grounds. These determinations were within the State Engineer's discretion and should not be disturbed on appeal. *Morros*, 766 P.2d at 266; *Rosner*, 719 P.2d at 806.

Finally, the manner in which the State Engineer approved Applicant's change in use applications fully complies with the requirements of NRS 533.345. That provisions 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." That standard was fully satisfied here.

The statute does not dictate the timing or procedure by which a person may apply for a change in use. Nor does the statute dictate the process by which the State Engineer must consider the applications. It is not the province of this Court to read such a timetable or procedure into the statute. As such, this Court should reject Petitioners' argument and affirm the State Engineer's Ruling.

L. THE STATE ENGINEER'S APPROVAL OF THE INVENTORY WAS AN INDEPENDENT MINISTERIAL ACTION. EUREKA COUNTY HAD NO RIGHT TO PARTICIPATE IN THE INVENTORY PROCESS AND WAIVED ANY RIGHT TO APPEAL.

Contrary to Eureka County's argument, the State Engineer did not abuse his discretion by accepting the inventory required under NRS 533.364(1). Before the State Engineer may approve an application for an interbasin transfer of water, he must have completed an inventory. But the inventory process is a separate, ministerial process that must be done one time for every water basin, not for every application for an interbasin transfer. Once an inventory is completed, the State Engineer may approve any number of interbasin transfers without conducting new inventories. The inventory statute does not contemplate any sort of adversarial hearing in conjunction with the inventory process. The inventory is simply a list of existing decreed, certified, and permitted water rights, the identified holders of those rights according to the State

Engineer's records, and a summary of the estimated surface and ground water available for appropriation in the basin.

The State Engineer's acceptance of the inventory and his determination that it met the statutory requirements is not an order or decision that may be appealed. If the determination was appealable, however, Eureka County failed to do so within 30 days as required by statute, and is barred from raising it in this proceedings.

In any event, the statutory requirements for the inventory are less stringent than the requirement that the State Engineer determine that there is sufficient water available for appropriation before approving an application. Since there is substantial evidence to support the State Engineer's finding in the Ruling that there is sufficient water available for appropriation, following a hearing in which Eureka County had a full opportunity to participate, the County has no credible argument that its due process rights were harmed by not being able to challenge the inventory.

1. Background

NRS 533.364(1) requires the State Engineer to complete an inventory prior to the approval of an application for an interbasin transfer of more than 250 acre-feet of groundwater from a basin that has not previously been inventoried. This requirement applies to any interbasin groundwater transfer that was noticed for a hearing on or after July 1, 2009. 2009 Nev. Stat. 599. The inventory requirement is not tied to any particular application for interbasin transfer. The statute merely requires such an inventory before any application may be approved.

NRS 533.364(1) requires the inventory to include only three things:

> (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.

Moreover, the statute expressly states that the State Engineer is **not** required to "initiate or complete a determination" of surface or groundwater rights or to "otherwise quantify any vested claims." NRS 533.364(2)(a). The statute contains no provision for protests or hearings. It does not require the State Engineer to make a decision or enter an order approving the inventory. It simply requires him to "complete" the inventory within one year of its commencement. NRS 533.364(4).

In a letter to Applicant dated April 20, 2011, the State Engineer determined that additional information was required to satisfy the inventory statute, indicating the specific information required to satisfy the statute and the required format. SROA. 69-70. The State Engineer sent copies this notice to all Petitioners, including Eureka County. SROA. 69-70. Applicant engaged its consultant, Interflow, to compile the requested information. SROA. 75.

On April 22, 2011, the State Engineer notified Applicant and Petitioners, including Eureka County, that it was holding an additional day of hearing to allow Petitioners to cross-examine Applicant regarding water use on the Project. R. 940-42. On May 10, 2011, the State Engineer held this additional day of hearing. R. 850-927. At no time before or during the May 10 hearing did Eureka County or the other Petitioners object to the State Engineer's April 20, 2011 request of Applicant to provide additional information to satisfy the inventory statute. On June 16, 2011, Interflow provided the requested supplemental information to the State Engineer. SROA. 74-273.

On June 22, 2011, the State Engineer sent a letter to Applicant which stated:

> Our office has received your *Water Resources Inventory Data Collection Report Kobeh Valley – NDWR Hydrographic Basin 139*. This was submitted by Interflow Hydrology on behalf of Kobeh Valley Ranch, LLC.
>
> The inventory is required by Nevada Revised Statute § 533.364.
>
> This letter does not imply approval or denial of the pending applications but is only an acknowledgement that the inventory has been received and meets the statutory requirement.

SROA 71. On July 5, 2011, the State Engineer sent Eureka County the inventory provided by Applicant and a copy of his June 22 letter. SROA 72. Eureka County did not appeal from this action by the State Engineer within the time limits provided by NRS 533.450.

2. The Inventory is Not a Separately Appealable Decision.

The inventory required under NRS 533.364(1) is a listing of the decreed, certified, and permitted rights, the names of water users holding those rights, and an estimate of the water available for appropriation in a particular basin. As such, it does not contain any legal findings or determinations of the State Engineer. NRS 533.450 permits judicial review of an "order or decision of the State Engineer," made pursuant to certain provisions of the Nevada Water Statute, "affecting [a] person's interests." The completion and acceptance of a statutorily required inventory is not an "order or decision" subject to judicial review under NRS 533.450. Moreover, the inventory does not affect Eureka County's interests.

The statutorily required inventory is a ministerial task that must be completed before the State Engineer approves an application involving an interbasin transfer greater than 250 acre-feet. While the State Engineer's Ruling approving Applicant's application to appropriate groundwater can be challenged (as is occurring here), the inventory itself is not a separate "order or decision" of the State Engineer that can be independently challenged. It's just a list of names, a list of decreed rights and an estimate of the total amount of water available for appropriation. The names of the individuals and entities that hold decreed water rights in the basin are matters of public record – not subject to judicial review. The estimate of the total amount of groundwater available for appropriation is simply an estimate at a given time and does not in any way affect the obligation of the State Engineer to determine whether water is available for appropriation for each application submitted to him.

3. If the Action of the State Engineer Was Appealable, Eureka County Failed to Appeal Within the Statutory Period.

If the State Engineer's acceptance of the inventory and acknowledgement that it satisfied the statutory requirements was an appealable "order or decision," NRS 533.450(1) requires that an appeal be commenced within 30 days of the order or decision in question. Eureka County did not file this appeal until August 8, 2011, which was beyond 33 days (allowing an extra 3 days since the June 22 letter was mailed).

Moreover, NRS 533.450(3) requires that "notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests [be] served upon the State Engineer and other interested parties within 30 days of the order or decision." Eureka County failed to timely do so and its failure to do so is fatal to its appeal.

4. Eureka County's Due Process Rights were not Violated Because the Evidence Supports the State Engineer's Finding of Sufficient Water Available for Appropriation.

Eureka County's argument challenging the "inventory" is merely a veiled attempt to get a "second bite at the apple" challenging the State Engineer's findings with respect to the availability of groundwater for appropriation. The issue of the amount of groundwater available for appropriation was a focus of the hearings and Petitioners had a full opportunity to contest it. Eureka County had ample opportunity to present its own evidence and to contest Applicant's evidence regarding the amount and location of ground water available for appropriation in Kobeh Valley. As noted above, the State Engineer considered all of the evidence submitted by the parties and properly determined that there was sufficient water in Kobeh Valley available for appropriation. This is a more exacting determination than the inventory requirements of NRS 533.364. The inventory was prepared consistent with these requirements.

By its plain language, NRS 533.364(1)(b) requires only an estimate of water available for appropriation. Such unambiguous statutory language must not be interpreted to have a different meaning than that which one would ordinarily assign. *See, e.g., Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998); *Desert Valley*, 104 Nev. at 720, 766 P.2d at 887. The Nevada legislature used the term "estimate" intentionally and intended only to require the inventory to take "a snapshot in time" of the water available for appropriation within a basin. *See* Nevada Assembly Committee Minutes, Committee on Government Affairs, 2009 Leg. 75th Sess. (statement of Pete Goicoechea, Member, Assembly Comm. on Gov't Affairs) (Mar. 24, 2009).

Eureka County cannot complain that it was deprived of its due process rights to challenge the ***estimate*** of Kobeh Valley water available for appropriation required by NRS 533.364, when it fully exercised its right to challenge the evidence that resulted in the State Engineer's finding that

there *actually* is water available for appropriation. Virtually all of the record reported in the inventory relating to the estimate of available groundwater was taken from the record in this proceeding. Nothing in the inventory is inconsistent with the finding of the State Engineer regarding water available for appropriation. *See* R. 2594. Eureka County fully participated in those proceedings and in this appeal. It was not denied any due process rights.

Contrary to Petitioner's assertions, there is also nothing in the statute which prevents the State Engineer from requesting that the Applicant complete the inventory. In fact, this arrangement is expressly authorized by NRS 533.364(2)(b).

Nor is there support for Eureka County's contention that the inventory should have taken longer to complete or should have contained more information. As discussed in the summary for the inventory provided to the State Engineer in June 2011, Interflow spent considerable man-hours collecting and compiling information regarding existing surface water rights and surface water available for appropriation. SROA. 77-79. As required by the statute, the inventory listed all decreed, certified, or permitted ground water and surface water rights; the owner of those rights; and reported the estimates of the total amount of surface water and groundwater available for appropriation. *Id.*

M. THE PERMITS ARE CONSISTENT WITH THE RULING AND TOGETHER PROHIBIT ANY INTERBASIN TRANSFER OF GROUNDWATER FROM DIAMOND VALLEY.

In the Ruling the State Engineer determined that the place of use of the Diamond Valley permits must be restricted to that basin and that the permits must expressly contain that restriction. R. 3595. Further, even though testimony showed that Applicant would use all of its Diamond Valley groundwater rights in Diamond Valley, the Ruling requires any unused amounts to be returned to the Diamond Valley aquifer. R. 3595, 871:5-23. The State Engineer's determination was made to prevent water from an over-allocated basin (Diamond Valley) from being exported to an under-allocated basin (Kobeh Valley). R. 3595. As required by the Ruling, the Diamond Valley permits restrict the use of groundwater to that portion of the proposed place of use that is within Diamond Valley. EC ROA 0153, 0155. Applicant is aware that it is bound by the terms of the Ruling, whether or not they are included verbatim in the permits. Therefore,

although the evidence indicates that it is unlikely there will be any unused Diamond Valley water (R. 871:5-23), if there is, Applicant will be required to return it to the Diamond Valley groundwater aquifer. R. 3595. Because Applicant will use the full amount of its Diamond Valley groundwater rights in Diamond Valley and can measure the amount of water produced in Diamond Valley, substantial evidence supports the State Engineer's restrictions that will prevent an interbasin transfer of Diamond Valley groundwater to any other basin.

Petitioners assert that the Ruling explicitly requires the Diamond Valley permits to expressly require any unused Diamond Valley groundwater to be returned to that basin. Petitioners' argument misconstrues the plain meaning of the Ruling, which requires permit terms limiting the use of water to Diamond Valley, but does not require the permits to expressly state that any unused Diamond Valley groundwater must be returned to that basin. R. 3595. Accordingly, this assertion is contrary to the clear language in the Ruling and ignores that the Ruling still applies to these permits.

Petitioners also argue that the Diamond Valley permits contradict themselves because they expressly limit water use to Diamond Valley, but also refer to a place of use that includes Kobeh and Pine valleys. (Eureka County Br. p. 49). Here again, Petitioners simply ignore the plain language of the permits, which state that "[t]he place of use of these permits is limited to the Diamond Valley Hydrographic Basin." EC ROA 0153, 0155. Therefore, even though the applications describe an area that includes Kobeh and Pine valleys, the permits limit any use to Diamond Valley. The permits are clearly subject to the Ruling and Applicant is bound by both. Nothing in Nevada water law requires that all restrictions in the Ruling be incorporated verbatim in the Permits. Since Applicant is bound by the Ruling, it has no objection if the restriction is added to the permits. But the State Engineer did not abuse his discretion by issuing the permits as written.

Lastly, the Permits do not allow additional diversion beyond the consumptive duty of the existing irrigation water rights and do not allow diversion for any non-consumptive use without further approval from the State Engineer. The State Engineer may consider the consumptive

duty[24] of an existing water right and that of a proposed new use in determining whether the proposed change conflicts with existing rights or with protectable interest in domestic wells or threatens to prove detrimental to the public interest under NRS 533.370(2). NRS 533.370(3). The consumptive duty of an irrigation water right is the amount of water that does not return to the aquifer after it is used for irrigation. R. 3603. In the Ruling, the State Engineer considered the consumptive duty of Applicant's existing irrigation water rights, determined that such use is 2.7 feet per year, and limited Applicant's change applications to that amount. R. 3604. And the amounts allowed in each of the permits to change Applicant's existing irrigation water rights are based on that consumptive duty. *See e.g.,* EC ROA 044, 046, 048, 050. Further, all of the permits are limited to a total combined volume of 11,300 afa. *See e.g.,* EC ROA 87.

Petitioners argue that the permits are inconsistent with the Ruling because they state that, "Additional diversion up to the total…[volume of the existing irrigation right] may be granted if it can be shown that the additional diversion will not cause the consumptive use…to be exceeded." Eureka County Br. 49-50, *See e.g.,* EC ROA 044, 046, 048, 050, 052. Petitioners interpret this language to mean that Applicant can divert more than 11,300 afa or more than the consumptive duty of the existing irrigation water rights. This interpretation ignores the plain language of each permit, which expressly limits Applicant to the consumptive duty specified in the Ruling. Further, Petitioners' interpretation ignores the express limitation in each permit that the total combined volume of water under all permits shall not exceed 11,300 afa. Lastly, this interpretation ignores the fact that any additional diversion must be approved by the State Engineer and must not exceed the consumptive duty of the existing rights, as set forth in the Ruling. As written, the permits limit the Applicant to the consumptive duty of the existing rights and a total volume of 11,300 afa. Accordingly, the permits are consistent with the Ruling and do

[24] Duty can be described as "that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon." *Farmers Highline Canal & Reservoir Co. v. Golden*, 272 P.2d 629, 634 (Colo. 1954).

not allow Applicant to use more than 11,300 afa or more than the consumptive duty of the existing irrigation water rights.

N. THE PERMITS ARE VALID.

Eureka County alleges that the place of use of the permits is too large and that several of the existing rights were forfeited, and therefore, the permits are invalid. These arguments merely repeat arguments addressed above in Sections E and J.

O. REMAND IS THE APPROPRIATE REMEDY TO CORRECT ANY DEFICIENCIES.

The record on appeal contains ample evidence supporting the State Engineer's decisions. Since the State Engineer's Ruling is supported by evidence in light of the whole record, that decision cannot be construed as clearly erroneous. The State Engineer's interpretation of its own enabling legislation is entitled to deference. There is no evidence that State Engineer abused his discretion, acted contrary to law or made a finding without the support of evidence in the record. Thus, this Court should uphold the Ruling and dismiss the Petitioners' appeals.

In the event that this Court disagrees with this conclusion, the proper remedy is not to vacate the Ruling, as suggested by Petitioners, but rather to remand to the State Engineer for application of the Court's opinion. *See Desert Irrigation, Ltd. v. Nevada*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997). With the possible exception of Eureka County, "[n]o one disputes the basic legal principles that govern remand." *INS v. Ventura*, 537 U.S. 12, 16 (2002). Black-letter administrative law teaches that the "proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* The reasons for allowing the agency to decide a matter placed in its hands by statute are several: "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 17.

Even the cases Eureka County relies on hold that a court may refuse to remand to an agency only when to remand would be "pointless," *People of Illinois v. ICC*, 722 F.2d 1341, 1349 (7th Cir. 1983), or "meaningless," *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969).

As these terms indicate, a court is required to remand unless no rational agency could side with the prevailing party on remand in light of the evidence in the record. *ICC*, 722 F.2d at 1349. Thus, remand is the "proper course" even if a court concludes that the agency's decision applied the wrong rule of law or was procedurally deficient. *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 895 F. Supp. 316 (D.D.C. 1995), another case Eureka County relies on, acknowledges that "a procedural deficiency" is the kind of agency error "that might necessitate remand to the agency." *Id.* at 319.

P. THE OTHER ARGUMENTS OF BENSON/ETCHEVERRY ARE WITHOUT MERIT.

Benson/Etcheverry also raise a number of technical arguments. (Benson/Etcheverry Br. 36-40.) Several of these arguments merely repeat arguments previously raised by Benson and the other Petitioners and are dealt with above. The remaining arguments have been mooted by actions of the State Engineer or do not require reversal of the Ruling and are discussed below.

1. Limitation of Permits to a total duty of 11,300 AFA.

Benson/Etcheverry assert that the total combined duty of Applicant's permits exceeds 30,000 acre-feet annually. (Benson/Etcheverry Br. 36, ll. 13-14.) This assertion is simply incorrect because it ignores the limitation expressly stated in each permit that the total combined duty of all of the permits may not exceed 11,300 acre-feet annually. This assertion also misses the fact that many of Applicant's existing water rights are supplemental to each other. The Benson Petitioners cannot simply add the duty of each permit to determine the total volume of water that can be pumped under all permits. Accordingly, Benson Petitioners' assertion is incorrect and there are no errors in the permits.

The Benson Petitioners also assert that it was an error not to include the determination in the Ruling that a 3M plan must be prepared with input from Eureka County. This assertion should be dismissed for the following reasons. First, Benson Petitioners do not have standing to raise an issue that affects Eureka County. Second, Benson Petitioners ignore that the permits are still subject to the Ruling and not every limitation in a ruling must be included in a permit.

Further, as conceded by Eureka County, this argument is moot. Accordingly, Benson Petitioners' assertion is incorrect and there are no errors in the permits.

2. Unused Diamond Valley water must be returned to Diamond Valley.

As argued above in section M, failure to include this restriction in the Permits is not required since Applicant is bound by the Ruling in any event. But Applicant has no objection if the express language is added to the Permits.

3. Allowing place of use to include 90,000 acres.

See argument above in section E.

4. Conditioning Permits on 3M Plan to be approved.

See argument above in C and D.

5. Conditioning Permits on input from Eureka County.

Notwithstanding the lack of standing on the part of Benson/Etcheverry to raise this issue, there is no requirement at law that the language in the Ruling allowing Eureka County to participate in the development of the 3M Plan must be recited in the Permits. Eureka County has provided input in the preparation of the 3M Plan and has not complained that the language is not included in the Permits.

6. The State Engineer is not Required to Delay Action on the Applications Until Completion of a Future USGS Study.

Benson/Etcheverry argue that the State Engineer should delay approval of the applications until after completion of a USGS study regarding interbasin flows. Benson alleges that this study is currently scheduled to be published some time in 2013. (Benson/Etcheverry Br. p. 32.). Benson's argument is untenable and would result in the federal government, not the State Engineer, controlling water law in the State of Nevada.

The State Engineer, not the USGS, has complete discretion to determine whether hydrological studies are necessary before acting on an application. NRS 533.368(1), 533.370(4)(d). Therefore, contrary to Petitioners' assertion, Nevada water law does not require the State Engineer to postpone consideration of an application simply because the hydrology of the basin at issue is being studied by USGS or any other government agency or third party.

Moreover, the State Engineer's decision not to delay action on these applications is supported by the record, which shows that numerous USGS reports from the 1940s to 2007 were submitted along with extensive testimony about the findings made in those reports. 2009 R. Vol. IV, 872:10-22, 874:1-25, 875:1-16, 1023, 852, 854, 676, R. 175:4-11, 192:19-24, 215:17-20, 239:22-25, 319:12-18, 365:8-11, 384:11-13, 398:3-6. Further, Applicant testified that it would incorporate any future USGS or other data into the 3M Plan. R. 141:15-21, 143:2-10.

Moreover, Petitioners' request for another delay is unreasonable and unworkable. If that were the standard, the State Engineer could rarely, if ever, grant an application since the USGS is continuously undertaking, completing, and updating studies of this nature. For instance, in 1983 this same issue was raised by citizens of Diamond Valley as a reason for denying applications to appropriate in Kobeh Valley for the same mine. R. 3030:2-13. The State Engineer at that time, Pete Morros, acknowledged the citizens' concerns about the need for more hydrogeologic studies, but recognized that such studies are expensive and time-consuming and would lead to delay of pending applications in every basin in the State. R. 3057:5-24. Mr. Morros further stated that "I can't believe that any requirement in the [water law statutes] would support the State Engineer taking that position." R. 3057:22-24. Accordingly, the State Engineer's decision to act on these applications and deny the request to delay action pending completion of a USGS report at some unknown date was reasonable and was not an abuse of discretion.

IV. CONCLUSION

Based on the facts and the legal arguments presented herein, this Court should deny Petitioners' requests and uphold the State Engineer's Ruling in its entirety. Petitioners have not met their burden to demonstrate on the record that the State Engineer's decision was in violation of constitutional or statutory provisions; in excess of his statutory authority; clearly erroneous in view of the substantial evidence in the record; or arbitrary or capricious or an abuse of discretion. Rather, the State Engineer's decision is supported by substantial evidence and his interpretations of its own enabling legislation are reasonable, consistent with applicable constitutional and statutory provisions, and not in excess of his authority. They should be given deference by this Court. The Ruling should be affirmed.

AFFIRMATION

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

Dated: February 24, 2012

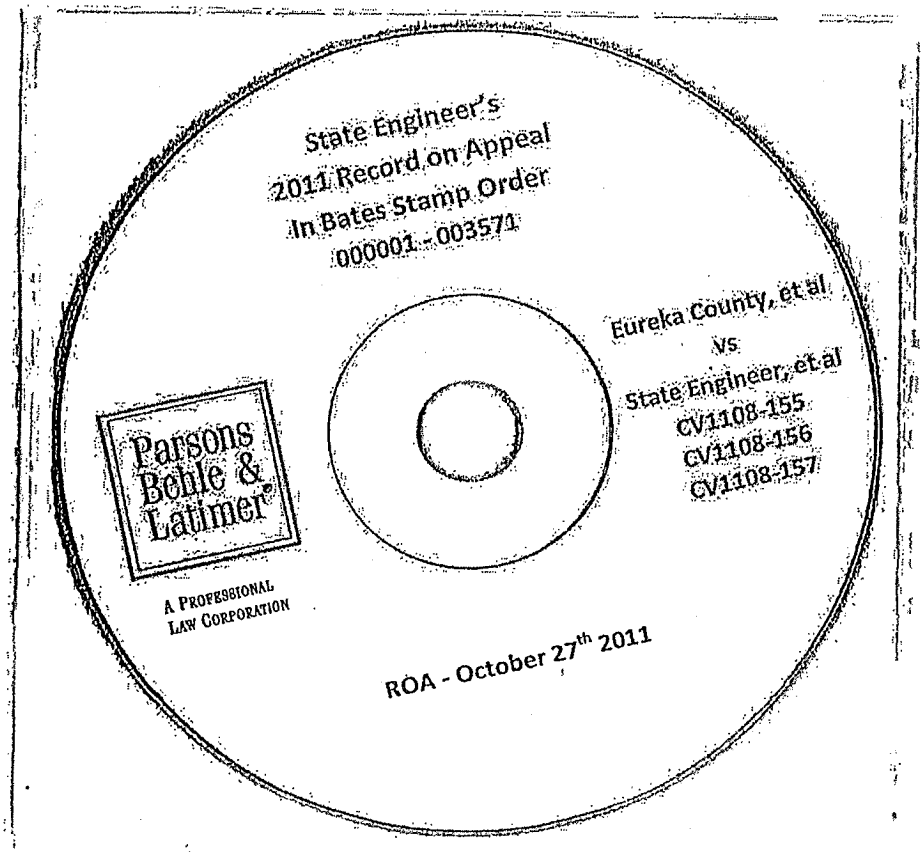
PARSONS BEHLE & LATIMER

By: _____

Ross E. de Lipkau, NV Bar No. 1628
John R. Zimmerman, NV Bar No. 9729
50 W. Liberty Street; Suite 750
Reno, NV 89501
Ph: 775.323.1601
Em: rdelipkau@parsonsbehle.com
Em: jzimmerman@parsonsbehle.com

Francis M. Wikstrom, *Pro Hac Vice*
UT Bar No. 3462
201 South Main Street; Suite 1800
Salt Lake City, UT 84111
Ph: 801.532.1234
Em: fwikstrom@parsonsbehle.com
ecf@parsonsbehle.com

Attorneys for Kobeh Valley Ranch


State Engineer's
2011 Record on Appeal
In Bates Stamp Order
000001 - 003571
Eureka County, et al
vs
State Engineer, et al
CV1108-155
CV1108-156
CV1108-157
Parsons Behle & Latimer
A Professional Law Corporation
ROA - October 27th 2011

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 27th day of February, 2012, I served a true and correct copy of the foregoing **ANSWERING BRIEF OF RESPONDENT, KOBEH VALLEY RANCH, LLC** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as follows:

Theodore Beutel, Esq.
EUREKA COUNTY DISTRICT ATTORNEY
701 S. Main Street
PO Box 190
Eureka, NV 89316
Email: tbeutel.ecda@eurekanv.org

Attorneys for Eureka County

Karen A. Peterson, Esq.
ALLISON & MACKENZIE
402 N. Division Street
Carson City, NV 89702
Email: kpeterson@allisonmackenzie.com

Attorneys for Eureka County

Therese A. Ure, Esq.
SCHROEDER LAW OFFICES, P.C.
440 Marsh Avenue
Reno, NV 89509
Email: therese@water-law.com

Attorneys for Benson, Diamond Cattle Company, and Etcheverry Family

Bryan L. Stockton,
Senior Deputy Attorney General
NEVADA ATTORNEY GENERAL'S OFFICE
100 North Carson Street
Carson City NV 89701
Email: bstockton@ag.nv.gov

Attorneys for Nevada State Engineer

Gordon H. DePaoli, Esq., and
Dale E. Ferguson, Esq.
WOODBURN AND WEDGE
6100 Neil Road; Suite 500
PO Box 2311
Reno, NV 89505
Email: gdepaoli@woodburnandwedge.com

Attorneys for Conley Land & Livestock, and Morrison

Rose Tennell
Employee of Parsons Behle & Latimer

GORDON H. DePAOLI
Nevada State Bar No. 195
DALE E. FERGUSON
Nevada State Bar No. 4986
DOMENICO R. DePAOLI
Nevada State 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 **REPLY 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

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 1112-164

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

Case No.: CV 1112-165

Dept. No.: 2

RESOURCES,

Respondent.

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 1202-170

Dept. No.: 2

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TABLE OF AUTHORITIES

I. INTRODUCTION.

Conley Land & Livestock, LLC ("Conley") and Lloyd Morrison ("Morrison") (collectively referred to herein as "Conley/Morrison") submit this Reply Brief in support of their Petition for Judicial Review of State Engineer Ruling No. 6127. In their Opening Brief, Conley/Morrison argued that the State Engineer exceeded his statutory authority in Ruling No. 6127 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.[1] Conley/Morrison expressly incorporate all arguments made in their Opening Brief but do not repeat those arguments here.

This Reply Brief addresses the arguments of Respondents Kobeh Valley Ranch, LLC ("Kobeh") and the State Engineer concerning the State Engineer's acceptance and approval of applications to change the point of diversion, place of use and/or manner of use of water which has never previously been appropriated. Kobeh and the State Engineer have each addressed the merits of this issue on two occasions. They first addressed it in connection with the State Engineer's Motion to Dismiss the Conley/Morrison Petition for Writ of Prohibition on or about December 15, 2011. *See* Kobeh Reply to Conley/Morrison's Request For and Points and Authorities in Support of Issuance of Writ of Prohibition and in Support of Issuance of Writ of Prohibition and in Opposition to Motion to Dismiss, dated December 15, 2011 (the "Kobeh Reply"); *see also* State Engineer Reply in Support of Partial Motion to Dismiss and Opposition to Request for Writ of Prohibition, dated December 15, 2011 (the "State Engineer Reply"). They have each addressed the issue again in their respective Answering Briefs, dated February 24, 2012.

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[1] Conley/Morrison also adopted and joined in the arguments made by Eureka County in its Opening Brief.

The Kobeh Reply and Kobeh Answering Brief both assert that Conley/Morrison did not raise this issue before the State Engineer, and therefore cannot raise it on judicial review of the State Engineer's ruling. *See* Kobeh Reply at 7-8; Kobeh Answering Brief at 8-10; 45. Both Kobeh and the State Engineer contend that N.R.S. § 533.325 does not prohibit the filing of an application to change an application. *See* Kobeh Reply at 8; Kobeh Answering Brief at 46-47; State Engineer Reply at 3; State Engineer Answering Brief at 32. Finally, both Kobeh and the State Engineer argue that the State Engineer's "interpretation" of the relevant statutes is reasonable and supported by good public policy. *See* Kobeh Reply at 8-12; Kobeh Answering Brief at 46-48; State Engineer Reply at 3-5; State Engineer Answering Brief at 32-34. The State Engineer offers two illustrations of why it is necessary to allow for the filing of a change to an application to appropriate. State Engineer Reply at 3-4; State Engineer Answering Brief at 32-33. We address each of these assertions in turn.

II. CONLEY/MORRISON ARE NOT PROHIBITED FROM RAISING THE ISSUE OF WHETHER ONE CAN APPLY FOR AND THE STATE ENGINEER CAN GRANT A CHANGE TO WATER WHICH HAS NEVER BEEN APPROPRIATED.

