

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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,

No. 61324

District Court Case No. 1108-155; CV 1108-156;  
CV 1108-157; CV 1112-161;  
CV 1112-165; CV 1202-170  
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Appellants,

vs.

THE STATE OF NEVADA STATE  
ENGINEER; THE STATE OF NEVADA  
DIVISION OF WATER RESOURCES; AND  
KOBEL VALLEY RANCH, LLC, A NEVADA  
LIMITED LIABILITY COMPANY,

Respondents.

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**APPELLANT EUREKA COUNTY'S OPENING BRIEF**

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**APPELLANT EUREKA COUNTY'S OPENING BRIEF**

Appellant, EUREKA COUNTY, a political subdivision of the State of Nevada (hereinafter "EUREKA COUNTY"), by and through its counsel, ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY,

hereby files its Opening Brief in accordance with Nevada Rules of Appellate Procedure (“NRAP”) 28 and 32.

**I.**

**JURISDICTIONAL STATEMENT**

This Court has appellate jurisdiction over this case because this is an appeal from the District Court’s denial of EUREKA COUNTY’s Petitions for Judicial Review. NRS 533.450(9) provides that an appeal may be taken to this Court from a judgment of the District Court in the same manner as in other civil cases. See NRAP 3A(b)(1).

On June 13, 2012, the District Court entered its Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review. Joint Appendix (“JA”) Volume (“Vol.”) 36 at 6823-6881. Written notice of entry of the District Court’s Order was served on June 14, 2012. JA Vol. 36 at 6882-6944. EUREKA COUNTY timely filed its Notice of Appeal, pursuant to NRAP 4(a)(1), on July 10, 2012. JA Vol. 36 at 6945-6949.

## II.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

A. Does the STATE ENGINEER have authority to grant applications to appropriate 11,300 acre feet annually (“afa”) of water under NRS 533.370(2)<sup>1</sup> when the proposed use or change conflicts with existing rights on the reliance of a future, undefined monitoring, management and mitigation plan?

B. Does Nevada water law and the prior appropriation doctrine preclude the STATE ENGINEER from granting groundwater permits to applicants later in time when the junior appropriations would impact prior surface water rights?

C. Did the STATE ENGINEER apply the correct standard when he granted KVR’s Applications and concluded an interbasin transfer of 11,300 afa of water from Kobeh Valley to Diamond Valley was environmentally sound pursuant to NRS 533.370(3)(c)?

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<sup>1</sup> NRS 533.370 was amended by Assembly Bill 115 during the 2011 Nevada Legislative Session. See 2011 Nev. Stats. Ch 166 at 758. The amendments renumbered the provisions of NRS 533.370. All citations to NRS 533.370 in this appellate brief use the amended numbering of NRS 533.370 as codified in 2011.

### **III.**

#### **STATEMENT OF THE CASE**

This is an appeal from the Seventh Judicial District Court's Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review entered on June 13, 2012 by the Honorable Dan L. Papez, District Judge.

The District Court erroneously concluded that Nevada water law allows the NEVADA STATE ENGINEER (hereinafter "STATE ENGINEER") to grant applications to appropriate or change 11,300 afa of water even if the proposed use or change conflicts with existing water rights, so long as the impacts to existing water rights can be mitigated.

Further, the District Court confused surface water and groundwater rights when it wrongly concluded that NRS 534.110(4) and (5) allow an appropriation of groundwater that will cause a "reasonable lowering" of the static surface water level as long as the prior appropriators can be satisfied under express conditions.

Finally, the District Court erroneously determined that the STATE ENGINEER applied the correct standard when he granted KVR's Applications and concluded that an interbasin transfer of 11,300 afa of water from Kobeh Valley to

Diamond Valley was environmentally sound in contravention of NRS 533.370(3)(c).

#### IV.

#### **STATEMENT OF THE FACTS**

##### **A. The Applications and Proposed Use.**

Between May 2005 and June 2010, KOBEH VALLEY RANCH, LLC (hereinafter “KVR” or the “Applicant”) filed Applications with the STATE ENGINEER to appropriate new water or to change the point of diversion, place of use and/or manner of use of existing water rights (collectively hereinafter “Applications”) for a mining project known as the Mount Hope Mine Project located in Eureka County, Nevada.<sup>2</sup> JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460; JA Vol. 26 at 4985-4988, 4994.

The Applications sought a total combined duty of 11,300 afa of groundwater for mining and milling purposes associated with the proposed mine. JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460; JA Vol. 26 at 4994. The mine life is expected to be 44 years and the 11,300 afa of groundwater to be pumped is a consumptive use, meaning that it will be fully

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<sup>2</sup> Some of the Applications were originally filed by a different entity. JA Vol. 13 at 2111-2149. The Applications not originally filed by KVR were later assigned or transferred to KVR. JA Vol. 26 at 4985-4986.

consumed in the mining process. JA Vol. 2 at 281-282, 312, 320; JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460. This is not a dewatering project for mining in that less than ten percent of the requested water will be needed to dewater the pit. JA Vol. 26 at 3596. All water sought under the Applications, including the water pumped from and around the pit to dewater the pit, is essentially used to create slurry necessary for the movement of material and the molybdenum recovery process, ultimately resulting in the conveyance of material through and eventually away from the mine process facilities in the form of tailing slurry to a tailing storage facility in Kobeh Valley. JA Vol. 2 at 282. While some of the water in the tailing slurry is anticipated to be recoverable and recycled back to the ore process circuit, the full fresh water need of 11,300 afa from the well field and pit dewatering applied for under the Applications is fully consumed in the mining process (e.g., evaporates) or is entrained forever in the tailings and can never be used again. Id. No water extracted for the mining project will be returned to the aquifer (e.g., injected or infiltrated) for later beneficial use as is often the case with pit dewatering for gold mining. JA Vol. 2 at 282, 311-312, 320.

The water to be appropriated is located in two different hydrographic basins, the Kobeh Valley Hydrographic Basin (“Kobeh Valley”) and the Diamond



Valley Hydrographic Basin (“Diamond Valley”). JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460. The quantity of water requested to be pumped from Kobeh Valley, being 11,300 afa, has never been pumped from that basin, and Diamond Valley is severely over appropriated. JA Vol. 8 at 1384-1385, 1449.

The groundwater for the Mount Hope Mine Project will come primarily from a well field located within Kobeh Valley. JA Vol. 26 at 5008. The well field will consist of 10 production wells and 2 construction wells, concentrated in a limited geographic area in Kobeh Valley. JA Vol. 8 at 1363, 1371; JA Vol. 10 at 1698-1699; JA Vol. 11 at 1881; JA Vol. 23 at 4408. KVR’s proposed wells are in fairly close proximity to existing springs, stockwatering wells and at least one domestic well in Kobeh Valley. JA Vol. 7 at 1242-1243; 1248-1252; JA Vol. 9 at 1552a-1552d.

The place of use for the water was identified by KVR as an approximately 90,000 acre area, which sits astride the boundaries of Kobeh Valley, Diamond Valley and Pine Valley Hydrographic Basins. JA Vol. 7 at 1175-1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460. Most of the groundwater to be appropriated will be diverted in Kobeh Valley and put to beneficial use in

Diamond Valley, constituting an interbasin transfer of water. JA Vol. 26 at 5008-5009.

The Applications were protested by various individuals and entities including EUREKA COUNTY. JA Vol. 7 at 1155-1174; JA Vol. 22 at 4240-4248; JA Vol. 25 at 4819-4860; JA Vol. 26 at 4988-4994. The STATE ENGINEER held administrative hearings on the Applications in December 2010 and in May 2011.<sup>3</sup> JA Vol. 7 at 1110-1118; JA Vol. 26 at 4995.

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<sup>3</sup> The Applications were previously before the STATE ENGINEER in an administrative hearing held October 13-17, 2008. JA Vol. 26 at 4995. In Ruling 5966 issued on March 26, 2009, the STATE ENGINEER approved some of the Applications and others were denied. See ROA Vol. 26 at 4995; ROA Vol. 36 at 6827-6828. Ruling 5966 was appealed to the District Court, and the District Court vacated Ruling 5966 in its Order entered on April 21, 2010. Id. Thereafter, KVR filed Change Applications 79911 through 79942 on June 15, 2010. JA Vol. 26 at 4995.

At the hearing before the STATE ENGINEER in December 2010, one of the Protestants filed a motion to adopt the previous record from the October 2008 hearing. JA Vol. 7 at 1151-1154. The motion was unopposed and the STATE ENGINEER adopted the Exhibits and Transcript from the previous hearing. JA Vol. 7 at 1146-1147; JA Vol. 26 at 4995.

In compliance with NRAP 30(b), only excerpts of the Transcript from the October 2008 hearing are included in the Joint Appendix because the excerpts are

**B. Existing Vested, Permitted and Certificated Water Rights and Domestic Wells.**

Numerous witnesses using and holding a variety of water rights in the Kobeh Valley Basin and Roberts Mountain area testified before the STATE ENGINEER, describing the history of their ranches, their vested, permitted, certificated and domestic water rights and the customary use of their water. JA Vol. 4 at 615-629, 637-644, 649-658, 660-666, 670-681; JA Vol. 10 at 1711; JA Vol. 25 at 4933; JA Vol. 26 at 4934-4938.

