

IN THE SUPREME COURT OF
THE STATE OF NEVADA

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EUREKA COUNTY,
Appellant,

KENNETH F. BENSON,
Appellant,

DIAMOND CATTLE COMPANY, LLC,
Appellant,

MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP,
Appellant,

v.

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

KOBEH VALLEY RANCH, LLC,
Intervenor-Appellee.

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

**APPELLANTS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL
AND MARGARET ANN ETCHEVERRY FAMILY LP'S
OPENING BRIEF**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, Appellants state that there are no parent corporations or publicly-held companies that own 10% or more of the party's stock. Schroeder Law Offices, P.C., including Laura Schroeder and Therese A. Ure, appeared for Appellants in proceedings below, and are expected to appear for Appellants before this Court.



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1 **OPENING BRIEF**

2 Appellants MICHEL AND MARGARET ANN ETCHEVERRY FAMILY,
3 LP, DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON
4 (collectively referred to herein as “Appellants”), by and through their attorneys of
5 record, Schroeder Law Offices, P.C., file this Opening Brief in their appeal from
6 the Findings of Fact, Conclusions of Law, and Order Denying Petitions for Judicial
7 Review of the Seventh District Court of the State of Nevada for the County of
8 Eureka in Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-1112-164,
9 CV-1112-165, and CV-1202-170.

10 **I.**

11 **STATEMENT OF JURISDICTION**

12 The Nevada Supreme Court has jurisdiction over this appeal pursuant to
13 Nevada Rule of Appellate Procedure 3A(b)(1), Nevada Revised Statute
14 533.450(9), and Nevada Revised Statute 233B.150.

15 This appeal is taken from a final order of the District Court, issued June 13,
16 2012, written notice of which was served on Appellants on June 14, 2012.
17 Appellants’ Notice of Appeal was timely filed on July 12, 2012 under Nevada Rule
18 of Appellate Procedure 4(a)(1).

19 **II.**

20 **STATEMENT OF ISSUES ON APPEAL**

21 This case involves challenges against State Engineer’s Ruling No. 6127,
22 approving Applications for the issuance of water use Permits. Appellants
23 demonstrate the State Engineer erred by approving Applications and issuing
24 Permits, and that the District Court erred in denying Appellants’ Petitions for
25 Judicial Review. Appellants ask this Court to reverse the decisions below and
26 remand for imposition of an order that Applications must be denied because they



1 are contrary to Nevada law.

2 **III.**

3 **STATEMENT OF THE CASE (PROCEDURAL HISTORY)**

4 On October 13 through 17, 2008, an administrative hearing on the
5 Applications was held before the State Engineer resulting in the March 26, 2009
6 issuance of Ruling No. 5966. Ruling No. 5966 was appealed to the Seventh
7 Judicial District Court in Eureka County, Nevada in Case Nos. CV-0904-122, CV-
8 0904-123 and CV-908-127. The District Court entered its decision on April 20,
9 2010, vacating Ruling No. 5966 and remanding the matter for a new hearing before
10 the State Engineer, finding that the State Engineer violated petitioners' due process
11 rights by relying on information in Ruling No. 5966 not properly entered in the
12 administrative record.

13 A second administrative hearing was held before the State Engineer on
14 December 6, 7, 9 and 10, 2010, and May 10, 2011. On July 15, 2011, the State
15 Engineer issued Ruling No. 6127, granting the majority of the Applications, and
16 then issued water use Permits. Appellants filed Petitions for Judicial Review of (1)
17 Ruling No. 6127, and (2) the State Engineer's issuance of the Permits in Eureka
18 County, Nevada District Court. The Petitions were consolidated with challenges
19 from other parties in Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-
20 1112-164, CV-1112-165 and CV-1202-170. On June 13, 2012, the District Court
21 issued its Findings of Fact, Conclusions of Law and Order Denying Petitions for
22 Judicial Review. Appellants timely filed their Notice of Appeal to the Nevada
23 Supreme Court on July 12, 2012.

24 **IV.**

25 **STATEMENT OF RELEVANT FACTS**

26 Between May 2, 2005 and June 15, 2010, numerous applications to



1 appropriate underground water and to change the point of diversion, place of use,
2 and manner of use within the Kobeh Valley and Diamond Valley hydrographic
3 basins, Lander County and Eureka County, Nevada, were filed by Idaho General
4 Mines, Inc. and Kobeh Valley Ranch, LLC (“Applications”). Joint Appendix
5 (“JA”) 4985-4995. Applications filed by Idaho General Mines, Inc. were thereafter
6 assigned to Kobeh Valley Ranch, LLC (“KVR” or “Respondent”). The
7 Applications were filed for water use related to a proposed molybdenum mine
8 known as the Mount Hope Mine Project, that required underground water for
9 mining, milling, and dewatering purposes. The Applications requested a total
10 combined duty of 11,300 acre-feet annually (“AFA”), that when developed will
11 constitute the largest single water use from the Kobeh Valley hydrographic basin.
12 Applications also requested changes to the current water uses in the Diamond
13 Valley hydrographic basin for use at the Mount Hope Mine Project. The Diamond
14 Valley hydrographic basin is already over-conscripted. JA5001 and 5008.

15 After the administrative hearings in 2010-2011, the State Engineer issued
16 Ruling No. 6127 on the Applications. In Ruling No. 6127, the State Engineer
17 found that Applications would conflict with existing water rights. JA5006, 5011
18 and 5022-5023; JA6417, 6429, 6792 and 6804. Specifically, the State Engineer
19 found conflicts with existing rights in springs on the floor of the Kobeh Valley
20 hydrographic basin. *Id.* The State Engineer did not make the required findings that
21 the lowering of the static groundwater level would be reasonable, nor did the State
22 Engineer impose any express conditions to ensure existing water use rights would
23 continue to be satisfied as required.

24 Ruling No. 6127 relied heavily on a non-existent, hypothetical mitigation
25 plan for the proposition that any conflicts could be mitigated. JA5006, 5011, 5019,
26 5021-5023, 5026. Appellants were not provided the opportunity to challenge any



1 mitigation plan at hearing because no mitigation plan was ever entered in the
2 record. The place of use requested in Applications is 90,000 acres, even though the
3 mine operation plan limits water use to a 14,000 acre boundary. JA309. Finally, the
4 Permits do not include a condition imposed by Ruling No. 6127 to return all excess
5 water from Diamond Valley to the aquifer in Diamond Valley. JA5008.

6 Appellant Michel and Margaret Etcheverry Family LP (“Etcheverry”) is a
7 landowner and water right holder in Kobeh Valley.¹ Etcheverry entered into a
8 long-term lease agreement with Appellant Diamond Cattle Company, LLC
9 (“Diamond Cattle”) to operate its farming and ranching operation. JA616-618. The
10 lease includes long-term rights to the United States Department of Interior Bureau
11 of Land Management (“BLM”) grazing preferences in the Roberts Creek
12 Allotment. JA619-620. Etcheverry’s private ranch includes a property line
13 boundary located within roughly 75 feet of Well 206, the point of diversion
14 proposed for Application Nos. 79934 through 79939 within the proposed well field
15 of the Mount Hope Mine Project. JA625.

16 Appellant Kenneth F. Benson (“Benson”) is an owner of water rights in
17 Diamond Valley.² Benson relies on water to support his farming and ranching
18 operations. Etcheverry is also the owner of water use rights on the floor of Kobeh
19 Valley.³ Etcheverry, on behalf of itself and Diamond Cattle, is a vested water right

20
21 ¹ Etcheverry is also a landowner and water right holder in Diamond Valley and Pine Valley.

22 ² See Nevada Division of Water Resources permits including, but not limited to, Permit No.
23 22648 (Certificate 6358 groundwater in Diamond Valley), Permit No. 22921 (Certificate No.
24 7874 groundwater in Diamond Valley), and Permit 35009 (Certificate No. 10255 groundwater in
25 Diamond Valley).

