

IN THE SUPREME COURT OF
THE STATE OF NEVADA

Electronically Filed
Dec 27 2012 09:47 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

EUREKA COUNTY,
Appellant,

KENNETH F. BENSON,
Appellant,

DIAMOND CATTLE COMPANY, LLC,
Appellant,

MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP,
Appellant,

v.

STATE OF NEVADA, STATE ENGINEER, DIVISION OF WATER
RESOURCES,
Appellee,

KOBEH VALLEY RANCH, LLC,
Intervenor-Appellee.

ON APPEAL FROM ORDER DENYING PETITIONS FOR JUDICIAL REVIEW
BY THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF EUREKA

**APPELLANTS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL
AND MARGARET ANN ETCHEVERRY FAMILY LP'S
SUPPLEMENT TO JOINT APPENDIX**

Laura A. Schroeder
Therese A. Ure
SCHROEDER LAW OFFICES, P.C.
440 Marsh Avenue
Reno, NV 89509
(775) 786-8800 Phone
counsel@water-law.com

**CHRONOLOGICAL & ALPHABETICAL INDEX
SUPPLEMENT TO JOINT APPENDIX**

Document	Filing Date	Volume	ASJA Page
Findings of Fact, Conclusions of Law, and Order Granting Petition for Judicial Review, Vacating Ruling #5966, and Remanding Matter for New Hearing	4/21/2010	I	1-16



CERTIFICATE OF APPENDIX (NRAP 30(g)(1))

In compliance with NRAP 30(g)(1), I hereby certify that this Appendix consists of true and correct copies of the papers in the District Court file.

DATED this 26th day of December, 2012.

/s/ Therese A. Ure
Therese A. Ure, NSB # 10255
Schroeder Law Offices, P.C.
440 Marsh Avenue
Reno, NV 89509
Phone: (775) 786-8800
Email: counsel@water-law.com
Of Attorneys for Appellants



NO.

FILED

APR 21 2010

Eureka County Clerk
By *Shanna McAnulty* Deputy

Case No. CV-0904-122
CV-0904-123
CV-0908-127

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

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

Petitioner,

v.

STATE ENGINEER, STATE OF NEVADA,
Nevada Division of Water Resources,

Respondent,

-and-

KOBEH VALLEY RANCH LLC, a Nevada
limited liability company,

Intervenor.

TIM HALPIN; EUREKA PRODUCERS'
COOPERATIVE, a Nevada non-profit;
CEDAR RANCHES, LLC, a Nevada limited
liability company,

Petitioners,

v.

STATE ENGINEER, STATE OF NEVADA,
Nevada Division of Water Resources,

Respondent,

-and-

KOBEH VALLEY RANCH LLC, a Nevada
limited liability company,

Intervenor.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER GRANTING PETITION
FOR JUDICIAL REVIEW, VACATING
RULING #5966, AND REMANDING
MATTER FOR NEW HEARING**

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



RECEIVED
APR 21 2010
Eureka County
Clerk & Treasurer

ASJA000001



1 **EUREKA COUNTY**, a political subdivision of
2 the State of the State of Nevada,

3 Petitioner,

4 v.

5 **STATE ENGINEER, STATE OF NEVADA**
6 **and KOBEH VALLEY RANCH LLC,**

7 Respondents.

8 **THIS MATTER** is presently pending before this Court on the Petition For
9 Judicial Review filed by Eureka County on April 21, 2009, in Case No. CV 0904-122, the
10 Petition For Judicial Review filed by Petitioners, Tim Halpin, Eureka Producers Cooperative
11 and Cedar Ranches, LLC (hereafter referred to as "Diamond Valley Petitioners"), on April
12 24, 2009 in Case No. CV 0904-123, and the Petition For Judicial Review filed by Petitioner,
13 Eureka County, on August 19, 2009 in Case No. CV 0908-127. On June 5, 2009, the Court
14 entered its Order Directing the Consolidation of Case No. CV 0904-123 with Case No. CV
15 0904-122, and on September 18, 2009, the Court entered its Order Directing the
16 Consolidation of Case No. CV 0908-127 with Case No. CV 0904-122 and Case No. 0904-
17 123. The cases have been fully briefed and oral argument was heard on January 7, 2010.
18 Petitioner Eureka County is represented by and through its counsel Karen Peterson, Esq.
19 and Eureka County District Attorney Ted Beutel, Diamond Valley Petitioners are
20 represented by Jarrad Miller, Esq., Respondent, Nevada State Engineer, State of Nevada
21 Department of Conservation and Natural Resources (hereinafter referred to as "State
22 Engineer") is represented by Deputy Attorney General Bryan Stockton, and Respondent in
23 Intervention, Kobe Valley Ranch, LLC (hereinafter referred to as "KVR") is represented by
24
25
26