Mr. Martin Etcheverry, whose family owns the Roberts Creek Ranch, testified he uses all the water that is on his Bureau of Land Management (“BLM”) allotment, known as the Roberts Creek allotment, comprised of approximately 156,000 acres. JA Vol. 4 at 615-617, 619-620, 626. Mr. Etcheverry testified: “It’s been documented that there are over a hundred springs on the allotment.” JA Vol. 4 at 621. It is a unique allotment with water all throughout the allotment. JA Vol. 4 at 621. The cows use the entire area, including the springs and the creeks in the lower part of the ranch up to the top of the mountain, for grazing. JA Vol. 4 at 621. The surface water is also used to irrigate all of the meadows on the private ground at Roberts Creek. JA Vol. 4 at 622. The private ground at Roberts Creek is approximately 320 acres and the private ground using Vinini Creek is 240 acres.

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essential to the decision of issues presented in this appeal.

JA Vol. 4 at 620, 622. Mr. Etcheverry has 7 underground wells on his BLM allotment and private ground. JA Vol. 4 at 623. Roberts Creek, springs above the ranch area and certain wells are also used for domestic purposes. JA Vol. 4 at 622-623. A portion of his BLM allotment is in a wilderness study area. JA Vol. 4 at 632.

These springs and creeks make Mr. Etcheverry's ranch and BLM allotment unique because they provide so much water and forage for his cattle. JA Vol. 4 at 621, 626-627. Mr. Etcheverry testified "...with all the springs and creeks, the cattle are distributed good throughout the pasture and they are utilizing the whole pasture." JA Vol. 4 at 626. "That's what makes it unique, just the water on the ranch, there's so many springs and creeks, plenty of water and the cattle do well there." JA Vol. 4 at 626. Mr. Etcheverry explained why the cattle do well and why it is important that cattle are disbursed throughout the pastures. JA Vol. 4 at 626-627. If too many cattle graze in one concentrated area, BLM rules and regulations are violated. JA Vol. 4 at 627.

The testimony of other witnesses with existing water rights in Kobeh Valley and the Roberts Mountain area was similar. See, Testimony of John Colby, JA Vol. 4 at 637-644, JA Vol. 26 at 4935, 4938; Testimony of Kenneth Buckingham, JA Vol. 4 at 649-658; JA Vol. 25 at 4933; Testimony of Jim

Etcheverry, JA Vol. 4 at 660-666, JA Vol. 26 at 4937-4938; Testimony of Gary Garaventa, JA Vol. 4 at 670-681; JA Vol. 26 at 4936. These water rights holders use the water on their private ground or BLM allotments for stockwater and to irrigate the meadows for pasture for their cattle and/or sheep. JA Vol. 4 at 637-639, 651-655, 662-664, 671-672. The numerous springs and creeks keep their cattle disbursed, the cattle do not have to walk very far for water, and the abundant springs and creeks provide forage for their stock. JA Vol. 4 at 639-640, 665-666. Most of the water right holders also have groundwater wells on their BLM allotment and private property for domestic and stockwatering purposes. JA Vol. 4 at 638, 657-658, 662, 665, 667-671; JA Vol. 25 at 4933; JA Vol. 26 at 4935-4938. A portion of Mr. Colby's BLM allotment is also part of a wilderness study area. JA Vol. 4 at 639-640. Wells cannot be drilled in the wilderness study area. JA Vol. 4 at 639-640, 643.

Mr. Jim Etcheverry testified he rotates his livestock around to different fields and if they are in a specific field at a specific time they need to use the water in that field. JA Vol. 4 at 665-666. Springs producing 2 to 3 gallons per minute of water are very valuable for the cows and sheep to water when they are in a specific field and need to use that water. JA Vol. 4 at 665. "So, if they [the

springs] were compromised, you know, it would really hurt right then.” JA Vol. 4 at 665.

Finally, several witnesses described the shallow water table in the Kobeh Valley Basin. JA Vol. 4 at 640-641, 676-677; JA Vol. 25 at 4751. Lowering the water table would impact their surface and groundwater rights and wildlife in the area. JA Vol. 4 at 641, 643, 673-677.

In the 2008 hearing, Thomas Buqo, an expert hydrogeologist for KVR responsible for KVR’s well drilling program, confirmed Mr. Martin Etcheverry’s statement regarding the number of springs in the area. JA Vol. 36 at 6956-6958, 6960-6961. Mr. Buqo testified:

Mr. Etcheverry I think said there’s 100 springs in the Roberts Mountains and I think he’s absolutely correct.

I know there’s a lot of small springs and seeps. . . . What we noticed is there are numerous springs in the Roberts Mountains area, lots and lots of them.

There’s also springs over on the valley floor.

JA Vol. 36 at 6961.

Martin Etcheverry, Jim Etcheverry and John Colby further testified regarding vested surface water rights they, or their predecessors, used prior to 1905

for stockwatering and cattle grazing purposes.<sup>4</sup> These witnesses testified there are hundreds of springs and creeks on both their private land and BLM allotments in Kobeh Valley and the Roberts Mountain area, with uses that pre-date 1905.<sup>5</sup> JA Vol. 4 at 634-636, 638-640, 664, 666, 668-669, 678-679; JA Vol. 26 at 4934, 4935, 4937, 4938.

Ron Damele testified that in 1878 his family came from Italy to Alpha, Nevada, which is located 36 miles north of the town of Eureka. JA Vol. 4 at 685-686. From the late 1800's, Mr. Damele's family owned the Three Bar, JD, Tonkin, Willow Creek and Indian Ranches. JA Vol. 4 at 699. His family ran cattle and sheep and irrigated the meadows on those properties and there was no doubt the water was used based on the information his family has handed down, the works he saw there and "because there's good creeks." JA Vol. 4 at 699.

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<sup>4</sup> At the 2008 hearing, the STATE ENGINEER's Office asked and Martin Etcheverry confirmed during public comment the rights he had on the springs in the Roberts Creek area were claims of vested rights. JA Vol. 36 at 6954. The STATE ENGINEER was put on notice in 2008, even if public comment is not evidence pursuant to NAC 533.060 and NAC 533.110, that there was a water user contending he had claims of vested rights in the Roberts Creek area.

<sup>5</sup> These vested rights were not listed in KVR's exhibits showing water rights KVR identified from records of the STATE ENGINEER's Office. JA Vol. 3 at 536-537, 541-542. All water rights owned by Kobeh Valley and Roberts Mountain area water users may not have been depicted on EUREKA COUNTY's exhibits.

**C. The Conflicts.**

At the hearings before the STATE ENGINEER, KVR's experts testified the Applications would conflict with existing rights. Terry Katzer, KVR's expert in hydrogeology, testified in response to questioning from KVR's attorney:

Q. Okay. Will the pumping over time cause impacts to springs in direct stock watering wells in the floor of Kobeh Valley?

A. I believe it will. And I can't name the springs because I'm not that familiar with them. Mud Springs, for instance, I know where that is. I've been there. It will probably dry that up with time. And other springs that are in close proximity to the well field.

Q. Stock watering wells?

A. Stock watering wells, yes, probably.

JA Vol. 2 at 338-339, 363. On cross examination, Mr. Katzer confirmed his earlier opinion that KVR's proposed groundwater pumping would impact existing surface and groundwater rights holders in the alluvial system:

Q. But in this case you've already testified that there's going to be impacts to existing rights from this pumping; is that correct?

A. That's in the alluvial system. That's a given.

JA Vol. 2 at 373-374 (emphasis added).



Dwight Smith, KVR's hydrogeology and groundwater modeling expert, and the individual responsible for the preparation of the numerical groundwater flow model presented by KVR, reading from the model report, testified that "[h]owever, the model offers the best available tool from any predictions and it suggests a potential to impact spring flows in Roberts Creek and Henderson Creek water sheds." JA Vol. 3 at 436-438, 525. Mr. Smith described the impacts to a specific existing permit, the Mud Spring permit, as follows:

Q. And then going down to spring 721 [Mud Spring permit]?

A. Yes.

Q. That's in green?

A. Yes.

Q. Which indicates it's a spring in the valley?

A. Yes, that's correct.

Q. And that's the Etcheverry Mud Spring permit that's referenced on page 189 of your text?

A. That's correct.

....

Q. And in the text that also indicates that that spring would have a permanent impact?

A. Well, not permanent because it does recover over time. Well, it recovers to within one foot of pre-pumping water levels. But that spring might be helpful to refer to Figure 4.4-20. I know we don't have the well field superimposed on this figure. But that spring is in very close proximity to a proposed production well site. I visited that spring and I actually recall finding a metal casing in the middle of that. I don't know if that's a spring that's just been augmented by drilling a well in the middle of it. I'm not quite sure the conspiracies [sic]. But very low flow supports a small pooled area of water that I've seen wild horses and occasionally cattle using as a source of stock water.

But I do, I think there's a high probability that that spring [Mud Spring] will cease the flow of it is -- see the flow as a direct result of pump-out from the well.

Q. It will cease the flow as a result of direct pumping from the well field?

A. I believe it would.

JA Vol. 3 at 544-545 (discussing Table 4.4.10 of the KVR model report found at JA Vol. 9 at 1687d and Figure 4.4-20 found at JA Vol. 11 at 1854a).

