The STATE ENGINEER's revision of the perennial yield is wholly removed from anything presented or discussed in the hearings before the STATE ENGINEER or any evidence presented to the STATE ENGINEER. Specifically, none of the parties raised the issue of revising the perennial yield of any of these basins, nor did any of the parties present any evidence in support of such a revision. Accordingly, Ruling 6127, with regard to the revisions of the perennial yields of the hydrographic basins, was completely unexpected because no evidence was before the STATE ENGINEER relating to revising the perennial yields of the basins or the Diamond Valley Flow System.

The basins at issue with regard to the points of diversion of the Applications were Kobeh Valley and Diamond Valley. See, ROA Vol. XVIII, p. 003594. None of the water to be appropriated in the Applications had a point of diversion or place of use in either Monitor Valley, Northern Part, Hydrographic Basin or Monitor Valley, Southern Part, Hydrographic Basin (collectively "Monitor Valley Basins"). Accordingly, the STATE ENGINEER did not have sufficient information before him to address the perennial yield of the Monitor Valley Basins.

Furthermore, the revisions of the perennial yields in other basins, which will be generally applicable to any applications to appropriate water in such basins, sounds of rulemaking as opposed to a simple adjudication of a contested case. A regulation is defined as "[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." NRS 233B.038.[18] NRS Chapter 233B thereafter provides detailed provisions associated with the process of creating and adopting regulations including provisions requiring notice to all interested parties and the opportunity for such parties to comment and present relevant information associated with the proposed regulation. NRS 233B.0395-NRS 233B.120. Since the issue before the STATE ENGINEER was KVR's Applications, which were unrelated to the Monitor Valley Basins, any

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p. 003612. The STATE ENGINEER concluded he had enough information to proceed with the applications and this issue was not a valid ground to deny an application. Id. at 003612-003613.

[18] The Nevada Administrative Procedure Act, NRS Chapter 233B, is inapplicable to the STATE ENGINEER with the exception of the adoption of the rules of practice before the STATE ENGINEER. See, NRS 533.365.

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individual currently appropriating water in the Monitor Valley Basins, or planning on appropriating water in the Monitor Valley Basins in the future, was not noticed of the Applications nor provided an opportunity to appear and present evidence at the hearings upon the Applications. Nonetheless, the STATE ENGINEER took action generally applicable to everyone associated with the Monitor Valley Basins without granting them any notice or opportunity to be heard despite the considerable potential impacts on such individuals.

It is undeniable that the STATE ENGINEER's revision of the perennial yields was unrequested and unsupported. The STATE ENGINEER's decision to revise such perennial yields appears to be a sudden turn of mind without apparent motive, a mere whim. Thus, the STATE ENGINEER's revision of the perennial yield is arbitrary and capricious and cannot be permitted to stand.

I. The STATE ENGINEER's Determination That The Requirements For An Interbasin Transfer Of Water Had Been Met Is Contrary To Law And Not Supported By Substantial Evidence.

The STATE ENGINEER explicitly acknowledges that an interbasin transfer of water will occur in this case for the water with a point of diversion in Kobeh Valley and a place of use in Diamond Valley. See, ROA Vol. XVIII, p. 003594.

NRS 533.370(3)[19] requires the STATE ENGINEER to consider the following factors in determining whether an application for an interbasin transfer of water must be rejected: (a) whether the applicant has justified the need to import the water from another basin; (b) whether a conservation plan has been adopted and is being effectively carried out, if the STATE ENGINEER determines that such a plan is advisable for the basin into which water is to be imported; (c) whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) whether the proposed action is an appropriate long-term use that will not unduly limit the future growth and development in the basin from which the water is exported; and (e) any other factor(s) the STATE ENGINEER determines to be relevant.

[19] The interbasin transfer statute was re-codified as NRS 533.370(3) in 2011.

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1. **The STATE ENGINEER Manifestly Abused His Discretion By Failing To Consider The Requirements Enumerated In NRS 533.370(3) With Regard To Pine Valley.**

The STATE ENGINEER concedes in Ruling 6127 that the Applications request that water be imported to Pine Valley from either Kobeh Valley or Diamond Valley. See, ROA Vol. XVIII, pp. 003594-003595. For example, the STATE ENGINEER stated: "[t]he mine project area straddles the basin boundary between Diamond Valley and Kobeh Valley and the proposed place of use also encompasses a small portion of Pine Valley." See, ROA Vol. XVIII, p. 003595. Furthermore, the STATE ENGINEER recognized that "[t]he Applicant is requesting an interbasin transfer of groundwater from both Kobeh Valley and Diamond Valley to a place of use that includes portions of the Kobeh Valley, Diamond Valley and Pine Valley Hydrographic Basins." See, ROA Vol. XVIII, p. 003594. The STATE ENGINEER's position is consistent with the testimony of Mr. Rogers, on behalf of KVR, that "the place of use incorporates a small piece of Pine Valley. There are no points of diversion in Pine Valley, if that's the question." See, ROA Vol. 1, p. 000134. Accordingly, it is clear that by approving the applications, the STATE ENGINEER allowed an interbasin transfer of water to Pine Valley. See, ROA Vol. XVIII, pp. 003594-003595.

For each basin to which water is imported, NRS 533.370(3) requires the STATE ENGINEER to consider two factors. First, whether the applicant has justified the need to import the water from another basin, and second, whether a conservation plan has been adopted and is being effectively carried out. NRS 533.370(3). Nonetheless, the STATE ENGINEER failed to address either of these issues specifically with regard to Pine Valley in Ruling 6127. In addition, KVR failed to submit any evidence with regard to these two issues in relation to Pine Valley as part of the administrative record before the STATE ENGINEER. The STATE ENGINEER's failure to address these issues required to be considered pursuant to the interbasin transfer statute is a manifest abuse of his discretion, requires that the interbasin transfer be rejected and requires that the Court vacate Ruling 6127.

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2. The STATE ENGINEER's Analysis Of The Environmental Impacts Renders A Portion Of NRS 533.370(3) Mere Surplusage And Is Arbitrary And Capricious.

The STATE ENGINEER acknowledges that he is obligated pursuant to NRS 533.370(3) to address whether an interbasin transfer is "environmentally sound as it relates to the basin from which the water is exported." See, ROA Vol. XVIII, p. 003597-003599. He then construes his analysis pursuant to this statutory factor to be: "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." See, ROA Vol. XVIII, p. 003597.

Following his declaration of this standard, the STATE ENGINEER applies the standard by considering the impacts upon the existing water rights in Kobeh Valley, the BLM's claims for reserved water rights in Kobeh Valley and the impacts on the springs in the area and then states that KVR's project and existing rights will use less water than the perennial yield of the basin. See, ROA Vol. XVIII, p. 003598. This analysis is nearly identical to the analysis conducted by the STATE ENGINEER in consideration of NRS 533.370(2), that is, whether the Applications conflict with existing rights and 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). The STATE ENGINEER's application of his standard for determining whether an interbasin transfer of water is environmentally sound violates this maxim of statutory interpretation by rendering the analysis of the environmental impacts into a mere reiteration of the analysis for the appropriation of water required for every application.

Again, the STATE ENGINEER determines any impacts can be mitigated and relies upon a future monitoring, management and mitigation plan to mitigate impacts to allow access for wildlife that customarily uses the source and to ensure existing rights are satisfied. See, ROA Vol. XVIII, p. 003598. This prong of the interbasin transfer statute does not allow the STATE

ENGINEER to approve an application if he orders mitigation to address any impacts. Id. at pp. 003598-003599. The STATE ENGINEER erred as a matter of law.

Further, the legislative history of NRS 533.370(3) makes it clear that more than a simple review of the impacts to existing water rights and sources must be considered. In discussing Senate Bill 108 in the 1999 Nevada Legislative Session, the State Water Planner, Naomi Duerr, referred to an Excerpt from the Draft Nevada State Water Plan which, in discussing interbasin transfers of water, identified as an issue the following:

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

See, Minutes for February 10, 1999, Senate Committee on Natural Resources, pp. 6-9.[20]

Accordingly, the STATE ENGINEER's application of the standard he articulated is contrary to law because it fails 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 groundwater.

3. The STATE ENGINEER Failed To Consider The Substantial Evidence Regarding Environmental Impacts In Kobeh Valley Associated With The Applications.

The flaw in the STATE ENGINEER's analysis regarding whether an interbasin transfer is environmentally sound is made even more apparent when considering the substantial evidence presented and ignored by the STATE ENGINEER regarding the unreasonable impacts to the water resources and hydrologic-related natural resources in Kobeh Valley caused by the interbasin transfer.

Rex Massey, a witness for EUREKA COUNTY with twenty-four years of experience in socioeconomic and demographic analysis, as well as environmental compliance, provided substantial testimony with regard to the various recreational and wildlife related natural resources in Kobeh Valley in the Mount Hope/Roberts Mountain area. See, ROA Vol. IV, p. 000692-000693.

[20] The entire Legislative History for S.B. 108 can be found at http://leg.state.nv.us/dbtw-wpd/exec/dbtwpub.dll.

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"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." See, ROA Vol. IV, p. 000695. The Mount Hope/Roberts Mountain recreation area is regularly used for camping, fishing, hiking, biking, hunting and wildlife viewing. See, ROA Vol. IV, p. 000697. 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." See, ROA Vol. IV, p. 000698.

KVR's expert admitted there are many, many springs throughout the area that don't have water rights issued on them. See, ROA Vol. II, pp. 000365-000366. As KVR's monitoring plan predicts, drawdown on the Roberts Mountains "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." See, ROA Vol. VI, p. 001066. These springs and shallow groundwater tables in Kobeh Valley support the water resources and hydrologic-related natural resources in Kobeh Valley. The Nevada Department of Wildlife and U.S. 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. See, ROA Vol. IV, pp. 00736-00737. Finally, 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 or the Mud Spring were impacted there would be definite impacts upon 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. See, ROA Vol. III, pp. 000499-000500.

The impacts to existing rights by pumping 11,300 afa of groundwater from Kobeh Valley are documented in Section B above. The STATE ENGINEER's hydrogeologist acknowledged in his questioning of Mr. Smith that in this area, with less than five feet of water level declines, many, many springs have dried up. See, ROA Vol. II, p. 000406 (discussing water level declines in the south playa of Diamond Valley not simulated in KVR's model).

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KVR presented no evidence regarding whether the proposed interbasin transfer was environmentally sound other than testimony it was complying with all environmental permitting requirements. See, ROA Vol. I, p. 000095, ROA Vol. VI, pp. 001058-001059. This is not the standard under the interbasin transfer statute and if it was, the STATE ENGINEER's duties under the statute would be redundant to the duties of other regulatory agencies. 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. There was no evidence submitted to support the STATE ENGINEER's findings that impacts can be mitigated based upon a future monitoring, management and mitigation plan, nor does Ruling 6127 cite to any such evidence to support the STATE ENGINEER's findings. The STATE ENGINEER's determination that the interbasin transfer is environmentally sound is arbitrary and capricious based upon the substantial evidence of record.

4. Substantial Uncontested Evidence Showed That The Interbasin Transfer Would Inhibit Future Growth In The Basin Of Origin And Thus, The STATE ENGINEER's Approval Of The Transfer Is Arbitrary And Capricious.

NRS 533.370(3) requires the STATE ENGINEER to consider "whether the proposed action is an appropriate long-term use that will not unduly limit the future growth and development in the basin from which the water is exported."

The STATE ENGINEER focuses his review of this element on the appropriateness of mining as a long-term use. See, ROA Vol. XVIII, p. 003599-003600. The STATE ENGINEER then relies on mining in Kobeh Valley as grounds for finding that the future growth of Kobeh Valley will not be limited and that KVR's proposed project is the type of future growth and development that would be anticipated in this area of Nevada. Id. This circular analysis causes the STATE ENGINEER to find that the proposed use for export of water outside the basin, mining, will be the predominant source of future growth and future use of any water in Kobeh Valley. Id. This confuses the two points which NRS 533.370(3) requires the STATE ENGINEER to consider. Simply because a use is an appropriate long-term use in another basin does not mean that it

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automatically accounts for the entire future growth in the basin of origin so that there would never be an undue limitation on future growth in the basin of origin if a long-term use in another basin was appropriate.

Further, the STATE ENGINEER references Permit No. 76526 to state that the Town of Eureka has water remaining available in the town water system. See, ROA Vol. XVIII, p. 003600. This point is entirely irrelevant. NRS 533.370(3) requires the STATE ENGINEER to consider the impacts upon future growth in the basin of origin, in this case Kobeh Valley. Nonetheless, Permit No. 76526, and the Town of Eureka's water system, are located in Diamond Valley. Thus, it is immaterial to a future growth and development analysis of the basin of origin under NRS 533.370(3) if water is available on permits in Diamond Valley.

Despite the STATE ENGINEER's position that the interbasin transfer will not unduly limit future growth in Kobeh Valley, several individuals, including representatives from EUREKA COUNTY testified that there would be undue limitation. Ronald Damele, the director of public works for Eureka County, testified that the County expected to see future growth. See, ROA Vol. III, p. 000521. Mr. Damele testified that in order for anyone to develop property in Eureka County there was a county water ordinance which required dedication of two acre-feet of water per new parcel. See, ROA Vol. III, p. 000521. Further, Mr. Massey, a EUREKA COUNTY witness, testified that growth in Eureka County would be expected to extend outside the town of Eureka in a northern and westerly direction, the westerly direction encompassing Kobeh Valley. See, ROA Vol. IV, pp. 000702-000703. The population of Eureka County in the next ten years is expected to increase by approximately 2,060 people and the land available for development in Kobeh Valley would allow for approximately 2,988 residential lots. See, ROA Vol. IV, pp. 000701-000703. Nonetheless, the approval of the Applications will prevent growth in the Kobeh Valley Hydrographic Basin and will increase the hardship on individuals attempting to develop property in that basin as they will find it challenging to obtain the necessary two acre-feet of water rights per parcel to dedicate to Eureka County for approval of their parcels.

In another section of Ruling 6127, the STATE ENGINEER reduced the perennial yield of Kobeh Valley from 16,000 afa to 15,000 afa, thus reducing the available water to

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appropriate in Kobeh Valley for future long term growth and development in the basin by 1,000 afa. See, ROA Vol. XVIII, p. 003586. Per the Ruling, the STATE ENGINEER purportedly took this action to establish a "safe and constructive" perennial yield in this basin. Id. It is arbitrary for the STATE ENGINEER to determine on the one hand that the perennial yield of the basin of origin needs to be reduced by 1,000 afa and then on the other hand, determine an export of 11,300 afa of water from the basin of origin will not unduly limit the future growth and development of the basin.

Obviously there was substantial evidence offered by EUREKA COUNTY to establish that there would be undue limitations on the future growth in Kobeh Valley if the STATE ENGINEER granted the Applications. Nonetheless, the STATE ENGINEER, relying primarily on his determination that mining was an appropriate long-term use of water in Kobeh Valley, ruled that there would not be undue limitations on future growth in Kobeh Valley. Clearly, in light of the evidence produced, Ruling 6127 is arbitrary and capricious.

J. The Base Water Rights Of Applications 76989, 79923, 76990 And 79935 Are Subject To Forfeiture As There Was No Evidence That The Water Was Put To Beneficial Use And Accordingly, The STATE ENGINEER's Grant Of Those Applications Is A Manifest Abuse Of Discretion.[21]

NRS 534.090(1) provides in pertinent part, "failure for 5 successive years ... to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse." Accordingly, "forfeiture applies when the State proves non-use over the statutory period, unless resumed use has 'cured' or resuscitated the defect in the water rights." Town of Eureka v. Office of the State Engineer of the State of Nevada, Division of Water Resources, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992). In order to cure a forfeiture, the resumed use must occur before a "claim or proceeding of forfeiture has begun." Id.

[21] This argument is raised both with regard to the Petition for Judicial Review of Ruling 6127, Case No. CV1108-155, and the Petition for Judicial Review of the issued Permits, Case No. CV1112-164.

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1. **Evidence Established That The Use Pursuant To The Base Water Rights Of Applications 76989, 79923, 76990 And 79935 Was Nothing More Than The Natural Free Flow Of Water Upon Real Property With No Actual Beneficial Use And Thus, The STATE ENGINEER Was Obligated Pursuant To NRS 534.090 To Deem The Base Rights Forfeited.**

NRS 534.090(1) clearly provides that in order to avoid forfeiture the beneficial use to which the water is put must be "for the purpose for which the right is acquired or claimed." Though the Nevada Supreme Court has never addressed the issue of what beneficial use is necessary to avoid forfeiture, other courts in prior appropriation states have addressed the issue.

For example, in State ex. rel. Martinez v. McDermott, 901 P.2d 745, 749 (N.M. App. 1995) the court ruled that a water rights owner's mere construction of a well and irrigation ditches and sporadic spreading of water across the ground was insufficient to prove beneficial use for a portion of the water rights, as the specified use of the water was for irrigation though no action was taken to plant, harvest or raise crops. In that case it was held that:

> [a] diversion alone is not beneficial use. There must be an ultimate, actual beneficial use of the water resulting from the diversion. Similarly, mere diversion of water into a canal or ditch, without applying water to irrigating a crop or other valid use, does not satisfy the requirement of a beneficial use.

Id. (internal citations omitted).

Further, Oregon courts have recognized that a failure to put water to the beneficial use for which it has been designated, or in the designated place of use, constitutes non-use for which forfeiture is the appropriate remedy. Hennings v. Water Resources Dept., 622 P.2d 333, 335 (Or. App. 1981); Hannigan v. Hinton, 97 P.3d 1256, 1259 (Or. App. 2004). The Court of Appeals of Oregon addressed a case similar to the current situation in Staats v. Newman, 988 P.2d 439 (Or. App. 1999). In Staats, water rights were cancelled due to forfeiture by the Oregon Water Resources Department after a hearing in which evidence was presented that water rights existed for irrigation but the ditches through which such irrigation was supposed to occur were in such disrepair that they could not be utilized or that they could not be controlled. Id. at 440. The water rights in Staats were for irrigation use which was defined by Oregon code as "the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants." Id. at 441. Irrigation was interpreted by the Oregon Water Resources Department and that Court to require artificial

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application of water, not naturally occurring sub-irrigation. Id. Therefore, the water rights in Staats were deemed forfeited. Id. at 442.

In this case, Applications 76989, 79923, 76990, 79935 (hereafter "Bartine Applications") are change applications for water rights previously certificated for use on the Bartine a.k.a. Fish Creek Ranch (hereafter "Bartine Rights"). See, ROA Vol. XVIII, pp. 003600-003601. The Bartine Rights were issued for irrigation to be completed utilizing artesian wells and the supporting structures, a small ditch and a groundwater well with ditches. See, ROA Vol. XVIII, p. 003602. Nonetheless, the evidence unquestionably established that, though the artesian wells had provided natural drainage, no irrigation had occurred on the Bartine Ranch for more than five years.

Specifically, James Ithurralde, Chairman of the Eureka County Board of Commissioners and elected Eureka County Assessor for three decades, testified:

> Q: Turning to Fish Creek, Bartine, are you familiar with that ranch?
> A: Yes.
> Q: Did you visit that property regularly as part of your assessment duties?
> A: Yes.
> Q: Did you ever see any water use or irrigation of land on that property when you visited the property?
> A: No. Irrigated you said?
> Q: Yes, irrigated.
> A: No.

See, CV0904 ROA Transcript, Vol. 3, p. 407, ll. 19-24, p. 408, ll. 15-18 and p. 423, ll. 9-19.

Further, Mr. Damele, a lifelong resident of Eureka County, testified as follows:

> Q: And then turning to Fish Creek, Bartine, are you familiar with that?
> A: I am.
> ...
> Q: Have you ever seen any water applied for beneficial use for agricultural purposes on that property?
> A: Not outside of the natural drainage of the two artesian wells.

See, CV0904 ROA Transcript, Vol. 3, p. 459, ll. 10-21, p. 484, ll. 1-18. Finally, several local individuals involved in farming and ranching also testified that no irrigation occurred on the Bartine Ranch, although the artesian wells provided a flow of natural drainage. See, CV0904 ROA Transcript, Vol. 1, p. 117, ll. 7-25, p. 118, ll. 1-7, and Vol. 2, p. 401, ll. 7-18.

The STATE ENGINEER cites to the 2010 crop inventories to support beneficial use. It must be noted that the 2010 crop inventories were unavailable to the parties at the time of the

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hearing and were not presented to the STATE ENGINEER.[22] See, ROA Vol. XVIII, p. 003601. Additionally, any alleged use in 2008-2010 would not cure the years of nonuse since any alleged resumed use occurred after the "claim or proceeding of forfeiture" in the October 2008 hearing. Town of Eureka, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992). See, above citations to CV0904 ROA.

The STATE ENGINEER concedes the validity and weight of the evidence of non-use stating "[t]here was substantial testimony stating that there was no irrigation of a crop on the ... [Bartine Ranch], but most of the witnesses appeared to agree that there was some artesian flow of water on the property." See, ROA Vol. XVIII, pp. 003601-003602. The mere assertion by the STATE ENGINEER that the crop inventories establish that the artesian flow occurred is insufficient, without more, to establish that the water was put to a beneficial use as required to avoid a forfeiture. Since it is acknowledged that substantial testimony establishes that there was no irrigation of a crop on the Bartine Ranch and all the STATE ENGINEER can state is that there was some artesian flow of water on the Bartine Ranch, then it is undisputed that the Bartine Rights were not put to beneficial use for a five year period. Accordingly, NRS 534.090(1) dictates that a forfeiture has occurred.

Therefore, the STATE ENGINEER's holding that there was not a forfeiture of the Bartine Rights is arbitrary and capricious.

2. Alternatively, There Is No Evidence To Establish That All Of The Bartine Rights Were Put To Beneficial Use And Thus, The Unused Portion Should Have Been Forfeited By The STATE ENGINEER And The STATE ENGINEER's Failure To Do So Is Arbitrary And Capricious.

NRS 534.090(1) explicitly acknowledges that it is possible to forfeit "a part" of certificated water rights if a portion of the rights are not put to the appropriate beneficial use. Thus, even if the STATE ENGINEER's determination that the mere artesian flow discussed above is sufficient to qualify as beneficial use, such artesian flow only utilized a portion of the Bartine Rights and thus, the remaining portion of the Bartine Rights should have been forfeited.

[22] The STATE ENGINEER also inexplicably excludes the crop inventory for 2009 in Ruling 6127 despite the fact that the 2009 crop inventory shows that 45 acres was irrigated by artesian flow under Certificate No. 2880. See, ROA Vol. XII, p. 002347 and Vol. XVIII, p. 003601.

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As an initial point, Ruling 6127 includes an undeniably erroneous statement that is irreconcilable with other statements in Ruling 6127. Specifically, the STATE ENGINEER states that: "[b]oth certificates [Certificate Nos. 2780 and 2880] irrigate the same acreage being 65.54 acres of land and are supplemental to each other by place of use." See, ROA Vol. XVIII, p. 003602. The STATE ENGINEER nonetheless details crop inventories showing 104.5 acres irrigated pursuant to Certificate Nos. 2780 and 2880. See, ROA Vol. XVIII, p. 003601. Obviously, the STATE ENGINEER is unclear as to the true nature of Certificate Nos. 2780 and 2880 as such Certificates are not supplemental to each other and have distinctly different places of use totaling 201.59 acres.[23]

It was assumed the Bartine Rights had a duty of 4 acre feet per acre. See, ROA Vol. IV, p. 000751. Ignoring the resumed use after notice of the forfeiture, the artesian flow, at its greatest flow only involved 65.54 acres. See, ROA Vol. IV, p. 000751. Accordingly, the appropriate portion of the Bartine Rights that were allegedly put to beneficial use was only 262 afa, approximately (65.54 acres x 4 afa). See, ROA Vol. IV, pp. 000751-000752. There was no evidence, either cited in Ruling 6127 nor presented to the STATE ENGINEER by any of the parties, showing any additional alleged irrigation. Nonetheless, the STATE ENGINEER granted the Bartine Applications in their entirety, approximately 796.5 afa, subject to consumptive use of 353.92 afa, for approximately the same 65.54 acres, finding that none of the Bartine Rights had been forfeited. See, EC ROA 075-078, 0111-0112, 0135-0136.

There being no evidence of any beneficial use for a portion of the Bartine Rights, the STATE ENGINEER's determination that all of the Bartine Rights were not forfeited is arbitrary and capricious.

K. The STATE ENGINEER Manifestly Abused His Discretion By Violating The Provisions Of NRS 533.325 And Granting Change Applications On Water Rights That Had Not Yet Been Permitted.

NRS 533.325 provides the process required to file a change application prior to placing water to beneficial use. Specifically, NRS 533.325 states:

[23] As previously noted, the STATE ENGINEER took administrative notice of all of the STATE ENGINEER's files which include Certificate Nos. 2780 and 2880. See, ROA Vol. I, p. 000008. Certificate No. 2780 can be found at http://water.nv.gov/data/permit/permit.cfm?page=1&app=9682. Certificate No. 2880 can be found at http://water.nv.gov/data/permit/permit.cfm?page=1&app=11072.

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> Any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so.

The term "water already appropriated" is explicitly defined in NRS 533.324 as "water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made."

NRS 533.324 was enacted as Assembly Bill 337 in the 1993 Nevada Legislative session in which it was repeatedly stated that the STATE ENGINEER could not consider a change application until the water rights proposed to be changed had been permitted.[24] For example, then State Engineer, R. Michael Turnipseed, testified before the Assembly Committee on Government Affairs in relation to A.B. 337, stating that A.B. 337 simply clarified the term water already appropriated "as being water rights which were in permit form." See, Minutes for March 24, 1993 Assembly Committee on Government Affairs, p. 693. Further, Assemblyman Joe Dini submitted written introductory comments regarding A.B. 337 which provided, "[t]he bill clarifies that the term 'water already appropriated' includes water (1) for whose appropriation the State Engineer has issued a permit." Id. at 693 and 713. Thus it is explicitly clear, both from the unambiguous language of the applicable statutes and the legislative history associated with such statutes, that the STATE ENGINEER cannot consider a change application for water that has not already been permitted. See, NRS 533.325 and NRS 533.324.

Despite this evident limitation on the STATE ENGINEER's authority, the STATE ENGINEER yet again exceeds that authority. In this case, Applications 79911, 79912, 79914, 79916, 79918, 79925, 79928, 79933, 79938, 79939 and 79940 all request that the STATE ENGINEER approve a change of the point of diversion, place of use or manner of use of water rights for which the STATE ENGINEER has not issued a permit. See, ROA Vol. VI, pp. 000999-001013, Vol. X, pp. 002156-002160, Vol. XI, pp. 002161-002165, 002171-002175, 002181-002185, 002191-002195, 002220-002224, 002240-002244 and 002270-002274. The STATE ENGINEER by statute is prohibited from issuing change applications for "water not already appropriated." NRS

[24] The entire Legislative History for A.B. 337 can be found at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB337,1993.pdf.

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533.325. Nonetheless, the STATE ENGINEER does exactly that in this case by issuing Ruling 6127 that grants change applications for other pending applications that have not been permitted.

Ruling 6127 undeniably exceeds the STATE ENGINEER's authority and is therefore an abuse of discretion and cannot be upheld.

L. The STATE ENGINEER's Acceptance Of KVR's Inventory Is An Abuse Of Discretion.

NRS 533.364 requires the STATE ENGINEER to complete an inventory of the basin from which water is to be transferred before approving certain interbasin transfers. Specifically, NRS 533.364 provides:

> before approving an application for an interbasin transfer of more than 250 acre-feet of groundwater from a basin which the State Engineer has not previously inventoried or for which the State Engineer has not conducted, or caused to be conducted, a study pursuant to NRS 532.165 or 533.368, the State Engineer or a person designated by the State Engineer shall conduct an inventory of the basin from which the water is to be exported. The inventory must include:
> (a) The total amount of surface water and groundwater appropriated in accordance with a decreed, certified or permitted right;
> (b) An estimate of the amount and location of all surface water and groundwater that is available for appropriation in the basin; and
> (c) The name of each owner of record set forth in the records of the Office of the State Engineer for each decreed, certified or permitted right in the basin.

The legislative history for Assembly Bill 416 of the 2009 Legislature adopting NRS 533.364 provides additional information as to what should be included in an inventory. For example, Jason King, the then Deputy State Engineer and current STATE ENGINEER, testified that "if we were to inventory a basin, not only would we look at water-righted resources, groundwater, and surface water, but we would also look for and quantify those water sources that do not have a water right on them." See, Minutes of the March 24, 2009 Assembly Committee on Government Affairs. Mr. King envisioned the actual inventory being completed as follows:

> The first part of the inventory we would query our database for that particular basin, since we have a list of all the water rights holders in that basin; we would get the names of all those people. We know where those points of diversion are, whether they are underground or surface water. That would be a major part of the inventory.
>
> The next thing to do would be to get people out on the ground, probably with topographic maps, maybe infrared maps, looking for other water resources. I am specifically talking about surface water, such as springs, that do not have an appropriation on them. We would go to those sites and

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> take measurements and get baseline data, so that if an interbasin transfer is approved, we can see whether there is an effect. But yes, it is going to be a combination of querying our database and putting men in the field to identify other sources.

See, Minutes of the April 3, 2009 Assembly Committee on Government Affairs. Mr. King further testified that there was not a single full inventory, as contemplated by Assembly Bill 416, on any of the 256 hydrographic basins and sub-basins in Nevada. See, Minutes of the March 24, 2009 Assembly Committee on Government Affairs.

1. The STATE ENGINEER Denied EUREKA COUNTY The Opportunity To Present Evidence Regarding The NRS 533.364 Inventory In Violation Of The Fundamental Notions Of Fairness And Due Process.

The Nevada Supreme Court has explicitly provided that the STATE ENGINEER must comply with the basic notions of fairness and due process in issuing any Ruling. Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979). The Nevada Supreme Court stated in Revert:

> The applicable standard of review of the decisions of the State Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had "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 decisionmaker must prepare findings in sufficient detail to permit judicial review. *Id.*; Wright v. State Insurance Commissioner, 449 P.2d 419 (Or. 1969); S*ee 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 ex rel. Johns v. Gragson, 89 Nev. 478, 515 P.2d 65 (1973).

95 Nev. at 787, 603 P.2d at 264. Should the STATE ENGINEER fail to comply with the basic notions of fairness and due process, his Ruling cannot be upheld. Id.

In this case the STATE ENGINEER did not even request the NRS 533.364 inventory be completed until after the administrative hearing on this matter. See, SROA 01-02. In response to the STATE ENGINEER's request for the additional information necessary for a basin inventory, EUREKA COUNTY explicitly stated that the notions of fairness and due process required granting EUREKA COUNTY the opportunity to review such information and cross-examine the individuals responsible for such submissions. See, SROA 044-062. The STATE ENGINEER, seeming to

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concede the validity of EUREKA COUNTY's concern, scheduled and held an additional administrative hearing on May 10, 2011. See, ROA Vol. VI, pp. 000940-000942. Nonetheless, the NRS 533.364 inventory was not completed prior to that hearing and as such EUREKA COUNTY was not allowed to review the inventory or cross examine the individuals responsible for producing such inventory, much less present evidence related to the inadequate and incomplete nature of the inventory. The STATE ENGINEER thereafter accepted the inventory submitted by KVR and issued Ruling 6127 without allowing EUREKA COUNTY the opportunity to review and present evidence, or cross-examine witnesses, regarding the inventory.

Because of the STATE ENGINEER's denial of EUREKA COUNTY's right to due process, no party had the opportunity to address the inadequate and incomplete nature of the inventory. For example, the inventory as presented includes several instances where information should have been provided, yet the space for such information is blank. See, e.g., SROA 0135, 0139, 0141, 0153 and 0186. Further, with regard to at least one water source, it appears that the individuals conducting the inventory did not go to the source or measure the flow, but instead simply attached a Google Earth picture of the area. See, SROA 0214. Finally, with no ability to cross-examine the individuals responsible for the inventory, it is impossible to determine how the water sources included on the inventory were located and to test the extensiveness of the review completed.

The STATE ENGINEER's failure to allow EUREKA COUNTY the opportunity to review the NRS 533.364 inventory prior to any hearing, much less cross-examine witnesses or present testimony, violates the fundamental notions of fairness and due process. The STATE ENGINEER's actions being a manifest abuse of discretion, this Court must vacate Ruling 6127.

2. The STATE ENGINEER's Reliance Upon The Inadequate Inventory Provided By KVR To The STATE ENGINEER Is An Abuse Of Discretion.

In this case the inventory required by NRS 533.364 was requested by the STATE ENGINEER and completed by KVR as if it were simply an afterthought. In fact, it was not until March 3, 2011, after the completion of the administrative hearing on the Applications, that the STATE ENGINEER raised the issue of completing the inventory. See, SROA 01-02. At that time

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the issue raised by the STATE ENGINEER was simply whether NRS 533.364 applied to this situation. Id. KVR conceded that NRS 533.364 applied to this situation and submitted copies of printouts from the STATE ENGINEER's website asserting that such printouts satisfied the requirements of NRS 533.364. See, SROA 04-043. The STATE ENGINEER responded to KVR's submission by requesting additional information associated with the inventory, though the STATE ENGINEER explicitly provided that it was not requiring certain water sources be identified. See, SROA 069-070. For example, the STATE ENGINEER stated "[f]or springs that are tributary or base flow to perennial or intermittent streams, it is sufficient to measure the stream source and not each individual spring that may feed the stream source." Id.

The Water Resources Inventory Data Collection Report Kobeh Valley - NDWR Hydrographic Basin 139 was thereafter submitted by Interflow Hydrology, Inc., KVR's hydrologists, to the STATE ENGINEER. The identification of water sources in KVR's inventory appears to have been completed over a four day period from May, 17, 2011- May 20, 2011. See, SROA 074-0273.

NRS 533.364 explicitly provides that an inventory must identify "all surface water and groundwater." Further the legislative history for the adoption of NRS 533.364 makes it clear that no one was envisioning an inventory thrown together following a simple four day investigation.[25] In order to identify all of the surface water and groundwater in a hydrographic basin, an investigation for unknown and unidentified water sources must be completed. The Kobeh Valley Hydrographic Basin encompasses 868 square miles, or 555,520 acres. Further, some of the water resources in that 868 square miles are inaccessible by vehicle. See, ROA Vol. III, p. 000452. As such, it is clear that a full investigation was not made and all surface water and groundwater was not identified in four days.