1 Ross E. de Lipkau, Esq. and John Zimmerman, Esq.

2 The Court having reviewed the Record on Appeal ("ROA"), and having
3 considered the argument of the parties, the applicable law and facts, and all pleadings and
4 papers on file in this matter, hereby makes the following Findings of Facts, Conclusions of
5 Law and Judgment.

6 **FINDINGS OF FACT**

7
8 During the period between January, 2004 and April, 2008, KVR filed a number
9 of applications with the Nevada State Engineer seeking to appropriate new groundwater
10 and/or to change the point of diversion, place of use and/or manner of use of existing water
11 rights. The source of supply for the new ground water being sought is the Kobeh Valley
12 Groundwater Basin located in Eureka County and Lander County, Nevada, and the
13 Diamond Valley and Pine Valley Hydrographic Basins located in Eureka County, Nevada.
14 The applications were filed in an effort to provide underground water to support a proposed
15 molybdenum mine project to be located in Eureka County known as the Mount Hope Mine
16 Project. The Applicant, KVR, is a subsidiary of General Moly, Inc. ("GMI"). GMI, acquired
17 a leasehold interest in the Mount Hope Mine in 2005 and has since commenced the
18 permitting process for the mine. Eureka County protested all applications to appropriate
19 and all applications to change except Application to Appropriate 74587. The Diamond
20 Valley Petitioners protested all of the applications except Application to Appropriate 74587.
21

22
23 On March 17, 2008, the State Engineer held a prehearing conference with all
24 interested parties and on May 7, 2008 issued a Pre-Hearing Order. An Administrative
25 Hearing on the applications was held before the State Engineer commencing on October
26 13, 2008 and continuing through October 18, 2008. The State Engineer issued Ruling No.



1 5966 (the "Ruling") on March 26, 2009, granting therein a majority of the applications
2 subject to certain terms and conditions.

3 In his Ruling, the State Engineer found that KVR had provided sufficient proof
4 of need to import water to the Mount Hope Mine Project from Kobeh Valley for a total
5 combined duty of 11,300 afa. The State Engineer also found and allowed KVR to pump
6 354 afa from Diamond Valley to the Project, provided that any water pumped from Diamond
7 Valley would be limited to existing rights. The State Engineer also found that KVR had not
8 justified a need to import water from Pine Valley to the Project as proposed under
9 Applications 76364 and 76365 and denied those applications. As a condition of the
10 issuance of the permits allowed in the Ruling, the State Engineer ordered that prior to
11 pumping any water allowed in the Ruling, KVR was required to prepare and submit to the
12 State Engineer for approval, a hydrologic monitoring, management and mitigation plan. The
13 State Engineer also found that KVR had provided substantial evidence on all other statutory
14 requirements justifying granting the application.
15

16
17 In their respective Petitions and supporting briefs and materials, Eureka
18 County and Diamond Valley Petitioners recite a number of assignments of error that they
19 argue require this Court to vacate the Ruling and remand the matter back to the State
20 Engineer for a new hearing. Chief among the assignments of error listed by Eureka County
21 is that Eureka County's due process rights were violated by the State Engineer's admission
22 and consideration of evidence not previously provided to Eureka County.¹ Eureka County
23 and Diamond Valley Petitioners also argue that in a number of areas, the Ruling is not
24

25
26 ¹See Eureka County's Opening Brief.



1 supported by substantial evidence and is therefore arbitrary and capricious.² Respondent
2 State Engineer and Respondent in Intervention KVR counter that the State Engineer did not
3 violate Petitioners due process rights by improperly considering evidence not previously
4 disclosed to Petitioners, and further, that the findings of the State Engineer are supported
5 by substantial evidence. The Court will review the issues presented accordingly.