Mr. Smith reiterated in his testimony that Mud Spring "would potentially cease to flow" because of its close proximity to the KVR well field. JA Vol. 3 at 531. Mr. Smith agreed with Mr. Katzer's opinions regarding impacts and testified:

A. . . . [N]othing is definitive, but at the same time I think it's pretty likely that those stock water resources will require mitigation. I think those stock water sources would potentially cease to flow. I think we'll see that effect fairly clearly and fairly soon in the pumping. I don't want to suggest that those impacts can't be fully mitigated.

Q. So you agree with the opinion from Mr. Katzer yesterday regarding impacts from the mine's proposed pumping to certain existing rights?

A. He was I think referencing these same references in his testimony.

Q. And you agree with that?

A. Yes, I concur with Terry's testimony.

JA Vol. 3 at 531.

Although Mr. Smith testified impacts to existing water rights could be “fully mitigated,” no evidence was presented by KVR at the hearings before the STATE ENGINEER that KVR had proposed or had any type of management or mitigation plan in place. JA Vol. 2 at 305-306, 315; JA Vol. 5 at 902; JA Vol. 7. at 1240. There is no evidence of a mitigation plan proposed by KVR that is part of the record before the STATE ENGINEER.<sup>6</sup> JA Vol. 2 at 305-306, 315; JA Vol. 5

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<sup>6</sup> EUREKA COUNTY submitted a proposed plan to the STATE ENGINEER which was designed to address the potential *unknown* impacts to senior water rights holders as a result of the mining operations. JA Vol. 14 at 2478-2492; JA Vol. 24 at 4681. EUREKA COUNTY's proposed plan was not

at 902; JA Vol. 7 at 1240. One of KVR's witnesses, the director of environmental permitting for the mine project, described such a plan as undeveloped and speculative:

A. I don't know what we would propose in a mitigation plan. A mitigation plan hasn't been developed yet. It would be speculative to say what we would or would not propose.

JA Vol. 2 at 267-268, 315.

In addition to the expert testimony by Mr. Smith, KVR's model report states:

Springs located in lower altitudes in the Roberts Mountains, such as sites 630 and 640 (Figure 4.4-20) are more likely to be impacted due to closer proximity to the KVCWF [Kobeh Valley Central Well Field], resulting in larger predicted drawdown at these locations. Discharge at Mud Spring (Site 721) and Lone Mountain Spring (Site 742), located near the southeast edge of the KVCWF near proposed well 226, are predicted to be impacted and will likely cease to flow based on predicted drawdowns of 40 to 50 feet. Both of these springs discharge less than approximately one gallon per minute.

. . . .

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designed to address the *known* impacts to senior water rights as it was believed that such senior water rights holders would be protected by the STATE ENGINEER's denial of KVR's Applications that conflicted with existing rights as required by NRS 533.370(2), codified at the time of the hearing as NRS 533.370(5). See JA Vol. 2 at 192-194, 200.

Only a few wells and water rights not directly associated with the EMLLC Mt. Hope project are within the area of predicted 10-foot drawdown contour (Tables 4.4-8 and 4.4-9; Figure 4.4-20). Notably, significant drawdown is projected for a well at the Roberts Creek Ranch.

JA Vol. 9 at 1552b-1552c. See also JA Vol. 3 at 535-536, for Mr. Smith's testimony regarding impacts to the Roberts Creek Ranch domestic well. KVR's model report also describes the impacts from KVR's pumping and includes a list of non-mine owned wells, water rights, and springs within the area of the mine's 10-foot drawdown predicted at project year 44 and post-project years 10, 30, 50, 100, 200, 300, and 400. JA Vol. 8 at 1360-1361, 1364a; JA Vol. 9 at 1552a-1552d, 1687a-1687d.<sup>7</sup>

A KVR exhibit also presented an overview of predicted impacts from the mine's proposed groundwater pumping:

- Significant ground water consumption in Kobeh Valley is expected to remove water from storage and lower groundwater elevations in portions of Kobeh Valley.
- Reduction of spring or surface water flows in portions of Kobeh Valley is possible as a result of the lowered groundwater levels.

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<sup>7</sup> Vested water rights were not listed in KVR's exhibits showing impacts to existing rights within the area of the mine's 10-foot drawdown. See JA Vol. 3 at 536-537, 541-542.

- Groundwater drawdown in the extreme western portion of Diamond Valley, in the vicinity of Tyrone Gap, is predicted to occur as the open pit extends below the water table.

....

- As the cone of groundwater depression propagates to the north from the well field or to the north and northwest from the pit area, it could encroach upon the southernmost or south-easternmost portions of the Roberts Mountains. This could result in reduction of spring or surface water flows or lowering of shallow groundwater tables that support wet meadow complexes and associated wildlife habitat in these areas.
- Water rights within the cone of depression could be affected: Appropriated surface waters could experience diminished flows. Appropriated groundwater could experience groundwater elevation declines which could impact well efficiencies or pumping costs.
- In general, the potential for impacts increases both with proximity of a given resource to the proposed well field and with increased duration of pumping.
- Figure 1 [JA Vol. 7 at 1248] shows the area that is predicted to experience groundwater drawdown in excess of ten feet at 5 years following project start-up, the water rights within this area and the monitoring locations proposed for this WRMOP [Water Resources Monitoring Plan]. Figure 2 [JA Vol. 7 at 1249] provides this same information, except that it shows the area predicted to experience drawdown in excess of 10 feet at 44 years following project start-up. Figures 3 through 5 [JA Vol. 7 at 1250-1252] show a more detailed view of Kobeh, Diamond, and Roberts Mountains monitoring locations, respectively.

JA Vol. 7 at 1242-1243, 1248-1252.

One witness testified at the December, 2010 hearing he had already experienced impacts as a result of limited pump tests completed by KVR. JA Vol. 4 at 625. Martin Etcheverry, the owner and operator of the Roberts Creek Ranch, testified:

THE WITNESS: As soon as 206 was done testing their well our Nichols Springs dropped in half the water and it hasn't recovered since then.

Q. (By Ms. Peterson) And that pump test was about two and a half years ago?

A. I believe so, yes.

JA Vol. 4 at 625. KVR was aware of these impacts to Nichols Springs in January, 2010, but had not provided any mitigation. JA Vol. 5 at 903-904.

KVR's identified impacts were based on a 10-foot groundwater drawdown contour that had been used for BLM permitting purposes to identify impacts. JA Vol. 2 at 332. Dale Bugenig, an expert witness for EUREKA COUNTY, provided a report and figures showing impacts to existing rights using KVR's numeric groundwater flow model with a 5-foot drawdown contour. JA Vol. 24 at 4688-4689; JA Vol. 25 at 4750, 4752. The 5-foot drawdown contour

depicts additional existing water rights subject to impacts from KVR's pumping. JA Vol. 24 at 4688-4689; JA Vol. 25 at 4750, 4752.

Extensive evidence was presented at the hearing before the STATE ENGINEER to show that Mud Spring and other springs and creeks in the alluvial system would be impacted—likely dried up entirely—by granting KVR's Applications. JA Vol. 2 at 363, 373-374; JA Vol. 3 at 525, 531, 544-545; JA Vol. 9 at 1687a-1687d. There would also be impacts to stockwatering wells and at least one domestic well in the alluvial system. JA Vol. 2 at 363, 373-374; JA Vol. 3 at 535-536; JA Vol. 9 at 1552c. Such springs and creeks and the wells are subject to vested, permitted or certificated water rights or domestic uses held by appropriators senior to KVR. JA Vol. 4 at 634-636, 638-641, 643, 664-665, 673-677; JA Vol. 25 at 4933; JA Vol. 26 at 4934-4938.

**D. Ruling 6127 and the District Court's Order.**

The STATE ENGINEER issued Ruling 6127 on July 15, 2011 (hereinafter sometimes referred to as "Ruling"). JA Vol. 26 at 4985-5026. The Ruling references the extensive area of water table drawdown predicted by KVR's proposed groundwater pumping and identified impacts to existing water right holders:

Those three ranchers [Martin Etcheverry, Jim Etcheverry and John Colby] 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.

JA Vol. 26 at 5005.

The STATE ENGINEER also stated:

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.

JA Vol. 26 at 5006.

Although Ruling 6127 acknowledges "certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping" and "[w]ater level drawdown due to simulated mine pumping is thoroughly documented," the Ruling granted the majority of KVR's Applications. JA Vol. 26 at 5002, 5005-5006, 5026. Ruling 6127 allowed the appropriation of a total combined duty of 11,300 afa of water, subject to minimal conditions, for example, the submission of

a future, undefined monitoring, management and mitigation plan. JA Vol. 26 at 5026.

EUREKA COUNTY requested judicial review of Ruling 6127. JA Vol. 1 at 01-06. After briefing by all the parties and oral argument, the District Court issued its Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review on June 13, 2012. JA Vol. 36 at 6823, 6825-6826. In its Order, the District Court concluded the STATE ENGINEER had the authority to grant KVR's Applications, even though the proposed use or change conflicted with existing rights, on the reliance of a future, undefined plan to mitigate such impacts. JA Vol. 36 at 6834-6835. The District Court stated:

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. . . . 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.

JA Vol. 36 at 6834. The District Court explained “[n]othing in Nevada’s water law statutes (NRS Ch. 533-534) prohibits the State Engineer from expressly conditioning approval of a permit on the submission and approval of a mitigation

plan to protect the rights of prior appropriators.” JA Vol. 36 at 6835. This appeal ensued. JA Vol. 36 at 6945.