26 ³ See Nevada Division of Water Resources permits including, but not limited to, Permit No.
48684 (Certificate 12338 groundwater of Kobeh Valley), Permit No. 12748 (Certificate 5880
surface water from Kobeh Valley’s Mud Spring), Permit No. 16802 (Certificate 5078 surface
water from Kobeh Valley’s Roberts Creek and tributary springs), Permit No. 2732 (Certificate
0480 surface water from Kobeh Valley’s Roberts Creek), and Permit 4768 (Certificate 1986
surface water from a Kobeh Valley unnamed spring). Etcheverrys also hold numerous vested
water rights in Kobeh Valley and in the Roberts Mountains.



1 holder and future claimant to vested stock water uses in the Roberts Mountain
2 areas of Kobeh Valley and Pine Valley as the holder of the grazing preference on
3 the Roberts Mountain Allotment. JA622-624. Etcheverry also maintains at least
4 one domestic well on its private Roberts Creek Ranch property on the floor of
5 Kobeh Valley, and at least two domestic wells at its Alpha Ranch in Pine Valley.
6 *Id.*

7 When KVR test pumped Well 206 (one of the Applicant's wells in Kobeh
8 Valley), the production on Nichols Spring, utilized by Etcheverry, decreased by
9 half and has not recovered years later. JA625-626. It is predicted that Well 206 will
10 see a drawdown of 205 feet by the end of the 44 year mine life. JA1882.
11 Etcheverry's Mud Spring will likely cease to flow as a direct result of pumping
12 under the Applications. *See* testimony of Applicant's expert witness Dwight Smith
13 (JA526, 545). Applicant's expert witness Terry Katzer testified that Mud Springs
14 would probably dry up with time along with other springs in close proximity to the
15 well field. JA363.

16 V.

17 SUMMARY OF THE ARGUMENTS

18 A) The State Engineer found that KVR's Applications would conflict with
19 existing water use rights on the floor of Kobeh Valley, including Appellants'
20 existing water use rights, and thus the State Engineer committed legal error
21 by granting KVR's Applications. NRS § 533.370(2). The District Court
22 erred by affirming the State Engineer's decision and denying Appellants'
23 Petitions for Judicial Review.

24 B) The State Engineer found that KVR's Applications would lower the static
25 water level at appropriators' points of diversion, but erred by granting the
26 applications without complying with the statutory requirements (1) to find



1 that the lowering is reasonable, and (2) existing rights can be satisfied under
2 express conditions. NRS § 534.110(4) and (5). The District Court erred by
3 affirming the State Engineer's ruling and denying Appellants' Petitions for
4 Judicial Review.

5 C) The State Engineer found the 90,000 acre place of use described in KVR's
6 Applications was proper, although KVR's plan of operations identifies only
7 a 14,000 acre place of use for mining purposes, because KVR proposed to
8 use water outside the 14,000 acre boundary for dust control and
9 environmental mitigation purposes. It was an error of law for the State
10 Engineer to approve the proposed place of use, and it was an error for the
11 District Court to deny Appellants' Petitions for Judicial Review, because the
12 Applications and Permits at issue do not allow KVR to use water for dust
13 suppression or environmental mitigation purposes (KVR is limited to
14 mining, milling, and dewatering). NRS §§ 533.335, 533.345.

15 D) KVR conceded Ruling No. 6127 requires all Permits contain the condition
16 that excess Diamond Valley water must be returned to the groundwater
17 aquifer in Diamond Valley, and KVR does not object to that term being
18 added to the Permits. JA6510. The District Court erred by denying
19 Appellants' Petitions for Judicial Review and affirming the State Engineer's
20 issuance of Permits that failed to include that condition, especially when no
21 disagreement existed.

22 E) The State Engineer must limit his decision to the evidence in the record.
23 Here, the State Engineer's reliance on a mitigation plan not entered in the
24 record to approve KVR's Applications was an error that denied Appellants
25 their due process right to address the mitigation plan at hearing. *Revert v.*
26 *Ray*, 95 Nev. 782, 787 (1979). The District Court erred by denying



1 Appellants' Petitions for Judicial Review and holding Appellants' due
2 process rights were not violated because Eureka County (a different party)
3 would be given the opportunity to participate in development of the
4 mitigation plan.

5 **VI.**
6 **STANDARD OF REVIEW**

7 When a court reviews a decision of the State Engineer regarding a question
8 of law, the court undertakes independent review. *Town of Eureka v. Office of State*
9 *Engineer*, 108 Nev. 163, 165, 826 P.2d 948 (1992); *In re Nevada State Engineer*
10 *Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22 (Nev. 2012). Review
11 of an order of the State Engineer is undertaken in the nature of an appeal. NRS §
12 533.450(1). When considering purely legal questions, a court does not grant
13 deference to the State Engineer's decision. *Town of Eureka*, 108 Nev. at 165, 826
14 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)).
15 The reviewing court may undertake independent review of the construction of a
16 statute. *Nevada Emp. Sec. Dep't v. Capri Resorts*, 104 Nev. 527, 528, 763 P.2d 50,
17 51 (1988). While the State Engineer's interpretation of a statute is persuasive, it is
18 not controlling. *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266
19 (1988). "When determining the validity of an administrative regulation, courts
20 generally give 'great deference' to an agency's interpretation of a statute that the
21 agency is charged with enforcing." *State, Div. of Insurance v. State Farm*, 116
22 Nev. 290, 293, 995 P.2d 482, 485 (2000). "An agency charged with the duty of
23 administering an act is impliedly clothed with power to construe it as a necessary
24 precedent to administrative action." *Pyramid Lake Paiute Tribe of Indians v.*
25 *Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996) (citing, *State v.*
26 *State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988)).



1 With regard to questions of fact, review of the State Engineer's decision or
2 order is limited to whether substantial evidence exists in the record to support the
3 decision. *Town of Eureka*, 108 Nev. at 165, 826 P.2d 948 (1992) (citing *Revert v.*
4 *Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979)). An inquiry as to substantial
5 evidence, presupposes the fullness and fairness of the administrative proceeding.
6 *Revert*, 95 Nev. at 787. All interested parties must have had a "full opportunity to
7 be heard"; the State Engineer must clearly resolve all the crucial issues presented;
8 and, the decisionmaker must prepare findings in sufficient detail to permit judicial
9 review. *Id.* When these procedures are not followed, and the resulting
10 administrative decision is arbitrary, oppressive, or accompanied by a manifest
11 abuse of discretion, the courts may intervene. *Id.*

12 VII.

13 ARGUMENT

14 A) The State Engineer erred by granting Applications that conflict with 15 existing water use rights.

16 Nevada water law is based primarily on the prior appropriation doctrine.
17 Under the prior appropriation doctrine, those who appropriate water to beneficial
18 use first, have a senior right of use to the amount of water appropriated as against
19 subsequent, later in time, junior appropriators. It is fundamental a junior user's
20 appropriation cannot conflict with an existing, senior, user's water right of use.
21 Nevada's 1913 Water Law Act adopted this principle: "Subject to existing rights,
22 all such water may be appropriated for beneficial use as provided in this act and
23 not otherwise." 1913 Nevada Statutes, Ch. 140 § 2 (March 22, 1913).

24 This fundamental element of Nevada water law remains within the
25 groundwater statutes (NRS Chapter 534) and the surface water statutes (NRS
26 Chapter 533) with statutory provisions to protect the existing, or senior, water



1 users. Under the current system of prior appropriation, an application, if approved
2 by the State Engineer, becomes permitted. *See generally*, NRS § 533.324 et. seq.
3 Upon the issuance of a permit, the appropriator (or water user) can then begin
4 using water for a beneficial use which is later perfected and a certificate issued.
5 For those rights of use existing prior to 1914, they must be adjudicated before they
6 can receive “certificate” type status. *See generally*, NRS § 533.090 et seq. Both
7 methods of water use authorization recognize and call for the protection of prior
8 existing water rights. *See generally*, NRS §§ 533.085, 533.370(2), 533.371(5).

9 Here the State Engineer found there will be conflicts with existing water
10 rights, yet failed to deny the conflicting applications, or otherwise condition the
11 permits to protect against those conflicts. The District Court upheld the State
12 Engineer’s Ruling to which Appellants appeal.