6 ISSUES PRESENTED

7 **A. Whether Petitioners' Due Process Rights Were Violated By The State** 8 **Engineer's Admission and Consideration Of Evidence Not Previously** 9 **Disclosed To Petitioners.**

10 Pursuant to Nevada law,³ the State Engineer issued a pre-hearing order on
11 May 7, 2008 directing the parties to complete an initial exchange of witness lists and
12 exhibits no later than June 16, 2008. The order further directed the parties to exchange like
13 information the parties intended to use in their rebuttal cases. The second information
14 exchange deadline was August 15, 2008. The ROA indicates that the parties complied with
15 the discovery order and exchanged information in preparation of the evidentiary hearing.
16 As part of the information exchange, KVR provided Petitioners a copy of the Regional
17 Groundwater Model that KVR intended to introduce at the hearing in support of its
18 applications.
19

20 During the October, 2008 administrative (evidentiary) hearing before the State
21 Engineer, Petitioners and the State Engineer learned from KVR for the first time that on
22 October 3, 2008, KVR had submitted to the Bureau of Land Management ("BLM") as part
23 of the National Environmental Policy Act ("NEPA") process, a new or updated version of its
24

25 ²Id.

26 ³See NRS 533.365; NAC 533.280.



1 Regional Groundwater Model. As part of its evidentiary presentation, KVR sought to
2 introduce its original Regional Groundwater Model, Exhibit 116, and have its experts testify
3 as well to the differences between Exhibit 116 and the new or updated version of the Model
4 submitted to the BLM. As KVR had not produced copies of the BLM version of the Model
5 to Petitioners prior to or during the hearing, Petitioners expressed their concern that they
6 would be unable to adequately cross-examine KVR's witnesses on the BLM version or have
7 time to have Petitioners' experts review the new version to determine reliability.
8 Notwithstanding Petitioners' concern about not having had access to and time to review the
9 BLM version prior to the hearing, the parties appeared to have reached an agreement on
10 how the matter would be handled in the remainder of the hearing.⁴

11
12 ⁴See Hr'g Tr., Vol. II, pp. 213-218 where the following exchange occurred:

13 HEARING OFFICER WILSON: Let's be on the record. We left off with the last witness, Steve
14 Walker, with Eureka County. I was told we might have some preliminary matters to take care
15 of before we continue on?

16 MS. PETERSON: Mr. De Lipkau, did you want me to address that or did you want to - -

17 MR. De LIPKAU: I'd like you to go first and then we'll respond.

18 MS. PETERSON: To our agreement that we came to last night? That's what I'm going to
19 address.

20 MR. De LIPKAU: Right. Please do.

21 MS. PETERSON: Thank you. The parties, well, mainly Eureka county and the applicant had
22 some discussions last night after the hearing and there is a model that the applicant had
23 submitted to the BLM on October 3rd.

24 The protestants have not had an opportunity to review that model. I believe the applicant
25 would like to have that information, that model submitted to the State Engineer's Office for
26 consideration in this proceeding.

So, We talked about a procedure that would allow the hearing to go forward because
everybody is here and we can give you all the information that we have, but also that the
technical experts would be able to get together after the hearing when that model is publicly
available and they could discuss it and try to come to some consensus on the model.

I believe it's our understanding that that discussion could include also the State Engineer's
technical expert and I think possibly the BLM's technical expert.

Then if they can come to some consensus, that would be presented to the State Engineer and
if there was not complete consensus, then all the parties would be given and opportunity to
present written information to the State Engineer to consider as to what changes they think
need to be made to the model and why.

Then the State Engineer obviously would be able to convene any other meeting or anything
else he might need to make his decision. But the ultimate goal would be to try to have a
decision out as originally planned like mid February.

I don't know, is that clear or do you need further information?

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



1 MR. FELLING: Well, when were you going to present this model; today?

2 MS. PETERSON: No. The October 3rd model?

3 MR. FELLING: Yes.

4 MS. PETERSON: It's not publically available. The BLM has it, it's part of the EIS Process.

5 MR. FELLING: Okay. So when would it be available to, for instance, our office?

6 MR. DeLIPKAU: I can't answer that question. It depends on when the BLM would release it. It could be as short as two weeks, it could be a matter of months.

7 What I'm saying if I can have a moment is that we want the hearing to proceed on the evidence submitted to the State Engineer.

8 The new model, as it's been called, has additional information as required by the BLM under its EIS authority. It does not involve this office.

9 The conclusion of the model, as submitted to the BLM, is virtually identical to the model before the State Engineer. As Ms. Peterson stated, when this report does in fact come out, again it's virtually identical in effect, we'll be happy to sit down via our computer people and go through it.