**V.**

**SUMMARY OF THE ARGUMENT**

In Ruling 6127, the STATE ENGINEER granted KVR’s Applications to appropriate 11,300 afa of water to the detriment of existing water rights, and in direct conflict with the mandates of NRS 533.370(2).

NRS 533.370(2) obligates the STATE ENGINEER to reject applications that will conflict with existing rights. Although KVR’s own experts testified at the hearings before the STATE ENGINEER that conflicts with existing rights would occur from pumping 11,300 afa of water, the STATE ENGINEER failed to apply the law and granted KVR’s Applications on the reliance of a future, undefined monitoring, management and mitigation plan.

The STATE ENGINEER also failed to apply the standard he articulated in Ruling 6127 when he granted KVR’s Applications and erroneously concluded that an interbasin transfer of 11,300 afa of groundwater from Kobeh Valley to Diamond Valley was environmentally sound.

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## VI.

### **STANDARD OF REVIEW ON APPEAL**

Questions of statutory construction presented in this appeal are questions of law which require de novo review by this Court. This Court recently held “[i]n the context of an appeal from a district court order denying a petition for judicial review of a decision made by the State Engineer, this court has the authority to undertake an independent review of the State Engineer’s statutory construction, without deference to the State Engineer’s determination.” Andersen Family Associates v. Ricci, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (citing Bacher v. State Engineer, 122 Nev. 1110, 1115, 146 P.3d 793, 798 (2006) and Kay v. Nunez, 122 Nev. 1100, 1103, 146 P.3d 801, 804 (2006)).

Any “presumption of correctness” of a decision of the STATE ENGINEER as provided by NRS 533.450(10), “does not extend to ‘purely legal questions,’ such as ‘the construction of a statute,’ as to which ‘the reviewing court may undertake independent review.’” In re State Engineer Ruling No. 5823, 128 Nev. \_\_\_, \_\_\_, 277 P.3d 449, 453 (2012) (quoting Town of Eureka v. State Engineer, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992)). At no time will the STATE ENGINEER’s interpretation of a statute control if an alternative reading is

compelled by the plain language of the statute. See Andersen Family Associates, 124 Nev. at 186, 179 P.3d at 1203.

Whether the STATE ENGINEER exceeded his authority in granting KVR's Applications to appropriate 11,300 afa of water to the detriment of existing water rights and in reliance on a future, undetermined mitigation plan, are purely legal questions. Therefore, this Court should undertake independent review without deference to the STATE ENGINEER's Ruling. See Jones v. Rosner, 102 Nev. 215, 216-217, 719 P.2d 805, 806 (1986) (reviewing court is free to decide legal questions without deference to an agency determination); accord Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. \_\_\_, \_\_\_, 245 P.3d 1145, 1148 (2010)("[w]e review purely legal questions without deference to the State Engineer's ruling."). The District Court's statutory construction to affirm the STATE ENGINEER's Ruling should also be reviewed de novo by this Court. See Great Basin Water Network v. State Engineer, 126 Nev. \_\_\_, \_\_\_, 234 P.3d 912, 916 (2010) ("We review a district court's statutory construction determination de novo."). Accordingly, EUREKA COUNTY's Opening Brief highlights the errors made in statutory construction by the STATE ENGINEER in Ruling 6127, and as affirmed by the District Court in its Order Denying Petitions for Judicial Review.

## VII.

### **OVERVIEW OF NEVADA WATER LAW AND THE PRIOR APPROPRIATION DOCTRINE**

Nevada's water law, like most western states, adheres to the prior appropriation doctrine. The prior appropriation doctrine "recognizes water rights based on the time of use, as well as actual use, of water without regard to the ownership of land contiguous to a water course." United States v. State Engineer, 117 Nev. 585, 591, 27 P.3d 51, 55 (2001) (Becker, J., concurring in part and dissenting in part). "Where the right to the use of running water is based upon appropriation, and not upon an ownership in the soil, it is the generally recognized rule here that priority of appropriation gives the superior right." Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 543 (1869). Accord Reno Smelting, Milling and Reduction Works v. Stevenson, 20 Nev. 269, 282, 21 P. 317, 322 (1889) (concluding the common law doctrine of riparian rights was unsuited to our State and that rights should be determined by the principles of prior appropriation).

An appropriative right "may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations." Desert Irrigation, Ltd. v. State of Nevada, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) (quoting Frank J. Trelease & George A.

Gould, Water Law Cases and Materials 33 (4th ed. 1986)). Thus, “first in time is the first in right” is the general rule of the prior appropriation doctrine. See Prosole v. Steamboat Canal Co., 37 Nev. 154, 166, 140 P. 720, 724 (1914) (acknowledging the “just and well-established rule that in cases [of water appropriation] the first in time is the first in right”).

This Court has described three different types of water rights in Nevada—vested, permitted, and certificated. See Andersen Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (2008). “Vested” water rights are ““water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation.”” Waters of Horse Springs v. State Engineer, 99 Nev. 776, 778, 671 P.2d 1131, 1132 (1983) (quoting Application of Filippini, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949)). This Court has determined that it is not always essential water be diverted to constitute an appropriation, such that the use of water by grazing livestock constitutes sufficient appropriation to establish a vested water right. See Waters of Horse Springs, 99 Nev. at 778, 671 P.2d at 1132. Accord State v. State Engineer, 104 Nev. 709, 716, 766 P.2d 263, 268 (1988) (“Nevada law and longstanding custom recognize stockwatering as a beneficial use of water.”).

It is imperative to Nevada water law that prestatutory vested rights not be impaired by statutory law. Nevada's nonimpairment statute is set forth at NRS 533.085(1):

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

See also Andersen Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (concluding that although prestatutory vested rights may be subject to state regulation, such regulation may not impair the quantity or value of the vested rights).

The second type of water rights in Nevada are "permitted" rights. Permitted rights are granted after the State Engineer approves a party's application for water rights. Such permit grants the applicant the right to develop a specific amount of water for a designated purpose. See Andersen Family Associates v. Ricci, 124 Nev. at 188-89, 179 P.3d at 1205.

Finally, the third type of water rights in Nevada are "certificated" rights. Certificated rights are granted after a party perfects his or her permitted water rights. In order to perfect permitted water rights, an applicant must file proof of beneficial use with the State Engineer. Once proof has been filed, the State



Engineer will issue a certificate in place of the permit. See Id. at 189, 179 P.3d at 1205.

Existing water rights include vested, permitted and certificated water rights. See Andersen Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (2008). NRS 533.370(2) prohibits the granting of applications to appropriate water, whether surface or groundwater, when the proposed use or change conflicts with existing water rights.<sup>8</sup>

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<sup>8</sup> In its entirety, NRS 533.370(2) states:

2. Except as otherwise provided in subsection 10, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

(Emphasis added.)

## VIII.

### ARGUMENT

#### A. The STATE ENGINEER Exceeded His Authority By Granting Applications When the Proposed Use or Change Conflicts With Existing Rights.

The powers of the STATE ENGINEER, like other state administrative agencies, are limited to those set forth in the law. See City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); Andrews v. Nevada State Board of Cosmetology, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970) (“Official powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function. The grant of authority to an agency must be clear.”) (internal citation omitted). See also NRS 532.110 (“[t]he State Engineer shall perform such duties as are or may be prescribed by law”); NRS 532.120(1) (“The State Engineer may make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.”).

Although an administrative agency’s powers are generally limited to the powers set forth by statute, “certain powers may be implied even though they were not expressly granted by statute, when those powers are necessary to the agency’s performance of its enumerated duties.” City of Henderson v. Kilgore,

122 Nev. at 334, 131 P.3d at 13. Therefore, for implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty of the agency. Id. at 335, 131 P.3d at 14. See also Clark County School District v. Teachers Association, 115 Nev. 98, 103-104, 977 P.2d 1008, 1011 (1999) (concluding that a hearing officer had the implied authority to issue subpoenas for limited pretrial discovery since the language of the statute authorized the hearing officer to subpoena witnesses to testify at the hearing).

The STATE ENGINEER has the express authority to approve applications to appropriate water if the conditions of NRS 533.370(2) are satisfied, and to reject applications if they are not. See Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. \_\_\_, \_\_\_, 245 P.3d 1145, 1146 (2010) (“The State Engineer is prohibited by law from granting a permit under a change application to appropriate public waters if: . . . the ‘proposed use or change conflicts with existing rights . . . .’”) (quoting NRS 533.370(3), now codified as NRS 533.370(2)). “Under NRS 533.370[(2)] the State Engineer must deny applications when there is no unappropriated water in the proposed source or when the proposed use conflicts with existing rights or is detrimental to the public interest.” State Engineer v.

Morris, 107 Nev. 699, 701, 819 P.2d 203, 204 (1991) (internal footnote omitted) (emphasis added).<sup>9</sup>

Nowhere in Nevada’s water law does it state the STATE ENGINEER has the power to grant applications to appropriate water when the proposed use or change conflicts with an existing water right. In fact, the plain language of NRS 533.370(2) unambiguously and expressly prohibits the STATE ENGINEER from granting applications where the proposed use or change conflicts with existing rights. NRS 533.370(2) expressly states that “where [an application’s] proposed use or change conflicts with existing rights . . . the State Engineer shall reject the application and refuse to issue the requested permit.” (Emphasis added.) “[I]t is well established that ‘[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.’” United States v. State Engineer, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) (quoting City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989)). Accord Bacher v. State Engineer, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006).