13 Nevada Revised Statute Section 533.370 governs the approval or rejection of
14 applications by the State Engineer for appropriations of water generally, and
15 specifically surface water applications, and provides in pertinent part:

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

23 NRS § 533.370(2)⁴ (emphasis added). Under this statute, where a proposed use
24 (i.e., Application) or where a proposed use is requested to be changed or
25 transferred (i.e., Change Application) conflicts with existing rights, the State
26

1 Engineer shall reject the application and refuse to issue the permits. The statutory
2 direction is mandatory. “The Legislature has charged the State Engineer with
3 evaluating proposed water appropriations, requiring the State Engineer to deny a
4 permit ‘where there is no unappropriated water in the proposed source of supply,
5 or where its proposed use or change conflicts with existing rights...’ NRS
6 533.370(5).” *Redrock Valley Ranch, LLC v. Washoe County*, 254 P.3d 641, 647,
7 127 Nev. Op. 38 (Nev. 2011). Likewise, the groundwater use statutes provide for
8 the protection of existing rights by providing the State Engineer with the ability to
9 condition or restrict appropriations. *See* NRS § 534.110(4), (5); *see also*, Argument
10 VII(B) below.

11 Appellants hold senior existing water use rights on the floor of Kobeh
12 Valley. Appellants rely on springs and domestic wells on the floor of Kobeh
13 Valley for their farming and ranching operations, grazing preferences, and use and
14 enjoyment of their private property. KVR’s test pumping already interfered with
15 Appellants’ water use rights. *See* Statement of Relevant Facts, *supra*. The State
16 Engineer specifically found KVR’s Applications would conflict with Appellants
17 existing water use rights. JA5006, 5011 and 5022-5023; JA6417, 6429, 6792 and
18 6804.

19 State Engineer Ruling No. 6127 determined: “Water rights that could
20 potentially be impacted are those rights on the valley floor where there is predicted
21 drawdown of the water table due to mine pumping” JA5006. And that,
22 “Applicants groundwater model does indicate that there may be an impact to
23 several small springs located on the valley floor of Kobeh Valley near the proposed
24 well locations.” JA5011. The State Engineer noted in its Answering Brief, on file
25

(Cont.)

26 ⁴ NRS 533.370 was amended July 1, 2011. A.B. 115, 76th Leg. (Nev. 2011). The language
previously in subsection 5 is now in subsection 2.



1 with the District Court, that “impacts” mean the same thing as “conflicts” when
2 considering the statutory language. JA5006, 5011 and 5022-5023; JA6417, 6429,
3 6792 and 6804. Further, in its Answering Brief, “The State Engineer also took
4 notice of conflicts that may occur.” *Id.* Thus, the State Engineer found that the
5 Applications would **conflict** with existing rights on the floor of Kobeh Valley.

6 When the State Engineer determined KVR’s Applications will conflict with
7 existing rights, and allowed the Applications to proceed to permitting despite the
8 conflict, the State Engineer committed an error of law. The District Court then
9 erred by denying Appellants’ Petition for Judicial Review and allowing the
10 issuance of Permits to KVR. This Court should reverse the District Court’s denial
11 of Appellants’ Petition for Judicial Review, and should remand the matter to the
12 District Court for entry of judgment reversing State Engineer Ruling No. 6127.

13 **B) The State Engineer erred by failing to determine whether the lowering**
14 **of the static water level would be reasonable, and failing to impose**
15 **express conditions to ensure existing water use rights will be satisfied.**

16 Similar to the statute on surface water appropriations, the groundwater use
17 statutes have a “no conflict” rule but provide the State Engineer with the ability to
18 condition or restrict appropriations:

19 (4) It is a condition of each appropriation of groundwater
20 acquired under this chapter that the right of the
21 appropriator relates to a specific quantity of water and
22 that the right must allow for a reasonable lowering of the
23 static water level at the appropriator’s point of diversion.
24 In determining a reasonable lowering of the static water
25 level in a particular area, the State Engineer shall
26 consider the economics of pumping water for the general
type of crops growing and may also consider the effect of
using water on the economy of the area in general.

(5) This section does not prevent the granting of permits
to applicants later in time on the ground that the
diversions under the proposed later appropriations may

1 cause the water level to be lowered at the point of
2 diversion of a prior appropriator, so long as any
3 protectable interests in existing domestic wells as set
4 forth in NRS 533.024 and the rights of holders of existing
5 appropriations can be satisfied under such express
6 conditions. At the time a permit is granted for a well:

7 (a) For municipal, quasi-municipal or industrial use;
8 and

9 (b) Whose reasonably expected rate of diversion is
10 one-half cubic foot per second or more,

11 >>> the State Engineer shall include as a condition of the
12 permit that pumping water pursuant to the permit may be
13 limited or prohibited to prevent any unreasonable adverse
14 effects on an existing domestic well located within 2,500
15 feet of the well, unless the holder of the permit and the
16 owner of the domestic well have agreed to alternative
17 measures that mitigate those adverse effects.

18 NRS § 534.110(4), (5) (emphasis added). In considering these groundwater
19 statutes, NRS § 534.110(4) relates to an applicant's experience in lowering the
20 static water level⁵, at its own well head location, or that point commonly referred to
21 as a point of diversion or point of appropriation. Under this statute, Nevada allows
22 for the granting of a water use when there is a reasonable lowering at the
23 Applicant's own point of diversion.

24 On the other hand, NRS § 534.110(5) applies where the new (or junior)
25 applicant's use lowers the static water level at another's (or the senior water user's)
26 point of diversion. However, this lowering of the senior's static water level must be
27 allowed if a finding is made that the senior's water uses can be satisfied if the
28 junior applicant's permits incorporates express conditions. Thus, NRS § 534.110(5)
29 allows for the lowering of the water level at a senior appropriator's point of

30 ⁵ The static water level refers to the elevation or level of the water table in a well when any pump
31 is not operating, and the elevation of the water level is "at rest."



1 appropriation, *only if* the senior's rights can be satisfied under "express
2 conditions."

3 Essentially, NRS § 534.110(4) and (5) provide a three step analysis for the
4 State Engineer to consider when reviewing groundwater applications prior to
5 permitting. Step One: The State Engineer must determine, if there is a lowering of
6 the groundwater table or static water level at the appropriator's point of diversion,
7 then whether or not that lowering is reasonable. Step Two: The State Engineer
8 must make a determination whether or not the application or proposed use, will
9 conflict with existing rights (i.e. will the new appropriation cause a lowering⁶ of
10 the water level at the senior or existing user's point of diversion?). Step Three: If
11 the State Engineer determines that there will be a lowering at the senior or existing
12 user's point of diversion caused by the new appropriation, and the State Engineer
13 determines that it will likely issue the permit, then the State Engineer must make a
14 finding that the senior water user, or the existing right, can be satisfied with
15 express conditions placed in the permit. It is the express conditions that will allow
16 permit enforcement to protect the existing rights.

17 Step One: Groundwater rights are only subject to a "*reasonable lowering* of
18 the static water level at the appropriator's point of diversion." NRS § 534.110(4)
19 (emphasis added). An *unreasonable* lowering of the static water level by new
20 appropriations is not permitted by law. In State Engineer Ruling No. 6127, the
21 State Engineer found that the Applications will cause a lowering of the static water
22 levels: "Water rights that could potentially be impacted are those rights on the
23 valley floor where there is predicted drawdown of the water table due to mine
24 pumping." JA5006. "Applicants groundwater model does indicate that there may
25

26 ⁶ Note, NRS § 534.110(5) does not include the word "reasonable" and relates to any lowering at
the existing water users point of diversion.



1 be an impact to several small springs located on the valley floor of Kobeh Valley
2 near the proposed well locations.” JA5011. Etcheverry’s Mud Spring will likely
3 cease to flow as a result of the Applicant’s pumping. JA363, 526, 531, 545. It is
4 predicted that Well 206 (one of Applicant’s wells) will see a drawdown of 205 feet
5 by the end of the 44 year mine life. JA1882. However, contrary to NRS §
6 534.110(4), the State Engineer never made a finding concluding that lowering of
7 the water table under this appropriation was “reasonable.” Without making a
8 finding that the drawdown caused by KVR’s Applications is “reasonable,” the
9 State Engineer did not have the authority to grant the Applications based on NRS §
10 534.110(4), or go on to Step Two of the statutorily required analysis.

