is an agricultural operator in Diamond and Kobeh Valley, Nevada, whose managing members include Mark and Martin Etcheverry. Martin Etcheverry is a general partner in Michel and Margaret Ann Etcheverry Family LP.

3. Michel and Margaret Ann Etcheverry Family LP ("Etcheverry LP"), a foreign limited partnership registered in Nevada, is a landowner and water right holder in Kobeh Valley, Nevada.

4. Respondent NEVADA STATE ENGINEER ("State Engineer") is an agent of the State of Nevada who, together with the Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, regulates the water use in the State.

5. A Notice of this Petition has been or will be served on the Nevada State Engineer and on all persons affected by Ruling #6127 of the State Engineer pursuant to NRS 533.450(3).

6. This Court has jurisdiction to address this petition under NRS 533.450 and NRS 233B.

7. Venue is proper under NRS 533.450. The Applications are appurtenant to lands in Eureka County.

## DECISIONS

8. Between May 3, 2005 and June 15, 2010, numerous applications to appropriate underground water and to change the point of diversion, place of use and/or manner of use within the Kobeh Valley (139) and Diamond Valley (153) Hydrographic Basins, Lander County and Eureka County, Nevada, were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively referred to herein as the "Applications"). The Applications filed by Idaho



General Mines, Inc. were thereafter assigned to Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for development of a proposed molybdenum mine known as the Mount Hope Mine Project requiring underground water for mining, milling and dewatering purposes.

9. The subject Applications request a total combined duty of 11,300 acre feet annually (afa).

10. On October 13-17, 2008, an administrative hearing was held before the State Engineer that resulted in the issuance of Ruling #5966 on March 26, 2009. Ruling #5966 was appealed to this Court in Case Nos. CV 0904-122 and CV 0904-123. This Court entered its decision on April 21, 2010 vacating Ruling #5966 and remanding the matter for a new hearing.

11. Benson timely filed protests on Applications 79934, 79935, 79936, 79937, 79938, and 79939, and participated in the administrative hearing.

Applicant's Application	Based on Changes to Application	CFS Requested by Applicant	AFA Requested by Applicant	Applicant's Point of Appropriation
79934	76745	1.22	819.24	Well 206
79935	76990	0.76	322.5	Well 206
79936	75990	1.0	272.64	Well 206
79937	75991	1.0	723.97	Well 206
79938	74587	1.0	723.97	Well 206
79939	73547	1.0	723.97	Well 206
Total:		5.98	3586.29	

12. Martin Etcheverry on behalf of himself, the Michel and Margaret Ann Etcheverry Family LP, and the Diamond Cattle Company, LLC, and as a witness for Eureka County, testified at the administrative hearing on December 9, 2010, in opposition to the Applications.

13. At trial, Martin Etcheverry testified at length as to the draw down of streams, creeks and wells as a direct result of the Applicant's water availability testing.

14. Etcheverry LP, the landowner to real property with water rights of use, has entered into a long term lease agreement with Diamond Cattle to operate the farming and ranching operation. This lease includes long term rights to the United States, Department of

1 Interior, Bureau of Land Management grazing preferences in the Roberts Creek Allotment. The  
2 grazing preference is an integral and indispensable part of the farming and ranching operation.  
3 Etcheverry LP is opposed to the Applications.

4 15. Diamond Cattle, an entity whose members include Mark and Martin Etcheverry,  
5 operates the grazing permits, farming, and livestock operations of Etcheverry LP in Kobeh  
6 Valley, and is opposed to the Applications. During the administrative hearing on December 9,  
7 2010, Martin Etcheverry testified as to the Applications' affects on Diamond Cattle interests.

8 16. A public administrative hearing was held on December 6, 7, 9, and 10, 2010, with  
9 one additional day on May 10, 2011.

10 17. On July 15, 2011, the State Engineer issued Ruling #6127 granting the majority of  
11 the Applications subject to certain terms and conditions.

12 18. This petition is filed with this Court on the grounds that Petitioners, who are  
13 landowners and/or agricultural producers in Eureka County with interests in the rights of use to  
14 ground water, as well as holders of property interests in ground water rights, are aggrieved by  
15 State Engineer Ruling #6127.

#### 16 GENERAL ALLEGATIONS

17 19. The State Engineer's Ruling #6127 is arbitrary, capricious and an abuse of  
18 discretion and/or exceeds his statutory authority in one or more of the following ways:

- 19 A. Failing to consider and address substantial evidence on the impacts of  
20 granting the Applications on existing water rights, including but not  
21 limited to failing to address Applicant's diversions from Well 206,  
22 being approximately 75 feet from Petitioner Etcheverry LP and  
23 Diamond Cattle's Roberts Creek Ranch. Applicant's own witnesses  
24 testified to 'dewatering' the carbonate aquifer upon which Petitioners  
25 rely for their irrigation, stock and domestic water uses.

26 ///

- 1 B. Determining that impacts from Applicant's pumping to existing rights  
2 can be adequately and fully mitigated by the Applicant is contrary to  
3 the evidence presented by existing water right holders that such  
4 impacts could not be mitigated.
- 5 C. Failing to adequately address the statutorily required elements for an  
6 interbasin transfer of water and the substantial evidence submitted  
7 regarding such elements.
- 8 D. Determining that Applicant's groundwater model was suitable to  
9 forecast impacts on the proposed water use.
- 10 E. Relying on a mitigation plan yet to be drafted to address impacts to  
11 existing rights and potential future impacts.
- 12 F. Approving the place of use requested was contrary to the substantial  
13 evidence on the record given that the actual well locations for the  
14 Mount Hope Mine Project are not known.
- 15 G. Ruling #6127 approved Applications for certain water rights that had  
16 been forfeited.
- 17 H. The record did not support findings and determinations made by the  
18 State Engineer in Ruling #6127 that changed the perennial yields of  
19 certain basins as there is no evidence in the Record that the Applicant  
20 can capture the perennial yield of the Kobeh Valley Hydrographic  
21 Basin and thus would be taking water from the basin's storage, which  
22 is contrary to the State Engineer's precedent and determinations  
23 regarding perennial yield.
- 24 I. Failing to allow for the incorporation and consideration of the USGS  
25 study as to the ground water flow between the seven hydrographic  
26 basins that encompass the Diamond Valley Flow System.



20. The substantial rights of Petitioners have been prejudiced because Ruling #6127 of the State Engineer violates statutory provisions, is in excess of the statutory authority of the State Engineer, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and is characterized by an abuse of discretion.

21. Ruling #6127 of the State Engineer is arbitrary and capricious, contrary to and affected by error of law, without any rational basis, violated Petitioners' due process rights, is beyond the legitimate exercise of power and authority of the State Engineer and is without consideration of all the facts and circumstances and the entire record as a whole.

22. Petitioner Benson has exhausted his administrative remedies.

23. Petitioners Diamond Cattle and Etcheverry LP have exhausted their administrative remedies by participating via testimony of Martin Etcheverry in opposition to the Applicant at the administrative level, and are aggrieved parties pursuant to NRS 533.450(1).

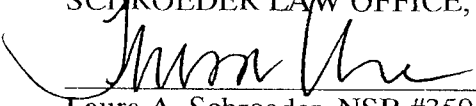
WHEREFORE, Petitioners request relief as follows:

1. Granting judicial review of the State Engineer Ruling #6127 issued on July 15, 2011;
2. Vacating and setting aside the State Engineer Ruling #6127 issued on July 15, 2011;
3. For the costs of suit herein incurred;
4. For reasonable attorney fees; and
5. For such other and further relief that this Court deems just and proper.

Pursuant to NRS 233B.133(4), a hearing is requested in this matter.

DATED this 10<sup>th</sup> day of August, 2011.

SCHROEDER LAW OFFICE, P.C.

  
Laura A. Schroeder, NSB #3595

Therese A. Ure, NSB #10255

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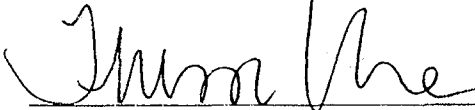
*Attorneys for the Petitioners*

1 **AFFIRMATION**

2 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
3 **PETITION FOR JUDICIAL REVIEW** does not contain the social security number of any  
4 person.

5  
6 DATED this 10<sup>th</sup> day of August, 2011.

SCHROEDER LAW OFFICE, P.C.

7  
8 

Laura A. Schroeder, NSB #3595

Therese A. Ure, NSB #10255

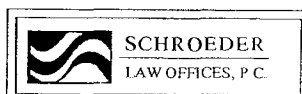
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*Attorneys for Petitioners*



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

IN THE MATTER OF APPLICATIONS 72695, 72696, )  
72697, 72698, 73545, 73546, 73547, 73548, 73549, )  
73550, 73551, 73552, 74587, 75988, 75989, 75990, )  
75991, 75992, 75993, 75994, 75995, 75996, 75997, )  
75998, 75999, 76000, 76001, 76002, 76003, 76004, )  
76005, 76006, 76007, 76008, 76009, 76483, 76484, )  
76485, 76486, 76744, 76745, 76746, 76802, 76803, )  
76804, 76805, 76989, 76990, 77171, 77174, 77175, )  
77525, 77526, 77527, 77553, 78424, 79911, 79912, )  
79913, 79914, 79915, 79916, 79917, 79918, 79919, )  
79920, 79921, 79922, 79923, 79924, 79925, 79926, )  
79927, 79928, 79929, 79930, 79931, 79932, 79933, )  
79934, 79935, 79936, 79937, 79938, 79939, 79940, )  
79941, AND 79942 FILED TO APPROPRIATE OR TO )  
CHANGE THE POINT OF DIVERSION, PLACE OF )  
USE AND MANNER OF USE OF THE PUBLIC )  
WATERS OF UNDERGROUND SOURCES WITHIN )  
THE KOBEH VALLEY (139) AND DIAMOND )  
VALLEY (153) HYDROGRAPHIC BASINS, LANDER )  
COUNTY AND EUREKA COUNTY, NEVADA. )

**RULING**

**#6127**

**GENERAL**

**I.**

Applications 72695 thru 72698 were filed on May 3, 2005, by Idaho General Mines, Inc., later assigned to Kobeh Valley Ranch, LLC, to appropriate 22.28 cubic feet per second (cfs) each of underground water for mining and milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by David A. Stine (Conley Land and Livestock, LLC), Eureka County and Lloyd Morrison.<sup>1</sup>

Applications 73545 thru 73552 were filed on December 5, 2005, by Idaho General Mines, Inc., later assigned to Kobeh Valley Ranch, LLC, to appropriate 22.28 cfs each of underground water for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed

<sup>1</sup> File Nos. 72695 thru 72698, official records in the Office of the State Engineer.

Mount Hope Mine. The applications were protested by David A. Stine (Conley Land and Livestock, LLC), Eureka County and Lloyd Morrison.<sup>2</sup>

Application 74587 was filed on August 2, 2006, by Idaho General Mines, Inc., later assigned to Kobreh Valley Ranch, LLC, to appropriate 22.28 cfs of underground water for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. This application was not protested.<sup>3</sup>

Applications 75988 thru 76004 were filed on June 29, 2007, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 54093, Permit 54094, Permit 60281, Permit 60282, Permit 60283, Permit 60284, Permit 60285, Permit 60286, Permit 72580, Permit 72581, Permit 72582, Permit 72583, Permit 72584, Permit 72585, Permit 72586, Permit 72587, and Permit 72588. The proposed manner of use is mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>4</sup>

Applications 76005 thru 76009 were filed on June 29, 2007, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 57835, Permit 57836, Permit 57839, Permit 57840 and Permit 66062, respectively. The proposed manner of use is for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>5</sup>

Applications 76483 thru 76486 were filed on November 14, 2007, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 10426 Certificate 2782, Permit 18544 Certificate 6457, Permit 23951 Certificate 8002 and Permit 23952 Certificate 8003, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>6</sup>

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<sup>2</sup> File Nos. 73545 thru 73552, official records in the Office of the State Engineer.

<sup>3</sup> File No. 74587, official records in the Office of the State Engineer.

<sup>4</sup> File Nos. 75988 thru 76004, official records in the Office of the State Engineer.

<sup>5</sup> File Nos. 76005 thru 76009, official records in the Office of the State Engineer.

<sup>6</sup> File Nos. 76483 thru 76486, official records in the Office of the State Engineer.



Applications 76744, 76745, and 76746 were filed on February 13, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of portions of Permit 13849 Certificate 4922, Permit 35866, and Permit 64616, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. Application 76744 was protested by Cedar Ranches, LLC, and Eureka County and Applications 76745 and 76746 were protested by Cedar Ranches, LLC, Eureka County and Lander County.<sup>7</sup>

Applications 76802, 76803, 76804 and 76805 were filed on March 11, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion of Applications 76005, 76006, 76007, and 76009. The proposed manner of use is for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>8</sup>

Applications 76989 and 76990 were filed on April 23, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion, place of use and manner of use of Permit 9682 Certificate 2780 and Permit 11072 Certificate 2880, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>9</sup>

Applications 77171, 77174 and 77175 were filed on June 20, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion of Applications 76003, 76485 and 76484, respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>10</sup>

Applications 77525, 77526 and 77527 were filed on October 23, 2008, by Kobeh Valley Ranch, LLC, to change the point of diversion of Applications 75990, 75996 and 75997 (portion), respectively. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum

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<sup>7</sup> File Nos. 76744, 76745, and 76746, official records in the Office of the State Engineer.

<sup>8</sup> File Nos. 76802, 76803, 76804 and 76805, official records in the Office of the State Engineer.

<sup>9</sup> File Nos. 76989 and 76990, official records in the Office of the State Engineer.

<sup>10</sup> File Nos. 77171, 77174 and 77175, official records in the Office of the State Engineer.

ore at the proposed Mount Hope Mine. The applications were protested by Eureka County.<sup>11</sup>

Application 77553 was filed on November 3, 2008, by Kobreh Valley Ranch, LLC, to change the point of diversion of a portion of Application 75997. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The application was protested by Eureka County.<sup>12</sup>

Application 78424 was filed on April 30, 2009, by Kobreh Valley Ranch, LLC, to change the point of diversion of Application 76803. The proposed manner of use is for mining, milling and dewatering purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The application was protested by Eureka County.<sup>13</sup>

Applications 79911 thru 79942 were filed on June 15, 2010, by Kobreh Valley Ranch, LLC, to change the point of diversion, place of use and/or manner of use of Applications 73551, 73552, 76004, 72695, 76003, 72696, 75997, 72697, 75988, 75996, 75999, 75989, 76989, 75995, 72698, 76000, 76002, 73545, 75992, 75993, 75994, 75998, 73546, 76745, 76990, 75990, 75991, 74587, 73547, 74587, 76746, 76001. The proposed manner of use is for mining and milling purposes. The project is further described as the mining and processing of molybdenum ore at the proposed Mount Hope Mine. The applications were protested by Eureka County, Lloyd Morrison, Baxter Glenn Tackett (79914, 79918, 79925), and Kenneth Benson (79934, 79935, 79936, 79937, 79938, 79939).<sup>14</sup>

## II.

Applications 72695 thru 72698 and Applications 73545 thru 73552 were timely protested by the following Protestants and on the following summarized grounds:

David Stine (Conley Land and Livestock, LLC, as Successor)<sup>1,2</sup>

- The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Kobreh Valley provides recharge to Diamond Valley and therefore, Diamond Valley water levels will decrease at an accelerated rate.

<sup>11</sup> File Nos. 77525, 77526 and 77527, official records in the Office of the State Engineer.

<sup>12</sup> File No. 77553, official records in the Office of the State Engineer.

<sup>13</sup> File No. 78424, official records in the Office of the State Engineer.

<sup>14</sup> File Nos. 79911 thru 79942, official records in the Office of the State Engineer.

- The applications list dewatering as a manner of use, but the points of diversion are at least 7 miles from the pit location. Applicant should specify actual points of diversion for dewatering.
- The mine site straddles Kobeh Valley and Diamond Valley and dewatering may involve an interbasin transfer of groundwater.
- Any application approved should be assigned a temporary status.

Eureka County

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- Place of use is listed as 90,000 acres and is inconsistent with stated purpose.
- The points of diversion are within Basin 139 and the place of use includes Basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6) (Interbasin transfers).
- There is no unappropriated water at the proposed source of supply, the proposed use conflicts with or will impair existing rights and protectable interests in domestic wells and threatens to prove detrimental to the public interest.
- Applicant has failed to provide the State Engineer with all relevant information required by statute.

Lloyd Morrison

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Over-pumping in Kobeh could stop underground recharge of Diamond Valley.

**III.**

Applications 75988 thru 76009 were timely protested by Eureka County on the following summarized grounds:<sup>4,5</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- There is no unappropriated water at the proposed source of supply, the proposed use conflicts with or will impair existing rights and protectable interests in domestic wells and threatens to prove detrimental to the public interest.
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County and others.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

#### IV.

Applications 76483 thru 76486 were timely protested by Eureka County on the following summarized grounds:<sup>6</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

#### V.

Applications 76744, 76745, and 76746 were timely protested by the following Protestants and on the following summarized grounds:<sup>7</sup>

##### Eureka County

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

##### Cedar Ranches, LLC

- There is no geologic and/or hydrologic evidence that the quantity of water exists in the mine region.

- New geologic data shows that eastern great basin carbonate aquifer ground-water system of Kobeh, Diamond, and Pine Valleys and other valleys of the region are interconnected.
- Water mining in Kobeh Valley will aggravate the over allocation of water permits in Diamond Valley.

Lander County (76745 and 76746 only)

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.
- Inter-basin and Inter-County transfer as proposed should be carefully examined.

VI.

Applications 76802, 76803, 76804 and 76805 were timely protested by Eureka County on the following summarized grounds:<sup>8</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

## VII.

Applications 76989 and 76990 were timely protested by Eureka County on the following summarized grounds:<sup>9</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-appropriate the basin.
- Direct conflict with forfeiture provisions of Nevada water law.
- Impact to existing rights in Kobeh Valley, Pine Valley and Diamond Valley.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Applicant has not shown compliance with NRS § 533.370(6).
- Applicant has failed to provide the State Engineer with all relevant information required by statute.
- Kobeh Valley may provide underflow to Diamond Valley and sustained pumping in Kobeh will likely reduce that amount and affect prior existing water rights held by Eureka County.
- All applications filed for this project cannot be approved as the aggregate is greater than 16,000 afa.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.

## VIII.

Applications 77171, 77174, 77175, 77525, 77526, 77527, 77553 and 78424 were timely protested by Eureka County on the following summarized grounds:<sup>10,11,12,13</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-pump the basin.
- Existing USGS reports suggests that Kobeh Valley may provide underground flow to Diamond Valley and affect existing municipal rights.
- Impact to existing stockwater and irrigation rights in Kobeh Valley and domestic wells in Diamond Valley.
- Effective monitoring and mitigation plan is necessary prior to development of any water and Eureka County should be involved in additional study, modeling and plan.
- Impacts associated with sustained pumping at the proposed points of diversion are unknown.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Compliance with the requirements of NRS § 533.370(6) must be met.
- All applications filed for this project cannot be approved as the aggregate is greater than 11,300 afa the Applicant is seeking.
- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.

- Only consumptive portion of base rights should be subject to change.
- Any protest hearings to be held should be in Eureka.
- The Applicant's groundwater model is not technically adequate and cannot be used as a basis to approve the applications.
- The point of diversion for Application 77553 is 1,500 feet west of the boundary between Kobreh Valley and Diamond Valley. The proposed location may suggest significant secondary permeability exists in the rocks at this locale; the well may intercept flow from Kobreh Valley to Diamond Valley.
- Hydraulic properties of the proposed point of diversion are not known.
- Further applications for the mines project should not be considered until the USGS study is complete and additional data and analysis is complete.

### IX.

Applications 79911 thru 79942 were timely protested by Eureka County and Lloyd Morrison on the following summarized grounds:<sup>14</sup>

- Perennial Yield - The basin is fully appropriated and the applications would substantially over-pump the basin.
- Existing USGS reports suggests that Kobreh Valley may provide underground flow to Diamond Valley and effect existing municipal rights.
- Impact to existing stockwater and irrigation rights in Kobreh Valley and domestic wells in Diamond Valley.
- Effective monitoring and mitigation plan is necessary prior to development of any water and Eureka County should be involved in additional study, modeling and plan.
- There are other pending applications to appropriate water and the applicant must withdraw these applications or a decision rendered on these applications prior to ruling.
- Not all of the proposed points of diversion have been explored. Impacts associated with sustained pumping at the proposed points of diversion are unknown.
- The applicant must prove that pumping will not impact any of the sources contributing to Pete Hanson Creek and Henderson Creek.
- The proposed place of use is larger than the mine's Plan of Operations project boundary.
- Further applications for the mines project should not be considered until the USGS study is complete and additional data and analysis is complete.
- Propagation of the cones of depression from pit dewatering in Diamond Valley must be determined.
- The points of diversion are within basin 139 and the place of use includes basins 153 and 53; Compliance with the requirements of NRS § 533.370(6) must be met.
- Kobreh Valley may provide underflow to Diamond Valley and sustained pumping in Kobreh Valley will likely reduce that amount and affect prior existing water rights held by Eureka County.
- All applications filed for this project cannot be approved as the aggregate is greater than 11,300 cfs the Applicant is seeking.

- Applicant lacks ability to finance the proposed works.
- Any application approved should be assigned a temporary status.
- Only consumptive portion of base rights should be subject to change.
- Any protest hearings to be held should be in Eureka.
- The applicant holds notices filed with the BLM associated with water supply exploration activities within Diamond Valley.
- Monitoring, Management and Mitigation Plan must be developed prior to approval.
- The State Engineer should conduct a full and fair hearing.
- Forfeiture of existing rights.

X.

Applications 79934 thru 79939 were timely protested by Kenneth F. Benson on the following summarized grounds:<sup>15</sup>

- Forthcoming USGS studies could indicate a greater contribution from Kobeh Valley to Diamond Valley. Possible flow of 10,000 to 12,000 acre-feet annually, if substantiated, would diminish the water balance and the mining project applications could not be supported.

XI.

Applications 79914, 79918 and 79925 were timely protested by Baxter Glenn Tackett on the following summarized grounds:<sup>16</sup>

- In summary, I protest the Application based on an ill conceived interbasin transfer of water, an erroneous definition of beneficial use of those waters and consumption for beneficial use in Kobeh Valley, and the very real potential that artesian flows in both Kobeh Valley and Antelope Valleys will be adversely affected.
- Protestant is owner and operator of Hot Springs Ranch in Antelope Valley and is concerned that artesian flows will be affected.

XII.

The applications at issue represent an attempt by the Applicant to procure sufficient water for a proposed molybdenum mine to be located near Mount Hope, approximately 25 miles northwest of the Town of Eureka, Eureka County, Nevada. The applications are a combination of new appropriations of water and change applications for existing water rights. The Applicant has amended its original request of 16,000 afa and is now requesting a total combined duty of 11,300 acre-feet annually (afa). The

<sup>15</sup> File Nos. 79934 thru 79939, official records in the Office of the State Engineer.

<sup>16</sup> File Nos. 79914, 79918 and 79925, official records in the Office of the State Engineer.



Applicant is Kobeh Valley Ranch, LLC; a company formed by General Moly, Inc. to handle, hold and control the water rights for the project.

On October 13-17, 2008, the State Engineer held an administrative hearing in the matter of applications filed to appropriate or change underground water to support the Mount Hope mining project. Some of the applications were approved and others were denied by State Engineer's Ruling No. 5966, issued March 26, 2009. The ruling was appealed to district court in accordance with NRS § 533.450. The Seventh Judicial District Court vacated Ruling No. 5966 in its Order entered April 21, 2010. Subsequently, change Applications 79911 thru 79942 were filed on applications subject to State Engineer's Ruling No. 5966. The State Engineer held a new administrative hearing on December 6, 7, 9 and 10, 2010, that included the additional Applications.

After all parties were duly noticed by certified mail, a public administrative hearing was held in Carson City, Nevada starting on December 6, 2010, in the matter of the above-referenced applications before representatives of the Office of the State Engineer.<sup>17</sup> Protestant Benson filed a Motion to adopt the previous record from the hearing of October 13-17, 2008, and the motion was unopposed.<sup>18,19</sup>

On May 10, 2011, an additional day of hearing was held to consider additional information regarding specific water usage at the proposed mining project. All parties were notified and additional testimony and exhibits were admitted as part of the record.<sup>20</sup>

### **FINDINGS OF FACT**

#### **I.**

#### **STATUTORY STANDARD TO GRANT**

The State Engineer finds that NRS § 533.370(1) provides that the State Engineer shall approve an application submitted in the proper form, which contemplates the application of water to beneficial use if the applicant provides proof satisfactory of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence, and his financial ability and reasonable

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<sup>17</sup> Exhibits and Transcript, public administrative hearing before the State Engineer, December 6, 7, 9, 10, 2010, official records in the Office of the State Engineer (Hereafter, Transcript, December 2010 and Exhibits, December 2010).