A. The Protests Raised the Issue of Whether an Application to Change an Application to Appropriate Is Allowed by Nevada Law.

Here, Morrison protested on the grounds that Kobeh must be required to either withdraw the Base Applications or, alternatively, the State Engineer must render his decision on the Base Applications before the Change Applications[2] could be filed and ruled upon. *See* RA 979-984 at para. 3.

B. Because the Issue of Whether an Application to Change an Application to Appropriate Can Be Properly Filed and Considered By the State Engineer Is a Purely Legal Issue, It Can Be Raised for the First Time on Judicial Review.

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[2] In their Opening Brief, Conley/Morrison define application numbers 79911, 79912, 79914, 79916, 79918, 79925, 79928, 79933, 79938, 79939 and 79940 as the "Change Applications," and application numbers 73551, 73552, 72695, 72696, 72697, 72698, 73545, 73546, 74587, 73547 and 74587 as the "Base Applications." Those definitions also apply in this Reply Brief.

Whether the issue of the Nevada State Engineer's lack of statutory jurisdiction to consider, accept, notice and approve change applications made upon mere applications to appropriate was raised at the administrative level is immaterial because that issue is a purely legal issue, and as such is non-waivable under Nevada law. Nevada law recognizes the fundamental principle that purely legal issues, such as the extent of an agency's subject matter jurisdiction, are non-waivable. *State ex rel Board of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (Nev. 2008).

Nevada law, as Kobeh contends, provides that courts "generally will not consider arguments that a party raises for the first time on appeal," and that "a party waives" such arguments, but importantly, and conspicuously absent from Kobeh's waiver argument, Nevada law also provides that "exceptions to the rule of waiver exist for purely legal, or constitutional issues." *Barta*, 124 Nev. at 621 fn 24; *citing Nevada Power v. Haggerty*, 115 Nev. 353, 365 fn 9, 989 P.2d 870, 877 fn 9 (addressing a purely legal issue of statutory interpretation raised for the first time in an amicus brief); *also citing Desert-Chrysler Plymouth v. Chrysler Corp.*, 95 Nev. 640, 643-644, 600 P.2d 1189, 1190-1191 (Nev. 1979) (addressing a constitutional issue raised for the first time on appeal). The purely legal issue of the State Engineer's statutory jurisdiction or authority to allow the filing of and to consider change applications made upon applications to appropriate is non-waivable, and may be raised at any time.

The rationale for the rule that an issue must generally have been raised at the agency level to be considered on appeal is predicated upon the need to create an adequate administrative record for judicial review. *C.f. Barta*, 124 Nev. at 621, 188 P.3d at 1098. Therefore, issues of fact or mixed issues of fact and law are generally considered waived if not raised at the agency level, considered by the agency, and that consideration reflected in the administrative record so as to allow for meaningful judicial review of the agency determination.

Id. The exception that pure questions of law are non-waivable thus recognizes that such purely legal issues need not have been raised at the agency level and made part of the administrative record because a court reviews such pure questions of law *de novo*, and the administrative record plays no part in such review. *C.f. King County v. Washington State Boundary Review Board*, 860 P.2d 1024, 1035 (Wash. 1994).

Kobeh argues that there must be more than a hint or a reference to an issue in the administrative record, and relies upon *King County* and other cases from Washington. *See* Kobeh Answering Brief at 9-10. The rationale for that rule is the same as for the general rule. As the *King County* court said, the purpose is, among other things, to give the agency the first opportunity to apply its expertise, exercise its discretion and correct its errors, and to aid in judicial review by the development of facts during the administrative proceeding. *King County*, 860 P.2d at 1035.

Those cases and their rationale do not apply here. Neither the State Engineer nor Kobeh contend that the State Engineer did not assume jurisdiction to consider, nor in Ruling No. 6127 approve the Change Applications; therefore, the issue of whether the State Engineer had statutory jurisdiction to consider the Change Applications is a purely legal question, akin to the issue of subject matter jurisdiction (which is clearly non-waivable). This Court's determination of that issue on judicial review is made *de novo*, without recourse of any kind to the administrative record.

Kobeh's unavailing waiver argument relies upon numerous authorities almost all from jurisdictions other than Nevada, with the notable exception of *Barta*, which as explained above, does not support Kobeh's waiver argument. For example, in *Bergen Pines Cnty Hosp. v. N.J. Dept of Human Services*, 476 A.2d 784 (N.J. 1984), the New Jersey Supreme Court determined that a party should not be able to raise objections to an agency rule and submit factual evidence that it failed to submit during the rulemaking process and thus "force courts to review

potentially-overwhelming reams of technical data and to resolve from scratch issues as to which it does not have a particular expertise." *Bergen*, 476 A.2d at 793. *Bergen* is thus inapposite to the present situation, where the issue allegedly not raised at the agency level is a purely legal issue, rather than a factual issue, like that in *Bergen*.

Similarly, in *T.C. v. Review Bd. Of Ind. Dp't of Workforce Dev.*, 930 N.E.2d 29 (Ind. Ct. App. 2010), the court concluded that the plaintiff waived the factual issue of whether her appeal from the decision of an Administrative Law Judge (ALJ) to an agency review board was timely filed when plaintiff raised that issue for the first time on judicial review of the administrative review board's determination that such appeal from the ALJ's decision was not timely. The *T.C.* Court reasoned that because the factual argument that the appeal was timely was not made to the administrative review board that reviewed the ALJ decision, and evidence in support of the contention that the appeal was timely was not been submitted to the administrative review board and thus made part of the administrative record, the plaintiff waived that argument. *C.f. T.C.*, 930 N.E.2d at 29-31.

The remaining authorities cited by Kobeh in support of its waiver argument likewise are inapplicable to the present situation, which concerns the purely legal issue of the State Engineer's jurisdiction to consider the Change Applications because those cases dealt with factual issues whose inclusion in the administrative record was essential to judicial review of an agency action. For example, in *Nykaza v. Dep't of Emp't Sec.* 364 Ill.App.3d 624 (Ill. App. 3d Dist. 2006), the issue allegedly not raised at the agency level was a factual issue concerning the facts related to the reasons for plaintiff's leaving a job, and whether under those facts he qualified for state unemployment benefits. Similarly, in *Hudock v. Pennsylvania Dep't of Public Welfare*, 808 A.2d 310 (Pa. Commonw. Ct. 2002), the issue that the reviewing court refused to consider because it was not raised at the agency level was a factual issue concerning the facts related to whether the appellant was afforded due process in his administrative appeal

of an agency determination. Again, in *Suprenant v. Bd. for Contractors*, 516 S.E.2d 220 (Va. Ct. App. 1999), the issue that the reviewing court refused to consider because it was not raised at the agency level was a factual issue concerning the facts related to whether an individual owner of a construction company could be held responsible for a judgment against the construction company.

Finally, *Brinkerhoff v. Schwendiman*, 790 P.2d 587 (Utah Ct. App. 1990), is completely inapposite to the present case as the issue of waiver was not determinative, rather the case dealt with and is unique to the particularities of the Utah Administrative Procedure Act (UAPA), which provides for a trial *de novo* following administrative suspension of a driver's license for driving under the influence. *See Brinkerhoff*, 790 P.2d 587. The court in *Brinkerhoff* dealt with and found that any procedural errors that occurred as a result of alleged agency violation of the UAPA at the agency level in the course of a hearing concerning revocation of a driver's license for driving under the influence, were waived or cured by a *de novo* trial on the merits in the district court as provided for under the circumstances in UAPA, because the statutory trial *de novo*, as provided for in the UAPA, was "the proper remedy to cure these non-prejudicial errors." *See Brinkerhoff*, 790 P.2d at 590.

Here, because the issue of the State Engineer's jurisdiction or authority to accept, notice, consider and approve applications made upon mere applications to appropriate is a non-waivable purely legal issue, and the administrative record is thus not germane to this Court's *de novo* review of that issue, whether or not the issue was raised at the agency proceeding is immaterial. It matters only that the issue has been raised.

III. NEVADA LAW ALLOWS ONLY FOR THE FILING OF APPLICATIONS TO CHANGE "WATER ALREADY APPROPRIATED," AND NEITHER THE STATE ENGINEER NOR KOBEH HAVE ESTABLISHED OTHERWISE.

A. The Plain Language of N.R.S. § 533.325 Prohibits the Filing and Processing of an Application to Change Water Which Has Not Been Appropriated.

The State Engineer argues that N.R.S. § 533.324 does not prohibit the filing of an application "to change water that has not been already granted a permit". State Engineer Answering Brief at 32; State Engineer Reply at 3. Kobeh argues that "N.R.S. 533.325 says nothing about whether a person may file an application to change the use while an application to appropriate is pending." Kobeh asserts that N.R.S. § 533.325 simply requires that a person receive a permit before "performing any work in connection" with the appropriation of water. Kobeh Answering Brief at 47. Kobeh also argues that N.R.S. § 533.325 "does not dictate the timing or procedure by which a person may apply for a change in use." *Id. at* 48. Neither the State Engineer nor Kobeh address the meaning of the phrase "water already appropriated." It is the meaning of that phrase which is determinative here.

The controlling statute, N.R.S. § 533.325, in relevant part 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]. The statute expressly states the stage of development a water right must be at when one may apply for a change and, by necessary implication, what the State Engineer may consider. One can only apply for, and therefore the State Engineer can only consider, applications which seek to change "water already appropriated." An application which seeks to change water which is not already appropriated cannot be filed, and cannot be processed. If the legislature intended to allow the filing and processing of applications to change water which was not already appropriated, *i.e.*, applications to appropriate, it would have said so. Neither the State Engineer nor Kobeh argue, nor could they, that a mere application to appropriate

constitutes "water already appropriated." Instead, they simply ignore that language in N.R.S. § 533.325.

The State Engineer's and Kobeh's argument that one may file and the State Engineer may process an application to change an application to appropriate as long as the State Engineer first issues (and then instantly abrogates) the permit to appropriate before he issues the permit to change elevates form over substance. More importantly, both the State Engineer and Kobeh ignore the context of the 1993 addition of N.R.S. § 533.324 to Nevada's water law. At that time, two courts had ruled that one could not file, and the State Engineer could not process, an application to change water which had not first been placed to its intended beneficial use before the change application was filed. *See* Conley/Morrison Opening Brief at 12-14. Those courts relied upon the accepted common law that water was not "appropriated" until the water had actually been placed to its intended beneficial use. *See, e.g., Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 159-60, 140 P. 720 (1914). As a result of those rulings, 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 made.

[Emphasis added]. Thus, that provision was added in the precise context of determining the stage of development of a water right at which an application to change it could be filed and processed. Nothing was added to state that at the water right application stage, an application to change could be filed and processed. *See* Conley/Morrison Opening Brief at 12-14. Indeed, from what was included in N.R.S. § 533.324, it is clear that an application to change an application to appropriate could not be filed or processed. Equally clear is the fact that the 1993 amendment was not related to any issue of when one may perform work on changes to water already appropriated.

Kobeh also argues that the State Engineer complied with N.R.S. § 533.324 and N.R.S. § 533.325 because he issued permits for the Base Applications on December 1, 2011, before issuing permits for the Change Applications on December 13, 2011. Kobeh Answering Brief at 45. This argument is purely form over substance. The State Engineer simultaneously approved both the Base Applications and Change Applications in Ruling No. 6127. The State Engineer issued a permit for the Base Applications on December 1, 2011 and then, on December 13, 2011, he immediately changed the status of the newly "permitted" Base Applications to "abrogated," meaning that they had been repealed or annulled, and issued a permit for the Change Applications. These facts make it clear that the Base Applications did not satisfy the definition of "water already appropriated" when Kobeh filed and the State Engineer approved the Change Applications, because he simultaneously approved both in Ruling 6127. Indeed, Kobeh itself has asserted that the issuance of permits pursuant to Ruling 6127 is "purely ministerial." *See* Kobeh Reply at 5-6.

B. No Principle of Statutory Construction Supports the Interpretation Offered By the State Engineer and Kobeh.

1. Introduction.

Both Kobeh and the State Engineer argue that the State Engineer's interpretation is reasonable, and should be upheld. However, neither point to any statutory language which the State Engineer has interpreted, reasonably or otherwise. The State Engineer does not even refer to the provisions of N.R.S. § 533.325, which are directly applicable here. The State Engineer's principal argument is that he has done this before. *See* State Engineer Answering Brief at 32-34. Because both Kobeh and the State Engineer recognize that the question turns on the meaning of "water already appropriated" and that the phrase clearly does not include the mere filing of an application to appropriate, they simply ignore the phrase and the fact that its meaning applies to not only N.R.S. § 533.325, but also to N.R.S. § 533.345 and § 533.425.

Thus, they do not address at all the principles of statutory construction supporting Conley/Morrison's interpretation here. *See* Conley/Morrison Opening Brief at 8-14.

Neither the State Engineer, nor Kobeh, contend that the provisions of N.R.S. § 533.325 are ambiguous, or capable of two or more reasonable interpretations. As a result, the State Engineer's "interpretation" here is not entitled to any deference. *United States v. State Engineer*, 117 Nev. 585, 589-90, 27 P.3d 51 (2001).

Rather than offering an alternative reasonable interpretation of the relevant statutory provisions, they rely on several arguments which do not withstand scrutiny. Kobeh first contends that Conley/Morrison has not articulated any public policy reason for their interpretation. It asserts the interpretation wastes limited resources, subjects an applicant to the risk of losing a priority date, potentially leaving less water available for appropriation, and substantially hinders the State Engineer from efficiently managing the administration of water rights in Nevada. Kobeh Reply at 11-12; Kobeh Answering Brief at 47. Notably, the State Engineer does not make similar arguments. The State Engineer simply argues that since the original application would have been granted, there would be no reason not to grant the change application. State Engineer Reply at 3-4; State Engineer Brief at 32-33.

2. An Applicant Does Not Lose a Priority Date If the State Engineer Is Required to Grant an Application to Appropriate Before He Accepts, Considers and Rules Upon Any Application to Change It.

As set forth above, Nevada law requires the State Engineer to consider and rule upon the original application to appropriate before accepting, considering and ruling upon any applications to change the point of diversion, place or manner of use of the original application. If the State Engineer grants the original application to appropriate, one may then file an application to change and, if granted, the water right under the change application will have the priority date from the original application. In fact, Nevada law specifically provides:

> If at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter, without losing priority of right.

N.R.S. § 533.040(2). Therefore, it is clear that the applicant is not required to file a new application to appropriate and risk the loss of priority if it decides to change the original point of diversion or manner or place of use.

Kobeh argues that "public policy" weighs in favor allowing applications to change applications to appropriate "when subsequent hydrologic studies and exploratory well-drilling indicate that the original well location is unacceptable." Kobeh Reply at 11. Kobeh then hypothesizes that requiring an applicant to wait for the original application to be granted before filing a change application runs the risk that intervening appropriators will have obtained permits at locations near the applicant's intended change location. Kobeh Reply at 11-12. Those assertions do not comport with reality.

First, Nevada law allows for waivers of permit requirements for purposes of exploration. *See* N.R.S. § 534.050(4). Thus, exploration can occur before any applications are filed. Second, frequently, when dealing with applications to appropriate in groundwater basins, the State Engineer rules on them in the order in which they are filed, thus ensuring that those filed first will be permitted first. Moreover, it is clear that at least in this situation, Kobeh's concern about intervening applications at the new location is not a reality. There are no such intervening applications, nor could there be. *See* Kobeh Answering Brief at 47. To the extent that public policy should ensure that intervening applications cannot be filed for the sole purpose of disrupting an application for a real project, or for other speculative reasons, Nevada law provides the State Engineer with ample tools to prevent that from happening. *See* N.R.S. § 533.375; *see also, Bacher v. State Engineer*, 122 Nev. 1110, 1119-20, 146 P.3d 793 (2006). Finally, if it is to be the policy of Nevada water law that an applicant should be allowed to

monopolize all ability to appropriate water in a groundwater basin by simultaneously filing numerous applications to appropriate and numerous applications to change applications to appropriate, it is for the legislature to make that policy, not the State Engineer.

3. There Is No Duplication or Waste of Resources Under Conley/ Morrison's Interpretation.

Original applications to appropriate must be noticed and reviewed as required by Nevada law. *See* N.R.S. §§ 533.325 - 533.375. Similarly, change applications, whenever they may be filed, must also be noticed and reviewed as required by Nevada law. *Id.* If the State Engineer does not analyze applications to appropriate and change applications under the relevant provisions of N.R.S. § 533.370, he does not fulfill his statutory responsibilities. There is no duplication or waste of resources, regardless of when a change application may be filed.

4. The State Engineer's Desert Land Entry and City of Ely Examples Do Not Justify the State Engineer's Failure to Follow Nevada Law.

The State Engineer has relied on two illustrations to support the argument that his "interpretation" here is reasonable. The first related to a Desert Land Entry, where the State Engineer apparently does not act on an application to appropriate until the applicant has been granted a right of entry to the land.[3] State Engineer Reply at 3-4. There, loss of priority is raised as a concern because the exact location of entry may not be at the location of the original water application. *Id.* at 3-4. That issue, if indeed it is an issue, can be easily managed by granting the application recognizing that such a permit does not authorize the use of land

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[3] The actual example provided by the State Engineer demonstrates that there is no limit on changes to applications to appropriate under the State Engineer's interpretation. There, Application to Appropriate No. 49671 was filed. Before it was granted, Change Application No. 54430 was filed to change the place of use and add 40 acres acquired by private purchase to the original place of use. Before either the original application and the change application were granted, Change Application No. 59144 was filed to change the point of diversion under Application No. 54430 before it had been granted. All three were permitted on the same day, and "Permit" No. 49671 was instantly abrogated by "Permit" No. 54430, which was instantly abrogated by Permit No. 59144.

owned by others. In that case, a later change application could be filed without loss of priority, if necessary.

The Ely water system example does not require any different result. State Engineer Reply at 4; State Engineer Answering Brief at 32-33. Ely's original filing was at the point of diversion at its existing wells. If there was unappropriated water in the basin, then once the State Engineer granted a permit, Ely could have filed an application to change that permit without loss of priority. To the extent that time was or is a factor, Nevada law allows the State Engineer to grant temporary changes on an expedited basis. *See* N.R.S. § 533.345.

C. Neither the State Engineer Nor Kobeh Can Justify the State Engineer's Failure to Follow Nevada Law Based Upon the Argument That "It Saves Time."

In the final analysis, the public policy argument of both Kobeh and the State Engineer is that proceeding in this fashion saves time. First, that may or may not be true in every case. As noted, Nevada law allows for expedited temporary changes to permitted rights while a permanent change is being processed. *See* N.R.S. § 533.345. Second, the State Engineer is not required to hold a hearing on the permanent change application simply because it has been protested. *See* N.R.S. § 533.365(4). If the protests to the change application essentially involve the same issues as were heard in connection with the application to appropriate, the State Engineer could reasonably overrule the protest without a hearing, and frequently does.

Equally important is the fact that relevant provisions of Nevada law, here, N.R.S. § 533.325, apply to both surface and groundwater. Although it may be arguable in a groundwater situation that "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," (State Engineer Answering Brief at 33), that is not always the case in a surface water situation, where the new point of diversion may impact other users on the stream differently than the original point of diversion.

In the case of an application to appropriate, in addition to ensuring that there is unappropriated water, the State Engineer is obligated to ensure that there is no conflict with existing rights, and that the appropriation will not threaten to prove detrimental to the public interest. He is obligated to make those same two determinations in connection with a change application. The process of granting and instantly abrogating a permit to appropriate, and simultaneously granting a change permit, substantially blurs, if it does not obliterate whether those required determinations have in fact been made in each case, or whether a court, on judicial review, can even tell.

It is clear that Nevada's water law includes several mechanisms which allow an applicant and the State Engineer to move the appropriation and change processes forward expeditiously. Requiring the State Engineer to follow the provisions of N.R.S. § 533.325 does not in any way hinder him from efficiently managing the administration of water rights in Nevada. *See* Kobeh Answering Brief at 47. On the other hand, the relevant Nevada statutes, N.R.S. § 533.325 and N.R.S. § 533.324, are clear and unambiguous. Applications to change applications to appropriate may not be filed, processed and approved until after a permit has been issued. It is for the legislature to decide whether applications to change applications to appropriate should be allowed to be filed and processed in order to save time. It is not a decision that the law leaves to the State Engineer.

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IV. CONCLUSION.

In Ruling No. 6127, the State Engineer has exceeded his power and 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 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.

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: March 28, 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

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 March 28, 2012, I caused to be served a true and correct copy of the *Reply Brief by Conley Land and Livestock, LLC and Lloyd Morrison* by depositing the same in the United States mail, postage prepaid, first class mail, addressed as follows:

Theodore Beutel
Eureka County District Attorney
P.O. Box 190
Eureka, Nevada 89316

Karen Peterson
Allison MacKenzie
P.O. Box 646
Carson City, Nevada 89702

Alan K. Chamberlain
Cedar Ranches, LLC
948 Temple View Drive
Las Vegas, Nevada 89110

Laura A. Schroeder
Theresa A. Ure
Schroeder Law Offices, P.C.
440 Marsh Avenue
Reno, Nevada 89509

Ross E. de Lipkau
Parsons, Behle & Latimer
50 W. Liberty Street, Suite 750
Reno, Nevada 89501

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

Gene P. Etcheverry
Executive Director, Lander County
315 S. Humboldt Street
Battle Mountain, Nevada 89820

B.G. Takett
c/o Rio Kern Investments
4450 California Avenue, Stop 297
Bakersfield, California 93309

and that a courtesy copy of the foregoing was sent via electronic mail to the following:

Theodore Beutel
tbeutel.ecda@eurekanv.org

Bryan L. Stockton
bstockton@ag.nv.gov

Ross E. de Lipkau
rdelipkau@parsonsbehle.com

Therese A. Ure
counsel@water-law.com

Karen A. Peterson
kpeterson@allisonmackenzie.com

The Honorable Dan Papez
dlpapez@mwpower.net

Holly Dewar

Holly Dewar

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 Kenneth F. Benson, Diamond Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family LP

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 Case No.: CV1112-164[1] 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

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

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[2] Case No.: CV1202-170[3] Dept. No.: 2

PETITIONERS KENNETH F. BENSON, DIAMOND CATTLE COMPANY LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP'S REPLY BRIEF

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

[3] Case No. CV1202-170 is pending consolidation with already consolidated cases CV1108-155, CV1108-156, and CV1108-157.

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

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SCHROEDER LAW OFFICES, P.C.

440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800 FAX (877) 600-4971

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REPLY BRIEF

Petitioners KENNETH F. BENSON ("Benson"), DIAMOND CATTLE COMPANY, LLC, and MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LIMITED PARTNERSHIP ("Etcheverry"[4]), collectively referred to herein as "Petitioners", by and through their attorneys of record, Schroeder Law Offices, P.C., file this Reply Brief in support of their Petition for Judicial Review filed in Case No. CV1108-157 on August 10, 2011, their Petition for Judicial Review filed in Case No. CV1112-165 on December 30, 2011 (as Amended on January 12, 2012), and their Petition for Judicial Review filed in Case No. CV1202-170 on February 1, 2012; in response to Respondent STATE ENGINEER's, Answering brief filed on February 24, 2012; and in response to Intervenor/Respondent KOBEH VALLEY RANCH, LLC's ("KVR"), Answering Brief filed on February 27, 2012.[5]

I.

INTRODUCTION

Petitioners submitted their Opening Brief pursuant to their petitions for judicial review on January 13, 2012. The State Engineer submitted an Answering Brief on February 24, 2012, and KVR submitted an Answering Brief on February 27, 2012. Petitioners hereby submit their Reply Brief, responding to the State Engineer's and KVR's Answering Briefs.

In this Reply Brief, Petitioners will establish that the State Engineer's and KVR's arguments in response to Petitioners' Opening Brief arguments are without merit. Specifically, Petitioners will establish the following:

1) The State Engineer erred in approving the Applications despite a finding of conflict with existing water rights;

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

[5] Any matter addressed in the State Engineer's or KVR's Answering Briefs is hereby replied to consistently with Petitioners' Opening Brief and is not admitted.

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2) The State Engineer erred in relying on a hypothetical, non-existent mitigation plan that was not entered into the record;

3) The State Engineer denied Petitioners' due process rights when it relied on a mitigation plan not in the record, thus denying Petitioners' opportunity to cross-examine and challenge the mitigation plan;

4) The State Engineer erred by granting Applications that are deficient on their face;

5) The State Engineer erred by granting Permits with terms inconsistent with Ruling No. 6127;

6) The State Engineer erred in setting the perennial yield;

7) The State Engineer erred by finding that interbasin transfers would be environmentally sound;

8) The State Engineer erred by relying on the Model as presented by KVR; and

9) The State Engineer erred by granting Permits with combined duties above and beyond that requested by KVR.

The Court should grant Petitioners the relief they seek against Ruling No. 6127 and the Permits issued by the State Engineer in reliance on Ruling No. 6127[6], as more specifically outlined in Section II herein.

II.

ARGUMENT

A. Reply to the State Engineer's and KVR's Answering Briefs

1. Conflict with Existing Water 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." Groundwater rights "allow for a reasonable lowering of the static water

[6] Ruling 6127 is found in the Record on Appeal at pages 3572 - 3613. Citations to the Record on Appeal are designated as "ROA."

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level at the appropriator's point of diversion." NRS § 534.110(4). Later appropriations may be granted that may cause the static water level to be reasonably lowered, only if existing appropriations can be satisfied under "express conditions." NRS § 534.110(5).

In Ruling No. 6127, the State Engineer specifically found that Applications would not conflict with existing rights in *Diamond Valley*.[7] ROA 3590. In contrast, the State Engineer did not find that Applications would not conflict with existing rights on the *floor* of *Kobeh Valley*, but rather found that Applications will impact water rights on springs in Kobeh Valley. ROA 3593, 3598. Further, in the State Engineer's Answering Brief, the State Engineer admitted that the "impacts" recognized in Ruling No. 6127 were actually "conflicts" under Nevada Revised Statute § 533.370(5). SE Ans. Br. at 7, 19 (Feb. 24, 2012). Petitioners do not challenge, but agree with, the finding by the State Engineer that Applications will conflict with existing water rights in Kobeh Valley.

Next, the State Engineer found that despite conflicts with existing water rights, "flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur." ROA 3593. This finding, however, is not supported by substantial evidence. Further, the State Engineer's decision to grant Applications based upon the finding that impacts can be mitigated is based on an error of law.

Despite the State Engineer's finding that Applications will conflict with existing water rights, Ruling No. 6127 concludes that "the approval of the applications will not conflict with existing water rights." ROA 3610. These statements are contradictory. The "no conflict" conclusion is only based on the State Engineer's finding that conflicts may be mitigated. In its Answering Brief, the State Engineer outlines that: "The State Engineer found that in order to determine that the Applications will not conflict with existing rights a specific regulatory regime [referring to a mitigation plan] must be put in place to control Project development" SE Ans. Br. at 21. That finding conflicts with the laws governing the State Engineer's actions.

[7] Petitioners challenge that finding, as more fully outlined in Petitioners' Opening Brief.

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As discussed more thoroughly below, the State Engineer's reliance on a non-existent mitigation plan is misplaced. The State Engineer may only consider evidence on the record when issuing a ruling. *See* Eureka County District Court's *Findings of Fact, Conclusions of Law, and Order Granting Petition for Judicial Review, Vacating Ruling #5966, and Remanding Matter for New Hearing,* p. 11, in *Eureka County v. State Engineer*, Case No. CV-0904-122 (Apr. 21, 2010), *citing, Cook County Federal Sav. & Loan A'ssn. v. Giffin*, 391 N.E.2d 473, 477 (Ill. App. 1979) for the proposition that "A decision based on evidence not in the record is a procedure not to be condoned." Here, the State Engineer relied on a mitigation plan which was not submitted into the record when it determined that any conflicts to existing rights, or impacts, could be mitigated. That decision is not based on substantial evidence in the record.

Moreover, whether conflicts can be mitigated is not the legal standard for issuing groundwater use rights. Nevada Revised Statute § 533.370(5) specifically provides that the State Engineer "shall reject" an application that conflicts with existing rights. The only exception is that groundwater rights allow for a "reasonable lowering" of the static water level so long as existing rights continue to be satisfied under "express conditions." NRS §§ 534.110(4) and (5).

Here, the State Engineer specifically found conflicts with existing rights. The State Engineer made no finding that the conflict with existing water rights from Applications constituted a "reasonable lowering." No such finding is found within Ruling No. 6127. Additionally, the State Engineer did not require "express conditions" that ensure existing rights will continue to be satisfied. The State Engineer ruled that if predicted impacts occur, mitigation can cure the impact (ROA 3593), but the State Engineer did not set express conditions, that is, specific measures, to ensure existing rights would be satisfied. Any express conditions that may be found in a mitigation plan were not submitted in the record at hearing.