11 Step Two: Under Step Two the State Engineer must determine the extent of
12 the water level lowering,⁷ at the senior user’s or the existing user’s point of
13 diversion. As discussed in Step One above, under these Applications, there will be
14 conflicts to existing rights. In the administrative hearings preceding Ruling No.
15 6127, Appellants testified about the Applications’ conflicts with their existing
16 rights on the floor of Kobeh Valley. *See* Statement of Relevant Facts, *supra*. In
17 Ruling No. 6127, the State Engineer determined that the Applications ***will conflict***
18 ***with existing rights*** in springs on the floor of Kobeh Valley. JA5006, 5011, 5022-
19 5023; JA6417, 6429, 6792, 6804. Therefore, the State Engineer found that there
20 are certain known impacts, or conflicts, on existing rights. However, the State
21 Engineer did not determine the extent of the conflict in order to move to Step
22 Three of the required statutory analysis.

23 Step Three: If there is lowering to the water level of the senior or existing
24 user, then a permit can still be granted if express conditions are placed on the
25

26 ⁷ NRS § 534.110(5) does not limit this “conflict review” to the senior or existing user of groundwater. Thus, this statute can apply to a lowering of the water level in relation to both groundwater uses and surface water uses.

1 permit so that the senior use can be satisfied. On April 3, 2012, oral argument was
2 held before the District Court on the Petitions for Judicial Review challenging
3 Ruling No. 6127 (Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-
4 1112-164, CV-1112-165 and CV-1202-170). At oral argument, the State Engineer
5 admitted that if effects to existing rights are known, then NRS § 534.110(5)
6 requires express conditions be placed in Permits to avoid those known effects.
7 JA6694-6700 (“So all these effects that you know about, based on geology, that
8 statute [NRS § 534.110(5)] applies to and you can put in the permit terms.”
9 JA6698-6699. “So if we knew what they were going to be, I would agree the
10 statute [NRS § 534.110(5)] would apply and require specific terms.” JA6699). The
11 State Engineer admitted before the District Court that he did not impose any
12 express conditions on KVR:

13 THE COURT: Did the State Engineer in his ruling
14 expressly state how petitioners’ water rights would be
15 satisfied by some lowering of the water table and the
impacts to their rights?

16 MR. STOCKTON: He did not.

17 JA6694. At the April 3, 2012 oral argument, the State Engineer noted that such
18 conditions might include requiring the Applicant to stop pumping, or to drill a well
19 for the affected appropriator and pay for pumping. JA6694-6700. Such conditions
20 are *express conditions* the State Engineer admittedly could include in the Permits.

21 Contrary to law, the State Engineer did not impose any express conditions
22 on the Permits to ensure that existing rights will be satisfied. The State Engineer
23 could not insert express conditions because as he admitted, he did not understand
24 the extent of the lowering, because the State Engineer had not adequately
25 completed the statutory analysis required by Steps One and Two. Instead, the State
26 Engineer issued the Permits subject to a non-existent monitoring, management and

1 mitigation plan (“3M Plan”), to be developed by KVR in the future, and without
2 identifying any conditions that must be included in the 3M Plan. JA5026.

3 The State Engineer made no finding as to “reasonable lowering” and
4 therefore NRS § 534.110(4) cannot serve as the basis for issuing the Permits.
5 Likewise, NRS § 534.110(5) cannot serve as the basis for issuing the Permits as
6 State Engineer’s Ruling No. 6127 found that effects to existing rights are known to
7 exist without specificity, yet, no express conditions were imposed on the Permits to
8 ensure that existing water use rights will be satisfied. This Court should reverse the
9 District Court’s denial of Appellants’ Petition for Judicial Review, and remand this
10 matter to the District Court with instructions to reverse Ruling No. 6127.

11 **C) The State Engineer erred by approving a place of use larger than the**
12 **intended place of use, and the District Court erred by allowing water**
13 **uses other than those applied for and stated in the Permits.**

14 Nevada Revised Statute § 533.325 requires the filing of an application with
15 the State Engineer for the appropriation of any public waters or for the change in
16 the place of use, manner of use, or point of diversion of waters already
17 appropriated. The application must include, among other information, the name of
18 the source of water, the amount of water to be appropriated, the purpose for the
19 appropriation, “a substantially accurate description of the location of the place at
20 which the water is to be diverted from its source,” and a description of the works.
21 NRS § 533.335. Applications to change the place of use, manner of use, or point of
22 diversion of appropriated waters must include “such information as may be
23 necessary to a full understanding of the proposed change.” NRS § 533.345(1). The
24 State Engineer’s approval of the application must be based on the applicant’s
25 submission of proof of intent to construct any works necessary to apply the water
26 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).



1 In the present case, Applications overstated the place of use as an area of
2 90,000 acres. JA309. The plan of operations for the mine identifies the water use
3 area as an approximately 14,000 acre area. *Id.* The sole reason for the request of an
4 additional 76,000 acres was that it would cause the mine a “hardship” to apply for
5 a change in the place of use in the future if some unidentifiable event were to
6 unfold. JA270 and 309. KVR recognizes its overstatement and attempts to make
7 an end-run around Nevada’s water law that limits an application to “beneficial
8 use.” “Hardship” is not an exception to identifying the actual place of beneficial
9 use. Further, KVR cannot show intent to apply water to the entire place of use
10 identified in the Applications. *Id.* KVR’s use on the additional 76,000 is merely
11 speculative, in opposite to the requirements of Nevada’s statutorily adopted
12 elements of the prior appropriation doctrine.

13 In Ruling No. 6127, the State Engineer concluded that “Applicant has met
14 the requirements for describing the points of diversion and place of use on the
15 application forms and supporting maps.” JA4996. Appellants challenged that
16 finding in District Court, raising the arguments above. In response, KVR argued
17 that the place of use was proper as it intended to use water on the entire place of
18 use, outside the mining boundary, for “dust control” and “environmental
19 mitigation.” JA6480. The District Court adopted KVR’s argument to support its
20 finding that the place of use in Applications is proper. JA6847-6848. Thus, the
21 District Court compounded its error of law by not only approving the speculative
22 76,000 acre place of use, but in further expanding KVR’s Applications in allowing
23 additional uses not included in the Applications.

24 / / /

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26 / / /



1 The only uses proposed by the Applications and allowed by Permits are
2 “mining, milling, and dewatering.” JA5257-5420; JA5778-6397.⁸ Even though
3 KVR failed to apply for such uses, at hearing in answer to argument on its
4 speculative 76,000 acre place of use, it admitted an intention to use water outside
5 of the mining area for uses *other than* mining, milling, and dewatering. KVR
6 invited legal error by making said arguments to the District Court. This Court must
7 reverse Ruling No. 6127 because the place of use exceeds the actual intended place
8 of use by 76,000 acres, and is not supported by the anti-speculation doctrine
9 encompassed in Nevada’s law of prior appropriation.

10 **D) The State Engineer erred by omitting from the Permits the condition**
11 **imposed by Ruling No. 6127.**

12 Ruling No. 6127 states:

13 The State Engineer finds that any permit issued for the mining project with a
14 point of diversion in the Diamond Valley Hydrographic Basin must contain
15 permit terms [1)] restricting the use of water to within the Diamond Valley
16 Hydrographic Basin and [2)] any excess water produced that is not
consumed within the basin must be returned to the groundwater aquifer in
Diamond Valley.

17 JA5008. Applications 76005-76009, 76802-76805, and 78424 request diversion
18 from the Diamond Valley Hydrographic Basin. JA2218-2237, 2269-2283 and
19 2318-2321. The State Engineer approved Applications 76005-76009, 76802-
20 76805, and 78424 and issued Permits, providing that the place of use is limited to
21 Diamond Valley. JA5984-6025, 6077-6116 and 6166-6173. However, the issued
22 Permits do not include the second requirement of Ruling No. 6127, that “any
23
24

25 ⁸ “Mining” means “the process of extracting ores from the earth.” Nevada Administrative Code
26 (“NAC”) § 445A.364. “Milling” means the mechanical processing of ore. “Dewatering” is the
removal of water from mined material. Mining, milling and dewatering does not include dust
control outside of the mining area or environmental mitigation. KVR must apply for additional
or changed water use rights to use water for dust control or environmental mitigation.