<sup>18</sup> Exhibit No. 13, December 2010.

<sup>19</sup> Exhibits and Transcript, public administrative hearing before the State Engineer, October 13-17, 2008, official records in the Office of the State Engineer (Hereafter, Transcript, October 2008 and Exhibits, October 2008).

<sup>20</sup> Transcript, May 10, 2011, and Exhibit Nos. 2, 3, 4 and 5.

expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

## **II. APPLICATIONS SUBMITTED IN PROPER FORM**

The protests allege that the applications should be denied because they fail to adequately describe the proposed points of diversion and place of use. The application form used by the Division of Water Resources (Division) requires a description of the proposed point of diversion by survey description and the description must match the illustrated point of diversion on the supporting map. If and when a well is drilled, it must be within 300 feet and within the same quarter-quarter section as described or an additional change application is required. Prior to an application being published, the Division reviews incoming applications and maps to ensure statutory compliance. Any application or map that does not meet the requirements for acceptance and that cannot be corrected during the review process is rejected and returned for correction with time limits for the applicant to re-submit. The State Engineer finds that the Applicant has met the requirements for describing the points of diversion and place of use on the application forms and supporting maps. The State Engineer finds that all applications subject to this ruling have been submitted in the proper form.

## **III. FINANCIAL ABILITY, BENEFICIAL USE AND REASONABLE DILIGENCE**

Nevada water law requires the State Engineer to consider whether the Applicant has an intention in good faith to construct the work necessary to place any approved water to beneficial use. The Applicant also must show that it has the financial ability and reasonable expectation to construct the work necessary to apply the water to its beneficial use.<sup>21</sup>

The chief financial officer of General Moly, Inc. stated that the total expenditure of funds required for the project is \$1,154,000,000. The Applicant has expended about \$163,000,000 on such things as buying equipment, hydrology, drilling, engineering, permitting, land and water rights. General Moly, Inc. will provide 80% of the funding and partner POSCO, a Korean steel producer, will provide the remaining 20%. General Moly Inc. has arranged much of its financing through its Hanlong transaction. The

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<sup>21</sup> NRS § 533.370(1)(c).

Hanlong transaction includes a \$665,000,000 bank loan from a Chinese bank sourced and fully guaranteed by Hanlong Group. It also includes an \$80,000,000 purchase of 25% of General Moly's fully diluted shares, a \$20,000,000 bridging loan from Hanlong Group, and a molybdenum supply agreement. Hanlong is a private Chinese company headquartered in Sichuan Province in China with experience in mining projects. The financial ability of the Applicant is further detailed in the Applicant's financial exhibit and testimony.<sup>22</sup>

The State Engineer finds the evidence presented demonstrates that the Applicant has a reasonable expectation of financial ability to construct the work and apply the water to the intended beneficial use with reasonable diligence.

#### **IV. STATUTORY STANDARD TO REJECT**

The State Engineer finds that NRS § 533.370(5) provides that the State Engineer shall reject an application and refuse to issue the permit where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS § 533.024, or where the proposed use threatens to prove detrimental to the public interest.

#### **V. UNAPPROPRIATED WATER - PERENNIAL YIELD**

Nevada Revised Statute § 533.370(5) provides that the State Engineer must reject an application where there is no unappropriated water in the proposed source of supply. In determining the amount of groundwater available for appropriation in a given hydrographic basin, the State Engineer relies on available hydrologic studies to provide relevant data to determine the perennial yield of a basin. The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. If the perennial yield is exceeded, groundwater levels will decline and steady-state conditions will not be achieved, a situation commonly referred to as groundwater mining. Additionally, withdrawals of groundwater in excess of the perennial yield may contribute to adverse

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<sup>22</sup> Exhibit No. 37 and Transcript, pp. 27-36, December 2010.

conditions such as water quality degradation, storage depletion, diminishing yield of wells, increase in cost due to increased pumping lifts, and land subsidence.<sup>23</sup>

The perennial yields of hydrographic basins that are part of interbasin flow systems are often difficult to establish, and in the past, groundwater has sometimes been double counted, so that the sum of the perennial yields of the basins in the flow system is more than the sum of either the evapotranspiration (ET) discharge or natural recharge of the basins in the flow system. Such is the case with the Diamond Valley groundwater flow system. The Diamond Valley flow system is comprised of seven hydrographic basins: Monitor Valley South, Monitor Valley North, Kobeh Valley, Antelope Valley, Stevens Basin, Pine Valley, and Diamond Valley.<sup>24</sup> Diamond Valley is the terminus of the groundwater flow system. Groundwater flows from South Monitor Valley to North Monitor Valley, then to Kobeh Valley, and finally to Diamond Valley. Groundwater from Antelope Valley may flow to Kobeh Valley and then to Diamond Valley. Groundwater from Stevens Basin flows to Diamond Valley and/or Antelope Valley. Groundwater from the Garden Valley area, a part of the Pine Valley Hydrographic Basin, flows to Diamond Valley.<sup>25</sup> Monitor Valley, Antelope Valley, Kobeh Valley and Diamond Valley lose much of their annually recharged groundwater to ET, and the actual amount of subsurface flow between basins is uncertain. Previous publications have estimated the amount of subsurface flow,<sup>26,27,28</sup> and the Applicant has also provided estimates of subsurface interbasin flow between selected basins.<sup>29</sup> While the estimated amount of subsurface interbasin flow may be uncertain or disputed, there is general agreement on the direction of flow. Figure 1, shown on page 16, shows basin water budgets and interbasin flows as estimated in the Reconnaissance Series reports, and for reference, also shows interbasin flow as computed by the Applicant's groundwater flow model. Monitor Valley South provides an estimated 2,000 afa of subsurface inflow to Monitor Valley North, which in turn supplies 6,000 afa of subsurface inflow to Kobeh Valley. The Applicant estimated 1,370 to 1,680 afa of subsurface flow

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<sup>23</sup> State Engineer's Office, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, October 1971.

<sup>24</sup> Exhibit No. 10, October 2008.

<sup>25</sup> Exhibit No. 13, October 2008.

<sup>26</sup> Exhibit No. 17, October 2008.

<sup>27</sup> Exhibit No. 16, October 2008.

<sup>28</sup> Exhibit No. 134, December 2010.

<sup>29</sup> Exhibit No. 39, Tables 3.5-2 and 4.1-13, December 2010.

from Northern Monitor Valley to Koberh Valley.<sup>30</sup> Subsurface flow from Koberh Valley to Diamond Valley was estimated by Harrill to be less than approximately 40 afa.<sup>31</sup> The Applicant estimated 1,100 to 1,600 afa of subsurface flow from Koberh to Diamond Valley.<sup>32</sup> As can be seen from Figure 1, the established perennial yields of Monitor Valley North and South, and Koberh Valley exceed both the recharge and the ET. In Reconnaissance Report 30,<sup>33</sup> Rush and Everett recognize that substantial development in one of the basins could affect the yields of adjacent basins. The Applicant's groundwater flow model simulates ET, and ET for each basin has been tabulated in its exhibit.<sup>34</sup> However, those tabulations do not represent the result of a specific study whose goal was to re-estimate groundwater ET, and will not be used in place of the existing published water budgets from the reconnaissance reports.

To resolve these issues with interbasin flow and to establish safe and conservative perennial yields in these basins, the perennial yield of each of the basins will be equal to the basin's groundwater ET. In this way, subsurface flow into or out of a basin will not be included in its perennial yield and there will be no double counting. Water that flows in the subsurface from Koberh Valley to Diamond Valley, however much that may be, will not be part of Koberh Valley's perennial yield. The State Engineer hereby establishes the perennial yield of the following six basins in the Diamond Valley Flow System as follows:

<u>Basin</u>	<u>Perennial Yield (acre-feet)</u>	
	<u>Previous</u>	<u>Revised</u>
Monitor Valley, Southern Part - Basin 140B:	10,000	9,000
Monitor Valley, Northern Part - Basin 140A:	8,000	2,000
Koberh Valley, Basin 139:	16,000	15,000
Antelope Valley, Basin 151:	4,000	4,000
Stevens Basin, Basin 152:	100	100
Diamond Valley, Basin 153:	30,000	30,000

<sup>30</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>31</sup> Exhibit No. 13, October 2008.

<sup>32</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>33</sup> Exhibit No. 17, p. 26, October 2008.

<sup>34</sup> Exhibit No. 39, Table 4.1-12, December 2010.

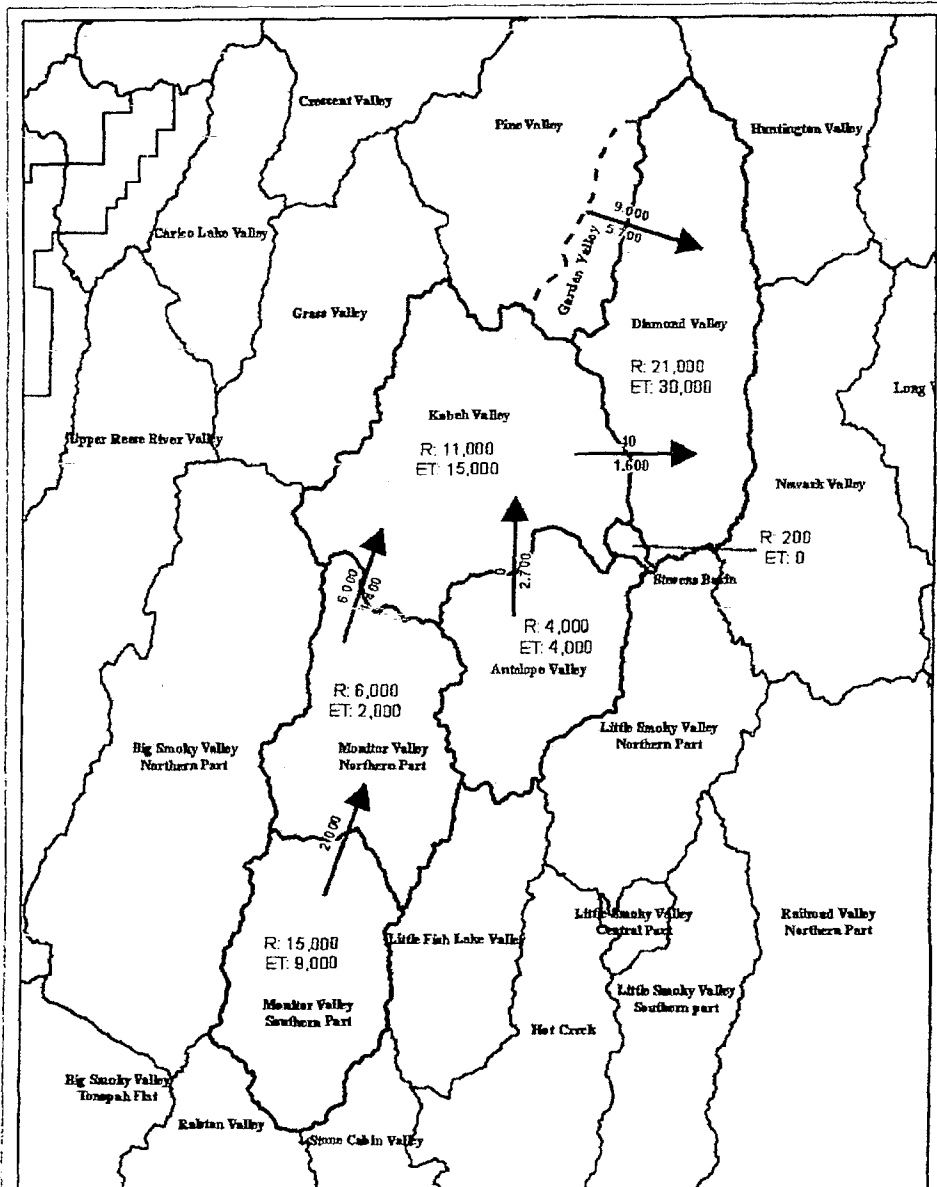


Figure 1 Hydrographic basins of the Diamond Valley groundwater flow system, showing reconnaissance report estimates of groundwater recharge and ET discharge. Arrows show estimated annual interbasin flow from both reconnaissance reports and groundwater flow model.

Interbasin groundwater flow  
Reconnaissance  
Modeled

R In-basin recharge (afa)  
ET Evapotranspiration (afa)

Prior to the administrative hearing, the Applicant acquired nearly all of the existing groundwater rights within the Kobeh Valley Hydrographic Basin, excepting approximately 1,100 afa. The Applicant has filed new applications and change applications seeking a total combined duty of 11,300 afa from Kobeh Valley. If the subject applications were to be approved, the total committed groundwater resources in Kobeh Valley would be approximately 12,400 afa, which is less than the revised perennial yield of 15,000 afa. The State Engineer finds that there is sufficient water within the perennial yield of Kobeh Valley to satisfy the water appropriation requirements of the project. The State Engineer finds that no new appropriation of underground water is sought within Diamond Valley.

#### **VI. CONFLICT WITH EXISTING RIGHTS OR DOMESTIC WELLS**

All of the Protestants raised the issue of potential conflicts with existing rights or domestic wells. They allege there could be potential impacts to water rights in Diamond Valley due to a reduction of subsurface flow from Kobeh Valley to Diamond Valley or due to drawdown from pumping. These potential impacts were evaluated by the Applicant in both its testimony and the groundwater flow model.<sup>35</sup> In Reconnaissance Series Report No. 6,<sup>36</sup> Eakin suggests minimal subsurface flow from Kobeh to Diamond Valley through the narrow alluvium-filled gap at Devil's Gate. Harrill suggests 40 afa through the same gap.<sup>37</sup> Rush and Everett concur on the minimal flow through Devil's Gate, and go on to state that flow from Kobeh to Diamond Valley through the carbonate bedrock is possible, but found no evidence to suggest such flow occurs.<sup>38</sup> Tumbusch and Plume did not provide a revised estimate of subsurface flow from Kobeh to Diamond Valley, but did pointedly recognize the potential for flow in the carbonate bedrock as evidenced by fault structures with solution cavities in carbonate outcrops at Devil's Gate.<sup>39</sup>

The Applicant used Darcy's Law to develop a conceptual estimate of interbasin flow, and estimated 50 to 290 afa of subsurface flow from Kobeh Valley to Diamond Valley at Devil's Gate through alluvium and carbonate bedrock.<sup>40</sup> Its witnesses further estimated 810 to 1,050 afa of deep flow in bedrock from Kobeh Valley to Diamond

<sup>35</sup> Exhibit No. 39, December 2010.

<sup>36</sup> Exhibit No. 16, p. 18, October 2008.

<sup>37</sup> Exhibit No. 13, pp. 21-23, October 2008.

<sup>38</sup> Exhibit No. 17, p. 16, October 2008.

<sup>39</sup> Exhibit No. 10, p. 13, October 2008.

<sup>40</sup> Exhibit No. 39, Table 4.1-13, December 2010.

Valley in the area north of Whistler Peak.<sup>41</sup> Next, they developed a numerical groundwater flow model to simulate both pre-development steady state conditions as well as the effects of pumping on groundwater levels and interbasin flow. With the groundwater flow model, it was estimated that pre-development flow was 1,583 afa from Kobeh to Diamond Valley.<sup>42</sup> For the present-day conditions, the model indicates water table drawdown due to agricultural pumping in Diamond Valley has increased inflow from Kobeh Valley to 2,001 afa,<sup>43</sup> which is estimated to further increase to 2,365 afa in year 2055 without any mine pumpage. For its predictive analyses, the Applicant completed multiple model simulations. A 'no action' alternative simulated continued agricultural pumping through year 2105. The Applicant's 'cumulative action' alternative simulated continued agricultural pumping as in the 'no action' alternative, but also simulated the pumping of 11,300 afa in Kobeh and Diamond Valley for the 44-year mine life ending in 2055. The net effect of the mine's pumping on groundwater levels and interbasin flow is then computed as the difference between the two model simulations.<sup>44,45</sup> The analyses of the future effects of pumping, by the Office of the State Engineer, used both the Exhibit No. 39 report as well as the computer model. The model results show a 15 afa increase in subsurface flow from Kobeh to Diamond Valley as a result of the mining project and its associated pumping.<sup>46</sup> The small increase in interbasin flow was explained as the net of a 40 afa increase in Kobeh to Diamond Valley flow at the site of the open pit due to dewatering, partially offset by a 25 afa decrease in Kobeh to Diamond Valley flow along the basin boundary at Whistler Mountain.<sup>47</sup>

Water level drawdown due to simulated mine pumping is thoroughly documented.<sup>48</sup> Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. However,

<sup>41</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>42</sup> Exhibit No. 39, Table 4.1-13, December 2010.

<sup>43</sup> Exhibit No. 39, Table 4.4-4, December 2010.

<sup>44</sup> Exhibit No. 39, pp. 177-178, December, 2010.

<sup>45</sup> There is a discrepancy in the naming of the alternatives. In Exhibit No. 39, pp. 177-178, the scenario that includes mine pumping is called 'cumulative action', however, the model files that simulate mine pumping are named 'base case'.

<sup>46</sup> Exhibit No. 39, Table 4.4-5 and 4.4-6, December 2010.

<sup>47</sup> Transcript, pp. 308-309, December 2010.

<sup>48</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-17, and groundwater flow model data files, December 2010.



additional drawdown at that same location due solely to continuing agricultural pumping in Diamond Valley is predicted to be about 90 feet.<sup>49</sup>

The model structure and simulation results were addressed by Protestant Eureka County's expert witnesses. Witness Bugenig testified that the model's predictive estimates of proposed mine pumping on Kobre to Diamond Valley subsurface flow was at least approximately accurate.<sup>50</sup> Witness Oberholtzer authored a May 2010 report in which the model was described as not having fatal flaws,<sup>51</sup> but in a November 2010 report she expressed concern that the model may not be accurate enough to be used as a predictive tool.<sup>52</sup> Ms. Oberholtzer testified that calibration issues in Diamond Valley raised concern and the model had limited abilities as a predictive tool.<sup>53</sup> In general, the expert witnesses brought forward by Protestant Eureka County testified that the model has shortcomings, but failed to present convincing evidence that the model predictions are not substantially valid.

Because the groundwater flow model is only an approximation of a complex and partially understood flow system, the estimates of interbasin flow and drawdown cannot be considered as absolute values. However, the modeling evidence does strongly suggest that the proposed mine pumping under these applications will not measurably decrease subsurface groundwater flow from Kobre to Diamond Valley and will not cause significant water level decline (less than 2 feet over entire mine life) at the points of diversion under existing water rights in Diamond Valley. The State Engineer finds the Applications will not conflict with existing rights in Diamond Valley by reducing the subsurface interbasin flow into the Diamond Valley hydrographic basin. Groundwater drawdown in Diamond Valley is not unreasonable at the locations of existing water rights and domestic wells, and meets the statutory requirements of NRS § 534.110. The State Engineer finds the applications will not conflict with existing rights or the protectable interest in domestic wells in Diamond Valley.

The Applicant's groundwater flow model indicates water level decline attributable to these applications is significant in the well field area in Kobre Valley and at the open pit mine. The Applicant's water level drawdown maps only show drawdown of ten feet

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<sup>49</sup> Exhibit 39, Groundwater flow model output data, December 2010.

<sup>50</sup> Transcript, p. 686, December 2010.

<sup>51</sup> Exhibit No. 402, December 2010.

<sup>52</sup> Exhibit No. 503, December 2010.

<sup>53</sup> Transcript, pp. 619-621, December 2010.

or more,<sup>54</sup> although the data files contain detailed information on drawdown to the fractions of a foot.<sup>55</sup> Many of the Protestants argued that water level declines of less than ten feet can cause impacts to surface waters in springs and streams, both in the mountains and on the valley floors. They point out that the model predicts drawdown of the water table below Henderson and Vinini Creeks and along the lower reaches of Roberts Creek. Since Henderson Creek is included in the Pete Hanson Creek Decree, they argue that these applications should be denied because they would conflict with existing rights. The Applicant's expert witnesses argue that these mountain springs and streams are not hydrologically connected to the saturated aquifer.<sup>56</sup> They argue that an unsaturated zone lies between these springs and streams and the aquifer; therefore, the relative level of the water table, so long as it is disconnected from the surface water feature, is immaterial, and no amount of decline in the water table could affect surface flows. This argument of the Applicant's expert witnesses is technically sound and is accepted by the State Engineer. In the testimony of Katzer, he refers to water levels in wells adjacent to Robert's Creek that demonstrate a disconnection between Robert's Creek and the groundwater aquifer that would prevent any decrease in stream flow due to the proposed pumping.<sup>57</sup> However, similar data is not available for Henderson and Vinini Creeks. Nevertheless, in the Henderson Creek area, Mr. Katzer argues that springs and streamflow are simply runoff from precipitation and draining of saturated soil, and are not directly connected to the groundwater aquifer. He argues that they are perched waters and similar to the Robert's Creek argument, could not be affected by a lowered water table. Mr. Katzer was asked about the depth to the water table relative to Henderson Creek and he stated that lower parts of Henderson Creek are probably close to the water table, but it would require drilling of monitor wells to know for certain.<sup>58</sup> As discussed above, the only way groundwater pumping could affect streamflow would be if the water table was in direct contact with the stream bed. It is important to note here that predicted groundwater level decline along Henderson Creek due to future agricultural pumping in Diamond Valley is greater than the predicted water level decline due to

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<sup>54</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-16, December 2010.

<sup>55</sup> Exhibit No. 30, groundwater flow model digital data, December 2010.

<sup>56</sup> Testimony of Katzer and Smith, Transcripts, December 2010.

<sup>57</sup> Exhibit No. 38, pp. 3-4, December 2010.

<sup>58</sup> Transcript, pp. 213-214, December 2010.

proposed mine pumping.<sup>59</sup> The State Engineer accepts the expert opinions of the Applicant that mine pumping is unlikely to affect streamflow in Roberts, Henderson or Vinini Creek and finds that the applications will not conflict with existing rights on those streams. However, because there are uncertainties with respect to the complex hydrogeology of the area and the ability of a model to accurately simulate future effects of pumping, the State Engineer will require a substantial surface and groundwater monitoring program to establish baseline groundwater and stream flow conditions to improve the predictive capability of the model and to increase the ability to detect future changes in the hydrologic regime.

Protestant Eureka County presented a comprehensive case with numerous witnesses and accompanying exhibits. In the 2008 hearing, Eureka County focused much of its argument on potential conflicts with Diamond Valley water rights. In the 2010 hearing, Eureka County stressed conflicts with existing rights in Kobeh and Pine Valleys. As discussed above, the State Engineer has found the applications will not conflict with existing rights in either Diamond or Pine Valley. Eureka County witnesses included the owners of the three largest ranches in the well field area in Kobeh Valley. Witnesses included Martin Etcheverry, owner of the Roberts Creek Ranch, Jim Etcheverry, owner of the 3-Bar Ranch, and John Colby, owner of the MW Cattle Company and the Santa Fe/Ferguson grazing allotment. Those three ranchers utilize available surface waters across the grazing allotments and own a variety of surface and groundwater rights in Kobeh Valley. The groundwater flow model predicts water table drawdown at the end of mine life of three feet or more in the general area of Kobeh Valley north of U.S. Highway 50 and east of 3-Bars Road. This includes the well field area, where drawdown is extensive. Drawdown of ten feet or less extends westerly to the Bobcat Ranch and southerly to the Antelope Valley boundary. Water rights that could potentially be impacted are those rights on springs and streams in hydrologic connection with the water table. That would include valley floor springs. Testimony from the Applicant's expert witnesses Katzer and Childress argue that faults at the base of the Robert's Mountains act as barriers to hydrologic flow and that surface water rights in the Roberts Mountains will not be impacted by proposed mine pumpage.<sup>60</sup> There was no expert testimony or

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<sup>59</sup> Exhibit No. 39, Groundwater flow model output data, December 2010.

<sup>60</sup> Transcript, pp. 169-177 and 227-260.

evidence submitted that indicates surface water rights in the Simpson Park Mountains would be impacted by the proposed applications. In Eureka County's Exhibit Nos. 526, 527, 529 and 530, numerous spring and stream water rights are shown. Water rights that could potentially be impacted are those rights on the valley floor where there is predicted drawdown of the water table due to mine pumping. The Applicant recognizes that certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping.<sup>61,62</sup> These springs produce less than one gallon per minute and provide water for livestock purposes.<sup>63</sup> The State Engineer finds that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur. To ensure funding exists for any required future mitigation, including mitigation after the cessation of active mining activities, the Applicant must demonstrate the financial capability to complete any mitigation work necessary in a monitoring, management, and mitigation plan. This monitoring, management, and mitigation plan must be approved by the State Engineer prior to diverting any water under these applications.