Because the NRS 533.364 inventory of Kobeh Valley conducted by KVR and accepted by the STATE ENGINEER was inadequate and incomplete, the requirements of NRS 533.364 have not been fulfilled and the interbasin transfer of water cannot be approved.

[25] If full basin inventories could be completed in a mere four days undoubtedly the STATE ENGINEER would have had a basin inventory for at least one basin in the State of Nevada by 2009.

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M. The Permits As Issued Are Inconsistent And Contradictory With Ruling 6127 And Thus Must Be Vacated As Arbitrary And Capricious Action.[26]

The STATE ENGINEER granted a majority of the Applications filed by KVR, subject to certain terms, conditions and restrictions as stated in Ruling 6127. Following entry of Ruling 6127, the STATE ENGINEER issued the Permits which were granted in such Ruling. See, EC ROA 01-0152. The STATE ENGINEER should have issued the Permits consistent with the terms, conditions and restrictions he had explicitly identified in Ruling 6127. Nonetheless, the STATE ENGINEER failed to consistently incorporate certain terms, conditions and restrictions, identified as essential in Ruling 6127, in the issued Permits and instead incorporated contradictory terms, conditions and restrictions.

EUREKA COUNTY's Petition for Judicial Review filed on December 29, 2011 alleged that the STATE ENGINEER improperly granted permits that allowed the appropriation of more than 11,300 afa for the Mt. Hope Mine Project in violation of Ruling 6127. See, EUREKA COUNTY Petition for Judicial Review, Case No. CV1112-164, ¶15. After EUREKA COUNTY's Petition for Judicial Review was filed, the STATE ENGINEER issued amended permits 76008, 76802, 76803, 76804, 76805 and 78424. See, EC ROA 153-164. This issue raised in EUREKA COUNTY's Petition for Judicial Review has been resolved by the STATE ENGINEER's issuance of the amended permits and accordingly, EUREKA COUNTY withdraws this issue from its appeal.

The first inconsistency between the Permits as issued and Ruling 6127 is the restriction regarding the use of water in Diamond Valley. Specifically, the STATE ENGINEER stated in Ruling 6127:

> The STATE ENGINEER finds that any permit issued for the mining project with a point of diversion within the Diamond Valley Hydrographic Basin must contain ***permit terms*** restricting the use of water to within the Diamond Valley Hydrographic Basin and any excess water produced that is not consumed within the basin must be returned to the groundwater aquifer in Diamond Valley. The State Engineer finds that any approval of Applications 76005-76009, 76802-76805, and 78424 will restrict the use of any groundwater developed to within the Diamond Valley Hydrographic Basin; ... (emphasis added).

[26] This argument is related to the Petition for Judicial Review filed as Case No. CV1112-164 which the parties stipulated to consolidate with the pending cases related to Ruling 6127.

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See, ROA Vol. XVIII, p. 003595. Despite this language in Ruling 6127 for the issuance of the Diamond Valley Permits[27], the STATE ENGINEER did not include a restriction in those Permits that any "excess water produced that is not consumed within the basin must be returned to the groundwater aquifer in Diamond Valley." The Diamond Valley Permits state "[t]he place of use of these permits is limited to the Diamond Valley Hydrographic Basin (153)." See, EC ROA 061, 063, 065, 067, 069, 079, 081, 083, 085, 0151, 0153, 0155, 0157, 0159, 0161 and 0163.

In addition, the Diamond Valley Permits provide that "[t]he point of diversion and place of use are as described on the submitted application to support this permit." See, EC ROA 062, 064, 066, 068, 070, 080, 082, 084, 086, 0152, 0154, 0156, 0158, 0160, 0162 and 0164. As discussed in more detail above, the Applications, including those associated with points of diversion in Diamond Valley, have a place of use incorporating approximately 90,000 acres. Thus, the provisions in the Diamond Valley Permits, though including a limitation for use only in Diamond Valley, also include a provision for a place of use incorporating the entire 90,000 acres. The 90,000 acres includes portions of Kobeh Valley, Pine Valley and Diamond Valley. ROA Vol. XII, p. 002438. Thus, it is undisputable that the Diamond Valley Permits contradict the terms of Ruling 6127 and fail to incorporate specifically identified terms, conditions and restrictions required by Ruling 6127.

The second inconsistency involves the Permits[28] which include a provision regarding consumptive use. In Ruling 6127, the STATE ENGINEER grants the Applications subject to "[a] total combined duty of 11,300 afa" and providing that "[a]ll changes of irrigation rights will be limited to their respective consumptive uses." See, ROA Vol. XVIII, p. 003613. Nonetheless, these Permits provide "initially only the net consumptive use amount of the base right ... can be diverted annually. Additional diversion ... may be granted if it can be shown that the additional diversion will not cause the consumptive use ... to be exceeded." See, EC ROA 044, 046, 048, 050, 052, 054, 056, 058, 060-070, 072, 074, 076, 078-086, 092, 096, 0100, 0106, 0108, 0112, 0118, 0120, 0130,

[27] The Diamond Valley Permits are Permit Nos. 76005-76009, 76802-76805 and 78424 and amended Permits 76008, 76802-76805 and 78424.

[28] The Permits involving this inconsistency are Permit Nos.75996-76009, 76745-76746, 76989-76990, 76802-76805, 79913, 79915, 79917, 79920-79921, 79923, 79926-79927, 79932, 79934-79935, 79941-79942 and 78424.

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0134, 0136, 0148, 0150-0153 and 0155-0164. This Permit term is inconsistent with both the provisions of Ruling 6127 that only grant the 11,300 afa KVR applied for, as allowing additional diversions could exceed the approved 11,300 afa total combined duty, and the provisions explicitly limiting the Permits to the respective consumptive uses as defined in the Ruling. Furthermore, it is not clear how additional diversions would not exceed the consumptive use, particularly in Kobeh Valley, where KVR's diversion and use of the water is entirely consumptive. See, ROA Vol. VI, p. 001065, Vol. VII, p. 001196.

Following a review of all of the evidence presented, the STATE ENGINEER decided that the terms, conditions and restrictions identified in Ruling 6127 were necessary. Thus, the issuance of Permits that are inconsistent with and contradictory to Ruling 6127 cannot be considered anything except arbitrary and capricious action by the STATE ENGINEER.

N. The Permits As Issued Are Invalid And Thus Arbitrary And Capricious.[29]

As is discussed in detail above, the Permits incorporate a place of use consistent with the Applications, which is an approximately 90,000 acre area, despite the actual plan of operations only encompassing an approximately 14,000 acre area. See, ROA Vol. I, p. 000133. The issuance of Permits with such an expansive and nebulous place of use, that inaccurately defines the actual place of use, in part simply to avoid the STATE ENGINEER's statutory obligation to approve changes to the place of use in the future, is undeniably arbitrary and capricious.

Further, as is also asserted above, all or a portion of certain base water rights had not been used for five consecutive years and should have been forfeited by the STATE ENGINEER. Permits 76989, 79223, 76990 and 79935 were issued for the full amount of the forfeited base water rights and as such, should not be issued for the full amount of the base water rights. Issuing permits for change applications where the base right has been forfeited is arbitrary and capricious.

The issuance of the Permits being arbitrary and capricious, such Permits must be deemed invalid and vacated.

[29] This argument is related to the Petition for Judicial Review filed as Case No. CV1112-164 which the parties stipulated to consolidate with the pending cases relating to Ruling 6127.

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O. Remand To The STATE ENGINEER Is Not Appropriate And The Court Must Deny KVR's Applications.

After a finding that an administrative agency's decision was arbitrary and capricious and the record is sufficient only to support a decision opposite of that made by the agency, the administrative agency "is not entitled to a second bite of the apple just because it made a poor decision—if that were the case, administrative law would be a never ending loop from which aggrieved parties would never receive justice." McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 895 F. Supp. 316, 319 (D.D.C. 1995). Courts are not obligated to engage in "the tedious process of administrative adjudication and judicial review ... needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." People of the State of Ill. v. I.C.C., 722 F.2d 1341, 1349 (7th Cir. 1983). Accordingly, remand is unnecessary when "remand would be an idle and useless formality ... convert[ing] judicial review of agency action into a ping-pong game." N. L. R. B. v. Wyman-Gordon Co., 394 U.S. 759, 766, 89 S. Ct. 1426, 1430, 22 L. Ed. 2d 709 (1969).

As is clear from the numerous errors, the STATE ENGINEER was determined to grant the Applications in this case regardless of the applicable statutory law or the substantial evidence provided to him. Given the STATE ENGINEER's determination to grant the Applications, it would be futile and useless to remand this matter to the STATE ENGINEER simply to have him issue another ruling granting the Applications, requiring EUREKA COUNTY to return this matter to this Court citing the same legal and factual barriers which indisputably exist now. In this matter both the applicable law and the substantial factual record submitted to the STATE ENGINEER only allow for one action: the denial of the Applications. Accordingly, this Court should not simply remand this matter to the STATE ENGINEER for further action but should instead vacate Ruling 6127 and deny the Applications on the grounds identified herein. Any permits issued by the STATE ENGINEER to KVR must be vacated.

IV.

CONCLUSION

Based upon the STATE ENGINEER's arbitrary and capricious actions, as well as the lack of substantial evidence to support Ruling No. 6127 and the inconsistent and contradictory Permit terms, conditions and restrictions, EUREKA COUNTY respectfully requests that this Court grant its Petition for Judicial Review, vacate Ruling No. 6127, deny KVR's Applications and vacate the issued Permits and amended Permits.

DATED this 13th day of January, 2012.

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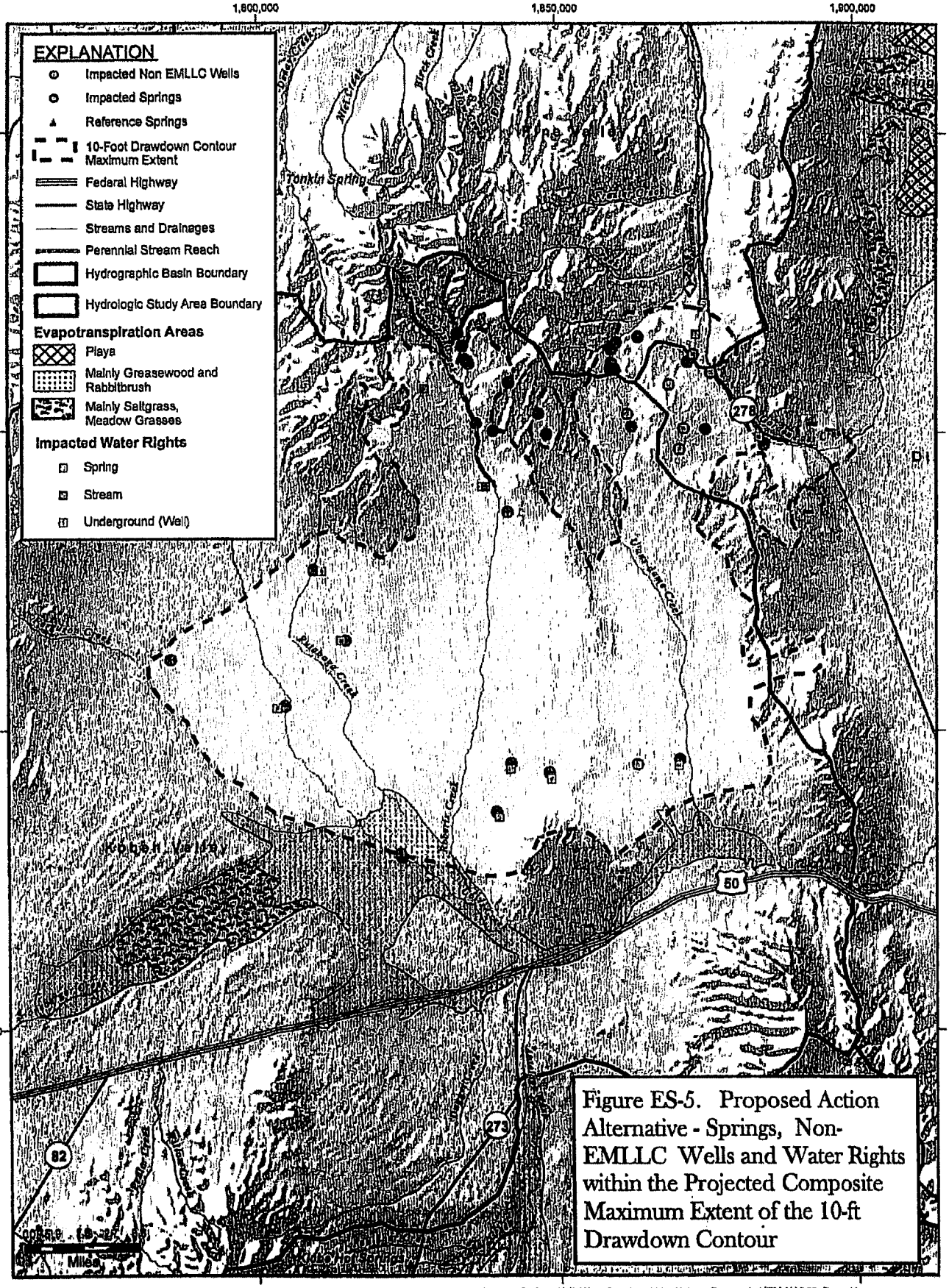


Figure ES-5. Proposed Action Alternative - Springs, Non-EMLLC Wells and Water Rights within the Projected Composite Maximum Extent of the 10-ft Drawdown Contour

001190

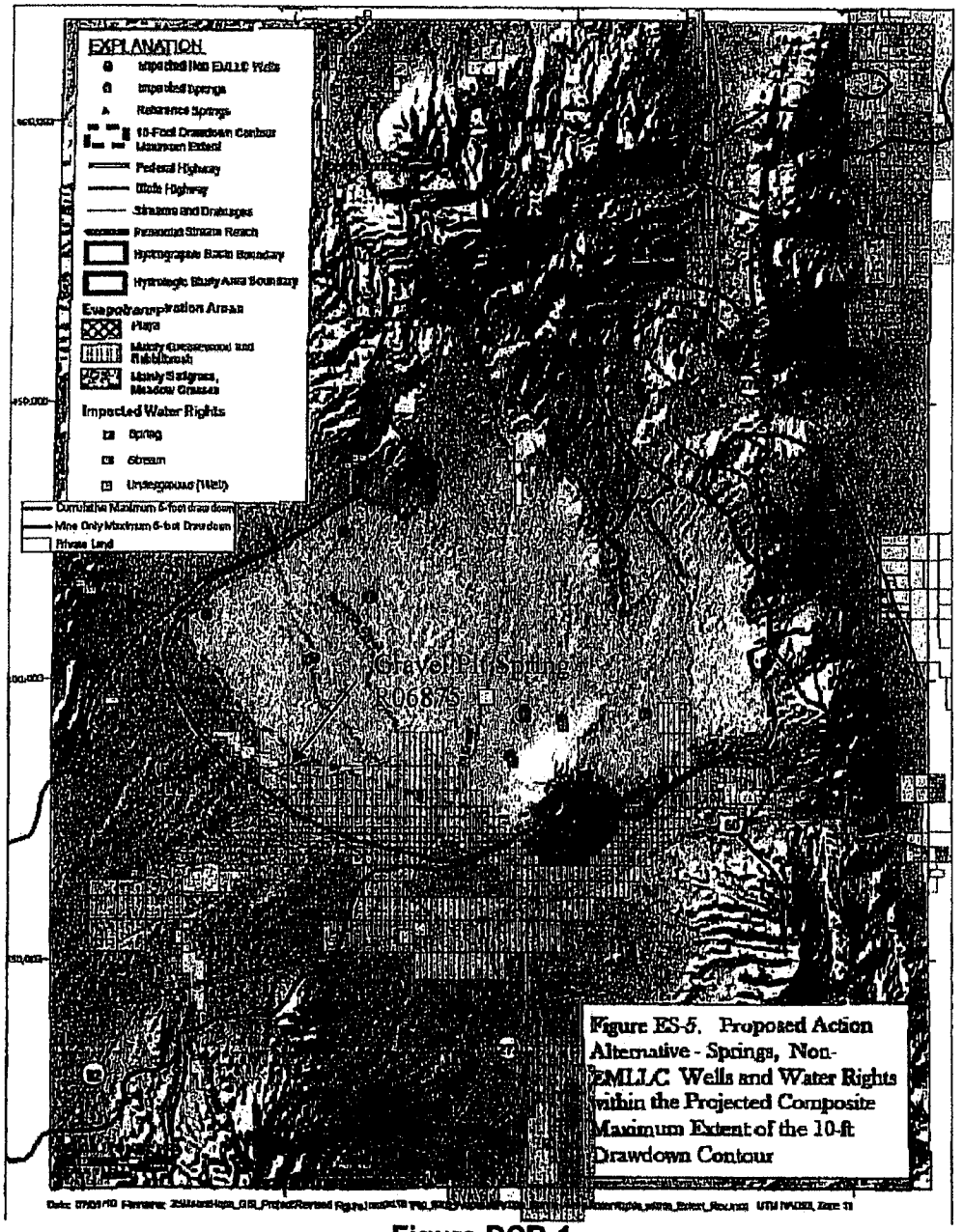
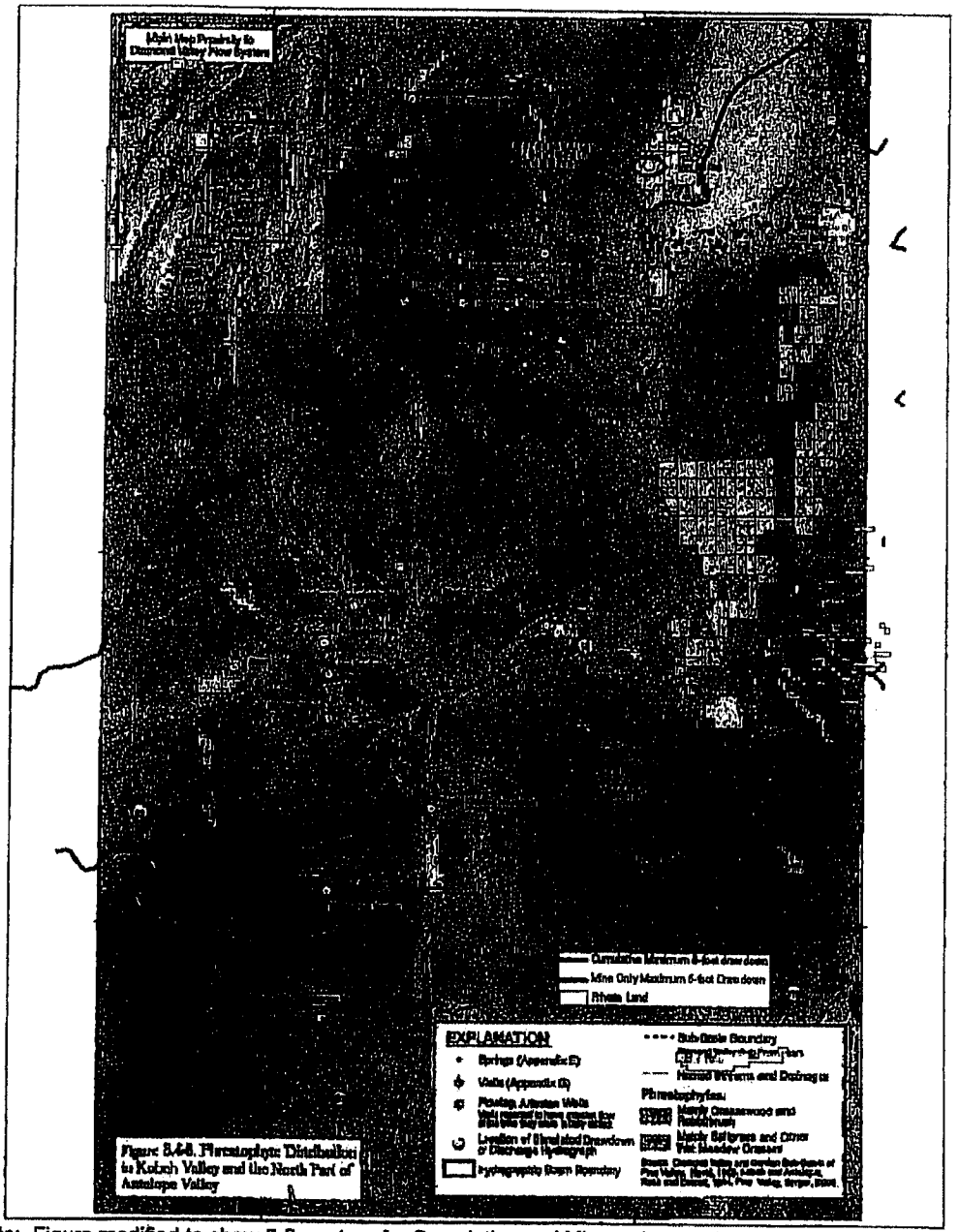


Figure ES-5. Proposed Action Alternative - Springs, Non-EMLLC Wells and Water Rights within the Projected Composite Maximum Extent of the 10-ft Drawdown Contour

Figure DCB-1
(Figure ES-5 with 5-ft year 2055 contour added)

As a point of clarification the 5 and 10 ft contours provided in Figure DCB-1 are for year 2055. This differs from the 10-ft contour in ES-5, which is a composite of the maximum extent of the 10-ft contour for different times after mining concludes.

Figure 3.4-8 below shows locations of wells and springs located within the 5-ft mine-only drawdown contour calculated by the County's consultant team. Comparison with Figure ES-5 shows an additional five wells and two springs in the Grub Flat area potentially impacted by the mine's pumping.



(Note: Figure modified to show 5-ft contour for Cumulative and Mine-only pumping scenarios)

003339

SEVENTH JUDICIAL DISTRICT COURT
COUNTY OF EUREKA, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, filed in case numbers: **CV1108-155, CV 1108-156, CV1108-157, CV1112-164 and CV 1112-165**

✔ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: January 13, 2012.

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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), 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 to all parties to this action by:

✔ Placing a true copy thereof in a sealed postage prepaid envelope, first class mail, in the United States Mail in Carson City, Nevada [NRCP 5(b)(2)(B)]

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DATED this 13th day of January, 2012.

Nancy Fontenot
NANCY FONTENOT

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Pursuant to NRAP Rule 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 a CD-ROM version of same to be served to all parties to this action by:

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DATED this 21st day of December, 2012.

/s/ Nancy Fontenot

impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources." ROA 3597; Ruling No. 5726 at 47.

In the present case, Applicant is requesting an interbasin transfer of groundwater from Kobeh and Diamond Valleys to the proposed place of use, which includes land in the Kobeh, Diamond, and Pine Valley hydrographic basins. ROA 594, 132:14 – 133:2; Exhibit 42, ROA 1943. The State Engineer granted interbasin transfers for all Applications, other than the Applications for Diamond Valley (Diamond Valley rights are restricted to use in Diamond Valley). ROA 3595. All the water, except for a minimal 726 AFA used for dust suppression, pumped out of Kobeh Valley will be used in the mining and milling processes in Diamond Valley. ROA 880:14 – 881:1. The State Engineer determined that the approved interbasin transfers were "environmentally sound" because the requested appropriation is less than the perennial yield of Kobeh Valley. ROA 3598.

In contradiction to the State Engineer's determination that the interbasin transfer would be environmentally sound, the State Engineer recognized that Applicant's groundwater model indicates impacts to springs and water rights on the valley floor of Kobeh Valley. *Id.* Further, and contrary to environmentally sound sustainability, the Applicant's model estimates 1600 AFA water flowing out of Kobeh Valley to Diamond Valley at Devils Gate, and further that the majority of the 11,300 AFA will be used in Diamond Valley. The State Engineer dismissed the admitted impacts on water resources by concluding, without any evidence, that a hypothetical mitigation plan to be created in the future "will ensure that any existing water rights are satisfied to the extent of the water right permit." *Id.* As discussed supra, no mitigation plan was entered into the Record.

The State Engineer's conclusion is not supported by substantial evidence, and thus is arbitrary and capricious. Instead, evidence in the Record supports a finding and determination that approval of these Applications will cause unreasonable impacts on water resources.

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Therefore, the interbasin transfer is not environmentally sound and must be denied. This Court should reverse Ruling No. 6127's approval of the Applications.

6. The State Engineer discounted overdraft in Diamond Valley and the negative effects that additional withdrawals in Kobeh Valley will have on subsurface flows from Kobeh to Diamond Valley, and existing water rights in Diamond Valley.

The State Engineer's failure to address the Applications' effect on the greater underground flow system, and specifically the underground flow from Kobeh Valley to Diamond Valley, will substantially and negatively impact Petitioners' existing water rights of use.

As a basis for the State Engineer's approval of Applications in Ruling No. 6127, the State Engineer determined the perennial yields of the basins at issue. Specifically, the State Engineer determined that the perennial yield for Kobeh Valley is 15,000 AFA, and therefore Applications should be approved. The State Engineer found that because total withdrawals from Kobeh Valley, including withdrawals proposed by Applications, would be less than 15,000 AFA there would be no effect. ROA 3584-3588. However, the Record supports that uncertainty exists as to the actual amount of water flowing from Kobeh Valley to Diamond Valley. The State Engineer did not account for any of this Valley flow and based his perennial yield finding and determination only on evapotranspiration. Ruling No. 6127 at ROA 3586. The State Engineer's determination discounted and underestimated the effect that further withdrawals from Kobeh Valley would have on water rights in Diamond Valley. This finding and determination was not supported by substantial evidence.

a. The Model Estimates 1600 AFA Contribution from Kobeh to Diamond Valley

Subsurface water flows from Kobeh Valley to Diamond Valley. ROA 3587. The State Engineer acknowledged that "there is a general agreement on the direction of flow," but that "the actual amount of subsurface flow between basins is uncertain." ROA 3585. Applicant's flow model estimated that as much as 1,600 AFA flow from Kobeh Valley to Diamond Valley,

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and that the flow between valleys increases as the water level drops in Diamond Valley.[11] ROA 3586, 3589. However, the State Engineer stated: "Because the groundwater flow model is only an approximation of a complex and partially understood flow system, the estimates of interbasin flow and drawdown cannot be considered as absolute values." ROA 3590. Even so, not to consider that interbasin flow at all, when the State Engineer acknowledged it existed in some "non-absolute" amount, was arbitrary and capricious given his findings and determinations related to perennial yield.

b. State Engineer Acknowledges Increased Use in Kobeh Valley Could Affect Diamond Valley.

The Reconnaissance Report 30, relied upon by the State Engineer in Ruling No. 6127, states "that substantial development in one of the basins could affect the yields of adjacent basins." ROA 3586. The Diamond Valley Hydrographic Basin has no more groundwater rights available within the Basin's perennial yield. ROA 3595. Despite the admitted lack of understanding regarding true subsurface flows, the State Engineer determined that substantial increases of water withdrawals in Kobeh Valley in line with these Applications would "not measurably decrease subsurface groundwater flow from Kobeh to Diamond Valley." ROA 3590. The State Engineer's determination is not supported by substantial evidence in the Record and thus is arbitrary and capricious.

Diamond Valley groundwater rights are fully subscribed, and decreased flows from Kobeh to Diamond Valley could affect yields in Diamond Valley, thus depriving water right holders in Diamond Valley of the exercise of the full allocation of their water rights. More importantly, a drawdown in the aquifer levels will require Diamond Valley appropriators to drill deeper and "race to the bottom" of the aquifer before the State Engineer might intervene to enforce to prevent or mitigate the interference. Most importantly, the State Engineer's

[11] 1,600 AFA is enough water to irrigate approximately 530 acres of agricultural crops, assuming water is applied at a duty or volume of 3.0 acre-feet per acre of land, or 400 acres at a duty of 4.0 acre-feet per acre of land.

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determination flies in the face of Nevada's established policy: "To encourage the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada." NRS § 533.024(1)(c).

c. Testimony Evidences Decline in Diamond Valley.

Petitioner Benson testified at hearing that the water level in Diamond Valley is falling at the Benson agricultural properties, and requested that the State Engineer consider impacts to existing water rights based on the flow system from Kobeh Valley to Diamond Valley. ROA 3607. In Ruling No. 6127, the State Engineer found and determined that falling water levels are due to agricultural pumping so that further aquifer drawdowns will not be impacted by pumping under Applications. *Id.* This conclusion is arbitrary and capricious. If water levels are dropping because of current appropriations, it makes no sense that additional withdrawals will not further impact the aquifer drawdown. Such a conclusion is not supported by substantial evidence.

The flow model is only an "approximation" and the flow system is only "partially understood," as admitted by the State Engineer. ROA 3590. Moreover, the State Engineer did not engage in any analysis of whether water levels would further decline due to agricultural withdrawals should the subsurface flow between the basins be reduced because of additional withdrawals in Kobeh Valley.

The State Engineer's Ruling No. 6127 cannot be supported as to its findings and determination regarding flow impacts between the Valleys.

d. USGS is Currently Studying Inter-basin Water Flow.

Better evidence will be available in the near future regarding accurate flows between the water basins, and it was an error for the State Engineer to make a decision based on mere "approximations" rather than substantial evidence. In conjunction with Eureka County, Nevada, the U.S. Geological Survey ("USGS") is currently engaged in an ongoing multiphase hydrogeological study of the Diamond Valley Flow System. ROA 711:17-22, 748:16 – 749:3, 759:14-18. An interpretive report relating the results of the study will be published in 2013. ROA

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789:14-23. The USGS study is intended to, among other things, provide hydrogeologists with a better understanding of the flow system and a better estimate of the amount of subsurface flow from Kobeh to Diamond Valleys. Toward that end, phase two of the study includes: 1) drilling monitoring wells in the vicinity of Devil's Gate to more accurately define subsurface outflow from Kobeh Valley to Diamond Valley, 2) drilling monitoring wells in Diamond Valley to the north of Whistler Peak to aid in assessment of possible outflow through this portion of Sulfur Spring Range, 3) operation of micro meteorological stations in Diamond and Kobeh Valleys, and 4) the detailed mapping of phreatophyte vegetation in order to review and update the water budgets for the basins. Exhibit 39, ROA 1201-1202.

At the very least, should this Court determine that an after-issued mitigation plan complies with due process, the State Engineer should also be required to incorporate the findings and conclusions of an after-issued USGS study, to determine any further conditions and limitations on the withdrawal under these Applications.

e. Applicant Acknowledges Inter-Basin Flow from Kobeh to Diamond Valley.

Applicant acknowledges an unknown amount of groundwater flows between Kobeh Valley and Diamond Valley at a depth through the bedrock north of Whistler Mountain, particularly the deep portions of the range composed of carbonate rocks, in addition to the shallow subsurface flow and carbonate flow of intermediate depth near Devil's Gate. Exhibit 39, ROA 1264-1265 and 738-739.

Given this evidence in the Record by the Applicant, it was arbitrary and capricious for the State Engineer not to address or incorporate provisions into its Ruling No. 6127 to address whatever amount of groundwater flow might reasonably exist in order to prevent injury to Petitioners and Nevada's public waters.

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f. The State Engineer Failed to Consider the Significance and Reliance Upon Ground Water Flow from Kobeh Valley to Diamond Valley.

Even the conservative estimate of 1,583 AFA used in Applicant's groundwater model amounts to approximately 13 percent of the total recharge to southern Diamond Valley. ROA 3270. Ruling No. 6127 also recognizes subsurface flows between Kobeh Valley and Diamond Valley. ROA 3587. Based on the state of overdraft in Diamond Valley and the hydrologic connection between Diamond Valley and Kobeh Valley, vastly increasing groundwater consumptive use pumping in Kobeh Valley will likely detrimentally impact water levels in Diamond Valley, and, by extension, cause injury to water rights in Diamond Valley, including those rights held by Petitioners. Such a possibility was not, or could not, be adequately addressed by the State Engineer, given the State Engineer's admission that the flow models were not accurate. Impact to and injury of existing water rights will occur as a result of diminishing the natural inflow or "source water" of Diamond Valley's groundwater by the substantial increase withdrawing water from the Kobeh Valley hydrographic basin.

This Court should reverse Ruling No. 6127's approval of these Applications.

7. The State Engineer erred by relying on the model presented by Applicant because that model underestimates the impacts caused by its proposed pumping, and has an unreasonably high degree of error.

Ruling No. 6127 relies on a model presented by Applicant that shows "limited" impacts to existing water rights as a result of groundwater withdrawals proposed in these Applications. *See, e.g.*, ROA 3590-3591. However, Applicant's model provides for a ten-foot drawdown contour line for predicting groundwater impacts. *See, e.g.*, ROA 1184.

The "magic" of graphs thus visualizes an impact that is inaccurate. By using a ten-foot drawdown contour line, as opposed to a five-foot drawdown contour line, Applicant underestimates the impacts which will result from Applicant's pumping.[12] ROA 576:10-13. A

[12] By using a ten-foot contour threshold in the model, all impacts to water at less than the ten-foot drawdown are ignored and not considered.

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drawdown of less than five feet can cause springs to dry up, causing impacts to aquatic and plant life in streams associated with those springs. ROA 576:20-25.

The submission by Applicant of a model with a ten-foot drawdown contour line had nothing to do with a scientific principle or belief that it would accurately account for all impacts. ROA 382:11 – 383:14. The sole reason the ten-foot drawdown contour line was used was because the Bureau of Land Management ("BLM") requested that measurement for its own purposes.[13] *Id.* However, the State Engineer's purposes are quite different from BLM's in that the State Engineer is required by law to investigate and analyze ***all*** impacts to existing water rights, not just those that are affected by a drawdown of ten feet or more. NRS § 533.370(5). Moreover, it is the policy of the State of Nevada that the State Engineer rely on the best available science (NRS § 533.024(1)(c)), which is notably absent from the ten-foot drawdown model given the fact that impacts at less than ten feet can occur.

Finally, the evaluation of the model's predictability indicates that the model has a low degree of predictability. The residual error rate was found to be higher than generally deemed acceptable by the authors of the software utilized to create the model. ROA 593:14-21.