1 excess water produced that is not consumed within the basin must be returned to
2 the groundwater aquifer in Diamond Valley.”

3 The condition to return groundwater to Diamond Valley is critical to
4 groundwater aquifer stability. KVR’s pit mine straddles hydrographic basins and
5 water will flow into the mine pit from different hydrographic basins. Tracking the
6 excess withdrawals from the Diamond Valley Hydrographic Basin for return to the
7 Diamond Valley aquifer, provides sustainability and may prevent further mining of
8 the Diamond Valley aquifer.

9 It was an error of law for the State Engineer to fail to comply with Ruling
10 No. 6127 by leaving out the “return flow” requirement. KVR did not object to
11 inclusion of the condition in the Permits. JA6510. This Court should remand the
12 District Court’s decision to require the condition for return flow to Permit Nos.
13 76005-76009, 76802-76805, and 78424 imposed by Ruling No. 6127 (unless this
14 Court reverses Ruling No. 6127 in total, as requested above).

15 **E) The District Court committed reversible error by upholding an**
16 **administrative decision based on evidence not entered in the**
administrative record.

17 The Nevada water code does not authorize the State Engineer to condition
18 his approval of applications upon a non-existent mitigation plan, not included in
19 the record. The District Court improperly determined that Appellants’ entitlement
20 to due process is satisfied by *Eureka County’s* participation in developing the
21 future 3M plan. Appellants’ entitlement to process cannot be satisfied by
22 substituting a third party in their place.

23 Nevada Revised Statute § 533.365 prescribes the procedure for hearings
24 before the State Engineer, and provides in pertinent part: “Each applicant and each
25 protestant shall, in accordance with a schedule established by the State Engineer,
26 provide to the State Engineer and to each protestant and each applicant information



1 required by the State Engineer relating to the application or protest.” Thus, all
2 information considered by the State Engineer must be submitted to the State
3 Engineer and become part of the record.

4 In the present case, the State Engineer found that the Applications would
5 conflict with existing rights on the floor of Kobeh Valley. JA5006, 5011, 5022-
6 5023; JA6417, 6429, 6792, 6804. However, the State Engineer granted the
7 Applications, relying on a Monitoring, Management, and Mitigation plan (“3M
8 Plan”) that did not exist, and was not entered in the record. The State Engineer
9 found:

10 [T]he Applicant’s groundwater model does indicate that
11 there may be an impact to several small springs located
12 on the valley floor of Kobeh Valley near the proposed
13 well locations... The monitoring, management and
14 mitigation plan will allow access for wildlife that
customarily uses the source and will ensure that any
existing water rights are satisfied to the extent of the
water right permit.

15 JA5011. The 3M Plan was never entered in the record during the administrative
16 proceedings.

17 In the first ruling issued by the State Engineer in this matter, Ruling No.
18 5966, KVR attempted to enter evidence into the record at hearing that was not
19 previously provided to the protestants (Appellants) regarding a new groundwater
20 model. The State Engineer stated that he would not rely on the evidence because
21 the protestants (Appellants) did not have a fair opportunity to review and
22 controvert the new evidence; however, Ruling No. 5966 referenced the new model
23 several times. The District Court reversed Ruling No. 5966 on due process grounds
24 because the Ruling was based on evidence not properly entered in the record,
25 denying the protestants’ the opportunity to “meet or challenge such evidence.”
26 Appellants’ Supplement to the Joint Appendix (“ASJA”) 15.

1 The Due Process Clause “forbids an agency to use evidence in a way that
2 forecloses an opportunity to offer a contrary presentation.” *Bowman Transp., Inc.*
3 *v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, fn. 4 (1974). “The action
4 of...an administrative board exercising adjudicatory functions when based on
5 information of which the parties were not apprised and which they had no
6 opportunity to controvert amounts to a denial of a hearing.” *English v. City of Long*
7 *Beach*, 217 P.2d 22, 24 (Cal. 1950). As has been recognized by other states, a full
8 and fair opportunity to be heard, which is essential to due process, requires that all
9 evidence utilized to support a decision be disclosed to the parties so that they may
10 have an opportunity to cross-examine the witness with regard to such evidence.
11 *Cook County Federal Sav. & Loan Ass’n v. Griffin*, 391 N.E.2d 473, 477 (Ill.App.
12 1979); *In re Amalgamated Food Handlers, Local 653-A*, 70 N.W.2d 267, 272
13 (Minn. 1955); *English*, 217 P.2d at 24. “A decision based on evidence not in the
14 record is a procedure not to be condoned.” *Cook*, 391 N.E.2d at 477.

15 Appellants in this case never had a chance to review the 3M Plan or
16 challenge whether its provisions would “ensure that existing water rights are
17 satisfied to the extent of the water right permit.” The State Engineer made findings
18 of fact that the non-existent 3M Plan would ensure protection of existing rights and
19 would avoid conflicts with existing rights. Yet, nothing in the record supported the
20 State Engineer’s findings. Further, it was impossible for Appellants to “meet or
21 challenge” the terms of a hypothetical, non-existent 3M Plan. Since the 3M Plan
22 did not exist, Appellants could not show that the 3M Plan would not cure conflicts
23 with existing water use rights. The State Engineer did not provide Appellants the
24 opportunity to review or challenge the 3M Plan before summarily determining that
25 a non-existent and not-of-record 3M Plan would avoid all conflicts, thus allowing
26 him to approve the Applications.



1 In upholding the State Engineer's Ruling No. 6127, the District Court erred
2 in its presumption that Appellants will be afforded due process through preparation
3 of a future 3M Plan. The District Court determined that, because Eureka County
4 could participate in the development of the 3M Plan, it was not a due process
5 violation for the State Engineer to rely on the non-existent 3M Plan in Ruling No.
6 6127. JA6841-6842. Eureka County is a separate party. Appellants herein were
7 not participants in development of the 3M Plan. Eureka County's participation
8 cannot cure the due process violation suffered by Appellants when the State
9 Engineer relied on a hypothetical, non-existent 3M Plan to cure any conflicts with
10 Appellants' water use rights, without providing Appellants the opportunity to
11 challenge any 3M Plan. Under the State Engineer's Ruling No. 6127 and District
12 Court's Order, Appellants are deprived of their opportunity to be heard. *Revert v.*
13 *Ray*, 95 Nev. 782, 787 (1979).

14 When the State Engineer fails to comply with the basic notions of fairness
15 and due process, the resulting ruling cannot be upheld. *Revert v. Ray*, 95 Nev. 782,
16 787 (1979). The recent creation of the 3M Plan illustrates the point. The 3M Plan
17 offers alternatives to satisfaction of water use rights, such as purchasing the injured
18 party's water or property, or substituting alternative sources of water for the
19 injured party's water use right. *See* 3M Plan, Attachment 1. If such information
20 was available prior to issuance of Ruling No. 6127, Appellants would have had the
21 opportunity to show why those provisions are not sufficient under Nevada Revised
22 Statutes §§ 533.370(2) or 534.110(4) and (5).⁹ Appellants were denied the
23 opportunity to challenge the sufficiency of the 3M Plan, and the State Engineer
24 / / /

25
26 ⁹ The State Engineer's approval of the 3M Plan is currently being reviewed by the Nevada District Court for the County of Eureka in Case No. CV1207-178.



1 erroneously relied on the not-of-record 3M Plan for finding that the Applications
2 should be approved.

3 **VIII.**
4 **CONCLUSION**

5 For the reasons stated above, this Court should reverse the District Court's
6 denial of the Petitions for Judicial Review, and should remand the case to the
7 District Court for entry of judgment reversing Ruling No. 6127 and denying
8 Permits.

9
10 DATED this 26th day of December, 2012.