## **VII. PUBLIC INTEREST**

Nevada Revised Statute § 533.370(5) provides that the State Engineer must reject an application if the proposed use of the water threatens to prove detrimental to the public interest. The State Engineer has found that the Applicant has demonstrated a need for the water and a beneficial use for the water and it does not threaten to prove detrimental to the public interest to allow the use of the water for reasonable and economic mining and milling purposes as proposed. The Applicant has acquired about 16,000 afa of existing water rights within Kobeh Valley and requires 11,300 afa for its project. The Applicant has confirmed its commitment to developing this project, has demonstrated the ability to finance the project, and will be required to monitor any groundwater development. Water level drawdown due to simulated mine pumping is thoroughly documented.<sup>64</sup> Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. In regards to the importance of mining, Protestant Eureka County testified that mining is a life blood of

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<sup>61</sup> Transcript, pp. 163 and 187, December 2010.

<sup>62</sup> Exhibit No. 39, pp. 189-190, December 2010.

<sup>63</sup> Exhibit No. 116, Appendix B, October 2008.

<sup>64</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-17, and groundwater flow model data files, December 2010.

Eureka County<sup>65</sup> and that Eureka County has and always will be a mining and agricultural county.<sup>66</sup> In addition, Protestant Eureka County indicated that the mine will provide an economic benefit in the form of increased employment and tax revenue for the county.<sup>67</sup> The State Engineer finds under these facts and circumstances the proposed use of the water does not threaten to prove detrimental to the public interest.

#### **VIII. STATUTORY STANDARD FOR INTERBASIN TRANSFERS**

Nevada Revised Statute provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (a) whether the applicant has justified the need to import the water from another basin; (b) if the State Engineer determines a plan for conservation is advisable for the basin into which the water is imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (c) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) whether the proposed action is an appropriate long-term use, which will not unduly limit the future growth and development in the basin from which the water is exported; and (e) any other factor the State Engineer determines to be relevant. NRS § 533.370(6).

The Applicant is requesting an interbasin transfer of groundwater from both Kober Valley and Diamond Valley to a place of use that includes portions of the Kober Valley, Diamond Valley and Pine Valley Hydrographic Basins.

#### **IX. OTHER RELEVANT FACTORS**

In Diamond Valley, the Applicant has acquired existing water rights and the water sought for transfer in this ruling totals about 616 afa (about 385 afa when adjusted for consumptive use reduction). This water is primarily needed to account for inflow of water into the mine pit. All applications in Diamond Valley (Applications 76005-76009, 76802-76805, and 78424) seek to change existing water rights acquired by the Applicant; no new water appropriations are being sought within the Diamond Valley Hydrographic Basin. Whether the groundwater is fully developed under the existing water rights or under the proposed changes to point of diversion, place of use and manner of use, there would be no increase in demand on the groundwater resource in Diamond Valley.

<sup>65</sup> Transcript, p. 715, December 2010.

<sup>66</sup> Transcript, p. 438, October 2008.

<sup>67</sup> Transcript, pp. 438-439, October 2008.

A review of the Diamond Valley Hydrographic Basin shows that there are more committed groundwater rights in the form of permits and certificates than the estimated perennial yield of the basin, while the Kobeh Valley Hydrographic Basin has excess groundwater available for this project. Unless additional restrictions are put in place through permit terms, a situation could exist where water from an over-allocated basin could be exported to a basin that is under-allocated and the State Engineer finds that this would be contrary to the proper management of the Diamond Valley Hydrographic Basin's groundwater resource at this time. The State Engineer finds that any permit issued for the mining project with a point of diversion within the Diamond Valley Hydrographic Basin must contain permit terms restricting the use of water to within the Diamond Valley Hydrographic Basin and any excess water produced that is not consumed within the basin must be returned to the groundwater aquifer in Diamond Valley. The State Engineer finds that any approval of Applications 76005-76009, 76802-76805, and 78424 will restrict the use of any groundwater developed to within the Diamond Valley Hydrographic Basin; therefore, there will be no interbasin transfer of water allowed and NRS § 533.370(6) will not be applicable to these applications.

**X.  
NEED TO IMPORT WATER**

The interbasin transfer criteria were adopted in 1999. The impetus for the legislation was the proposed transfer of groundwater from rural hydrographic basins in eastern Nevada to the greater Las Vegas area to meet anticipated municipal growth; however, there is no exclusionary language for other manners of use. The requirements of NRS § 533.370(6) along with other statutory criteria are addressed in the following sections.

The groundwater developed for the project will come primarily from a well field located within Kobeh Valley. The mine project area straddles the basin boundary between Diamond Valley and Kobeh Valley and the proposed place of use also encompasses a small portion of Pine Valley. The Applicant presented evidence of its water requirements necessary to operate the project. Water use estimates were made for the operation of the mill and other ancillary uses such as dust control and potable water

supply.<sup>68</sup> The maximum water demand for the project is estimated at 7,000 gpm or about 11,300 afa, which is the amount of water requested by the Applicant.<sup>69</sup>

The Mt. Hope mine straddles the Diamond Valley - Kobeh Valley basin boundaries. The amount of water needed to dewater the pit is less than ten percent of the amount needed for the entire mining operation. Most of the groundwater will be used in the mine's milling circuit. The mill is to be located within Diamond Valley and the tailings storage facility is to be located within Kobeh Valley. Water in the tailings facility will then evaporate from the tailings, be recycled back to the mill, or permanently stored in the tailings facility. A review of the Kobeh Valley Hydrographic Basin shows that there is sufficient unappropriated groundwater to satisfy the demands of the mining project without exceeding the perennial yield of Kobeh Valley. The State Engineer finds that the Applicant has justified the need to import water to Diamond Valley from points of diversion located within the Kobeh Valley Hydrographic Basin.

#### **XI. PLAN FOR CONSERVATION OF WATER**

If the State Engineer determines a plan for conservation is advisable for the basin into which the water is imported, the State Engineer shall consider whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out. Since July 1, 1992, water conservation plans are required for any supplier of municipal and industrial water uses based on the climate and living conditions of its service area.<sup>70</sup> The provisions of the plan must apply only to the supplier's property and its customers. The Applicant is not a municipal supplier of water, there are no municipal and industrial purveyors in Kobeh Valley or Pine Valley and the Applicant does not own or control the municipal water supply to the Town of Eureka in Diamond Valley or any other municipal or quasi-municipal water supply. Eureka County has a water conservation plan on file in the Office of the State Engineer for the Town of Eureka Water System, Devil's Gate GID District #1 and District #2, and Crescent Valley Town Water System.<sup>71</sup> The Applicant

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<sup>68</sup> Transcript, pp. 564-571, October 2008; Exhibit Nos. 105, 108 and 112, October 2008.

<sup>69</sup> Transcript, p. 106, December 2010.

<sup>70</sup> NRS § 540.131.

<sup>71</sup> Eureka County - Joint Water Conservation Plan for Town of Eureka Water System, Devil's Gate GID District #1 and District #2, and Crescent Valley Town Water System, official records in the Office of the State Engineer.

will use proven molybdenum mining and milling technologies that will conserve water through reuse and recycling methods.<sup>72</sup>

The State Engineer has considered this statutory provision and hereby determines that requiring additional plans for water conservation is not necessary.

## **XII. ENVIRONMENTALLY SOUND**

The interbasin transfer statute requires a determination of whether the use of water as proposed under the applications is environmentally sound as it relates to the basin from which the water is exported. The words environmentally sound have intuitive appeal, but the public record and discussion leading up to the enactment of NRS § 533.370(6)(c) do not specify any operational or measureable criteria for use as the basis for a quantitative definition. This provision of the water law provides the State Engineer with no guidance as to what constitutes the parameters of “environmentally sound;” therefore, it has been left to the State Engineer’s discretion to interpret the meaning of environmentally sound.

The legislative history of NRS § 533.370(6)(c) shows that there was minimal discussion regarding the term environmentally sound. However, the State Engineer at that time indicated to the Subcommittee on Natural Resources that he did not consider the State Engineer to be the guardian of the environment, but rather the guardian of the groundwater and surface water. The State Engineer noted that he was not a range manager or environmental scientist. Senator Mark A. James pointed out that by the language ‘environmentally sound’ it was not his intention to create an environmental impact statement process for every interbasin water transfer application and that the State Engineer’s responsibility should be for the hydrologic environmental impact in the basin of export.<sup>73</sup>

The State Engineer finds that the meaning of ‘environmentally sound’ for basin of origin must be found within the parameters of Nevada water law and this means that whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources. The State Engineer finds that in consideration of

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<sup>72</sup> Transcript, p. 118, December 2010.

<sup>73</sup> Nevada Legislature Seventieth Session, *Summary of Legislation*, Carson City, Nevada: 1999, Web, Mar. 2, 2011. <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1999/SB108,1999.pdf>.



whether a proposed project is environmentally sound there can be a reasonable impact on the hydrologic related natural resources in the basin of origin.

Existing water rights in Kobeh Valley, not owned or controlled by the Applicant, total around 1,100 afa, and if the water for the project is approved the committed groundwater resource from the basin would be about 12,400 afa, which is far less than the perennial yield of the Kobeh Valley Hydrographic Basin. A review of records in the Office of the State Engineer show that there are 71 water-righted springs within the Kobeh Valley Hydrographic Basin. Of these 71 water rights, 29 are un-adjudicated claims of reserved water right filed by the United States Bureau of Land Management (BLM). The BLM was a protestant to the initial applications in this matter, but withdrew its protests after reaching a stipulation on monitoring, management and mitigation with the Applicant. The State Engineer finds that none of the remaining water rights are owned by any of the Protestants in this matter. Most of the remaining springs are either located far away from the proposed well sites or will not be affected due to topography and geology. However, the Applicant's groundwater model does indicate that there may be an impact to several small springs located on the valley floor of Kobeh Valley near the proposed well locations. These small springs are estimated to flow less than 1 gallon per minute.<sup>74</sup> Because these springs exist in the valley floor and produce minimal amounts of water, any affect caused by the proposed pumping can be easily mitigated such that there will be no impairment to the hydrologic related natural resources in the basin of origin. The monitoring, management and mitigation plan will allow access for wildlife that customarily uses the source and will ensure that any existing water rights are satisfied to the extent of the water right permit.

The State Engineer finds that the Applicant is only requesting 11,300 afa for its mining project, which when combined with other existing water rights is less than the perennial yield of the Kobeh Valley Hydrographic Basin. The State Engineer finds that prior to the October 2008 hearing, the Applicant had acquired about 16,000 afa of previously permitted or certificated groundwater rights within the Kobeh Valley Hydrographic Basin. The State Engineer finds that the required monitoring, management and mitigation plan, that must be approved prior to the pumping of water for the project,

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<sup>74</sup> Exhibit No. 116, Appendix B, October 2008.

will ensure that the proposed interbasin transfer of groundwater from the Kobeh Valley Hydrographic Basin remains environmentally sound throughout the life of the project.

**XIII.  
LONG-TERM USE OF THE WATER AND FUTURE GROWTH AND  
DEVELOPMENT IN THE BASIN OF ORIGIN**

Nevada has been known for containing vast deposits of minerals located throughout the state and mining has been a predominant economic force in Nevada since before statehood. Due to the availability of those mineral deposits, mining is one of the larger industries in Nevada and has traditionally provided many high-paying jobs for local communities and has contributed to the communities in other ways such as investing in infrastructure and services for those communities. It has had such an impact that the Nevada legislature declared mining and related activities to be recognized as a paramount interest of the state.<sup>75</sup> Mining operations are highly regulated by numerous governmental entities at the state and federal levels, including but not limited to regulation by Congress, the Secretary of Agriculture, the Secretary of the Interior, the United States Bureau of Land Management, the United States Forest Service, and the Nevada Department of Conservation and Natural Resources, which includes the Nevada Division of Environmental Protection, the Nevada Division of Minerals and the Nevada Division of Water Resources.

The proposed mining project is located within Eureka County. Eureka County's protest states in part:

Eureka County recognizes that the custom and culture of mining is part of its history and appreciates the role mining plays in its local and regional economy. Eureka County welcomes new opportunity for mining in its communities as long as mine development is not detrimental to existing economic or cultural activity. This protest is aimed at ensuring that any development of water resources in Kobeh Valley is conducted in full accordance with Nevada law, the Eureka County Master Plan and related ordinances, and does not unduly threaten the health and welfare of Eureka County citizens.<sup>76</sup>

Protestant Eureka County presented testimony that there could potentially be mining-related projects and other activities in Kobeh Valley as an example of future growth that may occur in Kobeh Valley; however, no water right applications have been

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<sup>75</sup> NRS § 37.010 (f)(1).

<sup>76</sup> Exhibit No. 509, December 2010.

filed on these potential projects.<sup>77</sup> Protestant Eureka County also argues that the population of southern Eureka County may increase from 940 to over 2,000, although that includes an estimated 700 people from the mine assuming the Mount Hope project proceeds as planned.<sup>78</sup> A review of pumpage records submitted to the Office of the State Engineer shows that the Town of Eureka currently reports a usage of about 175 afa out of about 1,226 afa of available water rights.<sup>79</sup> It should be noted that there are no permitted municipal or quasi-municipal water users in the basin of origin, Kobeh Valley. The only existing groundwater uses permitted at this time in Kobeh Valley are mining and milling, irrigation, and stock watering.

The State Engineer finds that the water sought for appropriation in Kobeh Valley is less than the estimated perennial yield of the basin; therefore, substantial water remains within the basin for future growth and development. The State Engineer finds that the project will not unduly limit the future growth and development in the Kobeh Valley Hydrographic Basin. The State Engineer finds that the proposed mining project is the type of future growth and development that would be anticipated in this area of Nevada. The State Engineer finds that mining provides an economic base for Eureka County.

#### **XIV. FORFEITURE**

The Applicant has filed applications to change existing water rights. Once a certificate of appropriation for groundwater is issued, the owner is subject to the provisions of NRS § 534.090, which provides in part that the water right may be subject to forfeiture after five consecutive years of nonuse.<sup>80</sup>

Protestant Eureka County provided testimony and evidence regarding the alleged forfeiture of the following water right certificates; note, the associated change application(s) is in parentheses: Certificates 2780 (App. 76989, 79223), 2880 (App. 76990, 79935), 2782 (App. 76483), 6457 (App. 76484, 77174), 8002 (App. 76485, 77175), 8003 (App. 76486) and 4922 (App. 76744). The certificates are associated with three separate areas:

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<sup>77</sup> Transcript, pp. 749 and 750 and Exhibit No. 531, December 2010

<sup>78</sup> Transcript, pp. 703 and 704, December 2010.

<sup>79</sup> See, Permit No. 76526, total combined duty of water not to exceed 1,226.22 afa, official records in the Office of the State Engineer.

<sup>80</sup> NRS § 534.090.

1. Bartine a.k.a. Fish Creek Ranch
  - a. Certificate 2780 (Permit 9682)
  - b. Certificate 2880 (Permit 11072)
2. Willow a.k.a. 3F Ranch
  - a. Certificate 2782 (Permit 10426)
  - b. Certificate 6457 (Permit 18544)
  - c. Certificate 8002 (Permit 23951)
  - d. Certificate 8003 (Permit 23952)
3. Bean Flat a.k.a. Damele Ranch
  - a. Certificate 4922 (Permit 13849)

All certificates were issued for irrigation and/or domestic purposes and the testimony and evidence indicates extensive periods of non-use. The Division has conducted crop inventories in Kobeh Valley and records from those pumpage inventories from 1983 to 2007 were introduced at the hearing.<sup>81</sup> The following is a summary of the crop inventories that are available. There is no inventory data for any omitted years in the following Table 1.

Ranch & Cert./Year	1984	1985	1986	1993	1995	1998	2002	2003	2004	2005	2006	2007	2008	2010
Bartine Cert. 2780											65.54	65.54	15	59.5
Bartine Cert. 2880							20	20	20	20	0	0	45	45
Willow Cert. 2782											0	0	0	0
Willow Cert. 6457	0	0	0	0	0						0	0	0	0
Willow Cert. 8002	0	0	0	0	0	0					0	0	0	0
Willow Cert. 8003											0	0	0	
Bean Flat Cert. 4922											0	0	0	0

**Table 1. Crop inventory summary (acres).**

For the Bartine a.k.a. Fish Creek Ranch, the crop inventories indicate some usage of water in recent years. The Protestant has argued that the water is not used for active irrigation, rather the water flows uncontrolled from artesian wells on an area of pasture land and no crop has been planted and/or harvested; therefore, this use should not be counted as beneficial use as noted on the crop inventories. There was substantial

<sup>81</sup> Exhibit No. 29, October 2008.

testimony stating that there was no irrigation of a crop on the property,<sup>82</sup> but most of the witnesses appeared to agree that there was some artesian flow of water on the property. Certificate 2780 indicates that the proposed works include an artesian well, supporting structures and a small ditch. Certificate 2880 indicates that the proposed works consists of a groundwater well providing water to ditches. Both certificates irrigate the same acreage being 65.54 acres of land and are supplemental to each other by place of use. The crop inventories credit the entire acreage as irrigated pasture grass from an artesian well in 2006 and 2007, as seen in Table 1. The Protestant makes an argument that the artesian flow does not comply with the intent of the Certificates, does not constitute a beneficial use of water, and does not meet the definition of irrigate or irrigation water. However, because the Protestant's evidence of non-use conflicts with the 2006 and 2007 crop inventories, which show use on the entire place of use of 65.54 acres, and substantial use in 2008 and 2010, the State Engineer finds that there is not clear and convincing evidence of forfeiture for Certificates 2780 and 2880.

For the Willow Ranch, a.k.a. 3F Ranch, four witnesses testified that there has been no water use or irrigated land under the certificates, since the early 1980s, or at least 1989.<sup>83</sup> The witnesses consist of a resident who has hauled hay in the general area for 32 years and had assisted in harvesting crops on the ranch in 1980, a long-time resident that drove the area at least once a month between 1994-2003, the current Chairman of the Eureka County Board of Commissioners who was also the County Assessor for thirty years and visited the properties every five years as Assessor, and the Public Works Director for Eureka County who is a long-time resident and for a seven-year period was road superintendent. The available crop inventories corroborate the testimony of the witnesses as illustrated in Table 1. A review of the record shows no evidence was provided at the administrative hearing as to water use on the ranch from at least 1989 to 2010.

The evidence demonstrates that the water represented by Certificates 2782, 6457, 8002, and 8003 has not been placed to beneficial use for a period of time in excess of more than the statutory five-year period necessary to work a forfeiture. The State

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<sup>82</sup> Transcript, pp. 117, 118, 401, 423 and 484, October 2008.

<sup>83</sup> Transcript, pp. 113-114, 402, 422, 423 and 485, October 2008.

Engineer finds that the water under Certificates 2782, 6457, 8002 and 8003 is subject to forfeiture.

For Bean Flat, a.k.a. Damele Ranch, the crop inventories show no water use in 2006, 2007, 2008 and 2010.<sup>84</sup> Aerial photos from 1954, 1975 and 1981 compared to Google Earth today show no differences in the area and it appears the area has not changed significantly since at least 1954.<sup>85</sup> The Protestant's witness concluded that his review of the crop inventories and aerial photos show no beneficial use of water on this property.<sup>86</sup> The former Eureka County Assessor also testified that during his assessment duties he had never seen any water used for irrigation purposes at the ranch.<sup>87</sup> The evidence demonstrates that the water represented by Certificate 4922 (Permit 13849) has not been placed to beneficial use for more than the statutory five-year period necessary to work a forfeiture. The State Engineer finds that the water under Certificate 4922 is subject to forfeiture.

#### **XV. CROP CONSUMPTIVE USE**

The State Engineer defines the consumptive use of a crop as that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to non-recoverable water vapor, or otherwise does not return to the waters of the state. Consumptive use does not include irrigation inefficiencies or waste. The net irrigation water requirement of a crop is equal to the consumptive use of the crop less the amount of effective precipitation that falls on the crop. Therefore, the net irrigation water requirement is the amount of the crop's consumptively used water that is provided by the water right, and is the quantity considered under NRS § 533.3703 in allowing for the consideration of a crop's consumptive use in a water right transfer.

The State Engineer's consumptive use estimate for the Kobeh Valley and Diamond Valley Hydrographic Basins is based on the Penman-Monteith short reference evapotranspiration and dual-crop coefficient approach for estimating crop evapotranspiration, similar to methods described by the American Society of Civil

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<sup>84</sup> Crop/pumpage/well measurement data for Kobeh Valley (139), official records in the Office of the State Engineer.

<sup>85</sup> Transcript, pp. 169-170 and Exhibit No. 29, October 2008.

<sup>86</sup> Transcript, p. 171, October 2008.

<sup>87</sup> Transcript, p. 424, October 2008.

Engineers,<sup>88</sup> Food and Agriculture Organization of the United Nations,<sup>89</sup> and Allen et al., (2005).<sup>90</sup> Net irrigation water requirement estimates for each of Nevada's Hydrographic Basins are listed in the Evapotranspiration and Net Irrigation water Requirements for Nevada.<sup>91</sup> For Koebe Valley, the State Engineer finds that the net irrigation water requirement of both alfalfa and highly-managed pasture grass is estimated to be 2.7 feet per year. For Diamond Valley, the State Engineer finds that the net irrigation water requirement of both alfalfa and highly-managed pasture grass is estimated to be 2.5 feet per year.

#### **XVI. GEOLOGIC ARGUMENT OF CHAMBERLAIN**

Dr. Chamberlain is Protestant Cedar Ranches, LLC (Cedar), and testified on his own behalf and as the expert witness for Lloyd Morrison at the October 2008 hearing. Dr. Chamberlain was qualified as an expert in geology and as a petroleum geologist for the purposes of the 2008 hearing. Cedar Ranches is a Protestant to change Applications 76744, 76745, and 76746 in Koebe Valley. The crux of this Protestant's argument was that the existing published geologic data is not adequate and without an accurate geologic model it is impossible for the Applicant to develop a hydrologic model of the area.<sup>92</sup> A computer slide presentation was submitted in support of the Protestant's geologic theory and a shortened version of the presentation was given at the hearing.<sup>93</sup> The Protestant provided an exhibit for the December 2010 hearing, but as the Protestant did not appear at that hearing, the exhibit was not offered or admitted.

A review of the prior hearing testimony shows that the Protestant did a substantial amount of work as a petroleum geologist for the Placid Oil Company.<sup>94</sup> The Protestant also formed the Cedar Stratigraphic Corporation to generate geologic data for oil companies to use in their exploration programs.<sup>95</sup>

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<sup>88</sup> State Engineer's Office, *The ASCE Standardized Reference Evapotranspiration Equation*, 2005.

<sup>89</sup> State Engineer's Office, *Crop Evapotranspiration: Guidelines for Computing Crop Water Requirements*, FAO Irrigation and Drainage Paper No. 56, 1998.

<sup>90</sup> State Engineer's Office, Allen, R.G., Pereira, L.S., Smith, M., Raes, D., and Wright, J.L., *FAO-56 Dual Crop Coefficient Method for Estimating Evaporation from Soil and Application Extensions*, Journal of Irrigation and Drainage Engineering, 2005, pp. 131(1), 2-13.

<sup>91</sup> *Evapotranspiration and Net Irrigation water Requirements for Nevada*, Huntington and Allen, 2010, available online at [http://water.nv.gov/mapping/et/et\\_general.cfm](http://water.nv.gov/mapping/et/et_general.cfm)

<sup>92</sup> Transcript, p. 54, October 2008.

<sup>93</sup> Exhibit Nos. 75 and 84, October 2008; Transcript, pp. 49-93, October 2008.

<sup>94</sup> Transcript, p. 57, October 2008.

<sup>95</sup> Transcript, p. 53, October 2008.

The Protestant presented the results of some of the geological studies he has completed over the years; however, most of the studies were outside of the project area at issue in this case and their relevance appears tenuous at best.<sup>96</sup> One of his major points is that there is a hydrologic connection between Diamond Valley and Kobeh Valley, and that pumping in Kobeh Valley could impact water levels in Diamond Valley. The Protestant concluded by stating, "...this presentation establishes that an accurate geologic model is critical for the applicants to create an accurate hydrologic model..." and "[a]n accurate hydrologic model is necessary because the geology demonstrates there are huge horizontal and vertical conduits for the transfer of water from Diamond Valley to Kobeh Valley."<sup>97</sup> The existence of a hydrologic connection between Kobeh and Diamond Valleys, or between numerous other basins in the Diamond Valley Flow System, is generally accepted by hydrologists and the State Engineer. The Protestant provided documents stating, "Neither the State Engineer nor the BLM have the knowledge or necessary data to make major responsible resource or land use decisions concerning the eastern Great Basin Aquifer."<sup>98</sup> "The State of Nevada has yet to conduct a detailed and accurate State Geological Survey for proper land and resource decisions can be made."<sup>99</sup> "Meanwhile, Cedar Strat has already initiated a proprietary Great Basin Geological Survey that can be used for land and resource decisions and natural resource exploration."<sup>100</sup> "Cedar Strat's Great Basin Geological Survey has been recently valued at more than \$850 MM but it has only begun the work that needs to be done."<sup>101</sup>

The State Engineer finds the Protestant did not appear at the hearing on remand to support his protest. The State Engineer finds the basin and range extensional tectonics in the Great Basin is widely accepted by the scientific community in every peer-reviewed publication analyzed by the Office of the State Engineer and cannot be discounted based on this lone Protestant's contrary interpretation. The State Engineer finds that the Protestant is not an expert in hydrology or hydrogeology and any testimony or evidence provided by the Protestant in those areas of study carry no weight. The State Engineer

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<sup>96</sup> Exhibit Nos. 75 and 84, October 2008; Transcript, pp. 49-93, October 2008.