10 We will invite the State Engineer to be there also, as well as perhaps the BLM. What we're checking is that the State Engineer proceed with the hearing based upon the evidence previously submitted by the parties.

11 MR. FELLING: When you present testimony on the model, will your witness be able to answer questions pertaining to what is the difference between the models?

12 MR. DeLIPKAU: Yes.

13 MR. FELLING: Okay.

14 MR. DeLIPKAU: And again, the answer is virtually indistinguishable.

15 MR. FELLING: I'd rather hear it from the person presenting the model. If they were the same, they wouldn't both be necessary.

16 MR. DeLIPKAU: Well, that's our point.

17 MS. PETERSON: I just think that we need to be very careful about that because we obviously haven't had a chance to review that and concur with that information. We haven't seen it. It's my understanding that some of the changes that we proposed in our testimony have been made to that version of the model.

18 MR. DeLIPKAU: One more comment. We certainly don't want the ruling, this ruling held up by any delay in the BLM in releasing the amended computer report.

19 HEARING OFFICER WILSON: Mr. Benesch, go ahead.

20 MR. BENESCH: I guess I'm not understanding. They don't want anything held up, they can't tell you when you're going to get it, they can't tell you how long it's going to take to review it, they can sort of tell you there's some changes in it, but they're turning this into a moving target.

21 Let's just all go home and come back when they've done their work and reconvene and continue on with the hearing. That seems to make as much sense as anything.

22 MR. FELLING: Can we talk a few moments?

23 MR. BENESCH: This is highly unusual, to say the least.

24 HEARING OFFICER WILSON: Mr. Miller, anything to add?

25 MR. MILLER: No.

26 HEARING OFFICER WILSON: Thank you. We're going to talk about this for a few minutes. We'll be off the record and you're welcome to take a break for probably at least ten minutes.

(A short recess was taken.)

HEARING OFFICER WILSON: Let's be back on the record.

MR. KING: We're going to go ahead and go through with the hearing as planned.

Having this new model does present a little bit of a dilemma, but again, we'll go through with the hearing, maybe through questioning, cross-examination and then we can get a better feel for what the differences might be between the two models.

By the end of the hearing we'll decide whether or not we're going to need to keep the hearing open for some amount of time. We'll make that decision through the course of this hearing.



1
2 Consistent with the agreement between counsel that testimony regarding the
3 differences between the original Regional Groundwater Model and the October 3, 2008
4 BLM version would be allowed during the hearing, KVR's witness Dwight Smith offered
5 testimony regarding the differences between the original Model, Exhibit 116, and the BLM
6 version.⁵ At the conclusion of Dwight Smith's testimony, counsel for Eureka County again
7 reiterated her position as to the testimony regarding Exhibit 116 and the BLM version of the
8 Model.⁶ After a great deal of further discussion on this issue by counsel for Petitioners,
9 counsel for KVR, and the Hearing Officer, the Hearing Officer overruled Petitioners' motion
10 to strike the testimony regarding the BLM version of the Model, stating that the testimony
11 and slides regarding the BLM version would remain a part of the record but would not be
12 considered by the State Engineer in the final ruling on the applications.⁷ The Hearing
13 Officer clearly stated that only Exhibit 116 would be considered.⁸
14

15
16 Notwithstanding the State Engineer's decision that the testimony and slides
17 concerning the BLM version of the Model would remain a part of the record but not be
18 considered in the determination of KVR's applications, the BLM version of the Model was
19 noted several times in the Ruling. In the Ruling, the State Engineer stated: "[t]he method
20
21

22
23 ⁵ Hr'g Tr. Vol. V, pp. 931-962.

24 ⁶ Hr'g Tr., Vol. V, p. 953.

25 ⁷ Id. at p. 962.

26 ⁸ Id.



1 the Applicant used to simulate the net effect of mine pumpage was modified for the BLM
2 and not presented at the hearing as discussed above, but the results of the revised
3 simulation would not significantly change the estimated drawdown due to mine pumping.”⁹

4 The State Engineer again referenced the BLM version of the Model in the Ruling stating:

5 a better method of simulating the net effect of the mine-related
6 pumping on the hydrologic system would have been to simulate
7 the region with and without the mine pumping, and then to
8 compare the results to compute the actual effect of the mine
9 pumping. This was completed for the BLM in the EIS process,
10 but was not completed in time for the hearing. The results
11 relating to inflow to Diamond Valley from Kobeh Valley from this
12 BLM simulation were addressed in the testimony of Smith. He
13 testifies that these will be a net reduction in subsurface flow
14 from Kobeh Bally to Diamond Valley at 62 to 130 afa after 44
15 years of mine pumping.