11 SCHROEDER LAW OFFICES, P.C.
12

13 /s/ Therese A. Ure

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ATTACHMENTS INDEX

Attachment	Document	Filing Date
Attachment 1	Nevada Division of Water Resources Monitoring, Management, and Mitigation Plan for the Mt. Hope Project (<i>without attachments</i>), submitted in the Record on Appeal to the Seventh Judicial District Court for the State of Nevada in and for the County of Eureka in Case No. CV 1207-178	August 3, 2012



**NEVADA DIVISION OF WATER RESOURCES MONITORING, MANAGEMENT,
AND MITIGATION PLAN FOR THE MT. HOPE PROJECT**

1. BACKGROUND

- A. This Monitoring, Management, and Mitigation Plan (3M) applies to proposed groundwater extraction from Kobeh Valley and Diamond Valley for mining process water rights granted in Ruling 6127 of the office of the Nevada State Engineer (NSE) dated July 15, 2011. The groundwater extracted will be consumed in activities related to the Mt. Hope Project (Project), including mineral processing and mine dust control. The groundwater will be developed by Eureka Moly, LLC, (EMLLC) through Kobeh Valley Ranch, LLC (KVR), both of which are subsidiaries of General Moly, Inc. (GMI), with KVR being the water rights holder. The Lessee of the water rights and operator of the Project is EMLLC. The groundwater will be supplied primarily from a wellfield in Kobeh Valley and conveyed via pipelines to the mine and mill sites. In addition, groundwater will include water derived from open pit dewatering at rates that are predicted to reach a maximum of 742 af/yr. The distribution of this water from the pit is estimated at 20% from Kobeh Valley Hydrographic Basin and 80% from the Diamond Valley Hydrographic Basin.

2. PURPOSE OF THE 3M

- A. The purpose of this 3M is to assist the NSE in managing development of groundwater resources within and near the Project area to avoid adverse impacts to existing water rights. The 3M is designed to include or develop, as needed or appropriate, express conditions that will protect the rights of domestic well owners, if any, and existing appropriations.
- B. While it is the goal to avoid any adverse impacts due to the groundwater pumping, the 3M outlines a process by which adverse impacts will be identified and ultimately mitigated. It is intended to provide the necessary data to assess the response of the aquifer(s) to the stress of water resource exploitation, provide an early warning capability, and provide safeguards for responsible management of water.

3. AUTHORITIES AND PARTICIPANTS

- A. The NSE has final authority over the 3M, and EMLLC, including all successors and assigns, will be responsible for implementing and complying with the 3M.
- B. In addition to the purpose outlined above, this 3M is intended to provide participation and transparency to the locally affected stakeholders. Eureka County (EC) holds water rights for municipal use in Diamond Valley. Additionally, Eureka County has local natural resource, land-use, and water resource policies, plans, and goals

developed under Nevada State Law that obligate County officials, both elected and appointed, to actively participate in the planning and management of resources within Eureka County. Eureka County, and representatives from locally potentially affected farming, ranching, and domestic interests will be invited to participate in this 3M. In the event there are other water rights holders who may be adversely affected by Mt. Hope Project groundwater extraction, these entities could be invited to participate as described under MANAGEMENT and in accordance with this 3M. The entities that participate in this 3M as outlined in the MANAGEMENT section 5.B are hereinafter referred to as "Parties".

- C. The USGS will be invited to participate expressly to provide impartial technical and scientific input, as described herein.
- D. This 3M is separate from the requirements placed upon EMLLC by other agencies including the United States Bureau of Land Management (BLM) and Nevada Department of Wildlife (NDOW). The BLM has claimed Federal Public Water Reserves (PWR 107) within the area of concern. The BLM and EMLLC have entered into a stipulated settlement agreement as a condition of the BLM withdrawal of protests of EMLLC's water right applications and NDOW is included as a party to the settlement agreement.

4. PRINCIPAL COMPONENTS

The 3M consists of three principal components:

- A. Management
- B. Monitoring
- C. Mitigation

The framework of these components is described in the following sections.

5. MANAGEMENT

- A. Two committees are established. The Water Advisory Committee (WAC) is to establish and carryout policy under this 3M. The Technical Advisory Committee (TAC) is to provide the technical scientific expertise necessary for collection, evaluation and analysis of data. Separation of the roles and responsibilities of these two bodies is considered crucial to maintaining scientific impartiality of the data collection and analysis program.
- B. **Water Advisory Committee:**

- a. Within 30 days after NSE approval of this 3M, EMLLC, NSE, and Eureka County representatives will convene as the three (3) founding members of the WAC. Upon the three founding members convening, the Diamond Natural Resources Protection and Conservation Association (DNRPCA) and the Eureka Producers Cooperative (EPC) (DNRPCA and EPC represent the bulk of water rights holders in the Diamond Valley Flow System) will each be invited to bring forward one representative nominated from their respective membership for inclusion as members of the WAC. Letters of interest will also be accepted from potentially affected ranching interests (i.e., Kobeh Valley rancher) for inclusion as a member of the WAC. Eureka County, NSE, EMLLC, DNRPCA, and EPC will make the determination on the affected ranching interest to be included on the WAC based on letters of interest received. If any of the potentially affected ranching and farming interests ceases to exist, the remaining WAC members will develop a process so that replacement members will be selected to join the WAC. The WAC may also invite other potentially affected water rights holders to participate as members. The WAC will have no more than seven (7) members. The member of the WAC representing the NSE will be invited to participate as the chair of the WAC. If the NSE member representative declines this invitation, the WAC will elect the chairman. Each WAC member, at its sole discretion, may invite such additional staff or consultants to attend WAC meetings as it deems necessary.
- b. After the full WAC has been convened, the WAC will establish policy and define additional roles and responsibilities of the WAC and TAC, such as scheduling of meetings, agenda setting, publication of minutes, receiving input from the public, and any other necessary components.
- c. The WAC will meet no less than one time in each quarter starting at the execution of this 3M with the primary focus to ensure water monitoring is actively in place. Future meeting frequency may then be adjusted as decided by the WAC, but will be no less than once annually.
- d. The WAC will have an annual meeting, open to the public, to review project operations and to review monitoring, management and mitigation actions of the previous year.
- e. Purposes and Functions of the WAC will be to:
 - i. Provide a forum for the WAC to discuss relevant data and analyses.
 - ii. Share information regarding modeling efforts and model results.
 - iii. Make modifications to the Monitoring component of this 3M, including, but not limited to additional data collection and scientific investigations, based on recommendations from the TAC.
 - iv. Provide status reports and recommendations to the Parties.
 - v. Establish values for monitored variables (water levels, spring discharges, vegetation responses, etc.) known as "action criteria" which, if exceeded,

may be of concern to the Parties and could require mitigation or management actions.

- vi. Determine what constitutes an adverse impact on a case-by-case basis.
- vii. Form and ensure implementation of groundwater management or mitigation measures approved by the WAC based on recommendations of the TAC.
- viii. Review financial assurance periodically and make adjustments to amount as appropriate and recommend release of funds for mitigation and/or management measures.
- ix. Provide the NSE, Parties, and the local stakeholders with data and results of any analyses or technical evaluations, along with reports of specific implemented mitigation or management actions.
- x. Develop and implement a procedure to remove and replace WAC and TAC members as it deems necessary, excluding, however, removal of the founding members consisting of the NSE, EC, and EMLCC.

C. Technical Advisory Committee:

- a. The WAC will appoint a Technical Advisory Committee (TAC) as a subcommittee to the WAC. Each Party represented on the WAC is entitled to appoint a representative and is responsible for funding the participation of their respective TAC member. In addition, the USGS will be invited to participate as a member of the TAC. Funding for the USGS's participation in the 3M will be borne by EMLLC either through new or through existing joint funding agreements with USGS sponsored by Eureka County to study the Diamond Valley Flow System or by a "pass-through" agreement with the NSE. TAC members must exhibit a professional level of technical or scientific expertise and a background or experience in land management, natural resources, water resources, or other related field. Each Party, at its sole discretion may invite additional staff or consultants to attend TAC meetings.
- b. The TAC will meet within 30 days after WAC appointment to review the proposed monitoring provided as Attachment A to this 3M. Upon completing this review, the TAC will make recommendations to the WAC for any changes to the monitoring components of this 3M. Thereafter, the TAC will meet at intervals deemed appropriate by the TAC to review and analyze data, but not less than twice annually or as instructed by the WAC.
- c. At a minimum, purposes and functions of the TAC will be to:
 - i. Review the proposed monitoring and recommend to the WAC implementation, including any changes to the specific monitoring elements, as appropriate.
 - ii. Review historic groundwater level trends, spring and stream flows to determine historic hydrologic trends. Where possible, identify wet and dry

regimes, climate effects on groundwater recharge rates and base flows in surface waters.