<sup>97</sup> Transcript, p. 92, October 2008.

<sup>98</sup> Exhibit No. 75, October 2008.

<sup>99</sup> Exhibit No. 75, October 2008.

<sup>100</sup> Exhibit No. 75, October 2008.

<sup>101</sup> Exhibit No. 75, October 2008.



finds that the Protestant failed to provide substantial evidence and testimony in support of his protests.

**XVII.  
OTHER PROTEST ISSUES**

Nevada Revised Statute § 533.370(5) provides that the State Engineer shall reject an application where the proposed use conflicts with existing water rights. Witnesses testified to their various concerns primarily related to their respective water rights, business, farming, ranching and county interests.

The Eureka Producers Cooperative withdrew all protests prior to the remand hearing after reaching an agreement with the Applicant in August 2010. Lander County did not present a case at the December 2010 hearing. Tim Halpin, Lloyd Morrison and Cedar Ranches were represented by one attorney and presented a joint case at the 2008 hearing. Tim Halpin reached an agreement with the Applicant and withdrew his protests prior to the December 2010 hearing. Cedar Ranches did not attend the December 2010 hearing and did not present a case on remand.

Protestant Tackett attended the December 2010 hearing and indicated in testimony that he owns Klobe Hot Springs in the Northern part of Antelope Valley, south of Kober Valley, and expressed concern that the entire Diamond Valley flow system was not studied in its entirety. He asked that the Klobe Hot Springs be part of any monitoring efforts to protect his existing rights.<sup>102</sup> The State Engineer finds that the entire flow system has been considered, specifically in 'Findings Section V.' of this ruling, and a monitoring, management and mitigation plan will be required. The State Engineer finds that the predicted groundwater drawdowns in the area of Klobe Hot Springs to be minimal to non-existent and no effects on the Hot Springs area are predicted.<sup>103</sup>

Lloyd Morrison testified on his own behalf and raised concerns over impacts to his existing water rights. His property is located on the west side of Diamond Valley and is one of the closest properties to the proposed mine pit. He believes that a concise monitoring, management and mitigation plan must be in place before the permits are granted.<sup>104</sup> The State Engineer finds that an approved monitoring, management and mitigation plan will be required prior to diversion of water for the project. The State

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<sup>102</sup> Transcript, pp. 814-830, December 2010.

<sup>103</sup> Exhibit No. 39, Figures 4.4-12 to 4.4-16, December 2010.

<sup>104</sup> Transcript, pp. 428-430, December 2010.

Engineer has previously found, based on the scientific evidence, that there will be an impact of less than 2 feet on the water table at Mr. Morrison's wells in Diamond Valley due to the mine's proposed pumping. The State Engineer finds that this amount of drawdown over the 44-year life of the mine is not unreasonable and will not conflict with the Protestant's existing water rights.

Protestant Benson, through witness and son Craig Benson, offered testimony that the water level has been falling at a fairly steady rate of decline in Diamond Valley at the Benson agricultural properties.<sup>105</sup> He asked that the State Engineer consider impacts to the entire flow system and to existing rights in Diamond Valley.<sup>106</sup> The State Engineer finds that the entire flow system and impacts to existing rights are addressed throughout this ruling. Protestant Benson personally testified at the hearing of October 13-17, 2008, and again at the December 2010 hearing. Protestant Benson indicated that the water level in one of his wells has dropped 69 feet over a period of 49 years or about 1.4 feet per year.<sup>107</sup> The State Engineer finds that water level decline at Mr. Benson's well is due to agricultural pumping within Diamond Valley, and has found earlier in this ruling that there will not be unreasonable impacts to his water rights due to proposed mine pumping.

Protestant Conley testified that he acquired his property in Diamond Valley in 2007 and the water level has declined about two feet per year since that time.<sup>108</sup> Protestant Conley also believes pumping under these applications will have an adverse impact on his existing water rights. This claim is based on his belief in a hydrologic connection between Kobeh Valley and Diamond Valley. Protestant Conley stated that he believed the mine project should have acquired water from active water permits in Diamond Valley.<sup>109</sup> The Applicant has acquired 16,000 afa of existing water rights in Kobeh Valley and is seeking to develop 11,300 afa of water from the Kobeh Valley aquifer. The Applicant has also acquired substantial amounts of existing groundwater rights within Diamond Valley. A review of the record shows that the Applicant has justified the need for 11,300 afa of water from Kobeh Valley. The committed resources of the Kobeh Valley Hydrographic Basin are well below the estimated perennial yield, including the changes and appropriations sought by the Applicant in this ruling. The

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<sup>105</sup> Transcript, pp. 771-772, December 2010.

<sup>106</sup> Transcript, p. 778, December 2010.

<sup>107</sup> Transcript, p. 796, December 2010.

<sup>108</sup> Transcript, p. 432, December 2010.

<sup>109</sup> Transcript, p. 437, December 2010.

scientific evidence, including hydrologic studies and groundwater modeling, estimated future effects and this evidence shows that no unreasonable impacts will occur. The State Engineer finds that the applications will not conflict with the Protestant's existing water rights.

### XVIII.

Protestant Eureka County, through its closing brief, requests that the applications filed by the Applicant be denied because the proposed use or change conflicts with existing rights, a mitigation plan to prevent impacts to existing users has not been provided, the applications propose an interbasin transfer but the applicant has failed to provide evidence to satisfy the statutory requirements for the State Engineer to grant an interbasin transfer, there is a lack of water available to appropriate, and there is a lack of specificity in the applications. However, Protestant Eureka County also spoke in favor of mining.

In its protest, Eureka County states,

Eureka County recognizes that the custom and culture of mining is part of its history and appreciates the role mining plays in its local and regional economy. Eureka County welcomes new opportunity for mining in its communities as long as mine development is not detrimental to existing economic or cultural activity. This protest is aimed at ensuring that any development of water resources in Kobeh Valley is conducted in full accordance with Nevada law, the Eureka County Master Plan and related ordinances, and does not unduly threaten the health and welfare of Eureka County citizens.<sup>110</sup>

In testimony, the Eureka County Natural Resource Manager indicated that Eureka County did not want to kill the project but wanted it done right.<sup>111</sup> He indicated that the monitoring, management and mitigation plan was very important and that Eureka County wants full participation in developing the plan.<sup>112</sup> In testimony, the Chairman of the Eureka County Board of Commissioners confirmed that to his knowledge no one representing Eureka County has ever directed its consultants, employees or attorneys to try and kill the mine project.<sup>113</sup> The Chairman indicated that it was his understanding that Eureka County had to protest to maintain standing with the State Engineer and if there is

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<sup>110</sup> Exhibit No. 509, December 2010.

<sup>111</sup> Transcript, p. 755, December 2010.

<sup>112</sup> Transcript, p. 756, December 2010.

<sup>113</sup> Transcript, p. 714, December 2010.

not a settlement with the Applicant that the County would be denied the right to participate in a monitoring, management and mitigation plan.<sup>114</sup> The Chairman testified that mining is a life blood of Eureka County<sup>115</sup> and that Eureka County has and always will be a mining and agricultural county.<sup>116</sup> In addition, the mine will provide an economic benefit in the form of increased employment and tax revenue for the county.<sup>117</sup>

While substantial evidence exists that pumping 11,300 afa of water from Kobeh Valley, which is considerably less than the revised and more conservative perennial yield of 15,000 afa, can be safely carried out, the only way to fully ensure that existing water rights are protected is by closely monitoring hydrologic conditions while groundwater pumping occurs. The State Engineer has wide latitude and broad authority in terms of imposing permit terms and conditions. This includes the authority to require a comprehensive monitoring, management and mitigation plan prepared with assistance from Eureka County.

The State Engineer finds that a monitoring, management and mitigation plan prepared with input from Eureka County must be approved by the State Engineer prior to pumping groundwater for the project.

### **CONCLUSIONS**

#### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>118</sup>

#### **II.**

The State Engineer is prohibited by law from granting an application to appropriate or change the public waters where:<sup>119</sup>

- A. there is no unappropriated water at the proposed source;
- B. the change conflicts with existing rights;
- C. the proposed change conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

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<sup>114</sup> Transcript, p. 714 and pp. 716-717, December 2010.

<sup>115</sup> Transcript, p. 715, December 2010.

<sup>116</sup> Transcript, p. 438, October 2008.

<sup>117</sup> Transcript, pp. 438-439, October 2008.

<sup>118</sup> NRS Chapters 533 and 534.

<sup>119</sup> NRS § 533.370(5).

**III.**

The evidence and testimony show that select springs on the floor of Kobreh Valley and one domestic well near Roberts Creek may be impacted by the proposed pumping in Kobreh Valley; however, any impacts can be detected and mitigated through a comprehensive monitoring, management and mitigation plan. The State Engineer has found that the domestic well and spring flow reduction can be adequately and fully mitigated by the Applicant should impacts to existing rights or the domestic well occur. To ensure funding exists for any required future mitigation, including mitigation after the cessation of active mining activities, the Applicant must demonstrate the financial capability to complete any mitigation work necessary in a monitoring, management, and mitigation plan prior to pumping groundwater for the project.

Based on substantial evidence and testimony, and the monitoring, management and mitigation plan requirement, the State Engineer concludes that the approval of the applications will not conflict with existing water rights, will not conflict with protectable interests in existing domestic wells as set forth in NRS § 533.024, and will not threaten to prove detrimental to the public interest.

**IV.**

The State Engineer concludes the Applicant provided proof satisfactory of its intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence, and its financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

**V.**

The State Engineer concludes that based on the findings the Applicant meets the additional statutory criteria required for an interbasin transfer of water from Kobreh Valley under NRS § 533.370(6); therefore, the applications filed within Kobreh Valley can be considered for approval. The State Engineer concludes any groundwater developed in Diamond Valley will be limited to use within Diamond Valley; therefore, the interbasin transfer statute is not applicable to these applications.

## VI.

Concerns were raised at the administrative hearing that the State Engineer had not provided notice under NRS § 534.090 that the water right might be subject to forfeiture.

Nevada Revised Statute § 534.090 provides:

For water rights in basins for which the State Engineer keeps pumping records, if the records of the State Engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of such a water right which is governed by this chapter, the State Engineer shall notify the owner of the water right, as determined in the records of the Office of the State Engineer, by registered or certified mail that he has 1 year after the date of the notice in which to use the water rights beneficially and to provide proof of such use to the State Engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right.

The argument was raised that the State Engineer was required to notify the holders of the possible forfeiture one year before commencing the forfeiture proceeding. The statutory language quoted above was added to NRS § 534.090 in 1995 as Assembly Bill 435, which became effective on July 1, 1995. Accordingly, any water right for which there was more than five consecutive years of complete or partial non-use on the effective date of the notice provision, July 1, 1995, is not entitled to notice by the express terms of the statute. As to Certificates 2782, 4922, 6457, 8002, and 8003, the water rights had not been used for more than five consecutive years before the notice provision was enacted in 1995. Therefore, the holders of the water right were not entitled to notice of possible forfeiture. Such an interpretation is clear from the express provisions of the statute. The plain language of the statute lends itself to only one possible interpretation: any certificated underground water right or portion of water right that had not been put to beneficial use for five years or more when the notice provision became effective is not entitled to notice. The Applicant's argument can only be accepted if the phrase "but less than 5 consecutive years" is ignored.

Such an interpretation would not only be inconsistent with the express language of NRS § 534.090, but would give retroactive effect to the statute when the legislative history clearly intended the notice provision not apply retroactively. According to Assemblyman Neighbors, one of the sponsors of Assembly Bill 435, "there are not retroactive provisions in [A.B. 435]."<sup>120</sup> In testimony regarding A.B. 435, the State Engineer stated, "this office has

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<sup>120</sup> *Hearing on A.B. 435 before the Senate Committee on Natural Resources*, 1995 Leg., 68<sup>th</sup> Sess. 2 (June 7, 1995).

taken the position that if 5 years have already past [sic], those non-users of water rights are not to be notified. Under the measure, it is only the ones where 4 years of non-use of water rights have occurred, but not yet 5.”<sup>121</sup> The reason A.B. 435 was not applied to existing rights that had not been used for five years or more was that such a requirement would have placed a tremendous burden on the Office of the State Engineer. The State Engineer commented that “probably 4,000 water rights in the state . . . are subject to forfeiture.”<sup>122</sup>

Accordingly, the Legislature understood from one of the drafters of A.B. 435 that the notice provision was not intended to be applied in situations where five years of non-use had already occurred prior to the enactment of the law and thereby resurrect rights that were already subject to forfeiture. Generally, a statute will only be interpreted to have prospective effect unless there is a clear expression of legislative intent that it applies retroactively.<sup>123</sup> Here not only has the Legislature not stated an intention that the notice provision of NRS § 534.090(1) apply retroactively, they specifically indicated in both the language of the statute and the legislative history that the notice provision was not intended to be retroactive.

The State Engineer concludes that since more than five consecutive years of non-use of water under Certificates 2782, 4922, 6457, 8002, and 8003, had passed prior to the enactment of the notice provision of NRS § 534.090, he was not required to provide one-year notice as set forth in NRS § 534.090.

#### VII.

The State Engineer concludes, based on the revised perennial yield of Kobeh Valley compared to committed resource, that the actual withdrawal of groundwater within the basin is well below the perennial yield and water is available for appropriation for the temporary manner of use contemplated under these applications.

#### VIII.

The protests of Eureka County and Benson cite that further applications for the mining project should not be considered until a United States Geological Survey (USGS) study is completed. There is nothing in Nevada water law that requires or compels applications to be held for an indefinite period of time while a third party not associated with the project completes a study of the area. The State Engineer concludes there is

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<sup>121</sup> *Id.* at Sess. 4.

<sup>122</sup> *Ibid.*

<sup>123</sup> See, *Nevada Power Co. v. Metropolitan Development Co.*, 104 Nev. 684, 686, 765 P.2d 1162 (1988).


sufficient existing hydrologic information to proceed with these applications and this protest issue does not provide valid grounds for denial of the applications.

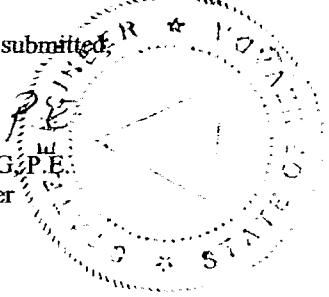
**RULING**

Certificates 2782, 4922, 6457, 8002 and 8003 are hereby declared forfeit; therefore, Applications 76483, 76484, 76485, 76486, 76744, 77174 and 77175 are denied. The remaining protests are overruled and Applications 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76802, 76803, 76804, 76805, 76989, 76990, 77171, 77525, 77526, 77527, 77553, 78424, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941 and 79942 are hereby granted subject to:

1. Existing rights;
2. Payment of the statutory permit fees;
3. A monitoring, management, and mitigation plan prepared in cooperation with Eureka County and approved by the State Engineer before any water is developed for mining;
4. All changes of irrigation rights will be limited to their respective consumptive uses;
5. No export of water from the Diamond Valley Hydrographic Basin;
6. A total combined duty of 11,300 afa.

Respectfully submitted,

  
JASON KING, P.E.  
State Engineer



Dated this 15th day of  
July, 2011.



1 exploration drilling, dust suppression and environmental mitigation.<sup>76</sup> Because KVR  
2 provided evidence that some water would be put to beneficial use upon the entire  
3 90,000 acre mine site as described on its applications, the Court finds that substantial  
4 evidence supports the State Engineer's determination that KVR's applications  
5 adequately describe place of use. The Court concludes that the State Engineer did not  
6 abuse his discretion by approving the applications without restricting the place of use.

7 The second issue raised by Eureka County regarding the sufficiency of  
8 KVR's applications is that KVR was unable to identify all the well locations for the  
9 project. Eureka County references that testimony of KVR's hydrogeologist Jack  
10 Childress that the specific location of KVR's production wells is not know.<sup>77</sup> KVR's  
11 model report stated as well that "...[t]he exact number, locations, well depths, and well  
12 pumping rates have a degree of uncertainty which will remain until production wells are  
13 constructed and actual pumping rates determined."<sup>78</sup> Eureka County contends that  
14 because only 44 percent of the proposed production wells have a known location,  
15 leaving 56 percent unknown, the impacts of pumping from the unknown 56 percent are  
16 unknown to KVR or the State Engineer. Eureka County argues that the State Engineer  
17 is therefore making a decision on potential impacts from production well pumping  
18 without any impact information from the unknown well sites and that his decision is  
19 therefore arbitrary, capricious and not based upon substantial evidence.

20 The administrative record shows that KVR described the location of each  
21 proposed point of diversion by survey description on its applications and supporting  
22

23  
24  
25 <sup>76</sup> R. at 92:20-25, 93:1-23, 135:5-16.

26 <sup>77</sup> ROA Vol. II at 000250.

<sup>78</sup> ROA Vol. VII at 001364-65.





maps.<sup>79</sup> While the exact number, location, well depths and pumping rates of production wells are uncertain, the State Engineer may by regulation grant some leeway in where the wells are finally located as long as the drill site is not more than 300 feet from the location of the existing point of diversion described in the permit and within the same quarter-quarter section as described in the permit.<sup>80</sup> The State Engineer stated these parameters in his Ruling.<sup>81</sup> The Court is unaware of any law or regulation and none are cited by the parties, that require KVR to actually drill, construct, and test all proposed production wells before filing an application to appropriate water. Given the uncertainty of whether groundwater applications for projects as large as the Mount Hope Mine Project will be granted, requiring KVR or any entity in a similar situation to locate, drill, construct, and test production wells prior to submitting an application to appropriate, will be cost prohibitive and severely limit the development of such projects. Surely the law does not intend that result.

The Court concludes that the State Engineer's responsibility is limited to reviewing the well locations described in the applications to determine whether the applications are sufficient as to form and content. The Court finds that the State Engineer's finding that KVR's applications met the requirements for describing the proposed points of diversion is supported by substantial evidence.

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<sup>79</sup> R. at 999-1023, 1943-44 and 2156 admitted at the hearing as exhibits 21-25, 42, and 99-125.

<sup>80</sup> NAC 534.300(4).

<sup>81</sup> Ruling #6127 at 12

E. Whether the State Engineer's Reliance On KVR's Model Was An Abuse Of Discretion.

Eureka County next contends that in determining potential impacts from KVR's groundwater pumping, the State Engineer's reliance on KVR's computer model was an abuse of discretion.

In support of its applications, KVR developed a computerized groundwater flow model to estimate the potential water table drawdown by its proposed pumping and presented the results to the State Engineer in a comprehensive report.<sup>82</sup> The record shows that both the model and the report are based on substantial research regarding the geology and hydrogeology of the area and have been through several updates based on test drilling, peer-review and collaboration, and refinements.<sup>83</sup> KVR's expert testified that a model is designed to predict drawdown on a regional basis and is not intended to be an exact calculator.<sup>84</sup> Eureka County was the only Petitioner to present expert witness testimony about KVR's model. Eureka County's expert reported that there were no "fatal flaws" in the model, but testified that the model's predictive capability was limited.<sup>85</sup> Eureka County's expert, however, also testified that her primary concerns had been largely rectified by later modeling work and that she could be wrong about the effect of her remaining concerns.<sup>86</sup> This witness also stated in her report that there is a degree of uncertainty with the use of any model because they are

<sup>82</sup> R. at 1132-1752.

<sup>83</sup> R. at 265:4-25, 269:11-15, 273:19-23, 275:16-25, 275:1-9, 277:15-25, 288:2-6. This peer-review included Eureka County and BLM and KVR's expert hydrogeologist and groundwater modeler testified that he had run the latest version of the model over a thousand times. R. at 293:13-20.

<sup>84</sup> R. at 265:22-25, 266:5-6, 301:24-25, 302:1-3.

<sup>85</sup> R. at 2841, 620:1-20.

<sup>86</sup> R. at 618:20-25, 619:1-6, 18-25, 620:1-20.



1 simplifications of complex natural systems.<sup>87</sup> The State Engineer noted this inherent  
2 uncertainty and still concluded that Eureka County's expert witness failed to show that  
3 the model's results were not substantially valid.<sup>88</sup> This determination is supported by  
4 other evidence in the record, as discussed above in Section II(A), and is within an area  
5 of the State Engineer's specialized knowledge and experience. Based on the foregoing  
6 evidence, the Court finds that the State Engineer did not abuse his discretion by relying  
7 in part on the model to analyze the potential drawdown in Diamond Valley, Kobeh  
8 Valley, and the Roberts Mountains that could be caused by KVR's pumping.

9  
10 Eureka County also contends that displaying the model results with ten-  
11 foot drawdown contours caused the State Engineer to disregard or minimize impacts to  
12 water sources that may occur where there is less than ten feet of drawdown.<sup>89</sup> KVR's  
13 witness testified that they were not relying solely on the ten-foot drawdown contour to  
14 evaluate impacts.<sup>90</sup> In addition, the State Engineer did not limit his review of potential  
15 impacts to areas within the ten foot drawdown contour, but instead recognized that  
16 potential impacts could occur to valley floor sources in direct contact with the  
17 groundwater aquifer and close to KVR's production wells.<sup>91</sup> Eureka County itself  
18 presented evidence to the State Engineer that showed the area in which the model  
19 predicted five feet of drawdown to occur.<sup>92</sup> Therefore, there is evidence in the record to  
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22 <sup>87</sup> R. at 3298.

23 <sup>88</sup> R. at 3590.

24 <sup>89</sup> Eureka County Opening Br. at 25-26; Benson/Etcheverry Opening Br. at 34 n. 12.

25 <sup>90</sup> R. at 156:17-19.

26 <sup>91</sup> R. at 3593.

<sup>92</sup> R. at 3275-76.



show that the State Engineer did consider potential impacts of less than ten feet. Taking these factors into considerations, the Court concludes that it is not an abuse of discretion to allow the reporting of modeled groundwater data-based on ten foot drawdown contour lines.

Eureka County also asserts that the model was poorly calibrated. The record shows that the model was appropriately calibrated in Kobeh Valley, especially on the valley floor where the only potential impacts would occur.<sup>93</sup> Eureka County relies on a statement from the State Engineer's staff regarding a calibration failure as to the Model's simulation of the predicted drawdown in Diamond Valley from existing agricultural pumping. KVR's expert testified that the model's calibration level in Diamond Valley was not a failure and did not affect simulated drawdown in Kobeh Valley.<sup>94</sup> As discussed above in Section II(A), other evidence established that the impacts to Diamond Valley and the Roberts Mountains surface water sources were unlikely and this evidence is sufficient to support the State Engineer's conclusion that these sources were unlikely to be impacted. Petitioners have not met their burden to show that the State Engineer's decision was not supported by substantial evidence. Moreover, the State Engineer's acceptance of the model is supported by the review and approval of the model by BLM's staff hydrologist and its independent third-party reviewer and by the testimony of Eureka County's expert witness.<sup>95</sup> Petitioners did not present a competing groundwater model.

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<sup>93</sup> R. at 342:11-14, 279:1, 289:9, 685:15-22.

<sup>94</sup> R. at 401:15-21, 420:18-24, 423:8-20, 424:6-24.

<sup>95</sup> R. at 1080-81; 107:12-17, 108:1-4, 342:7-10, 343:2-5, 346:25, 347:1-10.





The model's predictions are supported by other evidence in the record.

Petitioners agree that there are several acceptable means to estimate potential drawdown from groundwater pumping.<sup>96</sup> USGS reports from 1962 to 2006 conclude that only relatively small amounts of groundwater flow from Kobeh Valley to Diamond Valley.<sup>97</sup> This supports the model's prediction that granting the applications will not measurably impact water sources in Diamond Valley. KVR's expert witnesses also described three other reasons why pumping in Kobeh Valley would not affect Diamond Valley water levels. First, groundwater levels in Kobeh Valley are roughly 100 feet higher than those in Diamond Valley and have not lowered despite fifty years of pumping above the perennial yield in that basin.<sup>98</sup> Second, the geologic structures separating the valleys are not very permeable.<sup>99</sup> Third, there is a groundwater flow barrier between Kobeh Valley and Diamond Valley preventing pumping in Kobeh Valley from influencing any subsurface groundwater flow to Diamond Valley.<sup>100</sup>

Accordingly, the State Engineer's conclusions regarding the model are based on expert testimony, other evidence in the record, his credibility findings, and the absence of contradictory evidence from Petitioners.<sup>101</sup> All of this evidence is sufficient to overcome Petitioner's assertion that the State Engineer's reliance on the model was

<sup>96</sup> R. at 600:18-20, 602:22-25, 603:1-17.