16 See ROA Vol. V, p.33.

17 Eureka County argues that the State Engineer also referenced the BLM
18 version of the Model in the “Impacts to Existing Rights – Eureka County” section of the
19 Ruling found at ROA Vol. V, pp. 34-35 by referencing model adjustments and meaning
20 without specifically saying adjustments made in the BLM version of the Model. The Court
21 believes Eureka County’s contention is correct.

22 In reviewing the law applicable to these facts, the Court notes that the Nevada
23 Supreme Court has specifically stated that the State Engineer must comply with the basic
24 notions of fair play and due process in issuing any Ruling.¹⁰ Indeed, the Nevada Supreme
25 Court stated in *Revert*:

26 The applicable standard of review of the decisions of the State

⁹ROA, Vol. V, p.34.

¹⁰*Revert vs. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979).



Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had a "full opportunity to be heard," see NRS 533.450(2); the State Engineer must clearly resolve all the crucial issues presented, see *Nolan v. State Dep't of Commerce*, 86 Nev. 428, 470 P.2d 124 (1970)(on rehearing); the decision maker must prepare findings in sufficient detail to permit judicial review, *id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419 (Or. 1969); see also NRS 233B.125. When these procedures grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will not hesitate to intervene. *State es rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

95 Nev. 782, 787 (1979).

The Nevada Supreme Court has recognized that due process and fair play include meaningful cross-examination.¹¹ Fairness and due process in administrative hearings also accepts the notion that "the procedural rights of parties before an administrative body cannot be made to suffer for reasons of convenience or expediency."¹²

The United States Supreme Court has held that "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."¹³ "The action of ... an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing."¹⁴ As has been recognized by other states, a full and fair opportunity to be heard, which is essential to due process,

¹¹*Bivens Const. Vs. State Contractors Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991). (The Court recognizes that the State Engineer is exempt from the Nevada Administrative Procedures Act).

¹²*Checker Inc. Vs. Public Service Commission*, 84 Nev. 623, 634, 446 P.2d 981, 988 (1968).

¹³*Bowman Transp. Inc.v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, fn.4 (1974).

¹⁴*English v. City of Long Beach*, 217 P.2d 22, 24 (Cal. 1950).



1 requires that all evidence utilized to support a decision be disclosed to the parties so that
2 they may have an opportunity to cross-examine the witnesses with regard to such
3 evidence.¹⁵ "A decision based on evidence not in the record is a procedure not to be
4 condoned."¹⁶

5 Respondent KVR argues that no due process violation occurred in this matter
6 for several reasons: (1) that because Eureka County is a participating party in the NEPA
7 process, it should have had knowledge of and information regarding the update to the
8 Regional Groundwater Model at the time of the evidentiary hearing; (2) that if any due
9 process error has occurred in this matter, Eureka County invited such error because it
10 requested the testimony and slide presentation of the BLM version of the Model to be given
11 at the hearing; (3) that no due process violation has occurred because Eureka County, as
12 a participant in the NEPA process, has post-hearing access to all updates of the Model
13 submitted to the BLM; and (4) that even if all testimony and evidence regarding the
14 Regional Groundwater Model and its updated version were withdrawn from the evidence,
15 substantial evidence remains in the record to support the State Engineer's findings.
16

17 Regarding KVR's allegation that no due process violation has occurred
18 because Eureka County was a participant in the NEPA process and therefore had access
19 to the October, 2008 Model update, the Court finds that such situation, if accurately stated,
20 did not relieve KVR of its duty to disclose such evidence to Eureka County and Diamond
21 Valley Petitioners prior to the hearing. Although the deadline for exchanging discovery
22
23

24
25 ¹⁵*Cook County Federal Sav. & Loan A'ssn v. Griffin*, 391 N.E.2d 473, 477 Ill. App. 1979); *In re Amalgamated*
26 *Food Handlers, Local 653-A*, 70 N.W.2d 267, 272 (Minn. 1955); *English*, 217 P.2d at 24 (Cal. 1950).