The State Engineer acknowledges that the model is only an approximation, however, the State Engineer does not take the next step and require the model to be run at a level to show those impacts and injuries to water rights. An analysis of effects shown at a five-foot contour must be reviewed, especially when Applicant's own expert witness testimony admits that wells and springs will go dry due to Applicant's pumping. Substantial evidence does

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[13] It is worth noting that it is not uncommon for agencies to ask for a greater analysis than that shown by the BLM starting threshold when indicators show that further analysis should be conducted. On November 30, 2011, the United States Environmental Protection Agency ("EPA") sent a comment letter to the Bureau of Land Management in relation to a draft Environmental Impact Statement for the Southern Nevada Water Authority pipeline project (CEQ#20110176). In this comment letter the EPA states "there is a need for evaluation of the effects of groundwater drawdown of less than 10 feet." While it is not in the jurisdiction of the EPA to govern groundwater, the impacts in the draft EIS were great enough to trigger the EPA to inquire further. Here groundwater impact will occur and it is the place of the State Engineer to consider the impacts and injury. A five-foot contour analysis must be used.

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not support the grant of permits that will dry up springs and wells. This is injury, and this Court should reverse Ruling No. 6127's approval of these Applications.

B. The State Engineer's issuance of the 2011 Permits was contrary to and affected by error of law, without any rational basis, beyond the legitimate exercise of power and authority of the State Engineer, and resulted in a denial of due process to Petitioners.

On December 1, 13, and 14, 2011, the State Engineer issued permits to Applicant on some, but not all, of Applicant's Applications at issue. The issuance of the 2011 Permits was contrary to and affected by error of law, without rational basis, beyond legitimate exercise of power and authority, and resulted in a denial of due process to Petitioners. This Court should reverse the State Engineer's issuance of 2011 Permits.

1. The State Engineer's issuance of 2011 Permits above the duty requested by Applicant was an error of law.

Applicant requested a total of 11,300 AFA of water from the Kobeh Valley Hydrographic Basin. ROA 3588. However, the State Engineer issued permits with a total combined duty of over 30,000 AFA from Kobeh Valley. The 2011 Permits limit the total duty of water used each year to 11,300 AFA, but the total of the duties stated in the 2011 Permits exceed 30,000 AFA.

The State Engineer's action in granting water right permits with a total combined duty exceeding 30,000 AFA is error. There is no law that permits the State Engineer to permit more water use than requested in an Application. In addition, the State Engineer provides no support for such a conclusion in Ruling No. 6127.

The total duty of all water permits issued to Applicant in Kobeh Valley should be limited to Applicant's request of 11,300 AFA. This Court should reverse the State Engineer's issuance of 2011 Permits No. 73548, 73549, 73550, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, and

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79942. *See generally* Eureka County's Record on Appeal ("EC ROA"), submitted January 13, 2012, EC ROA 15-20 and 87-150.

2. The State Engineer's issuance of the 2011 Permits No. 76005-76009, 76802-76805, and 78424 was in error of law and contrary to Ruling No. 6127 because the permits did not include the condition that any excess water produced but not consumed be returned to the groundwater aquifer in Diamond Valley.

Ruling No. 6127 finds as follows:

> The State Engineer finds that any permit issued for the mining project with a point of diversion in the Diamond Valley Hydrographic Basin must contain permit terms restricting the use of water to within the Diamond Valley Hydrographic Basin and any excess water produced that is not consumed within the basin must be returned to the groundwater aquifer in Diamond Valley.

ROA 3595. Applications 76005-76009, 76802-76805, and 78424 request diversion from the Diamond Valley Hydrographic Basin. *Id*, EC ROA 61-70, 79-86, and 151-152.

The State Engineer issued permits for Applications 76005-76009, 76802-76805, and 78424. *Id.* The 2011 Permits state that the place of use is limited to the Diamond Valley Hydrographic Basin. However, these 2011 Permits do not include the second requirement of Ruling No. 6127, that "any excess water produced that is not consumed within the basin must be returned to the groundwater aquifer in Diamond Valley."

It was an error of law for the State Engineer to fail to comply with Ruling No. 6127 by leaving out the "return flow" requirement. This Court should reverse the issuance of 2011 Permits No. 76005-76009, 76802-76805, and 78424. *Id.*

3. The State Engineer's issuance of 2011 Permits which transfer irrigation water rights in excess of consumptive duties is inconsistent with Ruling No. 6127 and affected by error of law.

In Ruling No. 6127, the State Engineer set the consumptive use duties for Applications seeking to change the points of diversion, places of use, and manners of use for irrigation water rights. ROA 3603-3604. The State Engineer defined "consumptive use" as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to non-recoverable water vapor, or otherwise does not return to

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the waters of the state." ROA 3603. The State Engineer specifically found that the consumptive use of the water rights sought to be changed by Applications "is the quantity considered under NRS § 533.3703 in allowing for the consideration of a crop's consumptive use in a water right transfer." *Id.* The State Engineer thereafter set the consumptive use duties for alfalfa and highly-managed pasture grass in Kobeh and Diamond Valleys. ROA 3604.

Despite the State Engineer's ruling that transfers on irrigation water rights be limited to the consumptive use of the water, the State Engineer thereafter issued the following permits numbered: 57835 (abrogated by 76008); 76005 (abrogated by 76802); 76006 (abrogated by 76803); 76007 (abrogated by 76804); 76009 (abrogated by 76805); 76803 (abrogated by 78424); 76004 (abrogated by 79913); 76003 (abrogated by 79915); 75997 (abrogated by 79917); 75996 (abrogated by 79920); 75999 (abrogated by 79921); 76989 (abrogated by 79923); 76000 (abrogated by 79926); 76002 (abrogated by 79927); 75998 (abrogated by 79932); 76745 (abrogated by 79934); 76990 (abrogated by 79935); 76746 (abrogated by 79941); 76001 (abrogated by 79942). *See generally* EC ROA 43-86, 91-92, 95-96, 99-100, 105-108, 111-112, 117-120, 129-130, 133-136, and 147-152. Those 2011 Permits state that water use is only "initially" limited to net consumptive use. The 2011 Permits allow additional diversion, up to the total duty (amount of water) allowed under the underlying permit or certificate, "if it can be shown that the additional diversion will not cause the consumptive use...to be exceeded." ROA 3604.

The State Engineer's issuance of the 2011 Permits listed above allowing additional diversion beyond the net consumptive duty is inconsistent with Ruling No. 6127 and an error of law. In Ruling No. 6127, the State Engineer specifically found that the net consumptive duty "is the quantity considered" when allowing a water right transfer. The State Engineer issued 2011 Permits in contradiction to Ruling No. 6127. This Court should reverse the issuance of the 2011 Permits listed above.

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4. The State Engineer's issuance of 2011 Permits with a 90,000 acre place of use was beyond the State Engineer's power and authority, and an error of law.

As discussed in Section V.A(4), *supra*, Applicant overstated the intended place of use in Applications. The place of use is identified as a 90,000 acre area, but Applicant only intends to use the water on 14,000 acres of land. Ruling No. 6127 at ROA 133. Additional acres described as a place of use are speculative. The State Engineer's approval of these Applications and the overstated place of use is an error of law in opposite of the beneficial use doctrine. There is no law that allows the State Engineer to issue a permitted place of use of the speculation of the Applicant. This Court should reverse the State Engineer's issuance of all 2011 Permits.

5. The State Engineer's issuance of 2011 Permits conditioned on a monitoring, management and mitigation plan, without such a plan submitted at hearing, violates Petitioners' due process rights.

As discussed in Section V.A(3), *supra*, the State Engineer's Ruling No. 6127 heavily relied on a non-existent mitigation plan for the conclusion that any harm to existing water rights could be fully and adequately mitigated. However, no such mitigation plan was offered by Applicant on the record, and thus the State Engineer's conclusion was an error of law. The State Engineer's acceptance of a mitigation plan without any such plan offered on the record at hearing denies Petitioners the opportunity to controvert the successfulness of a mitigation plan, and thus denies Petitioners a due process hearing on that matter.

The State Engineer's issuance of 2011 Permits with a condition that the 2011 Permits are subject to the State Engineer's approval of a mitigation plan further violates Petitioners' due process rights. Petitioners were not given an opportunity to controvert the mitigation plan at hearing, and will not be given a future opportunity to challenge the mitigation plan on which the 2011 Permits are issued. This Court should reverse the State Engineer's issuance of all the 2011 Permits at issue in this case.

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6. The State Engineer's issuance of 2011 Permits conditioned on a monitoring, management and mitigation plan is contrary to Ruling No. 6127, and thus an error of law.

Ruling No. 6127 determines: "The State Engineer finds that a monitoring, management and mitigation plan ***prepared with input from Eureka County*** must be approved by the State Engineer prior to pumping groundwater for the project." ROA 3610 (emphasis added).

Despite the plain language of Ruling No. 6127, the 2011 Permits issued by the State Engineer do not require that the monitoring, management and mitigation plan be prepared with input from Eureka County. The 2011 Permits state: "This permit is subject to the approval of a monitoring, management and mitigation plan by the State Engineer before any water is developed for mining." The State Engineer's issuance of the 2011 Permits, excluding input from Eureka County, was contrary to Ruling No. 6127 and an error of law. This Court should reverse the State Engineer's issuance of all 2011 Permits.

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VI.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court reverse Ruling No. 6127 and the State Engineer's issuance of Permits No. 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989, 76990, 76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941, 79942, and 78424.

DATED this 13th day of January, 2012.

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Attorneys for the Petitioners Keneth F. Benson, Diamond Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family LP

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding ***PETITIONERS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP'S OPENING BRIEF*** does not contain the social security number of any person.

DATED this 13th day of January, 2012.

SCHROEDER LAW OFFICE, P.C.

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2012, I caused a copy of the foregoing ***PETITIONERS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP'S OPENING BRIEF*** to be served on the following parties as outlined below:

VIA US MAIL with courtesy copy by electronic mail

Karen A. Peterson
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Page 1 - CERTIFICATE OF SERVICE

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Dated this 13th day of January, 2012.

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioner,

vs.

THE STATE OF NEVADA, EX. REL., STATE ENGINEER, DIVISION OF WATER RESOURCES, and KOBEH VALLEY RANCH, LLC, a Nevada limited liability company,

Respondents. /

Case No.: CV1108-155

Dept. No.: 2

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

Petitioners/Plaintiffs,

vs.

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

Respondents/Defendants. /

Case No.: CV1108-156

Dept. No.: 2

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

Petitioners,

vs.

STATE ENGINEER, OF NEVADA, OFFICE OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, and KOBEH VALLEY RANCH, LLC, a Nevada limited liability company,

Respondents. /

Case No.: CV1108-157

Dept. No.: 2

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

Petitioner,

vs.

THE STATE OF NEVADA, EX. REL., STATE ENGINEER, DIVISION OF WATER RESOURCES, and KOBEH VALLEY RANCH, LLC, a Nevada limited liability company,

Respondents. /

Case No.: CV1112-164

Dept. No.: 2

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

Petitioners,

vs.

STATE ENGINEER OF NEVADA, OFFICE OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, and KOBEH VALLEY RANCH, LLC, a Nevada limited liability company,

Respondents. /

Case No.: CV1112-165

Dept. No.: 2

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EUREKA COUNTY'S OPENING BRIEF

Petitioner, EUREKA COUNTY, by and through its counsel, ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD. and THEODORE BEUTEL, ESQ., the EUREKA COUNTY DISTRICT ATTORNEY, files this Opening Brief in support of its Petitions for Judicial Review as follows:

I.

INTRODUCTION

The STATE ENGINEER disregarded his statutory obligations and the specific factual information associated with the applications to appropriate 11,300 acre feet annually of water at issue herein as well as the specific information associated with the Kobeh Valley Hydrographic Basin, as follows:

- NRS 533.370(2)[1] obligates the STATE ENGINEER to reject applications that will conflict with existing rights. The Applicant's experts testified that such conflicts would occur from pumping 11,300 acre feet annually of water, yet the STATE ENGINEER still granted the Applications.
- In ignoring his statutory obligation to reject the Applications, the STATE ENGINEER relied primarily upon a future plan to mitigate impacts from the Applicant that had not yet been drafted or presented to the STATE ENGINEER and disregarded the undisputed evidence that mitigation in this situation would not be effective and that the Applicant had in the past failed to follow through with necessary mitigation.
- The STATE ENGINEER ignored the substantial factual evidence of record showing: 1) the Applications were not accurate, 2) the numerical model presented was flawed, 3) the Applicant will not capture the perennial yield of water available for appropriation in Kobeh Valley, 4) the interbasin transfer is not environmentally sound as it relates to the basin of origin, 5) the interbasin transfer will unduly limit the future growth and development in the basin of origin, and 6) the past failure to place base rights to beneficial use resulted in a forfeiture of those water rights.
- The STATE ENGINEER violated his obligations pursuant to NRS 533.325, which prohibits granting change applications for water rights that have not yet been permitted, and NRS 533.364, which requires the STATE ENGINEER to obtain a complete basin inventory prior to granting certain interbasin transfers.
- The STATE ENGINEER issued permits that were inconsistent and contrary to Ruling 6127.

[1] NRS 533.370 was amended by Assembly Bill 115 in the 2011 Nevada Legislative session. Such amendments renumbered the provisions of NRS 533.370. All citations to NRS 533.370 herein will utilize the amended numbering as codified in 2011.

In light of these considerable violations of statute, numerous errors and the arbitrary and capricious actions by the STATE ENGINEER, EUREKA COUNTY requests that this Court issue an order vacating the STATE ENGINEER's Ruling 6127, denying the Applications and vacating the Permits issued by the STATE ENGINEER.

II.

STATEMENT OF THE CASE AND RELEVANT FACTS

KOBEH VALLEY RANCH, LLC (hereafter "KVR or the Applicant") proposes to develop a molybdenum mine, commonly referred to as the Mount Hope Mine Project, to be located in Eureka County, Nevada. See, State Engineer's Summary of Record on Appeal (hereafter "ROA"), Vol. VI, pp. 000999-001023, Vol. X, pp. 001945-002160, Vol. XI, pp. 002161-002294, and, Vol. XVIII, p. 003581. In order to develop the mine, between May, 2005 and June 2010, KVR[2] filed Applications with the STATE OF NEVADA, DIVISION OF WATER RESOURCES, STATE ENGINEER (hereafter "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 hereafter "Applications"), though a portion of the change applications requested the right to change water rights not already permitted. See, ROA Vol. VI, pp. 000999-001023, Vol. X, pp. 001945-002160, Vol. XI, pp. 002161-002294, and, Vol. XVIII, pp. 003572-003575. The Applications sought a total combined duty of 11,300 acre feet annually ("afa") of groundwater for mining and milling purposes associated with the proposed mine. See, ROA Vol. VI, pp. 000999-001023, Vol. X, pp. 001945-002160, Vol. XI, pp. 002161-002294, and, Vol. XVIII, p. 003581.

The water requested to be appropriated pursuant to the Applications is located in two (2) different hydrographic basins, the Kobeh Valley Hydrographic Basin ("Kobeh Valley") and the Diamond Valley Hydrographic Basin ("Diamond Valley"). See, ROA Vol. VI, pp. 000999-001023, Vol. X, pp. 001945-002160, and, Vol. XI, pp. 002161-002294. The quantity of water requested has never been pumped from the Kobeh Valley Hydrographic Basin and Diamond Valley is severely over appropriated. See, ROA Vol. VII, pp. 000182-000183, 001209-001210. The place of use for

[2] The Applications were filed by a variety of individuals and entities. See, ROA Vol. VI, pp. 000999-001023, Vol. X, pp. 001945-002160, Vol. XI, pp. 002161-002294, and, Vol. XVIII, pp. 003572-003575. Those Applications not originally filed by KVR were later assigned and/or transferred to KVR. Id.

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the water sought to be appropriated pursuant to the Applications was identified as an approximately 90,000 acre area, which sits astride the boundaries between Kobeh Valley, Diamond Valley and the Pine Valley Hydrographic Basins. See, ROA Vol. VI, pp. 000999-001023, Vol. X, pp. 001945-002160, and, Vol. XI, pp. 002161-002294. While the approximate 90,000 acre area identified in the Applications incorporated the area being considered for the mine, KVR's actual plan of operations specifically identified only a 14,000 acre area where the mine would be located and operated and the water requested pursuant to the Applications put to beneficial use. See, ROA Vol. I, p. 000133. Regardless of whether the place of use of the water is the approximate 90,000 acre area or the 14,000 acre area, most of the water to be appropriated pursuant to the Applications will be diverted in one hydrographic basin and put to beneficial use in another hydrographic basin, constituting an interbasin transfer. See, ROA Vol. XVIII, p. 003594.

The Applications were protested by various individuals and entities including EUREKA COUNTY. See, ROA Vol. VI, pp. 000979-000998, Vol. XIV, pp. 002828-002836, Vol. XVI, pp. 003253-003258, Vol. XVII, pp. 003407-003448, and, Vol. XVIII, pp. 003575-003581. EUREKA COUNTY protested all but one of the Applications asserting multiple legal and factual deficiencies including, but not limited to: (1) the hydrographic basins at issue were fully appropriated; (2) the Applications would have impacts on water rights users in Kobeh Valley, Diamond Valley and Pine Valley; (3) the inaccurate and over-expansive place of use identified in the Applications lacked sufficient specificity; (4) the Applications failed to meet the statutory requirements for an interbasin transfer of water; and, (5) the base rights for some of the change applications had been forfeited. See, ROA Vol. XVI, pp. 003253-003258, Vol. XVII, pp. 003407-003448, and, Vol. XVIII, pp. 003575-003581.

The STATE ENGINEER thereafter noticed and held an administrative hearing on the Applications from December 6-7, 2010 and December 9-10, 2010. See, ROA Vol. VI, pp. 000934-000939, Vol. XVIII, p. 003582.[3] At the hearing, EUREKA COUNTY presented substantial

[3] The STATE ENGINEER noticed and originally held an administrative hearing on the Mt. Hope Mine Project Applications in October, 2008. See, ROA Vol. XVIII, p. 003582. The applications at issue in the October, 2008 hearing were slightly different than the current Applications in that some applications that were considered at that hearing have been withdrawn and are not currently at issue and some of the Applications currently at issue were filed after the October, 2008 hearing. Following the October, 2008 hearing, the STATE ENGINEER entered Ruling 5966 granting

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evidence to support its grounds of protest, including testimony, documents and studies. Specifically, EUREKA COUNTY identified statutory requirements that KVR had failed to comply with, such as proving that the Applications, if granted, would not conflict with existing water rights, as required by NRS 533.370(2), satisfying the elements required pursuant to NRS 533.370(3) for approval of an interbasin transfer of water or showing that none of the base rights upon which the change applications were founded had been subject to forfeiture pursuant to NRS 534.090. See, e.g., ROA Vol. I, pp. 000187 and 000197-000198, ROA Vol. IV, pp. 000695 and 000697-000698 and Case Nos. CV0904-122 and CV0904-123 Record on Appeal ("CV0904 ROA"), Transcript, Vol. 3, p. 423, ll. 9-19.[4] EUREKA COUNTY also submitted expert evidence of significant flaws in the numerical groundwater flow model presented by KVR. See, ROA Vol. III, p. 000576 and 000593. Further, EUREKA COUNTY challenged the ability of KVR and/or the STATE ENGINEER to rely upon a mitigation plan that had not been drafted, presented to the STATE ENGINEER or provided to the various protestants so that they could cross-examine witnesses associated with such a mitigation plan, particularly in light of the substantial challenges associated with such mitigation. See, e.g., ROA Vol. III, p. 000494-000495 and 000500. Finally, EUREKA COUNTY asserted that the Applications were defective since KVR's place of use was overly broad and KVR could not identify where all the wells would actually be located. See, ROA Vol. I, p. 000133 and Vol. II, p. 000250.

Though KVR presented evidence in support of the Applications, KVR often conceded the validity of the grounds of protest asserted by EUREKA COUNTY. As an example, KVR conceded that there would undeniably be impacts to existing water rights users which would result from KVR's proposed pumping. See, e.g., ROA Vol. I, pp. 000163, 000187, 000197-198. As a further example, KVR conceded that the 90,000 acre area identified on the Applications was not the

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most of the Applications. Id. Several parties sought judicial review of Ruling 5966, including EUREKA COUNTY. Id. This Court entered an order on April 21, 2010 vacating Ruling 5966. Id.

[4] The transcript and record for the October, 2008 hearing were incorporated by reference into the proceeding held before the STATE ENGINEER in December, 2010. See, ROA Vol. I, p. 000008. The October, 2008 transcript and record were filed with this Court in the judicial review proceedings of STATE ENGINEER's Ruling 5966, such proceedings being Case Nos. CV0904-122 and CV0904-123 filed in this Court. The parties agreed that in the interests of avoiding a duplicate filing of the record on appeal from those cases in this proceeding, the record on appeal from Case Nos. CV0904-122 and CV0904-123 will be cited in this case, along with the Record on Appeal filed by the STATE ENGINEER on or about October 27, 2011.

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actual place of use but instead that the 14,000 acre area identified in the plan of operations was the actual place of use. See, ROA Vol. I, p. 000133.

Following the December, 2010 hearing, the STATE ENGINEER sent correspondence dated March 3, 2011 to KVR requesting additional information, specifically information regarding the scope of the interbasin transfer of water and an inventory as required pursuant to NRS 533.364. See, Eureka County's Supplemental Summary of Record on Appeal – CV1108-155, SROA 01-02. Both KVR and EUREKA COUNTY provided responses to such request for additional information and the STATE ENGINEER subsequently requested in correspondence dated April 20, 2011 that KVR provide additional information in compliance with NRS 533.364. See, SROA 03-070. Thereafter, the STATE ENGINEER noticed an additional hearing on May 10, 2011. See, ROA Vol. VI, pp. 000940-000942. The information required pursuant to NRS 533.364 was discussed at the May, 2011 hearing; however, KVR had not yet submitted the required inventory. See, ROA Vol. V, pp. 000921 and 000923. Sometime after the May, 2011 hearing, KVR submitted to the STATE ENGINEER the inventory required by NRS 533.364, though no additional hearings were held to allow EUREKA COUNTY, or any other protestant, to respond to, or cross-examine witnesses with regard to, the submitted inventory. See, SROA 074-0273. In fact, the inventory was not even provided to EUREKA COUNTY until July 5, 2011, after the STATE ENGINEER sent correspondence to KVR on June 22, 2011 acknowledging receipt and acceptance of the inventory. See, SROA 071-073.

On July 15, 2011 the STATE ENGINEER issued Ruling 6127 (hereafter sometimes referred to as "Ruling"). See, ROA Vol. XVIII, pp. 003572-003613. In Ruling 6127, the STATE ENGINEER granted the majority of the Applications and allowed the appropriation of a total combined duty of 11,300 afa of water, subject to minimal conditions, for example, the submission of a monitoring, management and mitigation plan. See, ROA Vol. XVIII, p. 003613. Thereafter, on December 1, December 11 and December 14, 2011, the STATE ENGINEER issued the Permits granted pursuant to Ruling 6127.[5] See, EC ROA 01-0152. The Permits as issued are not consistent

[5] Permit Nos. 72695, 72696, 72697, 72698, 73545, 73546, 73547, 73548, 73549, 73550, 73551, 73552, 74587, 75988, 75989, 75990, 75991, 75992, 75993, 75994, 75995, 75996, 75997, 75998, 75999, 76000, 76001, 76002, 76003, 76004, 76005, 76006, 76007, 76008, 76009, 76745, 76746, 76989 and 76990 were issued on December 1, 2011. Permit Nos.

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with the terms, conditions and restrictions explicitly identified in Ruling 6127. Id. and ROA Vol. XVIII, pp. 003572-003613. Following the issuance of the Permits, the STATE ENGINEER issued amended permits for Permit Nos. 76008, 76802-76805 and 78424, rectifying one inconsistency between Ruling 6127 and those Permits. See, EC ROA 0153-0164. Nonetheless, the STATE ENGINEER has not amended the Permits so that they are entirely consistent with Ruling 6127.

EUREKA COUNTY now requests judicial review of the portion of Ruling 6127 granting the Applications and of the issuance of the inconsistent Permits.

III.

ARGUMENT

A. Standard of Review.

A court reviewing the STATE ENGINEER's decision, with regard to questions of fact, must limit itself to a determination of whether substantial evidence in the record supports the STATE ENGINEER's decision. See, Town of Eureka v. State Engineer, 108 Nev. 163, 165, 826 P.2d 948 (1992)(citing Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). The court should sustain the ruling if it finds the ruling is supported by substantial evidence. See, United States v. Alpine Land & Reservoir Co., 919 F. Supp. 1470, 1474 (D. Nev. 1996). The Nevada Supreme Court has defined substantial evidence as "that which a reasonable mind might accept as adequate to support a conclusion." See, City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

Additionally, the decision of an administrative agency will generally not be disturbed unless it is arbitrary or capricious. See, Alpine Land & Reservoir Co., 919 F. Supp. at 1474 (D. Nev. 1996). A decision is arbitrary and capricious if it is "baseless or despotic" or evidences "a sudden turn of mind without apparent motive; a freak, whim, mere fancy." See, City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994)(citing City Council v. Irvine, 102 Nev. 277, 278-279, 721 P.2d 371, 372 (1986).

76802, 76803, 76804, 76805, 79911, 79912, 79913, 79914, 79915, 79916, 79917, 79918, 79919, 79920, 79921, 79922, 79923, 79924, 79925, 79926, 79927, 79928, 79929, 79930, 79931, 79932, 79933, 79934, 79935, 79936, 79937, 79938, 79939, 79940, 79941 and 79942 were issued on December 13, 2011. Permit No. 78424 was issued on December 14, 2011. All of the Permits issued between December 1, 2011 – December 14, 2011 are referred to collectively herein as the "Permits".

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When considering purely legal questions, a court does not grant deference to the STATE ENGINEER's decision in any manner. Town of Eureka v. State Engineer, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) (citing Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)).

B. The STATE ENGINEER Acted Arbitrarily And Capriciously By Ignoring NRS 533.370(2) Which Prohibits Him From Granting Water Rights Applications That Impact Existing Rights.

The powers of a state administrative agency are limited to the powers specifically set forth in statute. Andrews v. Nevada State Bd. of Cosmetology, 86 Nev. 207, 208, 467 P.2d 96, 96 (1970). An administrative agency "has no general or common law powers, but only such powers as have been conferred by law expressly or by implication. ... 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." Id. (internal citations omitted).

The powers of the STATE ENGINEER are enumerated, in part, in NRS Chapter 533. NRS 533.370(2) provides explicitly 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, the Nevada Supreme Court has stated: "the State Engineer must deny applications ... when the proposed use conflicts with existing rights." Office of State Eng'r v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 204 (1991).

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. Based upon that finding, the STATE ENGINEER denied the applications. Id. In the appeal of the denials, the Nevada Supreme Court, citing to NRS 533.370, held:

> If it depletes the underground reservoir, existing ground water rights will be impaired. If the additional water is replaced from the West Walker River, existing surface water rights will be impaired and it will be detrimental to the public welfare. Upon such findings, respondent was required by statute to deny all applications and ruled accordingly.

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Id. The Court thus upheld the STATE ENGINEER's denial of the applications because the applications conflicted with existing rights. Id. at 632, 238.

Other states with similar statutes have also strictly construed the statutory mandate that applications proposing to impair existing rights be denied. 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). The New Mexico Supreme Court stated: "The state engineer ... [has] 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 v. Reynolds, 367 P.2d 708, 710 (N.M. 1962)(emphasis in original). The Utah Supreme Court, in interpreting a statute similar to NRS 533.370, stated:

> 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 & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962). While it is well recognized that applications that impact existing rights cannot be approved, some states have allowed the approval of water applications where explicit conditions were established and proved to prevent all impacts to existing users prior to approval of the applications. See, e.g., Crafts v. Hansen, 667 P.2d 1068, 1070 (Utah 1983)("Thus, it is the State Engineer's obligation, before approving a change application, to determine that no vested water right will be impaired by the proposed change."); 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.").

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Based upon the uncontested expert evidence before him, the STATE ENGINEER's Ruling acknowledges the flow loss to certain springs impacted by the proposed pumping. The Ruling states:

> The Applicant recognizes that certain water rights on springs in Kobeh 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.

See, ROA Vol. XVIII, p. 003593, citing to the testimony of KVR expert witness, Terry Katzer.

Figure ES-5 from KVR's Hydrogeology and Numerical Flow Modeling Report, in Vol. VII, p. 001190 of the Record on Appeal is at the end of this brief. EUREKA COUNTY provides this evidence to the Court with its brief so the Court has a visual depiction of the identified springs, water rights and wells impacted from the proposed pumping as testified to by KVR's experts and acknowledged in the STATE ENGINEER's Ruling.

The evidence before the STATE ENGINEER by KVR's experts was that the Applications would conflict with existing rights, as the proposed pumping will have impacts on existing rights. Terry Katzer, KVR's expert in hydrogeology, testified as follows 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.

See, ROA Vol. I, pp. 000163 and 000187. On cross examination, Mr. Katzer further confirmed his earlier opinions that KVR's proposed groundwater pumping would impact existing water right 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.**

See, ROA Vol. I, pp. 000197-000198. (emphasis added).

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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, 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." See, ROA Vol. II, pp. 000261 and 000349. Additionally, as another example of the expected impacts, Mr. Smith described the impacts to a specific existing permit as follows:

> Q. And then going down to spring 721?
> 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 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 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.

See, ROA Vol. II, pp. 000368-000369, discussing Table 4.4.10 of the KVR model report, found at ROA Vol. VIII, p. 001520. Mr. Smith's further testimony with regard to Mud Spring and Lone Mountain Spring, because of their close proximity to the KVR well field was:

> A. ... nothing 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.

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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.

See, ROA Vol. II, p. 000355.

In addition to the above statements testified to by Mr. Smith, KVR's model report further 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.
> . . .
> 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.

See, ROA Vol. VII, pp. 001379-001380. See also, ROA Vol. II, pp. 000359-000360, 000362 for Mr. Smith's testimony regarding impacts to the Roberts Creek Ranch well. KVR's model report also 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. See, ROA Vol. VIII, p. 001517-001520.

KVR's proposed monitoring plan presented an overview of predicted impacts from the mine's proposed groundwater pumping, stating:

> Thus, an overview of the predicted impacts is warranted:
>
> - 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.
> - 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.
>
> . . .

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- 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 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 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 show a more detailed view of Kobeh, Diamond, and Roberts Mountains monitoring locations, respectively.

See, ROA Vol. VI, pp. 001066-001067.

Finally, several protestants provided further support for the expected impacts, testifying that they had already experienced impacts as a result of pump tests completed by KVR. As stated by Martin Etcheverry, the owner and operator of the Roberts Creek Ranch:

> 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.

See, ROA Vol. III, p. 000449. Moreover, as summarized in Dale Bugenig's report, an expert witness for EUREKA COUNTY, "[t]he projected maximum extent of the 10-ft drawdown contour extends into the headwaters of Henderson Creek, actually extending north of the stream in one area. 100% of the water in Henderson Creek is subject to the Pete Hanson Creek Decree, including ***all*** springs that contribute to the flow in the creek whether or not they are specifically identified." See, ROA Vol. XVI, p. 003281 (emphasis in original), and page 001190 of the Record on Appeal at end of this brief.

NRS 533.370(2) explicitly limits the STATE ENGINEER's authority by providing that the STATE ENGINEER can only grant applications to appropriate water that do not conflict

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with existing rights. In light of the extensive evidence establishing impacts to existing rights, the STATE ENGINEER was forced to recognize in Ruling 6127 that "certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping" and that "[w]ater level drawdown due to simulated mine pumping is thoroughly documented." See, ROA Vol. XVIII, pp. 003589, 003593. NRS 533.370(2), being a mandatory prohibition against granting applications that conflict with existing rights, does not include any provision which would allow the STATE ENGINEER to grant applications for permits that conflict with existing rights. Accordingly, NRS 533.370(2) required that the STATE ENGINEER deny the Applications. The STATE ENGINEER ignored the statute limiting his authority to grant these Applications because they conflict with existing rights. Accordingly, the Applications at issue in this proceeding must be denied.[6]

The STATE ENGINEER's position is apparently that the water rights which will be impacted are diminutive and apparently, less significant than the Applications considered in Ruling 6127, stating, "[t]hese springs produce less than one gallon per minute and provide water for livestock purposes."[7] See, ROA Vol. XVIII, p. 003593. There is no authority for the STATE ENGINEER to impose this standard. Thus, the STATE ENGINEER has undeniably exceeded his statutory authority. As such the STATE ENGINEER's position that he can grant permits following an arbitrary determination by the STATE ENGINEER regarding the importance of the existing rights impacted, based, at least in part, on the quantity of the water diverted, is clearly in excess of the STATE ENGINEER's authority.

The arbitrariness of the STATE ENGINEER's decision is made clear by his reference to the volume of water and stock watering use that he apparently deems diminutive. Specifically, Application to Appropriate Water No. 12748, which was filed in 1948, and certificated in 1965 as Certificate 5880, is the water right on Mud Spring utilized by the Etcheverry Family Limited

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[6] The STATE ENGINEER's failure to follow the statute requires that the Applications be denied. The error alleged is not a procedural error requiring a new hearing.

[7] The STATE ENGINEER also attempts to rely on the monitoring, management and mitigation plan that he requires KVR to provide after the issuance of Ruling 6127. Nonetheless, this monitoring, management and mitigation plan was not provided by KVR to the STATE ENGINEER prior to the issuance of his Ruling and, as is discussed in more detail below, is thus not something upon which the STATE ENGINEER can rely for the proposition that the Applications will not conflict with existing rights.

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Partnership which produces less than approximately one gallon per minute per KVR's model report. See, ROA Vol. VII, p. 001379. Certificate 5880 was granted based on proof of a beneficial use of 0.015 cfs of water or sufficient to water 500 cattle, 5,000 sheep and 50 horses. Likewise, Certificate 1986/Application 4768 listed on Table 4.4.10 of KVR's model report, is for an unnamed spring near the proposed pit area that may have permanent water level impacts with a date of priority of December 8, 1917. The amount of the appropriation is 0.10 cfs from March 1 to May 31 and September 1 to September 30 each year for stock water purposes through a reservoir, pipeline and troughs.[8] While the STATE ENGINEER may deem these diminutive uses unentitled to the protections granted by law, there are obviously substantial uses of water for the local rancher who relies upon this water for his livelihood.

The STATE ENGINEER failed to follow the statute and exceeded his statutory grant of authority by inserting a new standard into NRS 533.370(2), all of which constitute grounds for denying the Applications.

C. The STATE ENGINEER Cannot Rely Upon A Future Mitigation Plan Which Was Not Part Of The Record Before Him, And Accordingly, His Actions In This Matter Are Arbitrary And Capricious.