<sup>97</sup> 2009 R. at 1023, 852, 854, 676.

<sup>98</sup> R. at 168:1-15, 215:12-25, 216:1, 242:1-16; 2009 R. Tr. Vol. IV at 685:13-25.

<sup>99</sup> R. at 168:17-25, 169:1-25, 170:1-2, (citing Low, 1982 *Geology of Whistler Mountain*, R. at 3109-3252).

<sup>100</sup> 2009 R. Tr. Vol. IV at 796:10-25, 797:14-25, 798:1-6.

<sup>101</sup> Additionally, the evidence also showed that this model is being used as part of the environmental review process for the Mt. Hope Project and was approved by the BLM for that purpose. R. at 1080-81; 107:12-17, 108:1-4, 342:7-10, 343:2-5, 346:25, 347:1-10.

unreasonable. Based on the above, the Court finds that the State Engineer's ultimate determinations regarding the lack of conflicts are supported by the model and other substantial evidence and this Court will not substitute its judgment for that of the State Engineer.

**-F. Whether The State Engineer's Determination That Unappropriated Water In Kobeh Valley Is Available For KVR's Mine Project Is Supported by Substantial Evidence.**

Eureka County next contends that the State Engineer erred in determining the perennial yield of Kobeh Valley and that the evidence is insufficient to show that there is unappropriated water available to satisfy the water appropriation requirements for KVR's Project. Specifically, Eureka County argues that because the State Engineer failed to account for the uncaptured evapotranspiration<sup>102</sup> in his evaluation of how much water is available in Kobeh Valley for appropriation, his determination that 15,000 afa is the perennial yield of Kobeh Valley is overstated and in error. Eureka County contends that due to this error and KVR's stated intent that it will initially capture no evapotranspiration and will only capture approximately 4,000 afa of the evapotranspiration in Kobeh Valley at the end of the 44 year mine life, an overdraft or groundwater mining situation will be created.

Nevada law requires the State Engineer to reject an application "where there is no unappropriated water in the proposed source of supply."<sup>103</sup> The State Engineer determines the amount of groundwater available for appropriation in any given hydrographic basin by determining the perennial yield of the basin and the total amount

<sup>102</sup> Evapotranspiration is defined by the State Engineer as "[t]he process by which plants take in water through their roots and then give it off through the leaves as a by-product of respiration; the loss of water to the atmosphere from the earth's surface by evaporation and by transpiration through plants."

<sup>103</sup> NRS 533.370(2).



of existing rights.<sup>104</sup> The perennial yield is:

1 the maximum amount of groundwater that can be salvaged  
2 each year over the long term without depleting the  
3 groundwater reservoir. Perennial yield is ultimately limited to  
4 the maximum amount of natural discharge that can be  
5 salvaged for beneficial use. The perennial yield cannot be  
6 more than the natural recharge to a groundwater basin and  
7 in some cases is less. If the perennial yield is exceeded,  
8 groundwater levels will decline and steady-state conditions  
9 will not be achieved, a situation commonly referred to as  
10 groundwater mining.<sup>105</sup>

11 The State Engineer also considers in determining perennial yield, the natural discharge  
12 from a groundwater basin, including evapotranspiration.<sup>106</sup>

13 Eureka County's challenge to the State Engineer's perennial yield finding  
14 appears to be premised on an immediate recovery expectation, that unless the pumping  
15 in any given basin immediately prevents an equal amount of groundwater from being  
16 discharged through evapotranspiration, the appropriation of any groundwater would  
17 exceed the perennial year and is not therefore authorized by law.

18 KVR responds that capturing groundwater naturally discharged through  
19 evapotranspiration is a long term process that would require pumping for 100-150 years  
20 before an equal volume of evapotranspiration could be captured.<sup>107</sup> Contrary to Eureka  
21 County's position, Eureka County's own expert appears to have accepted the long term  
22 process premise by testifying that it would take at least 50 years to capture groundwater

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24 <sup>104</sup> R. at 3584.

25 <sup>105</sup> ROA Vol. XVIII at 003584.

26 <sup>106</sup> *Id.* at 003585.

<sup>107</sup> R. at 3584, 1088-90; 2009 Tr. Vol. IX at 10.9-16; R. at 1090.





being discharged naturally.<sup>108</sup>

1           NRS 533.370(2) requires the State Engineer to determine whether there is  
2           unappropriated water. Here, the State Engineer found that KVR's Project will require  
3           11,300 afa annually, that the perennial yield of Kobeh Valley is 15,000 afa; and that the  
4           total volume of existing rights is 1,100 afa, leaving the remaining 13,900 afa more than  
5           enough to satisfy KVR's request for 11,300 afa.<sup>109</sup> The Court is unaware of any  
6           requirement that in determining perennial yield, the State Engineer deduct from the  
7           available perennial yield, naturally discharged groundwater that is not immediately  
8           salvaged or captured by the appropriator at the proposed place of diversion. The Court  
9           is likewise unaware of any requirement that KVR capture the full amount of  
10          evapotranspiration within the 44 year life of the mine in order to appropriate the  
11          requested groundwater. The Court defers to the State Engineer's expertise in  
12          determining the perennial yield of any water basin in Nevada to the end that all water  
13          basins in Nevada remain in balance and to the further end that the scarce water  
14          resources in Nevada are preserved, protected and wisely used for the benefit of all of its  
15          citizens. The Court declines to impose Eureka County's formula of calculating perennial  
16          yield and therefore finds and concludes that the State Engineer's determination of  
17          perennial yield in Kobeh Valley is supported by substantial evidence.

21           Eureka County's allegation that KVR's pumping will create an "overdraft or  
22           constitute groundwater mining" is contrary to basic hydrogeology and Nevada's  
23           established practice of allowing appropriators to use transitional storage to capture the  
24

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25           <sup>108</sup> R. at 570:8-19.

26           <sup>109</sup> Eureka County's expert agreed that the natural discharge from Kobeh Valley was approximately 16,000  
afa. No contrary evidence was presented. 2009 R. Tr. Vol. I at 195:1-3.





perennial yield and ignores the statutory concept of "reasonable lowering" of the water table.<sup>110</sup> Transitional storage is the volume of groundwater in an aquifer that can be used during the transition period between natural equilibrium (groundwater is discharged solely by evapotranspiration of subsurface outflows) and pumping equilibrium (groundwater is discharged solely by pumping and all evapotranspiration has ceased).<sup>111</sup> The use of transitional storage is a matter of physics and is used in the development of any well in any groundwater basin. Eureka County also ignores the fact that some transitional storage must always be used to withdraw groundwater from a basin and, instead, assert that the total of all natural and artificial discharges (evapotranspiration and pumping) cannot exceed the perennial yield, at any time. This position, however, would effectively prohibit the State Engineer from granting any groundwater rights in any basin in Nevada because, as stated above, no groundwater can be developed without using transitional storage until the pumping equilibrium is reached. The Court concludes that the State Engineer did not abuse his discretion and that his determination regarding water available for appropriation is supported by substantial evidence.

**G. Whether The State Engineer Abused His Discretion In Revising The Perennial Yield Of Three Basins.**

Eureka County contends that the State Engineer improperly revised the perennial yield of Monitor Valley, Southern Part, from 10,000 afa to 9,000 afa, Monitor Valley, Northern Part, from 8,000 afa to 2,000 afa, and Koebeh Valley from 16,000 afa to 15,000 afa. Eureka County maintains that no information was presented or discussed

<sup>110</sup> 2009 R. Tr. Vol. IV at 808:23-25, 809:1-4; Tr. Vol. V at 909:2-4, 24-25, 921:9-12; R. at 3584-85, 1090, 203:18-22, 204:1-25.

<sup>111</sup> R. at 1089 (citing USGS reports); 2009 R. Vol. IV at 825:20-24; 2009 R. Vol. V at 909:2-4.

by any party during the administrative hearing concerning these revisions and therefore the change is not supported by the record.

NRS 533.070(2) requires the State Engineer to determine the perennial yield of any given basin to determine the availability of unappropriated water. In this matter, the State Engineer was apparently concerned that the original 16,000 afa perennial yield estimate for Kobeh Valley was prone to double counting (when the perennial yield of all basins in a flow system exceed their combined evapotranspiration or recharge rates) because a part of that amount was estimated subsurface inflow from other basins.<sup>112</sup> The State Engineer apparently believed that limiting the perennial yield to the natural discharge rate (15,000 afa) was the conservative approach and ensured Kobeh Valley would not be depleted over the long term.<sup>113</sup>

From a procedural standpoint, it does not appear that the Nevada Administrative Procedures Act, cited by Eureka County as support for its challenge, requires the State Engineer to notify any existing or unidentified future appropriator of his intent to revise perennial yield determinations in the subject basins. NRS 533.070(2) specifically provides the authority to the State Engineer to determine water availability in any given basin and he does so by estimating perennial yield. After evaluating the evidence presented at the administrative hearing which included Eureka County's expert witness, the State Engineer determined the perennial yield of Kobeh Valley to be 15,000 afa.<sup>114</sup> The evidence of record and the State Engineer's thought

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<sup>112</sup> R. at 3585-86.

<sup>113</sup> R. at 3586 (because the State Engineer actually **lowered** the perennial yield determination for Kobeh Valley, the Court is puzzled by Eureka County's complaint.)

<sup>114</sup> R. at 1271, 1463, 1497, 2009 R. at 678 (2006 USGS Report of the Diamond Valley Flow System), 1091 (1964 USGS Reconnaissance Series Report No. 30).



processes in determining Kobeh Valley's perennial yield are supported by substantial evidence and the Court so finds.

**H. Whether The State Engineer's Determination That The Requirements For An Interbasin Transfer Of Water Had Been Met Is Supported By Substantial Evidence.**

In his Ruling, the State Engineer expressly acknowledged that KVR was requesting an interbasin transfer of groundwater with a point of diversion in Kobeh Valley and a place of use in Diamond Valley.<sup>115</sup> In determining whether an application for an interbasin transfer of water must be rejected, NRS 533.070(3) requires the State Engineer to consider five factors: (1) whether the applicant has justified the need to import water from another basin; (2) if the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (3) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (4) whether the proposed action is an appropriate long term use which will not unduly limit the future growth and development in the basin from which the water is exported; and (5) any other factor the State Engineer determines to be relevant.

**1. Interbasin Transfer To Pine Valley.**

Eureka County first challenges the use of imported Kobeh Valley water in Pine Valley on the grounds that the State Engineer did not consider all of the factors required under NRS 533.370(3). The State Engineer and KVR both concede that the permits should be restricted to prohibit use of imported water in Pine Valley and

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<sup>115</sup> ROA Vol. XVIII at 0003594.



accordingly, it is so ordered.

1                   **2. Whether Granting KVR's Applications Was Environmentally Sound**  
2                   **As To Kobeh Valley.**

3                   In determining whether to approve an interbasin transfer of groundwater,  
4 the State Engineer is required to consider whether such transfer is "environmentally  
5 sound as it relates to the basin from which the water is exported."<sup>116</sup> The State  
6 Engineer has interpreted the phrase "environmentally sound" within the parameters of  
7 Nevada water law to mean "whether the use of water is sustainable over the long-term  
8 without unreasonable impacts to the water resources and the hydrologic-related natural  
9 resources that are dependant on those water resources."<sup>117</sup> In applying this definition  
10 of "environmentally sound" to the proposed interbasin transfer of water from Kobeh  
11 Valley to Diamond Valley, the State Engineer used the perennial yield and amount of  
12 existing rights to determine there would be 2,600 afa available for future appropriation if  
13 KVR's applications were granted.<sup>118</sup> The State Engineer also considered potential  
14 impacted springs and the necessity of a 3M Plan.<sup>119</sup> The State Engineer concluded that  
15 because only a few minor springs located on the valley floor could potentially be  
16 impacted by mine pumping and because any such impacts could be fully mitigated,  
17 there would be no impairment to the hydrologic related natural resources in Kobeh  
18 Valley.<sup>120</sup>  
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23                   <sup>116</sup> NRS 533.370(3)(c).

24                   <sup>117</sup> R. at 3597.

25                   <sup>118</sup> R. at 3598.

26                   <sup>119</sup> *Id.*

<sup>120</sup> *Id.*





Eureka County contends that the State Engineer's definition and application of the statutory term "environmentally sound" is too narrow and that more than a simple review of impacts to existing water rights and discussion of a 3M Plan is necessary for a proper determination of whether the proposed interbasin transfer of water is "environmentally sound." Eureka County argues that the State Engineer's "environmentally sound" analysis is nothing more than a reiteration of his analysis of impacts to existing rights made pursuant to NRS 533.370(2).

In support of its argument, Eureka County points to legislative testimony given regarding interbasin water transfers. In discussing Senate Bill 108 in the 1999 Nevada Legislative Session, State Water Planner Naomi Duerr referenced an excerpt from a Draft Nevada State Water Plan as follows:

Nevada has many threatened and endangered species and unique ecosystems, and has lost much of its wetland environments. Protection of water quality and recreation opportunities depend in large part on water availability. Because the water needs for these beneficial uses of water have not been adequately quantified and few water rights have been obtained to support them in the past, a thorough evaluation of the potential environmental impacts must precede any large scale water transfer.<sup>121</sup>

Eureka County also references the testimony of its witness, Rex Massey, who testified that Kobeh Valley supports important outdoor recreation resources and activities such as camping, fishing, hiking, biking, hunting and wildlife viewing and that these activities provide social and economic benefits.<sup>122</sup> Further evidence provided at the hearing shows that a potential drawdown of water on Roberts Mountain could result

<sup>121</sup> See Minutes For Feb. 10, 1999, Senate Comm. on Natural Res. at 6-9.

<sup>122</sup> ROA Vol. IV at 000695.

1 in reduced spring and surface flows negatively affecting wet meadows and associated  
2 wildlife habitat and could further affect a potential Lahontan Cutthroat Trout recovery  
3 project on Henderson and Vinini Creek.<sup>123</sup> Eureka County contends that because the  
4 State Engineer failed to consider or discuss the impacts of mine pumping on these  
5 important issues, his determination that the proposed interbasin transfer of water is  
6 "environmentally sound" is arbitrary, capricious and not based upon substantial  
7 evidence.

8 In his discussion of whether the interbasin transfer of water from Kobeh  
9 Valley to Diamond Valley is "environmentally sound" and what that term means, the  
10 State Engineer stated in his Ruling that "the public record and discussion leading up to  
11 the enactment of NRS 533.370(3)(c) do not specify any operational or measurable  
12 criteria for use as the basis for a quantitative definition,"<sup>124</sup> and that "this provision of water  
13 law provides no guidance as to what constitutes the parameters of 'environmentally  
14 sound.'"<sup>125</sup> In support of the State Engineer's conclusion that he was left to determine  
15 the interpretation of "environmentally sound," the State Engineer references the  
16 testimony of Senator Mark James concerning the interbasin transfer statute wherein  
17 Senator James "pointed out that by the language 'environmentally sound' it was not his  
18 intention to create an environmental impact statement process for every interbasin water  
19 transfer application and that the State Engineer's responsibility should be for the  
20 hydrologic environmental impact in the basin of export."<sup>126</sup>

24 <sup>123</sup> ROA Vol. VI at 001066; Vol. IV at 00736-37.

25 <sup>124</sup> R. at 3597.

26 <sup>125</sup> *Id.*

<sup>126</sup> R. at 3597-98.





The legislative history of the interbasin transfer statute supports the State Engineer's position that the meaning of the term "environmentally sound" was left to his discretion.<sup>127</sup> While not minimizing the importance of Eureka County's environmental impact concerns of the proposed interbasin transfer, the Court concludes that the State Engineer's interpretation of the interbasin transfer criteria is reasonable and should be afforded deference. Because the State Engineer determined that potential impacts to springs in Kobeh Valley could be mitigated, he concluded there would be no unreasonable impairment to the hydrologic related natural resources in Kobeh Valley.<sup>128</sup> The Court therefore concludes that the State Engineer applied the correct standard in determining the interbasin transfer of water from Kobeh Valley to Diamond Valley was environmentally sound and concludes further that the State Engineer's finding is supported by substantial evidence.

**3. Whether The Proposed Action Is An Appropriate Long-Term Use That Will Not Unduly Limit Future Growth And Development In Kobeh Valley.**

In determining whether to approve an interbasin transfer of water, the State Engineer must also consider "whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported."<sup>129</sup>

The State Engineer determined that the proposed action would not unduly limit future growth and development of Kobeh Valley. Based on the evidence

<sup>127</sup> It would seem to the Court that the Nevada Legislature purposely left the interpretation of the term "environmentally sound" to the State Engineer as the Nevada Legislature could have, but chose not to, supply its own definition.

<sup>128</sup> R. at 3598.

<sup>129</sup> NRS 533.370(3)(d).



presented, the State engineer determined that substantial water would still be available to satisfy significant future growth and that the proposed action is the type of growth expected in the area, which is supported by Eureka County's evidence of several potential mining projects in the County.<sup>130</sup> The State Engineer's Ruling shows that 2,600 afa of Kobeh Valley's perennial yield will be available for future growth after granting KVR's applications.<sup>131</sup>

Petitioners did not dispute this finding on appeal. Instead, Petitioner Eureka County asserts that granting the applications would prevent the maximum development of residential property in Kobeh Valley based on testimony that as many as 2,988 residential lots could be created in Kobeh Valley if all private land in the valley was subdivided into 2.5-acre lots. The Court finds that this testimony is not supported by evidence as the likelihood or feasibility of such growth was contradicted by the testimony of the Eureka County public works director who stated that the County has enough water rights to meet anticipated future growth for 20 years.<sup>132</sup> Further, testimony from Eureka County's socioeconomic consultant about future growth in Kobeh Valley was contradicted by his own testimony that Eureka County's non-mining base population was stable and unlikely to grow.<sup>133</sup> The Court concludes that the State Engineer's determination that granting the applications would not restrict future growth and development is supported by substantial evidence.

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<sup>130</sup> R. at 3600, 747:1-25, 748:1-7, 3527-35.

<sup>131</sup> R. at 3588.

<sup>132</sup> R. at 526:8-11.

<sup>133</sup> R. at 700:22-25, 701:10.



4. Whether The State Engineer Erred By Failing To Find The Bartine Ranch Water Rights Were Subject To Forfeiture.

Eureka County next contends that the State Engineer should have forfeited all of KVR's existing certificated groundwater rights at the Bartine Ranch or alternatively, should have forfeited all but those which are appurtenant to 65.54 acres.<sup>134</sup> Eureka County points out that the Bartine Rights were issued for irrigation to be completed utilizing artesian wells and the supporting structures, a small ditch and a groundwater well with ditches.<sup>135</sup> Eureka County asserts that although the artesian wells had provided natural drainage, no irrigation had occurred on the Bartine Ranch for more than five years.

In support of its argument, Eureka County offered the testimony of Eureka County Commission Chairman James Ithurralde and Mr. Damale who both testified that neither had seen irrigation on the Bartine Ranch.<sup>136</sup> Several other witnesses also testified that no irrigation had occurred on the Bartine Ranch although the artesian wells provided a flow of natural drainage.<sup>137</sup> Eureka County's expert witness testified that at least 65 acres at the Bartine Ranch had been irrigated and Eureka County's public works director testified that he had observed agricultural activity at the Bartine Ranch during the last five years.<sup>138</sup>

<sup>134</sup> KVR Filed change applications for Certificates 2780 (App. 76989, 79223) 2880 (App. 76990, 79935).

<sup>135</sup> ROA Vol. XVIII at 003602.

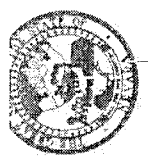
<sup>136</sup> CV0904 ROA Tr. Vol. 3 at 407:19-24, 408:15-18, 423:9-19, 459:10-21, 484:1-18.

<sup>137</sup> CV0904 ROA Tr. Vol. 1 at 117:7-25, 118:1-7; Vol. 2 at 401:7-18.

<sup>138</sup> R. at 564:17-19, 565:19-21, 522:12-19.



SEVENTH JUDICIAL DISTRICT COURT  
DAN L. PAPEZ  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA



1 Nevada law provides that the failure to put a certified groundwater right to  
2 beneficial use for five consecutive years causes a forfeiture of the unused portion of the  
3 rights.<sup>139</sup> The party asserting forfeiture bears the burden of proving non-use by clear  
4 and convincing evidence.<sup>140</sup> The Nevada Supreme Court has never addressed the  
5 issue of what beneficial use is necessary to avoid forfeiture.

6 In reviewing the Bartine Ranch water forfeiture issue, the State Engineer  
7 recognized that while there was some evidence of non-use of Bartine water, based upon  
8 the record as a whole, there was not clear and convincing evidence of forfeiture.<sup>141</sup> In  
9 reaching his conclusion, the State Engineer noted that both Bartine Certificates irrigate  
10 the same acreage being 65.54 acres of land and are supplemental to each other by  
11 place of use.<sup>142</sup> The State Engineer also found that crop inventories and records from  
12 pumpage inventories introduced at the administrative hearing indicated Bartine water  
13 usage in recent years.<sup>143</sup> The State Engineer also heard testimony from Eureka  
14 County's public works director that he had observed agricultural activity on the Bartine  
15 property within the last five years.

16 Although Eureka County does not dispute the accuracy of the crop  
17 inventories, it contends that they only evidence the natural flow of water from the  
18 artesian wells, which it argues is not a beneficial use sufficient to defeat a forfeiture  
19 claim. Eureka County cites court decisions from the intermediate appellate courts of  
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23 <sup>139</sup> NRS 534.090(1).

24 <sup>140</sup> *Town of Eureka*, 108 Nev. at 169, 826 P.2d at 952.

25 <sup>141</sup> R. at 3601-02.

26 <sup>142</sup> Ruling #6127 at 31.

<sup>143</sup> *Id.* at 30.

Oregon and New Mexico for the proposition that artesian flow is not a beneficial use.

1 The Court concludes that these two cases do not mandate the result asserted by Eureka  
2 County. In *Staats v. Newman*, an Oregon Administrative Law Judge ("ALJ") found that  
3 although petitioners had ditches on their land, those ditches "were in disrepair" and that  
4 most of the irrigation on the land was better understood as "subirrigation," or "naturally  
5 occurring subsurface seepage and capillary action."<sup>144</sup> The ALJ held that "subirrigation"  
6 did not amount to beneficial use.<sup>145</sup> Here, there is no evidence of "subirrigation use" at  
7 the Bartine Ranch and the crop inventories show some water was used to irrigate  
8 pasture grass.  
9

10 Under the New Mexico case cited by Eureka County, running water over  
11 land on which crops grow qualifies as "beneficial use."<sup>146</sup> Here, the State Engineer  
12 found<sup>147</sup> and Eureka County admits<sup>148</sup> that the Bartine water rights were perfected for  
13 irrigation using artesian wells and ditches and the State Engineer expressly found that  
14 "there was some artesian flow of water on the property."<sup>149</sup> The Court concludes that the  
15 use of the water under the Bartine Ranch water rights is a beneficial use because the  
16 water was used "for the purpose for which the right [wa]s acquired or claimed."<sup>150</sup>  
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20 <sup>144</sup> 988 P.2d 439, 440 (Or. Ct. App. 1999) (quotation marks omitted).

21 <sup>145</sup> *Id.* at 441 (emphasis added).

22 <sup>146</sup> *Martinez v. McDermott*, 901 P.2d 745, 750 (N.M. Ct. App. 1995) (finding "beneficial use" for purposes of  
23 establishing priority dates because "[c]learly, growing crops constitutes a beneficial use of water").

24 <sup>147</sup> R. at 3602.

25 <sup>148</sup> Eureka County Opening Br. at 40, 11, 6-8.

26 <sup>149</sup> R. at 3602; see also Eureka County Opening Br. at 40 (citing the testimony of Mr. Damele, in which he  
noted the "natural drainage of the two artesian wells").

<sup>150</sup> NRS 534.090(1); see also *Staats*, 988 P.2d at 441 ("The use must be what is permitted in the water right  
itself").





Eureka County argues that even if the crop inventories and evidence of artesian flow irrigating pasture grass is sufficient to overcome a forfeiture claim, then the State Engineer should have forfeited that portion of the Bartine Ranch water rights that were not used within the acreage specified on the crop inventories. A review of the crop inventories show that while they specify the number of acres irrigated, they do not show which acres.<sup>151</sup> Because water rights are appurtenant to the land on which they were placed to beneficial use, a claim of forfeiture requires a showing of which land was not irrigated for five consecutive years. Here, the State Engineer did not have evidence before him to determine which acres were not irrigated under the Bartine Ranch water rights, and therefore, he could not determine which rights were unused. Because Eureka County had the burden to prove forfeiture by clear and convincing evidence and failed to present any evidence specifically identifying the acres that it claimed had not been irrigated, the Court concludes that the State Engineer's decision not to forfeit any of the Bartine Ranch water rights is supported by the record and is not arbitrary, capricious, or an abuse of discretion.