KVR incorrectly argues in its Answering Brief that Petitioners' arguments regarding conflicts with existing water rights are mistaken because of the difference between "impact" to existing water rights, which is sometimes permissible, and "conflict" with existing water rights,

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which is not permissible under Nevada law. KVR Ans. Br. at 11 (Feb. 27, 2012). However, KVR's argument is rebutted by the State Engineer's own admission that its discussion of "impacts" in Ruling No. 6127 really concerned "conflicts." SE Ans. Br. at 7, 19. Moreover, even if the State Engineer merely found impacts, as opposed to conflicts, the State Engineer would then be required to analyze whether impacts were the result of a "reasonable lowering" of the static water level, and then would need to make "express conditions" to ensure satisfaction of existing water rights. Those steps are missing from Ruling No. 6127, and thus Ruling No. 6127 is contrary to Nevada law.

The State Engineer cannot determine that there will be conflicts with existing water rights, but that hypothetical mitigation supports a "no conflict" finding. If the State Engineer finds conflict, he is required by Nevada Revised Statute § 533.370(5) to reject the applications. The State Engineer may grant subsequent rights that would result in a "reasonable lowering" of the static water level, but no such finding was made in Ruling No. 6127. There is absolutely no statutory authority for the State Engineer to find conflict with existing water rights, but conclude that no conflict exists because a mitigation plan can cure conflicts after they occur. Ruling No. 6127 is not supported by substantial evidence because no mitigation plan exists in the record for the State Engineer to rely on. Further, Ruling No. 6127 is contrary to the law because Nevada Revised Statute § 533.370(5) directs the State Engineer to reject applications if they conflict with existing rights. This court should vacate Ruling No. 6127.

2. <u>Non-Existent, Hypothetical Mitigation Plan</u>

The State Engineer does not have authority to grant water use applications that conflict with existing rights. NRS § 533.370(5). However, in the present case, the State Engineer found conflicts with existing rights, as explained above, but nevertheless made a final "no conflict" determination in Ruling No. 6127, based on the finding that a mitigation plan could cure any conflicts. ROA 3610.

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The Answering Briefs for the State Engineer and KVR both argue that Petitioners' objections to the mitigation plan findings are unfounded because no law requires the State Engineer to condition permits on a mitigation plan or requires a mitigation plan to be completed prior to ruling on applications. KVR Ans. Br. at 13-16; SE Ans. Br. at 21-25. However, the State Engineer and KVR miss the point. Although the State Engineer is not required to condition permits on mitigation plans, when the State Engineer relies on a mitigation plan for a finding that applications will not conflict with existing water rights, there must be substantial evidence in the record to support that finding. *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). Logically, there cannot be substantial evidence in the record to support the State Engineer's finding if the mitigation plan does not exist at the time of the hearing, the plan is not placed in the record, and all testimony regarding a possible mitigation plan is hypothetical.

KVR further argues that because certain mitigation techniques were discussed at the hearing, that somehow makes the State Engineer's reliance justified. KVR Ans. Br. at 19. Even though the mitigation measures were given lip service at hearing, there was no indication whether such measures would be taken by KVR or required by the State Engineer. No proposed mitigation plan was offered into the record, and thus the State Engineer's reliance was misplaced and contrary to law.

Finally, KVR places heavy reliance on statements by Petitioners that conflicts can be hypothetically mitigated. KVR Ans. Br. at 20. Whether conflicts with existing water rights can hypothetically be mitigated is not the issue here. The issue is that the State Engineer relied on a mitigation plan that was not entered into the record, or even in existence, for its decision that no conflict exists. Maybe the final mitigation plan will fully cure conflicts, and maybe it will not. The point is that the State Engineer cannot rely on a mitigation plan for its findings unless the actual mitigation plan is entered into the record. The State Engineer could not determine that the

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non-existent mitigation plan would cure conflicts without reviewing the actual plan.[8] Almost anything can be mitigated in the hypothetical. The true question lies in whether the actual plan was considered by the State Engineer, which it was not.

The State Engineer's rulings must be supported by substantial evidence. When the State Engineer makes a Ruling by relying on facts that are not in the record, or furthermore, not in existence, the Ruling cannot be supported by substantial evidence. Thus, Ruling No. 6127 must be vacated.

3. Violation of Due Process

The Nevada State Engineer must comply with the basic notions of fair play and due process in issuing any Ruling. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262 (1979). The Nevada Supreme Court stated: "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." *Id.* Due process and fair play include meaningful cross-examination. *Bivens Const. v. State Contractors' Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991). This Court recognized, in its review of Ruling No. 5966, that a full and fair opportunity to be heard requires that all evidence used to support a decision be disclosed to the parties so that they may have an opportunity to cross-examine the witnesses with regard to the evidence. *See* Eureka County District Court's *Findings of Fact, Conclusions of Law, and Order Granting Petition for Judicial Review, Vacating Ruling #5966, and Remanding Matter for New Hearing,* pp. 10-11, in *Eureka*

[8] A specific plan for mitigation is needed for each source that will likely be impacted, conflicted with, or caused injury to. In response to KVR's argument, while Etcheverry did state that water tanks could be installed at various places on the Kobeh Valley floor to achieve mitigation (ROA 454:20-25), this statement is in the hypothetical. *See* KVR Ans. Br. at 20-21. For example, to install a water tank to support Etcheverry's USDI Bureau of Land Management ("BLM") authorized grazing permit stock water sources, permitting and rights-of way are required from the BLM. In addition, this comment fails to address who would pump or bring water to the water tank. Each of the hypothetical mitigation means have their own problems that would affect, delay, and/or make that mitigation technique untimely, not feasible, impracticable, and unreasonable.

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440 Marsh Avenue
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County v. State Engineer, Case No. CV-0904-122 (Apr. 21, 2010). A decision based on evidence not in the record is a procedure not to be condoned. *Id.* at 11.

Here, the State Engineer relied on a mitigation plan to determine that Applications would not conflict with existing water rights. The problem is that no mitigation plan was offered into the record. Any particular mitigation procedures that were considered were hypothetical. As recognized by this Court, the State Engineer may not base its decision on evidence not in the record. The State Engineer's finding that a non-existent and hypothetical mitigation plan would cure any conflicts with water rights amounted to a denial of Petitioners' due process rights because Petitioners had absolutely no opportunity to challenge the terms of the actual mitigation plan.

The State Engineer incorrectly argues in its Answering Brief that Petitioners have no property interest from which a due process claim may be made. SE Ans. Br. at 26. To the contrary, as admitted by the State Engineer, Applications may conflict with Petitioners' water rights on the floor of Kobeh Valley. Ruling No. 6127 at ROA 3593, 3598. Water rights are vested real property interests. *Carson City v. Estate of Lompa*, 88 Nev. 541, 501 P.2d 662 (1972). The government may not take a property interest without a due process hearing. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This Court has held that a due process hearing requires that all the evidence used to support a decision be disclosed to all the parties, that all parties have the chance to cross-examine that evidence, and that a decision cannot be based on evidence not in the record.[9]

Here, the State Engineer based its "no conflict" finding on a hypothetical and non-existent mitigation plan. No mitigation plan was entered in the record. Petitioners did not have a chance to challenge the mitigation plan because none was entered in the record. Petitioners' property interests may be taken by the State Engineer's Ruling, and Petitioners were denied the

[9] *See* Eureka County District Court's *Findings of Fact, Conclusions of Law, and Order Granting Petition for Judicial Review, Vacating Ruling #5966, and Remanding Matter for New Hearing*, pp. 10-11, in *Eureka County v. State Engineer*, Case No. CV-0904-122 (Apr. 21, 2010).

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opportunity to address all the evidence on which the State Engineer relied. That amounts to a violation of due process, and Ruling No. 6127 should be vacated.

KVR mistakenly argues that the State Engineer did not violate Petitioners' due process rights by basing its Ruling on a non-existent and hypothetical mitigation plan because the State Engineer ordered that KVR establish a mitigation plan with input by Eureka County. Eureka County is not the only petitioner in this case. Moreover, participation in the creation of the mitigation plan is not the same thing as being able to challenge the mitigation at hearing before the State Engineer issues a Ruling. Limited participation by one petitioner after the hearing does not cure due process violations during the hearing as to all petitioners.

KVR also argues that Petitioners have the opportunity to seek further judicial review of the State Engineer's approval of the mitigation plan under Nevada Revised Statute § 533.450, and thus Petitioners were not denied due process at the hearing. KVR Ans. Br. at 14, 17. Similar to KVR's previous argument, the ability to seek further judicial review does not cure due process violations during the hearing. Furthermore, KVR's assertion that Petitioners should have to bring multiple suits to address one Ruling is not in the interest of judicial economy or administrative efficiency and should be rejected. Ruling No. 6127 should be vacated.

4. <u>Adequacy of Applications</u>

Applications must be filed with the State Engineer for new water appropriations or for changes of already-appropriated waters. NRS § 533.325. For new appropriations, applications 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. For change applications, the application must provide "such information as may be necessary to a full understanding of the proposed change."

At hearing, KVR's witnesses testified that the proposed diversion points were unknown. Transcript at ROA 250:11-20; ROA 1364-1365; Benson/Etcheverry Br. at 27. In its Answering

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Brief, KVR clarifies that well locations will be restricted to the ten well locations described in its most recent change applications. KVR Ans. Br. at 23. Both KVR and the State Engineer recognize that any changes to the proposed well locations will require additional change applications to be filed by KVR and approved by the State Engineer. KVR Ans. Br. at 23; SE Ans. Br. at 28. As long as it is understood that the points of diversion/appropriation will be restricted to within 300 feet of the ten well locations and within the same 40 acre quarter-quarter section, Petitioners do not continue to challenge the description of the points of diversion/appropriation for the Applications.[10] So long as KVR is not attempting to circumvent the change application process required by the State Engineer should KVR choose to move any of the ten well locations, Petitioners would not challenge well locations if sufficiently identified in the current Applications.

However, the place of use in the Applications continues to be contrary to Nevada law. The Applications describe a 90,000 acre place of use, but the plan of operations for the mine describes water use on only a 14,000 acre area. Transcript at ROA 133:10-14, 133:15-21. KVR argues that it should not have to file for a change in place of use each time it wants to use water outside of its intended place of use, and so it should be entitled to overstate the intended place of use on the Applications to avoid that consequence. KVR Ans. Br. at 24. The State Engineer argues that the place of use in the permit is only the first step and that refinements to the place of use will occur during the perfection process. SE Ans. Br. at 31. Neither of those arguments is supported by Nevada law, and they must be rejected.

Nevada Revised Statute § 534.020 states that underground waters belong to the state and are only subject to appropriation for beneficial use. If KVR does not plan to beneficially use water on more than the 14,000 acre proposed place of use, it cannot claim that its Applications seek to appropriate water for beneficial on more than the 14,000 acres. Applications seek to

[10] Note that the State Engineer's Answering Brief (p. 28) identifies a quarter-quarter section as having 160 acres. This appears to be a typographical error as a quarter section contains 160 acres and a quarter-quarter section contains only 40 acres.

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circumvent Nevada's requirement that water only be appropriated for beneficial use, rather than for speculation.

In Nevada, if a permittee does not apply water to all the lands described within their permit during the perfection process, they can only receive a water right certificate for lands to which water was actually applied. That is because water only becomes appurtenant to the land on which it is beneficially used. NRS § 533.035. Anti-speculation doctrine requires the applicant to show, with reasonable expectation, beneficial use. *Bacher v. State Engineer*, 122 Nev. 1110, 1120, 146 P.3d 793, 799 (2006). The State Engineer argues that an applicant can apply for more acres than they actually intend to place water to beneficial use, and that the place of use can be "refined" later by the perfection and certification process, even if the proposed place of use is over six times that area stated in KVR's plan of operations. SE Ans. Br. at 31. The State Engineer's argument contradicts the strong anti-speculation policy in Nevada, and the purpose of water right applications for giving notice to the public regarding the intended use. If the State Engineer's arguments were correct, then all applicants could state however many acres they wished, in speculation, without actually intending to place water to beneficial use on those acres, and could figure out the place of use in the future. There are no statutes or rules allowing this State Engineer's interpretation, and the interpretation is contrary to Nevada policy. The State Engineer's interpretation should be given no deference when it is so clearly at odds with Nevada water law.

5. Permit Terms are Inconsistent with Ruling No. 6127

a) Unused Diamond Valley Water Must Be Returned to Diamond Valley Aquifer

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.

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ROA 3595. It is clear that the Ruling requires both "terms" to be mandatory in any permit issued in Diamond Valley; however, the "returned to the groundwater aquifer" term was left out of the permits issued by the State Engineer. This is important because the proposed mine's pit is anticipated to straddle three hydrographic basins. If there is inflow into the pit from the various basins, then water from Diamond Valley will be flowing into the other valleys, which is impermissible under Ruling No. 6127. KVR must be restricted from exporting any water out of Diamond Valley and must return any unused water to the Diamond Valley aquifer, rather than allowing water to flow into the other aquifers.

The State Engineer argues that this issue is a mere distraction because the water used in Diamond Valley cannot go anywhere other than Diamond Valley. SE Ans. Br. at 32. For the reasons stated above, that may not be true. Additionally, KVR has agreed to the insertion of the missing permit term into the Permits for Applications 76005-76009, 76802-76805, and 78424. KVR Ans. Br. at 58. The issuance of the aforementioned permits should be reversed and the State Engineer should be ordered to conform to its own Ruling. If the State Engineer cannot issue permits consistent with its Ruling, then such permits should be denied, rescinded, vacated, and/or otherwise not issued.

b) Participation by Eureka County in Mitigation Plan

Similarly, Ruling No. 6127 states: "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. However, the conditions in the permit do not require input from Eureka County.

The State Engineer does not address this issue in its Answering Brief. KVR argues that Petitioners do not have standing to challenge the absence of this necessary condition from the Permits (KVR Ans. Br. at 58); however, Petitioners may challenge inconsistencies between the Permits and Ruling No. 6127. KVR does not cite any authority otherwise.

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KVR additionally argues that the conditions in Ruling No. 6127 do not need to be included in the Permits. KVR Ans. Br. at 58. However, the finding as to Eureka County's participation is an express condition on the issuance of the Permits. As evidenced by the Permits themselves, all other conditions are expressly stated therein. The absence of this condition raises a question as to what is required by the Permits. The issuance of the Permits should be reversed and the State Engineer should be ordered to conform to its own Ruling.

c) Consumptive Use of Each Permit Exceeded

Pursuant to Nevada Revised Statute § 533.3703(1), the State Engineer may consider the consumptive use of a water right and the proposed beneficial use of water in determining whether a proposed change application complies with the provisions of Nevada Revised Statute § 533.370. In Ruling No. 6127, the State Engineer did decide to limit irrigation change applications to the consumptive use, and 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 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." ROA 3603. The State Engineer thereafter set the consumptive use duties for alfalfa and highly-managed pasture grass in Kobeh and Diamond Valleys. ROA 3604.

However, when issuing the Permits, the State Engineer allowed Permits, of which the total duty should have been limited to consumptive use rates (as outlined Benson/Etcheverry Br. at 38 (Jan. 13, 2012)), to exceed the consumptive use rates for each individual permit, so long as consumption in the mining project would not exceed the consumptive use rates. Therefore, rather than only transferring the amount of water consumed previously, the State Engineer allowed

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PHONE (775) 786-8800 FAX (877) 600-4971

transfer of the full amount of water so long as the consumptive rate remains the same. That action was contrary to Ruling No. 6127, which restricted the change Permits to the water actually consumed previously. The issuance of the Permits should be reversed and the State Engineer should be ordered to conform to its own Ruling.

The State Engineer admits that the Permit conditions allowing diversions exceeding consumptive use were not included in Ruling No. 6127. SE Ans. Br. at 31. KVR does not address this issue in its Answering Brief.

6. Perennial Yield

Petitioners fully covered this issue in their Opening Brief. Benson/Etcheverry Br. at 30-34. Nothing submitted by the State Engineer or KVR negates the points offered by Petitioners. The issue remains that the State Engineer, in Ruling No. 6127, admitted that flows between the hydrographic basins were uncertain. ROA 3585. Rather than obtaining adequate information to further analyze the uncertainties, the State Engineer totally discounted the flow from Kobeh Valley to Diamond Valley in its determination to change perennial yields for the valleys.

Nevada Revised Statute § 533.024 outlines Nevada's 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." The State Engineer points out that it is only required to consider evidence that is available. SE Ans. Br. at 11. KVR agrees with the State Engineer and does not want to cause additional delays by waiting for reliable scientific evidence. KVR Ans. Br. at 58. However, the State Engineer is also required to base its decisions on substantial evidence, rather than speculation or approximations. If evidence does not yet exist to allow the State Engineer to make reasonable decisions, the State Engineer should seek out such reliable, scientific information. Delayed decisions are better than misinformed decisions. That is why Petitioners noted the upcoming availability of USGS studies to aid the State Engineer's determinations. Benson/Etcheverry Br. at 32. The State Engineer's recognition of

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inadequate evidence regarding inter-basin flow on which to base perennial yields and the State Engineer's avoidance of that issue was in error and Ruling No. 6127 should be vacated.

7. Interbasin Transfer

The statutory standard for interbasin transfers requires that the State Engineer consider "[w]hether the proposed action is environmentally sound as it relates to the basin from which the water is exported." NRS § 533.370(3)(c). 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 impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources." Ruling No. 6127 at ROA 3597; SE Ruling No. 5726 at 47.

Here, the State Engineer determined that the requested interbasin transfer is environmentally sound because the requested appropriation is less than the perennial yield of Kobeh Valley. Ruling No. 6127 at ROA 3598; SE Ans. Br. at 20. However, the State Engineer also found that Applications would conflict with existing water rights in Kobeh Valley. Ruling No. 6127 at ROA 3593, 3598; SE Ans. Br. at 7, 19. The State Engineer found that any conflicts could be cured by mitigation, but, as discussed above, that finding was not supported by substantial evidence because no mitigation plan was entered into the record. KVR's Answering Brief (pp. 35-37) echoes the State Engineer's arguments.

The State Engineer's findings cannot be upheld. The State Engineer specifically found that Applications would conflict with existing water rights. The State Engineer erroneously found that the interbasin transfers are environmentally sound because conflicts can be mitigated, without any evidence on record to support that finding. Because there is no evidence to support the State Engineer's mitigation findings, its conclusion that the interbasin transfers are environmentally sound (which is based on the mitigation findings) must also fail. This Court should vacate Ruling No. 6127.

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8. The Model

KVR submitted a groundwater model in the record that uses a ten-foot drawdown contour line to predict groundwater impacts from the proposed pumping. ROA 1184. Petitioners opine that the model was insufficient because it focuses on an arbitrary ten-foot standard, rather than focusing on impacts at less than ten feet. Benson/Etcheverry Br. at 34-35. Further, Petitioners point out that the State Engineer should not have focused on the arbitrary ten-foot impact analysis. Benson/Etcheverry Br. at 34-35.

The State Engineer and KVR argue that the model's data files were submitted to the State Engineer, and that the State Engineer recognized the submission in Ruling No. 6127. KVR Ans. Br. at 26; SE Ans. Br. at 16; Ruling No. 6127 at ROA 3590-3591. However, the State Engineer relied upon the model without stating whether it analyzed groundwater impacts based on the data files rather than the ten-foot impact analysis presented by KVR. Without the State Engineer specifying the data that led to his conclusions about impacts to groundwater, is it impossible to determine whether the State Engineer's ruling in this regard was supported by substantial evidence, or was based on an arbitrary standard, and would thus be arbitrary and capricious. Ruling No. 6127 should be vacated. If remanded, this matter should be reviewed to ensure that the State Engineer's ruling is supported by substantial evidence and the law.

9. Issuance of Permits Above Requested Duty

Applicant requested a total duty of 11,300 AFA of water from the Kobeh Valley Hydrographic Basic. Ruling No. 6127 at ROA 3588. However, the State Engineer issued Permits with a total combined duty exceeding 30,000 AFA from Kobeh Valley, with a total duty not to exceed 11,300 AFA. Ruling No. 6127 did not discuss why the duties of each Permit, together, should exceed the total duty requested and approved (11,300 AFA). There is absolutely no support in the record for this action by the State Engineer.

KVR argues that the State Engineer's action is proper because certain water rights of use are supplemental to others. KVR Ans. Br. at 57. If that is the case, then the Permits should

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

indicate which ones are supplemental to others. The idea of a supplemental permits allows the use of the primary right until that water becomes unavailable, and then and only then, can the supplemental right be used to make up the difference between that already appropriated under the primary right and that amount, or duty, left to fulfill the primary right. Supplemental rights can not operate in and of themselves. Currently, no such evidence of supplemental designation is found within the Permits, and the State Engineer's actions in issuing the permits with arbitrary duties exceeding the amount requested by KVR is not supported by Ruling No. 6127 or the record.

B. Relief Requested by Petitioners

1. Vacate Ruling No. 6127;
2. Revoke the Permits and Applications issued to KVR by the State Engineer in contrary to the law and substantial evidence.

And/Or in the Alternative:

3. Remand this matter to the State Engineer;
4. Order the State Engineer to hold a new hearing on the Applications in compliance with the requirements of *Revert v. Ray*, 95 Nev. 782, 787 (1979), and to address the deficiencies in the record; and
5. Revoke the Permits issued to KVR, as they are based on legally insufficient Applications and a vacated Ruling, and contradict the terms of the Ruling.

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

III.

CONCLUSION

Based upon the violation of due process and the State Engineer's arbitrary and capricious actions, as well as the lack of substantial evidence to support Ruling No. 6127, Petitioners respectfully request that this Court grant their Petitions for Judicial Review and vacate Ruling No. 6127 and the Permits granted in reliance on Ruling No. 6127 and in contradiction to that Ruling.

DATED this 28th day of March, 2012.

SCHROEDER LAW OFFICES, P.C.

Laura A. Schroeder, NSB #3595
Therese A. Ure, NSB #10255
440 March Ave.
Reno, NV 89509
Phone: (775) 786-8800
Email: counsel@water-law.com
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 REPLY BRIEF*** does not contain the social security number of any person.

DATED this 28th day of March, 2012.

SCHROEDER LAW OFFICE, P.C.

Laura A. Schroeder, NSB #3595
Therese A. Ure, NSB #10255
440 Marsh Ave.
Reno, NV 89509
PHONE: (775) 786-8800
FAX: (877) 600-4971
Email: counsel@water-law.com
Attorneys for the Petitioners Keneth F. Benson, Diamond Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family LP

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2012, I caused a copy of the foregoing ***REPLY BRIEF*** to be served on the following parties as outlined below:

VIA US MAIL with courtesy copy by electronic mail

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

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

Theodore Buetel, Esq.
Eureka County District Attorney
701 South Main Street
P.O. Box 190
Eureka, NV 89316
tbeutel.ecda@eurekanv.org

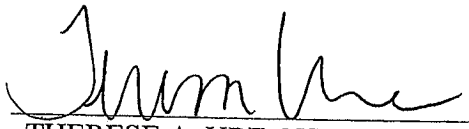
Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701
bstockton@ag.nv.gov

Ross E. de Lipkau, Esq.
Parsons, Behle & Latimer
50 West Liberty Street, Suite 750
Reno, NV 89501
RdeLipkau@parsonsbehle.com

VIA US MAIL ONLY

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

Dated this 28th day of March, 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

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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ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

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

ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.
402 North Division Street, P.O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.
402 North Division Street, P. O. Box 646, Carson City, NV 89702
Telephone: (775) 687-0202 Fax: (775) 882-7918
E-Mail Address: law@allisonmackenzie.com

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I. INTRODUCTION

Kobeh Valley Ranch, LLC, hereby responds to the briefs of Petitioners in the above-entitled, consolidated matters. This case is once again before the Court on the appeals of Eureka County and several other Petitioners from Ruling 6127 of the State Engineer and his issuance of permits thereunder. The record below demonstrates that the decision of the State Engineer is supported by substantial evidence and was not arbitrary, capricious, or in violation of law.

For the convenience of the Court, this brief is organized to respond to the issues in the order they were raised by Eureka County. Response to the additional issues raised by the other Petitioners follow at the end of the brief.

II. STATEMENT OF FACTS

The Project

The Mt. Hope Project will be one of the largest primary molybdenum mines in the world and will employ about 400 people. R. 1187, 1531, 1083; 2009 R. Tr. Vol. III, 535:8-11, 438:12-25, 439:1-7.[1] The mine will process approximately 60,000 tons of ore per day ("tpd") and will operate for 44 years. R. 863:12-25. As acknowledged by Eureka County, mining is an important part of the local economy, provides the most revenue to the County, and creates jobs. 2009 R. 437:18-23, 438:5-24, 536:1-25. The Project will require 11,300 afa of groundwater to process 60,000 tpd using industry-standard mining and processing methods. R. 144:14-23, 1180; 2009 Tr. Vol. II. 395:7-15. Approximately 95% of the groundwater needed for the Project will come from Kobeh Valley and will be used in the Kobeh Valley and Diamond Valley basins. R. 104:23-25, 105:1-2, 106:1-25, 107:1-9, 1079.. The State Engineer has granted approximately 17,000 acre-feet annually (afa) of groundwater rights in Kobeh Valley and Applicant owns nearly all of those water rights. 2009 R. 195:9-12, 196:1-5.

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[1]The 2009 record on appeal filed in the prior appeals of Eureka County, Tim Halpin, Eureka Producers' Cooperative, and Cedar Ranches, LLC., under cases CV 0904-122 and -123 was incorporated into the record of the State Engineer's 2010 hearing. The 2009 record on appeal is identified herein as "2009 R" or "2009 R. Tr.__, Vol. ___. page:line" for transcript citations. The 2011 record on appeal is identified herein as "R" or "R. page:line" for transcript citations.

In addition to Kobeh Valley groundwater, a few hundred acre-feet of Diamond Valley groundwater from the area near the mine will be used each year. R. 105:15-18, 146:5-13, 871:5-23. Applicant owns existing Diamond Valley groundwater rights and transferred those rights to the pit area to account for any water produced in that basin. R. 105:11-24. Initially, groundwater flowing into the open pit from the surrounding rock will comprise the majority of the Diamond Valley groundwater that will be used in the mining and milling process. R. 105:2-4. Wells may be used to dewater the surrounding rock if too much hydraulic pressure builds up behind the pit walls as mining progresses. R. 146:5-13, 318:4-14. Applicant will use the entire amount of water granted under the Diamond Valley permits in Diamond Valley. R. 871:17-23.

Although the Diamond Valley basin is severely over-appropriated, the State Engineer determined that Applicant is not requesting any new appropriations in that basin and the substantial weight of evidence showed that Diamond Valley farmers will not experience any measureable impacts to their wells based on Applicant's use of groundwater in Kobeh Valley. R. 3588, 168:6-25, 169:1-25, 170:1-2, 1537, 215:9-25, 242:1-14, 310:6-11; 2009 R. Tr. Vol. IV, 685:13-25, 797:18-25, 798:1-6, Tr. Vol. V, 901:4-11. Petitioners do not dispute the validity of Applicant's existing Diamond Valley rights or its right to transfer them to the pit area.

Procedural History

Between May 2005 and August 2006 Applicant, or its predecessor in title, filed with the State Engineer thirteen applications to appropriate groundwater in Kobeh Valley for the Project. R. 1945-1983. As existing Kobeh Valley groundwater rights were purchased, Applicant filed applications to change those rights with the State Engineer in order to use them for the Project. R. 1984-2127.

In October 2008, the State Engineer conducted five days of hearings regarding the above-mentioned applications and, six months later, issued Ruling 5966. 2009 R. 2-76. Eureka County, Tim Halpin, and the Eureka Producers' Cooperative appealed Ruling 5966 and it was vacated and remanded by this Court in April 2010 because the State Engineer had considered a report that had not been made available to the protestants. R. 3582, *See also, Findings of Fact, Conclusions of Law, and Order filed April 21, 2010 in consolidated cases* CV-0904-122, -123, and CV-0908-

127. While these prior applications were pending before the State Engineer on remand, Applicant filed new change applications, which sought to change the points of diversion and expand the place of use of the applications approved under Ruling 5966. R. 2156-2294, 999-1023. The new points of diversion were sought because Applicant's updated hydrogeology studies of Kobeh Valley identified better well locations. R. 1209. These newest applications sought to place most of Applicant's water rights in ten production wells in Kobeh Valley. R. 1944, 1531.

All of Applicant's applications were addressed by the State Engineer in a four-day hearing in December 2010 and one day in May 2011. The entire record from the 2008 hearing was incorporated in the record, and the State Engineer took notice of the official records of his office. R. 8:1-3, 21-22. Applicant's witnesses included its parent company's (General Moly, Inc.) technical director and project manager, chief financial officer, director of environmental permitting, and outside general counsel, and its consulting hydrogeologist. 2009 R. Tr. Vol. III 559:20-23; R. 27:17-18, 45:25, 46:1, 92:4-5, 227-229. Applicant also presented several expert witnesses: Dwight Smith (hydrogeology and groundwater modeling) R. 262:3-9; Terry Katzer (hydrogeology) R. 163:11-13; Tom Buqo (hydrogeology) 2009 R. Tr. Vol. IV. 666:23-25; Jim Rumbaugh (groundwater modeling) 2009 R. Tr. Vol. V. 1058:11-13; and Mark Thomasson (hydrogeology and groundwater modeling) 2009 R. Tr. Vol. IV. 840:19-21. The record also included several reports authored by these experts regarding the potential effect of pumping 11,300 afa from production wells in Kobeh Valley. 2009 R. 3176-3303, 3617-78; R. 1098-1128, 1132. Eureka County was the only protestant who offered testimony from hydrologists at the hearings.[2] The other protestants either did not testify or offered mainly anecdotal testimony.