The Nevada Supreme Court has held that administrative bodies required to make findings cannot defer making required findings to a later date or make broad, evasive conclusions about future actions that can be taken. City of Reno v. Citizens for Cold Springs, 126 Nev. Adv. Op. 27, 236 P.3d 10, 19 (Nev. 2010). In City of Reno v. Citizens for Cold Springs, a master plan amendment and adoption of zoning ordinance case, the Nevada Supreme Court stated that "more than the deferral of the issue or broad, evasive conclusions about how officials can build or expand utilities" was required when the Court reviewed the section of a governmental entity's order addressing the plan to meet future water demand and infrastructure needs. Id.

The Nevada Supreme Court's position is similar to the position of the federal courts with regard to various federal environmental statutes. Specifically, with regard to the Endangered Species Act, 16 U.S.C. 1533 requires the Secretary of the U.S. Department of the Interior to

[8] The STATE ENGINEER took administrative notice of all of the STATE ENGINEER's files and record which include Certificate 5880. See, ROA Vol. I, p. 000008. Certificates 5880 and 1986 can be found in the STATE ENGINEER's records and files. The extent of the use of these water rights was explicitly pointed out to the STATE ENGINEER in EUREKA COUNTY's opening argument at the hearing on the Applications. See, ROA Vol. I, pp. 000019, 000021.

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determine if a species is endangered or threatened based upon several factors, including, but not limited to, whether there will be "present or threatened destruction, modification or curtailment of its habitat or range." Biodiversity Legal Found. v. Babbitt, 943 F. Supp. 23, 25 (D.D.C. 1996). In situations where the Secretary has attempted to rely upon future action in determining if a species is endangered or threatened, the courts have held that the Secretary "cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record." Sw. Ctr. for Biological Diversity v. Babbitt, 939 F. Supp. 49, 52 (D.D.C. 1996).

Furthermore, courts have addressed whether mitigation measures required pursuant to statute can be deferred into the future. San Joaquin Raptor Rescue Ctr. v. County of Merced, 149 Cal. App. 4th 645, 669, 57 Cal. Rptr. 3d 663, 683 (Cal. App. 2007)(citing 14 CA ADC 15126.4). Such courts have recognized the importance of properly identifying mitigation measures, holding "[f]ormulation of mitigation measures should not be deferred until some future time." Id. Additionally, the Ninth Circuit, addressing the sufficiency of an Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA"), has held that a mere perfunctory review of mitigation is insufficient. Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998). "A mitigation discussion without at least *some* evaluation of effectiveness is useless in making ...[a] determination." S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009)(emphasis in original).

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. Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979). A well accepted concept of fairness and due process in administrative law requires that an administrative agency not rely upon information that is not presented at the hearing. See, e.g., English v. City of Long Beach, 35 Cal. 2d 155, 158, 217 P.2d 22, 24 (1950)("Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present"); Corcoran v. San Francisco City & County Emp. Ret. Sys., 114 Cal. App. 2d 738, 745, 251 P.2d 59, 63

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(1952)("They cannot, lawfully, decide cases on evidence not submitted to or known by the other side."); and, Welch v. County Bd. of Sch. Trustees of Peoria County, 22 Ill. App. 2d 231, 236, 160 N.E.2d 505, 507 (Ill. App. Ct. 1959)("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 Ruling 6127, the STATE ENGINEER continually relies upon the future monitoring, management and mitigation plan that he intends KVR to draft and submit after issuance of the permits. See, ROA Vol. XVIII, pp. 003592-003593 and 003609. 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.

See, ROA Vol. XVIII, p. 003592. Further, the STATE ENGINEER ignores his violation of NRS 533.370(2) in granting 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." See, ROA Vol. XVIII, p. 003593. The STATE ENGINEER explicitly contends he has the authority to grant applications that impact existing rights subject to future mitigation in his holding:

> ... the only way to 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.

See, ROA Vol. XVIII, p. 003609. 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 fully mitigated by the Applicant should impacts to existing rights or the domestic well occur. ...

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> Based on substantial evidence and testimony, and the monitoring, management and mitigation plan requirements, 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.

See, ROA Vol. XVIII, p. 003610.

The STATE ENGINEER's reliance on future monitoring, management and mitigation in approving Applications that conflict with existing rights violates the requirements of Nevada law. Further, as the Nevada Supreme Court has held, the STATE ENGINEER cannot defer a required finding based upon broad and evasive conclusions about future action. The STATE ENGINEER does essentially that in this proceeding; he granted applications based upon the broad conclusion that the future action of drafting a monitoring, management and 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 because he states such impacts can be adequately and fully mitigated. Further, since the monitoring, management and mitigation plan was not presented, neither EUREKA COUNTY, nor any of the other protestants, were able to assess the validity of any alleged mitigation steps or the mitigation plan. Finally, having never reviewed any proposed mitigation, the STATE ENGINEER is unable to determine if future mitigation would be sufficient to avoid the impacts to existing water right 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 and mitigation would be effective.

The STATE ENGINEER's interpretation of his authority pursuant NRS 533.370(2), to include the power to grant statutorily non-compliant applications based upon future actions, is in direct contradiction with the requirements of Nevada law and is therefore arbitrary and capricious.

D. The STATE ENGINEER's Decision To Rely Upon A Mitigation Plan To Be Drafted In The Future Ignores The Substantial Uncontroverted Evidence That A Mitigation Plan Will Be Ineffective.

Even if the STATE ENGINEER were permitted to grant the Applications based upon the future drafting and adoption of a monitoring, management and mitigation plan, the evidence in

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this case was insufficient to establish that such proposed mitigation would be effective. In fact, substantial evidence established the opposite; that mitigation would be ineffective and unlikely to occur.

The STATE ENGINEER clearly acknowledged the importance of the monitoring, management and mitigation plan in granting the Applications. See, ROA Vol. XVIII, pp. 003592-003593 and 003609. Nonetheless, the testimony and evidence presented by KVR with regard to the mitigation plan which had not yet been prepared was miniscule and cursory at best. KVR's testimony and exhibits regarding a mitigation plan were as follows:

- "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." See, ROA Vol. I, p. 000139.
- "A. We are developing a monitoring plan. The version of the monitoring plan that was submitted does not include mitigation. We were directed by the BLM not to include mitigation."[9] See, ROA Vol. I, p. 000123.
- "Q. And do you also make it very clear that it's only about monitoring and it doesn't have anything to do with management and mitigation; is that correct?
A. That's correct." See, ROA Vol. I, p. 000129.
- "Q. You are aware that in Ruling 5966 the State Engineer stated that a monitoring program approved by him must be and is a condition preceding to production of pumping, are you not?

  A. Yes. We're aware that a monitoring plan, monitoring, management, mitigation plan approved by the State Engineer in addition to the approval by the BLM." See, ROA Vol. I, p. 000122.

Instead of providing details as to the proposed mitigation, KVR submitted testimony speculating as to what mitigation may actually entail, for example, augmenting a well, piping water from the distribution system or trucking in water. See, ROA Vol. I, pp. 000206-000207. None of the evidence submitted to the STATE ENGINEER provided any further detail regarding the potential terms of a mitigation plan or that mitigation could or would be effective.

[9] KVR's monitoring plan specifically excluded mitigation measures: "Potential mitigation elements and thresholds are not discussed in this document." See, ROA Vol. VI, p. 001064.

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Regardless of the lack of information, it was made apparent that mitigation would not be as simple as KVR speculated. Mr. Garaventa, the owner of ranch land located near the proposed place of use, described his previous experiences with mitigation as follows:

> I've seen in different instances where they furnished water from places where they've been mining different mines and went ahead and took the water that was involved in their operation or that was coming up their stream that existed, pipe it down to some troughs to make water available for the wild horses and the livestock and wildlife in the area, sure, I've seen that. It was fine until the temperatures got below freezing and them waters freeze. And the two instances I know they weren't – sure they supplied water to the troughs but it wasn't accessible for the wildlife and the animals in the area because of the ice on the trough.

See, ROA Vol. III, pp. 000494-000495 and 000500.

Additionally, as was reiterated by several ranch owners, it is essential that the water sources be disbursed, as the springs naturally provide, so that the cattle do not over-graze in a single area near a single water source; yet "[n]o one can go up there. If we lose a spring, the only way you can replace that spring is with another spring. You can't go on the side of a mountain. You can't even get to these places where the springs are at. There's no way. They're in every canyon, every mountain range and it would be no way. You couldn't do it." See, ROA Vol. III, p. 000452. A further complication was noted by John Colby, the president of MW Cattle Company, who stated:

> Well, you know, that's what brought me to the place was, you know, it has lots of stock water and cows don't have to travel very far to get a drink. And you know, when they have to travel, that's not good for your business because they're walking off weight and that's what we're in the business for is weight on our calves. You know, and if they have to walk a long ways they lose weight instead of eating. And also you have problems with if they have to walk a long ways for water they lay down around there and eat everything down to the ground and they don't dispense over the whole thing good and that causes big problems.
> And yeah, my main reason for getting this place was the water. I like the water and the cows don't have to walk very far.

See, ROA Vol. III, p. 000461 and 000466.

Furthermore, it was made clear that mitigation measures may require approval from the federal government pursuant to the National Environmental Policy Act ("NEPA"), potentially necessitating completion of a further Environmental Impact Statement. See, ROA Vol. III, pp.

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000657-000658, Vol. XVI, p. 003296 and Vol. XVII, p. 003371.[10] Obviously, should mitigation measures trigger NEPA compliance, an extended period of time would be required to comply with NEPA before such mitigation measures could be put into effect and the approval and ability to legally complete such mitigation measures would be removed from the control of both KVR and the STATE ENGINEER.

Finally, evidence was presented establishing KVR's track record with regard to actually implementing mitigation. Specifically, evidence was submitted that KVR failed to mitigate impacts caused by its test pumping of Well 206 and had not mitigated those impacts to the date of the STATE ENGINEER's hearing despite having been specifically apprised of such impacts and the need for mitigation. See, ROA Vol. IV, pp. 000727-000728. Mr. Martin Etcheverry addressed the lasting and unmitigated impacts to his water rights in the Nichols Spring following the test pumping of Well 206 as follows:

> Q. When there were impacts to the Nichols Springs that you experienced earlier or you testified to earlier, do you recall that, after the pumping of Well 206 there were impacts to Nichols Spring?
> A. Yes.
> Q. Did you and your brother have to haul water up there?
> A. Yes, we did. Right after that. When the cattle were in that pasture we hauled water there, since then.
> Q. And you continue to haul water there?
> A. Yes.

See, ROA Vol. III, p. 000456. Mr. Jake Tibbitts, the Natural Resource Manager for EUREKA COUNTY since July 2008, testified that he had personally discussed the impacts to Nichols Springs with representatives of KVR on several occasions over the year prior to the hearing, and despite requests for mitigation of those impacts, KVR failed to mitigate such impacts. See, ROA Vol. IV, pp. 000717 and 000727-000728.

Accordingly, the STATE ENGINEER received not a single piece of evidence actually detailing the mitigation that KVR proposed to undertake to offset the impacts it conceded it would have upon existing water rights. Instead, the STATE ENGINEER received a wealth of evidence detailing the extreme challenges facing any mitigation of the impacts to existing water rights.

[10] When given the opportunity to dispute this possibility, KVR's expert, Dwight Smith, declined to do so. See, ROA Vol. II, p. 000339.

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Further, the STATE ENGINEER received evidence establishing KVR's past failure to mitigate known impacts to existing water rights. Despite the lack of evidence to support KVR's ability to mitigate the impacts which will occur and the substantial evidence calling into question KVR's ability, or willingness, to adequately mitigate the impacts, the STATE ENGINEER found based on no evidence of record that any impacts could be finally and fully mitigated and granted the Applications entirely relying upon a mitigation plan that had never been drafted much less reviewed by the STATE ENGINEER or any of the protestants. See, ROA Vol. XVIII, p. 003592, 003593 and 003609.

The STATE ENGINEER's reliance upon KVR's future mitigation plan in this case is baseless and despotic and thus, an arbitrary and capricious decision by the STATE ENGINEER.

E. The Applications Are Defective And Thus, The STATE ENGINEER's Decision To Grant Them Is A Manifest Abuse Of Discretion.[11]

The STATE ENGINEER is obligated to address all of the crucial issues necessary for a full and fair determination of each application to appropriate water rights. Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979). A failure to resolve such issues is a manifest abuse of discretion. Id. at 787, 265.

NRS 533.325 requires the filing of an application with the State Engineer for the appropriation of any public waters or for the change in the place of use, manner of use or point of diversion of waters already appropriated. The application to appropriate public waters must include certain information. NRS 533.335. Applications to change the place of use, manner of use or point of diversion of appropriated waters must include "such information as may be necessary to a full understanding of the proposed change." NRS 533.345(1).

While the Nevada Supreme Court has not addressed the specificity of information required for an application to be granted, the Supreme Court of Colorado addressed specificity with regard to change applications in High Plains A & M, LLC v. Southeastern Colorado Water Conservancy District, 120 P.3d 710, 721 (Colo. 2005). In that case, the applicant had filed applications to change both the point of diversion and the manner of use of numerous existing water

[11] This argument is raised both with regard to the Petition for Judicial Review of Ruling 6127, Case No. CV1108-155, and the Petition for Judicial Review of the issued Permits, Case No. CV1112-164.

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rights. Id. at 714. The manner of use was identified by various descriptions, all generally applying to municipal use, though no specificity regarding the actual municipality in which such rights were expected to be used was provided. Id. at 721. Thus, the Colorado water court found the applications "expansive and nebulous" and accordingly denied the requested changes. Id. at 716. The Supreme Court of Colorado reviewed the record and determined that the applicant had not provided any specificity as to the counties in which the proposed municipal use would occur beyond merely testifying that certain counties were experiencing growth and that no actual contracts for such use had been executed. Id. at 721. That Court concluded that the change applications were required to show with reasonable particularity where the water rights would be put to beneficial use and found that:

> A guess that a transferred priority might eventually be put to beneficial use is not what the Colorado Constitution or the General Assembly envisioned as the triggering predicate for continuing an appropriation under a change of water right decree. ... [T]he General Assembly did not intend that courts and potential opposers be burdened with change applications premised on conjecture. Change proceedings can be extremely expensive to participants and consume many days of trial and appeal time-taking away from the courts' attention to other needs of the citizens of Colorado. ... Applicants for a change of water right must expect full scrutiny of their applications by opposers and compliance with applicable procedures and substantive laws.

Id. at 721-722 (internal citations omitted). Thus, the applications in that matter were deemed premature since no particular place of use was indicated and the denial of such applications was upheld. Id. at 724.

In this case, the place of use on the Applications is identified as a 90,000 acre area. See, ROA Vol. I, p. 000133. Nonetheless, the plan of operations identifies the area where the mine will be located and the water will be put to beneficial use as only an approximately 14,000 acre area. See, ROA Vol. I, p. 000133.[12] The sole reason for the request of an additional 76,000 acres to be identified as the place of use, despite the clear lack of intent to place the water to beneficial use in that area, was that it would cause KVR a "hardship" to be required to re-apply to the STATE ENGINEER for a change application if in the future there was some currently unidentifiable reason

[12] Also see, CV0904 ROA Transcript Vol. III, p. 580, ll. 4-11.

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to put water to use in the additional 76,000 acres.[13] See, ROA Vol. I, pp. 000093-000094. Essentially KVR conceded that it was attempting to circumvent the requirements of Nevada water law and the statutory procedures provided for change applications.

In addition to failing to accurately describe the proposed place of use, KVR is not yet able to identify all the well locations for the project. As Jack Childress, KVR's hydrogeologist, testified:

> Q. Do you even know what the wells are that are planned for the well field production? Because they're not shown on Figure 10.
> A. It's not the intent of Figure 10. The intent of Figure 10 is to show where test and monitor wells are. It's my understanding that any additional wells would be along the corridor that's shown on the figure.
> Q. Right. But you don't know what their number are and you don't know where they're located. Is that fair?
> A. Sure.

See, ROA Vol. II, p. 000250. The KVR model report used to predict impacts states: "The exact number, location, well depths, and well pumping rates have a degree of uncertainty which will remain until production wells are constructed and actual pumping rates determined." See, ROA Vol. VII, p. 001364-001365. Further only the northern production wells have been drilled. See, ROA Vol. II, p. 000373. Thus as Mr. Smith testified on behalf of KVR, the wells which have been drilled and tested, and whose impacts are easier to monitor and identify, make up only 44 percent of the proposed production, leaving 56 percent of the proposed production entirely unknown. See, ROA Vol. II, pp. 000373-000374. The wells comprising 56 percent of the proposed production will be located in the alluvial aquifer, where pumping impacts on existing water rights are a "given" per Mr. Katzer's testimony. See, ROA Vol. II, pp. 000197-000198.

The defective nature of the Applications was appropriately presented to the STATE ENGINEER and substantial evidence regarding their inadequacy was offered. Notwithstanding the lack of specificity in the Applications and KVR's stated intent to avoid the applicable Nevada law, the STATE ENGINEER's entire analysis of this issue in Ruling 6127 was as follows:

> The protests allege that the applications should be denied because they fail to adequately describe the proposed points of diversion and place of use.

[13] It would hardly be "a hardship" for KVR to file change applications, as it has to date literally filed approximately 100 applications, including change applications, with the STATE ENGINEER seeking to appropriate water for the Mt. Hope Mine Project.

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

See, ROA Vol. XVIII, p. 003583. This statement cannot even be referred to as an analysis of the Applications as it fails to cite to any of the evidence submitted to the STATE ENGINEER nor does it address the concerns with the Applications raised by EUREKA COUNTY.[14] The STATE ENGINEER failed entirely to address the critical issue of whether the Applications were sufficient in this case. As a result of such failure, the STATE ENGINEER manifestly abused his discretion. See, Revert, *supra*.

Furthermore, the same rules that apply to all other individuals in the State of Nevada must apply to KVR. The overly broad place of use in the Applications presented by KVR are the equivalent of a rancher applying for water rights and listing the place of use as far in excess of the lands incorporating his ranch, explaining that he was simply trying to avoid the necessity of filing a change application should his operation expand and he possibly had a use for the water on those lands in the future. In that situation the STATE ENGINEER would justifiably deny the place of use described in the application. It should be no different in this situation. An applicant cannot attempt to nullify the authority of the STATE ENGINEER by simply over-applying for a place of use so as to avoid future regulation by the STATE ENGINEER.

The Applications as presented to the STATE ENGINEER by KVR neglect to provide the accurate information required by law, request a place of use that includes an additional 76,000 acres more than needed, and fail to identify the location, depth and pumping rates for wells

[14] The STATE ENGINEER's attention to the sufficiency of the Applications is notably different than the attention provided to this issue in the previous hearing wherein the STATE ENGINEER at least limited the place of use to the 14,000 acre area identified in the mine's plan of operation. See, CV09040 ROA Vol. V, p. 41.

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responsible for more than half of the proposed production, affecting any analysis of proposed impacts. As such, the STATE ENGINEER's Ruling granting these defective Applications without any attention to such issues is an abuse of discretion and is arbitrary and capricious.

F. The STATE ENGINEER's Reliance Upon KVR's Inadequate Model Was An Abuse Of Discretion.

In determining the impacts to existing water rights the STATE ENGINEER relied heavily on the numerical model prepared and presented by KVR. See, ROA Vol. XVIII, pp. 003588-003593. KVR's model provides for a ten-foot drawdown contour line for predicting groundwater impacts. See, ROA Vol. VII, p. 001184. By utilizing the ten-foot drawdown contour line as opposed to a five-foot drawdown contour line, KVR underestimates the impacts which will result from KVR's groundwater pumping. See, ROA Vol. III, p. 000576. As an example of such unidentified impacts, less than five-feet of drawdown can cause springs to dry up causing impacts to aquatic and plant life in streams associated with those springs. See, ROA Vol. III, p. 000576. Additionally, utilizing a five-foot drawdown contour line shows impacts to Gravel Pit Spring upon which there is a federally reserved water right (R06875) utilized as the primary source of water for "400 cattle, 40 horses, 350 sheep and 57 deer and antelope." See, ROA Vol. XVI, pp. 003275-003276. Thus, the use of a ten-foot drawdown contour line causes KVR's model to have limited value as it is unreliable in accurately predicting the full extent of the impacts upon existing users. Two figures in the Record on Appeal at Vol. XVI, pp. 003276-3277, depicting the impacts to existing water rights using a five-foot drawdown contour line, are at the end of this brief, along with a picture of Gravel Pit Spring in the Record on Appeal, at Vol. XVII, p. 003339.

The problems caused by the use of the ten-foot drawdown contour were not simply asserted by EUREKA COUNTY and the other protestants but were also recognized and acknowledged by KVR's witnesses. Specifically, Mr. Patrick Rogers, the director of environmental permitting for General Moly, conceded that there would be impacts not taken into account by the ten-foot drawdown contour line, stating: "[s]o we understand that there can be impacts from drawdown less than ten feet and we are committed to mitigating those impacts." See, ROA Vol. I, p. 000156. Further, at the previous hearing on these Applications, Mr. Smith, KVR's groundwater

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modeling expert, presumably utilizing his own professional judgment, prepared and presented a model that utilized a five-foot drawdown contour line. See, ROA Vol. II, p. 000383.

The sole reason for failing to account for such impacts has nothing to do with a scientific principle or a belief that the ten-foot drawdown contour line would accurately account for all impacts. See, ROA Vol. II, pp. 000382-000383. The sole reason that a ten-foot drawdown contour line was presented in this case was that the BLM requested a ten-foot drawdown contour line for all information submitted to the BLM. See, ROA Vol. II, pp. 000382-000383. Nonetheless, the STATE ENGINEER is not the BLM. The STATE ENGINEER, unlike the BLM, is exclusively interested in the impacts related to water resources and as such has a statutory obligation to rely upon the best available science. NRS 533.024(1)(c). It is illogical to assume that an admittedly inaccurate scientific standard should be applied for presentation to the STATE ENGINEER simply because a different agency, with a more limited interest in impacts associated with water resources, requested this standard for its regulatory purposes.

In addition to the issues caused by KVR's use of a ten-foot drawdown contour line, the evaluation of the model's predictability indicates that the model predictions have a low degree of reliability. Specifically, as Ms. Oberholtzer, EUREKA COUNTY's groundwater modeling expert testified, the residual error was higher than generally deemed acceptable by the authors of the software utilized to create the model. See, ROA Vol. III, p. 000593. While Ruling 6127 states that EUREKA COUNTY's experts testified that the model had shortcomings, but failed to present convincing evidence that the model predictions are not substantially valid, the STATE ENGINEER's chief hydrologist recognized there was a calibration failure with the model for Diamond Valley that was a conceptual shortcoming. ROA Vol. XVIII, p. 003590, Vol. II, p. 000401. The transient model was poorly calibrated and an uncalibrated model provides unreliable predictions of future impacts to pumping.

Despite this evidence regarding the flaws in the model's predictive capability, the STATE ENGINEER simply relied upon the model asserting that there was not substantial evidence regarding the model's validity. See, ROA Vol. XVIII, p. 003590. The STATE ENGINEER did not in any manner address the issues of impacts to existing water rights identified with utilizing a five-

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foot vs. ten-foot drawdown contour before relying upon the model as if it were entirely accurate. Obviously the model prepared and presented by KVR has limited value and does not address the entire extent of the impacts on existing users, a point presented in detail by EUREKA COUNTY and conceded by KVR. Thus any reasonable person would limit his reliance upon KVR's model. Accordingly, the STATE ENGINEER's inexplicable blind reliance upon the inaccurate model is an abuse of discretion and a violation of the STATE ENGINEER's duty to rely upon the best available science in determining conflicts with existing rights in his analysis and determination whether to grant applications to appropriate water.

G. The STATE ENGINEER Ignored The Substantial Evidence Presented Regarding KVR's Limited Ability To Capture The Perennial Yield Of Kobeh Valley.

The STATE ENGINEER determines the amount of groundwater available for appropriation in any given basin by determining the perennial yield of the hydrographic basin. The perennial yield is:

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

See, ROA Vol. XVIII, p. 003584. The STATE ENGINEER further recognizes that perennial yield cannot fail to take into account the natural discharge, including evapotranspiration ("ET").[15] See, ROA Vol. XVIII, p. 003585. Thus, as the STATE ENGINEER states in Ruling 6127, the perennial yield must be limited to the maximum amount of natural discharge, or ET, that can be salvaged for beneficial use. See, ROA Vol. XVIII, pp. 003584, 003586. Accordingly, it follows that if natural discharge or ET is not salvaged for beneficial use, the STATE ENGINEER should take that into account when considering what water is available for appropriation within a given hydrographic basin.

[15] Evapotranspiration is defined in the STATE ENGINEER's water words dictionary as "[t]he process by which plants take in water through their roots and then give it off through the leaves as a by-product of respiration; the loss of water to the atmosphere from the earth's surface by evaporation and by transpiration through plants."

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Substantial evidence was submitted that KVR's pumping will not be capturing the natural discharge or ET in Kobeh Valley. Specifically, KVR's experts concede that the perennial yield of the Kobeh Valley Hydrographic Basin is 16,000 acre feet annually ("afa") assuming that the ET is captured. See, ROA Vol. I, p. 000193. Nonetheless, KVR made clear in its testimony that it will initially capture no ET and that at the termination of the mine pumping, approximately 44 years later, it only projects that it will capture approximately 4,000 afa of the ET in Kobeh Valley. See, ROA Vol. I, pp. 000193-000194. Due to the failure of KVR to capture the ET in Kobeh Valley, an overdraft or groundwater mining situation will be created by KVR's groundwater pumping and, as stated by KVR, one of the expected impacts is that water will be removed from storage and groundwater elevations in Kobeh Valley will be lowered. See, ROA Vol. I, p. 000130 and Vol. VI, p. 001066. The water that KVR seeks to appropriate will come from basin storage. See, ROA Vol. VI, p. 001066.

NRS 533.370(2) prohibits the STATE ENGINEER from granting an application if "there is no unappropriated water in the proposed source of supply." Since KVR explicitly informed the STATE ENGINEER that it did not intend to capture most of the natural discharge or ET of the basin with its planned pumping and the STATE ENGINEER recognized in Ruling 6127 that only the natural discharge or ET salvaged for beneficial use could be counted in the perennial yield, the STATE ENGINEER should have taken the uncaptured ET into account in its evaluation of the water available for appropriation in Kobeh Valley. See, ROA Vol. I, p. 000209.

Nonetheless, the STATE ENGINEER paid no attention to the issue.[16] Instead the STATE ENGINEER merely stated that it was determining the perennial yield of Kobeh Valley to be 15,000 afa and that since the Applications requested less than the perennial yield, and KVR had acquired most of the groundwater rights in Kobeh Valley, there was water available for appropriation. See, ROA Vol. XVIII, p. 003588. This holding not only contradicts the STATE ENGINEER's other statements in Ruling 6127 regarding salvaging natural discharge but simply disregards the substantial evidence presented by KVR that the natural discharge or ET would not be

[16] As stated above, the STATE ENGINEER is required to address all crucial issues. Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 265 (1979). Water available for appropriation is undeniably one crucial issue that must be addressed by the STATE ENGINEER pursuant to NRS 533.370(2). The failure to address such an issue is a manifest abuse of discretion. Id.

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captured by its groundwater pumping. The STATE ENGINEER is not charged by law with merely performing a mathematical calculation to determine if there is water available to appropriate and rubber stamping an approval of an application that falls within a mathematical calculation. If such a calculation and undemanding process was the manner in which water was appropriated in Nevada, both the volume of law and the process to appropriate water would not be so detailed. Instead, the STATE ENGINEER is tasked by law with numerous duties and obligations associated with reviewing specific information regarding each individual application to appropriate water, including but not limited to, the specific information associated with the basin or water source in which the applicant proposes to divert or use water. Then, the STATE ENGINEER must make an analysis of the specific characteristics of the hydrologic basin to determine if there is water available to appropriate, including but not limited to whether the natural discharge in a basin is being salvaged by the proposed water use pursuant to his own definition of perennial yield.

A reasonable mind could not simply overlook his own definition of perennial yield and the uncontroverted evidence regarding the ongoing and uncaptured natural discharge or ET in Kobeh Valley and find that there was water available for appropriation in Kobeh Valley for a mining project of this magnitude. Therefore, the STATE ENGINEER's finding that water was available for appropriation is directly contradicted by his own definition of water available to appropriate and the substantial evidence, and must be set aside.

H. The STATE ENGINEER's Revision Of The Perennial Yield For Various Basins Without Any Reason And Without Taking Any Evidence Is An Abuse Of Discretion.

In Ruling 6127, the STATE ENGINEER revised the perennial yield of three basins. See, ROA Vol. XVIII, p. 003586. Specifically, the STATE ENGINEER modified the perennial yield of Monitor Valley, Southern Part from 10,000 afa to 9,000 afa, Monitor Valley, Northern Part from 8,000 afa to 2,000 afa and Kobeh Valley from 16,000 afa to 15,000 afa. Id.[17]

[17] Diamond Valley, Antelope Valley, Stevens Basin, Monitor Valley (Southern Part), Monitor Valley (Northern Part), and Kobeh Valley are recognized to be part of the Diamond Valley Flow System. The Diamond Valley Flow System was mentioned at the hearing to advise the STATE ENGINEER that the United States Geological Survey ("USGS") was conducting a study of the flow system. See, ROA Vol. IV, p. 000711. Certain protestants urged the STATE ENGINEER not to take any action on the Applications pending the outcome of the USGS study, which would provide more information to the STATE ENGINEER with regard to the Diamond Valley Flow System. See, ROA Vol. XVIII,

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I HEREBY CERTIFY THAT THE FOREGOING IS A COMPLETE AND EXACT COPY OF THE ORIGINAL THEREOF
Attorney for Petitioners
Filed on: 12-30-2011

CASE NO.: CV1112-165

DEPT. NO.: _____

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

v.

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

Respondent.

PETITION FOR JUDICIAL REVIEW

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

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JURISDICTION AND PARTIES

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

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

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

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

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

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

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

DECISIONS

8. Between May of 2005 and June of 2010 numerous applications to appropriate underground water and to change the point of diversion, place of use and/or manner of use were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch LLC (collectively herein the "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to

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Kobeh Valley Ranch LLC (the "Applicant"). The Applications were filed for a proposed molybdenum mine known as the Mount Hope Mine Project requiring underground water for mining and milling and dewatering purposes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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23. Petitioners have exhausted their administrative remedies.

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

WHEREFORE, Petitioner prays for judgment as follows:

1. That the Court vacate the above-stated Permits; and

2. That the Court award such other and further relief as seems just and proper.

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

DATED this 30th day of December, 2011.

SCHROEDER LAW OFFICE, P.C.

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Attorneys for the Petitioners

AFFIRMATION

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

DATED this 30th day of December, 2011.

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NO. _____
FILED

JAN 11 2012

Eureka County Clerk
By Deanna Conrad

Case No. CV1112-104

Dept. No. _____

In the Seventh Judicial District Court of the State of Nevada
in and for the County of Eureka

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

Petitioner,

vs.

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

Respondent.
_____/

SUMMONS
(THE STATE OF NEVADA)

THE STATE OF NEVADA SENDS GREETINGS TO THE ABOVE-NAMED DEFENDANT:

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you.

1. If you wish to defend this lawsuit, you must, within 20 days after this Summons is served on you, exclusive of the day of service, file with this Court a written pleading in response to this Complaint.
2. Unless you respond, your default will be entered upon application of the plaintiff, and this Court may enter a judgment against you for the relief demanded in the Complaint*, which could result in the taking of money or property or the relief requested in the Complaint.
3. If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.
4. You are required to serve your response upon plaintiff's attorney, whose address is:

KAREN A. PETERSON, Esq.
JENNIFER M. MAHE, Esq.
ALLISON, MacKENZIE, PAVLAKIS,
WRIGHT & FAGAN, LTD.
402 North Division Street
Carson City, NV 89703
Telephone: (775) 687-0202

THEODORE BEUTEL, Esq.
EUREKA COUNTY DISTRICT ATTORNEY
701 South Main Street
P.O. Box 190
Eureka, NV 89315
Telephone: (775) 237-5315

Clerk of Court

By Jackie Berg
Deputy Clerk

Date: Dec 29, 2011.

*Note - When service by publication, insert a brief statement of the object of the action. See Rule 4.

RETURN OF SERVICE ON REVERSE SIDE

STATE OF _____)
: ss.
COUNTY OF _____)

AFFIDAVIT OF SERVICE
(For General Use)

_____, declares under penalty of perjury:
That affiant is, and was on the day when he served the within Summons, over 18 years of age, and not a party to, nor interested in, the within action; that the affiant received the Summons on the _____ day of _____, 20___, and personally served the same upon _____, the within named defendant, on the _____ day of _____, 20___, by delivering to the said defendant, personally, in _____, County of _____, State of _____, a copy of the Summons attached to a copy of the Complaint.
I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed this _____ day of _____, 20___.

_____
Signature of person making service

STATE OF NEVADA)
: ss.
CARSON CITY)

NEVADA SHERIFF'S RETURN
(For Use of Sheriff of Carson City)

I hereby certify and return that I received the within Summons on the _____ day of _____, 20___, and personally served the same upon _____, the within named defendant, on the _____ day of _____, 20___, by delivering to the said defendant, personally, in Carson City, State of Nevada, a copy of the Summons attached to a copy of the Complaint.

_____
Sheriff of Carson City, Nevada

Date: _____, 20___

By _____
Deputy

STATE OF NEVADA)
: ss.
COUNTY OF _____)

AFFIDAVIT OF MAILING
(For Use When Service is by Publication and Mailing)

_____, declares under penalty of perjury:
That affiant is, and was when the herein described mailing took place, over 18 years of age, and not a party to, nor interested in, the within action; that on the _____ day of _____, 20___, affiant deposited in the Post Office at _____, Nevada, a copy of the within Summons attached to a copy of the Complaint, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to _____, the within named defendant, at _____; that there is a regular communication by mail between the place of mailing and the place so addressed.
I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed this _____ day of _____, 20___.

_____

NOTE - If service is made in any manner permitted by Rule 4 other than personally upon the defendant, or is made outside the United States, a special affidavit or return must be made.

AFFIDAVIT

State of Nevada)
ss.
County of Washoe)

WADE MORLAN R-006823, being first duly sworn deposes and says:

That affiant is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #322, and not a party to, nor interested in the within action affiant received the documents on **Dec 29 2011 10:52AM** and on **Dec 29 2011 2:30PM** affiant personally served a copy of the
SUMMONS; PETITION FOR JUDICIAL REVIEW; NOTICE OF PETITION FOR JUDICIAL REVIEW

on TRINA GIBSON OF THE OFFICE OF THE ATTORNEY GENERAL, STATE OF NEVADA, AUTHORIZED ACCEPT ACCEPTED ON BEHALF OF THE STATE OF NEVADA, EX. REL.