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<sup>9</sup> In the 2008 hearing, then Deputy State Engineer, Jason King, acknowledged that one of the criteria looked at in determining whether to grant or deny an application is will the application have an adverse impact on existing water rights. JA Vol. 36 at 6953. Mr. King stated the STATE ENGINEER’s Office has a mandate to protect existing rights. JA Vol. 36 at 6953.

Moreover, in Great Basin Water Network v. State Engineer, 126 Nev. \_\_\_, 234 P.3d 912 (2010), this Court reiterated its determination that “[t]he word “shall” is a term of command; it is imperative or mandatory, not permissive or directory.”” Great Basin Water Network, 126 Nev. at \_\_\_, 234 P.3d at 916 (quoting Blaine Equipment Co. v. State, 122 Nev. 860, 867, 138 P.3d 820, 824 (2006)) (quoting Adkins v. Oppio, 105 Nev. 34, 37, 769 P.2d 62, 94 (1989)). Thus, it is mandatory that the STATE ENGINEER reject an application and refuse to issue the requested permit when the proposed use or change conflicts with existing rights. See NRS 533.370(2).

Furthermore, no implied power is conferred on the STATE ENGINEER to grant applications if the conditions of NRS 533.370(2) are not met. Implied powers are conferred on an agency when such powers are necessary to the agency’s performance of its enumerated duties. See City of Henderson v. Kilgore, 122 Nev. at 334, 131 P.3d at 13.

As set forth above, the STATE ENGINEER has the express authority to approve applications to appropriate water if the conditions of NRS 533.370(2) are satisfied, and to reject applications if they are not. See Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. at \_\_\_, 245 P.3d at 1146. If the conditions of NRS 533.370(2) are not met, then the STATE ENGINEER has no implied power to

approve the applications. The STATE ENGINEER has no implied power to nullify one of the conditions of NRS 533.370(2)—namely the condition that a proposed use or change shall not conflict with existing rights. “While this court has determined that an administrative agency may possess an implied limited power, any implied limited power must be essential to carry out an agency’s express statutory duties.” City of Henderson v. Kilgore, 122 Nev. at 335, 131 P.3d at 14.

**B. NRS 533.370(2) Expressly Mandates that Applications that Conflict With Existing Rights Shall be Rejected by the STATE ENGINEER.**

As set forth above, NRS 533.370(2) expressly provides that “where [an application’s] proposed use or change conflicts with existing rights . . . the State Engineer shall reject the application and refuse to issue the requested permit.” (Emphasis added.) In construing this statute, this Court has determined that “the State Engineer must deny applications . . . when the proposed use conflicts with existing rights. . . .” State Engineer v. Morris, 107 Nev. at 701, 819 P.2d at 204.

In Griffin v. Westergard, 96 Nev. 627, 630, 615 P.2d 235, 237 (1980), the hydrographic basin from which the applicant sought to appropriate water was overappropriated and, accordingly, the State Engineer entered a finding that granting any additional groundwater rights in that basin would conflict with

existing rights. Thus, the State Engineer denied the applications. Id. This Court affirmed the State Engineer's denial of the applications because the applications conflicted with existing rights. Id. at 632, 615 P.2d at 238.

In affirming the State Engineer's denial in Griffin, this Court held that NRS 533.370(4), now codified as NRS 533.370(2), "required respondent [the State Engineer] to deny any permit that would impair existing rights and prove detrimental to the public interest." Id. at 631, 615 P.2d at 237 (emphasis added). Thus, this Court equated "conflict" with "impair" in the context of impacts to existing rights. Id.

Other states with similar statutes have also strictly construed the statutory mandate that applications proposing conflicts with existing rights must be denied. See Heine v. Reynolds, 367 P.2d 708, 710 (N.M. 1962); Piute Reservoir & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962).

In Heine v. Reynolds, the New Mexico Supreme Court concluded that "[t]he state engineer had a positive duty to determine if esisting [sic] rights would be impaired; and having found that they would be, there is no necessity under the statute to further determine the degree or amount of impairment. The burden is on the applicant to show no impairment of existing rights. . . ." Heine, 367 P.2d at 710 (emphasis in original).

Further, in Piute Reservoir & Irr. Co. v. West Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962) the Utah Supreme Court held that change applications must be denied where evidence showed that existing water users would be denied some quantity of water. The Utah Supreme Court reasoned as follows:

This court has never adopted the so-called ‘de minimus’ theory, which we understand to be that an application either to appropriate or change the diversion or use of water should be approved if the effect on prior vested rights is so small that courts will not be concerned therewith. This would seem to require the approval of an application if it were shown that the adverse effect on vested rights is very small, even though there is a definite showing of some such adverse effect. . . . However, the correct rule on this question is that the applicant must shown [sic] reason to believe that the proposed application for change can be made without impairing vested rights. This means that if vested rights will be impaired by such change or application to appropriate, such application should not be approved.

Piute Reservoir, 367 P.2d at 858 (internal footnote omitted). See also Postema v. Pollution Control Hearings Bd., 11 P.3d 726, 741 (Wash. 2000) (“The statutes do not authorize a de minimis impairment of an existing right. RCW 90.03.290 plainly permits no impairment of an existing right.”).

In City of Albuquerque v. Reynolds, 379 P.2d 73, 81 (N.M. 1962), the New Mexico Supreme Court upheld the state engineer’s decision to deny the City



of Albuquerque's application to drill wells in the underground basin unless the City retired its existing surface water rights to offset the effect of new groundwater pumping on the flows of the Rio Grande River. In reaching its conclusion, the New Mexico Supreme Court determined that the state engineer had the authority to promulgate rules requiring surface water right retirements as a condition to new appropriations of underground water from the Rio Grande River. Reynolds, 379 P.2d at 80. "[The requirement] that surface rights be retired to the extent necessary to protect prior stream appropriators as a condition of the granting of an application to appropriate from the basin, is within the lawful power and authority of the state engineer." Id. at 81.

The conditions imposed by the New Mexico state engineer and affirmed by the Court in Reynolds protected the existing water rights holders because no new appropriations of groundwater would be approved by the state engineer unless existing surface water rights were first retired. In the appeal before this Court, the conditions imposed on KVR by the STATE ENGINEER and approved by the District Court clearly do not protect the existing water rights holders because they are not defined.

Based on the uncontested expert evidence before him, the STATE ENGINEER's Ruling acknowledges the flow loss to certain springs impacted by KVR's proposed pumping.<sup>10</sup> Ruling 6127 states:

The Applicant recognizes that certain water rights on springs in Kobreh Valley are likely to be impacted by the proposed pumping. These springs produce less than one gallon per minute and provide water for livestock purposes. The State Engineer finds that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur.

JA Vol. 26 at 5006 (internal footnotes omitted). No evidence of a mitigation plan by the Applicant, KVR, to protect the existing water rights was presented to the STATE ENGINEER. JA Vol. 2 at 305-306, 315; JA Vol. 5 at 902; JA Vol. 7 at 1240.

Further, in 2008, KVR's expert in hydrogeology, Thomas Buqo, testified before the STATE ENGINEER that: "Springs are an important consideration because they tell you things about the hydrogeologic conditions and you also don't want to dry up springs when you're developing water." JA Vol. 36 at 6961. Although the STATE ENGINEER acknowledged the evidence of impacts

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<sup>10</sup> KVR's expert in hydrogeology, Terry Katzer, testified at the hearings before the STATE ENGINEER that KVR's proposed groundwater pumping would impact existing water rights holders in the alluvial system. JA Vol. 2 at 338-339, 363, 373-374.

to existing rights, the STATE ENGINEER nonetheless granted KVR's Applications. JA Vol. 26 at 5005-5006.<sup>11</sup>

The District Court compounded the STATE ENGINEER's error when it improperly concluded that NRS 533.370(2) does not prevent the STATE ENGINEER from granting applications that may impact existing rights if the existing rights can be protected through mitigation, thus allegedly avoiding a conflict with existing rights.

In its Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial Review, the District Court concluded that the STATE ENGINEER had the implied power to grant applications even if the proposed use or change conflicts with existing rights. The District Court stated as follows:

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. . . . NRS 533.370(2) requires the

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<sup>11</sup> In his Ruling, the STATE ENGINEER discounted Mr. Katzer's testimony that impacts were "a given" to numerous springs and stockwatering wells in the Kobeh Valley alluvial system, by minimizing the extent of impacts to select springs flowing less than one gallon per minute and one domestic well. JA Vol. 2 at 338-339, 363, 373, 374; JA Vol. 26 at 5006, 5011, 5023. The Ruling summarily categorizes all such impacted springs as having flows of less than one gallon per minute. JA Vol. 36 at 5006, 5011. Mud Spring and Lone Mountain Spring were the only springs KVR specifically identified with a purported flow of less than one gallon per minute. JA Vol. 3 at 544-545; JA Vol. 9 at 1552b.

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.

JA Vol. 36 at 6834.<sup>12</sup>

In support of its conclusion that “[n]othing in Nevada’s water law statutes (NRS Ch. 533-534) prohibits the State Engineer from expressly conditioning approval of a permit on the submission and approval of a mitigation plan to protect the rights of prior appropriators,” the District Court cites to United States v. Alpine Land & Reservoir Co., 919 F. Supp. 1470 (D. Nev. 1996). JA Vol. 36 at 6835. The District Court’s reliance on Alpine Land, however, is misplaced.