¹⁶*Cook County Federal Sav. & Loan A'ssn*, 391 N.E.2d at 477 (Ill. App. 1979).



1 information had passed, the Court believes that both sides had a continuing obligation to
2 disclose discovery information. Simple fairness would dictate such a procedure. Even if
3 Eureka County could have availed itself of the updated Model information prior to the
4 hearing, it was not on notice that such evidence would be presented at the hearing. The
5 Court therefore rejects KVR's argument to the contrary.

6 The second point KVR raises is that Eureka County cannot now complain of
7 a due process error when it invited error itself by requesting that KVR be required to explain
8 the differences during the hearing between the original Region Groundwater Model (Exhibit
9 116) and the October, 2008 updated BLM version of the Model.¹⁷ KVR suggests that the
10 State Engineer was complicit in the admission of such evidence and that KVR did all that
11 it could to ensure that the BLM version of the Model would not be considered as evidence.
12 KVR argues that at no time did it attempt to rely on the BLM version as evidence supporting
13 its case.¹⁸ KVR contends the only purpose of having its witness discuss the BLM version
14 was to describe the differences between the original and updated version of the Model so
15 that the State Engineer could determine whether to continue the hearing to allow Petitioners
16 additional time to review the updated Model.¹⁹

17 In Nevada, the doctrine of invited error applies to both civil and criminal cases
18 and basically states the principle that a party will not be allowed to complain on appeal of
19 errors which that party itself induced or provoked the hearing officer or opposing party to
20
21
22

23
24 ¹⁷See Intervenor's Answering Brief, pp. 18-19.

25 ¹⁸*Id.* at p. 19.

26 ¹⁹*Id.*



1 commit.²⁰ The ROA in this case reflects that early on during the evidentiary hearing,
2 Petitioners learned from KVR that it had submitted an updated version of its Regional
3 Groundwater Model to the BLM as part of the NEPA process in early October, 2008.
4 Although not entirely clear, the ROA indicates that Petitioners and KVR had discussions off
5 the record on how such evidence would be treated if presented by KVR given the fact that
6 the updated version had not been disclosed to Petitioners and Petitioners were unprepared
7 to meet such evidence. As previously discussed, the parties appeared to have reached an
8 agreement on how such evidence would conditionally be presented to the hearing officer.²¹
9 After KVR's witness testified to the differences between the two versions of the Model and
10 presented his power point program, Eureka County moved to strike the evidence regarding
11 the BLM version of the Model. Upon inquiry by the hearing officer, KVR requested the
12 hearing officer only to consider Exhibit 116 in support of its applications and not information
13 presented on the BLM version of the Model. The hearing officer stated that the disputed
14 evidence would remain on the record but would not be considered in the final decision on
15 the applications. Unfortunately and contrary to the hearing officer's assertion, reference to
16 the disputed BLM version of the Model appeared at least three times in the Ruling.
17
18

19 From these facts the Court cannot find that Petitioners invited error by insisting
20 or requesting the BLM version of the Model be presented in the hearing. In fact, the record
21 indicates that Petitioners were placed in a tough spot when they learned of the BLM version
22 early on in the hearing and in an effort to accommodate completing the hearing as
23

24
25 ²⁰*Clark Co. School District vs. Richardson Construction Inc.*, 123 Nev. 382, 388, 168 P.3d 87 (2007); *Pearson*
26 *vs. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994).

²¹See Footnote 4, *supra*.



1 scheduled, reached an agreement with KVR on how the evidence would conditionally be
2 presented by KVR. By so doing, Petitioners committed no wrong. Accordingly, the Court
3 finds that Petitioners did not invite error in the proceedings.

4 KVR next argues that Eureka County's claim that it had not reviewed the BLM
5 version of the Model prior to the hearing is baseless because as a participant in the NEPA
6 process, Eureka County continues to have access to the contents and conclusions
7 contained in the BLM version. While KVR's assertion may be true, the fact remains that
8 Eureka County and Diamond Valley Petitioners had not been placed on notice prior to the
9 hearing through discovery exchanges or otherwise that evidence concerning the BLM
10 version would be offered at the hearing by KVR. Because Petitioners were not prepared
11 to meet such evidence, they were denied a full and fair opportunity to examine and/or
12 challenge such evidence. The ability of Petitioners to access such information post-hearing
13 does nothing to cure the deficiency.
14