During the hearings, none of the Petitioners challenged the State Engineer's ability to condition approval of the applications upon the future submission and approval of a monitoring,

[2] Petitioner Morrison presented a petroleum geologist (Alan Chamberlain), who was also a protestant, but the State Engineer determined that his opinions in the areas of hydrology or hydrogeology should be given no weight. R. 3605. The only Petitioner who has any water rights in Kobeh Valley are the Etcheverrys, and they did not protest the applications at issue in this case or present any evidence. No other Kobeh Valley water-rights holder or landowner protested the applications except some who later withdrew their protest.

management, and mitigation plan ("3M Plan").[3] Rather, the record shows that Eureka County, which holds no water rights that would be impacted by the Project, filed its protests so that it could be involved with the 3M Plan. R. 712:12-25. Indeed, Eureka County's witness list identified nearly all of its witnesses as testifying on management, monitoring, and mitigation. R. 2295-2301. County witnesses testified about the need for monitoring and the type of monitoring that should be required. R. 649:9-25, 650:1-23, 652:6-14, 654:2-19, 658:7-12, 754:17-20. They testified about how monitoring could help Eureka County and the mine look at the appropriateness of the 3M Plan. R. 684:8-20. They also testified about the need for mitigation, R. 650:21-23, and the need for testing mitigation strategies. R. 658:7-12.

Eureka County presented its own "framework" for a 3M Plan to ensure that it and other stakeholders had an opportunity to participate. R. 2308-26, 721:6-25. The County proposal spoke to "threshold objectives for mitigation and "implementing monitoring," but it left the specifics up to input from the "proper people." R. 722:2-13. Eureka County acknowledged that "it is the State Engineer's authority to change [their proposed] plan at its discretion, the State Engineer's authority to modify it and the State Engineer's authority to make all final decisions regarding the recommendation of the plan." R. 723:11-14. Eureka County requested the State Engineer to "implement [its] frame work (sic) for a monitoring, management and mitigation plan." R. 728:7-11. As the record reflects, the County's position was:

> If the State Engineer does grant the water appropriations for the Mt. Hope Project, Eureka County asks the State Engineer to implement a comprehensive and inclusive water resources monitoring, management, and mitigation program that is much more comprehensive than the one proposed by the mine and which takes into account our comments and provides for active participation of Eureka County and other stakeholders (not just receipt and review of data.)

[3] Eureka County claims in its brief that it challenged the ability of the State Engineer to "rely on a mitigation plan that had not been drafted, presented to the State Engineer or provided to the various protestants," citing R. 494-95 and 500. The cited pages from the transcript provide no support for the County's assertion.

R. 3406. The County requested that "The plausible mitigation measures, too, should be the subject of analysis before the project is allowed to commence." R. 3296. The State Engineer's Ruling granted the County precisely what it asked for.

In a letter to Applicant dated April 20, 2011, the State Engineer determined that additional information was required to satisfy the new inventory statute, NRS 533.364, which had been enacted since the original hearing, indicating the specific information required to satisfy the statute and the required format. Eureka County Supplemental Record on Appeal "SROA" 69-70. The State Engineer sent copies of this notice to all Petitioners, including Eureka County. SROA 70. Applicant engaged its consultant, Interflow Hydrology, to compile the requested information. SROA. 77.

On April 22, 2011, the State Engineer notified Applicant and Petitioners that it was holding an additional day of hearing to allow Petitioners to cross-examine Applicant regarding water use on the Project. R. 940-42. On May 10, 2011, the State Engineer held this additional day of hearing. R. 850-927. At no time before or during the May 10 hearing did Eureka County or the other Petitioners object to the State Engineer's April 20, 2011 request of Applicant to provide additional information to satisfy the inventory statute. On June 16, 2011, Interflow Hydrology provided the requested supplemental information to the State Engineer. SROA. 74-273.

On June 22, 2011, the State Engineer sent a letter to Applicant which stated:

> Our office has received your Water Resources Inventory Data Collection Report Kobeh Valley – NDWR Hydrographic Basin 139. This was submitted by Interflow Hydrology on behalf of Kobeh Valley Ranch, LLC.
>
> The inventory is required by Nevada Revised Statute § 533.364. This letter does not imply approval or denial of the pending applications but is only an acknowledgement that the inventory has been received and meets the statutory requirement.

SROA 71. On July 5, 2011, the State Engineer sent Eureka County the inventory provided by Applicant and a copy of his June 22 letter. SROA 72. Eureka County did not appeal from this action by the State Engineer within the time limits provided by NRS 533.450(1).

On July 15, 2011, the State Engineer's Ruling 6127 granted the applications in the order in which they were filed. R. 3613. At no time prior to the Ruling did any of the Petitioners challenge the ability of the State Engineer to consider the applications to change Applicant's original applications to appropriate that were also under consideration by the State Engineer. The original applications to appropriate were the first granted, followed by the applications to change, which, when granted, modified the original applications to appropriate. Similarly, permits were first issued on the original applications followed by permits on the applications to change. State Engineer Record on Appeal ("ROA SE") Vol. I. 44-216, Vol. II. 217-421, Vol. III. 422-661.[4]

III. ARGUMENT

A. STANDARD OF REVIEW

On appeal, the State Engineer's decision is presumed to be correct and the burden of proof is on the party attacking it. *NRS 533.450(10)*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 203, 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 950 (1992). As to questions of fact, a court should not substitute its judgment for that of the State Engineer, pass on the credibility of witnesses, or weigh the evidence. Instead, a court must limit itself to a determination of whether substantial evidence[5] in the record supports the State Engineer's decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) (citing *No. Las Vegas v. Pub. Serv. Comm'n.*, 83 Nev. 278, 429 P.2d 66 (1967)). Here, the State Engineer's factual determinations are supported by substantial evidence and Petitioners have failed to show otherwise.

The State Engineer's interpretation of the meaning and legal effect of Nevada's water law statutes are also entitled to deference and respect by the courts. First, even though the State Engineer's interpretation of a statute is not controlling, it is presumed to be correct and the party challenging it has the burden of proving error. *See Anderson Family Assocs. v. Ricci*, 124 Nev.

[4] In cases CV-1112-164; and -165, Eureka County and Benson/Etcheverry appeal issuance of the permits. The State Engineer filed a separate record on appeal regarding those appeals, which record is identified by the State Engineer as "ROA SE."

[5] Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *State Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

182, 186, 179 P.3d 1201, 1203 (2008) (recognizing that the State Engineer "has the implied power to construe the state's water law provisions and great deference should be given to the State Engineer's interpretation when it is within the language of those provisions"); *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). Here, the State Engineer's interpretations of the water law statutes are reasonable and Petitioners have failed to overcome the presumption that those interpretations are correct.

Similarly, the State Engineer's conclusions of law, to the extent they are closely related to his view of the facts, are entitled to deference and must not be disturbed if they are supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). In *Jones*, Linda Rosner was fired after she threw away evidence of a mistake she made rather than provide the evidence to her supervisor. *Id.* at 805-06. An Appeals Referee of the Nevada Employment Security Department upheld the Department's determination that Ms. Rosner was not entitled to unemployment benefits because she was terminated for misconduct. *Id.* at 806. The district court reversed. *Id.* When the case came before the Nevada Supreme Court, Ms. Rosner argued that "whether her acts amounted to misconduct . . . is a question of law which may be decided by the district court without deference to the agency." *Id.* The Supreme Court disagreed. As the Court explained, whether Ms. Rosner's actions amounted to misconduct—a question of law—depended on the nature of Ms. Rosner's actions—a question of fact. Because those two questions were so "closely related," the Court held, the Appeals Referee's legal conclusion on the question of "misconduct" was "entitled to deference." *Id.* Here, the State Engineer's conclusions of law are intertwined with his findings of fact, and therefore, should not be overturned because they are supported by substantial evidence.

1. Petitioners Misinterpret and Misapply the Standard of Review.

Petitioners' arguments mischaracterize and misapply the standard of review on questions of fact and law. On questions of fact, Petitioners argue, at various points in their respective Opening Briefs: That "substantial evidence on the record supports a finding" in their favor (*see*

Benson/Etcheverry Br. p. 16); that "the Record supports that uncertainty exists" (*id.* at 30); and that "Eureka County presented substantial evidence to support its grounds of protest." (Eureka County Br. pp. 3-4.) The Court's decision to reverse or affirm does not depend on whether Petitioners can select evidence from the record that may support their positions on questions of fact. Instead, Petitioners must demonstrate that there was **not** substantial evidence in the record to support the State Engineer's decision or that the factual evidence before the State Engineer was so lacking in persuasive value that a "reasonable mind" could not accept that evidence "as adequate to support [the State Engineer's] conclusion[s]." *Bacher v. State Eng'r*, 122 Nev. at 1121, 146 P.3d at 800. Petitioners ignore the State Engineer's right, as fact finder, to make factual determinations and to decide which evidence and whose testimony is credible. Nevada law does not support Petitioners' attempts to retry this case and have this Court substitute its judgment for that of the State Engineer.

2. Petitioners Failed to Raise an Issue Before the State Engineer, and Therefore, Waived Their Right to Appeal from the State Engineer's Decision on That Issue.

"The right to administrative relief is a privilege afforded by law to persons who consider themselves interested or aggrieved." *Red River Broad. Co. v. FCC*, 98 F.2d 282, 286 (D.C. Cir. 1938). "Such a person should not be entitled to sit back and wait until all interested persons . . . have been heard, and then complain that he has not been properly treated." *Id.* As the New Jersey Supreme Court explained:

> One may . . . say there is not only a right but a duty to present all relevant evidence before the agency. . . . Both orderly procedure and good administration require that objections to agency proceedings be made while the agency has opportunity for correction. Any issue not raised at the administrative level may not be considered on review.

Bergen Pines Cnty. Hosp. v. N.J. Dep't of Human Serv., 476 A.2d 784, (N.J. 1984) (quoting B. Schwartz, Administrative Law §§ 114, 206 (1976)). Nevada abides by the same rule. *See State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("Because judicial review of administrative decisions is limited to the record before the administrative body, we

conclude that a party waives an argument made for the first time to the district court on judicial review.").

Other states agree. *See T.C. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 930 N.E.2d 29, 31 (Ind. Ct. App. 2010) ("Our Supreme Court has held that a party who fails to raise an issue before an administrative body has waived the issue on appeal. . . . [A]n administrative body is not required to brainstorm about every possible legal theory that might be available." (citation and quotation marks omitted)); *Nykaza v. Dep't of Emp't Sec.*, 364 Ill. App. 3d 624, 627 ("It is well-settled that if an argument is not presented in an administrative hearing, the argument is waived and may not be raised for the first time on appeal."); *Hudock v. Pa. Dep't of Pub. Welfare*, 808 A.2d 310, 313 n.4 (Pa. Commw. Ct. 2002) ("When a party fails to raise an issue, even one of constitutional dimension, in an agency proceeding, the issue is waived and cannot be considered for the first time in a judicial appeal."); *Suprenant v. Bd. for Contractors*, 516 S.E.2d 220, 225 (Va. 1999) ("[A]n appellant . . . may not raise issues on appeal from an administrative agency to the circuit court that it did not submit to the agency for the agency's consideration." (quotation marks omitted)); *Brinkerhoff v. Schwendiman*, 790 P.2d 587, 589 (Utah Ct. App. 1990) ("It is axiomatic in our adversary system that a party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings. . . . This principle is not limited to the trial court setting, but applies equally to administrative hearings.").

Furthermore, to preserve an issue for appeal a party must do more than generally discuss the issue. *See Conant v. Office of Pers. Mgmt.*, 255 F.3d 1371, 1375 (Fed. Cir. 2001) (for an issue to be properly raised before an administrative agency, "the issue must be raised with sufficient specificity and clarity that the tribunal is aware that it must decide the issue, and in sufficient time that the agency can do so"); *Citizens for Mount Vernon v. City of Mount Vernon*, 947 P.2d 1208, 1213 (Wash. 1997) (en banc) ("In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record."). In *King County v. Wash. State Boundary Review Bd. for King Cnty.*, 860 P.2d 1024 (Wash. 1993) (en banc), King County tried to persuade the court that it had challenged the relevant ordinance below because the ordinance was "in the materials before the Board and [in] a

memorandum presented to the Board on behalf of [one of the parties] arguing that the ordinance ha[d] no preclusive effect." *Id.* at 1036. But as the Washington Supreme Court explained, the fact that the ordinance was in the materials before the Board was not sufficient to avoid waiver of King County's specific argument that the ordinance prohibited the Board's actions. *Id.*

Under these principles, Petitioners have waived one issue they seek to belatedly present on appeal. Petitioners did not argue that the water law prohibited Applicant from filing, or the State Engineer from considering, the applications to change pending applications to appropriate. (*See* Part III.K below.)

B. SUBSTANTIAL EVIDENCE SUPPORTS THE STATE ENGINEER'S DETERMINATION THAT THE APPLICATIONS WILL NOT CONFLICT WITH EXISTING RIGHTS.

The State Engineer did not find that the Applications were likely to impact existing water rights except for two springs in Kobeh Valley. R. 3592-93.[6] Although Eureka County, which holds no water rights in Kobeh Valley, alludes to other impacts to creeks originating in the surrounding mountains, the State Engineer weighed and accepted Applicant's expert witness testimony that such impacts were unlikely because the sources of those creeks were runoff and high elevation springs that are not hydraulically connected to the saturated groundwater aquifer. R. 3591. The State Engineer's determination is supported by substantial evidence. R. 171:8-17, 23-25, 172:1-25, 173:1-2, 179:3-8, 187:21-25, 188:1-12; (Roberts Creek), 180:1-25, 181:1-25, 182:1-18, 188:15 25 (Henderson Creek), 182:22-25, 183:1-2, 189:12-17 (Vinini Creek), 184:3-16, 189:18-21 (Pete Hanson Creek), 1091-1130; 241:12-25, 246:813, 317:1521, 341:1-5 (area mountain creeks in general.)

According to the State Engineer, the two potentially affected springs "produce less than one gallon per minute and provide water for livestock purposes" and could therefore "be adequately and fully mitigated by the Applicant should predicted impacts occur." R. 3593. The

[6] The two springs specifically identified as likely to be impacted by Applicant's pumping are Mud Springs and Lone Mountain Spring. R. 1556. The Etcheverrys own stockwatering rights on Mud Spring and testified that impacts to valley floor water resources could be mitigated. R. 3522, 3593, 455:1-8. BLM is the only claimant to water rights on Lone Mountain Spring and withdrew its protest of these applications. 2009 R. 3692-3710.

State Engineer later repeated his finding that a mitigation plan could alleviate "any effect caused by the proposed pumping." R. 3598. The State Engineer's findings and conclusion are based on his expertise and discretion and are supported by substantial evidence in the record.

Petitioners' arguments misperceive the distinction between "impacting" a water source and "conflicting" with existing water rights. As Eureka County correctly points out, NRS 533.370(2) requires the State Engineer to deny a water right application if there is no water available for appropriation in the basin or if the proposed use ***conflicts*** with existing rights. On the other hand, the statute does not require the State Engineer to deny applications that may ***impact*** certain water sources, if the applicant can successfully mitigate those impacts. Nothing in the statutes prohibits the State Engineer from conditioning approval of an application on the submission, approval, and implementation of a mitigation plan that would ensure that any impacts to the water source would not result in a diminution or deprivation of existing water rights.

NRS 533.024(1)(b), for example, contemplates and allows for the possibility of some impact by one applicant upon another applicant by defining the protections afforded domestic wells as those from "unreasonable adverse effects . . . which cannot reasonably be mitigated." Understanding the practical reality that new applications may impact prior users without actually conflicting with prior rights, the legislature further allowed for management and mitigation of those impacts in NRS 534.110:

> 4. It is a condition of each appropriation of groundwater acquired under this chapter that the right of the appropriator relates to a specific quantity of water and that the right must allow for a ***reasonable lowering*** of the static water level at the appropriator's point of diversion. In determining a ***reasonable lowering*** of the static water level in a particular area, the State Engineer shall 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 cause the water level to be lowered at the point of diversion of a prior appropriator, so long as any protectable interests in existing domestic wells as set forth in NRS 533.024 and the rights of holders of existing appropriations can be satisfied under such express conditions. . . .

(Emphasis added.)

The recognition that certain impacts can be mitigated is consistent with NRS 533.370(2), which provides that the State Engineer must deny an application only if it ***conflicts*** with existing rights. If an applicant successfully mitigates the impacts of its application, as the State Engineer found Applicant could do here, that application will not conflict with existing rights because the water rights holder whose water is affected will receive the same amount of water, at the same point of diversion and place of use, and during the same time period as he would in the absence of the new application. R. 3593. And the permits and the law state that the State Engineer retains the power to curtail Applicant's pumping should a true conflict ever occur in the future that cannot be effectively mitigated. *See e.g.* Permit 79911 ("The State retains the right to regulate the use of the water herein granted at any and all times." State Engineer Record on Appeal dated February 1, 2012 "ROA SE" 438); *See also*, NRS 534.110(6).

Further, nothing in Nevada's Water Rights Statute prohibits the State Engineer from including terms and conditions, including a mitigation plan, in its approval of an application. The Nevada Federal District Court—interpreting Nevada law—has held that the State Engineer "has the inherent authority to condition his approval of an application to appropriate based on his statutory authority to deny applications if they impair existing water rights." *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1479 (D. Nev. 1996).

Petitioners' interpretation of NRS 533.370(2), if taken to its logical conclusion, would prevent the State Engineer from allowing the perennial yield of any Nevada basin to be developed and used by new groundwater applicants since any new pumping is almost certain to impact other groundwater uses. Under Petitioners' argument, even if the resulting impacts to existing rights could be fully mitigated so that existing users would receive the full measure of their water rights, no new applications could be approved. In view of the Legislative expressions in NRS 533.024(1)(b), 534.110(4)-(5), and 533.370(2), Petitioners' statutory interpretation would produce an illogical and absurd result. *See Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) ("[W]henever possible, a court will interpret a rule or statute in harmony with other rules or statutes. In addition, statutory interpretation should avoid absurd or unreasonable results." (citation omitted)).

The cases upon which Petitioners rely are entirely consistent with the State Engineer's ruling.[7] The Utah Supreme Court's opinion in *Piute Reservoir & Irrigation Co. v. West Panguitch Irrigation & Reservoir Co.*, 367 P.2d 855 (Utah 1962), moreover, actually supports the proposition that a court should take mitigation efforts into account in determining whether an application to appropriate or to change impairs existing rights. *Id.* at 856. According to that court, no conflict with existing water rights exists so long as the users are not deprived "of the same quantity of water during the same period of time as they would have had without th[e] change." *Id.* Finally, Petitioners' characterization of statutory provisions in Utah and Washington as "similar" to NRS 533.370(2) is inaccurate. (Eureka County Br. p. 8.) Petitioners cannot ignore the distinctions between the words "impact", "impair," and "conflict" in the different statutes. Indeed, unlike the Utah and Washington statutes, Nevada law expressly contemplates mitigation. *See* NRS 533.024(1)(b); NRS 534.110(4), (5).

Accordingly, NRS 533.370(2) does not require the State Engineer to deny an application if any potential impacts to existing rights can be mitigated and the State Engineer did not act arbitrarily, capriciously, or in violation of Nevada law in conditionally approving the applications.

C. THE STATE ENGINEER PROPERLY CONSIDERED THE APPLICANT'S YET-TO-BE-ESTABLISHED MITIGATION PLAN.

Petitioners contend that the State Engineer could not conditionally approve the applications based on a 3M Plan that does not yet exist, thus denying them the opportunity to challenge the Plan in contravention of their due process rights. (Eureka County Br. pp. 14-17, Benson/Etcheverry Br. pp. 22-25.) This argument fails for several reasons. First, as noted above,

[7] The Utah Supreme Court's opinion in *Crafts v. Hansen*, 667 P.2d 1068 (Utah 1983), impliedly accepts the relevance of mitigation measures when it suggests that a change application should be granted "[i]f the evidence shows that there is reason to believe that the proposed change can be made without impairing vested rights." *Id.* at 1070 (quoting *Salt Lake City v. Boundary Springs Water Users Ass'n*, 270 P.3d 453, 455 (Utah 1954)). The court in *Crafts* also made clear that more than a *de minimis* impact was required before a change application could be denied. As the court held, "[a] change application cannot be rejected without a showing that vested rights will thereby be *substantially impaired*." *Id.* (emphasis added). The other cases Eureka County cites do not even discuss the possibility of mitigation. *See Griffin v. Westergard*, 96 Nev. 627, 630, 615 P.2d 235, 237 (1980) (upholding the State Engineer's conclusion that granting change applications would impair existing rights, but failing to address the possibility of mitigation); *see also Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726, 741 (Wash. 2000) (holding, without discussing the possibility of mitigation, that Washington's statutes "do not authorize a de minimis impairment of an existing right"); *Heine v. Reynolds*, 367 P.2d 708, 710 (N.M. 1962) (same).

Eureka County asked the State Engineer to condition approval on a 3M Plan to be developed with the participation of the County and other stakeholders, and the State Engineer gave them precisely what they asked for. They cannot now be heard to complain about that outcome.

Second, Petitioners have not been deprived of any due process rights. The State Engineer's Ruling and the permits clearly provide that Applicant may not withdraw and use any water unless and until the State Engineer approves a 3M Plan. R. 3609, 3613. Petitioners, primarily through Eureka County, have had and continue to have, the right to participate in the development of the 3M Plan. They can challenge the details of the Plan. When the Plan is submitted to the State Engineer, Petitioners have the ability to make any additional submissions they desire. And when the Plan is ultimately approved, Petitioners have the statutory right to challenge that decision on appeal.

1. Conditional Approval of the Applications In Advance of a Written 3M Plan is Not Arbitrary or Capricious or in Violation of Statutory Requirements.

Even though Applicant's requested groundwater use is considerably less than the perennial yield of Kobeh Valley, the State Engineer conditioned his approval of the applications on Applicant preparing for the State Engineer's review a 3M Plan with required input from Eureka County. R. 3609, 3613. According to the Ruling, the State Engineer must finally approve the 3M plan before Applicant pumps or diverts any groundwater for the Project. R. 3609. The Plan will be designed to monitor surface and groundwater quantity to identify changes that may occur from the Applicant's diversion of water. R. 3609. The 3M plan must also include a mitigation plan to prevent or ameliorate impacts to existing water rights. R. 3609. Applicant is fully committed to complying with the terms of the 3M Plan, and the State Engineer retains the authority to halt pumping at any time if Applicant fails to do so. R. 60:17-23, 82:4-25, 124:3-10, 187:17-20

Nevada's water statutes do not prohibit what the State Engineer did here. Nothing in NRS Chapters 533 or 534 requires that a mitigation plan be presented to the State Engineer and approved prior to his acting on the applications. Nor does the Nevada Supreme Court's decision in *City of Reno v. Citizens for Cold Springs*, 126 Nev. Adv. Op. 27, 236 P.3d 10 (2010), impose

such a requirement. (Eureka County Br. p. 14). In *City of Reno*, the city was required by its own municipal code to make a finding "regarding plans to supply adequate water services and infrastructure to support the proposed development" before adopting a master plan amendment and a zoning ordinance. *Id.* at 17 (discussing former Reno Municipal Code § 18.06.404(d)(1)). Unlike the municipal code at issue in that case, the Nevada Water Statute does not require pre-approval of a mitigation plan. In fact, *City of Reno* actually supports the State Engineer's decision here. In *City of Reno*, the respondents argued that the city violated NRS 278.0282(1), which states that "[b]efore the adoption or amendment of any master plan . . . each governing body . . . shall submit the proposed plan or amendment to the regional planning commission." *Id.* at 16. Much like the State Engineer did here, the city had conditionally approved the master-plan amendments, expressly stating that the amendments would not "become effective" until the Regional Planning Commission approved the amendments. *Id.* at 17. The court affirmed the City's actions, holding that the City "complied with the express language" of the code. *Id.*

The other authorities cited by Eureka County are equally unpersuasive because they too involve procedural requirements or processes that differ from those at issue under Nevada's Water Statutes. In *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal. App. 4th 645 (2007), for example, California Environmental Quality Act ("CEQA") guidelines specifically required that "[f]ormulation of mitigation measures should not be deferred until some future time." *Id.* at 683 (quoting CEQA guidelines § 15126.4)). In addition, the governing statute provided that "an [Environmental Impact Record] [prepared by the agency] [wa]s to provide public agencies and the public in general with *detailed information* about the effect which a proposed project is likely to have on the environment." *Id.* at 675-76 (emphasis added) (quoting 14 CA ADC § 21061)). The Nevada Water Statutes do not impose the same requirements.

Cases that arise under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") are even farther afield. (Eureka County Br. pp. 14-16.) Like the California statutory scheme in *San Joaquin Raptor Rescue*, NEPA requires an Environmental Impact Statement to "discuss mitigation measures with sufficient detail to ensure that environmental consequences have been fairly evaluated." *S. Fork Band Council v. U.S. Dep't of*

Interior, 588 F.3d 718, 727 (9th Cir. 2009) (quotation marks omitted). There is no similar language in the Nevada Water Statute.

As to the Endangered Species Act ("ESA"), Eureka County cites two decisions in which the District of Columbia District Court reversed and remanded the Fish and Wildlife Service's ("FWS") decision to not list a species based on the undefined future actions of the Forest Service. Unlike the State Engineer's Ruling, however, the FWS's decision was not conditional and did not depend on the FWS's future assessment of the situation, but instead on the indeterminate future actions of an independent third party. Thus, these cases are not on point and are not persuasive. There is nothing in the State Engineer's enabling legislation or the State Engineer's policies that can be said to preclude the State Engineer from granting an application to appropriate water conditioned upon the applicant preparing and obtaining State Engineer approval of a 3M plan to deal with any impacts.

In sum, Eureka County has failed to present any authority to support its contention that the State Engineer is prohibited from including terms and conditions in its approval of applications. Further, the State Engineer's interpretation of its own enabling legislation is entitled to deference. *Jones*, 719 P.2d at 806; *Morris*, 819 P.2d at 205; *Pyramid Lake Paiute Tribe*, 918 P.2d at 700.

2. The State Engineer's Ruling Does Not Deny Due Process Rights.

Petitioners allege that the State Engineer violated their procedural due process rights, but they are mistaken. Procedural due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotation marks omitted). Rather, due process is "flexible and calls for such procedural protections as the particular situation demands." *Id.*; *State v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986). Consequently, the procedural protections required by the Constitution vary with the seriousness of the interests at stake. Fewer procedural protections are required, therefore, when less serious interests are at stake. The Nevada Supreme Court has held, for example, that the State Engineer need not hold a hearing before revoking temporary water permits. *See State Eng'r v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). Likewise, a court need not hold a hearing "to make a ruling on a motion to

expunge a frivolous or excessive [mechanic's] lien." *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. Adv. Op. 36, 240 P.3d 1033, 1037 (2010); *see also id.* at 1041 (finding that "due process was satisfied" despite the absence of a hearing because "both parties were afforded sufficient opportunity to present their case through affidavits and supporting documents"). In so holding, the Nevada Supreme Court understands that due process means that "interested parties are given an 'opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id.* at 1041 (quoting *Mathews*, 424 U.S. at 333).[8]

Here, although Petitioners cannot establish any right to participate in the development and consideration of the 3M Plan, Petitioners had the opportunity to request specific mitigation measures at the hearing, and the State Engineer gave them the opportunity to meaningfully participate by ordering Applicant to prepare the 3M plan with the input and participation of Eureka County. R. 3609. The State Engineer is not quelling Eureka County's voice, as Eureka County would have the Court believe but, rather, making sure the County's voice is heard. Eureka County has been participating in the development of the 3M Plan since the Ruling. When the 3M Plan is submitted to the State Engineer for his consideration, Petitioners are free to make any counter submissions they desire. Moreover, all Petitioners have the statutory right to appeal the ultimate decision of the State Engineer regarding the 3M Plan. NRS 533.450. Thus, although Nevada's Water Statutes give the State Engineer discretion whether to hold a hearing upon receipt of a protest, *see* NRS 533.365(4), Petitioners will have an opportunity to appeal the State Engineer's 3M determination should they "feel aggrieved by" that determination. NRS 533.450(1). It is during that judicial proceeding, which by statute must include a "full opportunity to be heard . . . before judgment is pronounced," NRS 533.450(2), that Petitioners are "given an 'opportunity to be heard at a meaningful time and in a meaningful manner,'" *J.D.*

[8] In many ways, Eureka County's due process argument is a non-starter. Courts uniformly agree that states and their political subdivisions (such as Eureka County) are not considered persons for purposes of the Due Process Clause. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). In *State v. County of Douglas*, 90 Nev. 272, 524 P.2d 1271 (1974), the Nevada Supreme Court ruled that counties may not "invoke the proscriptions of the Fourteenth Amendment" against the State because the county is itself a political subdivision of the state. *Id.* at 280, 1276.

Constr., 240 P.3d at 1041 (quoting *Mathews*, 424 U.S. at 333), thereby satisfying due process requirements.