**J. Whether The State Engineer Violated The Provisions Of NRS 533.325 By Acting On Change Applications Pending New Appropriations.**

Eureka County and Conley-Morrison next challenge the authority of the State Engineer to review applications to appropriate and applications to change their points of diversion in a single proceeding. The challenge is to thirteen of the eighty-eight applications addressed in the State Engineer's Ruling.

The State Engineer accepted, noticed, reviewed, and acted on KVR's applications to appropriate (i.e. new appropriations) and their accompanying change

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<sup>151</sup> 2009 R. at 2106-59.

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

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  
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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  
25 a party waives an argument made for the first time to the district court on judicial review") (footnote omitted).

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

<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).



principles of "judicial economy."<sup>156</sup> Had Petitioners given the State Engineer an opportunity to address their argument about change applications, the State Engineer could have easily avoided the issue by modifying the process by which he granted the applications, although, as noted below, he was not required to do so. In light of these considerations, the Court declines to address an argument Petitioners could have presented to the State Engineer, especially where Petitioners were unable to describe at oral argument any injury they have suffered as a result of the manner in which the State Engineer proceeded.

Additionally, in the protests that Eureka County and Morrison filed with the State Engineer, they expressly requested the State Engineer act on the applications to appropriate prior to the change applications, which is exactly what the State Engineer did in this case. The State Engineer granted the applications and issued the permits in the sequence in which they were filed. Accordingly, not only did Eureka County and Morrison fail to raise the issue before the State Engineer, they actually requested the State Engineer take the action that they now complain of on appeal. In Nevada, the doctrine of invited error does not allow a party to complain on appeal of errors which that party itself induced or provoked the hearing officer or opposing party to commit.<sup>157</sup>

Regardless of Petitioners' failure to raise this issue below, the Court concludes that it lacks merit. In Petitioners' view, NRS 533.325 prohibits an applicant from filing, and the State Engineer from accepting, noticing, reviewing, and acting on an application to change a pending application to appropriate. By its terms, however, the

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<sup>157</sup> *Clark Co. Sch. Dist. v. Richardson Constr. Inc.*, 123 Nev. 382, 388, 168 P.3d 87, 91-92 (2007); *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994).



statute does not expressly speak to the order in which the State Engineer may grant applications to appropriate or applications to change. The provision on applications to appropriate, NRS 533.325, simply requires that a person receive a permit before "performing any work in connection" with the appropriation of water or with a change in place of diversion, manner of use, or nature of use. And the provision on change applications, NRS 533.345, merely mandates that the change application contain enough information for the State Engineer to have a "full understanding of the proposed change." Neither provision mandates the manner or order in which the State Engineer must perform his duties.

The State Engineer interprets the statute as allowing him to accept, notice, review, consider and sequentially grant applications to appropriate and their related change applications during the same proceeding and then sequentially issue permits in the same order. In so doing, the original application is granted first and then is superseded by the later granted change application. The permits are then issued accordingly. The Court sees no reason to disturb the State Engineer's application of the statute. The State Engineer's interpretation is reasonable and entitled to deference.<sup>158</sup>

Further, public policy counsels in favor of the State Engineer's interpretation.<sup>159</sup> The process of reviewing an application is a lengthy one and approval often takes several years. Where, as here, the applicant discovers that the locations at which it originally sought to appropriate water are impractical, it does not make sense to

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<sup>158</sup> See *Pyramid Lake*, 112 Nev. at 747, 918 P.2d at 700 (1996) ("An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action").

<sup>159</sup> *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988) ("The words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results").





require the applicant to either file a new application to appropriate, thereby risking its priority under the old application, or await approval of its original application to appropriate before filing an application to change. Adopting either requirement would lead to delay and waste limited state resources. Petitioners offer no reason to believe that such an arduous process makes sense and are unable to identify any harm they have suffered as a result of the manner in which the State Engineer granted KVR's change applications.<sup>160</sup> Here, the State Engineer granted the applications in the order in which they were filed and issued permits on the applications to appropriate prior to the applications to change. Accordingly, the Court concludes that the State Engineer did not exceed his authority by accepting, noticing, reviewing, and acting on the applications in sequence in the same proceeding.

**K. Whether The State Engineer's Acceptance Of KVR's Inventory Was An Abuse Of Discretion.**

NRS 533.364(1) requires the State Engineer to complete an inventory prior to the approval of an application for an interbasin transfer of more than 250 acre-feet of groundwater from a basin that has not previously been inventoried. This requirement applies to any interbasin groundwater transfer that was noticed for a hearing on or after July 1, 2009.<sup>161</sup> The statute requires the inventory to include three items:

- (a) The total amount of surface water and groundwater appropriated in accordance with a decreed, certified or permitted right;
- (b) An estimate of the amount and location of all surface water and groundwater that is available for appropriation in the basin; and

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<sup>160</sup> Apr. 3, 2012 Oral Arg. Tr. at 17:19-23, 116:16-23.

<sup>161</sup> NRS 533.364(2)(a).



(c) The name of each owner of record set forth in the records of the Office of the State Engineer for each decreed, certified or permitted right in the basin:

The statute expressly states that the State Engineer is not required to initiate or complete a determination of surface or groundwater rights or to "otherwise quantify any vested claims."<sup>162</sup> The inventory statute does not contemplate any sort of adversarial hearing in conjunction with the inventory process. The statutorily required inventory is a ministerial task that must be completed before the State Engineer approves an application involving an interbasin transfer greater than 250 acre-feet. Once an inventory is completed, the State Engineer may approve any number of interbasin transfers without conducting new inventories. The estimate of the total amount of groundwater available for appropriation is only a one-time estimate and does not affect the obligation of the State Engineer to determine whether water is available for appropriation for each application submitted to him. The statute only requires that the State Engineer complete the inventory within one year of its commencement and before approval of an interbasin transfer.<sup>163</sup>

Eureka County asserts that the State Engineer violated its due process rights by not holding a hearing and allowing the County to examine witnesses, and that the inventory was inadequate. Respondents counter that nothing in NRS 533.364(1) requires the State Engineer to provide notice and an opportunity to comment or provide a hearing on the inventory. KVR asserts that the inventory met the statutory requirements. Additionally, KVR argues that the State Engineer's acceptance of the

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<sup>162</sup> *Id.*

<sup>163</sup> NRS 533.364(4).



inventory is not an appealable decision under NRS 533.450 and that Eureka County failed to file and serve its petitions for judicial review within the statutory appeal period. Because the latter two arguments are jurisdictional, the Court will discuss them first.

The inventory required under NRS 533.364(1) is a listing of the decreed, certified and permitted rights, the names of water users holding those rights, and an estimate of the water available for appropriation in a particular basin. The inventory is not required to contain any findings or determinations of the State Engineer. The inventory is a list of names and water rights and an estimate of the total amount of water available for appropriation in Kobeh Valley. The names of the individuals and entities that hold decreed water rights in the basin are matters of public record. NRS 533.364(1)(b)'s plain terms require only that the State Engineer provide an "estimate" of the water available for appropriation. When the Nevada Legislature uses unambiguous terms, the Court will not give those terms anything other than their customary meaning.<sup>164</sup> The word "estimate" suggests flexibility and discretion. The Nevada Legislature confirmed that was its intent when it explained that it used the term "estimate" to require the State Engineer to take "a snapshot in time" of the water available for appropriation within a basin.<sup>165</sup>

NRS 533.450 permits judicial review only of an "order or decision of the State Engineer . . . affecting [a] person's interests."<sup>166</sup> The completion and acceptance of a statutorily required inventory is not an "order or decision" subject to judicial review

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<sup>164</sup> See e.g., *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998); *Desert Valley*, 104 Nev. at 720, 766 P.2d at 887.

<sup>165</sup> See Nevada Assembly Committee Minutes, Comm. on Gov't Affairs, 2009 Leg. 75th Sess. (Statement of Pete Goicoechea, Member, Assembly Comm. On Gov't Affairs) (Mar. 24, 2009).

<sup>166</sup> NRS 533.364(4).



1 under NRS 533.450. Thus, while the State Engineer's Ruling approving KVR's  
2 applications can be challenged, the inventory itself is not a separate "order or decision"  
3 of the State Engineer that can be independently challenged. Moreover, the acceptance  
4 of the inventory by the State Engineer does not affect any interest of Eureka County or  
5 the other Petitioners. Therefore, the Court concludes that the State Engineer's  
6 acceptance of the inventory is not appealable.

7 Even if the State Engineer's acceptance of the inventory is appealable,  
8 Eureka County did not timely file and serve its petitions for judicial review. An appeal of  
9 a State Engineer order or decision must be filed and notice served on the State  
10 Engineer within 30 days after the date of the order or decision.<sup>167</sup> Here, the State  
11 Engineer's letter accepting the inventory is dated June 22, 2011. Accordingly, Eureka  
12 County should have filed and served its appeal by July 22, 2011. Eureka County filed  
13 its petitions on August 8, 2011, and therefore, it was not timely filed under NRS  
14 533.450(1), (3). Relying on the APA, Eureka County argues that the appeal period does  
15 not begin to run until the date the letter was served. As stated above, the APA does not  
16 apply to the State Engineer except for the adoption of his rules of practice,<sup>168</sup> so it is not  
17 controlling here. Further, NRS 533.450 expressly states that the 30-day appeal period  
18 begins to run from the date of the order or decision. Additionally, Eureka County does  
19 not contest that NRS 533.450(1) requires that notice of the appeal be personally served  
20 on the State Engineer within the same 30-day period. Here, the record shows that  
21 Eureka County served the State Engineer with its petition on August 9, 2011.<sup>169</sup>  
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25 <sup>167</sup> NRS 533.450(1).

26 <sup>168</sup> NRS 233B.039(1)(j).

<sup>169</sup> See Notice of Pet. for Judicial Review filed Aug. 9, 2011 in Case No. CV 1108-155.



Accordingly, even under the County's argument, it did not timely comply with NRS 533.450(3) and the Court lacks jurisdiction to consider the State Engineer's acceptance of the inventory.

Even assuming the State Engineer's acceptance of the inventory is an appealable decision and Eureka County timely appealed, the Court concludes that the State Engineer did not violate Eureka County's due process rights because the County had a full opportunity to challenge whether water was available for appropriation in Kobeh Valley, which was a predicate finding to the State Engineer's Ruling. Moreover, Eureka County has not pointed to any evidence in the record to show that the inventory is inconsistent with the finding of the State Engineer regarding water available for appropriation.<sup>170</sup> Eureka County fully participated in the proceedings below and in this appeal and, therefore, was not denied any due process rights. The Court also concludes that the State Engineer's finding of available water in Kobeh Valley is supported by substantial evidence.<sup>171</sup>

**L. Whether The Permits As Issued Are Inconsistent And Contradictory To Ruling #6127.**

A portion of KVR's applications sought to change existing irrigation water rights in Diamond Valley. In the Ruling, the State Engineer determined that the Diamond Valley permits must expressly restrict water use to within that basin.<sup>172</sup> As required by the Ruling, the Diamond Valley permits, as amended, expressly restrict the

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<sup>170</sup> See R. at 3588, 2594.

<sup>171</sup> See *supra*, §§ F, G.

<sup>172</sup> R. at 3595.



place of use to that basin.<sup>173</sup> Petitioners argue that the permits are ambiguous as to this restriction because the applications included places of use in Kobeh Valley and Pine Valley and the permits state that the "point of diversion and place of use are as described on the submitted application to support this permit."<sup>174</sup> The Court concludes that the permits, as amended, are not ambiguous because, even though they refer to the point of diversion and place of use described on the applications, the amended permits clearly limit the place of use to Diamond Valley.

The Ruling also states that any unused water pumped under the Diamond Valley permits must be returned to that basin.<sup>175</sup> The express permit term in the Diamond Valley permits restricting the place of use to that basin necessarily includes the requirement that any unused Diamond Valley water must be returned to that basin. Because KVR may not use Diamond Valley water in another basin, discharging any water to another basin without the right to use it there would be an unlawful waste of water. Further, the State Engineer's failure to include this restriction in the permit terms is reasonable considering the record shows that KVR would consume all water produced in Diamond Valley in that basin.<sup>176</sup>

Petitioners Benson-Etcheverry assert that the permits allow KVR to divert more than 11,300 afa. After reviewing the permits the Court concludes that this assertion is incorrect because they clearly are limited to a total combined annual volume

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<sup>173</sup> ROA SE at 273-82, 342-81, 430-37.

<sup>174</sup> See e.g., ROA SE at 373.

<sup>175</sup> R. at 3595.

<sup>176</sup> R. at 8715-14.



of 11,300 acre-feet.<sup>177</sup> Benson-Etcheverry also argue that the permits to change existing irrigation rights allow KVR to divert more than the consumptive use amount of the existing right. This assertion is also incorrect because while the permits were approved for the full amount of the existing irrigation water right, they expressly state that only the consumptive use amount of the existing right may be diverted.<sup>178</sup> This language is based on NRS 533.3703, which allows the State Engineer to consider the consumptive use amount of an existing water right and the consumptive use amount of the proposed change to determine if the change complies with NRS 533.370(2). Here, KVR is switching from a use that is only partially consumptive (irrigation) to one that is fully consumptive (mining and milling). Accordingly, to avoid an increase in the amount of water actually consumed by the water right, the State Engineer is allowed to limit the proposed new use to the consumptive use amount of the existing right.<sup>179</sup> The permits also state that KVR may divert more water if it shows the State Engineer that the additional diversion is non-consumptive, but this language does not allow KVR to divert more than the consumptive use amount.<sup>180</sup> Therefore, because the permit terms limit KVR to the consumptive duty of the existing irrigation water rights, the Court concludes that Benson-Etcheverry's contention is incorrect.

Benson-Etcheverry argue that the State Engineer erred by not expressly stating in the permits that the 3M Plan must be prepared with input from Eureka County as set forth in the Ruling. The Court concludes that Benson-Etcheverry do not have the

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<sup>177</sup> See e.g., ROA SE at 273-82, 430-661.

<sup>178</sup> See e.g., ROA SE at 453.

<sup>179</sup> R. at 3603; NRS 533.3703.

<sup>180</sup> See e.g., ROA SE at 453.



standing to raise this issue because it affects Eureka County only. Further, even if Benson-Etcheverry had standing, the Court concludes that the permits remain-subject to the terms of the Ruling, and therefore, the failure to include this term in the permits is not an error.

### III. Conley-Morrison Assignment Of Error.

#### A. Whether The State Engineer Violated The Provisions Of NRS 533.325 By Acting On Change Applications Pending New Appropriations.

This issue was addressed by the Court supra in Section II (J) pp. 46-50 of the Court's Findings, Conclusions and Order. The conclusions and/or findings made therein are hereby affirmed and adopted as though fully set forth here. For the reasons stated therein, the Court concludes that the State Engineer did not exceed his authority by accepting, noticing, reviewing, and acting on the applications in sequence in the same proceeding.

### IV. Benson-Etcheverry Assignment Of Error.

#### A. Whether Ruling #6127 Was Arbitrary, Capricious, Not Supported By Substantial Evidence, Contrary To Law, And Made Without Due Process of Law.

Benson-Etcheverry assigns error to issues previously discussed in this Order as follows: (1) KVR's applications conflict with existing rights; (2) State Engineer's reliance on non-existent 3M Plan; (3) reliance on non-existent 3M Plan denies due process rights; (4) applications fail to adequately describe points of diversion and place of use; (5) interbasin transfer not environmentally sound; (6) determination that water withdrawal from Kobeh Valley would not impact Diamond Valley rights; (7) reliance on KVR's model; (8) place of use exceeds State Engineer's authority; (9) applications delayed pending USGS Interbasin Water Flow Study.







With the exception of USGS Water Flow Study Issue, each of Benson-Etcheverry's claimed errors have been discussed, analyzed and ruled upon in the Eureka County segment of this Order. The Court therefore affirms and adopts those findings as though fully set forth here.

**B. Whether the State Engineer Should Have Delayed Consideration Of KVR's Applications Pending Completion Of A USGS Interbasin Water Flow Study.**

Benson-Etcheverry argue that the State Engineer should delay approval of KVR's application until after completion of a USGS study regarding interbasin flows. They allege that this study is currently scheduled to be published some time in 2013.<sup>181</sup> The Court concludes that the State Engineer's decision to act on KVR's application is supported by substantial evidence and nothing requires the State Engineer to postpone action on KVR's applications in this case. The record shows that numerous USGS reports from the 1940s to 2007 were submitted along with extensive testimony about the findings made in those reports.<sup>182</sup> Further, KVR testified that it would incorporate any future USGS or other data into the 3M Plan.<sup>183</sup>

Public policy also weighs in favor of the State Engineer's decision to act on KVR's applications instead of postponing action while awaiting a future USGS study. The USGS is continuously studying water resources in Nevada's hydrographic basins. The record shows that in 1983 this same issue was raised by citizens of Diamond Valley as a reason for postponing applications to appropriate in Kobeh Valley for the same

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<sup>181</sup> Benson-Etcheverry Opening Br. at 32.

<sup>182</sup> 2009 R. Vol. IV at 872:10-22, 874:1-25, 875:1-16, 657-1115, R at 175:4-11, 192:19-24, 215:17-20, 239:22-25, 319:12-18, 365:8-11, 384:11-13, 398:3-6.

<sup>183</sup> R. at 141:15-21, 143:2-10.

mine.<sup>184</sup> The State Engineer at that time acknowledged the citizens' concerns about the  
1 need for more hydrogeologic studies, but recognized that such studies are expensive  
2 and time-consuming and would lead to delay of pending applications in every basin in  
3 the State.<sup>185</sup> Accordingly, the Court concludes that the State Engineer was not required  
4 to postpone action on KVR's applications and finds that his decision not to postpone  
5 action in this case is supported by substantial evidence.  
6

7 The Court having considered, analyzed, discussed and issued its findings  
8 and conclusions as to the issues raised in the respective Petitions For Judicial Review;  
9 and  
10

11 Good cause appearing;

12 IT IS HEREBY ORDERED that Petitioner's respective Petitions For  
13 Judicial Review are HEREBY DENIED.

14 DATED this 13<sup>th</sup> day of June, 2012.

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18 DISTRICT JUDGE  
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26

<sup>184</sup> R. at 3030:2-13.

<sup>185</sup> R. at 3057:5-24.



JUN 13 2012

Eureka County Clerk  
By *Heather M. Carter*

Case Nos. CV 1108-155  
CV-1108-156  
CV-1108-157  
CV-1112-164  
CV-1112-165  
CV-1202-170

Dept No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF  
NEVADA, IN AND FOR THE COUNTY OF EUREKA

\* \* \* \* \*

EUREKA COUNTY, a political subdivision  
of the State of Nevada,  
Petitioner,

v.

STATE OF NEVADA, EX. REL., STATE  
ENGINEER, DIVISION OF WATER  
RESOURCES,

Respondent.

CONLEY LAND & LIVESTOCK, LLC, a  
Nevada limited liability company, LLOYD  
MORRISON, an individual,

Petitioners,

v.

OFFICE OF THE STATE ENGINEER OF  
THE STATE OF NEVADA, DIVISION OF  
WATER RESOURCES, DEPARTMENT OF  
CONSERVATION AND NATURAL  
RESOURCES, JASON KING, State  
Engineer, KOBEH VALLEY RANCH, LLC,  
Real Party in Interest,

Respondents.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER DENYING  
PETITIONS FOR JUDICIAL REVIEW

SEVENTH JUDICIAL DISTRICT COURT  
DAN L. PAPEZ  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA





1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company, and  
MICHEL and MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
registered foreign limited partnership,

4 Petitioners,

5 v.

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

9 Respondent.

10  
11 EUREKA COUNTY, a political subdivision  
12 of the State of Nevada,

13 Petitioner,

14 v.

15 STATE OF NEVADA, EX. REL., STATE  
16 ENGINEER, DIVISION OF WATER  
RESOURCES,

17 Respondent.

18 KENNETH F. BENSON, an individual,  
19 DIAMOND CATTLE COMPANY, LLC, a  
20 Nevada limited liability company, and  
MICHEL and MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
registered foreign limited partnership,

21 Petitioners,

22 v.

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

26 Respondent.



1 KENNETH F. BENSON, an individual,  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company, and  
4 MICHEL AND MARGARET ANN  
5 ETCHEVERRY FAMILY, LP, a Nevada  
6 registered foreign limited partnership,  
7  
8 Petitioners,  
9  
10 v.  
11  
12 STATE ENGINEER OF NEVADA, OFFICE  
13 OF THE STATE ENGINEER, DIVISION OF  
14 WATER RESOURCES DEPARTMENT OF  
15 CONSERVATION AND NATURAL  
16 RESOURCES,  
17  
18 Respondent.

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THIS MATTER is presently pending before the Court on Petitions for Judicial Review filed by Eureka County, a political subdivision of the State of Nevada, (hereafter "Eureka County") in Case No. CV1108-155, on August 8, 2011, and in Case No. CV 1112-164, on December 29, 2011, and by a Petition For Writ Of Prohibition,<sup>1</sup> Complaint, and Petition For Judicial Review filed by Conley Land & Livestock, LLC, a Nevada limited liability company; Lloyd Morrison, an individual, (hereafter "Conley-Morrison") in Case No. CV 1108-156, on August 10, 2011, and by Petitions For Judicial Review filed by Kenneth F. Benson, an individual; Diamond Cattle Company, LLC, a Nevada limited liability company; Michel and Margaret Ann Etcheverry Family, LP, a Nevada registered foreign limited partnership, (hereafter "Benson-Etcheverry") in Case No. CV-1108-157, on August 11, 2011, in Case No. CV-1112-165, on December 30, 2011, and a subsequent Amended Petition in Case No. CV 1112-165, filed on January

<sup>1</sup> Petitioners Conley-Morrison elected not to proceed with their Petition For Writ of Prohibition and to proceed solely on their Petition For Judicial Review. See Conley-Morrison's Jan. 13, 2012, Opening Br. at 5.



17, 2012, and a Petition For Judicial Review filed in Case No. CV 1202-170, on  
1 February 2, 2012. By stipulation of the parties and Order of the Court, all of the above-  
2 referenced cases were consolidated for review and determination by the Court, and  
3 additionally, Kobe Valley Ranch, LLC (hereafter "KVR") was allowed to intervene as a  
4 Respondent. The Office of the State Engineer of the State of Nevada (hereafter "State  
5 Engineer") is likewise a Respondent to the Petition. The Respondents filed their  
6 Answers to said Petitions and the cases have been fully briefed by the parties. Oral  
7 argument was heard on April 3, 2012 in Eureka District Court. Eureka County is  
8 represented by Karen Peterson, Esq., and Eureka County District Attorney Ted Beutel.  
9 Conley-Morrison is represented by Gordon DePaoli, Esq. and Dale Ferguson Esq.  
10 Benson-Etcheverry is represented by Laura Schroeder, Esq. and Therese-Ure, Esq.  
11 The State Engineer is represented by Senior Deputy Attorney General Bryan Stockton,  
12 and KVR is represented by Ross E. de Lipkau, Esq., John R. Zimmerman, Esq., and  
13 Francis M. Wikstrom, Esq.

16 The Court having reviewed the Record on Appeal (ROA),<sup>2</sup> and having  
17 considered the arguments of the parties, the applicable law and facts, and all papers  
18 and pleadings in this matter, hereby makes the following findings of fact, conclusions of  
19 law, and judgment.  
20

21 ///

22 ///

23  
24 <sup>2</sup> This includes the record on appeal dated October 27, 2011 filed by the State Engineer (hereinafter "R."),  
25 the record on appeal dated January 13, 2012 filed by Eureka County (hereinafter "EC ROA"), the  
26 supplemental record on appeal dated January 13, 2012 filed by Eureka County (hereinafter "SROA"), and the  
record on appeal dated February 3, 2012 filed by the State Engineer (hereinafter "ROA SE"). Additionally,  
this includes the record on appeal filed in consolidated cases CV 0904-122 and CV0904-123, which was  
incorporated by reference in the State Engineer's proceedings below (hereinafter "2009 R." or for transcripts  
"2009 Tr. Vol. Page:line").

## FACTS AND PROCEDURAL HISTORY

1           The ROA in this matter shows that in 2005, General Moly, Inc. (hereafter  
2 "GMI") acquired a leasehold interest in a proposed molybdenum mine located in Eureka  
3 County, Nevada, commonly referred to as the Mount Hope Mine Project. GMI and its  
4 subsidiary, KVR, commenced a development plan for the mine and began the permitting  
5 process. The mine is projected to be one of the largest primary molybdenum mines in  
6 the world employing some 400 people and processing approximately 60,000 tons of ore  
7 per day. The expected mine life is 44 years.