100 NORTH CARSON ST
CARSON CITY, NV 89701

Affiant does hereby affirm under penalty of perjury that the assertions of this affidavit are true.

WADE MORLAN R-006823

Signed and sworn to before me on **Jan 5 2012**

by **WADE MORLAN R-006823**

Notary Public

STEPHANIE MARTELL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 05-97425-2 - Expires June 9, 2013

Reno/Carson Messenger Service, Inc.
License #322

185 Martin St
Reno, NV 89509
775-322-2424

FILED

JAN 11 2012

Eureka County Clerk
By Deanna Counsell

CASE NO. CV1112-164

Dept. No. _____

In the Seventh Judicial District Court of the State of Nevada
in and for the County of Eureka

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

Petitioner,

vs.

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

Respondent.

_____/

SUMMONS
(First Additional)

(STATE ENGINEER, DIVISION OF WATER RESOURCES)

THE STATE OF NEVADA SENDS GREETINGS TO THE ABOVE-NAMED DEFENDANT:

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you.

1. If you wish to defend this lawsuit, you must, within 20 days after this Summons is served on you, exclusive of the day of service, file with this Court a written pleading in response to this Complaint.
2. Unless you respond, your default will be entered upon application of the plaintiff, and this Court may enter a judgment against you for the relief demanded in the Complaint*, which could result in the taking of money or property or the relief requested in the Complaint.
3. If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.
4. You are required to serve your response upon plaintiff's attorney, whose address is:

KAREN A. PETERSON, Esq.
JENNIFER M. MAHE, Esq.
ALLISON, MacKENZIE, PAVLAKIS,
WRIGHT & FAGAN, LTD.
402 North Division Street
Carson City, NV 89703
Telephone: (775) 687-0202

THEODORE BEUTEL, Esq.
EUREKA COUNTY DISTRICT ATTORNEY
701 South Main Street
P.O. Box 190
Eureka, NV 89315
Telephone: (775) 237-5315

Clerk of Court

By Jackie Berg
~~Deputy~~ Clerk

Date: Dec 29, 2011.

*Note - When service by publication, insert a brief statement of the object of the action. See Rule 4.

RETURN OF SERVICE ON REVERSE SIDE

STATE OF _____)
: ss.
COUNTY OF _____)

AFFIDAVIT OF SERVICE
(For General Use)

_____, declares under penalty of perjury:
That affiant is, and was on the day when he served the within Summons, over 18 years of age, and not a party to, nor interested in, the within action; that the affiant received the Summons on the _____ day of _____, 20___, and personally served the same upon _____, the within named defendant, on the _____ day of _____, 20___, by delivering to the said defendant, personally, in _____, County of _____, State of _____, a copy of the Summons attached to a copy of the Complaint.
I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed this _____ day of _____, 20___.

_____
Signature of person making service

STATE OF NEVADA)
: ss.
CARSON CITY)

NEVADA SHERIFF'S RETURN
(For Use of Sheriff of Carson City)

I hereby certify and return that I received the within Summons on the _____ day of _____, 20___, and personally served the same upon _____, the within named defendant, on the _____ day of _____, 20___, by delivering to the said defendant, personally, in Carson City, State of Nevada, a copy of the Summons attached to a copy of the Complaint.

_____
Sheriff of Carson City, Nevada

Date: _____, 20___

By _____
Deputy

STATE OF NEVADA)
: ss.
COUNTY OF _____)

AFFIDAVIT OF MAILING
(For Use When Service is by Publication and Mailing)

_____, declares under penalty of perjury:
That affiant is, and was when the herein described mailing took place, over 18 years of age, and not a party to, nor interested in, the within action; that on the _____ day of _____, 20___, affiant deposited in the Post Office at _____, Nevada, a copy of the within Summons attached to a copy of the Complaint, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to _____, the within named defendant, at _____; that there is a regular communication by mail between the place of mailing and the place so addressed.
I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed this _____ day of _____, 20___.

_____

NOTE - If service is made in any manner permitted by Rule 4 other than personally upon the defendant, or is made outside the United States, a special affidavit or return must be made.

AFFIDAVIT

State of Nevada)
ss.
County of Washoe)

LISA MORLAN R-017281, being first duly sworn deposes and says:

That affiant is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #322, and not a party to, nor interested in the within action affiant received the documents on **Dec 29 2011 11:26AM** and on **Dec 29 2011 2:49PM** affiant personally served a copy of the

SUMMONS; PETITION FOR JUDICIAL REVIEW; NOTICE OF PETITION FOR JUDICIAL REVIEW

on **BOB CONNER OF THE OFFICE OF THE DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA, AUTHORIZED TO ACCEPT, ACCEPTED ON BEHALF OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES**

901 S STEWART ST STE 1003
CARSON CITY, NV 89701

Affiant does hereby affirm under penalty of perjury that the assertions of this affidavit are true.

Lisa Morlan
LISA MORLAN R-017281

Signed and sworn to before me on **Dec 30 2011**

by **LISA MORLAN R-017281**

Notary Public

Reno/Carson Messenger Service, Inc. License #322

185 Martin St
Reno, NV 89509
775-322-2424

STEPHANIE MARTELL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 05-97425-2 - Expires June 9, 2013

RNPERSI 02/07/00

0332397 - ALLI

CASE NO.: CV1112-165

DEPT. NO.: 2

SCHROEDER LAW OFFICES, P.C.
Laura A. Schroeder, Nevada State Bar #3595
Therese A. Ure, Nevada State Bar #10255
440 Marsh Ave.
Reno, Nevada 89509-1515
PHONE: (775) 786-8800, FAX: (877) 600-4971
counsel@water-law.com
Attorneys for the Petitioners

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioners,

v.

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

Respondent.

FIRST AMENDED PETITION FOR JUDICIAL REVIEW

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

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Petitioners petition and allege as follows:

JURISDICTION AND PARTIES

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

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

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

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

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

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

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

8. Petitioners have exhausted their administrative remedies

REQUEST FOR CONSOLIDATION

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

SCHROEDER LAW OFFICES, P.C.
440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800 FAX (877) 600-4971

DECISIONS

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

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

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

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

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

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

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

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SCHROEDER LAW OFFICES, P C
440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800 FAX (877) 600-4971

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

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

AGENCY ERROR(S)

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

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

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

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

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

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SCHROEDER LAW OFFICES, P.C.
440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800 FAX (877) 600-4971

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

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

REQUEST FOR RELIEF

WHEREFORE, Petitioner requests judgment as follows:

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

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SCHROEDER LAW OFFICES, P.C.
440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800 FAX (877) 600-4971

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

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

DATED this 12th day of January, 2012.

SCHROEDER LAW OFFICE, P.C.

Laura A. Schroeder, NSB #3595
Therese A. Ure, NSB #10255
440 Marsh Ave.
Reno, NV 89509
(775) 786-8800
FAX: (877) 600-4971
Email: counsel@water-law.com
Attorneys for the Petitioners

AFFIRMATION

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

DATED this 12th day of January, 2012.

SCHROEDER LAW OFFICE, P.C.

Laura A. Schroeder, NSB #3595
Therese A. Ure, NSB #10255
440 Marsh Ave.
Reno, NV 89509
(775) 786-8800
FAX: (877) 600-4971
Email: counsel@water-law.com
Attorneys for Petitioners

CERTIFICATE OF SERVICE

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

Karen A. Peterson
Allision, Mackenzie, Pavlakis, Wright & Fagan Ltd.
P.O. Box 646
Carson City, NV 89701

Dale E. Ferguson, Esq.
Gordon H. DePaoli, Esq.
Woodburn and Wedge
6100 Neil Road, Ste. 500
Reno, NV 89511

Ross E. de Lipkau, Esq.
Michael R. Kealy, Esq.
Parsons, Behle & Latimer
50 West Liberty Street, Suite 750
Reno, NV 89501

Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701

Theodore Buetel, Esq.
Eureka County District Attorney
701 South Main Street
P.O. Box 190
Eureka, Nevada 89316

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

Dated this 12th day of January, 2012.

THERESE A. URE, NSB# 10255
Schroeder Law Offices, P.C.
440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800; FAX (877) 600-4971
counsel@water-law.com
Attorneys for Protestant Kenneth F. Benson, Diamond Cattle Company LLC, and Etcheverry Family LP

Gordon H. DePaoli
Nevada Bar No. 195
Dale E. Ferguson
Nevada Bar No. 4986
Domenico R. DePaoli
Nevada Bar No. 11553
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, Nevada 89511
Telephone 775/688-3000
Attorneys for Petitioners Conley Land & Livestock, LLC
and Lloyd Morrison

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

EUREKA COUNTY, a political subdivision of the State of Nevada, Petitioner, vs. STATE OF NEVADA, EX. REL., STATE ENGINEER, DIVISION OF WATER RESOURCES, Respondent.	Case No.: CV 1108-155 Dept. No.: 2
CONLEY LAND & LIVESTOCK, LLC, a Nevada limited liability company, LLOYD MORRISON, an individual, Petitioners, vs. OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, JASON KING, State Engineer, KOBEH VALLEY RANCH, LLC, Real Party in Interest, Respondents.	Case No.: CV 1108-156 Dept. No.: 2 **OPENING BRIEF OF CONLEY LAND & LIVESTOCK, LLC and LLOYD MORRISON**

KENNETH F. BENSON, an individual, DIAMOND CATTLE COMPANY, LLC, a Nevada limited liability company, and MICHEL and MARGARET ANN ETCHEVERRY FAMILY, LP, a Nevada registered foreign limited partnership, Petitioners, vs. STATE ENGINEER OF NEVADA, OFFICE OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No.: CV 1108-157 Dept. No.: 2

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TABLE OF AUTHORITIES

Statutes

PREFACE

Conley Land & Livestock, LLC ("Conley") and Lloyd Morrison ("Morrison") (collectively referred to herein as "Conley/Morrison") are each owners of water rights used in connection with their respective farming and ranching operations in Diamond Valley, Eureka County, Nevada. Conley/Morrison timely protested several of the applications involved in this proceeding. Each appeared pro se in the proceedings before the Nevada State Engineer (the "State Engineer"). Ruling No. 6127 at 4, 5, 9, 10; Bate Stamp Nos. 427-437, 965-968, 979-986.[1]

Conley/Morrison adopt and join in Eureka County's Opening Brief. In this Opening Brief, Conley/Morrison address one of the issues presented by Ruling No. 6127. Issues not addressed here have been comprehensively addressed in Eureka County's Opening Brief and Conley/Morrison will not repeat those issues or arguments here.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Nevada State Engineer exceeded his statutory authority by accepting, noticing, considering and approving applications to change the point of diversion, place of use and/or manner of use of applications to appropriate water that had never before been permitted by the Nevada Division of Water Resources?

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[1] On or about October 27, 2012, the State Engineer filed the Record and Summary of Record on Appeal in this matter. The Bate Stamp Nos. referenced here track those used by the State Engineer in his filing of the Record on Review.

STATEMENT OF THE CASE

A. Statement of Facts Relevant to Issue Presented For Review.

The material facts relevant to the issue addressed in this Brief are few and undisputed. In Ruling No. 6127, the State Engineer granted permits on applications to change the point of diversion, place of use and/or manner of use with respect to water which was not then and never had been appropriated. More specifically, Ruling No. 6127 considers and grants Application Nos. 79911, 79912, 79914, 79916, 79918, 79925, 79928, 79933, 79938, 79939 and 79940 (the "Change Applications") to change the point of diversion, place of use and/or manner of use with respect to applications to appropriate water which at the time of the Ruling were not and never had been the subject of a validly issued permit to appropriate water under N.R.S. Chapters 533 and 534.[2]

The following Table depicts the Change Applications, the previously unpermitted Applications to Appropriate Nos. 73551, 73552, 72695, 72696, 72697, 72698, 73545, 73546, 74587, 73547 and 74587 (the "Base Applications") which the Change Applications seek to change, and the location of the Change Applications and Base Applications in the Record on

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[2] Application No. 79911 was filed June 15, 2010 to change Application No. 73551. A permit, previously issued with respect to Application No. 73551, was vacated by an order of this Court on April 10, 2010. Similarly, Application No. 79912 was filed to change Application No. 73552. A permit, previously issued with respect to Application No. 73552, was vacated by an order of this Court on April 4, 2010. In all other cases, the Applications to Appropriate which the listed Applications seek to change have not been the subject of a permit, vacated or otherwise.

Review:

Change Application No. (Bates Nos.)[3]	Base Application No. (Bates Nos.)
79911 (2156-2160)	73551 (1975-1977)
79912 (2161 – 2165)	73552 (1978-1980)
79914 (2171 – 2175)	72695 (1945-1947)
79916 (2181 – 2185)	72696 (1948-1950)
79918 (2191 – 2195)	72697 (1951-1953)
79925 (2225 – 2227)	72698 (1954-1956)
79928 (2240 – 2244)	73545 (1957-1959)
79933 (2270 – 2274)	73546 (1960-1962)
79938 (999 - 1003)	74587 (1981-1983)
79939 (1004 – 1008)	73547 (1963-1965)
79940 (1009 – 1013)	74587 (1981-1983)

B. Events Subsequent to Ruling No. 6127.

After the State Engineer issued Ruling No. 6127, Conley/Morrison filed a *Verified Petition for Writ of Prohibition, Complaint and Petition for Judicial Review* (the "Petition and Complaint"). Conley/Morrison's Petition for Writ of Prohibition alleges that the State Engineer exceeded his statutory authority and jurisdiction by granting applications to change the point of diversion, place of use and/or manner of use of applications to appropriate water that had never

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[3] The relevant applications may also be reviewed at the Nevada Division of Water Resources Website at State Engineers website at http://water.nv.gov/water rights/.

been permitted. Conley/Morrison's Complaint and Petition for Judicial Review makes that same claim, as well as additional claims. The Petition for Writ of Prohibition seeks a peremptory writ of prohibition restraining the State Engineer from any further proceedings related to the Change Applications until such time as permits have been issued under the Base Applications and new applications to change those permits have been properly filed and noticed in accordance with the requirements of Nevada law. Petition and Complaint at 6.

On or about September 28, 2011, the real party in interest, Kobeh Valley Ranch, LLC ("Kobeh") filed an *Answer* to the Petition and Complaint. On or about September 14, 2011, the Nevada State Engineer filed a document styled *Partial Motion to Dismiss, Notice of Intent to Defend* (the "Motion to Dismiss"). The Motion to Dismiss seeks dismissal of the Petition for Writ of Prohibition on the grounds that Conley/Morrison have a plain, speedy and adequate remedy under the law within the meaning of N.R.S. §34.330. On or about November 4, 2011, Conley/Morrison filed a *Request for and Points and Authorities in Support of Issuance of Writ of Prohibition and in Opposition to Motion to Dismiss* (the "Request and Opposition"). Pursuant to two stipulations for extension of time, the State Engineer was given until December 16, 2011, in which to reply to Conley/Morrison's Request and Opposition.

In the meantime, on December 1, 2011, the State Engineer issued permits for the Base Applications. On December 13, 2011, the State Engineer abrogated the Base Applications and simultaneously issued permits for the Change Applications. EC ROA 21-26, 2-14. [4]

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[4] On or about December 29, 2011, Eureka County filed a related Petition for Judicial Review that was assigned Case No. CV1112-164. The parties have stipulated to the consolidation of that case with this matter and to the filing of a related Record on Appeal simultaneously with Eureka County's filing of its Opening Brief. The Bate Stamp Nos. cited here refer to the Record on Appeal filed by Eureka County with its Opening Brief.

On or about December 16, 2011, Kobeh filed *Kobeh Valley Ranch's Reply to Conley/Morrison's Request for and Points and Authorities in Support of Issuance of Writ of Prohibition and in Opposition to Motion to Dismiss* (the "Kobeh Reply") and the State Engineer filed a *Reply in Support of Partial Motion to Dismiss and Opposition to Request for Writ of Prohibition* (the "State Engineer Reply"). Those pleadings contend that Conley/Morrison have a plain, speedy and adequate remedy pursuant to N.R.S. § 533.450 and are therefore not entitled to relief under the Petition for Writ of Prohibition. They also assert that the State Engineer's acceptance, consideration and granting of applications to change the point of diversion, place of use and/or manner of use of mere applications to appropriate water was consistent with Nevada law. In addition, the Kobeh Reply also contends that because the State Engineer issued the permits on the Change Applications on December 13, 2011, the Petition for Writ of Prohibition is now moot.

Given these facts, and the fact that Conley/Morrison raise the same issue in this Opening Brief based upon their Complaint and Petition for Judicial Review, i.e., that an application to change "water already appropriated" cannot be filed and noticed, heard and granted by the State Engineer until after a permit to appropriate that water has been issued, in the general interest of judicial economy it would appear that that legal issue is now best decided on its merits in the context of the Complaint and Petition for Judicial Review under N.R.S. 533.450.

STANDARD OF REVIEW

The issue addressed in this Brief is a pure question of law. In such cases independent review is necessary. *Langman v. Nevada Administrators, Inc.*, 114 Nev. 203, 207, 955 P.2d 188, 190 (1998). "'The construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate.'" Pure legal questions are decided without any deference to an agency determination. *City of Reno v. Bldg. & Const. Trades Council of N. Nevada*, 251 P.3d 718, 721 (Nev. 2011) (internal citation omitted).

"While it is true that an administrative agency's interpretation of its own regulation or statute is entitled to consideration and respect – especially where, as here, the State Engineer has a special familiarity and expertise with water rights issues – it 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.' '[A]n [administrative] agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision.'" *United States v. State Engineer*, 117 Nev. 585, 590-91, 27 P.3d 51, 53, 54 (2001) (State Engineer exceeded the scope of his authority by ignoring the plain meaning of the statute).

ARGUMENT

I. NEVADA LAW CLEARLY AND UNAMBIGUOUSLY PROVIDES THAT ONE CANNOT APPLY FOR AND THE STATE ENGINEER CANNOT GRANT, A CHANGE TO WATER WHICH HAS NEVER BEEN APPROPRIATED

As is set forth above, it cannot be disputed that through Ruling No. 6127, the State Engineer allowed Kobeh to file and then went forward to hear, grant and subsequent to the Ruling, permit the Change Applications. Those Change Applications purport to change water

applied for under the Base Applications that had not been already appropriated. In other words, the Engineer allowed the filing of, heard, approved and has now permitted a change to water which was not already appropriated as required by Nevada's water law.

In relevant part, N.R.S. § 533.325 provides:

> Any person who wishes . . . to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such . . ., change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so. [Emphasis added].

Under the statute, one can only apply for, and the State Engineer can only consider, applications which seek to change "water already appropriated."[5] An application which seeks to change water which is not already appropriated cannot be filed and cannot be processed. There are a number of principles of statutory construction which are relevant to the determination of what constitutes "water already appropriated."

When examining a statute, a court "should ascribe plain meaning to its words, unless the plain meaning was clearly not intended." *Cote v. Eighth Judicial District Court*, 124 Nev. 36, 175 P.3d 906, 908 (2008); *Diamond v. Swick*, 117 Nev. 671, 675, 28 P.3d 1087 (2001); *State Employees Association, Inc. v. Lau*, 110 Nev. 715, 717, 877 P.2d 531 (1994). The State Engineer cannot ignore the plain meaning of an unambiguous statute. *United States,* 117 Nev. at 589. The plain meaning of "water already appropriated" cannot include water which is the subject of a mere application to appropriate which is nothing more than a request for the permission required to make an appropriation in the first place. Because the appropriation

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[5] The State Engineer's printed forms for use in filing change applications provide for an "application for permission to change water heretofore appropriated (Identify existing rights by Permit, Certificate, Proof or Claim Nos. If Decreed, give title of Decree and identify right in Decree.)"

cannot be made until the permission is granted, an application alone is clearly not an appropriation. The State Engineer exceeded the scope of his authority by ignoring the plain meaning of the statute. *Id* at 590.

Because the statute is unambiguous there is no reason to go beyond its plain meaning to apply other principles of statutory instruction. However, application of those principles does not lead to any different result.

Legislative intent governs the construction of a statute, "and such intent must be gathered from consideration of the entire statute or ordinance and not from consideration of only one section thereof." *A Minor Girl v. Clark County Juvenile Court Services*, 87 Nev. 544, 548, 490 P.2d 1248, 1250 (1971); *see also, International Game Technology, Inc. v. Second Judicial District Court*, 122 Nev. 132, 127 P.3d 1088, 1103 (2006) ("When interpreting a statute, a court should consider multiple legislative provisions as a whole"); *Midwest Livestock Commission Co. v. Griswold*, 78 Nev. 358, 360, 372 P.2d 689, 690 (1962) ("Our obligation, however, is to ascertain the legislative intent. We can do this only by reading the whole act.") As a consequence, it is not enough to look at only N.R.S. § 533.325. Rather, other provisions of Nevada's water law must be considered in determining whether "water already appropriated" includes an application to appropriate. When the water law as a whole is considered, it becomes abundantly clear that an application to appropriate does not by itself result in "water already appropriated."

In N.R.S. § 533.030(1), the legislature stated that "all water may be appropriated for beneficial use as provided in this chapter and not otherwise." Again, N.R.S. § 533.325 in relevant part provides:

Any person who wishes to appropriate any of the public waters . . . shall, before

> performing any work in connection with such appropriation, . . . apply to the State Engineer for a permit to do so.

An application to appropriate in the context of the statutory appropriation process serves a purpose similar to that of a notice of intent to appropriate in the common law appropriation process. It is a step in that process, but is not one which by itself is sufficient to constitute an appropriation. Under the common law, no appropriation occurred until the water was diverted with intent to apply it to beneficial use, followed by an application so such use within a reasonable period of time. *Walsh v. Wallace*, 26 Nev. 299, 327 (1902); *Gotelli v. Cardelli*, 26 Nev. 382, 386-87 (1902). . Those are all actions which Nevada's water law provides may not happen unless and until the State Engineer issues a permit to appropriate.

The "application for a permit to appropriate water" must contain specific information including, but not limited to, the applicant's name, the name of the water source, the amount of water the applicant desires to appropriate, the proposed purpose of use, description of the proposed place of use, and estimates concerning costs and time associated with the proposed appropriation. N.R.S. § 533.335. After receiving an application to appropriate water, the State Engineer must publish notice of the application in a newspaper circulated in the county where the water sought to be appropriated is located. N.R.S. § 533.360(1). Within 30 days from the date of the last publication of the notice concerning the application, any interested person may file a written protest requesting that the State Engineer deny the requested appropriation. N.R.S. § 533.365 (1). After receiving and considering any protest to the application, the State Engineer may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved. N.R.S. § 533.365(3). Finally, the State Engineer must either reject or approve the proposed appropriation of water pursuant to the

criteria set forth in N.R.S. § 533.370. Those are all unnecessary steps if the mere filing of the application results in "water already appropriated."

If the State Engineer approves the application, the proposed appropriation becomes a "permit" to appropriate water. This occurs only after the State Engineer places his "endorsement of approval upon [the] application" and sets a time for the completion of work related to the appropriation and the actual application of water to beneficial use. N.R.S. § 533.380(1). In the permitting process, the "state engineer may limit the applicant to a smaller quantity of water, to a shorter time for the completion of work," and to a shorter time for placing the water to beneficial use and perfecting the water right than was requested by the applicant in his application to appropriate water. N.R.S. § 533.380(3). Again, all of these statutory steps would be unnecessary if an application alone results in "water already appropriated."

The "permit" becomes a conditional appropriation. It constitutes the State Engineer's permission to divert water and begin placing that diverted water to beneficial use in order to perfect the water right and receive a "certificate" of appropriation. The permit holder must proceed with due diligence towards perfection of the water right. If the State Engineer determines that the "holder of a permit is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the state engineer shall cancel the permit." N.R.S. § 533.395(1). The State Engineer must also cancel the permit if the holder fails to file his proof of application of water to beneficial use and related documentation within the time period stated on the permit. N.R.S. § 533.410.

Finally, the State Engineer issues a "certificate" of appropriation when the permit holder files proof, satisfactory to the State Engineer, that the water has been placed to beneficial use. N.R.S. § 533.425. Specifically, the statute states that "the state engineer shall issue to the holder

or holders of the permit a certificate setting forth," among other things, the name of the appropriator, the amount of the appropriation, and a description of the place of use of the water right. *Id.*

When the foregoing provisions of Nevada's water law are considered, it becomes clear that "water already appropriated" cannot include a mere application. A statute should be read to give meaning to all of its parts, *Nevada Tax Commission v. Bernhard*, 100 Nev. 348, 351, 683 P.2d 21, 23 (1984), and in harmony with other statutes. *In Re: Parental Rights as to A.J.G. v. State of Nevada*, 122 Nev. 1418, 148 P.3d 759, 765 (2006). "It is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes . . . ." *Whealon v. Sterling*, 121 Nev. 662, 667, 119 P.3d 1241, 1245 (2005). If an application by itself constituted "water already appropriated," those additional provisions and steps in the process would be unnecessary.

Courts are also to construe statutory language in a manner that avoids absurd or unreasonable results. *Id. See also, Nevada Tax Commission*, 100 Nev. at 351, 683 P.2d at 23; *Meridian Gold Co. v. State of Nevada*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003). It is presumed that every word, phrase or provision has meaning. *Charlie Brown Construction Company, Inc. v. City of Boulder City*, 106 Nev. 497, 502-503, 797 P.2d 946, 949 (1990), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 205, 267, 993 P.3d 1259, 1270 (2000). No part of a statute should be rendered nugatory or mere surplusage by a judicial interpretation. *One 1978 Chevrolet Van v. County of Churchill*, 97 Nev. 510, 512, 634 P.2d 1208, 1209 (1981); *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 135 P.3d 807, 810 (2006). Under the provisions of N.R.S. § 533.370(2), in considering whether to approve or reject an application to appropriate water, the State Engineer must determine if there is "unappropriated

water in the proposed source of supply." If the mere filing of an application to appropriate results in "water already appropriated," the exercise of determining if there is any unappropriated water is rendered meaningless.

A final principle of statutory construction applicable here is that the mention of one thing implies the exclusion of another, "expressio unis est exclusio alterius." *See, In Re Bailey's Estate*, 31 Nev. 377, 103 P. 232 (1909). Until 1993, there was nothing in Nevada's water law which even partially expressly defined "water already appropriated." Two court rulings in 1992, both involving applications to change, prompted the legislature to clarify what was "included" in "water already appropriated."

In *United States v. Alpine Land & Reservoir Co. (Alpine III)*, 983 F.2d 1487, 1492-1495 (9th Cir. 1992), the Ninth Circuit Court of Appeals rejected a Nevada State Engineer interpretation of "water already appropriated," and thus transferable by change application, that included "all rights to the use of water, including inchoate rights, such as permits where the water has not been put to beneficial use." *Alpine III*, 983 F.2d at 1492. The *Alpine III* court was required to determine for itself the meaning of "water already appropriated" as, at that time, no statutory clarification existed, and the State Engineer agreed that the issue of the proper application of the procedure to change the point of diversion or place or manner of use depended upon the interpretation of "water already appropriated." *Alpine III*, 983 F.2d 1492-1495. Accordingly, the *Alpine III* court drew upon applicable precedent, and determined that the State Engineer's assertion that the definition of "water already appropriated" included "all rights," including "inchoate rights," was unsupportable and inconsistent with Nevada water law and the doctrine of prior appropriation generally as interpreted in Nevada courts and the courts of other prior appropriation jurisdictions. *C.f., Alpine III*, 983 F.2d at 1492-1495.

Logically, the broad definition of "water already appropriated" to include "all rights" advanced by the State Engineer in *Alpine III* would, if accepted by the court, have extended to arguably unperfected rights like those at issue in the *Alpine* litigation, permitted rights as argued in *Alpine III*, and perhaps even to applications to appropriate like those at issue here.

In *Pyramid Lake Paiute Tribe of Indians, et al. v. R. Michael Turnipseed, et al.*, in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, No. CV91-2231 (Aug. 31, 1992 Order), the court ruled that under Nevada law, one could not change the point of diversion, place of use or manner of use of water unless the right to that water had been fully perfected. In that case the applications to change involved previously permitted water rights which had not yet been fully perfected. In reaching its conclusion, the court interpreted the phrase "water already appropriated" in N.R.S. §§ 533.325 and 533.345 to mean that the change sought must involve water rights which had been fully placed to beneficial use, and therefore fully perfected under Nevada law.

In 1993, after those decisions, the Nevada legislature enacted N.R.S. § 533.324, which provides:

> As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is mace.

[Emphasis added]. Noticeably, absent from what is "included" in "water already appropriated" for purposes of a change application is a mere "application." The Legislature heard and received extensive oral and written testimony, including from the then State Engineer and a former State Engineer. Neither suggested that "water already appropriated" did or should include a mere

application to appropriate.[6] Nothing in the legislative history for that legislation suggests that the Legislature intended that "water already appropriated" include applications to appropriate water. Instead, that history indicates that the Legislature's intent was to continue the historic practice of allowing the filing and consideration of changes to existing water rights in the form of permits or certificates issued by the State Engineer.

Nevada state and federal courts have consistently rejected arguments for a broad interpretation of the term "water already appropriated," choosing instead to adopt a more restrictive view of the legal meaning of the phrase based on applicable precedent and consistent with the doctrine of prior appropriation, and leaving it to the Legislature to determine whether to broaden the definition of the term by statute, which it has done, and in doing so, as mentioned above, it has chosen not to broaden the statutory definition of "water already appropriated" to include applications to appropriate water. Thus, the Court should vacate the State Engineer's approval and granting of permits under the Change Applications. Nevada law is clear that applications to change any water to be appropriated under the Base Applications may not be filed, noticed, heard and granted until after, not before, valid permits have been issued under those Base Applications.

CONCLUSION.

In Ruling No. 6127, the State Engineer has exceeded the scope of his authority in accepting, considering and approving changes to water which has never been appropriated. The Court should vacate the State Engineer's approval of the Change Applications. Applications to

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[6] The complete legislative history for Assembly Bill 337 from the 1993 Nevada Legislature can be viewed at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB337.1993.pdf.

change any water to be appropriated under the Base Applications may not be filed, noticed or heard until after, not before, valid permits have been issued under those Applications. Moreover, for that reason and the resons stated in Eureka County's Opening Brief, the Court should vacate Ruling No. 6127, deny all Applications approved by that Ruling and abrogate all permits issued under it.

Dated: January 13th, 2012.

WOODBURN AND WEDGE

By: Dale E. Ferguson
Gordon H. DePaoli
Dale E. Ferguson
Domenico R. DePaoli
Attorneys for Conley Land & Livestock, LLC and Lloyd Morrison

AFFIRMATION (pursuant to N.R.S. 239B.030)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

WOODBURN AND WEDGE

By: Dale E. Ferguson
Gordon H. DePaoli
Dale E. Ferguson
Domenico R. DePaoli
Attorneys for Conley Land & Livestock, LLC and Lloyd Morrison

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of the law offices of Woodburn and Wedge, and that in such capacity and on this 13th day of January, 2012, I caused to be served a true and correct copy of the OPENING BRIEF OF CONLEY LAND & LIVESTOCK, LLC and LLOYD MORRISON by depositing it in the United States mail, postage prepaid, first class mail, addressed as follows:

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

EUREKA COUNTY, a political subdivision of the State of Nevada, Petitioner, vs. STATE OF NEVADA, EX. REL., STATE ENGINEER, DIVISION OF WATER RESOURCES, Respondent.	Case No.: CV1108-155 Dept. No.: 2
CONLEY LAND & LIVESTOCK, LLC, a Nevada Limited Liability Company, LLOYD MORRISON, an individual, Petitioners, vs. OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, JASON KING, STATE ENGINEER, KOBEH VALLEY RANCH, LLC, Real Party in Interest, Respondents.	Case No.: CV1108-156 Dept. No.: 2

KENNETH F. BENSON, an individual, DIAMOND CATTLE COMPANY, LLC, a Nevada Limited Liability Company, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, a Nevada Registered Foreign Limited Partnership, Petitioners, vs. STATE ENGINEER, OF NEVADA, OFFICE OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No.: CV1108-157 Case No.: CV1112-165[1] Dept. No.: 2 **PETITIONERS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP'S OPENING BRIEF**

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[1] Case No. CV1112-165 is proposed for consolidation with case CV1112-164, and with already consolidated cases CV1108-155, CV1108-156, and CV1108-157.

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OPENING BRIEF

Petitioners KENNETH F. BENSON ("Benson"), DIAMOND CATTLE COMPANY, LLC, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LIMITED PARTNERSHIP ("Etcheverry"[2]) (collectively referred to herein as "Petitioners"), by and through their attorneys of record, Schroeder Law Offices, PC, file this Opening Brief in support of their Petition for Judicial Review filed in Case No. CV1108-157 on August 10, 2011; and in support of their Petition for Judicial Review filed in Case No. CV1112-165 on December 30, 2011, as Amended on January 12, 2012.

I.

PROCEDURAL HISTORY

It is the second time this matter has been before the State Court on a petition for judicial review. Between May 2, 2005 and June 15, 2010, numerous applications to appropriate underground water and to change the point of diversion, place of use, and manner of use within the Kobeh Valley (139) and Diamond Valley (153) hydrographic basins, Lander County and Eureka County, Nevada, were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch, LLC (collectively referred to herein as "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobeh Valley Ranch, LLC ("Applicant"). The Applications were filed for a proposed molybdenum mine known as the Mount Hope Mine Project, requiring underground water for mining, milling, and dewatering purposes. The Applications, a combination of applications for new appropriations of water and applications to change the point of diversion, place of use, and/or manner of use of existing water rights, requested a total combined duty of 11,300 acre-feet annually ("AFA").

On October 13-17, 2008, an administrative hearing was held before the State Engineer that resulted in the March 26, 2009 issuance of Ruling No. 5966. Ruling No. 5966

[2] A short reference to Etcheverry includes interests relating to Diamond Cattle Company, LLC as well as Michel and Margaret Ann Etcheverry Family Limited Partnership.

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was appealed to this Court in Case Nos. CV0904-122 and CV0904-123. This Court entered its decision on April 21, 2010, vacating Ruling No. 5966 and remanding the matter for a new hearing before the State Engineer.