The Nevada Supreme Court's opinion in *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979), does not require a contrary result. There, some of the parties before the State Engineer argued that they acquired adverse possession over the relevant water rights before those water rights were abandoned by the record owner. In its decision, the State Engineer entirely failed to address the adverse possession argument. *Id.* at 785, 264. And then, in its post-review brief to the district court, the State Engineer attempted to remedy the deficiency by "assert[ing] that any use" of the relevant water rights was not adverse. *Id.* The district court thought the State Engineer's post hoc conclusory assertions as to adverse possession were sufficient to uphold the State Engineer's decision. The Supreme Court disagreed, holding that the State Engineer could not simply disregard the parties' adverse possession argument in its decision and then try to rectify that deficiency by making findings in its post-review brief. *Id.* at 787, 265. In short, the Court's opinion in *Revert* stands for the unremarkable proposition that the State Engineer must "resolve all the crucial issues presented." *Id.*

D. SUBSTANTIAL EVIDENCE SUPPORTS THE STATE ENGINEER'S FINDING THAT THE POTENTIALLY IMPACTED KOBEH VALLEY-WELLS AND SPRINGS CAN BE FULLY MITIGATED.

Substantial evidence supports the State Engineer's conclusion that any impacts to the water rights for springs and wells located on the floor of Kobeh Valley could be successfully mitigated to avoid any conflicts with existing rights. The State Engineer determined that most of the spring water rights in Kobeh Valley are owned by the BLM and that the remaining springs are either located far away from the ten production well locations or will not be affected due to topography and geology. R. 3598, 370:21-25. Applicant's experts testified that the proposed pumping would not adversely affect existing water rights on the floor of Kobeh Valley, with the possible exception of springs and stockwatering wells located near Applicant's production wells. R. 191:14-17, 187:7-16, 355:1-20. According to Applicant's experts, Mud Spring and Lone Mountain Spring, which produce less than one gallon per minute and whose water rights were limited to stockwatering uses (R. 3593, 1735-36), were the only springs more than likely to be

adversely affected. R. 355:1-20.[9] In addition, the experts testified that any potential impacts to the nearby springs could be fully mitigated if they occur, thereby avoiding any conflicts. R. 355:1-20, 205: 23-25, 206: 1-25, 314:3-8.

Applicant's experts testified that there were several techniques available to mitigate any loss from these springs, including deepening the impacted stockwatering wells or piping water from Applicant's distribution system to a spring area, R. 206:10-12; and adjusting the volume or rate of water pumped from each of Applicant's production wells. R. 314:3-8; 2009 R. Tr. Vol. IV. 783:1-5. The three Kobeh Valley ranchers called by the County as witnesses each conceded that mitigation of their valley floor water rights, the only sources that would be affected by Applicant's pumping, was possible.[10] R. 454:20-25, 455:1-8, 471:15-25, 493:8-13. Even Eureka County implicitly acknowledged that mitigation could avoid conflicts with existing water rights by resolving any impacts to water sources under a proposed 3M Plan. R. 2321-22, 728:7-11, 650:21-25, 658:7-12, 3296, 684:8-20, 721:21-25, 722:16-25, 723:4-14, 754:17-21.

In contesting the viability of mitigation, Eureka County points to testimony of John Colby, in which he stated that one of the benefits of dispersed water sources is that his cattle do not have to travel very far, and therefore lose less weight. (Eureka County Br. 19.) But as the record makes clear, Colby was describing stockwatering sources, mainly in the Simpson Park Mountains, which are about 15 miles away and will not be affected by the Project. (R. 463:22-25, 466:5-19, 3592-93.) The only surface water source shown on Eureka County's exhibit of Colby's water rights on the valley floor (R. 3523) is a reserved water right claim owned by the BLM and used by Colby for stockwatering (Proof of Appropriation R06875, identified by Eureka County as

[9] Petitioners imply that, the State Engineer's statement about the two potentially affected springs having minimal flows and being used only for stockwatering, imposes an arbitrary hierarchy of water rights in which small uses are deemed less significant. (Eureka County Br. 13:11-23; 14:1-10.) But the State Engineer's statement simply reflects the observation that it is easier to avoid conflicts when mitigating impacts to water sources that produce relatively minor amounts of water for uses that the water right holders themselves testified could be mitigated. This observation in no way denigrates stockwatering rights or sources that produce small amounts of water; it merely reflects the State Engineer's experience and common sense.

[10] Eureka County called John Colby (MW Cattle Company), James Etcheverry (on behalf of 3-Bar Ranch), and Martin Etcheverry (on behalf of the Etcheverry Family Limited Partnership as owner of Roberts Creek Ranch). None of the ranchers had protested the applications and only one appealed the Ruling (Etcheverry Family Limited Partnership).

"Federal Reserved Water."). R. 3526. As to the wells that potentially could be impacted, those on the valley floor, both Colby and James Etcheverry testified that any lowering of their stockwatering wells could be mitigated. R. 471:15-20, 493:6-13. And although Colby stated that mitigating stockwater would require some effort, he stated it could be done. R. 469:11-19, 471:4-12. Etcheverry testified that mitigation would be difficult for springs in the Roberts Mountains due to the number of springs and access difficulties, but said that mitigation was possible for the lower elevation sources. R. 452:1-20, 454:20-25.

Benson/Etcheverry argue that Etcheverry's Roberts Creek water rights will be affected by Applicant's pumping because those rights are on the valley floor of Kobeh Valley. (Benson/Etcheverry Br. 11.) Although the place of use and point of diversion for Etcheverry's Roberts Creek water rights are on the valley floor, the primary water source of Roberts Creek is precipitation, snowmelt, and springs in the upper elevations of the Roberts Mountains. R. 312:3-15. As Applicant's experts testified, Roberts Creek and Roberts Mountain springs are unlikely to be affected by Applicant's pumping because they are not hydraulically connected to the alluvial groundwater aquifer. R. 171:11-25, 172:1-11, 25, 173:1-2, 1090-91; 2009 Tr. Vol. IV, 786:2-10. Indeed, Martin Etcheverry himself testified that he could see no impact to the springs that are tributary to Roberts Creek after a 31-day pump test from Applicant's Well 206. R. 458:4-20.

Benson/Etcheverry and Eureka County also raise concerns regarding Applicant's Well 206 because of its proximity to the Etcheverry Ranch's boundary[11] and impacts to Nichols Spring. Etcheverry testified that he believed the flow of Nichols spring, which the Ranch uses for stockwatering, was reduced by half because of Applicant's test pumping of Well 206. R. 449:17-22. Upon examination by the State Engineer, however, Etcheverry could not estimate the magnitude of flow from the spring, either before or after the pump test. R. 457:14-25, 458:1. Ultimately, Etcheverry admitted that any loss of flow to this spring could be mitigated by a

[11] Benson only protested the six applications for Well 206 and testified the only reason he did so was because he believed it was an infringement of a property right to locate a well on public land near private property. R. 797:18-25, 798:1-13.

substitute supply of water provided by Applicant, R. 455:1-4, and he admitted that water tanks could be installed at various places on the floor of Kobeh Valley to achieve mitigation of his three water sources. R. 454:20-25.

Here, Applicant's witnesses acknowledged that some water sources may require mitigation, but they also testified that mitigation could be accomplished. R. 138:17-20, 206:5-12, 355:11-13. Applicant presented testimony about specific mitigation measures and its financial ability and intention to mitigate impacted sources. R. 60:17-23, 82:4-25, 124:3-10, 156:12-19, 187:17-20, 314:3-8; 2009 R. Tr. Vol. IV. 783:1-5. Petitioners offered no evidence that mitigation of the potentially affected sources was impossible. Rather, Eureka County's witnesses conceded that mitigation was possible for the potentially affected water rights. R. 454:20-25, 455:1-8, 471:13-21, 483:15-19, 493:8-13. And even though one witness stated that he was aware of two circumstances where mitigation failed because the replacement water froze during the winter months, he did not state that it was impossible to keep it from freezing. R. 500:8-19. Accordingly, the record contains substantial evidence to support the State Engineer's conclusion that the applications will not conflict with existing rights on the valley floor, because any potential impacts from Applicant's pumping will be adequately and fully mitigated by a 3M plan that must be approved by the State Engineer prior to Applicant's diversion of any water under the Applications. The foregoing evidence is more than sufficient to support the State Engineer's consideration of the impacts and his conclusion that mitigation can be achieved. R. 3598; *see Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998).

E. SUBSTANTIAL EVIDENCE SUPPORTS THE STATE ENGINEER'S DETERMINATION THAT APPLICANT MET THE REQUIREMENTS FOR DESCRIBING THE PROPOSED POINTS OF DIVERSION AND PLACE OF USE ON THE APPLICATIONS.

The State Engineer's determination that Applicant met the requirements for describing on the applications the proposed points of diversion (well sites) and place of use is supported by substantial evidence. As stated above, the applications at issue in this case are a combination of applications to appropriate and applications to change existing water rights. Under NRS 533.335(5) an application to appropriate must contain, "[a] substantially accurate description of

the location of the place at which the water is to be diverted from its source." The Nevada Supreme Court has stated that NRS 533.335 is for information purposes only. *See Morros*, 104 Nev. at 713, 766 P.2d at 266.[12] Lastly, an applicant must file "such maps and drawings and such other data as may be prescribed by the State Engineer." NRS 533.350. For both appropriation applications and change applications the State Engineer requires an applicant to describe the proposed point of diversion by survey description and the proposed place of use by legal subdivision. R. 3583. These descriptions must match the diversion point and place of use shown on the supporting maps. R. 3583.

Since this Project began, Applicant has conducted exploratory drilling and testing to find optimum locations for its production wells. R. 232:4-20, 263:17-25, 274:2-7, 1202. This exploratory work resulted in Applicant identifying ten production well locations and seeking to obtain nearly all of its water rights for those wells by filing change applications in June 2010 (Applications 79911-79940). R. 300:1-4, 999-1023, 2161-2294. These most recent applications describe the ten production well locations and were considered at the December 2010 hearing. R. 3613. Applicant also testified and submitted evidence showing the location of those proposed production wells and well-field area within Kobeh Valley. R. 1944, 1072-73, 1078-79, 1186-871531, 106:2-3, 150:5-13, 299:23-25, 300:1-4, 376:3-8, 377:2-7, 393:4-9.

Applicant described the location of each proposed point of diversion by survey description on its applications and those descriptions match the supporting maps filed with the applications. R. 999-1023, 1945-2294. Petitioners cannot dispute this evidence, but instead assert that Applicant "is not yet able to identify all the well locations for the project." (Eureka County Br. 23; Benson/Etcheverry Br. 27.) This assertion is based on a single statement from one of Applicant's consultants who said that it was fair to say that he did not know "what the wells are that are planned for the well field production." R:250:18-20. This testimony did not state that

[12] Additionally, if an application to appropriate is for mining purposes, then it must describe the proposed method of applying and utilizing the water. NRS 533.340(4). A change application, which "must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer," is far less cumbersome. NRS 533.345(1).

Applicant was unable to identify its proposed well locations. Moreover, earlier on cross-examination this witness clearly and repeatedly testified that water rights were outside the scope of his work and that he was not aware of, or familiar with, Applicant's water right applications. R. 248:11-21. Further, this witness testified that it was not his intent to show the locations of Applicant's water right applications in his report. R. 250:11-17. Accordingly, instead of relying on the actual applications, Petitioners attempt to manufacture a defect by relying on a single statement from a witness who had no knowledge of or responsibility for the location of the wells.

As further support for their assertion regarding Applicant's points of diversion, Petitioners cite Applicant's statement that until production wells are drilled and pumped "'[t]he exact number, location, well depths, and well pumping rates have a degree of uncertainty.'" (Eureka County Br. p. 23, ll. 12-15.) This statement, however, does not support Petitioners' argument because it simply recognizes that, although Applicant has conducted extensive exploratory drilling and testing, nothing is certain until the actual production wells are drilled, cased, and pumped. R. 316:24-25, 317:1-5. Nevada law and the State Engineer's regulations do not require an applicant to drill, construct, and test costly production wells before filing an application with the State Engineer, and doing so would put the cart before the horse. The State Engineer is limited to reviewing the well locations described in the applications to determine whether they are sufficient.

If in the future, any of the ten wells at the locations described on the most recent applications do not produce enough water for Applicant's needs, then Applicant will be required to file new applications to change the point of diversion at that time. Accordingly, Petitioners' assertion is unfounded and substantial evidence supports the State Engineer's determination that the applications met the legal and regulatory requirements for describing the proposed points of diversion.

Similarly, Applicant described the proposed place of use of on the applications by legal subdivision as required by the State Engineer. R. 999-1023, 1945-2294, 3583. Again, Petitioners cannot dispute that fact, but instead argue that because the place of use is not limited to the heart of the mining operation, the proposed place of use is too large. This argument has nothing to do

with whether the place of use is adequately described on the applications, but instead is based on Petitioners belief that the place of use is simply too large. Petitioners assert that solely because of the size of the place of use, the applications cannot show with reasonable particularity where the water rights will be put to beneficial use.

First, as to the size of a proposed place of use, neither Nevada law nor the State Engineer limits the amount of land that can be included within a place of use. Applicant testified that the Mt. Hope Project is a very large mine, with a large number mining claims, and it would need to use water within the entire place of use. R. 92:15-25, 93:1-8, 135:5-16, 144:14-24.[13] The vast majority of the water will be used within the 14,000-acre plan of operations area. R. 949, 1003, 1187. The "remarks" section of the applications gives a general description of where Applicant intends to use the water for the Mt. Hope Project. R. 1003. The groundwater flow model report also contains numerous maps showing the location of the well-field, the pit area, tailings facility, and plan of operations area. R. 1187, 1531-32, 1634, 1713. Applicant presented evidence that it would need to use a small amount of water in the 76,000 acres outside the 14,000-acre plan of operations area. Applicant's witness explained that small volumes of water would be used for exploration drilling, dust suppression, or environmental mitigation that might be necessary in the larger area. R. 92:20-25, 93:1-23; 135:5-16. These are not "unidentifiable event[s]" or "speculative" as argued by Benson/Etcheverry. (Benson/Etcheverry Br. p. 26.) They are reasonably foreseeable uses in any mining operation. Petitioners cannot seriously suggest that Nevada law requires a new application to be filed each time a water truck is sent out within the 90,000 acre mining area for dust suppression on a dirt road or to water new plantings required for environmental mitigation.

Accordingly, the applications satisfied the statutory and regulatory requirements for describing the proposed points of diversion and place of use, Applicant's testimony and evidence

[13] It is not uncommon for large mines to be permitted to use water throughout the mine area. See, Cortez Joint Venture permit 71044; Robinson Nevada Mining Company permit 55911; Round Mountain, permits 70169 and 60876; Newmont Gold permit 56607; Coeur Rochester permit 81234. The State Engineer took administrative notice of all of the State Engineer's files and records, which include these water rights, which are available online at *http://www.water.nv.gov/data/permit/index.cfm.*

at the December 2010 hearing provided even more information regarding those two requirements. Therefore, the State Engineer's determination that the applications satisfied the statutory and regulatory requirements is supported by substantial evidence

F. SUBSTANTIAL EVIDENCE, INCLUDING THE GROUNDWATER MODEL, SUPPORTS THE STATE ENGINEER'S FINDINGS REGARDING IMPACTS OF GROUNDWATER PUMPING.

Petitioners argue that the State Engineer "relied heavily" (Eureka County Br. p. 25) on Applicant's groundwater model and that his "inexplicable blind reliance" (Eureka County Br. p. 27) was an abuse of discretion. (Eureka County Br. pp. 25-27; Benson/Etcheverry Br. pp. 34-35.) In fact, the groundwater flow model was only part of the substantial evidence that the State Engineer relied on to determine the impacts from the Mt. Hope Project. In addition to the groundwater model, the State Engineer relied on expert testimony and reports, concessions by Petitioners' witnesses, his own credibility findings, and the absence of contradictory evidence from Petitioners.

A groundwater flow model is a mathematical representation of a flow system that estimates drawdown of an aquifer by simulating the effects of groundwater pumping. R. 265:22-25, 266:5-6. Groundwater flow models are not required by Nevada law or the State Engineer's regulations, and Eureka County's expert witness agreed that there are several other acceptable means to estimate potential impacts. R. 600:18-20, 266:3-25, 271:3-25, 272:1-10, 175:20-24. Furthermore, as stated by Eureka County, "[a]s with any groundwater flow model there is a degree of uncertainty" because they are a simplification of a complex natural system. R. 3590, 3298, 301:24-25, 302:1-3, 600:18-20. The State Engineer acknowledged that the groundwater model is only an "approximation of a complex and partially understood flow system," but noted that the modeling evidence "does strongly suggest" that the impacts were as he found them to be. R. 3590.

The results of the modeling are contained in the July 2010 Hydrogeology and Numerical Modeling Report ("Report"), which is part of the Record. R. 1132-1752 (Exhibit 39). The Model and the Report were the result of years of exploratory drilling and aquifer testing, data collection and evaluation, peer-review and collaboration, and refinement, including input from Eureka

County. R. 265:4-20, 269:11-21, 273:19-23, 275:16-25, 276:1-9, 277:15-25, 288:2-6, 293:13-20. Applicant's expert hydrogeologist and groundwater modeler testified that he had run the latest version of the model over a thousand times. R. 293:13-20. This Model is also being used as part of the environmental review process for the Mt. Hope Project in which Eureka County is involved and has been accepted by the Bureau of Land Management (BLM) for purposes of that review. R. 1080-81; 107:12-17, 108:1-4, 342:7-10, 343:2-5, 346:25, 347:1-10. Eureka County is a cooperating agency in that environmental review process and was a very active participant in the review of the Model during that process. R. 99:19-21, 100:8-25, 101:1-23; 269:1-25, 270:16-25, 271:1-9, 1060-63. Petitioners' assertions that the Model underestimates impacts from Applicant's groundwater pumping, has a high degree of error, and a low degree of reliability are contradicted by substantial evidence in the record.

Petitioners contend that by displaying the results with ten-foot drawdown contours, the Model disregards impacts at less than ten feet. (Eureka County Br. p. 25; Benson/Etcheverry Br. p. 34 n. 12.) Drawdown contour lines are simply the manner in which the Model's mathematical results are graphically reported and displayed. R. 383:10-14. As Applicant's modeler, Dwight Smith, testified, the Model is not an "exact calculator for drawdown" that is able to definitively predict the exact level of drawdown that will occur, but is a tool designed to approximate drawdown on a regional basis. R. 302:1-3. Accordingly, hydrogeologists must use their professional judgment when assessing the likelihood that the Model's predictions will occur. For example, the Model predicts a drawdown of ten feet in portions of the Henderson Creek watershed, but Terry Katzer qualified that prediction by testifying that because Henderson Creek is not hydraulically connected to the groundwater aquifer, it will not be affected by Applicant's groundwater pumping. R. 172:2-11, 181:19-23. More importantly, the Model's data files, which were provided to all protestants, actually can show drawdown contours to within fractions of a foot. R. 3591. Thus, Petitioners could have used the Model and displayed the predicted drawdown in five-foot intervals if they so desired. R. 330:13-17. Indeed, Eureka County did precisely this when it reported the results of the Model using a five-foot drawdown contour. R. 3275-76.

Petitioners wrongly assert that Applicant's own witnesses recognized problems with the ten-foot contours. To the contrary, Smith testified that using ten-foot contours for reporting results was sufficient and that he would have voiced his concerns if he believed otherwise. R. 383:2-5. Smith emphasized that the ten-foot contour line is just a manner of displaying the drawdown predictions of the Model. R. 383:13-14. Further, Applicant's witnesses testified that they were not relying solely on the ten-foot drawdown contour to evaluate impacts. "[W]e understand that there can be impacts from drawdown less than ten feet and we are committed to mitigating those impacts." R. 156:17-19, 324:11-15.

Petitioners' assertion that the Model was poorly calibrated[14] ignores substantial evidence that it was calibrated quite well in Kobeh Valley and reasonably well in Diamond Valley. R. 342:11-14, 279:1, 289:9, 404:4-10, 685:15-17. Applicant's expert witnesses disputed what the State Engineer's staff referred to as a "calibration failure," as to the Model's simulation of the predicted drawdown in Diamond Valley from existing agricultural pumping, and the State Engineer made no adverse finding concerning calibration in his Ruling. R. 401:15-21, 423:8-20. More importantly, Applicant's expert testified that the Model's calibration level in Diamond Valley did not affect simulated drawdown in Kobeh Valley. R. 424:6-24. Moreover, the State Engineer's findings regarding the Model are supported by the review and approval of BLM's staff hydrologist and its independent third-party reviewer.[15] R. 342:7-10, 16-19, 343:2-5, 346:25, 347:1-10.

[14] Calibration is the process of adjusting aquifer hydraulic properties in a groundwater model to make the simulated groundwater levels match the observed groundwater levels. 2009 R. Tr. Vol. IV, 851:15-19, 1059:19-22.

[15] One of Eureka County's modeling experts, Carol Oberholtzer, initially reported that there were no "fatal flaws" in the Model, *see* R. 2841, but then later raised concerns about the predictive value of the model in her testimony, *see* R. 620:1-20. She ultimately concluded that her primary concerns had been largely rectified by later modeling work and that she could be wrong about the effect of her remaining concerns. R. 618:20-25, 619:1-6, 18-25, 620:1-20. Petitioners latch onto Oberhoeltzer's isolated statement that the Model had a residual error that was higher than generally deemed acceptable by the authors of the software used to create it. (Eureka County Br. 26; Benson Br. p. 35.) This one-time and otherwise unsupported statement falls far short of satisfying Petitioners' burden to show that the State Engineer's decision was not supported by substantial evidence, especially where the State Engineer's conclusions on impact were supported by evidence other than the Model, and where Petitioners did not present a competing groundwater model.

In addition to the Model and Report, the State Engineer's impact findings are supported by other evidence in the record. The Model's predictions about impacts to Diamond Valley are supported by several reports by the United States Geological Survey (USGS) from 1962 to 2006, all of which conclude that only relatively small amounts of groundwater flow from Kobeh Valley to Diamond Valley. 2009 R. 1023, 852, 854, 676. The State Engineer's findings regarding impacts to streams and springs in the surrounding mountain ranges are supported by the testimony of Applicant's expert witnesses (Terry Katzer, Thomas Buqo, and Dwight Smith) and its consulting hydrogeologist (Jack Childress). Katzer and Buqo were qualified as experts in hydrogeology and Smith was qualified as an expert in hydrogeology and groundwater modeling. Applicant's witnesses explained three reasons why pumping in Kobeh Valley would not affect Diamond Valley water levels. First, the groundwater levels in Kobeh Valley are roughly 100 feet higher than those in Diamond Valley and had not lowered despite fifty years of substantial over-pumping of the Diamond Valley groundwater aquifer. R. 168:1-15, 215:12-25, 216:1, 242:1-16, 2009 R. Tr. Vol. IV. 685:13-25, 797:14-25, 798:1-6. Second, Katzer explained that the different water levels of the pre-historic lakes that once covered Kobeh Valley (Lake Jonathan) and Diamond Valley (Lake Diamond) show that the rock separating the two lakes is not very permeable because otherwise the lake levels would have likely equalized over time. R. 1537, 168:17-25, 169:1-25, 170:1-2, (citing Low, Dennis James, 1982 Geology of Whistler Mountain, R. 3109-3252). Third, Buqo testified of a groundwater flow barrier between Kobeh Valley and Diamond Valley and noted that pumping groundwater in Kobeh would not reduce any subsurface groundwater flow to Diamond. 2009 R. Tr. Vol. IV, 796:10-25, 797:14-25, 798:1-6.

This evidence is sufficient to overcome Benson/Etcheverry's objections that the State Engineer did not properly take into account the effect of Kobeh Valley pumping on Diamond Valley. (Benson/Etcheverry Br. 30-34.) In addition, as stated above and in the Ruling, several USGS scientists have concluded, based on the area's geology and hydrogeology, that the subsurface flow of groundwater from Kobeh Valley to Diamond Valley through the alluvium is

minimal,[16] R. 3588, and that there is no evidence that subsurface groundwater from the deeper carbonate aquifer is flowing from Kobeh Valley to Diamond Valley. 2009 R. 676, 2009 R. Tr. Vol. IV. 796:10-16; R. 215:22-25. Benson/Etcheverry did not offer any expert testimony or factual evidence to contradict these conclusions.

Furthermore, Katzer and Buqo both testified that groundwater pumping in Kobeh Valley would not affect stream flow in Roberts, Henderson, or Vinini creeks because the primary water source for those creeks is not hydraulically connected to the Kobeh Valley groundwater aquifer. R. 172:25, 173:1-2, 179:4-8, 181:19-25, 182:1-19, 186:19-25,189:12-21, 2009 R. Tr. Vol. IV, 786:2-10. Based on his research, Childress testified that the effect of Applicant's pumping in Kobeh Valley on surface water sources in the Roberts Mountains would be "absolutely unmeasurable (sic)." R. 241:22-25. Smith seconded this view, relying for support on the Model as well as on the fact that the flow of those surface water sources was purely dependent on precipitation, snowmelt, and climatic conditions. R. 311:20-25, 312:1-15. Because the base flow of Roberts Creek is derived from relatively high elevations in the mountain block system, Smith explained, the likelihood that drawdown caused by Kobeh Valley pumping would affect these sources was remote. R. 315:1-15. No contrary expert testimony was presented by Petitioners.

Eureka County's experts testified that the Model was not perfect, but agreed that there were no so-called "fatal flaws." R. 2841. The State Engineer concluded that the County's experts "failed to present convincing evidence that the model predictions are not substantially valid." R. 3590. For this reason, the State Engineer accepted the testimony of Applicant's experts, and rejected those of Eureka County's experts. R. 3591-92. As noted above, the State Engineer's credibility determination should not be second-guessed by this Court. *Bacher*, 122 Nev. at 1121, 146 P.2d at 800. Given the Model and the well-supported testimony of Applicant's experts, substantial evidence supports the State Engineer's conclusions.

[16] One USGS scientist estimated the flow at less than 40 afa through the alluvium in the Devil's Gate area. R. 854.

G. APPLICANT IS NOT REQUIRED TO IMMEDIATELY "CAPTURE" THE PERENNIAL YIELD OF KOBEH VALLEY.

Nevada law requires the State Engineer to reject an application "where there is no unappropriated water in the proposed source of supply." NRS 533.370(2). The State Engineer uses the "perennial yield" to determine whether there is unappropriated water in a groundwater basin. R. 3584; *See Morris*, 107 Nev. at 703, 819 P.2d at 206 (1991); *see also Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 245 P.3d 1145 (2010). "The perennial yield of a groundwater reservoir may be defined as the maximum volume of groundwater that can be salvaged each year over the long-term without depleting the groundwater reservoir." R. 3584.

The Mt. Hope Project will require 11,300 afa for approximately 44 years. The State Engineer determined that the perennial yield of Kobeh Valley is 15,000 acre feet,[17] that the total volume of existing groundwater rights is 1,100 acre feet, and that the remaining 13,900 acre feet is more than enough to satisfy Applicant's requested 11,300 acre feet. R. 3588, 1208-09. Petitioners assert that if perennial yield is "ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use" (R. 3584), then the amount of groundwater naturally discharged from Kobeh Valley that is not be salvaged or "captured" by Applicant for beneficial use must be deducted from the available perennial yield. (Eureka County Br. p. 27, ll. 21-26.)

Aside from no support in the law, Petitioners' novel theory suffers from two primary defects. First, it fails to appreciate that "capturing" groundwater naturally discharged by evapotranspiration[18] is a long term process. R. 3584. This long-term process cannot be squared with Petitioners' view, under which no one may appropriate any groundwater unless the pumping *immediately* prevents an equal amount of the groundwater from being discharged by evapotranspiration. This kind of immediate recovery expectation would be impossible in Kobeh

[17] This amount is based on estimated natural discharge and Eureka County's expert agreed that discharge was approximately 16,000 afa and the other Petitioners did not present any contrary evidence or dispute this finding. 2009 R. Tr. Vol. I. 195:1-3.

[18] Natural discharge of groundwater in most Nevada basins, including Kobeh Valley, occurs primarily through evapotranspiration--the process that returns water to the atmosphere through evaporation and transpiration. R. 1266, 1089-90.

Valley, whose perennial yield is presently consumed by evapotranspiration. R. 209:19-25, 201:1-12. And this allegation is contrary to Eureka County's expert testimony that it would take at least fifty years to capture groundwater being discharged naturally. R. 570:8-19. Second, Petitioners' theory disregards the text of NRS 533.370(2), which instructs the State Engineer that the relevant question for the purpose of water appropriation is whether the water is "unappropriated," not whether it is "salvageable" or "capturable." The existence of "unappropriated" water was precisely the determination the State Engineer made here.

Further, Petitioners' allegation that Applicant's pumping will create an "overdraft or constitute groundwater mining" is contrary to basic hydrogeology and ignores both the statutory concept of "reasonable lowering" of the water table and the State Engineer's established practice of allowing appropriators to use transitional storage to capture the perennial yield (e.g. Diamond Valley). 2009 R. Tr. Vol. IV. 808:23-25, 809:1-4, 826:14-24, 2009 R. Tr. Vol. V. 909:2-4, 24-25, 921:9-12, R. 3584-85, 1090, 203:18-22, 204:10-15. Transitional storage is the volume of groundwater in an aquifer that can be used during the transition period between natural equilibrium (prior to any consumptive uses where groundwater is discharged solely by evapotranspiration or subsurface outflows) and pumping equilibrium (where a cone of depression has been created and groundwater is discharged solely by pumping). R. 1089 (citing USGS reports); 2009 R. Tr. Vol. IV. 825:20-24, Vol. V. 909:2-5. The use of transitional storage is a matter of physics and is used in the development of any well in any groundwater basin, including Diamond Valley where the existing irrigation users have not yet and likely never will completely reduce the volume of groundwater discharged by evapotranspiration despite pumping substantially above the perennial yield for many years. R. 204:15-22, 357:21-25, 358:1-11. Petitioners' argument ignores the fact that during the transition from natural equilibrium to pumping equilibrium evapotranspiration is still occurring and, when combined with the amount of groundwater pumped from a basin, the total may exceed perennial yield. R. 358:4-.