In Alpine Land, the federal district court noted that in Ruling 4207, the State Engineer granted the applicant’s change applications, but imposed a

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<sup>12</sup> It is important to note that EUREKA COUNTY has always advanced that KVR change the location of its well field so that the wells are not in close proximity to existing water rights in Kobeh Valley or reduce the size of its project by requesting a smaller quantity of water to minimize potential impacts. JA Vol. 5 at 909; JA Vol. 35 at 6666-6667. EUREKA COUNTY’s contention that KVR should scale down its mining project or reconfigure its well field to minimize impacts to existing water rights shows that the District Court’s concern and KVR’s argument that EUREKA COUNTY’s statutory interpretation of NRS 533.370(2) would create a near impossibility for the future development of any new groundwater in Nevada is without merit. JA Vol. 36 at 6835-6836.

number of conditions upon them. Alpine Land, 919 F. Supp. at 1478. First, the State Engineer approved the applicant's change applications for surface water rights so long as no irrigation wells were drilled in California to re-irrigate the land being stripped of water. Id. The condition expressed by the State Engineer in granting the change applications stated as follows: "[T]he approval is null and void if any attempt is made to drill wells and irrigate, from a groundwater source, the land being stripped of water." Id. at 1473 (emphasis added). Although the applicant argued that the State Engineer had no authority to issue such a condition, the federal district court concluded that "[t]he Nevada State Engineer has the inherent authority to condition his approval of an application to appropriate based on his statutory authority to deny applications if they impair existing water rights." Id. at 1479.

The second condition imposed by the State Engineer in Alpine Land was to order that the applicant shall bear the transportation loss attributable to granting the change applications. Id. In granting the change applications, the State Engineer determined that there would be a large transportation loss because the distance between the applicant's proposed diversion and place of use covered a distance of about eight miles. Id. The State Engineer determined that the applicant should bear the entire transportation loss attributable to granting the change

applications in order to protect downstream users. Id. The federal district court concluded the second condition was a proper exercise of the State Engineer's authority in granting the change applications. Id. at 1479-80.

Based on the foregoing, it is clear that the holding in Alpine Land does not support the District Court's determination that the STATE ENGINEER can grant applications that conflict with existing rights based on a future, undefined mitigation plan. Instead, the holding in Alpine Land reaffirms the statutory mandate that applications that conflict with existing rights cannot be approved. See NRS 533.370(2). See also Alpine Land, 919 F. Supp. at 1473 (condition imposed by the State Engineer stated that the approval of the applications would be null and void if any attempt was made to re-irrigate the land stripped of water—thus protecting the existing surface water rights holders).

Accordingly, the District Court's decision to defer to the STATE ENGINEER's interpretation of his authority under NRS 533.370(2) because there was no specific prohibition in the law to conditioning approval on the submission and approval of a future, undefined mitigation plan to remediate impacts to existing water rights is not within the statutory provisions and was, thus, in error. The STATE ENGINEER had no discretion to grant KVR's Applications under NRS 533.370(2). KVR's Applications conflicted with existing rights and they

should have been rejected. See Great Basin Water Network, 126 Nev. at \_\_\_, 234 P.3d at 916 (noting that the word “shall” is a term of command; it is mandatory, not permissive or directory).

**C. The STATE ENGINEER is Precluded from Granting Groundwater Permits to Applicants Later in Time if the Junior Appropriations Will Impact Prior Surface Water Rights.**

The District Court determined that because subsections (4) and (5) of NRS 534.110 allow an appropriation of groundwater that will cause a “reasonable lowering” of the static water level as long as the prior appropriators can be satisfied under express conditions, and there is a legislative declaration regarding mitigation of impacts to domestic wells contained in NRS 533.024(1)(b), impacts on existing water rights are permitted under NRS 533.370(2) in Nevada. JA Vol. 36 at 6834-6836. The statutes cited by the District Court, however, address standards associated with groundwater—not surface water.

The springs and creeks at issue in this case are surface water, not groundwater, and it is impossible to have a “reasonable lowering” of a spring or a creek.<sup>13</sup> Vested surface water rights cannot be impaired or affected nor can the customary manner of use of vested rights be impaired or affected pursuant to NRS

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<sup>13</sup> Even if a “reasonable lowering” was permitted for surface water, it is not plausible to assert that such reasonable lowering should include drying up the surface water source as will occur in this case. JA Vol. 9 at 1687a-1687d.

533.085(1). Therefore, the provisions of NRS 534.110(4) and (5) and NRS 533.024(1)(b), which apply to groundwater diversions, do not apply to allow impacts to senior surface water rights.

Moreover, based on the STATE ENGINEER's approval of a future, undefined mitigation plan, and his reliance on NRS 534.110, a question arises regarding the procedure the STATE ENGINEER must use to impose "express conditions" as provided in NRS 534.110 for new groundwater appropriations. Pursuant to the prior appropriation doctrine, express conditions must protect the rights of holders of existing groundwater appropriations prior to the approval of an application. The simple answer can be found not only in the doctrine of prior appropriation, as discussed above, but in NRS 534.110(5) which states that a permit for an underground water right may be granted "so long as ... the rights of holders of existing appropriations can be satisfied under such express conditions." This clearly mandates that such express conditions must be imposed and the senior/existing groundwater appropriations satisfied before the STATE ENGINEER grants a permit to a junior groundwater appropriator. Such timing forces a hard look at impacts because the senior groundwater appropriator will demand protection of his appropriation as part of express conditions, or in the alternative the senior groundwater appropriator will be made whole in some other



way. See Alpine Land, 919 F. Supp. at 1473 (State Engineer imposed an express condition that approval of the change applications would be null and void if any attempt was made to re-irrigate the land from which the water was being stripped—thus protecting existing water rights holders).

**D. The STATE ENGINEER’s Ruling Fails to Adhere to the Prior Appropriation Doctrine and the Well-Established Rule of “First in Time, First in Right” Because it Allows KVR to Pump 11,300 afa of Water at the Expense of Existing Water Rights Holders.**

As discussed in detail above, the appropriation of water in Nevada is in accordance with the prior appropriation doctrine. Moreover, the appropriation of water in Nevada is governed by statute and the STATE ENGINEER is authorized to regulate such appropriations. See NRS 532.110; NRS 532.120; NRS 533.030(1). This Court has recognized that water in Nevada “is a precious and increasingly scarce resource. Consequently, state regulation like that in NRS Chapters 533 and 534 is necessary to strike a sensible balance between the current and future needs of Nevada citizens and the stability of Nevada’s environment.” Bacher v. State Engineer, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006).

Although Ruling 6127 acknowledges that “certain water rights on springs in Kobeh Valley are likely to be impacted by [KVR’s] proposed pumping” and that “[w]ater level drawdown due to simulated mine pumping is thoroughly documented,” the STATE ENGINEER nevertheless granted KVR’s Applications

to pump 11,300 afa of water to the detriment of the holders of existing water rights. JA Vol. 26 at 5002, 5005-5006, 5026. Because Nevada adheres to the prior appropriation doctrine and the “first in time, first in right” model, the STATE ENGINEER does not have the authority to grant KVR’s proposed use or change at the expense of existing water rights holders.

**E. The STATE ENGINEER Exceeded His Authority by Relying on a Future, Undefined Monitoring, Management and Mitigation Plan that was Not in the Record to Protect Existing Water Rights.**

In accordance with NRS 533.370(2), the STATE ENGINEER has no authority to grant applications and issue permits where the proposed use or change conflicts with existing rights, regardless of any future, undefined mitigation plan. See Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 750, 918 P.2d 697, 701 (1996) (“NRS 533.370(3) [now codified in NRS 533.370(2)]), which has remained essentially unchanged for decades, limits the role of the State Engineer. The State Engineer has no express authority to engage in a comparative economic analysis of water delivery alternatives.”). Further, NRS 533.370(2) does not provide the STATE ENGINEER the authority to rely on a future, undefined monitoring, management and mitigation plan that was not in the record to protect existing water rights, including the protection of

vested rights which may not be impaired or affected pursuant to NRS 533.085(1).<sup>14</sup>

It is undisputed that the STATE ENGINEER must provide all parties a full opportunity to be heard in compliance with the basic notions of fairness and due process. See Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979). A well-accepted concept of fairness and due process in administrative law requires that an administrative agency not rely on information that is not presented at the hearing. See Revert, 95 Nev. at 787-88, 603 P.2d at 265. See also Welch v. County Bd. of Sch. Trustees of Peoria County, 160 N.E.2d 505, 507 (Ill. App. Ct. 1959) (“the findings of an administrative agency must be based on facts established by evidence which is introduced as such, and the administrative agency cannot rely on its own information to support its findings”).

In Revert v. Ray, appellants argued before the State Engineer that their predecessors in interest had acquired a vested interest in the waters of Beatty Springs. Id. at 785, 603 P.2d at 263-64. Without considering the issue of adverse possession, the State Engineer found that the subject rights in Beatty Springs had

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<sup>14</sup> KVR testified at the hearings before the STATE ENGINEER that it had no current mitigation plan. JA Vol. 2 at 305-306, 315; JA Vol. 5 at 902; JA Vol. 7 at 1240.

been abandoned and, as a result, the water rights reverted to the State and were subject to appropriation. Id. at 785, 603 P.2d at 264. Appellants appealed the State Engineer's decision to the district court. Id.