On June 15, 2010, Applicant filed Applications 79934 through 79939 to change the point of diversion, place of use, and manner of use of groundwater previously applied for or appropriated under existing permits and certificates, as shown in the following chart:

Original Water Right	**Change Application in Ruling No. 5966**	**June 15, 2010 Change Application**	**Rate of Water Requested**	**Duty of Water Requested**
Permit #35866	Application #76745	Application #79934	1.22 cfs	819.24 AFA
Permit #11072, Certificate #2880	Application #76990	Application #79935	0.76 cfs	322.5 AFA
Permit #60281	Application #75990	Application #79936	1.0 cfs	272.64 AFA
Permit #60282	Application #75991	Application #79937	1.0 cfs	723.97 AFA
	Application #74587	Application #79938	1.0 cfs	723.97 AFA
	Application #73547	Application #79939	1.0 cfs	723.97 AFA
			TOTAL: 5.98 cubic feet/second	**TOTAL:** 3586.29 AFA

On July 28, 2010, timely protests were filed by Petitioner Benson against Applications 79934 through 79939.

Eureka County also filed timely protests on several of Applicant's applications.[3]

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

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[3] A list of protests to Applications are delineated in the beginning of Ruling No. 6127. *See* ROA 3572-3575.

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

On July 15, 2011, the State Engineer issued Ruling No. 6127, granting a majority of the Applications, subject to certain terms and conditions. Applications No. 79934 through 79939 were granted by Ruling No. 6127.

On August 11, 2011, Petitioners filed their Petition for Judicial Review, challenging Ruling No. 6127, in Case No. CV1108-157. Respondent Kobeh Valley Ranch, LLC ("Respondent" or "Applicant") filed its Answer to Petition for Judicial Review on September 29, 2011.

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

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

On December 14, 2011, the State Engineer issued Permit 78424 to the Applicant. All of the permits issued on December 1, 2011, December 13, 2011, and December 14, 2011, are collectively referred to herein as "2011 Permits."

Petitioners filed their Petition for Judicial Review, challenging issuance of the aforementioned 2011 Permits, on December 30, 2011, in Case No. CV1112-165. Petitioners filed an Amended Petition for Judicial Review on January 12, 2012, in Case No. CV1112-165.

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Pursuant to this Court's Order Setting Briefing Schedule, Petitioners hereby file their Opening Brief in the above-referenced cases.

II.

STATEMENT OF RELEVANT FACTS

Between the years 2005 and 2010, Applicant filed numerous Applications to appropriate groundwater and to change points of diversion, places of use, and manners of use within the Kobeh Valley and Diamond Valley Hydrographic Basins. The purpose of Applications is to secure sufficient water to operate an open pit molybdenum mine and mill to be located at Mt. Hope, approximately 20 miles northwest of the Town of Eureka, Eureka County, Nevada. *See* Exhibits 99-125, 21-25, and 40 at ROA 2156-2294, 999-1023, and 1766. The mine has a projected lifespan of 44 years, and, according to Applicant, will require approximately 11,300 AFA, or approximately 7,000 gallons/minute, pumped on a continuous basis. Exhibit 40 at ROA 1766.

Kenneth Benson ("Petitioner Benson") submitted a timely protest against Applications 79934 through 79939. Ruling No. 6127 at ROA 3581. Applications 79934 through 79939 each list Well 206 as the requested changed point of diversion. Exhibits 21, 22, and 122-125 at ROA 999-1008 and 2275-2294. Applications 79934 through 79939 request a total cumulative diversion rate of 5.98 cubic feet/second ("cfs"), or 2,684 gallons/minute, and a total cumulative duty of 3,586.29 AFA, which represents more than 31 percent of the 11,300 acre-feet required for the Mt. Hope mine operations. *Id.*

Well 206 draws from a carbonate rock aquifer with relatively high transmissivity. Exhibits 40 and 53 at ROA 1775 and 1810. Applicant conducted a 32-day constant rate aquifer test on Well 206 from April 10 to May 12, 2008, at a target pumping rate of 1,400 gallons/minute. *Id.* at ROA 1805; Table 10 at ROA 1831. Observed drawdown in Well 206 reached 30 feet at the end of the pumping test. *Id.* at ROA 1805. Static water levels in the aquifer did not return to pre-testing levels and a residual drawdown of 4.5 feet was observed. *Id.* Based

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on the "conservative" pumping of Well 206, Applicant's scientific analysis indicates that there will be a 205 foot drawdown at the end of the mine's 44-year pumping period. Exhibit 39 at ROA 1716. Applicant's expert admits that pumping over time will cause impacts to multiple springs and stock watering wells on the floor of Kobeh Valley. Transcript at ROA 187:7-16.

Well 206 is uniquely situated and located within roughly 75 feet of the property line boundary of a private ranch, Roberts Creek Ranch, owned by Petitioner Etcheverry. Exhibit 526 at ROA 3522; Transcript at ROA 439:22 – 441:2, 448:7-15. The Etcheverry Family possesses multiple water rights for Roberts Creek Ranch, and also maintains at least one domestic well on the property. ROA 447:4-6.[4] Following Applicant's pumping test of Well 206 in 2008, the Etcheverry Family observed that water levels in nearby Nichols Springs were cut by half and have never fully recovered. ROA 448:16 – 449:22, 456:8 – 458:3. Furthermore, since Applicant's pumping test of Well 206, the Etcheverry Family has been forced to haul water to the cattle that were previously supplied by Nichols Springs. ROA 456:8-18.

Petitioner Etcheverry participated in the administrative hearing held in 2010. ROA 439-460. Petitioner Etcheverry is a landowner and water right holder in Kobeh Valley, Pine Valley, and Diamond Valley, and utilizes grazing preferences in the Roberts Creek Allotment as part of its ranching enterprise. ROA 442:22 – 443:8. Petitioner Etcheverry's water rights on the floor of Kobeh Valley include the following:

a) Application/Permit No. 48684, Certificate No. 12338: Allows 8.684987 AFA from a groundwater well for stockwatering;

b) Application/Permit No. 12748, Certificate No. 5880: Allows 10.863906 AFA from the Etcheverry Mud Spring for stockwatering;

c) Application/Permit No. 16802, Certificate No. 5078: Allows 117 AFA from the Roberts Creek & Tributaries Spring for irrigation;

[4] Petitioner Etcheverry LFP also holds water rights in Pine Valley, including Permits Nos. 13708, 43321, 43322, V01392, V01555, V02781, V02782, V02783, and V02784. Exhibit 526 at ROA 3522.

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d) Application/Permit No. 2732, Certificate No. 0480: Allows 120 AFA from the Roberts Creek for irrigation; and

e) Application/Permit No. 4768, Certificate No. 1986: Allows 24.213621 acre-feet per season from an unnamed spring for stockwatering.

See generally Exhibit 526 at ROA 3522.

Further, excessive additional groundwater pumping in Kobeh Valley can have adverse impacts on water rights in Diamond Valley. There is general agreement that subsurface water flows from Kobeh Valley to Diamond Valley, but how much is uncertain. ROA 3585. The State Engineer found that "[b]ecause the groundwater flow model is only an approximation of a complex and partially understood flow system, the estimates of interbasin flow and drawdown cannot be considered as absolute values." ROA 3590.

Petitioner Benson argued at the 2010 hearing that the State Engineer should consider forthcoming United States Geological Survey studies, as the best available evidence, before making a determination about whether Diamond Valley water rights would be negatively impacted by Applicant's proposed groundwater pumping. Ruling No. 6127 at ROA 3581. Petitioner Benson's argument comports with Nevada Revised Statutes § 533.024(1)(c), which "encourage[s] the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada."

Petitioner Benson is an owner of water rights in Diamond Valley, Nevada, including the following:

a) Application/Permit No. 22648, Certificate No. 6358: Allows 1,186.88 AFA from a groundwater well for irrigation;

b) Application/Permit No. 22921, Certificate No. 7874: Allows 1,186.88 AFA from a groundwater well for irrigation; and

c) Application/Permit No. 35009, Certificate No. 10225: Allows 640 AFA from a groundwater well for irrigation.

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See Exhibit 302 at ROA 2794-2796.

For the reasons stated below, Petitioners Benson's and Etcheverry's existing water rights will be negatively impacted as a result of Ruling No. 6127 and the State Engineer's issuance of 2011 Permits. Accordingly, the State Engineer was required to deny Applications pursuant to Nevada Revised Statute § 533.370(5). This Court should reverse Ruling No. 6127 and the issuance of 2011 Permits.

III.

SUMMARY OF THE ARGUMENTS

The State Engineer's Ruling No. 6127 was arbitrary and capricious and not supported by substantial evidence for one or more of the following reasons:

1) Applications conflict with existing rights, and thus the State Engineer was required to deny Applications;

2) The State Engineer's reliance on a non-existent mitigation plan to mitigate harm to existing rights was without support;

3) The Ruling's reliance on a non-existent mitigation plan denied Petitioners their due process rights;

4) The State Engineer erroneously issued Applications, which did not comport with requirements regarding describing points of diversion and places of use;

5) The interbasin transfers approved by State Engineer are not environmentally sound, and thus should have been denied;

6) The State Engineer's determination that substantial withdrawals from Kobeh Valley would not impact existing rights in Diamond Valley was arbitrary and capricious and not based on substantial evidence; and

7) Applicant's model underestimates impacts caused by pumping, and thus the State Engineer's reliance on the model was not based on substantial evidence.

Second, the State Engineer's issuance of 2011 Permits approved by Ruling No. 6127 was arbitrary and capricious, contrary to and affected by an error of law, without rational basis,

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beyond legitimate exercise of power and authority, and/or resulted in a denial of due process to Petitioners for one or more of the following reasons:

1) The State Engineer's issuance of 2011 Permits with a combined total duty of over 30,000 AFA was arbitrary and capricious, given the 11,300 AFA limitation requested by Applicant;

2) Issuance of 2011 Permits in Diamond Valley without the requirement that water produced but not consumed be returned to the groundwater aquifer in Diamond Valley is contrary to Ruling No. 6127;

3) The State Engineer's issuance of transfer permits in excess of consumptive use duties was inconsistent with Ruling No. 6127 and affected by an error in law;

4) The State Engineer's designation of a 90,000 acre place of use exceeds the State Engineer's authority and is affected by an error of law;

5) The State Engineer's issuance of 2011 Permits with a condition that each 2011 Permit is subject to a mitigation plan to be approved by the State Engineer violates Petitioners' due process rights; and

6) The State Engineer's issuance of 2011 Permits with a condition that each 2011 Permit is subject to a mitigation plan to be approved by the State Engineer is contrary to Ruling No. 6127.

IV.

STANDARD OF REVIEW

When a court reviews the decision of a state agency, the court should not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. NRS § 233B.135(3). However, a court may reverse, remand, or set aside the decision of an agency if the agency's decision is:

a) In violation of constitutional or statutory provisions;

b) In excess of the statutory authority of the agency;

c) Made upon unlawful procedure;

d) Affected by other error of law;

e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

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f) Arbitrary or capricious or characterized by an abuse of discretion.

Id.

When a court reviews the decision of a state agency regarding a question of fact, the court is limited to a determination of whether substantial evidence in the record supports the decision. *Town of Eureka v. State Engineer*, 108 Nev. 163, 165 (1992). The decision should be affirmed if the court finds the ruling supported by substantial evidence. *United States v. Alpine Land & Reservoir Co.*, 919 F.Supp. 1470, 1474 (D.Nev. 1996). The Nevada Supreme Court defines "substantial evidence" as "that which a reasonable mind might accept as adequate to support a conclusion." *State Employment Sec. Dept. v. Hilton Hotels Corp.*, 102 Nev. 606, 608 (1986) (citing *Richardson v. Perales*, 402 U.S. 389 (1971)).

The decision of an administrative agency will generally not be reversed unless it is arbitrary or capricious. *Hilton Hotels*, 102 Nev. at 608. A decision is "arbitrary or capricious" if it is "baseless or despotic," or "a sudden turn of mind without apparent motive; a freak, whim, mere fancy." *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222 (1994).

Nonetheless, an administrative decision may also be reversed, remanded or set aside if it is "affected by an error of law." *Dredge v. State ex rel. Dep't Prisons*, 105 Nev. 39, 43 (1989) (ruling applied to NRS § 233B.135 by *Pricz Tattoo Studio LLC v. Dep't of Employment Training & Rehabilitation-Employment Securities Division*, Slip Copy, 2011 WL 6932405, *1 (Nev. 2011)). An error of law is a "clear error in view of the reliable, probative, and substantial evidence of record or an abuse or clearly unwarranted exercise of discretion." *Dredge*, 105 Nev. at 43. Further, the administrative decision may be reversed, remanded or set aside if the decision constitutes an "abuse of discretion" because the decisionmaker acted arbitrarily or capriciously. *Id.*

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V.

ARGUMENT

A. The State Engineer's Ruling No. 6127 is not supported by substantial evidence and is arbitrary and capricious.

Ruling No. 6127 was issued by the State Engineer on July 15, 2011, granting the majority of Respondent's Applications. Ruling No. 6127 is not supported by substantial evidence, and thus is arbitrary and capricious. This Court should reverse Ruling No. 6127 for the reasons stated below.

1. Ruling No. 6127 grants Applications which will conflict with existing water rights. Pursuant to Nevada State law, the State Engineer was required to deny the applications. Ruling No. 6127 is not supported by substantial evidence and is arbitrary and capricious.

The substantial evidence on the record supports a finding that the Applicant's water use will impact and injure both ground water and surface water sources. The impact and injury will occur to vested water claims (pre-dating Nevada's water code) and certificated water rights senior in priority to the Applicant. Substantial evidence supports a denial of Applicants water applications and permits in that exercise of such permits will cause injury to existing rights, and an unreasonable lowering of the ground water table.

a. Injury Will Occur Due to an Unreasonable Lowering of the Ground Water Table.

Nevada Revised Statute § 533.370(5) provides: "the State Engineer ***shall*** reject the application and refuse to issue the requested permit" if the "proposed use or change conflicts with existing rights." (Emphasis added). Existing water rights to use underground water are specifically recognized. NRS § 534.100. Groundwater rights "allow for a ***reasonable*** lowering of the static water level at the appropriator's point of diversion." NRS § 534.110(4) (Emphasis added). Later appropriations may be granted that may cause the water level to be lowered at the point of diversion of a prior appropriator, only if the rights of existing appropriators can be satisfied under "express conditions." NRS § 534.110(5).

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Petitioner Michel and Margaret Etcheverry Family LP ("Etcheverry") is a landowner and water right holder in Kobeh Valley. Etcheverry entered into a long-term lease agreement with Petitioner Diamond Cattle Company, LLC ("Diamond Cattle") to operate its farming and ranching operation. The lease includes long-term rights to the United States Department of Interior Bureau of Land Management ("BLM") grazing preferences in the Roberts Creek Allotment. Etcheverry's private ranch includes a property line boundary located within roughly 75 feet of Well 206, the point of diversion proposed for Applications No. 79934 through 79939 within the proposed well field.

Etcheverry is the owner of five water rights on the floor of Kobeh Valley. Etcheverry on behalf of itself and Diamond Cattle are vested claim holders and future claimants to vested water uses for stock water in the Roberts Mountain areas of Kobeh Valley and Pine Valley as the holder of the grazing preference on the Roberts Mountain Allotment. Etcheverry also maintains at least one domestic well on its private Roberts Creek Ranch property on floor of Kobeh Valley as well as at least two domestic wells at its Alpha Ranch. Transcript, State Engineer's Record on Appeal ("ROA"), submitted October 27, 2011, ROA 446:25 – 447:9. Finally, Etcheverry's interests in Diamond Valley include four agricultural production circles with water rights.

Ruling No. 6127 states: "The Applicant's groundwater flow model indicates water level decline attributable to these applications is significant in the well field area in Kobeh Valley and at the open pit mine." ROA 3590. The State Engineer analyzed the potential for Applications to conflict with existing water rights based on 1) groundwater flow from Kobeh to Diamond Valley, 2) a hydraulic disconnect between groundwater pumping and mountain streams and springs, and 3) the admitted future effects of pumping on hydraulically connected Kobeh Valley streams and springs. *See* Ruling No. 6127 at ROA 3588-3593.

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First, the State Engineer determined that groundwater flow from Kobeh Valley to Diamond Valley through Devil's Gate[5] is low, and thus groundwater pumping in Kobeh Valley pursuant to Applications would not conflict with existing water rights in Diamond Valley.[6] Ruling No. 6127, ROA 3588-3590. *Next*, the State Engineer determined that there is not a hydraulic connection between the groundwater source for Applications and mountain streams and springs in the Roberts Mountains, and thus Applications would not interfere with existing rights from those mountain streams and springs.[7] *Id.* at ROA 3591-3592. *Finally*, the State Engineer determined: "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." *Id.* at ROA 3593. This last finding by the State Engineer is consistent with the testimony given by Applicant's witness, Terry Katzer, stating that existing water rights on the Kobeh Valley floor would be directly impacted by the pumping proposed in Applications. ROA 163:11-13 and 187:7-16.

This last finding and conclusion is supported by Applicant's expert witness, Dwight Smith, who testified that the Etcheverry Mud Spring would likely cease flowing as a direct result of pumping under the Applications. ROA 368:12 - 369:21. This statement is also confirmed by Applicant's expert witness Terry Katzer who testified concerning the impacts from Applicant's pumping, "Mud Springs....[i]t will probably dry that up with time. And other springs that are in close proximity to the well field." Transcript at ROA 187:7-16. Katzer continued noting there would be impacts to stock water wells from Applicant's pumping. *Id.* As an additional example, Martin Etcheverry testified that by the time Applicant was done testing

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[5] Devil's Gate is the area where the basin line between Kobeh Valley and Diamond Valley intersect Hwy 50. This area is comprised of a geologic formation that creates a natural "gate" wherein underground water is known to flow from Kobeh Valley to Diamond Valley. The inflow to Diamond Valley is unknown, however Applicants estimate the flow to be approximately 1600 AFA, or enough water to irrigate 530 acres of land. *See* infra.

[6] Petitioners seek review of this determination, and the argument in support of reversal is discussed infra.

[7] Petitioners seek review of this determination, and the argument in support of reversal is discussed infra.

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Well 206, Nichols Springs dropped to half the water and has not yet recovered, years later.[8] ROA 448:16-35, 449:17-22, 456:8 – 458:3. Applicant's witness, Jack Childress, acknowledged that the net effect of Applicant's proposed pumping from Well 206 will be to "dewater" the carbonate block that houses Well 206. ROA 258:25 - 259:2. It is predicted that Well 206 will see a drawdown of 205 feet by the end of the 44 year mine life. Exhibit 39 at ROA 1716. Indeed, Applicant's experts indicate that pumping over time will cause impacts to multiple springs and stock watering wells on the floor of Kobeh Valley. ROA 187:7-16.

Dewatering the aquifer and causing streams to dry up are injury, and warrant denial of these Applications. Despite the State Engineer's finding that water rights on the valley floor of Kobeh Valley would likely be impacted by the pumping proposed by Applications, the State Engineer did not deny the Applications as required by Nevada Revised Statute § 533.370(5). The State Engineer's action is not supported by substantial evidence and is arbitrary and capricious, and an abuse of discretion.

b. No Express Conditions Are Stated to Mitigate Injury.

The State Engineer also failed to engage in the analysis required by Nevada Revised Statute § 534.110(5). Nevada Revised Statute § 534.110(5) states that new appropriations that would lower the static water level may only be granted if "the rights of holders of existing appropriations can be satisfied under such express conditions." No conditions were identified in Ruling No. 6127 that will satisfy injury caused to existing users.

The State Engineer made a determination that any predicted impacts could be "adequately and fully mitigated by the Applicant." Ruling No. 6127 at ROA 3593. However, no mitigation plan exists on the record. Moreover, because no actual mitigation plan exists,[9] there

[8] Nichols Spring is located just north-east of Etcheverry's Roberts Creek Ranch property and flows off of the Roberts Mountains.

[9] It is understood that mitigation plans are being drafted; however, Petitioners are not included as a party to the mitigation drafts and have no due process in its creation other than by submitting public comment at Eureka County Commissioners meetings wherein any draft is being discussed. Furthermore, nowhere has any draft plan discussed curtailment as an option to stop future injury from occurring. Any mitigation plan that will affect the

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has been absolutely no evidence submitted which shows that a mitigation plan would adequately or fully mitigate the predicted conflicts with existing water rights. The determination is not supported by substantial evidence because it is not based on any evidence in the Record. Furthermore, the standard is not that conflicts can be mitigated; the standard imposed by Nevada Revised Statute § 534.110(5) is that existing rights must be satisfied, or new appropriations may not be made.

The substantial evidence in the Record supports a finding and determination that Applications will conflict with existing water rights held by Petitioners. Pursuant to Nevada Revised Statute § 533.370(5), the State Engineer was required to deny the Applications outright. There is no evidence in the record to support a finding that Petitioner's existing water rights will be satisfied despite the lowering of the static water level, which is a condition precedent to granting the Applications. NRS § 534.110(5). The State Engineer's reliance on a hypothetical mitigation plan that does not exist was misplaced and exceeded his authority. One may only conclude that Ruling No. 6127 is not supported by substantial evidence on the record and is arbitrary and capricious. This Court should reverse Ruling No. 6127's approval of the Applications.

2. The State Engineer cannot rely on a non-existent mitigation plan to determine whether conflicts with existing water rights will be mitigated, and does not have the authority to grant water rights when they conflict with existing rights.

Nevada Revised Statute § 533.370(5) provides: "the State Engineer ***shall*** reject the application and refuse to issue the requested permit" if the "proposed use or change conflicts with existing rights." (Emphasis added). Groundwater rights "allow for a ***reasonable*** lowering of the static water level at the appropriator's point of diversion." NRS § 534.110(4) (emphasis added). Later appropriations may be granted that may cause the water level to be lowered at the

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process in which Petitioners would seek recourse from injury to certificated and vested water rights from the State must meet State administrative rule-making procedures or thus violate Petitioners due process rights.

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point of diversion of a prior appropriator, only if the rights of existing appropriators can be satisfied under "***express conditions***." NRS § 534.110(5) (emphasis added).

Pursuant to the above-cited provisions of the Nevada Revised Statutes, a water appropriation that would conflict with existing water rights "shall" be denied. However, groundwater rights must permit reasonable lowering of the static water level, but only at the point of diversion and only so far as the prior appropriator's rights can still be satisfied.

The State Engineer recognized in Ruling No. 6127 that granting Applications would conflict with existing rights on the floor of Kobeh Valley. The floor of Kobeh Valley encompasses a much larger area than the points of diversions described in these Applications. Further, hearing testimony by Applicant's witnesses established that granting Applications would cause certain springs to cease flowing, such as the Etcheverry Mud Spring. *See* Transcript at ROA 368:12 – 369:21. But despite the State Engineer's recognition of conflicts with existing rights, and testimony by Applicant's own witnesses that pumping proposed in Applications would cause certain springs to cease flowing, the State Engineer determined that Applications should be granted, so long as a mitigation plan is submitted in the future and approved by the State Engineer. ROA 3593.

Nevada Revised Statute § 533.370(5) does not grant the State Engineer the authority to approve applications that will conflict with existing rights subject to the future development by the applicant of a mitigation plan to be approved by the State Engineer. No mitigation plan was submitted by Applicants at hearing, and a mitigation plan has yet to be approved by the State Engineer.

The Nevada Supreme Court has held that administrative bodies are required to make findings and cannot defer making those required findings to a later date or make broad, evasive conclusions about future actions that can be taken. In *City of Reno v. Citizens for Cold Springs*, a master plan amendment and adoption of zoning ordinance case, the Nevada Supreme Court stated that "more than deferral of the issue or broad, evasive conclusions about how officials can

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build or expand utilities" was required when the Court reviewed the section of a governmental entity's order addressing the plan to meet future water demand and infrastructure needs. *City of Reno*, 236 P.3d at 19.

The substantial evidence on the record does not support the State Engineer's determination that any conflicts with existing water rights may be mitigated. No mitigation plan was submitted to the State Engineer, and thus there is no evidence on record from which that determination could have been made. It was improper for the State Engineer to consider a hypothetical mitigation plan, and his findings and determinations based on the non-existent mitigation plan were not supported by substantial evidence. The evidence in the Record shows that Applications will conflict with existing water rights. There is no evidence that the exercise of the Applications/Permits are limited to affecting the points or diversions or that existing water rights will continue to be satisfied. Pursuant to Nevada Revised Statute § 533.370(5), Applications must be denied. This Court should reverse Ruling No. 6127's approval of these Applications.

3. The reliance of Ruling No. 6127 on a non-existent monitoring, management, and mitigation plan, without a plan submitted, violates Petitioners' due process rights.

The State Engineer relied heavily on the future development of a mitigation plan for his findings in Ruling No. 6127 that the exercise of Applications would limit interference with existing rights, would not negatively impact water resources, and more. However, no mitigation plan was submitted before the Record closed for Ruling No. 6127. The State Engineer has now issued the 2011 Permits based on approval of the Applications in Ruling No. 6127, which condition 2011 Permits on the State Engineer's approval of a mitigation plan, without the ability of Petitioners to challenge or controvert the details of the mitigation plan. Ruling No. 6127 violates Petitioners' due process rights because the Ruling is heavily reliant on a document not in the Record, and thus Petitioners' were denied an opportunity of review and hearing on a fundamental portion of what the STATE ENGNEER will eventually require prior to the water

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use under the issued 2011 Permits. Whether the State Engineer's requirements will be sufficient is unknown. More importantly, there will be no opportunity for Petitioners to participate in setting such requirements in order to protect their water rights.

Nevada Revised Statute § 533.365, dictating the procedure for hearings before the State Engineer, provides in pertinent part: "Each applicant and each protestant shall, in accordance with a schedule established by the State Engineer, provide to the State Engineer and to each protestant and each applicant information required by the State Engineer relating to the application or protest."

In addition, the Nevada Supreme Court explicitly provides that the State Engineer must comply with the basic notions of fairness and due process in issuing any ruling. *Revert v. Ray*, 95 Nev. 782, 787 (1979). The Court stated:

> The applicable standard of review of the decisions of the State 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 decisionmaker 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 ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

Revert, 95 Nev. at 787. When the State Engineer fails to comply with the basic notions of fairness and due process, his Ruling cannot be upheld. *Id.*

The United States Supreme Court held that "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, fn. 4 (1974). "The action of...an administrative board exercising adjudicatory functions when based on information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing." *English v. City of Long Beach*, 217 P.2d 22, 24 (Cal. 1950). As has been

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recognized by other states, a full and fair opportunity to be heard, which is essential to due process, requires that all evidence utilized to support a decision be disclosed to the parties so that they may have an opportunity to cross-examine the witness with regard to such evidence. *Cook County Federal Sav. & Loan Ass'n v. Griffin*, 391 N.E.2d 473, 477 (Ill.App. 1979); *In re Amalgamated Food Handlers, Local 653-A*, 70 N.W.2d 267, 272 (Minn. 1955); *English*, 217 P.2d at 24. "A decision based on evidence not in the record is a procedure not to be condoned." *Cook*, 391 N.E.2d at 477.

In this case, Applicant stated that a hypothetical mitigation plan, to be developed in the future, will cure any interference or negative effects on existing water rights. The State Engineer relied on such evidence when issuing Ruling No. 6127. *See, e.g.*, Ruling No. 6127 at ROA 3593, 3598, 3606, 3608-3610. However, no mitigation plan was submitted on the Record. Therefore, Petitioners had no opportunity to controvert the State Engineer's conclusion that such a hypothetical mitigation plan would be sufficient. Moreover, Petitioners are offered no future opportunity to provide input in the development of the mitigation plan.

It was not proper for the State Engineer to rely on testimonial evidence regarding a mitigation plan that does not exist.[10] Further, it was not proper for the State Engineer to rely on such a non-existent mitigation plan for his determination that any harm to existing water rights may be "adequately and fully mitigated" without any such mitigation plan on the Record. Ruling No. 6127 is arbitrary and capricious, not supported by substantial evidence, and violates Petitioners' due process rights. This Court should reverse Ruling No. 6127.

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[10] Furthermore, testimonial evidence at hearing did not outline specific mitigation measures to address the injury of each source and each water right. Petitioners had no opportunity to review, question, cross examine, or offer contrary evidence as to any mitigation plan, or any specific mitigation proposals, and had no opportunity to address whether or not those plans or proposals could feasibly and adequately satisfy existing rights.

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4. Applications do not comply with requirements of Nevada law to accurately describe the points of diversion and place of use. The State Engineer does not have the authority to approve water right applications that do not comply with the most basic required elements of water right applications in the State of Nevada.

The State Engineer acted contrary to the law by approving Applications that do not contain essential elements such as place of use and point of diversion with the intent to put water to beneficial use.

Nevada Revised Statute § 533.325 requires the filing of an application with the State Engineer for the appropriation of any public waters or for the change in the place of use, manner of use, or point of diversion of waters already appropriated. The application must include, among other information, the name of the source of water, the amount of water to be appropriated, the purpose for the appropriation, "a substantially accurate description of the location of the place at which the water is to be diverted from its source," and a description of the works. NRS § 533.335. Applications to change the place of use, manner of use, or point of diversion of appropriated waters must include "such information as may be necessary to a full understanding of the proposed change." NRS § 533.345(1).

Water rights have certain elements, such as the source of water, the priority of the appropriation, the rate and/or duty of water use, the point of diversion, the place of use, and more. These elements are basic to all water rights in the State of Nevada, and are necessary to "a full understanding" of proposed changes to water rights. For instance, how can one have a full understanding of proposed changes if they do not know where water will be diverted from? Under these Applications, the point of diversion is critical to a determination of injury given that Nevada statutes only allow impact at the point of diversion. Drawdown outside of the point of diversion (or the cone of depression) is not excepted from the statutory consideration of injury. Similarly, how can one have a full understanding if they cannot decipher where water will be used? The State Engineer concluded that "Applicant has met the requirements for

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describing the points of diversion and place of use on the application forms and supporting maps." Ruling No. 6127 at ROA 3583.

Nevada Revised Statute § 533.040(1) states that water "shall be deemed to remain appurtenant to the place of use." In the present case, Applications overstate the place of use. This is plain and simple, speculation, which is prohibited under the beneficial use doctrine. The place of use in Applications is identified as a 90,000 acre area. ROA 133:10-14. In contrast, the plan of operations identifies the area where the mine will be located and the water will be put to beneficial use as only an approximately 14,000 acre area. ROA 133:15-21. The sole reason for the request of an additional 76,000 acres was that it would cause the mine a "hardship" to apply for a change in the place of use in the future if some unidentifiable event were to unfold. ROA 93:24 – 94:9. "Hardship" is not an exception of the beneficial use doctrine that prevents such outright speculation.

It is illogical and against the doctrine of beneficial use for a place of use to be larger than the actual area where it is intended to place appropriated water to beneficial use. Nevada Revised Statute § 534.020 notes that underground waters belong to the state and are subject to appropriation for beneficial use only. The place of use requested in the Applications is simply speculative.

Applicant does not intend to use water on 76,000 acres proposed as the place of use. Instead, Applicant is simply speculating how it might use the water use appropriated under the Applications. Applicant is attempting "to reserve" Applicant's right to use water on those acres if some unidentifiable future event creates such a necessity. The Applicant has no real intent to put water to beneficial use, the "unidentifiable future event" is not an event, action, or condition that constitutes beneficial use of the waters of the State of Nevada, and is specifically contrary to the non-speculation requirements of the beneficial use doctrine.

Moreover, approval of a water right application by the State Engineer must be based on submission of proof by the applicant of their intent in good faith to construct any works

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necessary to apply the water to the intended beneficial use. NRS § 533.370(1)(c)(1). Application of water to beneficial use must occur on the identified place of use. NRS § 533.040(1). In the present case, Applicant admits it has no intent to apply water to the entire place of use identified in Applications. ROA 133:10-21. Therefore, Applicant cannot show a good faith intent to construct works necessary to apply the water to beneficial use on the entire place of use. The State Engineer's approval of Applications despite the failure of Applicant to show the requisite good faith intent to beneficially use water on the identified place of use was in error, contrary to Nevada law, and not supported by substantial evidence on the record.

In addition to failing to accurately describe the proposed place of use, Applicant is not yet able to identify the well locations for the project. Nevada Revised Statute § 533.335(5) expressly requires that applications to change a point of diversion, place of use, or manner of use provide "substantially accurate description of the location of the place at which the water is to be diverted from its source." Without this identification, the State Engineer has no ability to evaluate point of diversion injury. Applicants were required to provide a substantially accurate description of all proposed wells in order for the required evaluations to be made prior to issuing any, even a conditional, approval.

Applicant's hydrogeologist, Jack Childress, testified that Applicant does not know how many wells will be drilled or where they will be located. ROA 250:11-20. "The exact number, well depths, and well pumping rates have a degree of uncertainty which will remain until production wells are constructed and actual pumping rates determined." Exhibit 39, ROA 1364-1365. Further, only the northern production wells have been drilled. ROA 373:8-17. Thus, the wells which have been drilled and tested, and whose impacts are easier to monitor and potentially identify, make up only 44 percent of the proposed production, leaving 56 percent entirely unknown. ROA 373:20 – 374:3. These wells, comprising 56 percent of the proposed production, will be located in the alluvial aquifer, where pumping impacts are a "given," according to Applicant's witness' testimony. ROA 197:23 – 198:4.

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Based on the Applications' overstating the intended place of use, and the Applications' failure to identify the points of diversion, the State Engineer did not have the authority to approve the Applications. Substantial evidence in the Record supports a finding and determination that Applicants have not complied with Nevada law regarding the form of applications. The State Engineer's ruling to the contrary was not supported by substantial evidence and was thus arbitrary and capricious. This Court should reverse Ruling No. 6127's approval of the Applications.

5. The interbasin transfers proposed by these Applications will have unreasonable impacts on water resources. Therefore, the interbasin transfers are not environmentally sound and must be denied.

An interbasin groundwater transfer is defined as "a transfer of groundwater for which the proposed point of diversion is in a different basin than the proposed place of beneficial use." NRS § 533.007. In determining whether an application for an interbasin transfer of groundwater must be denied, the State Engineer "shall consider" the following factors:

a) Whether the applicant has justified the need to import the water from another basin;

b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;

c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;

d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and

e) Any other factor the State Engineer determines to be relevant.

NRS § 533.370(6)(a)-(e). The standard for whether an interbasin transfer is "environmentally sound" is "whether the use of the water is sustainable over the long-term without unreasonable

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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,

Appellants,

vs.