Petitioners also ignore the fact that some transitional storage must always be used to withdraw groundwater from a basin and, instead, assert that the total of all natural and artificial discharges (evapotranspiration and pumping) cannot exceed the perennial yield, at any time. This

position, however, would effectively prohibit the State Engineer from granting any groundwater rights in any basin in Nevada because, as stated above, no groundwater can be developed without using transitional storage until the pumping equilibrium is reached. Petitioners' theory is not the law in Nevada.

H. SUBSTANTIAL EVIDENCE SUPPORTS THE STATE ENGINEER'S REVISION OF THE PERENNIAL YIELD OF KOBEH VALLEY.[19]

Petitioners complain that the State Engineer lowered the perennial yield from 16,000 afa to 15,000 afa without notice and without support in the record. But Petitioners cannot question that NRS 533.370(2) requires the State Engineer to determine if there is unappropriated water before granting any application. The State Engineer does this by determining the perennial yield. Here, the State Engineer reasoned that the yield should be limited to the amount of groundwater discharged from the basin naturally through evapotranspiration and therefore lowered the perennial yield to equal to that amount. R. 3586.

Contrary to Eureka County's objection, however, there is substantial support for the State Engineer's decision. First, the State Engineer explained that the original estimate of 16,000 acre feet was prone to double counting (when perennial yields of all basins in a flow system exceed their combined evapotranspiration or recharge rates, R. 3585-86). In the State Engineer's view, limiting the perennial yield to the natural discharge (evapotranspiration) rate (15,000 acre feet) was the safe and conservative option because it would ensure that Kobeh Valley would not be depleted permanently over the long-term. R. 3586. (According to the evidence in the record, the maximum volume of natural discharge that can be captured over the long-term in Kobeh Valley is 15,000 acre feet. R. 3584.) The premise underlying this decision is that if 15,000 afa are discharged naturally, and the basin remains in equilibrium and water levels do not decline, then the basin is getting at least that amount of recharge annually. The State Engineer's responsibility under NRS 533.370(5) and his careful reasoning make it difficult to understand Eureka County's

[19] Eureka County also complains that the State Engineer lowered the perennial yield for Monitor Valley. Monitor Valley is not relevant to Applicant's permits.

complaints that the State Engineer's decision was "completely unexpected." (Eureka County Br. p. 30, ll. 1-2, 5-8; *see also id.* at 31, ll. 8-9.)

Second, the evapotranspiration rate used by the State Engineer to set the perennial yield of Kobeh Valley was based on substantial evidence presented during the 2008 and 2010 hearings. R. 1271, 1463, 1497, 2009 R. 678 (2006 USGS Report of the Diamond Valley Flow System), 1091 (1964 USGS Reconnaissance Series Report No. 30). This evidence included the testimony of Eureka County's own expert, Steve Walker, who stated that the estimate was reasonable. 2009 R. Tr. Vol. I, 194:4-8, 195:1-3.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE STATE ENGINEER'S EVALUATION AND FINDINGS THAT APPLICANT SATISFIED THE FOUR FACTORS UNDER *NRS 533.370(3)* RELEVANT TO AN INTERBASIN TRANSFER OF GROUNDWATER FROM KOBEH VALLEY.

1. Substantial evidence supports the State Engineer's determination that Applicant has justified the need to import groundwater from Kobeh Valley and Diamond Valley to Pine Valley.

Substantial, undisputed evidence in the record supports the State Engineer's determination that Applicant justified the need to import 11,300 afa of groundwater from Kobeh Valley to Diamond Valley. 2009 R. Tr. Vol. III, 566:4-6, Vol. II, 395:7-15. As a preliminary matter, none of the protestants at the 2008 or 2010 hearings disputed that 11,300 afa was needed for the contemplated Mt. Hope Project. The strongest objection came from Eureka County, who simply said that it preferred a smaller-scale project for a longer period. R. 732:14-25; 733:1-6. Indeed, Eureka County's own expert witness testified that he agreed with Applicant's water use estimate and concluded that the estimate was prepared according to generally accepted engineering calculations and industry standards. 2009 R. Tr. Vol. II, 395:7-15, 396:2-7, 2009 R. 2405-2416. Further, although the State Engineer did not require a conservation plan for the Kobeh Valley basin, evidence in the record suggests that the Mt. Hope mining process will recycle 68%-75% of the water used (consistent with other molybdenum mines in the United States), 2009 R. Tr. Vol. III, 582:15-17 (recycling), 577:12-17 (other mine designs and mining methods), and that Applicant designed its mine and mill to take advantage of water savings techniques and strategies, 2009 R. Tr. Vol. III, 569:8-25, 570:1-6, 24-25 (water saving designs); 572:16-20 (alternatives).

Nor is there any weight to Petitioners' assertion that the State Engineer's Ruling should be reversed because he did not expressly address Applicant's need to import water from Kobeh Valley to Pine Valley. (Eureka County Br. 32, ll. 19-20.) Without question, the State Engineer must consider whether an applicant has justified the need to import water, but the interbasin transfer statute does not require express findings so long as it is clear that the State Engineer addressed the justification question. NRS 533.370(3)(a). In his Ruling, the State Engineer recognized that a very small portion of Applicant's proposed place of use included Pine Valley and that Applicant was requesting an interbasin transfer of groundwater from Kobeh Valley to Diamond and Pine valleys. R. 3594-96.

Applicant's witnesses testified that the place of use included a small portion of Pine Valley because water may be used for mineral exploration, dust suppression, or environmental mitigation. R. 92:20-25, 93:1-8, 132:24-25, 133:1-2, 135:2-16. The State Engineer observed that the overwhelming majority of water would be used in the mining and milling processes located solely within Diamond and Kobeh valleys. R. 3594-96. Therefore, Petitioners are incorrect that the State Engineer failed to consider the justified need criterion for Pine Valley.

Next, Petitioners incorrectly assert that the State Engineer did not consider whether a conservation plan was advisable for Pine Valley under NRS 533.370(3)(b). (Eureka County Br. 32, ll. 19-20.) The State Engineer began by noting that Applicant was not a municipal water supplier, that there were no municipal water suppliers in Kobeh Valley or Pine Valley, and that Applicant does not control the municipal water supply in Diamond Valley. R. 3596. The State Engineer next observed that Applicant had shown that it would use proven molybdenum mining and milling technology that will conserve water through reuse and recycling. R. 3596-97. In light of these considerations, the State Engineer determined that requiring additional water conservation plans was unnecessary. R. 3597. In short, the State Engineer expressly recognized that Pine Valley was within Applicant's place of use and referenced Pine Valley in his findings regarding a conservation plan. The interbasin transfer statute requires nothing more.

2. The State Engineer's analysis of whether the Project was environmentally sound as to Kobeh Valley is supported by substantial evidence.

In determining whether to approve an interbasin transfer of groundwater, the State Engineer must consider "[w]hether the proposed action is environmentally sound as it relates to the basin from which the water is exported." NRS 533.370(3)(c). This statute provides no guidance to the State Engineer as to whether a project is "environmentally sound." R. 3597. The legislative history as to the meaning of "environmentally sound" is sparse. The only comment is one provided by Senator James, who said, in response to the State Engineer's statement that the State Engineer is not the "guardian of the environment," that it was not the intent of the bill to require an environmental impact statement for interbasin water transfers. *See* Minutes for February 22, 1999, Senate Committee on Natural Resources, pp. 2-3. Instead, the legislator wanted the State Engineer to simply consider the environmental impact on the basin of origin in determining whether to approve an interbasin water transfer. *Id.* The State Engineer interprets the phrase to mean "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." R. 3597. Further, the State Engineer limits this consideration to "the parameters of Nevada water law." R. 3597. Any other environmental review would be outside the water law and the State Engineer's qualifications under NRS 532.030.

Petitioners do not disagree with the State Engineer's interpretation, but instead argue that he applied it incorrectly in this case. First, because the State Engineer discussed impacts to existing rights in determining whether the applications conflicted with existing rights under NRS 533.370(2) and in considering whether the interbasin transfer was environmentally sound for Kobeh Valley under NRS 533.370(3)(c), Eureka County alleges that his analyses under both statutes was "nearly identical" and rendered the latter statute mere surplusage. (Eureka County Br. pp. 33-34.) This assertion mischaracterizes the Ruling, which shows that the State Engineer focused on specific evidence regarding the potential impacts to existing rights in Kobeh Valley and Diamond Valley in determining whether there was a conflict. R. 3588-93. This analysis

carefully evaluated the predictions of the groundwater flow model and expert witness testimony regarding any potential impacts. R. 3588-93. On the other hand, in considering whether the interbasin transfer from Kobeh Valley was environmentally sound as to that basin, the State Engineer used the perennial yield and amount of existing rights to determine how much water would be left if Applicant was granted 11,300 afa, considered the number of potentially impacted springs, including those with water rights, and the 3M plan. R. 3598-99. The fact that similar considerations arise in the State Engineer's analysis of two harmonious statutory provisions does not render his analysis of one or the other provision superfluous. Therefore, the State Engineer's analysis under both statutes was correct and his consideration of the environmentally sound criterion was not a "mere reiteration" of his prior analysis regarding potential impacts to existing rights.

Eureka County also asserts that the State Engineer's interpretation of "environmentally sound" requires him to consider more impacts, but it does not specifically describe those other impacts and instead simply quotes the portion of the legislative history where one witness testified that a "thorough evaluation of the potential environmental impacts must precede any large scale water transfer." (Eureka County Br. p. 34, quoting one section of a draft state water plan.) First, this is not the kind of legislative history that overrides the "great deference" Nevada courts have traditionally and routinely given the State Engineer's interpretation of Nevada's statutory water law. *Morros*, 104 Nev. 709, 766 P.2d 263 (discussing NRS chapters 533 and 534); *see Town of Eureka*, 108 Nev. at 165-66, 826 P.2d at 950 (noting that the State Engineer's interpretation of a statute does not control but is considered "persuasive" evidence of the statute's meaning). Second, this description is squarely at odds with Senator James' testimony that the statute was not intended to require an environmental impact statement. Third, Eureka County's apparent position would require the State Engineer to step outside his qualifications and address issues that are typically addressed by other state and federal agencies. Nevada's water statutes do not require the State Engineer to analyze impacts to threatened or endangered species, recreational opportunities, and water quality. Not only would doing so expand the role of the State Engineer beyond that envisioned by Nevada water law, see NRS 533.024(1)(c),

(encouraging the "State Engineer to consider the best available science in rendering decisions concerning the *available surface and underground sources of water in Nevada.*") (emphasis added), but it would also intrude on the environmental questions assigned to agencies that are designed for, and better equipped to handle, the kind of wide-ranging environmental issues Eureka County urges. Accordingly, the Court should reject Eureka County's argument that the State Engineer misapplied his own interpretation of Nevada law, especially because the County does not contest that interpretation and its argument is directly contradicted by the legislative history.

Benson/Etcheverry simply disagree with the State Engineer's finding that diverting Kobeh Valley groundwater to Diamond Valley is environmentally sound for Kobeh Valley and argue that it will cause "unreasonable impacts on water resources." (Benson/Etcheverry Br. p. 29.) This argument relies on testimony that a few springs and stockwatering wells on the Kobeh Valley floor that are close to Applicant's production wells may be impacted, but ignores evidence showing that these potentially impacted sources have minimal flow and can be mitigated if impacted. (*Id.*) Petitioners state, with no support from the record, that 1,600 afa of groundwater flow from Kobeh Valley to Diamond Valley at the Devils Gate area. First, this statement is simply incorrect because USGS estimates that only 40 afa of groundwater may flow from Kobeh Valley to Diamond Valley at Devils Gate and that this is the only groundwater flow between the basins. 2009 R. 676, 854, R. 1264. Also, Benson/Etcheverry fail to mention that Applicant's pumping will reduce groundwater flow from Kobeh Valley to Diamond Valley by a maximum of 25 afa. R. 1374, 309:4-17. Accordingly, Benson/Etcheverry's assertion is incorrect and their arguments fail to consider the entire record which supports the State Engineer's decision.

3. Substantial evidence supports the State Engineer's determination that the proposed interbasin groundwater transfer from Kobeh Valley is environmentally sound.

Substantial evidence supports the State Engineer's ruling that granting Applicant's applications is environmentally sound. In making this determination, the State Engineer took into account the impacts of the proposed action on the perennial yield of the Kobeh Valley groundwater basin, the hydrologic impacts on the basin's surface water resources, and the

appropriate monitoring, management, and mitigation necessary to ensure that Applicant's pumping remains environmentally sound.

Thus, as discussed above, the State Engineer reasoned that granting the permits was environmentally sound because Kobeh Valley would retain 2,600 acre feet for future appropriation. R. 3598. Further, the State Engineer determined that only a few minor springs located on the valley floor of Kobeh Valley might be impacted, but that those impacts could be mitigated by Applicant's and Eureka County's 3M plan. R. 3598.

Petitioners dispute this conclusion by pointing to the testimony of its socioeconomic consultant, Rex Massey, regarding recreational activities in the Roberts Mountain Range and population trends of Eureka County. (Eureka County Br. pp. 34-35.) There are numerous problems with Massey's testimony. To begin with, he was not qualified as an expert in any field and did not testify that he had any experience assessing environmental impacts from groundwater pumping. More importantly, Massey did not testify that he believed any adverse environmental impacts would occur from Applicant's pumping. On the other hand, three expert witnesses and Applicant's consulting hydrogeologist, all of whose testimony was expressly accepted by the State Engineer, R. 3591, presented written reports indicating that surface water resources in the Roberts Mountains would not be affected by Applicant's pumping because they are not hydrologically connected to Kobeh Valley's groundwater aquifer. R. 171:16-17, 172:25, 173:1-2, 179:3-8, 187:21-25, 188:1-12; (Roberts Creek), 181:3-25, 182:1-19, 188:15-25 (Henderson Creek), 189:12-17 (Vinini Creek), 189:18-21 (Pete Hanson Creek), ; 241:22-25, 246:8-13, 317:18-21, 341:2-4, 1091-93 (Roberts Mountains surface water sources in general).

Massey's testimony regarding Eureka County population growth was no more persuasive. His testimony was entirely speculative. Moreover, the record established that any impacts to water sources on the valley floor of Kobeh Valley can be fully mitigated, thereby eliminating the potential effect on the recreational activities of Eureka County residents. R. 3593. In sum, the State Engineer's conclusion that the action is environmentally sound both lies within his particular expertise and is supported by substantial evidence.

4. Substantial evidence supports the State Engineer's finding that Applicant's proposed action is an appropriate long-term use which will not unduly limit the future growth and development in Kobeh Valley.

The State Engineer determined that the proposed action would not unduly limit the future growth and development of Kobeh Valley. The State Engineer reasoned that substantial water would still be available to satisfy significant future growth, and that the proposed action is the type of growth expected in the area–as shown by the evidence presented by Eureka County concerning several potential mining-related projects. R. 747:1-25, 748:1-7, 3600, 3527-3535,. Further, substantial, uncontroverted evidence showed that there would be approximately 2,600 afa of groundwater rights available in Kobeh Valley for future growth if Applicant's applications were approved. Petitioners failed to offer any evidence to the contrary at the hearing.

The only witness to testify about the future growth and development of Kobeh Valley was Mr. Massey. He offered nothing more than speculation about the potential for growth in Kobeh Valley. R. 703:4-5 (noting that as many as 2,988 residential lots could be created in Kobeh Valley if all private land in the valley was subdivided into 2.5-acre lots). Moreover, Massey did not testify as to the likelihood that such growth would occur other than to state that future residential areas would likely expand north and west of the Town of Eureka. R. 702:22-24. In addition to being unsupported by any data or expert opinion on the likelihood or feasibility of such growth, Massey's statement contradicts the testimony of the Eureka County public works director, who stated that the County has enough water rights to meet anticipated future growth for 20 years. R. 526:8-11. Moreover, Massey's statement is at odds with his own testimony, in which he observed that Eureka County's non-mining base population was stable and unlikely to grow. R. 700:22-25, 701:10.

J. SUBSTANTIAL EVIDENCE SUPPORTS THE STATE ENGINEER'S DETERMINATION THAT CERTIFICATES 2780 AND 2880 HAD NOT BEEN FORFEITED.

The failure to put a certificated (i.e. perfected) groundwater right to beneficial use for five consecutive years causes a forfeiture of the unused portion of that right. NRS 534.090(1). Although Eureka County sets forth the correct elements of a forfeiture, it fails to acknowledge the

high burden of proof required to establish a forfeiture. Because the law abhors a forfeiture, the State Engineer, or the party asserting forfeiture, bears the burden of proving non-use by clear and convincing evidence. *Town of Eureka*, 108 Nev. at 169, 826 P.2d at 952. Because of the clear and convincing standard, Petitioners face an enormous burden on appeal. Petitioners must show that there was no evidence that a reasonable mind might accept as adequate to support the State Engineer's conclusion that Eureka County failed to show clearly and convincingly that these water rights had not been used for five consecutive years. *Id.* Petitioners have failed to carry their burden. Instead they want to simply reargue the evidence and point solely to the evidence that supports their position.

1. Petitioners cannot demonstrate that the record as a whole clearly and convincingly establishes that there was no beneficial use.

At the hearing, Eureka County asserted that all of Applicant's existing certificated groundwater rights had not been used for at least five straight years and were subject to forfeiture.[20] The State Engineer determined that Applicant's rights were perfected for irrigation use at the Bartine Ranch, Willow Ranch, and Damele Ranch. R. 3601. The State Engineer held that the Willow Ranch and Damele Ranch rights had been forfeited, but that there was not clear and convincing evidence to support forfeiture of 65.54 acres of Applicant's certificated groundwater rights at Bartine Ranch (certificate nos. 2780 and 2880). R. 3602. This finding is supported by the State Engineer's records of annual crop inventories conducted by his staff from 1983 to 2010, which showed substantial use of the water perfected under the certificates. R. 3601; 2009 R. 2107, 2109, 2112, 2115, 2120, 2130, 2135, 2138, 2140, 2153, 2156-59. This finding is also supported by Eureka County's expert in natural resource assessment and agricultural irrigation, Steve Walker, who testified that he agreed that at least 65 acres had been irrigated according to the records that he reviewed. R. 564:17-19, 565:19-21, 2009 R. 2101. Further, Eureka County's public works director testified that he noticed agricultural activity at the Bartine Ranch in the last five years. R. 522:12-19.

[20] Although Benson/Etcheverry and Conley/Morrison now assert the same allegation, they did not raise this issue at the hearing or present any evidence regarding non-use.

Eureka County's request to forfeit Applicant's water rights is based on an alleged inconsistency with two, out-of-state, intermediate appellate courts. As Eureka County admits, "the Nevada Supreme Court has never addressed the issue of what beneficial use is necessary to avoid forfeiture." (Eureka County Br. p. 39.) In the absence of controlling Nevada law, this Court should defer to the State Engineer's interpretation. Nothing in *Staats v. Newman*, 988 P.2d 439 (Or. Ct. App. 1999), counsels to the contrary. And *Martinez v. McDermott*, 901 P.2d 745 (N.M. Ct. App. 1995), rather than undercutting the State Engineer's decision, in fact directly supports it.

In *Staats*, an ALJ found that although petitioners (whose water rights were at issue) had ditches on their land, those ditches "were in disrepair" and that most of the irrigation on the land was better understood as "subirrigation," or "naturally occurring subsurface seepage and capillary action." 988 P.2d at 440. (quotation marks omitted). Under an administrative rule of the Oregon Water Resources Department, which defined "irrigation" as "artificial application of water to crops or plants by *controlled means*," the ALJ held that this "subirrigation" did not amount to beneficial use. *Id.* at 441. (emphasis added). The Oregon Court of Appeals upheld the ALJ's determination. Unlike *Staats*, there is no evidence of "subirrigation use" here, nor is there evidence of ditches in disrepair.

Indeed, the use of the water under the Bartine Ranch Permits qualifies as "beneficial use" because the water was used "for the purpose for which the right [wa]s acquired or claimed." NRS § 534.090(1); *see also Staats*, 988 P.2d at 441 ("The use must be what is permitted in the water right itself."). As the State Engineer found (R. 3602), and as Eureka County admits (Eureka County Br. 40), the Bartine Permits were issued for irrigation using artesian wells and ditches, and the State Engineer expressly found that "there was some artesian flow of water on the property." R. 3602; *see also* Eureka County Br. p. 40 (citing the testimony of Mr. Damele, in which he noted the "natural drainage of the two artesian wells"). Eureka County suggests that this "artesian flow" somehow does not meet the definition of "irrigation," but according to Webster, to "irrigate" means to "to supply (as land or crops) with water by artificial means." Webster's Third New Int'l Dictionary 1196 (1993). To bore a "deep and narrow well . . . until

water is reached that will flow upward through artesian pressures" is to artificially supply with water. *Id.* at 123 (defining "artesian well").

Under the New Mexico case cited by Eureka County, running water over land on which crops grow—precisely what happened here—qualifies as "beneficial use." *Martinez*, 901 P.2d at 750 (finding "beneficial use" for purposes of establishing priority dates because "[c]learly, growing crops constitutes a beneficial use of water"). Indeed, none of the uses the *Martinez* court says do **not** qualify as "beneficial use" are at issue here. *See id.* at 748-50 (noting that an "intended future use," a "diversion alone," "softening the ground," and "simply applying water to land," do not amount to "beneficial use" of water). In short, there is evidence in the record to support the State Engineer's finding that the Bartine Permits have been put to "beneficial use." That is all that is required. As the court in *Staats* summarized:

> In this case, there was conflicting evidence as to the nature of petitioners' use of water on their property. The department [equivalent to the State Engineer here] weighed that conflicting evidence and ultimately found more persuasive the evidence contrary to petitioners' contentions. Specifically, the department found that any of the artificial ditches that still existed were incapable of controlling the flow of water through them. We have reviewed the record as a whole and conclude that the department reasonably could make that finding.

988 P.2d at 442.

Eureka County's argument that that the State Engineer cannot rely on the 2008 crop inventories because they were created after the October 2008 hearing in which the County asserts that it made the forfeiture claim[21] is no more persuasive. Even though the crop inventories may not have been prepared prior to the October 2008 hearing, it is obvious that the 2008 irrigation season in Eureka County would have been essentially finished and the majority of the water would have been used in the peak summer irrigation months and prior to Eureka County's forfeiture claim in October 2008. The fact that those inventories showed crops as a result of

[21] Under *Town of Eureka*, forfeiture may be cured by substantial use of the water after the non-use period so long as no claim or proceeding of forfeiture has begun. 826 P.2d at 952.

using the Bartine Ranch water rights eliminates Eureka County's ability to prove non-use through clear and convincing evidence.

2. Petitioners cannot demonstrate that the record as a whole clearly and convincingly establishes that a portion of the Bartine rights should have been forfeited.

The State Engineer granted the applications to change the Bartine Ranch rights and issued permits based on his finding that at least 65.54 acres were not subject to forfeiture. Based on the State Engineer's determination that the duty of irrigation water rights in Kobeh Valley is 4 acre-feet/acre, the total volume of water rights not subject to forfeiture is 262.16 acre-feet. This duty is the maximum volume of water that could be beneficially used for irrigation and accounts for the fact that some water will not be used in the irrigation cycle or is evaporated and will return to the groundwater aquifer. Under NRS 533.3703, the State Engineer is allowed to consider the consumptive use of the water right to be changed and that of the proposed water right in determining whether the change conflicts with existing rights or domestic wells or threatens to be detrimental to the public interest. Stated differently, the State Engineer is allowed to restrict the volume of water to be changed to only the portion of water that is fully consumed by the existing water right. The principle is to limit the net effect of the proposed change to the net effect of the existing water right, which is designed to protect other existing water right holders from changes that reduce the return flow to the groundwater aquifer.

The State Engineer determined that in Kobeh Valley the consumptive volume is 2.7 acre-feet/acre. Accordingly, the State Engineer has determined that 67.5% (2.7/4) of the total volume of water that is pumped for irrigation does not return to the groundwater aquifer and is consumed by the irrigation process, evapotranspiration, and evaporation. Therefore, the consumptive volume of the Bartine Ranch irrigation water rights is 176.96 acre-feet, which is 67.5% of the maximum volume of 262.16 acre-feet.

K. THE STATE ENGINEER DID NOT ABUSE HIS DISCRETION BY GRANTING THE CHANGE APPLICATIONS.

Out of 88 applications addressed in the State Engineer's Ruling, Petitioners challenge the State Engineer's process to review thirteen of the applications to appropriate and applications to change their points of diversion in a single proceeding. Petitioners' challenge fails because:

(1) Petitioners never raised this issue before the State Engineer in the administrative hearings and have therefore waived the argument[22]; and

(2) There is nothing in NRS 533.325 that prevents the State Engineer from considering an application to appropriate water and a later filed modification or change in use to the underlying water right in the same proceeding. Indeed, for many years it has been the State Engineer's practice to address an application to appropriate water and any later filed modification or change in use to said water right application in the same proceeding to efficiently manage the administration of water rights in Nevada. It is within his authority under NRS 533.325 to do so and it is appropriate for the Court to defer to the State Engineer's interpretation of how best to efficiently implement the statute in these circumstances. For these reasons, the State Engineer's Ruling should therefore be upheld.

1. Background

Between May 2005 and August 2006, Applicant filed thirteen applications to appropriate groundwater in Kobeh Valley. R. 1945-1983. Beginning in June 2007 and prior to the State Engineer approving the applications to appropriate groundwater, Applicant filed applications to for a change the use of its existing water rights. R. 1984-2127. In October 2008, the State Engineer reviewed evidence regarding all of the filed applications and six months later issued a ruling granting the majority of the applications. 2009 R. 2-76. This prior ruling was vacated and remanded by the Court in April 2010. R. 3582.

Since the October 2008 hearing, Applicant has continued to study and test the hydrogeology of Kobeh Valley as part of refining its well-field analysis and as part of the BLM

[22] Conley/Morrison raised this issue for the first time on appeal. None of the other Petitioners raised this issue until their recent briefing on appeal.

environmental review process. R. 99:3-14, 264:16-23, 274:13-25, 275:1-25, 276:1-9. In June 2010, based on anticipated changes to the use of the water rights that are the subject of the thirteen additional applications to appropriate, Applicant filed applications for a change in use. R. 2156-2294, 999-1023. In the December 2010 hearing, the State Engineer reviewed the previously submitted applications to appropriate and the applications for change in use and, on July 15, 2011, approved them in Ruling 6127 in the sequence in which they were filed. R. 3613. The State Engineer later issued the permits in the sequence in which the applications were granted. Eureka County Record on Appeal "EC ROA" 87-90, 93-4, 97-8, 101-2, 115-16, 121-22, 131-32, 141-46. Therefore, and contrary to the assertions of Petitioners, the underlying permits to appropriate water had been issued by the State Engineer before the permits for the change in use were issued.

2. Petitioners Failed to Raise This Issue Before the State Engineer.

In the administrative proceeding, Petitioners failed to raise their arguments regarding the State Engineer's authority to review the thirteen change in use applications in the same proceeding as the underlying applications to appropriate. As such, Petitioners have waived these arguments and these arguments should not be considered on appeal.

Issues that could have been addressed in an administrative proceeding should not be considered for the first time in an original proceeding before the district court. *See Barta*, 124 Nev. at 621, 188 P.3d at 1098 (2008) ("Because judicial review of administrative decisions is limited to the record before the administrative body, we conclude that a party waives an argument made for the first time to the district court on judicial review."). Raising issues for the first time in a petition for appellate review is improper and undermines the efficiency, fairness, and integrity of the proceeding before the State Engineer. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. Adv. Op. 42, 245 P.3d 542, 544 (2010).

Petitioners had several opportunities to raise their challenges in the underlying proceeding. Having failed to raise this argument before the State Engineer, Petitioners cannot now raise this argument on appeal. As such, the Court should reject Petitioners' attempt to circumvent the State Engineer.

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 on a Pending Application to Appropriate.

Contrary to Petitioner's arguments, NRS 533.325: (1) 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; (2) does not prohibit the State Engineer from accepting, reviewing for statutory compliance and adequacy, and sending for public notice 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; and (3) does not prohibit the State Engineer from hearing evidence on and considering both applications in the same proceeding and granting them sequentially.

The State Engineer's interpretation of the statute as permitting the change applications to be filed before the applications to appropriate are granted conforms to the well-settled rule that "[t]he 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 Water Co. v. Nevada*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988) (citing *Welfare Div. v. Washoe Co. Welfare Dep't*, 88 Nev. 635, 503 P.2d 457 (1972)). Further, as set forth above, the State Engineer's view or interpretation of his own statutory authority is persuasive, even if not controlling. *Morris*, 107 Nev. at 701, 819 P.2d at 205. "An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112 Nev. at 747, 918 P.2d at 700.