The district court in Revert v. Ray conducted a limited review of the proceedings before the State Engineer to determine whether substantial evidence existed in the record to support the State Engineer's decision. Id. at 786, 603 P.2d at 264. Although the district court expressed some concern over the State Engineer's failure to consider whether appellants' predecessors in interest had adversely possessed the springs prior to the time of abandonment, the district court nonetheless relied on a post-review brief filed by the State Engineer which asserted that any use of the Beatty Springs by appellants' predecessors in interest had been permissive and not adverse. Id. at 785-86, 603 P.2d at 264-65.

On appeal, this Court in Revert v. Ray reversed the district court's judgment and remanded the case back to the State Engineer "for a full and fair determination of appellants' adverse possession claim." Id. at 788, 603 P.2d at 265. In reaching its conclusion, this Court noted that resolution of appellants' adverse possession claim was essential to the "full and fair determination" of the appropriation application. Id. at 787, 603 P.2d at 265. Further, this Court stated that if the alleged adverse possession had been completed prior to the date of

abandonment, then appellants would have established a vested interest in the disputed waters. Id. Since the State Engineer did not address the issue at the administrative hearing, appellants were deprived of a “full and fair determination” of their claim. Id.

This Court in Revert v. Ray further noted that the district court compounded the State Engineer’s error when the district court failed to remand the matter back to the State Engineer for a proper determination of the adverse possession issue. Id. Instead, the district court erroneously relied on a post-review brief filed by the State Engineer to supply the missing findings. Id. This Court held that since the post-review brief was not part of the record before the State Engineer, the brief should not have been considered by the district court. Id. This Court stated:

The State Engineer’s brief amounted to nothing more than a post hoc rationalization for the State Engineer’s prior error of omission and is not the type of “explicit and concise” finding of fact required by NRS 233B.125. The brief, in short, was not a part of the record and thus, should not have been considered by the district court.

Id. Thus, this Court reversed the district court’s judgment and remanded the case back to the State Engineer for findings.

The holding in Revert v. Ray is applicable to the facts of this case in that the STATE ENGINEER relied on a future, undefined monitoring,

management and mitigation plan that was not in the record, and the District Court affirmed the STATE ENGINEER's reliance on such future, undefined plan that was not part of the record. The STATE ENGINEER's Ruling denied the Protestants a "full and fair determination" of the conflicts with existing rights because the STATE ENGINEER relied on a future, undefined mitigation plan not in the record.

Furthermore, NRS 533.370(2) mandates that applications which conflict with existing rights must be rejected. NRS 533.370(2) does not authorize the STATE ENGINEER to mitigate the impacts to existing rights and issue the permits. If the Nevada Legislature had intended to give the STATE ENGINEER such power, the Nevada Legislature would have specifically set out such authority in the statutes. For example, the Nevada Legislature expressly gave the STATE ENGINEER the power to restrict the drilling of wells in any basin or portion thereof designated by the STATE ENGINEER if the STATE ENGINEER determined that additional wells "would cause an undue interference with existing wells." NRS 534.110(8).

Even assuming *arguendo* that the STATE ENGINEER has the authority to grant applications that conflict with existing rights based on a mitigation plan, the mitigation measures must be expressly determined and

approved by the STATE ENGINEER as part of a “full and fair determination” of the issue prior to granting the applications. See Revert v. Ray, 95 Nev. 782, 787-88, 604 P.2d 262, 265 (1979) (concluding that matters not in the record before the State Engineer should not be considered to ensure a full and fair determination). Therefore, the STATE ENGINEER needs to promulgate rules and regulations regarding how such mitigation measures are to be presented for consideration prior to an application being granted, assuming *arguendo* that he has the authority to grant applications that conflict with existing rights.

Since there is no guidance in Nevada law regarding the definition, purpose or scope of mitigation within the strictures of NRS 533.370(2), the laws of other jurisdictions illustrate that mitigation measures have been expressly authorized by statutes and administered in accordance with specific rules and regulations.

For example, Colorado has adopted a process by which it authorizes a plan for augmentation to be filed by water appropriators. See Colo. Rev. Stat. Ann. §37-92-302 (West 2012). In Colorado, a “plan for augmentation” is:

[A] detailed program . . . to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies

of water, by the development of new sources of water, or  
by any other appropriate means . . . .

Colo. Rev. Stat. Ann. §37-92-103(a) (West 2012). The intent of the Colorado Legislature in authorizing plans for augmentation was to allow new users of water to come into being so long as the vested rights of others are protected. See Upper Eagle Regional Water Authority v. Wolfe, 230 F.3d 1203, 1010-11 (2010) (“An augmentation decree holder must replace water to the stream in the amount, time, and location necessary to provide vested water rights and decreed conditional water rights the water that would have been available absent the out-of-priority diversion and resulting depletion.”) See also 2 Colo. Code Regs. §410-1:5-5.6 (2012) (setting forth specific regulations for replacement plans for new appropriations of groundwater in an overappropriated area to protect existing water rights).

As another example, Oregon’s regulatory scheme defines mitigation as “taking action or measures that avoid, minimize, rectify, reduce or compensate for impact.” Or. Admin. R. 690-051-0010(19) (2012). Moreover, Oregon’s statutory provisions associated with mitigation provide that water officials “shall consider mitigation measures and may include mitigation measures as conditions in any water right permit or certificate to ensure the maintenance of the free-flowing character of the scenic waterway in quantities necessary for recreation,



fish and wildlife.” Or. Rev. Stat. §390.835(10) (2012). See Waterwatch of Oregon, Inc. v. Water Resources Commission, 112 P.3d 443, 453 (Or. Ct. App. 2005) (noting that Oregon’s water laws require the “maintenance” of stream flows and an attempt at “moderation” of impacts does not satisfy the statutory requirement). Oregon also has an entire system established for the award and use of mitigation credits. See Or. Rev. Stat. §537.746 (2012).

Finally, Montana allows for mitigation of adverse effects occurring as the result of a new water appropriation. See Mont. Code Ann. §85-2-362 (2011). However, in allowing for mitigation, the Montana statute plainly dictates what must be provided for in a mitigation plan as follows:

- (a) where and how the water in the plan will be put to beneficial use;
- (b) when and where, generally, water reallocated through exchange or substitution will be required;
- (c) the amount of water reallocated through exchange or substitution that is required;
- (d) how the proposed project or beneficial use for which the mitigation plan is required will be operated;
- (e) evidence that an application for a change in appropriation right, if necessary, has been submitted;
- (f) evidence of water availability;

(g) evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator; and

(h) evidence that the appropriate water quality permits have been granted pursuant to Title 75, chapter 5, as required by 75-5-410 and 85-2-364.

Mont. Code Ann. 85-2-362 (2011). Thus, Montana water law requires that a mitigation plan must be prepared before an application may be granted.<sup>15</sup>

In Ruling 6127, the STATE ENGINEER continually relies on a future mitigation plan that he intends KVR to draft and submit after issuance of the permits. JA Vol. 26 at 5005-5006, 5022-5023, 5026. For example, the STATE ENGINEER states:

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.

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<sup>15</sup> Similarly, federal courts have also addressed the impropriety of administrative agencies relying on future mitigation measures. See South Fork Band Council of Western Shoshone of Nevada v. United States Department of Interior, 588 F.3d 718, 727 (9<sup>th</sup> Cir. 2009) (noting that “[a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective . . . . A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.”) (emphasis in original).

JA Vol. 26 at 5005. Further, the STATE ENGINEER ignores his violation of NRS 533.370(2) in granting KVR's Applications that conflict with existing rights by finding "that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur."<sup>16</sup> JA Vol. 26 at 5006. The STATE ENGINEER contends that he has the authority to grant applications that conflict with existing rights subject to future mitigation in Ruling 6127:

[T]he 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.

JA Vol. 26 at 5022. Finally, Ruling 6127 concludes:

The evidence and testimony show that select springs on the floor of Kobeh Valley and one domestic well near Roberts Creek may be impacted by the proposed pumping in Kobeh 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

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<sup>16</sup> This conclusion, repeatedly stated by the STATE ENGINEER in his Ruling [JA Vol. 26 at 5006, 5011, 5023], does not cite to any portion of the record to support the conclusion nor did the STATE ENGINEER provide any discussion, rationale or evaluation of mitigation measures to support his conclusion.

fully mitigated by the Applicant should impacts to existing rights or the domestic well occur. . . .

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 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.

JA Vol. 26 at 5023.

The STATE ENGINEER's reliance on a future, undefined mitigation plan in granting KVR's Applications is in direct violation of NRS 533.370(2). The STATE ENGINEER granted KVR's Applications based on the broad conclusion that the future action of drafting a mitigation plan will bring the Applications into compliance with NRS 533.370(2)'s prohibition at some point in the future, after the permits have already been issued. The STATE ENGINEER acknowledges that existing water rights will be impacted, but he alleges that such impacts can be adequately and fully mitigated. Further, no evidence of a mitigation plan proposed by KVR was presented to the STATE ENGINEER, and neither EUREKA COUNTY, nor any of the other protestants, were able to assess the validity of any alleged mitigation steps or the mitigation plan. Moreover, having never reviewed any proposed mitigation, the STATE ENGINEER was unable to determine before

approving KVR's Applications if future mitigation would be sufficient to avoid the conflicts with existing water rights holders and bring the Applications into compliance with NRS 533.370(2). There is no evidence cited in Ruling 6127 to support the STATE ENGINEER's findings that any impacts can be mitigated or that mitigation would be effective.