8  
9           Between May, 2005 and June, 2010 and as a part of its development plan,  
10 KVR filed applications with the State Engineer to appropriate new groundwater or to  
11 change the point of diversion, place of use and/or manner of use of existing water rights.  
12 The applications sought a total combined duty of 11,300 acre feet annually ("afa") of  
13 groundwater for mining and milling purposes associated with the proposed mine project.  
14

15           The water requested in KVR's applications is located in two hydrographic  
16 basins, the Kobeh Valley Hydrographic Basin (hereafter "Kobeh Valley") and the  
17 Diamond Valley Hydrographic Basin (hereafter "Diamond Valley"). Kobeh Valley is  
18 located in Eureka County and Lander County, Nevada, and Diamond Valley is located  
19 entirely within Eureka County, Nevada.  
20

21           The initial thirteen applications were protested by various entities and  
22 individuals including Eureka County, Tim Halpin, and the Eureka Producers'  
23 Cooperative. An administrative hearing to consider KVR's applications was held before  
24 the State Engineer on October 13-18, 2008. On March 26, 2009, the State Engineer  
25 issued Ruling #5966 granting therein a majority of KVR's applications subject to certain  
26





terms and conditions. Eureka County, Tim Halpin and the Eureka Producers' Cooperative appealed Ruling #5966 to this Court by filing Petitions For Judicial Review. Those Petitions were heard and considered by this Court and on April 21, 2010, this Court issued its Order vacating Ruling #5966 and remanding the matter to the State Engineer for a new hearing.<sup>3</sup>

While these prior applications were pending before the State Engineer on remand, KVR filed new change applications seeking to change points of diversion and expand place of use of the applications approved in Ruling #5966. As referred to above, the prior applications and the new change applications were timely protested by individuals and entities on various grounds. The State Engineer thereafter noticed and held an administrative hearing on the applications on December 6-7, 2010 and on December 9-10, 2010.

By correspondence dated March 3, 2011 sent by the State Engineer to KVR, the State Engineer requested additional information regarding the scope of the interbasin transfer of water and an inventory as required by NRS 533.364. Both KVR and Eureka County provided responses to the State Engineer's request for additional information. Through correspondence dated April 20, 2011, the State Engineer requested additional information from KVR as required by NRS 533.364. Thereafter, the State Engineer noticed an additional hearing day on May 10, 2011 to discuss the requested information. On June 16, 2011, KVR provided its final, additional information to the State Engineer concerning inventory.

On July 15, 2011, the State Engineer issued Ruling #6127 granting KVR's

<sup>3</sup> See Findings of Fact, Conclusions of Law and Order Granting Pets. For Judicial Review, Vacating Ruling #5966, And Remanding Matter For New Hr'g, filed on Apr. 21, 2010.





1 applications in the order in which they were filed.<sup>4</sup> The applications were granted  
2 subject to: (1) existing rights; (2) payment of statutory permit fees; (3) a monitoring,  
3 management and mitigation plan prepared in cooperation with Eureka County and  
4 approved by the State Engineer before any water is developed for mining; (4) all  
5 changes of irrigation rights will be limited to their consumptive uses; (5) no export of  
6 water from Diamond Valley hydrographic basin; (6) a total combined duty of 11,300 afa.

7 Subsequent to granting the applications, the State Engineer also granted  
8 the change applications which, when granted, modified the original applications to  
9 appropriate. On December 1, December 11 and December 14, 2011, the State  
10 Engineer issued the permits granted pursuant to Ruling #6127. Petitioners appeal  
11 Ruling #6127 on multiple grounds.  
12

13 DISCUSSION

14 I. Standard of Review

15 Nevada law allows every person feeling aggrieved by an order or decision  
16 of the State Engineer to have that matter reviewed on appeal.<sup>5</sup> On appeal, the State  
17 Engineer's decision or ruling is prima facie correct, and the burden of proof is upon the  
18 person challenging the decision.<sup>6</sup> With regard to questions of fact, the reviewing court  
19 must limit its determination to whether substantial evidence in the record supports the  
20

21  
22 <sup>4</sup> In his ruling, the State Engineer granted applications 72695, 72696, 72697, 72698, 73545, 73546, 73547,  
23 73548, 3549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75996,  
24 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745,  
25 76802, 76803, 76804, 76805, 76989, 76990, 77171, 77525, 77529, 77527, 77553, 78424, 79911, 79912,  
79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926,  
79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940,  
79941 and 79942.

26 <sup>5</sup> NRS 533.450(1).

<sup>6</sup> NRS 533.450(10).



State Engineer's decision.<sup>7</sup> The court may not pass upon the credibility of witnesses,  
1 reweigh the evidence, nor substitute its judgment for that of the State Engineer.<sup>8</sup>  
2 Substantial evidence has been defined as "that which a reasonable mind might accept  
3 as adequate to support a conclusion."<sup>9</sup>  
4

5 Unless the decision of an administrative agency is found to be arbitrary or  
6 capricious, such decision generally will not be disturbed on appeal.<sup>10</sup> A decision is  
7 regarded as arbitrary or capricious if it is "baseless or despotic" or evidences "a sudden  
8 turn of mind without apparent motive; a freak, whim, mere fancy."<sup>11</sup>  
9

10 Because the State Engineer is authorized by Nevada law to decide and  
11 regulate the appropriation of water, "that office has the implied power to construe the  
12 State's water law provisions and great deference should be given to the State  
13 Engineer's interpretation when it is within the language of those provisions."<sup>12</sup> However,  
14 a reviewing court is not compelled to defer to the State Engineer's interpretation of a  
15 regulation or statute if the plain language of the provision requires an alternative  
16 interpretation.<sup>13</sup>  
17

18 ///

19 <sup>7</sup> *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) (citing *Revert*  
20 *v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979)).

21 <sup>8</sup> *Revert*, 95 Nev. 782 at 786, 603 P.2d at 264 (citing *N. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 279, 429,  
22 P.2d 66 (1967)).

23 <sup>9</sup> *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

24 <sup>10</sup> *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1474 (D. Nev. 1996).

25 <sup>11</sup> *Estate of Wells*, 110 Nev. at 1222, 885 P.2d at 548 (citing *City Council v. Irvine*, 102 Nev. 277, 278-79,  
26 721 P.2d 371, 372 (1986)).

<sup>12</sup> *Anderson Family Assocs. v. State Engineer*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008); *United*  
*States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001).

<sup>13</sup> *Anderson Family Assocs.*, 124 Nev. at 186, 179 P.3d at 1203.



## II. Eureka County's Assignment Of Error

### A. Whether KVR's Applications Conflict With Existing Rights Or Protectable Interests In Domestic Wells.

Eureka County first contends in its appeal that the State Engineer acted arbitrarily and capriciously and in violation of NRS 533.370(2) in granting KVR's applications because said grant would conflict with existing water rights or protectable interests in domestic wells. In support of its argument, Eureka County points to the testimony and evidence admitted and considered by the State Engineer during the administrative hearing showing that springs in Kobeh Valley would be adversely affected by mine pumping. Specifically, Eureka County references the testimony of KVR's hydrology experts, Terry Katzer and Dwight Smith, both of whom acknowledged adverse effects to stock watering wells in Kobeh Valley by mine pumping.

The ROA reflects that both Terry Katzer and Dwight Smith acknowledged during their testimony that existing permit Spring #721, also known as the Etcheverry Mud Spring, a low flow spring used by wild horses and cattle, would be impacted by mine pumping and that a high probability existed that Mud Spring would cease to flow. Dwight Smith testified further that Lone Mountain Spring which is located near KVR's proposed well field would also potentially cease to flow.

Evidence of other potential conflicts with existing water rights were also presented during the administrative hearing. Martin Etcheverry, owner and operator of the Robert's Creek Ranch, testified that pump tests completed by KVR dropped by half the water flowing from Nichols Spring and that the Spring had not recovered some two and a half years later. Eureka County's expert witness, Dale Bugenig, summarized in his report that the expected 10 foot drawdown contour caused by mine pumping would

extend into the headwaters of Henderson Creek which would impact existing rights to water in Henderson Creek as defined in the Pete Hanson Creek Decree.

In his Ruling, the State Engineer determined that the water rights that might potentially be impacted by KVR's pumping are those that exist on the valley floor of Kobeh Valley within the predicted water level drawdown area.<sup>14</sup> The State Engineer found, however, that only two springs were likely to be affected by KVR's pumping,<sup>15</sup> and that those springs could be adequately and fully mitigated because they produce less than a gallon/minute, were for stockwatering uses, and exist on the valley floor. The evidence supporting this finding is the testimony of KVR's expert witnesses and the owners of the potentially impacted water rights and amount and use of those potentially impacted water sources.<sup>16</sup> As to other springs and stockwatering wells on the Kobeh Valley floor that might potentially be affected, the State Engineer conditioned his approval on the submission and approval of a monitoring, management, and mitigation plan ("3M Plan") that will carefully monitor them and require mitigation if they are in fact impacted.<sup>17</sup> There is nothing in the record to suggest that these other springs or wells are unique or that mitigation would not be possible and the uncertainty of any impacts supports the State Engineer's decision to protect rights to these sources through the development and implementation of an approved 3M Plan.

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<sup>14</sup> R. at 3593.

<sup>15</sup> The two springs specifically identified as likely to be impacted by KVR's pumping are Mud Springs and Lone Mountain Spring, which are subject to water rights held by the Etcheverrys and BLM. R. at 1556, 3522 (identified as water right No. 12748); 2009 R. at 3692-3710 (BLM stipulation). The record shows that Etcheverrys did not file a protest against the granting of these applications and BLM withdrew its protest.

<sup>16</sup> R. at 1379, 1445, 1519, 1735-36, 206:10-12, 314:3-8, 454:20-25, 455:1-8, 471:15-25, 472:1, 493:8-13.

<sup>17</sup> R. at 3592-93, 3598, 3610, 3613.





Eureka County argues that the State Engineer failed to consider the extent of the water rights on the two springs likely to be impacted, which according to Eureka County were granted for more than a few gallons/minute. The Court finds that the State Engineer did not ignore or fail to consider the extent of water rights on these sources, but instead recognized the evidence that these springs actually produce less water than is specified in the water right.<sup>18</sup> Further, even though the evidence showed that these springs may produce less than that of the applicable water right, the State Engineer concluded in the Ruling that KVR would be required to fulfill each water right to the extent of each right.<sup>19</sup>

At the hearing before the State Engineer, KVR's experts testified that there were several techniques available to mitigate any loss from these springs and wells, including deepening the impacted stockwatering wells, piping water from KVR's distribution system to the spring area,<sup>20</sup> and adjusting the volume or rate of water pumped from each of KVR's production wells.<sup>21</sup> The three Kobre Valley ranchers called by Eureka County as witnesses each conceded that mitigation of their valley floor water rights was possible.<sup>22</sup> Eureka County implicitly acknowledged that mitigation could avoid conflicts with existing water rights by resolving any impacts to water sources

<sup>18</sup> R. at 1735-36. Other evidence in the record shows that these springs were dry at one point in time. R. at 1445.

<sup>19</sup> R. at 3598.

<sup>20</sup> R. at 206:10-12, 454:20-25, 455:1-8, 471:13-20, 483:11-19, 493:6-13.

<sup>21</sup> R. at 314:3-8, 2009 R. Tr. Vol. IV at 783:1-5.

<sup>22</sup> Eureka County called John Colby (MW Cattle Company), James Etcheverry (on behalf of 3-Bar Ranch), and Martin Etcheverry (on behalf of the Etcheverry Family Limited Partnership as owner of Roberts Creek Ranch). None of the ranchers had protested the applications and only one appealed the Ruling (Etcheverry Family Limited Partnership). R. at 454:20-25, 455:1-8, 471:15-25, 493:8-13.

under a proposed 3M -Plan.<sup>23</sup> The Court concludes that the State Engineer's determination is reasonable, within his field of expertise, and supported by substantial evidence in the record.

Eureka County also argues that pursuant to NRS 533.370(2) and notwithstanding evidence of mitigation potential, the State Engineer is not authorized to order mitigation of impacts and must deny any applications that could potentially impact an existing water right. The Court concludes that NRS 533.370(2) does not prevent the State Engineer from granting applications that may impact existing rights if the existing right can be protected through mitigation, thus avoiding a conflict with existing rights. Nevada is one of the driest states in the entire country and it is likely that the development of any future water rights in Kobeh Valley or for that matter in any other location in the State of Nevada will have some potential impact on existing water rights because each new development will necessarily have to use some transitional storage and lower the groundwater table to capture the perennial yield.<sup>24</sup> The Court concludes Nevada law allows the State Engineer to grant subsequent applications even if they may impact existing rights so long as those existing rights can be made whole through mitigation. NRS 533.370(2) requires the State Engineer to deny a water right application if there is no water available for appropriation in the basin or if the proposed use conflicts with existing rights. The statute does not require the State Engineer to deny applications that may impact certain water sources, if the applicant can successfully mitigate those impacts. NRS 534.110(5) states that "[t]his section does not

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<sup>23</sup> R. at 2321-22, 658:7-12, 728:7-11, 3296, 722:16-25, 723:4-14.

<sup>24</sup> R. at 204:15-22, 357:21-25, 358:1-11, 359:11-17, 1088-90.





1 prevent the granting of permits to applicants later in time on the ground that the  
2 diversions under the proposed later appropriations may cause the water level to be  
3 lowered at the point of diversion of a prior appropriator, so long as any protectable  
4 interests in existing domestic wells as set forth in NRS 533.024 and the rights of holders  
5 of existing appropriations can be satisfied under such express conditions." Nothing in  
6 Nevada's water law statutes (NRS Ch. 533-534) prohibits the State Engineer from  
7 expressly conditioning approval of a permit on the submission and approval of a  
8 mitigation plan to protect the rights of prior appropriators. The Nevada Federal District  
9 Court – interpreting Nevada law – has held that the State Engineer "has the inherent  
10 authority to condition his approval of an application to appropriate based on his  
11 statutory authority to deny applications if they impair existing water rights."<sup>25</sup>  
12

13 Eureka County's interpretation of NRS 533.370(2) advocates a "no impact  
14 rule" which would essentially prevent the State Engineer from allowing the perennial  
15 yield of any Nevada basin to be developed and used by new groundwater applicants  
16 because any new pumping would necessarily draw down the water table which is almost  
17 certain to impact other groundwater uses to some degree. Under Eureka County's  
18 interpretation that an impact is necessarily a conflict, no new applications could be  
19 approved even if the resulting impacts to existing rights could be fully mitigated so that  
20 existing users would receive the full measure of their water rights. In view of the  
21 legislative expressions in NRS 533.024(1)(b), 534.110(4)-(5), and 533.370(2), the Court  
22 concludes Eureka County's statutory interpretation of NRS 533.370(2) would create a  
23 near impossibility for the future development of any new groundwater in the State of  
24  
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<sup>25</sup> *Alpine Land & Reservoir Co.*, 919 F. Supp. at 1479.

1 Nevada contrary to legislative intent and public policy. The Court concludes that NRS  
2 533.370(2) does not require the State Engineer to deny an application if any potential  
3 impacts to existing rights can be mitigated and therefore the State Engineer did not act  
4 arbitrarily, capriciously, or in violation of Nevada law in conditionally approving KVR's  
5 applications.

6 The State Engineer also determined that pumping groundwater in Kobeh  
7 Valley would not conflict with existing rights or domestic wells in Diamond Valley.<sup>26</sup>  
8 KVR's expert witnesses testified that pumping groundwater in Kobeh Valley would not  
9 affect Diamond Valley water levels. These experts testified that the groundwater levels  
10 in Kobeh Valley are roughly 100 feet higher than those in Diamond Valley and have not  
11 lowered in response to significant agricultural pumping and water level declines in  
12 Diamond Valley.<sup>27</sup> KVR's experts also testified that there is a groundwater flow barrier  
13 between Kobeh Valley and Diamond Valley.<sup>28</sup> These expert conclusions are supported  
14 by several USGS<sup>29</sup> reports in the record that conclude, based on the area's geology and  
15 hydrogeology, that the subsurface flow of groundwater from Kobeh Valley to Diamond  
16 Valley through the alluvium is minimal,<sup>30</sup> and there is no evidence that subsurface  
17 groundwater from the deeper carbonate aquifer is flowing from Kobeh Valley to  
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19  
20  
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22 <sup>26</sup> R. at 3590.

23 <sup>27</sup> R. at 168:1-15, 215:12-25, 216:1-6, 242:4-14, 310:9-11; 2009 R. Tr. Vol. IV at 685:13-25, 797:14-25,  
24 798:1-6.

25 <sup>28</sup> R. 1 at 68:1-15, 215:12-25, 216:1-6, 242:4-14; 2009 R. Tr. Vol. IV at 685:20-25, 796:17-24.

26 <sup>29</sup> United States Geological Survey.

<sup>30</sup> R. at 3588. One USGS scientist estimated the flow at less than 40 acre-feet annually (afa) through the alluvium in the Devil's Gate area. 2009 R. Vol. VI at 854.







1 Diamond Valley.<sup>31</sup> Another report showed that the geological structure separating the  
2 two valleys is not very permeable.<sup>32</sup> Lastly, KVR's groundwater flow model showed that  
3 KVR's pumping would not adversely affect Diamond Valley water levels.<sup>33</sup> This  
4 contradicts Petitioner's assertion that the State Engineer did not properly take into  
5 account the effect of Kobeh Valley pumping on Diamond Valley.<sup>34</sup>

6 The Court finds that this evidence is sufficient to convince a reasonable  
7 mind that these applications would not conflict with existing rights or domestic wells in  
8 Diamond Valley, and therefore, the State Engineer's finding in this regard is supported  
9 by substantial evidence.

10 The State Engineer likewise determined that pumping groundwater in  
11 Kobeh Valley would not conflict with existing rights on Roberts, Henderson, or Vinini  
12 Creeks. The evidence before the State Engineer was that water resources in, or  
13 originating from, the surrounding mountain ranges would not be affected by KVR's  
14 pumping because those sources were not hydraulically connected to the groundwater  
15 aquifer.<sup>35</sup> KVR's expert witnesses testified that the flow of those surface water sources  
16 was purely dependent on precipitation, snowmelt, and climatic conditions<sup>36</sup> and that  
17 groundwater pumping in Kobeh Valley would not affect stream flow in Roberts,  
18  
19

20 <sup>31</sup> 2009 R. Vol. VI at 676, 852; 2009 R. Tr. Vol. IV at 796:10-24, 797:14-24; R. at 215:20-25.

21 <sup>32</sup> R. at 168:17-25, 169:1-25, 170:1-2 (citing Low, Dennis James, 1982 *Geology of Whistler Mountain*; R. at  
22 3109-3252).

23 <sup>33</sup> R. at 310:9-11, 3589-90.

24 <sup>34</sup> Benson/Etcheverry Opening Br. at 30-34.

25 <sup>35</sup> R. at 3591-92, 171:8-17, 172:2-11, 24-25, 173:1-2, 187:21-25, 188:1-12 (Roberts Creek), 181:3-25, 182:1-  
26 18, (Henderson Creek), 189:12-14 (Vinini Creek), 183:19-25, 184:2-7, 189:18-21 (Pete Hanson Creek), 1090-  
1093, 241:16-25, 246:8-13, 341:1-5 (area mountain creeks in general).

<sup>36</sup> R. at 180:20-25, 182:12-14, 188:21-25, 325:2-14, 312:12-15.

Henderson, or Vinini Creeks because the primary water source for those creeks is not hydraulically connected to the Kobeh Valley groundwater aquifer.<sup>37</sup> No contrary expert testimony was presented by Petitioners. The Court finds that the evidence is sufficient to convince a reasonable mind that these applications would not conflict with existing rights on Roberts, Henderson, or Vinini Creeks, and therefore, the State Engineer's finding in this regard is supported by substantial evidence.

**B. Whether The State Engineer Violated Nevada Law By Conditioning The Approval of KVR's Applications On A 3M Plan Yet To Be Developed.**

Eureka County next contends that the State Engineer's reliance on a future monitoring, management and mitigation plan in approving KVR's applications violates Nevada law. Eureka County argues that because a 3M Plan was not presented or reviewed at the administrative hearing, neither Eureka County nor any of the other protestants were given the opportunity to assess or challenge the plan. Eureka County offers as well that because no 3M Plan is yet in existence, there is no evidence in the record to support the State Engineer's conclusion that a 3M Plan will effectively mitigate impacts to existing water rights. Eureka County concludes that because the record is barren of any details of a 3M Plan, the State Engineer's reliance on the yet to be developed plan in approving the applications is arbitrary, capricious and in violation of Nevada law.

In support of its argument, Eureka County cites the Nevada Supreme Court's decision in *City of Reno v. Citizens For Cold Springs*.<sup>38</sup> In *City of Reno*, the city

<sup>37</sup> R. at 3591-92, 170:3-8, 187:21-25, 188:1 (Roberts Creek), 181:19-23 (Henderson Creek), 189:12-17 (Vinini Creek), 189:18-21 (Pete Hanson Creek), 172:25, 173:1-2, 179:4-8, 186:19-25 (area mountain creeks in general).

<sup>38</sup> 126 Nev. , , 236 P.3d 10 (2010).





was required by its own municipal code to make a finding "regarding plans to supply adequate water services and infrastructure to support the proposed development" before adopting a master plan amendment and a zoning ordinance.<sup>39</sup> Unlike the municipal code at issue in that case, the Nevada water law statutes require no such prerequisite with regard to a mitigation plan. Further, the respondents in *City of Reno* argued that the city violated NRS 278.0282(1), which states that "before the adoption or amendment of any master plan . . . each governing body . . . shall submit the proposed plan or amendment to the regional planning commission."<sup>40</sup> Much like the State Engineer did here, the city conditionally approved the master-plan amendments, expressly stating that the amendments would not "become effective" until the Regional Planning Commission approved the amendments.<sup>41</sup> The court affirmed the City's actions, holding that the City did not violate NRS 278.0282 by conditionally approving amendments to the Reno Master Plan prior to submitting the amendments to the Regional Planning Commission for review because the master-plan amendments would only become effective after approval by the Regional Planning Commission. Similarly, KVR's applications were conditionally granted upon the approval of a 3M Plan to be later submitted to and approved by the State Engineer with input from Eureka County.<sup>42</sup>

The Court concludes that there is nothing in the State Engineer's enabling legislation or the State Engineer's policies that preclude him from granting applications

<sup>39</sup> *Id.* at 17 (discussing former Reno Municipal Code §18.06.404(d)(1)(b)).

<sup>40</sup> *Id.* at 16.

<sup>41</sup> *Id.*

<sup>42</sup> The Court has considered other cases cited by Eureka County in support of their argument and finds that these cases are not on point and are not persuasive in the instant matter. See *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal. App. 4th 645 (2007); *S. Fork Band Council of W. Shoshone v. United States DOI*, 588 F.3d 718, 727 (9th Cir. 2009).



contingent upon his subsequent review and approval of a 3M Plan to monitor, manage, and mitigate any impacts to prior appropriators. In the absence of such an express prohibition, and the Petitioners' failure to overcome the presumption that the State Engineer's interpretation of a statute is correct,<sup>43</sup> the Court will defer to the State Engineer's interpretation and administration of the statute.<sup>44</sup>

Eureka County also argues that in administrative proceedings before the State Engineer, the State Engineer is required to provide all parties a full opportunity to be heard in compliance with basic notions of fair play and due process.<sup>45</sup> Eureka County complains that, by the State Engineer's reliance on a 3M Plan that is yet undeveloped and not part of the administrative record, the due process rights of all of the protestants were violated. In this regard, Eureka County's argument appears to be twofold: (1) that the State Engineer relied upon a non-existent 3M Plan as a basis to grant KVR's applications; and (2) that Eureka County and other protestants had no opportunity to assess, challenge or otherwise be heard on the merits of a 3 M Plan.<sup>46</sup>

In *Mathews v. Eldridge*,<sup>47</sup> the United States Supreme Court held that due process is satisfied by giving both parties "a meaningful opportunity to present their

<sup>43</sup> See *Anderson Family Assoc.*, 124 Nev. at 186, 179 P.3d at 1203 (recognizing that the State Engineer "has the implied power to construe the state's water law provisions and great deference should be given to the State Engineer's interpretation when it is within the language of those provisions"); see also *United States v. State Engineer*, 117 Nev. at 589, 27 P.3d at 53; *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

<sup>44</sup> *Morros*, 104 Nev. at 713, 766 P.2d at 266.

<sup>45</sup> *Revert*, 95 Nev. at 787, 603 P.2d at 264.

<sup>46</sup> *English v. City of Long Beach*, 35 Cal. 155, 158, 217 P.2d 22, 24 (1950); *Corcoran v. San Francisco City and County Emp. Ret. Sys.*, 114 Cal. App. 2d 738, 745, 251 P.2d 59, 63 (1952); *Welch v. County Bd. of Sch. Trustees of Peoria County*, 22 Ill. App. 2d 231, 236, 160 N.E.2d 505, 507 (Ill. App. Ct. 1959).