15 Finally, KVR argues that evidence offered at the hearing regarding the
16 groundwater models was merely a part of the evidence it offered to show the possible
17 hydrologic effect of groundwater pumping on nearby surface or groundwater sources. KVR
18 contends that if all evidence concerning the groundwater models including Exhibit 116 and
19 any evidence regarding the BLM version were withdrawn from the evidence, other
20 independent evidence standing alone would support the State Engineer's finding that the
21 development of 11,300 afa of groundwater in Kobeh Valley would not adversely affect
22 existing rights in Diamond Valley.²²
23
24

25 ²²Without specifically stating or conceding a due process violation, KVR appears to be requesting the Court
26 to conduct a harmless error analysis in this matter. The Court is unaware of any authority, and KVR has cited
no authority that allows a court in Nevada to conduct a harmless error analysis of a due process violation in



1 Assuming arguendo, that KVR's contention is true, the problem remains that
2 the State Engineer cited the evidence concerning the BLM version of the Model in the
3 Ruling. The Court is unaware how those references can now be undone.

4 The Court has considered as well whether the references to the BLM version
5 of the Model in the Ruling were merely passing references without reliance thereon, or
6 whether the references provided some of the basis for the findings stated in the Ruling.
7 After a careful and deliberative review of the Ruling, the Court believes that the State
8 Engineer considered such evidence to support the findings in the Ruling. As such,
9 Petitioners' due process rights were violated as they were denied a meaningful opportunity
10 to challenge such evidence.
11

12 CONCLUSIONS OF LAW

13 Based upon the findings hereinabove set forth, the Court hereby concludes:

14 1. The right to cross-examine witnesses in an adjudicatory proceeding is
15 one of fundamental importance and its denial in this case amounted to a violation of due
16 process.
17

18 2. That Petitioners' due process rights were violated because evidence of
19 the BLM version of the Model was not disclosed to Petitioners prior to the hearing nor were
20 Petitioners put on notice that such evidence would be offered at the hearing, thus denying
21 Petitioners a full and fair opportunity to meet or challenge such evidence.
22

23 3. That Petitioners' due process rights to a full and fair hearing were
24 violated when the State Engineer considered and relied upon evidence (the BLM version
25 of the Model) in the Ruling when the State Engineer stated such evidence would not be so
26 a civil case.



1 considered.

2 Good cause appearing;

3 **IT IS HEREBY ORDERED** that Petitioners' respective Petitions For Judicial
4 Review are **HEREBY GRANTED**.

5 **IT IS FURTHER ORDERED** that State Engineer Ruling 5966 is **VACATED**
6 and this matter is **REMANDED** to the State Engineer for a new hearing.²³
7

8 DATED this 20th day of April, 2010.

9
10
11 
12 DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26

²³The Court's disposition of this matter makes it unnecessary to address the remaining issues on appeal.

PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 26th day of December, 2012, I caused a copy of the foregoing ***APPELLANTS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP'S SUPPLEMENT TO JOINT APPENDIX*** to be served on the following parties as outlined below:

VIA ELECTRONIC NOTICE:

Karen A. Peterson
kpeterson@allisonmackenzie.com

Theodore Beutel
tbeutel.ecda@eurekanv.org

Jennifer Mahe
jmahe@allisonmackenzie.com

Bryan L. Stockton
bstockton@ag.nv.gov

Ross E. de Lipkau
RdeLipkau@parsonsbehle.com

VIA US MAIL

Francis M. Wikstrom
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111

William E. Nork, Settlement Judge
825 W. 12th Street
Reno, NV 89503

///

///

///

///

///

///

///

///

///



1 John R. Zimmerman
2 Parsons Behle & Latimer
3 50 West Liberty Street, Suite 750
4 Reno, NV 89501

5 Dated this 26th day of December, 2012.

/s/ Therese A. Ure

6 THERESE A. URE, NSB# 10255
7 Schroeder Law Offices, P.C.
8 440 Marsh Avenue
9 Reno, NV 89509
10 PHONE (775) 786-8800; FAX (877)
11 600-4971
12 counsel@water-law.com
13 *Attorneys for Appellants Kenneth F.*
14 *Benson, Diamond Cattle Company LLC,*
15 *and Michel and Margaret Ann*
16 *Etcheverry Family, LP*
17
18
19
20
21
22
23
24
25
26