Additionally, Nevada does not have the basic statutory and regulatory requirements found in other jurisdictions to allow for mitigation. This lack of authority, especially in light of the explicit and detailed authority provided by states authorizing mitigation, must be viewed as a denial of the authority to consider mitigation. Furthermore, even if relying on mitigation were appropriate, the STATE ENGINEER has not adequately defined the purpose and the scope of the alleged mitigation to ensure the appropriate protections to existing water rights holders as would have been required in states in which mitigation is permitted.

Accordingly, the STATE ENGINEER's interpretation of his authority pursuant to NRS 533.370(2), to include the power to grant statutorily non-compliant applications based on future undefined actions, is in direct violation of Nevada water law.

**F. The STATE ENGINEER Did Not Apply the Correct Standard When He Granted KVR's Applications and Erroneously Concluded that an Interbasin Transfer of 11,300 afa of Water From Kobeh Valley to Diamond Valley Was Environmentally Sound.**

An interbasin transfer of groundwater is a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use. See NRS 533.007. In this appeal, most of the water to be appropriated by KVR (11,300 afa pursuant to the Applications as approved by the STATE ENGINEER) will be diverted in Kobeh Valley and put to beneficial use in Diamond Valley, constituting an interbasin transfer of water. JA Vol. 26 at 5007.

NRS 533.370(3)(c) requires the STATE ENGINEER to consider whether an interbasin transfer of water is “environmentally sound as it relates to the basin from which the water is exported.” In Ruling 6127, the STATE ENGINEER interprets this statutory requirement to mean that he must determine “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.” JA Vol. 26 at 5010.

EUREKA COUNTY agrees with the foregoing standard and presented evidence at the hearings before the STATE ENGINEER to show that the proposed interbasin transfer was not environmentally sound.

Although Ruling 6127 espouses the correct standard for an interbasin transfer of water, the STATE ENGINEER did not apply this standard to his analysis. Rather, the STATE ENGINEER merely considered the impacts on the existing water rights in Kobeh Valley, the impacts on the springs and streams in the area, and then stated the proposed mining project and existing rights will use less water than the perennial yield of the basin. JA Vol. 26 at 5011. All of these conditions are applicable under an analysis of NRS 533.370(2), not NRS 533.370(3).

The interbasin transfer analysis employed by the STATE ENGINEER in Ruling 6127 is nearly identical to the analysis conducted under NRS 533.370(2), that is, whether KVR's Applications conflict with existing rights and whether there is water available to appropriate. It is a well-accepted maxim of statutory interpretation that statutes must be interpreted "to give meaning to each of their parts, such that, when read in context, none of the statutory language is rendered mere surplusage." Stockmeier v. Psychological Review Panel, 122 Nev. 534, 540, 135 P.3d 807, 810 (2006). Nowhere in Ruling 6127 does the STATE ENGINEER, applying his own standard, identify or discuss the "hydrologic-related natural resources" of Kobeh Valley and whether these "hydrologic-related natural resources" will be unreasonably impacted by KVR's proposed pumping. Ruling

6127 merely mentions “wildlife” in ordering future undefined mitigation to address impacts. See JA Vol. 26 at 5011. The STATE ENGINEER’s failure to use the standard he articulated is contrary to law because it failed to give meaning to portions of the interbasin transfer statutory language and merely applies the same standard as NRS 533.370(2) in determining whether to approve or reject an application for an interbasin transfer of water, rendering the language of NRS 533.370(3)(c) mere surplusage. See Andersen Family Associates v. Ricci, 124 Nev. at 187-88, 179 P.3d at 1204 (“[n]o statutory language should be rendered mere surplusage if such a consequence can properly be avoided”).

The STATE ENGINEER determined that any impacts to the basin from which the water is appropriated can be mitigated by a future, undefined plan to allow access for wildlife that customarily use the water resource and to ensure that existing rights are satisfied. JA Vol. 26 at 5011. NRS 533.370(3)(c) does not allow the STATE ENGINEER to approve an application simply because he orders mitigation to address any impacts.

The flaw in the STATE ENGINEER’s analysis regarding whether an interbasin transfer is environmentally sound is even more apparent in light of the extensive evidence presented and ignored by the STATE ENGINEER regarding



the unreasonable impacts to the hydrologic-related natural resources in Kobeh Valley caused by the interbasin transfer.

Rex Massey, a witness for EUREKA COUNTY with 24 years of experience in socioeconomic and demographic analysis, as well as environmental compliance, provided substantial testimony with regard to the various recreational and wildlife hydrologic-related natural resources in Kobeh Valley in the Mount Hope/Roberts Mountain area. JA Vol. 5 at 867-874. “The area supports important outdoor recreation resources and activities which provide social and economic benefits. The most popular recreational activities are directly or indirectly related to water resources.” JA Vol. 5 at 871. The Mount Hope/Roberts Mountain recreation area is regularly used for camping, fishing, hiking, biking, hunting and wildlife viewing. JA Vol. 5 at 873. Thus, “for all the reasons listed above, the proximity, the valued activities, the high participation rates, the needed and desired types of facilities and areas and the limited availability of those types of resources, the Roberts Mountains area provides important recreation and contributes to the quality of life and the well-being of Eureka County residents.” JA Vol. 5 at 874.

At the 2008 hearings before the STATE ENGINEER, KVR’s expert admitted that there are many springs throughout the area. JA Vol. 36 at 6961. See also JA Vol. 3 at 541-542 for testimony from the 2010 hearing. As one of KVR’s

exhibits predicted, drawdown in the Roberts Mountains area “could result in reduction of spring or surface water flows or lowering of shallow groundwater tables that support wet meadow complexes and associated wildlife habitat in these areas.” JA Vol. 7 at 1242. These springs and shallow groundwater tables in Kobeh Valley support the hydrologic-related natural resources in Kobeh Valley.

The Nevada Department of Wildlife and United States Fish and Wildlife Services have designated both Henderson and Vinini Creek as potential Lahontan Cutthroat Trout recovery streams, something that requires a sufficient and reliable quantity and quality of water. JA Vol. 5 at 912-913. Further, Gary Garaventa, a local rancher and an individual who has worked for the United States Department of Agriculture Wildlife Services for 36 years, testified that if the Lone Mountain Spring<sup>17</sup> or the Mud Spring were impacted there would be definite impacts on wild horses and local wildlife, including the sage hen (sage grouse), since that was the only source of water in the areas where those wildlife are located. JA Vol. 4 at 670, 672-677.

At the hearings, the STATE ENGINEER’s Chief Hydrologist acknowledged in his questioning of Mr. Smith that in this area of Eureka County,

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<sup>17</sup> The existing water rights to Lone Mountain Spring are held by the BLM. The BLM entered into an agreement with KVR and withdrew its protest to KVR’s Applications in 2008. JA Vol. 26 at 6832.

with less than five feet of water level declines, many springs have dried up. JA Vol. 3 at 578, 582 (discussing water level declines in the south playa of Diamond Valley not simulated in KVR's model).

KVR presented no evidence regarding whether the proposed interbasin transfer was environmentally sound other than testimony that it was complying with all environmental permitting requirements. ROA Vol. 1 at 295, 300-301. This is not the standard under the interbasin transfer statute, nor does it satisfy the standard espoused by the STATE ENGINEER in Ruling 6127. See NRS 533.370(3)(c). KVR simply did not address this issue or present any evidence on this standard of the interbasin transfer statute before the STATE ENGINEER.

There was no evidence in contradiction of the admitted unreasonable impacts to the water resources and hydrologic-related natural resources in Kobeh Valley which will result if the interbasin transfer occurs. Further, there was no evidence submitted to support the STATE ENGINEER's findings that environmental impacts can be mitigated based on a future, undefined monitoring, management and mitigation plan, nor does Ruling 6127 cite to any such evidence to support the STATE ENGINEER's findings. Thus, the STATE ENGINEER's

determination that the interbasin transfer is environmentally sound is in contravention of NRS 533.370(3)(c).

## **IX.**

### **CONCLUSION**

Based on the foregoing, it is clear that the STATE ENGINEER had a statutory obligation to reject KVR's Applications and refuse to issue the requested permits pursuant to NRS 533.370(2). Further, the District Court erred when it concluded that the STATE ENGINEER could grant KVR's Applications to appropriate 11,300 afa of water, to the detriment of existing water rights, on the basis of an undefined, future mitigation plan that was not part of the record. The STATE ENGINEER has no authority to rely on a future, undefined mitigation plan to protect existing water rights holders. Moreover, in contravention of NRS 533.370(3)(c), the STATE ENGINEER applied the wrong standard when he granted KVR's Applications and concluded that an interbasin transfer of 11,300 afa of groundwater from Kobeh Valley to Diamond Valley was environmentally sound. Therefore, any permits issued by the STATE ENGINEER to KVR must be vacated.

DATED this 26<sup>th</sup> day of December, 2012.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26<sup>th</sup> day of December, 2012.

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## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

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