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

Respondents.

_____/

Case No. 61324

District Court Case Nos. CV 1108-15; CV 1108-156; CV 1108-157; CV 1112-164; CV 1112-165; CV 1202-170

JOINT APPENDIX
Volume 27

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CHRONOLOGICAL APPENDIX TO APPEAL FROM JUDGMENT

DOCUMENT	DATE	VOL	JA NO.
Petition for Judicial Review	08/08/2011	1	01-06
Notice of Verified Petition for Writ of Prohibition, Complaint and Petition for Judicial Review	08/10/2011	1	07- 08
Verified Petition for Writ of Prohibition, Complaint and Petition for Judicial Review	08/10/2011	1	09-59
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Summons and Proof of Service, Jason King	08/11/2011	1	63-65
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Summons and Proof of Service, Jason King	08/15/2011	1	121-123
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First Additional Summons and Proof of Service, State Engineer, Division of Water Resources	08/17/2011	1	129-133
Order Allowing Intervention of Kobeh Valley Ranch, LLC, to Intervene as a Respondent	09/14/2011	1	134-135

DOCUMENT	DATE	VOL	JA NO.
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Answer to Petition for Judicial Review by Kobeh Valley Ranch, LLC	09/29/2011	1	150-154
Answer to Petition for Judicial Review by Kobeh Valley Ranch, LLC	09/29/2011	1	155-160
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Request for and Points and Authorities in Support of Issuance of Writ of Prohibition and in Opposition to Motion to Dismiss	11/10/2011	27	5027-5052
Order Setting Briefing Schedule	12/02/2011	27	5053-5055
Reply in Support of Partial Motion to Dismiss and Opposition to Request for Writ of Prohibition	12/15/2011	27	5056-5061

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Kobeh Valley Ranch's Joinder in the State of Nevada and Jason King's Partial Motion to Dismiss	12/15/2011	27	5084-5086
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Petition for Judicial Review	12/30/2011	27	5092-5097
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Petitioners Kenneth F. Benson, Diamond Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family LP's Reply Brief	03/28/2012	34	6542-6565
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DOCUMENT	DATE	VOL	JA NO.
Affidavit of Service by Certified Mail	08/11/2011	1	66-68
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Opening Brief of Conley Land & Livestock, LLC and Lloyd Morrison	01/13/2012	27	5112-5133

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Petition for Judicial Review	02/01/2012	31	5721-5727
Petitioners Kenneth F. Benson, Diamond Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family LP's Opening Brief	01/13/2012	27	5134-5177
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Transcript for Petition for Judicial Review	04/03/2012	35	6639-6779
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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: December 21, 2012.

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

EUREKA COUNTY, a political subdivision of the State of Nevada, Petitioner, vs. STATE OF NEVADA, EX. REL., STATE ENGINEER, DIVISION OF WATER RESOURCES, Respondent.	Case No.: CV 1108-155 Dept. No.: 2
CONLEY LAND & LIVESTOCK, LLC, a Nevada limited liability company, LLOYD MORRISON, an individual, Petitioners, vs. OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, JASON KING, State Engineer, KOBEH VALLEY RANCH, LLC, Real Party in Interest, Respondents.	Case No.: CV 1108-156 Dept. No.: 2 **REQUEST FOR AND POINTS AND AUTHORITIES IN SUPPORT OF ISSUANCE OF WRIT OF PROHIBITION AND IN OPPOSITION TO MOTION TO DISMISS**

KENNETH F. BENSON, an individual, DIAMOND CATTLE COMPANY, LLC, a Nevada limited liability company, and MICHEL and MARGARET ANN ETCHEVERRY FAMILY, LP, a Nevada registered foreign limited partnership, Petitioners, vs. STATE ENGINEER OF NEVADA, OFFICE OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No.: CV 1108-157 Dept. No.: 2

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I. PROCEDURAL BACKGROUND.

On July 15, 2011, the Nevada State Engineer issued Ruling No. 6127 granting a number of applications filed pursuant to the provisions of Nevada Revised Statutes Chapters 533 and 534. As a result of that Ruling, Conley Land & Livestock, LLC ("Conley") and Lloyd Morrison ("Morrison") (collectively referred to herein as "Conley/Morrison") filed a Verified Petition for Writ of Prohibition, Complaint and Petition for Judicial Review. The real party in interest, Kobeh Valley Ranch, LLC filed an Answer. The Respondent, Nevada State Engineer, filed a document styled "Partial Motion to Dismiss, Notice of Intent to Defend."

The Partial Motion to Dismiss requests the Court to dismiss the Petition for Writ of Prohibition (the "Prohibition Petition"). The grounds for that motion are based upon the contention that N.R.S. § 533.450, which provides for review of a State Engineer ruling, constitutes a "plain, speedy and adequate remedy in the ordinary course of the law," and that as a result, a writ of prohibition cannot be issued. *See* State Engineer's Brief at 2.

The Partial Motion does not reference any procedural rule on which it is based. Moreover, the provisions of Nevada law related to a writ of prohibition, unlike its counterpart, a writ of mandamus, do not adopt the provisions of the Nevada Rules of Civil Procedure as the rules of practice for proceedings involving writs of prohibition. *Compare* N.R.S. § 34.300 with N.R.S. §§ 34.320 through 34.350. The Partial Motion effectively contends that, as a matter of law, N.R.S. § 533.450 constitutes a "plain, speedy and adequate remedy in the ordinary course of law," within the meaning of N.R.S. § 34.330 and under relevant Nevada case law construing it

and the similar provisions in N.R.S. § 34.170.[1]

As is more fully set forth below, the undisputed facts here establish as a matter of law that N.R.S. § 533.450 is not a "plain, speedy and adequate remedy in the ordinary course of law." More importantly, they establish that, as a matter of law, Conley/Morrison are entitled to, and they hereby request, the issuance of a writ permanently restraining the State Engineer from issuing permits on certain applications approved in Ruling No. 6127 to change applications to appropriate. An application to change "water already appropriated" cannot be filed, noticed, heard and granted until after a permit to appropriate has been issued Therefore, Conley/Morrison request that the Court issue the writ requested in accordance with N.R.S. § 34.340(3).

II. STATEMENT OF FACTS RELEVANT TO PROHIBITION PETITION.

The material facts relevant to the Prohibition Petition are few and undisputed. In Ruling No. 6127, the State Engineer has considered, purports to grant and, if not restrained by this Court, will issue permits on applications to change the point of diversion, place of use and/or manner of use with respect to water which is not now and never has been appropriated. More specifically, Ruling No. 6127 considers and grants Application Nos. 79911, 79912, 79914, 79916, 79918, 79925, 79928, 79933, 79938, 79939 and 79940 to change the point of diversion, place of use and/or manner of use with respect to applications to appropriate water which are not and never have been the subject of a validly issued permit to appropriate water under N.R.S.

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[1] The Prohibition Petition clearly includes sufficient allegations to survive a motion to dismiss for failure to state a claim. *See* Prohibition Petition at paras. 11-18; *see also, Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 8 P.3d 837 (2000).

Chapters 533 and 534.[2] Attached hereto as Exhibit A is a table showing where each of those Applications are located in the Record on Review, matched with the unpermitted Application to Appropriate which each seeks to change and also showing where that base application is located in the Record.

The purpose of a writ of prohibition is to prevent a court or an agency from exercising judicial or quasi-judicial functions that transcend the limits of their powers. *See* N.R.S. § 34.320; *Mineral County v. Nevada*, 117 Nev. 235, 243-244, 20 P.3d 800, 805-806 (2001). The central issues on the merits here are whether the relevant provisions of Nevada law allow the State Engineer to accept for filing, notice, consideration and approval any change to water which has never been appropriated, and whether the review provisions of N.R.S. § 533.450 provide a defense to the issuance of a writ of prohibition.

III. UNDER THE CIRCUMSTANCES PRESENTED HERE, THE COURT SHOULD NOT DISMISS THE PROHIBITION PETITION, AND INSTEAD SHOULD ISSUE THE WRIT.

A. Introduction.

Both N.R.S. § 34.330 (prohibition) and N.R.S. § 34.170 (mandamus) provide in relevant part that an extraordinary writ "shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Thus, cases construing the relevant provisions of one apply with equal force to the other.

Relevant Nevada case law establishes that petitions for extraordinary writs are addressed

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[2] Application No. 79911 was filed June 15, 2010 to change Application No. 73551. A permit, previously issued with respect to Application No. 73551, was vacated by an order of this Court on April 10, 2010. Similarly, Application No. 79912 was filed to change Application No. 73552. A permit, previously issued with respect to Application No. 73552, was vacated by an order of this Court on April 4, 2010. In all other cases, the Applications to Appropriate which the listed Applications seek to change have not been the subject of a permit, vacated or otherwise.

to the sound discretion of the court. *See, e.g.*, *Salaiscooper v. Eighth Judicial Dist. Ct.*, 117 Nev. 892, 901, 34 P.3d 509 (2001); *Harvey L. Lerer, Inc. v. Eighth Judicial Dist. Ct.*, 111 Nev. 1165, 901 P.2d 643 (1995); *Roundhill General Imp. Dist. v. State Engineer*, 97 Nev. 601, 637 P.2d 534 (1981). It also establishes that in appropriate circumstances, such writs may be issued even though there may be a remedy at law.

Petitions for extraordinary writs are addressed to the sound discretion of the court, and generally only may issue where there is no 'plain, speedy, and adequate remedy' at law, however, even if there is another remedy at law, each case must be examined based upon its particular facts, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted. *Harvey L. Lerer*, 111 Nev. at 1168, 901 P.2d at 645 [*Citing*, N.R.S.. § 34.330; *also citing State ex. rel Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983); *also citing Jeep Corp. v. District Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (internal citations omitted)]. Arresting the proceedings of a lesser tribunal, conducted in excess of its statutory jurisdiction, is a situation where the circumstances reveal urgency and strong necessity that mandate extraordinary relief. *C.f. Harvey L. Lerer*, 111 Nev. 1165, 901 P.2d 643 (1995).

In *Harvey L. Lerer*, the Petitioner sought a Writ of Prohibition from the Supreme Court of Nevada, ordering a district court to refrain from taking further steps to hear, determine, or adjudicate any issues in two cases over which Petitioner asserted the court lacked jurisdiction. *Harvey L. Lerer,* 111 Nev. at 1166, 901 P.2d at 644. Petitioner also requested that the court order the district court to vacate orders it lacked jurisdiction to make, and dismiss the district court cases. *Id.*, at 1166-1167. The Nevada Supreme Court granted Petitioner's petitions, and ordered the district court to vacate its orders and dismiss the cases before it, despite the fact that an appeal would have been available remedy after judgment. *Id.*

In *Harvey L. Lerer*, Petitioner, a non-Nevada lawyer, had affiliated with a Nevada attorney in the representation of Petitioner's clients in a Nevada personal injury suit. *Harvey L. Lerer,* 111 Nev. 1167-1168, 901 P.2d 644-645. Following settlement of that suit, the affiliating Nevada attorney filed and served a motion to adjudicate an attorney's lien, pursuant to N.R.S. § 18.015, seeking attorney's fees he alleged he was owed. *Id.* Ultimately, the district court entered an order which held Petitioner in contempt for failing to appear at a contempt hearing set by the district court, and for failing to deposit the disputed funds in a blocked account pending resolution of the attorney's lien claim, as it had ordered. *Id.*

The Nevada court's determination in *Harvey L. Lerer* was based upon the Court's reading of the plain language of the attorney lien statute, N.R.S. § 18.015. *Harvey L. Lerrer*, 111 Nev. at 1168-1169, 901 P.2d at 645-646. Specifically, the statute provided, in relevant part, that an attorney "shall have a lien upon any claim, demand, or cause of action...which has been placed in his hands by a client." *Id.* The Nevada court reasoned that, since there was no agreement for payment between the Nevada attorney and the clients, and instead only an agreement between Petitioner and the Nevada attorney, the suit had not been placed "in the hands" of the Nevada attorney by the clients, and hence the district court should have refused to entertain a suit under N.R.S. § 18.015 on such facts. *Id.*, 111 Nev. at 1169, 901 P.2d at 646. The Nevada court concluded therefore that, as a matter of law, the district court was obligated to refuse to entertain the motion under N.R.S. § 18.015, because the plain language of that statute provided only for recovery between clients and their attorneys and not between affiliating attorneys. *See, Harvey L. Lerer*, 111 Nev. at 1168-11169, 901 P.2d at 645-646.

Regardless of the existence of a legal remedy, consideration of an extraordinary writ is also warranted in a matter of statewide importance, and in a matter where sound judicial

economy and administration militate in favor of such petitions. *Salaiscooper*, 117 Nev. at 901-902 (*citing, State of Nevada v. Dist. Ct.*, 116 Nev. 127, 994 P.2d 692 (2000); *also citing, Jeep Corp. v. dist. Ct.*, 98 Nev. 440, 652 P.2d 1183 (1982); *also citing, Smith v. Dist. Ct.*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997)). For similar reasons, the Arizona Supreme Court in *Westurlund v. Croaff*, 198 P.2d 842, 845 (Ariz. 1948) considered and issued a writ of prohibition where it was clear that the tribunal had exceeded its jurisdiction.

Thus, in order for the Court to give appropriate consideration to the question of whether the legal remedy under N.R.S. § 533.450 is a "plain, speedy and adequate remedy" under the principles set forth in the cases cited above, and to appropriately exercise its discretion here, the Court must examine the bases for the contention that in accepting for filing, noticing, considering, granting and at some point proposing to issue permits on changes to water which has never been appropriated, the State Engineer acted beyond his jurisdiction. We address that issue initially, and then explain why, under the cases cited above, the Court should not only not dismiss the Prohibition Petition, but also should issue the appropriate writ as requested.

B. Nevada Law Clearly and Unambiguously Provides That One Cannot Apply for and the State Engineer Cannot Grant, a Change to Water Which Has Never Been Appropriated.

As is set forth above, it cannot be disputed that in Ruling No. 6127, the State Engineer allowed Kobeh Valley Ranch, LLC to apply for, and in Ruling No. 6127, has granted 11 applications to change the point of diversion, place of use and/or manner of use with respect to water applied for under applications for which no valid permit to appropriate has been granted. In other words, he approved a change to water which was not already appropriated.

In relevant part, N.R.S. § 533.325 provides:

Any person who wishes . . . to change the place of diversion, manner of use or

> place of use of water already appropriated, shall, before performing any work in connection with such . . ., change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so. [Emphasis added].

One can only apply for, and the State Engineer can only consider, applications which seek to change "water already appropriated."[3] There are a number of principles of statutory construction which are relevant to the determination of what constitutes "water already appropriated."

First, when examining a statute, a court "should ascribe plain meaning to its words, unless the plain meaning was clearly not intended." *Cote v. Eighth Judicial District Court*, 124 Nev. 36, 175 P.3d 906, 908 (2008); *Diamond v. Swick*, 117 Nev. 671, 675, 28 P.3d 1087 (2001); *State Employees Association, Inc. v. Lau*, 110 Nev. 715, 717, 877 P.2d 531 (1994). The plain meaning of "water already appropriated" cannot include the mere filing of an application which is made to obtain the permission required to make an appropriation in the first place. Because the appropriation cannot be made until the permission is granted, an application alone is clearly not an appropriation.

Second, legislative intent governs the construction of a statute, "and such intent must be gathered from consideration of the entire statute or ordinance, and not from consideration of only one section thereof." *A Minor Girl v. Clark County Juvenile Court Services*, 87 Nev. 544, 548, 490 P.2d 1248, 1250 (1971); *see also, International Game Technology, Inc. v. Second Judicial District Court*, 122 Nev. 132, 127 P.3d 1088, 1103 (2006) ("When interpreting a statute, a court should consider multiple legislative provisions as a whole"); *Midwest Livestock Commission Co.*

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[3] The State Engineer's printed forms for use in filing change applications provide for an "application for permission to change water heretofore appropriated (Identify existing rights by Permit, Certificate, Proof or Claim Nos. If Decreed, give title of Decree and identify right in Decree)."

v. Griswold, 78 Nev. 358, 360, 372 P.2d 689, 690 (1962) ("Our obligation, however, is to ascertain the legislative intent. We can do this only by reading the whole act). As a consequence, it is not enough to look at only N.R.S. § 533.325. Rather, other provisions of Nevada's water law must be considered in determining whether "water already appropriated" includes an application to appropriate. When the water law as a whole is considered, it becomes abundantly clear that an application to appropriate does not by itself result in "water already appropriated."

In N.R.S. § 533.030(1), the legislature stated that "all water may be appropriated for beneficial use as provided in this chapter and not otherwise." Again, N.R.S. § 533.325 in relevant part provides:

> Any person who wishes to appropriate any of the public waters . . . shall, before performing any work in connection with such appropriation, . . . apply to the State Engineer for a permit to do so.

An application to appropriate in the context of the statutory appropriation process serves a purpose similar to that of a notice of intent to appropriate in the common law appropriation process. It is a step in that process, but is not one which by itself is sufficient to constitute an appropriation. Under the common law, no appropriation occurred until the water was diverted with intent to apply it to beneficial use, followed by an application so such use within a reasonable period of time. *Walsh v. Wallace*, 26 Nev. 299, 327 (1902); *Gotelli v. Cardelli*, 26 Nev. 382, 386-87 (1902). Those are all actions which Nevada's water law provides may not happen unless and until the State Engineer issues a permit to appropriate.

The "application for a permit to appropriate water" must contain specific information including, but not limited to, the applicant's name, the name of the water source, the amount of water the applicant desires to appropriate, the proposed purpose of use, description of the

proposed place of use, and estimates concerning costs and time associated with the proposed appropriation. N.R.S. § 533.335. After receiving an application to appropriate water, the State Engineer must publish notice of the application in a newspaper circulated in the county where the water sought to be appropriated is located. N.R.S. § 533.360(1). Within 30 days from the date of the last publication of the notice concerning the application, any interested person may file a written protest requesting that the State Engineer deny the requested appropriation. N.R.S. § 533.365 (1). After receiving and considering any protest to the application, the State Engineer may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved. N.R.S. § 533.365(3). Finally, the State Engineer must either reject or approve the proposed appropriation of water pursuant to the criteria set forth in N.R.S. § 533.370. Those are all unnecessary steps if the mere filing of the application results in "water already appropriated."

If the State Engineer approves the application, the proposed appropriation becomes a "permit" to appropriate water. This occurs only after the State Engineer places his "endorsement of approval upon [the] application" and sets a time for the completion of work related to the appropriation and the actual application of water to beneficial use. N.R.S. § 533.380(1). In the permitting process, the "state engineer may limit the applicant to a smaller quantity of water, to a shorter time for the completion of work," and to a shorter time for placing the water to beneficial use and perfecting the water right than was requested by the applicant in his application to appropriate water. N.R.S. § 533.380(3). Again, all of these statutory steps would be unnecessary if an application alone results in "water already appropriated."

The "permit" becomes a conditional appropriation. It constitutes the State Engineer's permission to divert water and begin placing that diverted water to beneficial use in order to

perfect the water right and receive a "certificate" of appropriation. The permit holder must proceed with due diligence towards perfection of the water right. If the State Engineer determines that the "holder of a permit is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the state engineer shall cancel the permit." N.R.S. § 533.395(1). The State Engineer must also cancel the permit if the holder fails to file his proof of application of water to beneficial use and related documentation within the time period stated on the permit. N.R.S. § 533.410.

Finally, the State Engineer issues a "certificate" of appropriation when the permit holder files proof, satisfactory to the State Engineer, that the water has been placed to beneficial use. N.R.S. § 533.425. Specifically, the statute states that "the state engineer shall issue to the holder or holders of the permit a certificate setting forth," among other things, the name of the appropriator, the amount of the appropriation, and a description of the place of use of the water right. *Id.*

When the foregoing provisions of Nevada's water law are considered, it becomes clear that "water already appropriated" cannot include a mere application. A statute should be read to give meaning to all of its parts, *Nevada Tax Commission v. Bernhard*, 100 Nev. 348, 351, 683 P.2d 21, 23 (1984), and in harmony with other statutes. *In Re: Parental Rights as to A.J.G. v. State of Nevada*, 122 Nev. 1418, 148 P.3d 759, 765 (2006). "It is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes . . . ." *Whealon v. Sterling*, 121 Nev. 662, 667, 119 P.3d 1241, 1245 (2005). If an application by itself constituted "water already appropriated," those additional provisions and steps in the process would be unnecessary.

Courts are also to construe statutory language in a manner that avoids absurd or

unreasonable results. *Id. See also, Nevada Tax Commission*, 100 Nev. at 351, 683 P.2d at 23; *Meridian Gold Co. v. State of Nevada*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003). It is presumed that every word, phrase or provision has meaning. *Charlie Brown Construction Company, Inc. v. City of Boulder City*, 106 Nev. 497, 502-503, 797 P.2d 946, 949 (1990), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 205, 267, 993 P.3d 1259, 1270 (2000). No part of a statute should be rendered nugatory or mere surplusage by a judicial interpretation. *One 1978 Chevrolet Van v. County of Churchill*, 97 Nev. 510, 512, 634 P.2d 1208, 1209 (1981); *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 135 P.3d 807, 810 (2006). Under the provisions of N.R.S. § 533.370(2), in considering whether to approve or reject an application to appropriate water, the State Engineer must determine if there is "unappropriated water in the proposed source of supply." If the mere filing of an application to appropriate results in "water already appropriated," the exercise of determining if there is any unappropriated water is rendered meaningless.

A final principle of statutory construction applicable here is that the mention of one thing implies the exclusion of another, "expressio unis est exclusio alterius." *See, In Re Bailey's Estate*, 31 Nev. 377, 103 P. 232 (1909). Until 1993, there was nothing in Nevada's water law which even partially expressly defined "water already appropriated." Two court rulings in 1992 prompted the legislature to clarify what was "included" in "water already appropriated."

In *United States v. Alpine Land & Reservoir Co. (Alpine III)*, 983 F.2d 1487, 1492-1495 (9th Cir. 1992), the Ninth Circuit Court of Appeals rejected a Nevada State Engineer interpretation of "water already appropriated," and thus transferable by change application, that included "all rights to the use of water, including inchoate rights, such as permits where the water has not been put to beneficial use." *Alpine III*, 983 F.2d at 1492. The *Alpine III* court was

required to determine for itself the meaning of "water already appropriated" as, at that time, no statutory clarification existed, and the State Engineer agreed that the issue of the proper application of the procedure to change the point of diversion or place or manner of use depended upon the interpretation of "water already appropriated." *Alpine III*, 983 F.2d 1492-1495. Accordingly, the *Alpine III* court drew upon applicable precedent, and determined that the State Engineer's assertion that the definition of "water already appropriated" included "all rights," including "inchoate rights," was unsupportable and inconsistent with Nevada water law and the doctrine of prior appropriation generally as interpreted in Nevada courts and the courts of other prior appropriation jurisdictions. *C.f., Alpine III*, 983 F.2d at 1492-1495.

Logically, the broad definition of "water already appropriated" to include "all rights" advanced by the State Engineer in *Alpine III* would, if accepted by the court, have extended to arguably unperfected rights like those at issue in the *Alpine* litigation, permitted rights as argued in *Alpine III*, and perhaps even to applications to appropriate like those at issue here.

In *Pyramid Lake Paiute Tribe of Indians, et al. v. R. Michael Turnipseed, et al.*, in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, No. CV91-2231 (Aug. 31, 1992 Order), the court ruled that under Nevada law, one could not change the point of diversion, place of use or manner of use of water unless the right to that water had been fully perfected. In reaching that conclusion, the court interpreted the phrase "water already appropriated" in N.R.S. §§ 533.325 and 533.345 to mean that the change sought must involve water rights which had been fully placed to beneficial use, and therefore fully perfected under Nevada law.

In 1993, after those decisions, the Nevada legislature enacted N.R.S. § 533.324, which provides:

> As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is mace.

[Emphasis added]. Noticeably, absent from what is "included" in "water already appropriated" for purposes of a change application is a mere "application." The Legislature heard and received extensive oral and written testimony, including from the then State Engineer and a former State Engineer. Neither suggested that "water already appropriated" did or should include a mere application to appropriate.[4] Nothing in the legislative history for that legislation suggests that the Legislature intended that "water already appropriated" include applications to appropriate water. Instead, that history indicates that the Legislature's intent was to continue the historic practice of allowing the filing and consideration of changes to existing water rights in the form of permits or certificates issued by the State Engineer.

Nevada state and federal courts have consistently rejected arguments for a broad interpretation of the term "water already appropriated," choosing instead to adopt a more restrictive view of the legal meaning of the phrase based on applicable precedent and consistent with the doctrine of prior appropriation, and leaving it to the Legislature to determine whether to broaden the definition of the term by statute, which it has done, and in doing so, as mentioned above, it has chosen not to broaden the statutory definition of "water already appropriated" to include applications to appropriate water. Thus, a writ should issue here permanently restraining the State Engineer from issuing any permits under Application Nos. 79911, 79912, 79914, 79916, 79918, 79925, 79928, 79933, 79938, 79939 and 79940. Nevada law is clear that

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[4] The complete legislative history for Assembly Bill 337 from the 1993 Nevada Legislature can be viewed at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB337.1993.pdf.

applications to change any water to be appropriated under Applications Nos. 73551, 73552, 72695, 72696, 72697, 72698, 73545, 73546, 74587 and 73547 may not be filed, noticed, heard and granted until after, not before, valid permits have been issued under those Applications.

C. The Court Should Consider the Prohibition Petition and Issue the Writ Because the Issue of Whether Water Already Appropriated Includes Applications to Appropriate Water Is a Matter of Statewide Importance, Because Sound Judicial Economy and Administration Requires Its Consideration, and Because the Circumstances Reveal Urgency and Strong Necessity.

Having established that the State Engineer in Ruling 6127, in accepting, considering and granting applications to change water which has never been appropriated, clearly exceeded his power, we now address why the availability of review under N.R.S. § 533.450 does not preclude the Court's consideration of the Prohibition Petition and issuance of a writ here. Here, whether or not a separate right to appeal exists, it certainly will not be speedy or adequate enough to avoid the risk of great waste of personal, administrative and judicial resources which, of course, adds to the statewide importance of the issue, and further weighs in favor of a determination to consider the extraordinary writ prayed for here. *Salaiscooper*, 117 Nev. at 901-902.

The legal issue presented is a new legal issue. No court has determined that the legal definition of "water already appropriated," as that term is used in Nevada statute, includes an application to appropriate. The Nevada Legislature has chosen not to include an application to appropriate as being within "water already appropriated." The legal issue presented is one of statewide importance and, as such, should be the subject of consideration in association with the issuance of an extraordinary writ. Moreover, as in *Harvey Lerer*, the State Engineer in the past has exercised, and in the future likely will exercise, his quasi-judicial functions in excess of his jurisdiction by determining to consider and grant change applications made upon applications to

appropriate in contravention of the plain language of N.R.S. § 533.325.

The State Engineer will likely determine to consider any other change applications made on other applications to appropriate in the time between now and an eventual result in any alternative appeal. If, in an alternative appeal, it is determined that the legal definition of the term "water already appropriated," as that term is used in Nevada water law, does not include applications to appropriate, it is obvious that considerable resources of all concerned would be wasted on meaningless consideration of change applications made upon applications to appropriate, protests to those applications, and associated judicial review, since the State Engineer lacks the authority to consider changes to any application not falling within the legal definition of "water already appropriated." Those circumstances represent the kind of urgency and strong necessity which the courts in *Harvey Lerer* found justified extraordinary relief.

Further, the issue of the proper legal meaning of the term "water already appropriated" is a matter of statewide importance because obviously the statute applies statewide, and the impact to the waters of the State that flow from rulings on what the State Engineer determines to consider are felt statewide, and water is, of course, a matter of tremendous and unique import in Nevada, the driest state in the Union. *C.f. Preferred Equities Corp. v. State Engineer, State of Nevada*, 75 P.3d 380, 389 (Nev. 2003).

The Court's proper role in a situation such as this is to determine whether or not to consider the writ prayed for in the same manner as the Nevada Supreme Court would if faced with the same issue presented here. A determination that a writ concerning a new legal issue of the legal definition of a term of statewide importance in the speedy and efficient administration of Nevada's water law, as noted above, is one the Nevada Supreme Court would determine to consider based upon applicable precedent, and so, too, should this Court reach the same

determination.

Further, sound judicial economy and administration militates in favor of consideration of the petition for extraordinary relief in this instance because by determining to consider the present change applications upon applications to appropriate, the State Engineer has exceeded his statutory authority. *See, Salaiscooper*, 117 Nev. at 901-902; *Harvey L. Lerer*, 11 Nev. at 1168-1170. The State Engineer exceeded his statutorily prescribed authority and role by his legal determination that he had the authority to consider the change applications made upon applications to appropriate. Sound judicial economy and administration necessitates a clearly defined role for the State Engineer in making water use decisions. Under Nevada's water law, the State Engineer has no authority to consider a change application made upon applications to appropriate. He may only consider applications to change "water already appropriated."

"Prohibition is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an authorized application of judicial force, and the writ will not be withheld because other concurrent remedies exist; it not appearing that such remedies are equally adequate and convenient." *Abbott v. Christopher*, 112 N.W.2d 310, 313 (Iowa 1961). Thus, if the proceedings complained of are clearly beyond the jurisdiction of the inferior court or tribunal, and must ultimately be held to have been mistaken, prohibition should issue *before the party aggrieved is put to the difficulties which would be raised, and the court to the inconvenience that would ensue, by permitting such proceedings to continue.*" *Id.* (emphasis in original).

IV. CONCLUSION.

In Ruling No. 6127, the State Engineer has exceeded his power in accepting, considering and approving changes to water which has never been appropriated. The Court should issue a

writ of prohibition permanently restraining him from ever issuing any permits under Application Nos. 79911, 79912, 79914, 79916, 79918, 79925, 79928, 79933, 79938, 79939 and 79940. Applications to change any water to be appropriated under Application Nos. 73551, 73552, 72695, 72696, 72697, 72698, 73545, 73546, 74587 and 73547 may not be filed, noticed or heard until after, not before, valid permits have been issued under those Applications.

AFFIRMATION (pursuant to N.R.S. 239B.030)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated: November 10, 2011. WOODBURN AND WEDGE

By: Dale E. Ferguson
Gordon H. DePaoli
Dale E. Ferguson
Domenico R. DePaoli
Attorneys for Conley Land & Livestock, LLC and Lloyd Morrison

EXHIBIT A

EXHIBIT A

The State Engineer filed the Summary of Record on Review and the record by compact disk from the administrative proceeding in this matter on or about October 27, 2011. The applications relevant to consideration of the issues raised by the Petition for Writ of Mandate are located at the following Bates stamp numbers:

Application No. (Bates Nos.)	Base Application No. (Bates Nos.)
79911 (2156-2160)	73551 (1975-1977)
79912 (2161 – 2165)	73552 (1978-1980)
79914 (2171 – 2175)	72695 (1945-1947)
79916 (2181 – 2185)	72696 (1948-1950)
79918 (2191 – 2195)	72697 (1951-1953)
79925 (2225 – 2227)	72698 (1954-1956)
79928 (2240 – 2244)	73545 (1957-1959)
79933 (2270 – 2274)	73546 (1960-1962)
79938 (999 - 1003)	74587 (1981-1983)
79939 (1004 – 1008)	73547 (1963-1965)
79940 (1009 – 1013)	74587 (1981-1983)

The relevant applications may also be reviewed at the Nevada Division of Water Resources Website at State Engineers website at http://water.nv.gov/water rights/.

EXHIBIT A

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of the law offices of Woodburn and Wedge, and that in such capacity and on this 10th day of November, 2011, I caused to be served a true and correct copy of *Request for and Points and Authorities in Support of Issuance of Writ of Prohibition and in Opposition to Motion to Dismiss* by depositing it in the United States mail, postage prepaid, first class mail, addressed as follows:

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NO.

FILED

DEC 02 2011

Eureka County Clerk

BY Laura M Carter

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. THE STATE OF NEVADA, EX., REL., STATE ENGINEER, DIVISION WATER RESOURCES, Respondent.	Case No. CV1108-155 Dept. No. 2
CONLEY LAND & LIVESTOCK LLC, a Nevada limited liability company; LLOYD MORRISON, an individual, Petitioners, v. THE OFFICE OF THE State Engineer OF THE STATE OF NEVADA, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, JASON KING, STATE ENGINEER, KOBEH VALLEY RANCH, LLC, REAL PARTY IN INTEREST, Respondents.	Case No. CV1108-156 Dept. No. 2 **ORDER SETTING BRIEFING SCHEDULE**

PARSONS BEHLE & LATIMER

16620.027/4818-1714-9454.1

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

Petitioners,

v.

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

Respondent.

Case No. CV1108-157

Dept. No. 2

The parties approached this Court for assistance in setting a briefing schedule upon the Petition for Judicial Review in the above-entitled, consolidated matter. The Court considered the respective comments of counsel for the parties, and hereby sets the briefing schedule.

IT IS HEREBY ORDERED that the parties to this consolidated matter shall serve their respective briefs, with a courtesy copy to all counsel by electronic mail, in compliance with the following briefing schedule in this matter:

Petitioners' Opening Briefs	January 13, 2012
Respondents' Response Briefs	February 13, 2012
Petitioners' Reply Briefs	March 14, 2012

Briefs shall be mailed or Federal Expressed to the Court for filing on the same date that they are served or within a reasonable time thereafter as provided for in Rule 5(d) of the Nevada Rules of Civil Procedure.

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IT IS FURTHER ORDERED that the parties shall appear before this Court on April 3, 2012 at 10 a.m. for a one-day hearing pursuant to NRS 533.450(2).

DATED: ~~November~~ December 1, 2011.

DISTRICT JUDGE

Submitted By:

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

CONLEY LAND & LIVESTOCK LLC, a Nevada Limited Liability company; LLOYD MORRISON, an individual,

Petitioner,

vs.

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

Respondents.

Case No: CV 1108-156

Dept No: II

Affirmation (Pursuant to NRS 239B.030)

The undersigned hereby affirm that this document does not contain a social security number of any person.

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS AND OPPOSITION TO REQUEST FOR WRIT OF PROHIBITION

The State of Nevada, and Jason King, P.E., in his capacity as State Engineer of Nevada, by and through their counsel, Attorney General Catherine Cortez Masto and Senior Deputy Attorney General Bryan Stockton, hereby reply to the Request for and Points and

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Authorities in Support of Issuance of Writ of Prohibition and in Opposition to Motion to Dismiss (Opposition).