Here, Applicant filed the change applications after subsequent hydrogeologic studies and exploratory well-drilling indicated that the original well locations were unacceptable. Nothing in the statute prohibited the filing of the change applications. The State Engineer's allowance of the filing of the change applications was appropriate and his consideration of both the original applications and the change in use applications in one proceeding and his granting them in the order in which they were filed was proper. This procedure is reasonable, efficient and not contrary to the plain language of NRS 533.325 and is therefore entitled to some deference. *Morros*, 766 P.2d at 266; *Rosner*, 719 P.2d at 806.

Petitioners argue that NRS 533.325 and 533.324 "unambiguous[ly]" hold that the State Engineer "cannot consider a change in use application for water that has not already been permitted." (Eureka County Br. p. 43.) Petitioners misread the statute. NRS 533.325 says nothing about whether a person may file an application to change the use while the application to appropriate is still pending. NRS 533.325 simply requires that a person receive a permit before "performing any work in connection" with the appropriation of water or with a change in place of diversion, manner of use, or nature of use. The process of reviewing an application is lengthy and approval may take several years. Petitioners fail to articulate any public policy reason for requiring a person to wait for the State Engineer to act on the underlying application to appropriate before ever applying to change that application. Requiring Applicant to re-file the applications would cause delay, waste limited state resources, and exalt form over substance. It would also subject the Applicant to the risk of losing its priority date, possibly causing conflicts with other water users at that point of diversion and potentially leaving less water available for appropriation. Petitioner's interpretation of the statute would lead to a strained construction and an impractical application that would substantially hinder the State Engineer from efficiently managing the administration of water rights in Nevada.

Moreover, in these proceedings the State Engineer's approval of the change in use applications in the same proceeding did not cause harm to any interested parties because there were no intervening water rights that would otherwise have taken priority.[23] As required by the statute, the State Engineer provided proper notice of both the original applications to appropriate and the change in use applications and evaluated whether they conflicted with existing rights and determined that they did not. The State Engineer had the authority to deny the applications based on the public interest, but determined the public interest did not warrant such denial. The State Engineer also had the authority to deny applications based on the anti-speculation doctrine *Bacher*, 122 Nev. 1110, 146 P.3d 793, but also did not believe denial was warranted on these

[23] Applicant owns or controls substantially all of the water rights in Kobeh Valley. The State Engineer's consideration of the underlying applications to appropriate and the subsequently filed applications for change in use in the same proceeding caused no impact to existing water rights in Kobeh Valley.

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
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KAREN A. PETERSON, NSB 366
kpeterson@allisonmackenzie.com
JENNIFER MAHE, NSB 9620
jmahe@allisonmackenzie.com
DAWN ELLERBROCK, NSB 7327
dellerbrock@allisonmackenzie.com
ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD.

402 North Division Street
Carson City, NV 89703
(775) 687-0202

and

THEODORE BEUTEL, NSB 5222
tbeutel@eurekanv.org
Eureka County District Attorney
702 South Main Street
P.O. Box 190
Eureka, NV 89316
(775) 237-5315

Attorneys for Appellant,
EUREKA COUNTY

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
Summons and Proof of Service, Kobeh Valley Ranch, LLC	08/11/2011	1	60-62
Summons and Proof of Service, Jason King	08/11/2011	1	63-65
Affidavit of Service by Certified Mail	08/11/2011	1	66-68
Notice of Petition for Judicial Review	08/11/2011	1	69-117
Summons and Proof of Service, Kobeh Valley Ranch, LLC	08/15/2011	1	118-120
Summons and Proof of Service, Jason King	08/15/2011	1	121-123
Summons and Proof of Service, The State of Nevada	08/17/2011	1	124-128
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.
Partial Motion to Dismiss, Notice of Intent to Defend	09/14/2011	1	136-140
Order Allowing Intervention of Kobeh Valley Ranch, LLC, as a Party Respondent	09/26/2011	1	141-142
Answer to Verified Petition for Writ of Prohibition, Complaint and Petition for Judicial Review by Kobeh Valley Ranch, LLC	09/28/2011	1	143-149
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
Order Directing the Consolidation of Action CV1108-156 and Action No. CV1108-157 with Action CV1108-155	10/26/2011	1	161-162
Summary of Record on Appeal	10/27/2011	2-26	163-5026
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

DOCUMENT	DATE	VOL	JA NO.
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	12/15/2011	27	5062-5083
Kobeh Valley Ranch's Joinder in the State of Nevada and Jason King's Partial Motion to Dismiss	12/15/2011	27	5084-5086
Petition for Judicial Review	12/29/2011	27	5087-5091
Petition for Judicial Review	12/30/2011	27	5092-5097
Summons and Proof of Service, The State of Nevada	01/11/2012	27	5098-5100
First Additional Summons and Proof of Service, State Engineer, Division of Water Resources	01/11/2012	27	5101-5103
First Amended Petition for Judicial Review	01/12/2012	27	5104-5111
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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.

/s/ KAREN A. PETERSON
KAREN A. PETERSON, NSB #366
ALLISON, MacKENZIE, PAVLAKIS,
WRIGHT & FAGAN, LTD.
P.O. Box 646
Carson City, NV 89702

Attorneys for Appellant,
EUREKA COUNTY

Case No.: CV1202-170

Dept. No.: 2

Ross E. de Lipkau, NSB No. 1628
John R. Zimmerman, NSB No. 9729
PARSONS BEHLE & LATIMER
50 West Liberty Street, Suite 750
Reno, NV 89501
Ph: 775.323.1601
Em: rdelipkau@parsonsbehle.com

Francis M. Wikstrom, *Pro Hac Vice*
UT Bar No. 3462
201 South Main Street; Suite 1800
Salt Lake City, UT 84111
Ph: 801.532.1234
Em: fwikstrom@parsonsbehle.com
ecf@parsonsbehle.com

Attorneys for Respondent
KOBEH VALLEY RANCH, LLC

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.

ANSWER TO PETITION FOR JUDICIAL REVIEW

COMES NOW, Respondent Kobeh Valley Ranch, LLC, the real party in interest (hereinafter "KVR") and files its Answer to Kenneth F. Benson, an individual, Diamond Cattle

Company, LLC, and Michel and Margaret Ann Etcheverry Family, LP's Petition for Judicial Review. Petitioners will hereinafter be referred to as Benson, et al.

1. KVR admits the allegations contained within paragraph 1 of Benson, et al.'s Petition for Judicial Review.

2. KVR does not have sufficient information or knowledge as to the truth or falsity of the allegations contained within paragraph 2 of Benson, et al.'s Petition for Judicial Review, so therefore denies the allegations therein.

3. KVR does not have sufficient information or knowledge as to the truth or falsity of the allegations contained within paragraph 3 of Benson, et al.'s Petition for Judicial Review, so therefore denies the allegations therein.

4. KVR admits the allegations contained within paragraph 4 of Benson, et al.'s Petition for Judicial Review.

5. KVR admits the allegations contained within paragraph 5 of Benson, et al.'s Petition for Judicial Review.

6. KVR admits the allegations contained within paragraph 6 of Benson, et al.'s Petition for Judicial Review.

7. KVR admits the allegations contained within paragraph 7 of Benson, et al.'s Petition for Judicial Review.

8. KVR is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within paragraph 8 of Benson, et al.'s Petition for Judicial Review.

9. KVR admits the allegations contained within paragraph 9 of Benson, et al.'s Petition for Judicial Review.

10. KVR admits that Benson, et al. filed a brief, but denies the remaining allegations contained within paragraph 10 of Benson, et al.'s Petition for Judicial Review.

11. KVR admits the allegations contained within paragraph 11 of Benson, et al.'s Petition for Judicial Review.

12. KVR admits the allegations contained within paragraph 12 of Benson, et al.'s Petition for Judicial Review.

13. KVR admits the allegations contained within paragraph 13 of Benson, et al.'s Petition for Judicial Review.

14. KVR admits the allegations contained within paragraph 14 of Benson, et al.'s Petition for Judicial Review.

15. KVR admits the allegations contained within paragraph 15 of Benson, et al.'s Petition for Judicial Review.

16. KVR admits the allegations contained within paragraph 16 of Benson, et al.'s Petition for Judicial Review.

17. KVR admits the allegations contained within paragraph 17 of Benson, et al.'s Petition for Judicial Review.

18. KVR admits the allegations contained within paragraph 18 of Benson, et al.'s Petition for Judicial Review.

19. KVR admits the allegations contained within paragraph 19 of Benson, et al.'s Petition for Judicial Review.

20. KVR admits the allegations contained within paragraph 20 of Benson, et al.'s Petition for Judicial Review.

21. KVR admits the allegations contained within paragraph 21 of Benson, et al.'s Petition for Judicial Review.

22. KVR denies the allegation contained within paragraph 22 of Benson, et al.'s Petition for Judicial Review.

23. KVR denies the allegation contained within paragraph 23 of Benson, et al.'s Petition for Judicial Review.

24. KVR denies the allegation contained within paragraph 24 of Benson, et al.'s Petition for Judicial Review.

25. KVR denies the allegation contained within paragraph 25 of Benson, et al.'s Petition for Judicial Review.

26. KVR denies the allegation contained within paragraph 26 of Benson, et al.'s Petition for Judicial Review.

AFFIRMATIVE DEFENSES

1. Petitioners have failed to state a claim upon which relief may be granted.

2. Petitioners' relief is barred by the doctrine of latches and doctrine of waiver.

3. Petitioners are barred from seeking relief pursuant to the applicable statute of limitations.

4. Respondent Nevada State Engineer, in Ruling 6127, issued such ruling upon substantial evidence with Petitioners being given the liberal right to present any and all documents, and testimony they so chose during the administrative hearing.

5. Petitioners are estopped from asserting, and waived their arguments and claims by failing to produce any evidence whatsoever in support of their protests.

6. Petitioner Ken Benson protested only applications 79934-79939 and accordingly, Benson's is prohibited from appealing the other applications.

7. Petitioners Etcheverry LP and Diamond Cattle did not protest any applications and therefore are barred from appealing any applications.

WHEREFORE, Respondent KVR respectfully prays that this Court enter an Order as follows:

1. Affirming, in its totality Ruling 6127;

3. Awarding KVR costs of suit and attorney's fees;

4. For such other and further relief as the Court deems just and proper.

AFFIRMATION

The undersigned hereby affirms that this document does not contain a social security number.

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Dated: February 17, 2012

PARSONS BEHLE & LATIMER

By: _____

Ross E. de Lipkau, NV Bar No. 1628
John R. Zimmerman, NV Bar No. 9729
50 W. Liberty Street; Suite 750
Reno, NV 89501
Ph: 775.323.1601
Em: rdelipkau@parsonsbehle.com
Em: jzimmerman@parsonsbehle.com

Francis M. Wikstrom, *Pro Hac Vice*
UT Bar No. 3462
201 South Main Street; Suite 1800
Salt Lake City, UT 84111
Ph: 801.532.1234
Em: fwikstrom@parsonsbehle.com
ecf@parsonsbehle.com

Attorneys for Kobeh Valley Ranch

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 23rd day of February, 2012, I served a true and correct copy of the foregoing **ANSWER TO PETITION FOR JUDICIAL REVIEW (CASE NO. CV1202-170)** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as follows:

Theodore Beutel, Esq.
EUREKA COUNTY DISTRICT ATTORNEY
701 S. Main Street
PO Box 190
Eureka, NV 89316
Email: tbeutel.ecda@eurekanv.org

Attorneys for Eureka County

Karen A. Peterson, Esq.
ALLISON & MACKENZIE
402 N. Division Street
Carson City, NV 89702
Email: kpeterson@allisonmackenzie.com

Attorneys for Eureka County

Therese A. Ure, Esq.
SCHROEDER LAW OFFICES, P.C.
440 Marsh Avenue
Reno, NV 89509
Email: therese@water-law.com

Attorneys for Benson, Diamond Cattle Company, and Etcheverry Family

Bryan L. Stockton,
Senior Deputy Attorney General
NEVADA ATTORNEY GENERAL'S OFFICE
100 North Carson Street
Carson City NV 89701
EMail: bstockton@ag.nv.gov

Attorneys for Nevada State Engineer

Gordon H. DePaoli, Esq., and
Dale E. Ferguson, Esq.
WOODBURN AND WEDGE
6100 Neil Road; Suite 500
PO Box 2311
Reno, NV 89505
EMail: gdepaoli@woodburnandwedge.com

Attorneys for Conley Land & Livestock, and Morrison

Rose Dunnell

Employee of Parsons Behle & Latimer

CATHERINE CORTEZ MASTO
Attorney General
BRYAN L. STOCKTON
Senior Deputy Attorney General
100 N. Carson Street
Carson City, Nevada 89701
Telephone: 775-684-1228
Facsimile: 775-684-1103
Attorneys for Respondents
State Engineer

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
Case No.: CV 1112-164
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, DEPARMENT 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

Affirmation pursuant to NRS 239B.039
The undersigned does hereby affirm that the following document does not contain the social security number of any person.

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Carson City, Nevada 89701-4717

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
Case No.: CV 1112-165

Dept. No.: 2

ANSWERING BRIEF

COMES NOW, JASON KING, P.E., State Engineer, in his official capacity by and through their counsel, Attorney General CATHERINE CORTEZ MASTO and Senior Deputy Attorney General BRYAN L. STOCKTON, hereby submits their Answering Brief in the above entitled matter.

DATED this 24th day of February 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
BRYAN L. STOCKTON
Nevada State Bar #4764
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Attorneys for Respondent,
Nevada State Engineer

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

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I. INTRODUCTION

In Ruling 6127, the State Engineer approved applications to change existing Diamond Valley and Kobeh Valley water rights and approved new appropriations of water rights within Kobeh Valley for use at the proposed Mount Hope Mine. Numerous restrictions and conditions were placed on the water rights including but not limited to no water can be developed until a monitoring, management and mitigation plan is approved, no water developed within Diamond Valley can leave the basin, and the total water that may be developed for the project is limited to 11,300 acre-feet annually from both basins. The State Engineer further found that the requirements for interbasin transfer of water from Kobeh Valley to Diamond Valley had been met, that no unreasonable impacts would occur, and that any impacts that may manifest from the use of the water could be mitigated.

II. ISSUES ON APPEAL

1. Can the State Engineer use Perennial Yield to Determining Water Available for Appropriation?
2. Is Actual Capture of Evapotranspiration Required?
3. Will the Kobeh Valley Appropriation Exceed the Perennial Yield?
4. Did the State Engineer Improperly Rely on the Groundwater Model as well as the Other Evidence Available?
5. Was the State Engineer was Capable of Interpreting the Groundwater Model?
6. Did the State Engineer Properly Evaluate the Interbasin Transfer of Water from Kobeh Valley to Diamond Valley?
7. Can the State Engineer use Monitoring, Management and Mitigation Plans to Manage Water in the State of Nevada?
8. Did the State Engineer Take any Property Interest from the Petitioners?
9. Were the Applications Adequate?
10. Did Kobeh Valley Ranch (KVR) Demonstrate its Financial Ability to Carry Out the Project?

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11. Did the State Engineer Properly Consider Domestic Wells, Existing Rights, and the Public Interest in Ruling?

12. Can the State Engineer Consider Applications and Change Applications at the Same Time?

13. Does the State Engineer have the Discretion to Determine the Adequacy of a Basin Inventory?

III. FACTS

The applications at issue before the State Engineer fell into three basic categories:

1. Applications 72695 thru 72698, 73545 thru 73552, and 74587 were filed as new appropriations with the State Engineer to appropriate 22.28 cubic feet per second not to exceed 16,000 acre-feet annually of underground water for mining, milling and dewatering purposes. The Applicant later requested that the total water needed for the project is 11,300 acre-feet annually. ROA SE 2-3.

2. Applications 75988 thru 76004, 76005 thru 76009, 76483 thru 76486, 76744, 76745, 76746, 76989 and 76990 were filed to change the point of diversion, place of use and manner of use of existing water rights to mining, milling and dewatering purposes. ROA SE 3-4.

3. Applications 76802 thru 76805, 77171, 77174, 77175, 77525, 77526, 77527, 77553, 78424 and 79911 thru 79942 were all filed to change the applications referenced in facts one or two above. ROA SE 4-5.

Various applications were timely protested by David Stine (Conley Land and Livestock, LLC, as Successor), Eureka County, Lloyd Morrison, Cedar Ranches, LLC, Lander County, Kenneth F. Benson, and Baxter Glenn Tackett. ROA SE 5-11.

The applications sought to procure sufficient water for a molybdenum mine near Mount Hope on the border between Kobeh Valley and Diamond Valley, approximately 25 miles northwest of the Town of Eureka. ROA SE 11-12.

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The procedural history in the matter is that:

> On October 13-17, 2008, the State Engineer held an administrative hearing in the matter of applications filed to appropriate or change underground water to support the Mount Hope mining project. Some of the applications were approved and others were denied by State Engineer's Ruling No. 5966, issued March 26, 2009. The ruling was appealed to district court in accordance with NRS § 533.450. The Seventh Judicial District Court vacated Ruling No. 5966 in its Order entered April 21, 2010.

ROA at SE 12. The hearing on remand was held before the State Engineer on December 6, 7, 9 and 10, 2010. The State Engineer granted a Motion to adopt the previous record from the hearing of October 13-17, 2008. ROA SE 12. The State Engineer held an additional day of hearing on May 10, 2011 to consider additional information on water usage at the mine. ROA SE 12.

A central issue in this case is whether the pumping in Kobeh Valley will affect water rights in Diamond Valley. The State Engineer first designated the Diamond Valley Hydrographic Basin as in need of additional management by State Engineer's Order 277 dated August 2, 1964.[1] The basin designation was later amended by State Engineer's Order 541, which noted that the basin had 30,000 acre-feet annually of recharge and 127,526 acre-feet annually of permitted water rights.[2] State Engineer's Order 541 further noted that although 32,650 acres were permitted with water rights, only 17,000 acres had actually been irrigated that year. *Id.* The State Engineer ordered that all applications to appropriate new water rights would be denied in the main agricultural area. The State Engineer has additionally issued Order 809 on December 1, 1982 which requires totalizing meters be placed on all wells.[3]

Since the Diamond Valley Hydrographic Basin is fully appropriated the only way to obtain water rights in that basin would be through the purchase of existing rights.

The State Engineer examined the Diamond Valley flow system, which includes; Monitor Valley South, Monitor Valley North, Kobeh Valley, Antelope Valley, Stevens Basin, Pine Valley,

[1] Available at http://images.water.nv.gov/images/orders/277o.pdf
[2] Available at http://images.water.nv.gov/images/orders/541o.pdf
[3] Available at http://images.water.nv.gov/images/orders/809o.pdf

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and Diamond Valley. ROA SE 15. Diamond Valley is the terminus of the groundwater flow system. Groundwater flows from South Monitor Valley to North Monitor Valley, then to Kobeh Valley, and finally to Diamond Valley. ROA SE 15. Estimates of subsurface interbasin flow between the basins are uncertain, therefore, the State Engineer limited the perennial yield of all the basins in the Diamond Valley flow system to the amount of estimated evapotranspiration in each basin in order to leave interbasin flows undiminished and to avoid double counting interbasin flows for the purposes of appropriation. ROA SE 16. Although the precise amount of subsurface flow is uncertain, all evidence supports the finding that the flow between Kobeh Valley and Diamond Valley is minimal (less than 1000 acre-feet).

The State Engineer received both testimony and, as directed by this court, the groundwater flow model submitted to the Bureau of Land Management as part of the Environmental Impact Study. The State Engineer also reviewed past studies conducted in the Diamond Valley flow system. The model demonstrated that there would be an increase in subsurface flow of 15 acre-feet annually from Kobeh to Diamond Valley as a result of the mining project and its associated pumping. ROA SE 19. The State Engineer also found that:

> Water level drawdown due to simulated mine pumping is thoroughly documented. Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. However, additional drawdown at that same location due solely to continuing agricultural pumping in Diamond Valley is predicted to be about 90 feet.

ROA at SE 19-20. The State Engineer found that although Eureka County's experts "testified that the model has shortcomings, [they] failed to present convincing evidence that the model predictions are not substantially valid." ROA SE 20. The State Engineer found that mining operations in Kobeh Valley would not conflict with existing rights in Diamond Valley and that drawdown in Diamond Valley will not have an unreasonable impact on existing water rights and domestic wells. ROA SE 20.

Considerable evidence was presented concerning the effect of mine pumping on Henderson, Vinini Creeks and Roberts Creek. ROA SE 21. The State Engineer accepted "the expert opinions of the Applicant that mine pumping is unlikely to affect streamflow in Roberts,

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Carson City, Nevada 89701-4717

Henderson or Vinini Creek and found that the applications will not conflict with existing rights on those streams." ROA SE 21-22. However, to ensure existing water rights are not unreasonably impacted, he required 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. ROA SE 22.

The State Engineer found that the groundwater flow model predicts water table drawdown at the end of mine life of three feet or more in the general mine area. ROA SE 22. "Drawdown of ten feet or less extends westerly to the Bobcat Ranch and southerly to the Antelope Valley boundary." ROA SE 22. The State Engineer recognized that water rights on the valley floor could potentially be impacted. However, the duty of water associated with these water rights is small and can be easily mitigated by KVR. ROA SE 22. The State Engineer held that he would order mitigation to be taken if and when impacts appear. ROA SE 23.

The State Engineer made detailed findings concerning the public interest:

> The State Engineer has found that the Applicant has demonstrated a need for the water and a beneficial use for the water and it does not threaten to prove detrimental to the public interest to allow the use of the water for reasonable and economic mining and milling purposes as proposed. The Applicant has acquired about 16,000 afa of existing water rights within Kobeh Valley and requires 11,300 afa for its project. The Applicant has confirmed its commitment to developing this project, has demonstrated the ability to finance the project, and will be required to monitor any groundwater development. Water level drawdown due to simulated mine pumping is thoroughly documented. Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. In regards to the importance of mining, Protestant Eureka County testified that mining is a life blood of Eureka County and that Eureka County has and always will be a mining and agricultural county. In addition, Protestant Eureka County indicated that the mine will provide an economic benefit in the form of increased employment and tax revenue for the county. The State Engineer finds under these facts and circumstances the proposed use of the water does not threaten to prove detrimental to the public interest.

ROA at 22-23.

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Attorney General's Office
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The State Engineer considered the criteria that must be satisfied to grant an interbasin transfer. The State Engineer found that the Diamond Valley Hydrographic Basin is fully appropriated, no water may be exported from Diamond Valley and that the permit terms would restrict the use of Diamond Valley water to Diamond Valley ROA SE 24.

The applications seek to develop 11,300 acre-feet annually from the Kobeh Valley Hydrographic Basin. Very limited water use was permitted from Diamond Valley Hydrographic Basin (385 acre-feet annually). ROA SE 24, 26. Water will be used to dewater the mine pit, in the milling circuit, and to transport tailings as a slurry to the tailings facility in Kobeh Valley. ROA SE 25-26. The State Engineer found that there was sufficient "groundwater to satisfy the demands of the mining project without exceeding the perennial yield of Kobeh Valley," and that KVR had demonstrated a need to import water. ROA SE 26. The State Engineer found that the Applicant justified the need to import water to Diamond Valley from points of diversion located within the Kobeh Valley Hydrographic Basin. ROA SE 26.

The State Engineer next considered whether "a plan for conservation of water is advisable for the basin into which the water is to be imported . . . ." (NRS 533.370 (3)(b)) and determined that "additional plans for water conservation [are] not necessary." ROA SE 27. Based on the evidence and testimony provided, the State Engineer found that the interbasin transfer of water is environmentally sound for the basin of origin.

The State Engineer has consistently held:

> that the meaning of 'environmentally sound' for basin of origin must be found within the parameters of Nevada water law and this means that whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources."

ROA SE 27-28.

The State Engineer found that the committed water rights in Kobeh Valley, including those held by KVR equals 12,400 acre-feet annually. The State Engineer determined that the perennial yield of the Kobeh Valley Hydrographic Basin was 15,000 acre-feet annually.

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Therefore, the amount of existing committed ground water rights is less than the amount of water that replenishes the basin on an annual basis. ROA SE 16. The State Engineer also found that there are seventy-one water-righted springs within the Kobeh Valley Hydrographic Basin. ROA SE 28. Twenty-nine of the springs are subject of claims by the United States Bureau of Land Management (BLM) who settled with KVR based on a monitoring and mitigation plan. ROA SE 28. The records showed that "none of the remaining water rights are owned by any of the Protestants in this matter. Most of the remaining springs are either located far away from the proposed well sites or will not be affected due to topography and geology." ROA SE 28. The State Engineer also took notice of conflicts that may occur:

> However, the Applicant's groundwater model does indicate that there may be an impact to several small springs located on the valley floor of Kobeh Valley near the proposed well locations. These small springs are estimated to flow less than 1 gallon per minute. Because these springs exist in the valley floor and produce minimal amounts of water, any affect caused by the proposed pumping can be easily mitigated such that there will be no impairment to the hydrologic related natural resources in the basin of origin. The monitoring, management and mitigation plan will allow access for wildlife that customarily uses the source and will ensure that any existing water rights are satisfied to the extent of the water right permit.

ROA SE 28. The State Engineer found that with proper management and mitigation, "the proposed interbasin transfer of groundwater from the Kobeh Valley Hydrographic Basin remains environmentally sound throughout the life of the project." ROA SE 28-29.

In reviewing the long-term economic impact on Kobeh Valley, the State Engineer noted that "mining is one of the larger industries in Nevada and has traditionally provided many high-paying jobs for local communities and has contributed to the communities in other ways such as investing in infrastructure and services for those communities." ROA SE 29. The State Engineer found the water rights granted "in Kobeh Valley is less than the estimated perennial yield of the basin; therefore, substantial water remains within the basin for future growth and development." ROA at 30. Of the 15,000 acre-feet annual perennial yield, 12,400 is currently permitted, which leaves 2,600 acre-feet annually for potential

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development. The State Engineer compared this with current usage in that "the Town of Eureka currently reports a usage of about 175 [acre-feet annually] out of about 1,226 [acre-feet annually] of available water rights." ROA SE 30.

The State Engineer declared a number of water rights forfeited and KVR has not challenged those forfeitures. Eureka County herein challenges the State Engineer's refusal to forfeit water rights associated with the Bartine or Fish Creek Ranch. The State Engineer found that clear and convincing evidence was not presented to support forfeiture of these water rights. ROA SE 32.

Morrison, Conley and "Benson, offered testimony that the water level has been falling at a fairly steady rate of decline in Diamond Valley . . . ." ROA SE 36-37. The State Engineer found that the decline in water levels is due to current agricultural pumping in Diamond Valley. ROA SE 37. The State Engineer found that "[t]he scientific evidence, including hydrologic studies and groundwater modeling, estimated future effects and this evidence shows that no unreasonable impacts [from KVR] will occur in Diamond Valley as a result of pumping in Kobeh Valley." ROA SE 37.

IV. STANDARD OF REVIEW

The State Engineer is appointed by and is responsible to the Director of the Nevada Department of Conservation and Natural Resources and performs duties prescribed by law and by the Director of the Department. NRS 532.020 532.110. Those duties include administering the appropriation and management of Nevada's public water, both surface and ground water, under NRS Chapters 533 and 534. The State Engineer must be a "licensed professional engineer pursuant to the provisions of chapter 625 of NRS and . . . have such training in hydraulic and general engineering and such practical skill and experience as shall fit him for the position." NRS 532.030.

Pursuant to NRS 533.450(9), "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." On appeal the function of this Court is to review the evidence on which the State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the Court is

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bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). Benson et al. cite the Nevada Administrative Procedures Act (NAPA) in connection with the standard of review. However, decisions of the State Engineer are specifically exempted from the NAPA. NRS 233B.039(1)(j).

Review of a decision of the State Engineer is in the nature of an appeal and is, consequently, limited in nature. NRS 533.450(1) states in pertinent part:

> Any person feeling himself aggrieved by any order or decision of the State Engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal . . . .

This Court has interpreted these provisions to mean that a petitioner does not have a right to de novo review or to offer additional evidence at the district court. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also*, *Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943) (a court may construe a prior judgment, but cannot properly consider extrinsic evidence); *State Engineer v. Curtis Park*, 101 Nev. at 32, 692 P.2d at 497 (function of court is to review evidence relied upon and ascertain whether evidence supports order); *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) (court should not substitute its judgment for that of the State Engineer).

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, an agency's view or interpretation of its statutory authority is persuasive, even if not controlling. *State Engineer v. Morris*, 107 Nev. at 701, 819 P.2d at 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.*

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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).

V. ARGUMENT

A. PERENNIAL YIELD

1. Perennial Yield is the State Engineer's Method of Determining Water Available for Appropriation.

The method to determine the best balance between these two goals is to determine the perennial yield. "In determining the amount of groundwater available for appropriation in a given hydrographic basin, the State Engineer relies on available hydrologic studies to provide relevant data to determine the perennial yield of a basin." ROA SE 14. The definition of perennial yield is important and the State Engineer has set out the requirements clearly:

> The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less. If the perennial yield is exceeded, groundwater levels will decline and steady-state conditions will not be achieved, a situation commonly referred to as groundwater mining. Additionally, withdrawals of groundwater in excess of the perennial yield may contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield of wells, increase in cost due to increased pumping lifts, and land subsidence.