<sup>47</sup> 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

case." Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."<sup>48</sup> Rather, "due process is flexible and calls for such procedural protections as the particular situation demands."<sup>49</sup> The Nevada Supreme Court has recognized that due process means that "interested parties are given an 'opportunity to be heard at a meaningful time and in a meaningful manner."<sup>50</sup>

In the instant matter, the State Engineer's determination to grant KVR's applications and permits and condition pumping on his later approval of a 3M Plan is not inconsistent with basic notions of fairness and a full opportunity to be heard.

Eureka County's meaningful opportunity to participate in and be heard in the development of a 3M Plan is expressly set forth in Ruling #6127.<sup>51</sup> It must be clear that in order to develop an effective 3M Plan sufficient to meet the State Engineer's approval, KVR, Eureka County, and other interested parties must have sufficient time to identify the scope of the impacts of mine pumping and to determine how best to mitigate impacts to existing rights. The input of Eureka County will obviously be of the most valuable assistance in developing the 3M Plan and that input will be given at the most meaningful time, during the actual development of the Plan. In the event Eureka County or other interested persons "feel aggrieved" by the State Engineer's determination of the sufficiency of the 3M Plan, the matter may be appealed to district court.<sup>52</sup> This entire

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<sup>48</sup> *Id.*

<sup>49</sup> *Burleigh v. State Bar of Nevada*, 98 Nev. 140, 145, 643 P.2d 1201, 1204 (1982).

<sup>50</sup> *J.D. Constr. v. IBEX Int'l Corp.*, 126 Nev. , 240 P.3d 1033, 1041 (2010) (quoting *Mathews*, 424 U.S. at 333).

<sup>51</sup> Ruling #6127 at 42.

<sup>52</sup> NRS 533.450(1).



1 range of participation by Eureka County in developing the 3M Plan satisfies all due  
2 process afforded by law. The Court therefore concludes that Petitioners' due process  
3 rights were not violated by the State Engineer's approval of the applications subject to  
4 approval of a 3M Plan.

5 The State Engineer granted KVR's applications upon evidence before him  
6 that unappropriated water was available in Kobeh Valley and that the water could be  
7 appropriated and used by KVR in a mining project without conflict to existing rights  
8 because existing rights could be made whole through mitigation. The key to protecting  
9 existing rights will be the 3M Plan which will first serve to identify impacts and the extent  
10 of those impacts, and second, to develop and implement mitigation efforts to ensure  
11 impacted existing rights are made whole. As inferred from the record, test pumping and  
12 analysis of pumping data, as it relates to impacts to existing rights, obviously takes time  
13 to complete. That data will form the basis of a 3M Plan ultimately submitted to the State  
14 Engineer for approval. The specifics of a 3M Plan not known at the time of the hearings  
15 will be made known after the data is collected and analyzed with input from Eureka  
16 County. The Plan will be submitted to the State Engineer in all transparency and the  
17 State Engineer must approve the 3M Plan before production pumping is allowed. In the  
18 Court's view, that developmental sequence does not violate the due process rights of  
19 Eureka County or other Petitioners and the Court so finds.

22 **C. Whether Substantial Evidence Supports The State Engineer's**  
23 **Determination That A Mitigation Plan Will Be Effective.**

24 Eureka County next argues that assuming arguendo that the State  
25 Engineer is allowed to conditionally grant KVR's applications based upon the future  
26 drafting of a 3M Plan, there is insufficient evidence in the record to establish that any



1 proposed mitigation would be effective. Eureka County maintains that because KVR  
2 provided only "minuscule and cursory" information to the State Engineer as to what  
3 mitigation measures would be undertaken, whether or not such mitigation would be  
4 effective is speculative at best and that the information is insufficient to support the  
5 State Engineer's conclusions.

6 Eureka County points to evidence it presented at the hearing that suggests  
7 mitigation would be ineffective. Mr. Garaventa, a rancher operating near the proposed  
8 well field, testified that in previous experiences where mining operations supplied water  
9 for livestock and wildlife, the water froze in the troughs in cold months and was  
10 unavailable for the animals. Other ranchers testified that it was essential that stock  
11 water be disbursed to avoid over-grazing near a single source. Witness John Colby,  
12 president of MW Cattle Company, testified that when cattle have traveled far to water  
13 sources "to get a drink," the calves suffer weight loss which in turn harms business.  
14 Eureka County argues as well that because mitigation efforts may require approval from  
15 the federal government, the provisions of the National Environmental Policy Act  
16 ("NEPA") may further complicate the mitigation plan. Finally, Eureka County argues that  
17 KVR's track record in actually implementing mitigation has been poor to date as KVR  
18 failed to mitigate known impacts to Nichols Spring caused by its test pumping. Eureka  
19 County maintains that at the administrative hearing it produced "a wealth of evidence"  
20 detailing extreme challenges faced by KVR in mitigating impacts to existing rights while  
21 KVR produced no evidence on planned mitigation measures. Eureka County concludes  
22 that the State Engineer's findings on the effectiveness of mitigation to be arbitrary and  
23 capricious and not based on substantial evidence.  
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KVR counters that substantial evidence supports the State Engineer's conclusion that any impacts to the water rights to springs and stockwatering wells located on the floor of Kobeh Valley could successfully be mitigated to avoid conflicts to those prior rights. KVR recounts the testimony of its experts that the only springs likely to be impacted near KVR's production wells are Mud Springs and Lone Mountain Spring,<sup>53</sup> which produce less than one gallon per minute and which apparently have run dry at times.<sup>54</sup> KVR's experts testified that any impacts to any stockwatering springs or wells could be fully mitigated thus fully avoiding conflicts with existing rights.<sup>55</sup> KVR also references its mitigation plan entered into with the BLM, the owner of 29 springs in Kobeh Valley, which describes potential mitigation measures that KVR would undertake to meet BLM needs.<sup>56</sup> KVR also argues that because only 1,100 afa of existing rights in Kobeh Valley are not owned or controlled by KVR, the mitigation requirements it would have to undertake would be limited.<sup>57</sup>

Commenting further on the effectiveness of a mitigation plan, KVR discounts the testimony of Kobeh Valley rancher John Colby regarding dispersed water sources available for cattle because Mr. Colby was describing water sources in the Simpson Park Mountains which will not be impacted by mine pumping.<sup>58</sup>

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<sup>53</sup> R. at 187:10-16, 355:5-11.

<sup>54</sup> R. at 1379, 1735-36, 1445.

<sup>55</sup> R. at 314:3-8, 198:4-7, 206:10-12.

<sup>56</sup> 2009 R. at 3703-04.

<sup>57</sup> R. at 3598.

<sup>58</sup> R. at 463:21-25, 466:5-19.





Regarding whether Roberts Creek will be affected by mine pumping, KVR contends that Petitioners did not provide any expert testimony that Roberts Creek would be affected by mine pumping while KVR's experts testified that because Roberts Creek was not hydraulically connected to the groundwater aquifer, Roberts Creek was unlikely to be affected by mine pumping.<sup>59</sup> Additionally, Martin Etcheverry testified that he could see no impact to the springs that are tributaries to Roberts Creek.<sup>60</sup>

Concerning KVR's Well #206 and its possible impacts to Nichols Spring, according to KVR, Martin Etcheverry conceded that any loss of flow to Nichols Spring could be mitigated by a substitute supply of water.<sup>61</sup> Mr. Etcheverry testified that water tanks supplied and installed by KVR at various places on the floor of Kobeh Valley would mitigate impacts to his other water sources.<sup>62</sup>

Although conflicting evidence was presented at the administrative hearing regarding whether mitigation efforts by KVR would be effective, the State Engineer found that potential impacts to existing water rights in Kobeh Valley could be mitigated. Supporting the State Engineer's finding was the testimony of KVR's experts and concession by Petitioners that mitigation was possible for the potentially affected existing rights. It is not the function of the Court to reweigh the evidence supporting the State Engineer's findings or substitute its judgment for that of the State Engineer. The Court therefore finds that sufficient evidence was presented to convince a reasonable mind that any potential impacts caused by mine pumping to existing rights can be fully

<sup>59</sup> R. at 3591-92, 171:8-17, 172:2-11, 24-25, 173:1-2, 187:21-25, 188:1012.

<sup>60</sup> R. at 458:4-6, 458:14-20.

<sup>61</sup> R. at 455:1-7.

<sup>62</sup> R. at 454:20-25.

mitigated. The Court therefore concludes the State Engineer's determination is supported by substantial evidence.

**D. Whether KVR's Applications Are Defective In Form And Content.**

Under Nevada law, any person seeking to appropriate public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, must first make application to the State Engineer for a permit to do so.<sup>63</sup> Such applications must contain "[a] substantially accurate description of the location of the place at which the water is to be diverted from its source . . .",<sup>64</sup> and must further " . . . be accompanied or followed by such maps and drawings and such other data as may be prescribed by the State Engineer . . .".<sup>65</sup> Both new appropriation applications and change applications are required by the State Engineer to describe the proposed place of use by legal subdivision.<sup>66</sup> These descriptions must match the diversion point and place of use shown on the supporting maps.<sup>67</sup> Nevada law requires the State Engineer to address all of the crucial issues necessary for a full and fair determination of a pending application,<sup>68</sup> including identifying the place of use and point of diversion. A decision by the State Engineer that fails to appropriately address crucial issues connected with an application may constitute a manifest abuse of discretion.<sup>69</sup>

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<sup>63</sup> NRS 533.325.

<sup>64</sup> NRS 533.335(5).

<sup>65</sup> NRS 533.350.

<sup>66</sup> R. at 3583.

<sup>67</sup> R. at 3583.

<sup>68</sup> *Revert*, 95 Nev. at 787, 603 P.2d at 264.

<sup>69</sup> *Id.* at 787, 603 P.2d at 265.



Eureka County maintains that KVR's applications are defective because (1) the applications fail to accurately describe the place of use; and (2) KVR is unable to identify all well locations for the project. Regarding the first issue, KVR's applications identify the place of use as a 90,000 acre area.<sup>70</sup> KVR's plan of operations identifies the area where the mine will be located and where the water will be put to beneficial use to be approximately 14,000 acres.<sup>71</sup> Eureka County maintains that KVR provided no adequate reason supporting a 90,000 acre place of use determination and that the sole reason for requesting an additional 76,000 acres was to prevent a "hardship" to KVR in having to re-apply for a change application in the event place of use needed to expand.<sup>72</sup>

In its response, KVR points to the administrative record showing that its applications comply with Nevada law by describing the place of use by legal subdivision and by further depicting the place of use on an accompanying map.<sup>73</sup> KVR presented evidence that shows that its Project is a large mine and that the water sought to be appropriated would be used within the entire mine site.<sup>74</sup> KVR concedes that while most of the water will be put to beneficial use within the 14,000 acre plan of operations boundary,<sup>75</sup> some water will be used outside the plan of operations boundary for

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<sup>70</sup> ROA Vol. I at 000133.

<sup>71</sup> *Id.*

<sup>72</sup> ROA Vol. I at 000093-94.

<sup>73</sup> R. at 999-1023, 1943-2294.

<sup>74</sup> R. at 144:14-19, 861:9-14.

<sup>75</sup> R. at 857:25, 858:1-5, 949, 1003, 1187.



JUN 18 2012

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KOBEH VALLEY RANCH, LLC

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

EUREKA COUNTY, a political subdivision of  
the State of Nevada,

Petitioner,

vs

THE STATE OF NEVADA, EX. REL.,  
STATE ENGINEER, DIVISION OF WATER  
RESOURCES,

Respondent.

Case No. CV1108-155  
Dept. No. 2

CONLEY LAND & LIVESTOCK LLC, a  
Nevada limited liability company; LLOYD  
MORRISON, an individual,

Petitioners,

vs

THE OFFICE OF THE STATE ENGINEER  
OF THE STATE OF NEVADA, DIVISION  
OF WATER RESOURCES, DEPARTMENT  
OF CONSERVATION AND NATURAL  
RESOURCES, JASON KING, STATE  
ENGINEER, KOBEH VALLEY RANCH,  
LLC, REAL PARTY-IN-INTEREST

Respondents.

Case No. CV1108-156  
Dept. No. 2

1 KENNETH F. BENSON, an individual;  
2 DIAMOND CATTLE COMPANY, LLC, a  
3 Nevada limited liability company; MICHEL  
4 AND MARGARET ANN ETCHEVERRY  
FAMILY, LP, a Nevada registered foreign  
limited partnership,

Petitioners,

5 vs

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

9 Respondent.

10 EUREKA COUNTY, a political subdivision of  
the State of Nevada,

Petitioner,

11 vs

12 THE STATE OF NEVADA, EX. REL.,  
13 STATE ENGINEER, DIVISION OF WATER  
RESOURCES,

14 Respondent.

15 KENNETH F. BENSON, an individual;  
16 DIAMOND CATTLE COMPANY, LLC, a  
Nevada limited liability company; and  
17 MICHEL AND MARGARET ANN  
ETCHEVERRY FAMILY, LP, a Nevada  
registered foreign limited partnership,

Petitioners,

18 vs

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

22 Respondents.

Case No. CV1108-157  
Dept. No. 2

Case No. CV1112-164  
Dept. No. 2

Case No. CV1112-165  
Dept. No. 2

23 **NOTICE OF ENTRY OF FINDINGS OF FACT,**  
24 **CONCLUSIONS OF LAW, AND ORDER DENYING**  
25 **PETITIONS FOR JUDICIAL REVIEW**

26 TO: ALL PARTIES IN INTEREST

27 YOU AND EACH OF YOU are hereby notified that on June 13, 2012, the Honorable Dan  
28 L. Papez entered a Findings of Fact, Conclusions of Law, and Order Denying Petitions for

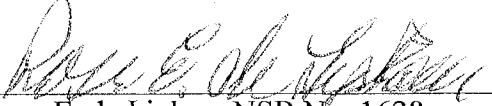
1 Judicial Review. A copy of the Findings of Fact, Conclusions of Law, and Order Denying  
2 Petitions for Judicial Review is attached hereto.

3 **AFFIRMATION**

4 Pursuant to NRS 239B.030, the undersigned hereby affirms that this document does not  
5 contain the Personal Information, as defined by NRS 603A.040, of any person.

6 Dated: June 14, 2012 PARSONS BEHLE & LATIMER

7 By:

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23 *Kobeh Valley Ranch, LLC*  
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25  
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28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 14 day of June, 2012, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING PETITIONS FOR JUDICIAL REVIEW** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as follows:

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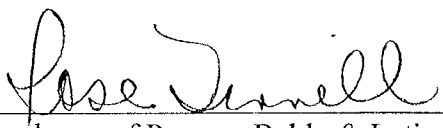
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*Attorneys for Benson, Diamond Cattle Company, and Etcheverry Family*

  
Employee of Parsons Behle & Latimer

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

EUREKA COUNTY, a political subdivision of the State of Nevada; KENNETH F. 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,

v.

THE STATE OF NEVADA STATE ENGINEER; THE STATE OF NEVADA DIVISION OF WATER RESOURCES; and, KOBEH VALLEY RANCH, LLC, a Nevada Limited Liability Company,  
Respondents.

No. 61324

Electronically Filed  
Aug 10 2012 08:33 a.m.

DOCKETING STATEMENT  
CIVIL APPEALS  
TACIEN Nindeman  
Clerk of Supreme Court

## GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

## WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.



1. Judicial District Seventh Department 2

County Eureka County Judge Dan L. Papez

District Ct. Case No. CV 1108-157, CV 1112-165, and CV 1202-170

**2. Attorney filing this docketing statement:**

Attorney Therese A. Ure & Laura A. Schroeder Telephone 775-786-8800

Firm Schroeder Law Offices, P.C.

Address 440 Marsh Avenue  
Reno, NV 89509

Client(s) Kenneth F. Benson; Diamond Cattle Co., LLC, Michel & Margaret Ann Etcheverry  
Family, LP ("Kenneth F. Benson et al.")

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Bryan L. Stockton Telephone 775-684-1228

Firm Nevada Attorney General's Office

Address 100 North Carson Street  
Carson City, NV 89701-4717

Client(s) State Engineer , State of Nevada, Division of Water Resources

Attorney Ross E. de Lipkau Telephone 775-323-1601

Firm Parsons Behle & Latimer

Address 50 W. Liberty Street, Suite 750  
Reno, NV 89501

Client(s) Kobeh Valley Ranch, LLC

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |  |   |
|--|---|
| <input type="checkbox"/> Judgment after bench trial                | <input type="checkbox"/> Dismissal:                                     |
| <input type="checkbox"/> Judgment after jury verdict               | <input type="checkbox"/> Lack of jurisdiction                           |
| <input type="checkbox"/> Summary judgment                          | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                          | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief         | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction                | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief        | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

This case has not previously been before the Nevada Supreme Court.

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

The following cases were consolidated in the Seventh Judicial District Court for the County of Eureka, and are currently appealed to this court in Supreme Court No, 61324:

- Eureka County v. State of Nevada, ex. rel., State Engineer, Division of Water Resources, CV 1108-155, June 13, 2012.

- Conley Land & Livestock, LLC; Lloyd Morrison v. The Office of the State Engineer of the State of Nevada, CV 1108-156, June 13, 2012.

(See Attached Supplement to Docketing Statement)

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

Between 2005-2010 Kobre Valley Ranch ("KVR") filed numerous water use applications to appropriate water and change water use rights. After administrative hearing, the State Engineer issued Ruling No. 5966, which was appealed, reversed and remanded by the Seventh Judicial District Court on due process grounds in Case Nos. CV0904-122 and -123. On remand, after additional administrative hearing, the State Engineer issued Ruling No. 6127 on July 15, 2011. Appellants filed petitions for judicial review with the Seventh Judicial District Court and oral argument was held before the court on April 3, 2012. The district court affirmed the State Engineer's Ruling No. 6127 and the State Engineer's issuance of water use permits, denying the petitions for judicial review. Appellants now appeal the district court's denial to the Nevada Supreme Court.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1) The State Engineer found that KVR's applications would conflict with existing water rights on the floor of Kobre Valley, including Appellants' existing water rights, and thus the State Engineer committed a legal error by granting KVR's applications. The district court erred by affirming the State Engineer's decision and denying Appellants' petitions for judicial review.

2) The State Engineer found that KVR's applications would lower the static water level at the appropriators' points of diversion, but erred by granting the applications without complying with the statutory requirement to make findings that the lowering is reasonable, and that the existing rights can be satisfied under express conditions. The district court erred by affirming the State Engineer's ruling and denying Appellant's petitions for judicial review.

(See Attached Supplement to Docketing Statement)

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

The consolidated cases outlined in Question No. 7 herein raise the same or similar issues and were all appealed to this Court under Supreme Court No. 61324.

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: This appeal alleges, in part, a due process violation under the United States Constitution. See Question #9 herein, Issue #3.

**13. Trial.** If this action proceeded to trial, how many days did the trial last? \_\_\_\_\_

Was it a bench or jury trial? N/A: oral argument only

**14. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No

## TIMELINESS OF NOTICE OF APPEAL

**15. Date of entry of written judgment or order appealed from** Jun 13, 2012

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**16. Date written notice of entry of judgment or order was served** Jun 14, 2012

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59      Date of filing \_\_\_\_\_

**NOTE:** Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail

**18. Date notice of appeal filed** Jul 12, 2012

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:  
- Eureka County, Nevada, July 10, 2012

**19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)

**SUBSTANTIVE APPEALABILITY**

**20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☒ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify)

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRS 233B.150 provides: "An aggrieved party may obtain a review of any final judgment of the district court by appeal to the Supreme Court. The appeal shall be taken as in other civil cases." Here, Appellants petitioned the district court for judicial review of an administrative ruling. Appellants' petitions were denied by the district court and are thus "aggrieved." Appellants now appeal the district court's final judgment denying their petitions to the Nevada Supreme Court.

**21. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Kenneth F. Benson; Diamond Cattle Co., LLC; Michel and Margaret Ann Etcheverry Family, LP; Eureka County, Nevada; Conley Land & Livestock, LLC; Lloyd Morrison; State of Nevada, State Engineer, Division of Water Resources; Kobeh Valley Ranch, LLC-

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Conley Land & Livestock, LLC and Lloyd Morrison are not parties to this appeal because they did not file notices of appeal and they are not respondents.

**22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Benson/Diamond Cattle/Etcheverry/Eureka County/Conley/Morrison: State Engineer Ruling No. 6127 and the issuance of water use permits should be reversed. Denied by district court on June 13, 2012.

State Engineer/Kobeh Valley Ranch: State Engineer Ruling No. 6127 and the issuance of water use permits should be affirmed. Granted by district court on June 13, 2012.

**23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**24. If you answered "No" to question 23, complete the following:**

(a) Specify the claims remaining pending below:

N/A

(b) Specify the parties remaining below:  
N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

N/A because #24 is N/A

**26. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order



## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Kenneth F. Benson et al.

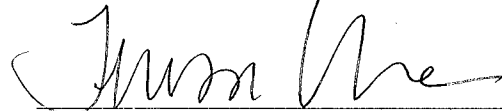
Name of appellant

Schroeder Law Offices, P.C.

Name of counsel of record

Aug 9, 2012

Date



Signature of counsel of record

NSB #10255

Multnomah County, Oregon

State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 9th day of August, 2012, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Bryan L. Stockton, Attorney for Nevada State Engineer

Ross E. de Lipkau, Attorney for Kobeh Valley Ranch

John R. Zimmerman, Attorney for Kobeh Valley Ranch

Francis M. Wikstrom, Attorney for Kobeh Valley Ranch

Karen A. Peterson, Attorney for Eureka County

Jennifer Mahe, Attorney for Eureka County

Theodore Beutel, Attorney for Eureka County

Dale E. Ferguson, Attorney for Conley Land & Livestock and Lloyd Morrison

Gordon H. DePaoli, Attorney for Conley Land & Livestock and Lloyd Morrison

William E. Nork, Settlement Judge

Dated this 9th day of August, 2012



Signature

## **SUPPLEMENT TO DOCKETING STATEMENT (CIVIL APPEAL)**

### **3. Attorney(s) ~~representing respondent(s)~~ (continued)**

#### **Additional Counsel**

Attorney: Francis M. Wikstrom Telephone: 801-532-1234  
Firm: Parsons Behle & Latimer  
Address: 201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Client(s): Kobeh Valley Ranch, LLC

### **7. Pending and prior proceedings in other courts (continued)**

- Kenneth F. Benson; Diamond Cattle Co. LLC; Michel and Margaret Ann Etcheverry Family LP v. State Engineer of Nevada, CV 1108-157, June 13, 2012.

- Eureka County v. State of Nevada, ex. rel., State Engineer, Division of Water Resources, CV 1112-164, June 13, 2012.

- Kenneth F. Benson; Diamond Cattle Co. LLC; Michel and Margaret Ann Etcheverry Family LP v. State Engineer of Nevada, CV 1112-165, June 13, 2012.

- Kenneth F. Benson; Diamond Cattle Co. LLC; Michel and Margaret Ann Etcheverry Family LP v. State Engineer of Nevada, CV 1202-170, June 13, 2012.

### **9. Issues on appeal (continued)**

3) The State Engineer must limit its decision to the evidence in the record. Here, the State Engineer's reliance on a mitigation plan that was not entered in the record in approving KVR's applications was an error that denied Appellants their due process right to address the mitigation plan at hearing. The district court erred by denying Appellants' petitions for judicial review and holding that Appellants' due process rights were not violated because Eureka County (a different party) would be given the opportunity to participate in development of the mitigation plan.

4) The State Engineer found that the 90,000 acre place of use described in KVR's applications was proper, although KVR's plan of operations identifies only a 14,000 acre place of use for mining purposes, because KVR proposed to use water outside the 14,000 acre boundary for dust control and environmental mitigation

purposes. It was an error of law for the State Engineer to approve the proposed place of use, and it was an error for the district court to deny Appellants' petitions for judicial review, because the applications and permits at issue do not allow KVR to use water for dust suppression or environmental mitigation purposes (they are limited to mining, milling and dewatering).

5) KVR conceded that Ruling No. 6127 requires that all permits contain the condition that excess Diamond Valley water must be returned to the groundwater aquifer in Diamond Valley, and KVR does not object to that term being added to the permits. The district court erred by denying Appellants' petitions for judicial review and affirming the State Engineer's issuance of permits that failed to include that condition, especially when the parties agreed on that issue.

### **Certificate of Service (continued)**

The completed docketing statement was served upon all counsel of record by mailing it by first class mail with sufficient postage prepaid to the following addresses:

Bryan L. Stockton  
100 North Carson Street  
Carson City, NV 89701-4717

Ross E. de Lipkau  
John R. Zimmerman  
50 W. Liberty Street, Suite 750  
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