- iii. Review, develop, and refine standards and quality control procedures for data collection, management, and analysis.
- iv. Inform the entity or entities that collect data of standard accepted protocols of data collection, recording and analysis (e.g., USGS) that will be used.
- v. Evaluate monitoring data, reports, analyses, etc. to determine whether data gaps exist and make appropriate recommendations to the WAC.
- vi. Develop and recommend action criteria to the WAC for management or mitigation measures based upon available data and analyses.
- vii. Evaluate all monitoring data to determine if any action criterion has been or is predicted to be exceeded, indicating a possible adverse impact and report findings to the WAC.
- viii. Recommend mitigation and management measures and related scope of work details to the WAC. This includes individual resources or a comprehensive list of all resources to support WAC evaluation of the adequacy of mitigation funding.
- ix. Evaluate the effectiveness of mitigation, if implemented, and report findings to the WAC.
- x. Make recommendations to the WAC regarding the numerical groundwater flow model, including appropriate times for any model updates and modes of model output.

D. Numerical Groundwater Flow Model:

- a. EMLLC has developed the Numerical Groundwater Flow Model (FM) to simulate the groundwater flow system and the FM will be updated to incorporate the data collected under this 3M. EMLLC will update the FM after recovering data from the first year of wellfield pumping for mineral processing as recommended under the provisions of this 3M. Thereafter, EMLLC will update the FM on a schedule as determined under the provisions of the 3M.
- b. The FM will be used as a management tool to evaluate predictions of drawdown and impacts and to help define action criteria.

E. Prevention of Interbasin Transfer from Diamond Valley Basin:

- a. If excess water is produced within the Diamond Valley Hydrographic Basin which is not consumed in that basin, this water will be returned to the Diamond Valley Hydrographic Basin. As described in Section 6.E., water derived from pit dewatering and consumed will be documented and reported by EMLLC to verify that the volume of water extracted from Diamond Valley is equal to or less than the volume of water consumed in Diamond Valley (i.e. no transfer of water out of Diamond Valley).

F. Action Criteria:

- a. Specific quantitative action criteria will be developed by the WAC with recommendations from the TAC. These criteria will be developed to provide early warning of potential adverse impacts to water rights, determined to be caused by Project groundwater pumping.
- b. When any action criterion that has been adopted as part of this 3M is reached, the following management actions will be triggered:
 - i. The TAC will meet as soon as possible to assess whether the action criterion exceedance is caused by Project groundwater pumping and present their findings to the WAC.
 - ii. If the WAC determines that any action criterion exceedance is caused by Project groundwater pumping, the TAC will expeditiously develop mitigation or management measures for the WAC to consider. The TAC will analyze the feasibility of the specific measures to assess alternatives, evaluate the potential effectiveness of the measures, and evaluate potential impacts created by implementation of the measures.
 - iii. The WAC will determine whether or not to recommend implementation of the mitigation or management measures and to also recommend if the funds described in MITIGATION will be used to implement such measure.
 - iv. The effectiveness of any implemented measure will be evaluated by the TAC to ensure the measure met or exceeded the intended result. Results and recommendations for any additional measures will be reported to the WAC.
 - v. Any member of the WAC may propose an additional action criterion or a change to existing action criteria. Any such change must be presented in writing to the WAC and accompanied by analyses to support the proposed change.

G. Decision-Making Process:

- a. For technical issues, including, but not limited to monitoring modifications, setting action criteria, and appropriate mitigation, decisions under this 3M will be made after considering the evaluation and recommendations of the TAC.
- b. All Parties shall be afforded the opportunity to attend meetings where decisions will be made. Any decisions made by the WAC under this 3M shall be by unanimous vote of Parties in attendance, provided however, both EMLLC and EC must be present for a vote to occur. If unanimity is not achieved, the Parties may jointly agree to conduct additional data collection and/or data review and analyses directed at resolving the different interpretations or opinions. If that is not successful, the Parties may refer the issue, accompanied by their respective opinions, to the NSE for final determination.

- c. Decisions made by the WAC regarding recommended modifications to the 3M, implementation of mitigation, or other management actions that would be required of EMLLC will be subject to the jurisdiction and authority of the NSE.
- d. Nothing herein limits or changes the NSE authority, and any Party can petition the NSE to consider any issue.

H. Modification of the 3M

- a. The Parties may individually or jointly petition the NSE to modify this 3M in the event that mutual agreement cannot be reached. Any such petition shall be concurrently provided to the other Parties. Prior to the NSE decision, all Parties will be provided the opportunity to submit a written response to the NSE no later than 60 calendar days following the date of receipt of the petition by NSE.
- b. Any modification to the 3M must be approved by the NSE.
- c. Nothing herein seeks to limit, alter, modify or change the exclusive authority of the NSE to approve or modify the 3M.

6. MONITORING

- A. Hydrological related studies for the Project contain data concerning water and related resources in Kobeh Valley, Diamond Valley, Pine Valley, and surrounding areas. These data include locations of existing and proposed supply and monitoring wells, groundwater extraction rates, groundwater level measurements, flow from springs and streams, water quality, precipitation data, and wetland/riparian conditions. Additional data relevant to the Project available from other local, state, and federal agencies or other reliable sources will be compiled into a database by EMLLC and expanded as new data are collected under the provisions of this 3M.
- B. The proposed monitoring is provided in Attachment A to this 3M. As described in MANAGEMENT of this 3M, the TAC will review this proposed monitoring and provide recommendations to the WAC regarding changes and/or implementation. In addition to this initial review, the TAC will review the proposed monitoring and make recommendations to the WAC for changes throughout the Project life based on monitoring data and analysis. Such recommended changes may include, but not be limited to, addition or deletion of monitoring sites, addition or deletion of monitoring parameters, changes to monitoring methods, and increases or decreases in monitoring frequencies. Upon acceptance by the NSE of this 3M, EMLLC will implement the monitoring requirements as set forth in Attachment A.

- C. The term "as is feasible" as used in this 3M relates to mechanical failures or other events/reasons outside the control of the Parties, as agreed upon by the Parties, that interfere with data collection.

D. Groundwater

- a. Groundwater pumping will be measured by flow meters installed on each production well, dewatering well and pit dewatering sump.
- b. Water levels in all wells included as part of the Project monitoring network will be measured by recording pressure transducers (data loggers). The measurement frequency will depend on distance to the wellfield and be based on TAC recommendations.
- c. The Project monitoring network will include "sentinel" wells (i.e., wells strategically located to provide early indication of drawdown propagation towards sensitive or important resources). At a minimum these will be located near the boundary between Kobeh, Diamond, Pine and Antelope Valleys; between the pumping wells and the headwaters of Henderson and Roberts Creeks and Tyrone Gap; between the wellfield and Gravel Pit Spring, Bartine artesian wells, the Antelope Valley Hot Springs (Klobe Hot Springs), and the stock wells at Hay Ranch. Nested wells that monitor individual aquifers at a single location where more than one hydrostratigraphic unit is present or strong vertical gradients may exist will be completed, as is feasible.
- d. Test wells constructed at each Project production well site will be maintained as monitoring wells, as is feasible, and equipped with recording pressure transducers.
- e. Several USGS monitoring wells are located near the proposed well field and within the projected drawdown area. If the USGS is not funded to monitor these specific wells, EMLLC will request USGS permission to collect data from these wells. If the WAC determines that monitoring should continue at these locations, EMLLC may be required to drill replacement wells or develop a suitable alternative.

E. Pit Dewatering

Groundwater will be extracted from the Diamond Valley Hydrographic Basin either by wells or pit dewatering sumps. To determine the amount of water from pit dewatering within the Diamond Valley Hydrographic Basin, the total groundwater removed by pit dewatering sumps will be measured by totalizing flow meters and then multiplied by a factor reflecting the portion of the pit area that is located in Diamond Valley Hydrographic Basin. The discharge from dewatering wells will be measured with totalizing flow meters and allocated to the basin in which the well is located. Water truck loads utilized in the pit complex will be counted and recorded to document water used in

Diamond Valley for mine environmental dust suppression. The amount of water used in Diamond Valley for other uses will be metered or estimated and recorded in the database.