DATED this 15th day of December 2011.

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I. POINTS IN REPLY

A. Prohibition is not Available in Water Rights Cases to Circumvent the Appellate Process.

Petitioners cite a number of cases which govern writs generally to show that an appeal is not a "plain, speedy and adequate remedy in the ordinary course of law. . . ." NRS 34.330. However, the Nevada Supreme Court has clearly held that Writs of Mandamus or Prohibition are not available as a substitute for an appeal under NRS 533.450.

> We further determine that extraordinary writ relief is not available to review a State Engineer's decision. Writ relief is generally available only in the absence of an alternative adequate and speedy legal remedy. Because a State Engineer's decision may be challenged through a petition for judicial review, as set forth in NRS 533.450(1), an adequate and speedy legal remedy precluding writ relief exists.

Howell v. Ricci, 124 Nev. 1222, 1223-1224, 197 P.3d 1044, 1045 (2008). Conley may not bypass the water law by its application for an extraordinary remedy.

In addition, the history of this case illustrates the futility of this approach. The State Engineer initially issued ruling 5966 which granted certain applications. The State Engineer then issued permits on those applications again at issue herein. When this court reversed

ruling 5966, the State Engineer revoked the permits. Thus, the writ process advocated by Conley to arrest the permits being issued is entirely superfluous and a waste of judicial resources as the permits can be rescinded if the State Engineer is again reversed by this Court.

B. Opposition to Request for Writ of Prohibition.

Conley is correct that the phrase "water already appropriated" is defined by statute. The statute, however, does not prohibit an appropriator from filing application to change water that has not been already granted a permit. NRS 533.324 provides that

> As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made.[1]

The Legislature specifically said that the changes cannot be "made." The statute does not prevent the filing of a subsequent change application. The State Engineer interprets the statute to mean that if a permit is granted for the original application, the change application may contemporaneously be granted for the subsequent application.

To illustrate, a typical example occurred with Application 49671, which was filed in 1986 for a new appropriation of water for irrigation purposes within Sections 15, 21 and 22, T.2N., R.67E., M.D.B.&M. in conjunction with a Desert Land Entry application.[2] Application 54430 was filed in 1990 to change the place of use of the water requested for appropriation under Application 49671 eliminating the place of use in Section 15 and a portion of the place of use in Section 22. An application for water to accompany a Desert Land Entry is not acted on until the time the State Engineer is informed that the applicant has been granted a right of entry to the land. However, it often happens that the Desert Land Entry is not at the exact location of the original water right application. If the State Engineer were to deny the original

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[1] Legislative history available at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB337,1993.pdf

[2] Permit files are public record and available at http://water.nv.gov/data/permit/

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water right applications, which often sit for years pending action by the Bureau of Land Management (BLM), the water right applicant would lose their priority date through no fault of their own. Since the original application would have been granted and the change application merely reduced the place of use, there was no reason not to grant the original application and then the change application.

An example more closely related to the applications at issue herein was Application 78487 filed Ely Municipal Water Department in May 2009 to appropriate water for municipal use indicating that Murry Springs was drying up and the City needed to supply water from wells being drilled by the mining company that were a significant source of water for the City of Ely. In Application 78487, the City indicated that when new well locations were determined, it would file change applications. Application 78698 was filed by Ely Municipal Water Department in July 2009 to change the point of diversion from Section 15 to Section 11. Since the original application would have been granted and the change merely moved the point of diversion, there was no reason not to grant the original application and then the change application.

In this case, Kobeh filed its original applications for mining use in the project area. The change applications are for the same use and in the same overall project area. The State Engineer found that he could grant the original permits pursuant to NRS 533.370. The change applications, also satisfying NRS 533.370, could then be issued immediately following the approval of the original permits.

Purely legal issues or questions may be reviewed without deference to an agency determination. However, the agency's conclusions of law that are closely related to its view of the facts are entitled to deference and will not be disturbed if they are supported by substantial evidence. *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). Likewise, "[w]hile not controlling, an agency's interpretation of a statute is persuasive."

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State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)). Any review of the State Engineer's interpretation of his legal authority must be made with the thought that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996) (citing *State v. State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988)); see also *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984) (deference promotes uniformity in the law because it makes various courts less likely to adopt differing readings of a statute. Instead, the view taken by a single centralized agency will usually control). In an area as complex and interconnected as the administration of water law, the court should not upset the delicate balance without good reason.

Nevada is the driest state in the Union. Nevada must maximize the beneficial use of its water without causing damage to the water resource. The State Engineer balances the needs of the state and the resource within the confines of the law. Before a court changes a long-standing interpretation of the law, it should inquire as to the effect on other water users. See, *Great Basin Water Network v. State Engineer*, 124 Nev. ___, 234 P.3d 912, 914 (2010). The State Engineer has used this interpretation of the water law and applied it to other water rights. This is a reasonable interpretation under the statute. The court should take into account all the other water users that may be affected if the court changes the State Engineer's interpretation of the statute.

II. CONCLUSION

The Nevada Supreme Court clearly stated that Writs are not appropriate to review a ruling by the Nevada State Engineer. Conley has an adequate and speedy remedy at law. In addition, no irreparable harm can result, as the State Engineer is able to cancel any permits issued if this court reverses the ruling. In addition, the Court should not lightly change the interpretation of a statute by the State Engineer absent a compelling reason if that change can harm other water right holders not before the Court.

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DATED this 15th day of December 2011.

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CERTIFICATE OF MAILING

I, Sandra Geyer certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 15th day of December 2011, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing **REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS AND OPPOSITION TO REQUEST FOR WRIT OF PROHIBITION**, addressed as follows:

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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. THE STATE OF NEVADA, EX., REL., STATE ENGINEER, DIVISION WATER RESOURCES, Respondent.	Case No. CV1108-155 Dept. No. 2
CONLEY LAND & LIVESTOCK LLC, a Nevada limited liability company; LLOYD MORRISON, an individual, Petitioners, v. THE OFFICE OF THE State Engineer OF THE STATE OF NEVADA, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, JASON KING, STATE ENGINEER, KOBEH VALLEY RANCH, LLC, REAL PARTY IN INTEREST, Respondents.	Case No. CV1108-156 Dept. No. 2

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

Petitioners,

v.

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

Respondent.

Case No. CV1108-157

Dept. No. 2

KOBEH VALLEY RANCH'S REPLY TO CONLEY/MORRISON'S REQUEST FOR AND POINTS AND AUTHORITIES IN SUPPORT OF ISSUANCE OF WRIT OF PROHIBITION AND IN OPPOSITION TO MOTION TO DISMISS

Respondent Kobeh Valley Ranch, LLC, real party in interest, by and through its counsel of record, having joined the Motion to Dismiss filed on behalf of the State Engineer, hereby replies to the Request for and Points and Authorities in Support of Issuance of Writ of Prohibition and in Opposition to Motion to Dismiss filed by Conley Land & Livestock, LLC and Lloyd Morrison on November 10, 2011. This Reply is based on the following Memorandum of Points and Authorities, the Nevada State Engineer's Ruling No. 6127 dated July 15, 2011, and all of the pleadings and papers before this Court.

INTRODUCTION

Petitioners Conley Land & Livestock, LLC, and Lloyd Morrison ("Conley /Morrison") appealed from the State Engineer's Ruling 6127. For some reason, they elected not to seek a stay of the Ruling which, if granted, would have prevented the State Engineer from issuing permits based on the Ruling. Those permits have been issued in by the State Engineer.

A writ of prohibition is inappropriate because Conley/Morrison had a "plain, speedy, and adequate" remedy at law. Nevada water law not only provides for an appeal from any ruling of the State Engineer, it also allows a court to stay a ruling if an application for a stay is made within 10 days after the petition for review is filed and if a bond is posted in an amount determined by

the court. Petitioners did not seek a stay nor did they offer to post a bond. Since they had an adequate legal remedy, a writ should not issue.

In addition, the issuance of permits based on a ruling of the State Engineer is a purely ministerial act and not the proper subject of a writ of prohibition. Conley/Morrison also lack standing to maintain this action because they do not assert a "beneficial interest" that will be affected by the issuance or non-issuance of the permits. Moreover, Conley/Morrison failed to timely raise the issues they now assert when the matter was before the State Engineer prior to Ruling 6127. Those issues may not be raised either in a direct appeal or a collateral attack seeking a writ of prohibition. In any event, the issues raised by Conley/Morrison lack merit—there is no statutory prohibition against seeking to change the point of diversion or use relating to a pending application to appropriate. Finally, since the permits have already issued, the petition for a writ of prohibition is moot.

Denial of the writ of prohibition will not foreclose Conley/Morrison from raising any issues that they properly preserved below. Since their petition seeks both judicial review and a writ of prohibition based on the same issue, the Court may consider their underlying issue after it is fully briefed and argued on appeal from the State Engineer's Ruling.

ARGUMENT

1. Petitioners Cannot Satisfy the Requirements to Obtain a Writ of Prohibition.

NRS 34.320 provides that a writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." NRS 34.330 further provides that a writ may be issued "where there is not a plain, speedy and adequate remedy in the ordinary course of law." Finally, a writ of prohibition is issued "on the application of the person beneficially interested." Id. Conley/Morrison cannot meet any of these requirements.

a. A Plain, Speedy, and Adequate Remedy Exists at Law.

It is well settled that "a writ of prohibition will only issue when no plain, speedy, and adequate remedy exists at law." Del Papa v. Steffen, 112 Nev. 369, 372, 915 P.2d 245, 247

(1996). There is no need for an extraordinary writ in this action because Nevada law provides an adequate and speedy remedy by which Conley/Morrison may challenge the State Engineer's Ruling 6127 and the issuance of permits thereunder. That remedy is by appeal to the District Court as provided in NRS 533.450:

> 1. Any person feeling aggrieved by any order or decision of the State Engineer, acting in person or through the assistants of the State Engineer . . . may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated . . . ..
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> 2. The proceedings in every case must be heard by the court, and must be informal and summary, but full opportunity to be heard must be had before judgment is pronounced.

Indeed, Conley/Morrison have availed themselves of the statutory remedy in the same pleading in which they seek a writ of prohibition. In their appeal, they seek to vacate Ruling 6127 for the same reasons they seek a writ of prohibition.

The Nevada Supreme Court has held in a writ of mandamus case that "when the Legislature has created a right to petition for judicial review, that right constitutes an 'adequate and speedy legal remedy.'" Howell v. Ricci, 124 Nev. 1222, 1229, 197 P.3d 1044, 1049 (2008) (quoting Kay v. Nunez, 122 Nev. 1100, 1104-05, 146 P.3d 801, 805 (2006)). Conley/Morrison do not allege that the appellate relief is "inadequate" and they cannot claim that it is not "speedy." The statutory language requiring the appellate proceedings to be "informal and summary, but [with] full opportunity to be heard" suggests that the Legislature did provide a speedy and adequate remedy.[1]

Conley/Morrison seek a writ of prohibition to prevent the State Engineer from engaging in the ministerial act of issuing permits based on Ruling 6127. Here again, the Legislature provided a remedy at law by which they could have achieved the same result, had they elected to do so. NRS 533.450(5) would have allowed them to seek a stay of the State Engineer's ruling by filing a motion with this Court within 10 days after filing their petition for judicial review. Of course

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[1] Conley/Morrison filed their Petition on August 10, 2011, but recently advised this Court that they needed until January 23, 2012 to file their opening brief. It is inconsistent to request this amount of time and then contend that they do not have a speedy remedy at law.

they would have had to file a bond in order to obtain the stay and this may explain why they did not seek the statutory remedy. See NRS 533.450(6). But the fact that they did not avail themselves of a remedy at law does not mean that they did not have an effective remedy. See Shook v. Huffman, 43 S.W.3d 735, 736 (Ark. 2001) (denying a petition for a writ of prohibition because the petitioner failed to appeal from a divorce decree). The Court should not resort to an extraordinary remedy in equity when a directly applicable remedy is available at law. See State ex rel. Janesville Auto Transp. Co. v. Superior Court of Porter County, 387 N.E.2d 1330, 1332 (Ind. 1979) ("original actions are viewed with disfavor and are not intended to be used to circumvent the normal appellate process"); see also Lake O'Woods Club v. Wilhelm, 28 S.E.2d 915, 919 (W. Va. 1944) ("Where [a remedy at law] exists, and it is adequate and complete, equity does not have jurisdiction."). This should particularly hold true when the issues involved in the direct appeal and the petition for a writ of prohibition are identical and would result in duplication of effort and waste of judicial resources.

b. The Writ Petition Should Be Denied Because it Seeks to Restrain a Ministerial Act.

The Writ Petition seeks to enjoin the State Engineer from the ministerial action of issuing permits based on Ruling 6127. As noted above, NRS 34.320 provides that a writ of prohibition lies to prevent a person from "exercising judicial functions, when such proceedings are without or in excess of [his] jurisdiction." The only judicial function performed by the State Engineer was to conduct the hearing and issue Ruling 6127. Issuance of the permits based on that ruling is not judicial, it is purely ministerial. As the Nevada Supreme Court noted long ago: "It is emphatically held that the writ of prohibition will not issue to restrain or prevent the acts of an executive or ministerial officer." O'Brien v. Trousdale, 41 Nev. 90, 167 P. 1007, 1008 (1917).

"'A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists.'" Lockyer v. City & County of San Francisco, 33 Cal. 4th 1055, 1082, 95 P.3d 459, 473 (2004) (quoting Kavanaugh v. W. Sonoma County Union High Sch. Dist., 29 Cal. 4th 911, 916, 62 P.3d

54, 58 (2003)). Once Ruling 6127 was decided on the merits, issuance of the permits required no further adjudication; they issue as a matter of course. It would be improper to restrain the ministerial act of issuing permits through a writ of prohibition.

c. Conley/Morrison Do Not Have Standing Because They Do Not Assert a Beneficial Interest.

Although Conley/Morrison have standing under NRS 533.450(1) to appeal from Ruling 6127 ("Any person feeling aggrieved . . . may have the same reviewed by a proceeding . . . in the nature of an appeal . . . ."), the standing requirement for seeking a writ of prohibition is much greater. NRS 34.330 requires that a writ of prohibition be issued "on the application of [a] person beneficially interested." It is one thing to be an "aggrieved person; it is another to have a "beneficial interest." It is the burden of Conley/Morrison to establish that they had a "beneficial interest" sufficient to confer standing to seek a Writ of Prohibition. See Heller v. Legislature of State of Nev., 120 Nev. 456, 461, 93 P.3d 746, 749 (2004) (requiring a Petition to demonstrate a beneficial interest in a mandamus proceeding); see also NRS 34.320 ("The Writ of Prohibition is the counterpart of the writ of mandate."). A mandamus proceeding is the statutory counterpart to a prohibition proceeding, and the statutory language requiring a beneficial interest is identical with respect to both Petitions. Compare NRS 34.170 and NRS 34.330; see also NRS 34.320.

"'To demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a ***direct and substantial*** interest that falls within the zone of interests to be protected by the legal duty asserted.'" Heller, 120 Nev. at 461, 93 P.3d at 749 (2004) (emphasis added) (quoting Lindelli v. Town of San Anselmo, 111 Cal.App.4th 1099, 4 Cal.Rptr.3d 453, 461 (2003)). As the Nevada Supreme Court stated: "'[T]he writ must be denied if the Petitioner will gain no ***direct*** benefit from its issuance and suffer no ***direct*** detriment if it is denied.'" Id. (quoting Waste Management v. County of Alameda, 79 Cal.App.4th 1223, 94 Cal.Rptr.2d 740, 747 (2000) (emphasis added)). Conley/Morrison do not provide evidence, by affidavit or otherwise, that they will obtain a direct benefit or suffer a direct harm if permits are issued pursuant to Ruling 6127.

Conley/Morrison have no pending application for the diversion of water currently before

the State Engineer that could be impacted by the State Engineer's issuance of permits under Ruling 6127. In addition, Conley/Morrison do not own any water rights in Kobeh Valley. Their groundwater rights within Diamond Valley will be unaffected by the issuance of the permits. (See Ruling 6127 p. 14, attached as Exhibit 1 to the Verified Writ Petition.) They cannot show any direct impact arising from the State Engineer's issuance of the permits at this time or why their rights would not be fully protected by the statutory appellate process. The appeal will be fully briefed and argued by April 3, 2012.[2] Accordingly, this Petition should be denied because Conley/Morrison lack the necessary beneficial interest to invoke writ relief and thus lack standing to seek such a writ from this Court.

2. Petitioners Failed to Raise These Issues Before the State Engineer.

Conley/Morrison had the opportunity and should have raised their challenges to the change applications during the administrative proceedings before the State Engineer. They filed protests against the granting of applications pursuant to NRS 533.365. They could have raised the issues they now attempt to raise, but they didn't. They could have presented evidence at the hearing before the State Engineer, but they didn't. They could have filed a post-hearing brief, but they didn't.

Issues that could have been addressed initially by the State Engineer should not be considered for the first time in an original proceeding. See Schuck v. Signature Flight Support of Nevada, Inc., 245 P.3d 542, 544 (Nev. 2010) (denying the consideration of an issue for the first time on appeal); see also State ex rel. Tucker County Solid Waste Auth. v. W. Virginia Div. of Labor, 668 S.E.2d 217, 231-32 (W. Va. 2008) (recognizing that a matter should first be litigated through the appropriate administrative channels before it can be considered in a petition for a writ of prohibition). It is improper and it undermines the efficiency, fairness, and integrity of the proceeding before the State Engineer to delay and to raise issues for the first time in a petition for an extraordinary writ. See Schuck, 245 P.3d at 544. The appropriateness of the change

[2] Obviously, the permits will ultimately stand or fall based on the outcome of the appeal. But Petitioners cannot demonstrate a beneficial interest that would be directly affected by the permits being issued in the meantime.

applications should have been first raised before the State Engineer because he is charged with the administration of public waters. Instead, Conley/Morrison chose to do nothing. Accordingly, the petition for a writ of prohibition should be denied because the State Engineer was not afforded the opportunity to consider this issue during the protest hearing.

3. NRS 533.325 Does not Prohibit An Applicant from Filing, or the State Engineer from Considering, an Application to Change the Point of Diversion or Use of a Pending Application to Appropriate.

The Petition for Writ of Prohibition should be denied and the Motion to Dismiss granted because NRS 533.325 does not prohibit a person from filing an application to change the point of diversion, place of use, or manner of use of water that is subject to a pending application to appropriate. Additionally, NRS 533.325 does not prohibit the State Engineer from accepting, reviewing for statutory compliance and adequacy, and sending for public notice, an application to change a pending application to appropriate. Lastly, NRS 533.325 does not prohibit the State Engineer from hearing evidence on and considering both applications in the same proceeding and granting them sequentially.

Although questions of law are reviewed de novo, the State Engineer's conclusions of law, which will necessarily be closely related to his view of the facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence. Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986); Town of Eureka v. State Engineer, 108 Nev. 163, 826 P.2d 948 (1992). Likewise, the State Engineer's view or interpretation of his own statutory authority is persuasive, even if not controlling. Morris v. State Engineer, 107 Nev. 699. 701, 819 P.2d 203, 205 (quoting State v. State Engineer, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)). Any review of the State Engineer's interpretation of his legal authority must be made with the thought that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." Pyramid Lake Paiute Tribe v. Washoe County, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996), quoting State v. State Engineer, 104 Nev. at 713, 766 P.2d at 266. Here, the State Engineer has determined that allowing a person to file a change to an application to appropriate, even before the original application is acted on, is

allowed, and that he may consider both applications in one proceeding and grant them in the order in which they were filed. This interpretation is reasonable and supported by substantial evidence, and therefore, is entitled to deference. Further, this interpretation is not prohibited by NRS 533.325.

a. The State Engineer was Acting within his Statutory Jurisdiction.

The State Engineer acted within his jurisdiction when he granted the applications and issued the permits. Conley/Morrison rely solely on NRS 533.325 to support their argument that Kobeh Valley Ranch could not file, and the State Engineer could not accept, process, or act on, changes to applications to appropriate until the original or "base" applications were first granted and the permits on them were issued. Their argument, however, is not supported by the statute or public policy.

NRS 533.325 requires a person to apply for a permit to appropriate or permit to change the point of diversion, place of use, or manner of use of water already appropriated before that person may perform any work in connection with the appropriation or the change. As discussed by Conley/Morrison, the Legislature clarified the meaning of the phrase, "water already appropriated" in 1993 by passing Assembly Bill 337, which amended the definition of that phrase. The statute and amendment, however, relate solely to whether a person is allowed to perform any work relating to the original application or to the change application before a permit to do so is granted. The statute does not dictate the timetable or procedure by which a person may apply for a change or the process by which the State Engineer must consider the applications.

Here, the State Engineer reviewed the applications to appropriate in the same proceeding, and conditionally approved them in the sequence in which they were filed. (See Ruling 6127 p. 42). He later issued the permits to appropriate before issuing the permits to change. The State Engineer issued the permits on three separate dates, as evidenced by the attached Exhibits 1, 2 and 3. Accordingly, when the State Engineer issued the permits to change, the underlying permits to appropriate had been granted and met the definition of "water already appropriated."

Conley/Morrison's argument is that NRS 533.325 prohibits even the filing of an application to change prior to the issuance of the underlying permit to appropriate. But NRS 533.325 says nothing about how or when an application to change may be filed and the Court should not read into a statute language which is simply not there. Madera v. SIIS, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) ("Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." quoting Erwin v. State of Nevada, 111 Nev. 1535, 1538–39, 908 P.2d 1367, 1369 (1995)).

NRS Ch. 533 sets forth the procedure the State Engineer must follow when considering applications. He must publish notice of the application in a newspaper in the county where the water sought to be appropriated is located (NRS 533.360(1)) and consider any protest to the granting of the application (NRS 533.365(3)) and he may hold a hearing to consider the rights at issue (NRS 533.365(3)). Conley/Morrison are unable to identify any violations of the requirements of NRS 533.330 through 533.364. No statute prohibits a person from applying for, or the State Engineer from accepting and considering, a change to an application to appropriate. The State Engineer must follow the same statutory process described above regardless of whether an application to appropriate or an application to change is involved.

Conley/Morrison point to the fact that the State Engineer's printed change application form does not reference changes to applications as support for their argument that one can only apply to change water already appropriated. Petition, p. 7, ll. 4-5, footnote 3. This argument, however, is contrary to the State Engineer's practice of accepting and considering changes to applications to appropriate--a practice based on his interpretation of Nevada water law that is entitled to deference. In any event, the form provided by the State Engineer does not determine the requirements of the law.

When interpreting a statute, courts should resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable. Desert Valley Water Co. v. State Engineer, 104 Nev. 718, 720, 766 P.2d 886 (1988) (citing, Cragun v. Nevada Pub. Employees'

Ret. Bd., 92 Nev. 202, 547 P.2d 1356 (1976)). "The words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results." Desert Valley, 104 Nev. at 720, 766 P.2d at 887 (citing Welfare Div. v. Washoe Co. Welfare Dep't, 88 Nev. 635, 503 P.2d 457 (1972)). Further, "[i]t is . . . settled in this state that the water law and all proceedings thereunder are special in character and the provisions of such law not only lay down the method of procedure, but strictly limit it to that provided." G. and M. Properties v. Second Judicial Dist. Ct., (citing Ruddell v. District Court, 54 Nev. 363, 17 P.2d 693 (1933); and In re Water Rights in Humboldt River, 49 Nev. 357, 246 P. 692 (1926)).

Public policy supports the State Engineer's interpretation because it allows a person to apply for a change to the point of diversion, place of use, or manner of use of a pending application to appropriate instead of forcing the State Engineer to first act on the underlying application before accepting and considering the application for change that all concerned know is forthcoming. As discussed above, the process of reviewing an application is a lengthy process and may take several years depending on the complexity of the issues involved. Conley/Morrison fail to articulate any reasonable public policy to support their argument that a person should be required to wait for the State Engineer to act on the underlying application to appropriate before even applying to change that application. More importantly, they fail to suggest a reason why the State Engineer should be required to duplicate the review and public notice process in order to grant a change application. Conley/Morrison's position would cause delay and waste limited state resources without any significant public benefit. It would exalt form over substance.

Public policy weighs in favor of the State Engineer's position because an applicant should be allowed to apply for a change to a pending application when subsequent hydrogeologic studies and exploratory well-drilling indicate that the original well location is unacceptable. If the State Engineer has not yet acted on the underlying application to appropriate, then under Conley/Morrison's argument, the applicant would have to choose between filing another application to appropriate, and losing his priority date, or waiting for the State Engineer to act on the underlying application and then initiating a second procedure to consider the change. Losing

the priority date raises the possibility that a later applicant would take priority and no water would be available for appropriation. And waiting for the original application to be granted prior to filing a change risks the possibility that intervening appropriators have obtained permits at locations near the applicant's intended change location. Accordingly, under Conley/Morrison's interpretation, an applicant would be prohibited from protecting its priority and would have to risk the possibility that intervening appropriators would obtain potentially conflicting rights. There is no sound policy reason to justify such an interpretation. If the State Engineer approves the underlying application to appropriate, he should be able to then grant the change application. If the underlying application is denied, then the change application would fail also.

Moreover, allowing a change application to be filed before the underlying application to appropriate is acted on does not harm subsequent applicants who filed their application with knowledge of prior applications. Existing appropriators are not harmed because the State Engineer will be required to review both the application to appropriate and the change application for impacts to existing rights. *NRS 533.370(5).* And the public interest is protected because both applications are subject to public notice and protest and the State Engineer has the authority to deny both applications based on the public interest. *Id.* The public is also protected against speculators who seek to monopolize water resources by a continuous series of applications because the State Engineer has the authority to deny applications based on the anti-speculation doctrine. Bacher v. State Engineer, 122 Nev. 1110, 146 P.3d 793 (2006). Lastly, the interpretation placed on Nevada's water law by Conley/Morrison will have a very significant and detrimental impact on Kobeh Valley Ranch which has proceeded in good faith to appropriate water.

b. The State Engineer was Acting within his Discretionary Authority.

The State Engineer acts within his discretion to consider change applications so long as the applications provide the State Engineer with a full understanding of the proposed changes. NRS 533.345 dictates the requirements for an application to change the point of diversion, place of use, and manner of use of water already appropriated. It states that "[e]very application for a

permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer." Thus, so long as an application comports with the other requirements of Chapter 533, the application need only offer enough information to give the State Engineer a "full understanding of the proposed change." Nothing in the statutory scheme dictates that the State Engineer must wait until a permit to appropriate is issued before consideration of a change to that permit. So long as the State Engineer has a "full understanding of the proposed change," he should be able to proceed to consider the application.

Conley/Morrison repeatedly assert that if an applicant is allowed to apply for a change to an application to appropriate, and the State Engineer is allowed to consider the change simultaneously with the underlying application before it is granted, then all of the statutory steps to obtain a permit to appropriate would be unnecessary. This argument ignores the fact that the State Engineer undertakes the same review and public notice process described above and applies the same criteria set forth in NRS 533.370 whether he considers an application to appropriate or a change application. Obviously, the State Engineer could not grant an application to change the point of diversion, place of use, or manner of use of an application to appropriate that was never granted or permitted. Nothing, however, constrains the State Engineer from engaging in the just, speedy, and inexpensive determination of multiple applications concerning the same applicant and the same water.

4. The Petition for Writ of Prohibition is Moot Because the Permits Have Been Issued.

It is settled that a case must present a justiciable controversy "through all stages of the proceeding." Personhood Nevada v. Bristol, 245 P.3d 572, 574 (2010). Moreover, "even though a case may present a live controversy at its beginning, subsequent events may render the case moot." Id. citing University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).

In this case, Conley/Morrison have petitioned the District Court for a writ of prohibition "restraining the State Engineer from taking any further action or proceedings related to any such

application to change the point of diversion, place of use and/or manner of use of an application to appropriate and vacating Ruling No. 6127." However, there is no further action for the State Engineer to take. Since Conley/Morrison did not seek a stay of the State Engineer's Ruling, all of the permits in dispute have already been issued. Accordingly, this case no longer presents a live controversy. Even if the writ were issued, there is nothing for the writ to arrest or prohibit because the permits have been issued and there is no further actions by the State Engineer to restrain.

Furthermore, Conley/Morrison cannot overcome mootness by demonstrating that this issue "involves a matter of widespread importance that is capable of repetition, yet evading review." Id. (citing Traffic Control Servs. v. United Rentals, 120 Nev. 168, 171–72, 87 P.3d 1054, 1057 (2004) (recognizing the capable-of-repetition-yet-evading-review exception where duration of the challenged action is "relatively short" and there is a "likelihood that a similar issue will arise in the future" (citing Binegar v. District Court, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996)). The issues raised by Petitioners will not evade review since they have raised the same issues in their appeal from Ruling 6127.

CONCLUSION

For the foregoing reasons, the Petition for a writ of prohibition should be dismissed.

AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Seventh Judicial District Court does not contain the Social Security number of any person.

DATED this 15th day of December, 2011.

PARSONS BEHLE & LATIMER

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Attorneys for Respondent
KOBEH VALLEY RANCH, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of December, 2011, I caused to be mailed, first class; postage prepaid, a true and correct copy of the foregoing **KOBEH VALLEY RANCH'S REPLY TO CONLEY/MORRISON'S REQUEST FOR AND POINTS AND AUTHORITIES IN SUPPORT OF ISSUANCE OF WRIT OF PROHIBITION AND IN OPPOSITION TO MOTION TO DISMISS**, to:

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INDEX TO EXHIBITS

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EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

List of Permits Issued 12/01/11

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EXHIBIT 2

EXHIBIT 2

EXHIBIT 2

List of Permits Issued 12/13/11

76802
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EXHIBIT 3

EXHIBIT 3

EXHIBIT 3

List of Permit Issued 12/14/11

78424

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KOBEH VALLEY RANCH, LLC

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

EUREKA COUNTY, a political subdivision of the State of Nevada, Petitioner, v. THE STATE OF NEVADA, EX., REL., STATE ENGINEER, DIVISION WATER RESOURCES, Respondent.	Case No. CV1108-155 Dept. No. 2
CONLEY LAND & LIVESTOCK LLC, a Nevada limited liability company; LLOYD MORRISON, an individual, Petitioners, v. THE OFFICE OF THE State Engineer OF THE STATE OF NEVADA, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, JASON KING, STATE ENGINEER, KOBEH VALLEY RANCH, LLC, REAL PARTY IN INTEREST, Respondents.	Case No. CV1108-156 Dept. No. 2

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

Petitioners,

v.

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

Respondent.

Case No. CV1108-157

Dept. No. 2

KOBEH VALLEY RANCH'S JOINDER IN THE STATE OF NEVADA AND JASON KING'S PARTIAL MOTION TO DISMISS

Respondent Kobeh Valley Ranch, LLC, real party in interest, by and through its counsel of record, hereby joins and adopts as if its own, the Partial Motion to Dismiss of the State of Nevada and Jason King, P.E., in his capacity as State Engineer of Nevada, filed on the 20th day of September, 2011 in the above-entitled matter. Kobeh Valley Ranch's Reply to the Opposition brief filed by Conley Land & Livestock, LLC, a Nevada limited liability company, and Lloyd Morrison an individual, is filed concurrently herewith.

AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court does not contain the Social Security number of any person.

DATED this 15th day of December, 2011.

PARSONS BEHLE & LATIMER

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Attorneys for Respondent
KOBEH VALLEY RANCH, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of December, 2011, I caused to be mailed, first class; postage prepaid, a true and correct copy of the foregoing **KOBEH VALLEY RANCH'S JOINDER IN THE STATE OF NEVADA AND JASON KING'S PARTIAL MOTION TO DISMISS**, to:

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Rose Tunnell
Employee of Parsons Behle & Latimer

NO.

FILED

DEC 29 2011

Eureka County Clerk

BY Jackie Kenz

Case No. CV1112-164

Dept. No. _____

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioner,

vs.

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

Respondent.

_____/

PETITION FOR JUDICIAL REVIEW
(Exempt from Arbitration:
Judicial Review of
Administrative Decision)

Petitioner, EUREKA COUNTY, a political subdivision of the State of Nevada, by and through its counsel ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD. and THEODORE BEUTEL, EUREKA COUNTY DISTRICT ATTORNEY, petitions and alleges as follows:

1. Petitioner, EUREKA COUNTY, is a political subdivision of the State of Nevada.

2. Respondent, THE STATE OF NEVADA, EX. REL., STATE ENGINEER, DIVISION OF WATER RESOURCES ("STATE ENGINEER"), is empowered to act pursuant to the provisions of Chapters 533 and 534 of the Nevada Revised Statutes on applications to appropriate water, protests filed against applications to appropriate water and all matters related thereto.

3. This Petition is brought pursuant to the procedures authorized and provided for in NRS 533.450.

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E-Mail Address: law@allisonmackenzie.com

4. A Notice of this Petition has been served on the STATE ENGINEER and all persons affected as required by NRS 533.450(3).

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

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

7. EUREKA COUNTY filed protests to all the Applications except one.

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

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

10. On August 8, 2011, EUREKA COUNTY filed its Petition for Judicial Review challenging Ruling 6127, designated Case No. CV-1108-155, before this Court.

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

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

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

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

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

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

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

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

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

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

20. The action of the STATE ENGINEER by issuing the Permits with terms and conditions different from and/or inconsistent with Ruling 6127 are arbitrary and capricious, contrary

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to and affected by error of law, without any rational basis, beyond the legitimate exercise of power and authority of the STATE ENGINEER, and have resulted in a denial of due process to EUREKA COUNTY, all to the detriment and damage of EUREKA COUNTY.

21. EUREKA COUNTY has exhausted its administrative remedies.

22. EUREKA COUNTY seeks to have this action consolidated with Case Nos.CV 1108-155; CV 1108-156 and CV 1108-157.

WHEREFORE, Petitioner prays for judgment as follows:

1. That the Court vacate the above-stated Permits; and

2. That the Court award such other and further relief as seems just and proper in the premises.

DATED this 29th day of December, 2011.

KAREN A. PETERSON, ESQ.
Nevada State Bar No. 0366
JENNIFER MAHE, ESQ.
Nevada State Bar No. 9620
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-and-

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By: _____
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Nevada State Bar No. 5222

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SEVENTH JUDICIAL DISTRICT COURT
COUNTY OF EUREKA, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, **Petition for Judicial Review** filed in case number: CV1112-104

✓ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: December 29, 2011.

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