F. Surface Water

- a. At a minimum, the monitoring of stream flow will be conducted as follows:
 - i. Monitoring will include continuous measurements of stream stage at selected control sections for each stream, as is feasible.
 - ii. The geometry of the control sections will be measured at the start of monitoring and re-measured at least annually.
 - iii. Stage measurements will be collected with recording pressure transducers on a frequency of not less than one hour.
 - iv. The flow in the streams at the control sections will be gaged monthly, as is feasible, for the first year of record to establish stage-discharge relationship for each gaging station and following any changes in the control section geometry.
 - v. All control sections in streams will be assessed routinely for any changes in the control section geometry and the stage discharge relationship be re-established accordingly.
 - vi. Following the first year of gaging, stream-flow measurements will be collected at least quarterly.
 - vii. Flow data will be recorded at least quarterly and hydrographs updated at least annually.

G. Water Quality

Water quality samples will be collected from selected production and monitoring wells, surface waters and pit water and analyzed by a laboratory certified by the State of Nevada using standard accepted protocols and a standard water test. Macroinvertebrate monitoring will take place in select streams as an indicator of general stream and/or fishery health.

H. Biological Resources

To assess if there is any loss of vegetative communities in phreatophytic and riparian areas, monitoring of vegetation, including phreatophyte vegetation and riparian zones will be conducted. Specific locations are to be determined by the WAC and itemized in Attachment A, and will include sites in Kobeh Valley, Diamond Valley, Pine Valley and Antelope Valley that may be affected by groundwater extraction. Data will be collected using a variety of techniques and will include on-site measurement of vegetation cover, frequency, and type. Shallow wells will be co-located with vegetation monitoring transects. Remote sensing will be employed to help define and monitor the extent of vegetation communities at a larger spatial scale.

I. Meteorology

Weather/Climate stations will be installed and maintained to continuously monitor wind speed and direction, precipitation, temperature, barometric pressure, humidity, and solar radiation. Existing precipitation stations will be used where possible. The purpose of collecting weather/climate data is to provide the WAC with a basis for evaluating whether changes in groundwater levels or stream and spring flow are due to changes in weather or climate.

J. Elevation Control/Subsidence

Monitoring locations for subsidence, groundwater measuring point elevations and ground surface elevations will be established using survey-grade GPS instrumentation. A standard GPS data collection protocol (i.e., common geographic datum) will be used to allow a comparative base for all elevation associated data. Subsidence monitoring will be augmented using remote sensing technologies (e.g. InSAR). Frequency and methodology of remote sensing to monitor subsidence will be reviewed and determined by the WAC in consideration of TAC recommendations.

K. Data Management

- a. All monitoring data will be entered into the 3M database on a regular, timely, and continual basis as it is collected and verified using WAC-approved quality assurance and quality control (QA/QC). Data collected under or as described in this 3M will be fully and cooperatively shared among the Parties. Verified data within the 3M database will become available to the public, upon request.
- b. In addition to updating the 3M database on a regular and continual basis, EMLLC will provide an annual report that summarizes all information and analysis. This report, due in the NSE's office by March 31, will be prepared based on recommendations and in cooperation with the TAC. These reports will summarize water production, the results of monitoring, and all management and mitigation actions taken during the year. Copies of the annual report will be provided to each of the Parties.
- c. All water level, spring discharge, and stream flow data shall be submitted semi-annually to the NSE in an electronic format specified by the NSE. Data shall be submitted within 30 days of the end of the reporting period.

7. MITIGATION

- A. EMLLC will mitigate adverse impacts, if any, as agreed upon under the provisions of this 3M. The WAC will take necessary steps, including recommending whether funding described below may be used as outlined in this 3M, to ensure that mitigation actions are feasible, reasonable, timely, and effective.

- B. Effectiveness of implemented mitigation measures will be evaluated under the provisions of this 3M. Additional measures will be implemented if a previous mitigation measure does not meet its intended purpose(s).
- C. To ensure funding exists for any required future monitoring and mitigation after the cessation of active mining, EMLLC will provide financial assurances under the provisions of this 3M.
- D. EMLLC's financial assurances (FA) funding will be placed into an interest bearing trust account to be established as a part of this 3M. The initial funding will occur in a manner as follows:
 - a. Initial funding of \$250,000 will occur within 60 days of GMI's Board of Directors formal approval authorizing the start of construction of the Project.
 - b. Additional funding of \$750,000 will occur no later than the end of month six of wellfield pumping for mineral processing (plant startup).
 - c. Funding will be examined and adjusted, as recommended by the WAC, every three years to ensure that sufficient funding is in place to mitigate all potential adverse impacts, including funding for operating and maintenance and long-term replacement costs.
- E. After cessation of mining and groundwater pumping by EMLLC, if the NSE determines that there is no longer a reasonable potential for future impacts attributable to the Project, any excess funds, including interest, remaining in the account will be returned to EMLLC.
- F. This 3M outlines measures and procedures to identify and mitigate adverse impacts that may result from project pumping, all of which are uncertain. Due to the uncertainty, this 3M is intended to set forth procedures and methods for identifying adverse impacts and require mitigation of those identified impacts.
- G. To ensure wildlife have continued access to customary use, adversely impacted surface water sources will be mitigated through such measures including, but not limited to, installation and maintenance of replacement water sources of equal or greater volume (e.g. guzzlers) in the same area as the impacted water source.
- H. EMLLC will mitigate permitted water rights and determined and undetermined claims of vested or reserved rights should adverse impacts occur.
- I. Mitigation measures, if necessary, will be developed and implemented on a case-by-case basis under provisions of this 3M.
- J. Potential mitigation measures include the following:

- a. Supply (Project) water will be provided from wells located in Kobeh Valley that are completed in the carbonate and alluvial aquifers. Pumping of these different aquifers will have different impacts to the groundwater and surface water flow systems. Adjustment of carbonate/alluvium groundwater pumping ratio could be employed to either minimize or mitigate effects.
- b. Impacts can be greatly influenced by the specific location of groundwater pumping. Mitigation measures include reduction or cessation of groundwater extraction from one or more wells and/or geographic redistribution of groundwater extraction.
- c. Replacement wells can be constructed to mitigate impacted surface water or groundwater rights, or to supply water for wildlife.
- d. Revegetation of affected areas to achieve appropriate vegetative communities.
- e. Financial compensation or, if agreed upon, property (i.e., land and water rights) of equal value could be purchased for replacement.
- f. If adverse impacts to the Diamond Valley Flow System, or other adjacent basins are determined to be caused by Project groundwater pumping, active and current water rights (water currently pumped) within the affected basin could be purchased and retired.
- g. Implement technology to reduce water consumption of the Project. Pumping rates may be decreased if alternative technology emerges that could reduce water requirements or increase water recycling rates. Water conservation techniques will be proactively employed in order to reduce other mitigation measures (i.e. before any impact is measured).
- h. If surface fissures develop due to land subsidence, they shall be mitigated by filling with a suitable material to prevent injury to wildlife, livestock or people.
- i. Other measures as agreed to by the Parties and/or required by the NSE.

1 **PROOF OF SERVICE**

2 Pursuant to NRAP 25(d), I hereby certify that on the 26th day of December,
3 2012, I caused a copy of the foregoing ***APPELLANTS KENNETH F. BENSON,***
4 ***DIAMOND CATTLE COMPANY LLC, AND MICHEL AND MARGARET***
5 ***ANN ETCHEVERRY FAMILY LP'S OPENING BRIEF*** to be served on the
6 following parties as outlined below:

7 ***VIA ELECTRONIC NOTICE:***

8 Karen A. Peterson
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10 Jennifer Mahe
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12 Ross E. de Lipkau
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14 ***VIA US MAIL***

15 Francis M. Wikstrom
16 Parsons Behle & Latimer
17 201 South Main Street, Suite 1800
Salt Lake City, UT 84111

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

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

5 Dated this 26th day of December, 2012.

/s/ Therese A. Ure

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