ROA SE 14-15. The State Engineer utilized discharge calculations to determine the perennial yield. ROA SE 16 ("to establish safe and conservative perennial yields in these basins, the perennial yield of each of the basins will be equal to the basin's groundwater [evapotranspiration]."). This method has been an accepted scientific tool both before and since the Reconnaissance Series was first published in the 1960's. See, Rush and Everett, *Ground Water Resources – Reconnaissance Series, Report 30*, Geological Survey, United States Department of the Interior, November 1964.[4] The State Engineer established this method to avoid any effect on the interbasin flows as a result of appropriation and pumping of the

[4] Case No. CV0904-122, ROA at 1071. Available at http://images.water.nv.gov/images/publications/recon%20reports/rpt30_monitor_antelope_kobeh_valley.pdf

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perennial yield. ROA SE 16. ("In this way, subsurface flow into or out of a basin will not be included in its perennial yield . . . "). Benson curiously asserts that the State Engineer failed to consider interbasin flows. Benson Opening Brief at 30, 33-34. However, as stated above, the State Engineer specifically utilized evapotranspiration as a measure of perennial yield to avoid any impact on interbasin flows. Benson's arguments in this regard are wholly without merit.

Benson, also rely on a non-existent study that is in progress by the United States Geological Survey (USGS). Benson Opening Brief at 32-33. NRS 533.024 (1)(c) was adopted by the Legislature "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." (emphasis added). There is no requirement for the State Engineer to wait for information that may or may not have an impact on the decision. In this case, the State Engineer specifically lowered the perennial yield to ensure there would be no impact on interbasin flows and makes it unlikely that any future USGS study cited by Benson will impact the decision of the State Engineer.

The State Engineer adjusted the perennial yield of the valleys in the Diamond Valley flow system based on the evidence presented and his own decision that only evapotranspiration should be considered in determining perennial yield. Eureka County objects to the changes in perennial yield. Eureka County Opening Brief at 29. However, the discretion to change the perennial yield is solely at the discretion of the State Engineer and is made based on the scientific evidence before him. NRS 533.024(1)(c). Because of interbasin flow, the State Engineer could not adjust one valley without changing the perennial yield of the other valleys in the Diamond Valley Flow system. The State Engineer found that to adjust one valley without adjusting the others would result in inaccurate perennial yield figures and possible double counting of recharge. ROA SE 16-17. There is no statutory limitation on the State Engineer's discretion to determine perennial yield. The State Engineer's findings on perennial yield are supported by substantial evidence. The findings on perennial yield are nearly identical to those found for evapotranspiration by Rush and Everett. *Reconnaissance Series, Report 30*, table

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6, p. 18.[5] As the findings of the State Engineer are supported by substantial evidence, they must be affirmed. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

2. Actual Capture of Evapotranspiration Cannot be used to Determine Water Available for Appropriation.

As acknowledged by Eureka County, the idea behind the capture of evapotranspiration is that pumping will lower the water table until the top of the aquifer is below the root zone of the phreatophytes and evapotranspiration will cease. Eureka County Opening Brief at 27-28. The basin will then reach a steady state wherein pumping and recharge are exactly equal on over time.

Eureka County, once again argues that an appropriator cannot appropriate water that is currently being transpired by phreatophytes since the plants will continue to use the water until the water table is lowered and thus, the basin will be overpumped or mined. Eureka County Opening Brief at 27. Acceptance of this argument will lead to absurd results. If ground water appropriations were limited by this concept, it would be virtually impossible to develop groundwater in Nevada.

The pumping of groundwater in Nevada almost always involves pumping some water from transitional storage and this is NOT groundwater mining. **Eureka County has filed their protest ostensibly to protect the existing irrigators within Diamond Valley, but has put forth an argument that if accepted, would eliminate all irrigation in Diamond Valley.** The Eureka County argument defies basic hydrologic principles and is illogical. Groundwater budgets are generally calculated under pre-development conditions where the groundwater system is in long-term equilibrium; that is the amount of water recharge to the system is approximately equal to the amount of water discharging from the system. Humans often change the pre-development system by withdrawing (pumping) water for use. Pumping must be supplied from (1) increased recharge, (2) decreased discharge, (3) removal of water from storage, or some combination of these three.

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[5] Case No. CV0904-122, ROA at 1086.

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Currently in Diamond Valley, large amounts of groundwater are being removed from storage as evidenced by a declining water table of 2-4 feet per year throughout most of the irrigated areas. ROA 2413. Regardless of the amount of water initially pumped from a well, that initial water always comes from storage and the water level in the well will drop and a cone of depression around the well will be established. NRS 534.110(4)("It is a condition of each appropriation of groundwater acquired under this chapter that the right of the appropriator relates to a specific quantity of water and that the right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion."). This is a necessary part of well development to induce a flow of water to the well, without which no water could be developed from the well. The change in storage in response to pumping is almost always transient as the system adjusts to the pumping. If the perennial yield is not exceeded, the system will eventually reach a new equilibrium and the changes to storage will stop and pumpage will then again be equal to the increased recharge plus the decreased discharge. Eureka County has intentionally ignored these basic and accepted hydrologic principles to confuse the court and cannot be taken seriously.

The initial studies of Kobeh Valley were conducted by Rush and Everett in Reconnaissance Report 30 in 1964.[6] The Reconnaissance Report estimated that 2,700,000 acre feet of water were contained in the groundwater aquifer under Kobeh Valley. Rush and Everett.[7] This water provides what is referred to above as transitional storage and may be pumped until the basin reaches steady state. NRS 533.371(4) allows the State Engineer to appropriate water from a "proposed source of supply without exceeding the perennial yield or safe yield of that source. . ."

Eureka County argues that the mine will not be able to capture all evapotranspiration over the life of the mine and therefore, no water may be appropriated. KVR was granted change applications for approximately 5,007.64 acre-feet annually of permanent irrigation water rights. These water rights were permanent water rights and retain that character when

[6] Case No. CV0904-122, ROA at 1086
[7] Case No. CV0904-122, ROA at 1096.

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transferred to the mine. When the mine ceases operations, these rights may be transferred back to irrigation uses and put to beneficial use once again and can be pumped until the basin reaches the steady state condition. NRS 533.040(2)

As stated above, the State Engineer utilizes evapotranspiration to determine perennial yield and that amount of water is available for appropriation is entitled to deference from the court. "While not controlling, an agency's interpretation of a statute is persuasive." *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)(*Citing, Nevada Power Co. v. Public Serv. Comm'n*, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986)).

The Legislature has declared that "all water may be appropriated for beneficial use as provided in this chapter and not otherwise." NRS 533.030(1). The logic of Eureka County's argument is absurd, and would defeat the legislative intent and must be rejected.

3. The Appropriations Will Not Exceed the Perennial Yield

The State Engineer reviewed conflicting evidence and studies to determine the perennial yield of the Kobeh Valley Hydrographic Basin. "To resolve these issues with interbasin flow and to establish safe and conservative perennial yields in these basins, the perennial yield of each of the basins will be equal to the basin's groundwater [evapotranspiration]." ROA SE 16. Based on the available data the State Engineer established the perennial yield of the Kobeh Valley Hydrographic Basin at 15,000 acre-feet annually. ROA SE 16.

KVR purchased the bulk of the rights in Kobeh Valley. However, there remained 1,100 acre-feet annually of existing water rights belonging to other parties within the Kobeh Valley Hydrographic Basin. ROA SE 18. KVR's new appropriations and change applications sought "a total combined duty of 11,300 afa from Kobeh Valley." ROA SE 18, *See also,* ROA SE 44. The total committed ground-water resources in Kobeh Valley including the KVR changes and new appropriations total approximately 12,400 acre-feet annually, which is less than the perennial yield of 15,000 acre-feet annually. ROA SE 18. These determinations by the State Engineer are supported by substantial evidence and must be affirmed.

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B. THE MODEL.

1. The State Engineer Placed the Proper Amount of Reliance on the Groundwater Model as well as the Other Evidence Available.

This Court's remand was specifically for the State Engineer to receive and review the model submitted by the Applicant to the Bureau of Land Management (BLM.). Order in case CV0904-122, p.15. The remand was specifically in response to Eureka County's assertions that the State Engineer could not make an informed decision without the model. Case CV0904-122, Eureka County Opening Brief pp. 18-19. Now Eureka County asserts that the State Engineer abused his discretion because he "relied heavily on the numerical model prepared and presented by KVR." Eureka County Opening Brief at 25. The State Engineer acknowledged that "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 SE 20.

The State Engineer made the specific factual finding that Eureka County's witnesses "failed to present convincing evidence that the model predictions are not substantially valid." ROA SE 20. Under NRS 533.450(9), "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." In addition, the court "must accord deference to the point of view of the trial judge since he had the opportunity to weigh evidence and evaluate the credibility of witnesses-an opportunity foreclosed to this court." *Harris v. Zee*, 87 Nev. 309, 311, 486 P.2d 490, 491 - 492 (1971).

The State Engineer's review of the model, and other evidence supported his factual findings that the permits should be issued. It would be highly improper for this Court to remand a case to the State Engineer to review a model and then determine exactly how much factual reliance the State Engineer can place on that model, and these arguments must be rejected.

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2. The State Engineer was Capable of Interpreting the Groundwater Model beyond the Drawing of a 10-foot Countour Line.

Eureka County and Benson place a tremendous amount of significance on the depiction of a 10-foot drawdown contour line in the model. The State Engineer found that the model allowed him to analyze the model beyond just the graphic depiction of the ten foot drawdown contour. "The Applicant's water level drawdown maps only show drawdown of ten feet or more, although the data files contain detailed information on drawdown to the fractions of a foot." ROA 20-21, . The State Engineer, as the agency charged with enforcing the water law is uniquely qualified to determine the amount of emphasis to place on the evidence presented by the parties. This Court should not direct the State Engineer to place emphasis on any one piece of evidence, including the 10-foot contour line, unless there is good reason therefore.

C. INTERBASIN TRANSFER

1. Statutory Standard For Interbasin Transfers

Nevada Revised Statute provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider:

> (a) Whether the applicant has justified the need to import the water from another basin;
> (b) If the State Engineer determines 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(3).

KVR requested interbasin transfers 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. However, only exportation of water from Kobeh Valley to Diamond Valley was allowed in the ruling.

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2. Need To Import Water

The groundwater for the project will come primarily from wells located in the Kobeh Valley Hydrographic Basin. "The mine project area straddles the basin boundary between Diamond Valley and Kobeh Valley and the proposed place of use also encompasses a small portion of Pine Valley." ROA at 25. Mining and milling operations will use 11,300 acre-feet annually. May 10, 2011 Trancript ROA 882. The State Engineer's specific findings in relation to the need to import water from Kobeh Valley to Diamond Valley were that:

> The Mt. Hope mine straddles the Diamond Valley - Kobeh Valley basin boundaries. The amount of water needed to dewater the pit is less than ten percent of the amount needed for the entire mining operation. Most of the groundwater will be used in the mine's milling circuit. The mill is to be located within Diamond Valley and the tailings storage facility is to be located within Kobeh Valley. Water in the tailings facility will then evaporate from the tailings, be recycled back to the mill, or permanently stored in the tailings facility.

ROA SE 26. The mill will be in Diamond Valley. KVR has some existing Diamond Valley water rights, however, those rights are insufficient to supply all the needs of the mining operation. KVR acquired over 16,000 acre-feet annually of existing water rights in Kobeh Valley and seeks to use only 11,300 acre-feet annually. May 10, 2011 Trancript ROA 882. The need for the water is self-evident in that the project cannot go forward without the water and none of the Petitioners challenges the State Engineer's findings in this regard.

3. Plan For Conservation Of Water

The State Engineer considered his discretionary decision as to whether "a plan for conservation of water is advisable for the basin into which the water is to be imported . . . ." NRS 533.370(3)(b). Eureka County and Benson argue that the State Engineer must impose a plan for conservation on the entire basin and every water user therein. The State Engineer disagrees with that interpretation of the statute. If the State Engineer determines a plan for conservation is advisable for the basin into which the water is imported, the State Engineer shall consider whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out. Since July 1, 1992, water conservation plans are required for any supplier of municipal and industrial water uses based on the climate and living

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conditions of its service area. NRS 540.151. The provisions of the plan apply only to the supplier's property and its customers. The Applicant is not a municipal supplier of water, there are no municipal and industrial purveyors in Kobeh Valley or Pine Valley and the KVR does not own or control the municipal water supply to the Town of Eureka in Diamond Valley or any other municipal or quasi-municipal water supply. Eureka County has a water conservation plan on file in the Office of the State Engineer for the Town of Eureka Water System, Devil's Gate GID District #1 and District #2, and Crescent Valley Town Water System.[8] The Applicant will use proven molybdenum mining and milling technologies that will conserve water through reuse and recycling methods. ROA 118.

The State Engineer properly considered and determined that municipal purveyors have adequate conservation plans in place and this provision does not apply to the agriculture users and the Applicant has no control over any municipality or agricultural user. Eureka County and Benson are misapplying this provision of the water law. The State Engineer's interpretation of this provision of the water law is entitled to deference, and is supported by substantial evidence.

4. Environmentally Sound

The State Engineer has consistently held:

> that the meaning of 'environmentally sound' for basin of origin must be found within the parameters of Nevada water law and this means that whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources."

ROA SE 27. The State Engineer found that KVR owned all existing water rights in Kobeh Valley, except 1,100 acre-feet annually. ROA SE 28. Adding these water rights to those approved for the mine equals 12,400 acre-feet annually which is less than the perennial yield of the Kobeh Valley Hydrographic Basin ROA SE 16. The State Engineer also found that there are seventy-one water-righted springs within the Kobeh Valley Hydrographic Basin.

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

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Twenty-nine of the springs are subject of claims by the United States Bureau of Land Management (BLM) who settled with KVR based on a monitoring and mitigation plan. The remaining springs are either located far away from the proposed well sites or will not be affected due to topography and geology." ROA SE 28. The State Engineer also took notice of conflicts that may occur:

> However, the Applicant's groundwater model does indicate that there may be an impact to several small springs located on the valley floor of Kobeh Valley near the proposed well locations. These small springs are estimated to flow less than 1 gallon per minute. Because these springs exist in the valley floor and produce minimal amounts of water, any affect caused by the proposed pumping can be easily mitigated such that there will be no impairment to the hydrologic related natural resources in the basin of origin. The monitoring, management and mitigation plan will allow access for wildlife that customarily uses the source and will ensure that any existing water rights are satisfied to the extent of the water right permit.
>
> The legislative history of NRS § 533.370(6)(c) shows that there was minimal discussion regarding the term environmentally sound. However, the State Engineer at that time indicated to the Subcommittee on Natural Resources that he did not consider the State Engineer to be the guardian of the environment, but rather the guardian of the groundwater and surface water. The State Engineer noted that he was not a range manager or environmental scientist. Senator Mark A. James pointed out that by the language 'environmentally sound' it was not his intention to create an environmental impact statement process for every interbasin water transfer application and that the State Engineer's responsibility should be for the hydrologic environmental impact in the basin of export.

ROA SE 27. Nevada's water law provideslittlelittle guidance to the State Engineer in defining whether the use of water is environmentally sound to the basin of origin. The State Engineer's limited focus on water issues is consistent with his enabling statutes. Concerns for the detailed analysis of impacts related to the mine project on the environment are properly handled by agencies designed for that purpose. It would be improper for the court to adopt Eureka County's definition of environmentally sound .

The United States Supreme Court faces a similar issue in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984). In that case, the congress left undefined the term "stationary source" when it enacted provisions of the Clean Air Act.

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Id. at 840. The appeals court had crafted a definition of the term and applied that definition to the facts at issue therein. *Id.* at 841. The Supreme Court reversed and held that:

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843. Substantial evidence supports the State Engineer's decision. The amount of water appropriated is less than the Perennial Yield and the State Engineer is requiring a Monitoring, Mitigation and Management Plan to monitor and identify potential impacts to water rights including potential spring sites. The plan provides for mitigation if impacts are seen and will provide for hydrologically related protections of both Kobeh and Diamond Valley. He determined based on ample and substantial evidence that "the proposed interbasin transfer of groundwater from the Kobeh Valley Hydrographic Basin [will remain] environmentally sound throughout the life of the project." ROA SE 28-29.

5. Other Relevant Factors

KVR acquired 616 acre-feet annually of existing water rights in Diamond Valley. ROA SE 249, 257, 265, 273, 283, 342, 352, 362, 372, and 430. The State Engineer noted that those water rights would be reduced to 385 acre-feet annually when considering the consumptive use reduction allowed by NRS 533.3703. Diamond Valley water is necessary to the project to account for inflow of water into the mine pit. May 10, 2011 Transcript ROA 865-866. However, the State Engineer found that the Diamond Valley Hydrographic Basin has "more committed groundwater rights in the form of permits and certificates than the estimated perennial yield of the basin.

> 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.

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ROA SE 25. The State Engineer denied the applications as far as they sought a transfer of water from Diamond Valley to Kobeh Valley. ROA SE 25. Diamond Valley water will have to be measured separately and accounted for as either used in Diamond Valley, or returned to the aquifer.

D. THE STATE ENGINEER IS NOT REQUIRED TO HAVE A COMPLETED MONITORING, MANAGEMENT, AND MITIGATION PLAN BEFORE RULING ON APPLICATIONS

The Project proposed by the Applicant is of a size and scope that justifies a comprehensive 3M Plan that will control development of the area long after the Applications are permitted. The State Engineer has required such plans to effectively manage other large-scale water development projects in Nevada, particularly for the mining industry. The 3M program is designed to promote sustainable development of the resource while protecting existing rights.

The data collected from the monitoring portion of the 3M Plan will allow the State Engineer to make real time assessments within the basin as well as making predictions as to the location and magnitude of any draw-downs that may occur in the future under different pumping regimes. The State Engineer found that in order to determine that the Applications will not conflict with existing rights a specific regulatory regime must be put in place to control Project development. 3M Plans are designed to be adaptable and this 3M Plan will change throughout the life of the project as data is collected and model outputs are analyzed.

Collected hydrologic data can be used in the groundwater model to identify potential areas of impact, to review the appropriate location of new wells, and to optimize pumping at current well locations without causing impacts. Stressing the aquifer by pumping will increase the model's predictive capability because longer term pumping stresses provide aquifer response parameter data. This information will provide the State Engineer with an important management tool throughout the project life.

The contention of both Eureka County and Benson that a 3M Plan must be approved before ruling on the Applications is not supported by Nevada water law. The Protestants in this matter have no legal authority to require a 3M Plan and no legal authority to decide when

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or if such a plan should be required. Such authority is reserved for the State Engineer, who often utilizes such plans as a management tool to effectively carry out his duties. Their attempt to usurp this authority from the State Engineer should be properly ignored by the Court. This proposed requirement by Eureka County and Benson would have a chilling effect on the development of any new projects in Nevada. This Applicant has already risked millions of dollars at the pre-development stage prior to approval of water right permits that will allow an initial 3M Plan to be developed at this point in time.

Both Eureka County and Benson rely heavily on *City of Reno v. Citizens for Cold Springs*, 126 Nev. ___, 236 P. 3d 10 (2010) for the proposition that the State Engineer cannot approve permits until the 3M plan is complete. However, the major difference between the two cases is that no authority requires the State Engineer to adopt a 3M plan.

The State Engineer has broad statutory authority under NRS § 534.110(6) to curtail pumping if the resource is being damaged, or protected domestic rights are being affected and such authority exists whether or not a 3M Plan is required by the State Engineer. The State Engineer takes seriously his responsibility to protect the water resources of Nevada. NRS § 533.030. He may order curtailment of pumping regardless of the effect on mining operations. NRS § 534.110(6). The State Engineer found that substantial evidence showed that the Diamond Valley would not be harmed by the transfer of existing water rights to the mining operations. The State Engineer has a number of tools to balance the basin. The most drastic measure would be to curtail pumping by the juniors appropriators until the resource comes into balance, not by shutting down the most unpopular users first. NRS § 533.110(6). Thus, the State Engineer exercised his discretion on how best to control water resources by ordering KVR to have an approved 3M plan prior to pumping water for mining operations.

In *Citizens for Cold Springs*, the Nevada Supreme Court reviewed actions by the Reno City Council to change zoning in the Cold Springs area in northern Reno. *Citizens for Cold Springs*, 236 P. 3d at 12. NRS 278.0282(1) required that "[b]efore the adoption or amendment of any master plan,... each governing body and any other affected entity shall submit the proposed plan or amendment to the regional planning commission." *Id.* at 16.

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"The City Council included a provision in Resolution 6712 that stated the amendments would only 'become effective upon a determination of conformance by the Regional Planning Commission.'" *Id.* The court held that the conditional approval by the city council met the intent of NRS 278.0282(1). *Id.* at 17.

In this case, no statute requires the State Engineer to adopt or impose a 3M plan. However, the State Engineer has the discretion to impose the requirement to develop a 3M plan prior to the commencement of mining operations. He did this as part of his duties to administer the water rights in the State of Nevada. NRS 534.110.

In *Citizens for Cold Springs*, the court also reviewed the 2008 version of Reno Municipal Code RMC § 18.06.404(d)(1)(b) (2008). The RMC required that "there are, or are planned to be adequate services and infrastructure to support the proposed zoning change and existing uses in the area. . . ." In *Citizens for Cold Springs* "the parties acknowledge[d] that the existing water and sewer services in Cold Springs [could not] support the proposed development and urbanization permitted by the change in zoning." *Citizens for Cold Springs*, 236 P. 3d at 17. The court held that "plain language, governing entities must make a finding during the zoning and planning stage of development about how officials plan to meet the water and infrastructure demands generated by the proposed zoning change." *Id.* at 18.

The problem with applying *Citizens for Cold Springs* to this case is that there is no statutory requirement to require the State Engineer to order the development of a 3M plan prior to granting permits. The State Engineer exercised his discretion to do so out of an abundance of caution and to assist him in protecting existing water rights from "undue interference with existing wells." NRS 534.110(8).

The effects of pumping on the aquifer are not certain and although the scientists do their best, no one really knows exactly what is happening in the aquifer. Rock formations that prevent water from moving in a certain direction can occur anywhere within the basin. ROA 1784-1785. Faults can change the direction of flow with no evidence being present on the surface. The monitoring plan will require monitoring wells to be drilled in areas that effects are expected to be. However, if the effects are not as expected, the 3M plan will have to be

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adjusted to determine where the effects are manifesting. New monitoring wells may have to be drilled or additional study may have to be conducted. The State Engineer is uniquely equipped to perform these functions and the court should not undertake to dictate a monitoring plan.

Recognizing that the Nevada Supreme Court has consistently refused to assign controlling authority to prior administrative decisions.

> Moreover, "even if the [agency] has failed to follow some of its prior decisions, the [agency] has not thereby abused its discretion. In Nevada, administrative agencies are not bound by stare decisis." *Motor Cargo v. Public Service Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992). Thus, no binding effect is given to prior administrative determinations.

Desert Irr., Ltd. v. State Engineer, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). Experience in other cases may provide examples to help the court in its review.

One current example is the case surrounding the famous Devils Hole Pupfish which is present only in Devils Hole in the Amargosa Valley of Nevada. The history of Devils Hole is well-documented. The United States Supreme Court described the early events that ultimately led to the current situation:

> Devil's [sic] Hole is a deep limestone cavern in Nevada. Approximately 50 feet below the opening of the cavern is a pool 65 feet long, 10 feet wide, and at least 200 feet deep, although its actual depth is unknown. The pool is a remnant of the prehistoric Death Valley Lake System and is situated on land owned by the United States since the Treaty of Guadalupe Hidalgo in 1848, 9 Stat. 922. By the Proclamation of January 17, 1952, President Truman withdrew from the public domain a 40-acre tract of land surrounding Devil's Hole, making it a detached component of the Death Valley National Monument. Proclamation No. 2961, 3 CFR 147 (1949-1953 Comp.).

Cappaert v. U. S., 426 U.S. 128, 131 (1976). The Supreme Court found that the federal reservation was established, in part, to preserve the Devils Hole pupfish for scientific purposes and that the federal reserved water right appurtenant to the withdrawn land must be protected. The U.S. Supreme Court did not require the State Engineer to provide a detailed 3M plan, but ruled that "[t]he pool need only be preserved, consistent with the intention

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expressed in the Proclamation, to the extent necessary to preserve its scientific interest. *Id.* at 141.

On remand, the federal district court ordered Nevada and the State Engineer, to keep water above "a daily mean water level of 2.7 feet below the copper washer. . . ." *United States v. Cappaert*, 455 F.Supp. 81, 81 (1978). The federal injunction only specifically covered pumping within 2½ miles of Devils Hole. *Id.* However, the State Engineer interprets that holding as requiring him to manage water within the Amargosa Desert Hydrographic Basin to maintain the water levels at Devils Hole. If the water levels are not maintained, a federal court could require the State Engineer to initiate regulation of the basin by priority or the federal court could step in to manage the groundwater basin itself without the benefit of the experienced personnel employed by the State Engineer to allow Nevada's citizens to use water, while still protecting Devils Hole.

Following an administrative hearing on certain applications to change points of diversion to a location closer to the Devils Hole in the Amargosa Desert Hydrographic Basin, the State Engineer issued Ruling 5902.[9] In that case, the United States Park Service protested the applications and asserted that moving the pumping centroid closer to Devils Hole would have an adverse impact on the federally reserved water right. State Engineer Ruling 5902, p. 9. The Applicants argued that geologic conditions between the Devils Hole and the proposed points of diversion that would prevent injury to the federally reserved water right. State Engineer Ruling 5902, pp. 17-18. The State Engineer allowed the changes to be made with the requirement that a monitoring plan be established to ensure the changes did not adversely affect the federally reserved water right. State Engineer Ruling 5902, p. 24.

Just as the federal courts have allowed the State Engineer to manage water in the area surrounding the federally reserved water rights at the Devils Hole, this Court must allow the State Engineer to manage water in the Kobeh and Diamond Valleys for the additional

[9] Available at http://images.water.nv.gov/images/rulings/5902r.pdf

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impact that may result from the KVR use of water.[10] To take away this authority will greatly limit the State Engineer's ability to properly manage the water resources of the state.

E. NO PROPERTY OR LIBERTY INTEREST HAS BEEN OR WILL BE TAKEN FROM APPELLANTS.

Benson asserts that they have been denied due process by the State Engineer in granting the applications with out a 3M plan in place without citation to any authority. Benson Opening Brief at 39. The Benson's property rights have not been taken as a result of his actions. In fact, despite the fact that no authority requires a 3M plan, the State Engineer ordered the development of the plan specifically to protect existing water rights. Since constitutional due process concerns are not involved, Appellants are left with the procedure adopted by the Legislature of the State of Nevada, which is more than adequate to protect existing water rights.

Due process generally applies when the government is taking a "life, liberty or property interest." U.S. Const. Amend. 14 §1. Basic notions of due process apply when a person is deprived of those rights. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(" This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."). The State Engineer considered evidence presented by both sides to determine whether the applications could be granted without conflicting with existing senior water rights. ROA SE 38. ("The State Engineer finds that the applications will not conflict with the Protestant's existing water rights.") Despite this finding, the State Engineer required KVR to develop a 3M plan to ensure that conflicts do not occur or if they do occur, that they can be mitigated or eliminated. Due process requires the State Engineer to provide notice and opportunity before taking property, but not before taking steps to protect property rights.

"[D]ecisions sustaining other land-use regulations, which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in

[10] The court is aware of the issues with water levels in Diamond Valley related to current agricultural pumping. The State Engineer is actively working with water right holders in Diamond Valley to improve the situation and bring the basin back into balance.

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property value, standing alone, can establish a 'taking' . . . ." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978) (citations omitted). The assertion that cattle may not gain as much weight if they walk a little farther to obtain water does not rise to the level of a taking. *See, Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'") If necessary, the State Engineer will protect the rights of senior appropriators to enforce their priority against junior appropriators in times of scarcity. NRS 534.110(6).

> It is the very essence of the doctrine of prior appropriation that as between persons claiming water by appropriation, he or she has the best right who is first in time, and that the prior appropriator is entitled to the water to the extent appropriated to the exclusion of any subsequent appropriator.

79 AM. JUR. 2D *Waters* § 351 (2002).

Eureka County argues that it needs information to supervise where and when KVR uses its water. However, no one is allowed to supervise the use of another's water rights. If the court were to allow such a common law remedy, it is likely that litigation would explode as neighbors would bring their disputes against each other to the State Engineer and the courts to supervise each other's use of water. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 566 (1972), the United States Supreme Court held that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Eureka County or anyone else can file a complaint with the State Engineer if KVR's use of water interferes with their water rights, but cannot assume day-to-day supervision over water rights.

Appellants Eureka County and Benson essentially assert that they have a property interest in the denial of the changes to existing water rights belonging to KVR. This is simply not the case. All water sources in the State belong to the public. NRS 533.025. Water that is not currently appropriated is available to be put to beneficial use. NRS 533.030. There is simply no property being taken from anyone. Ruling 6127 clearly protects and supports the

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existing water rights by requiring a monitoring, management and mitigation plan and notice that pumping must stop if it impacts on senior water rights.

1. ADEQUACY OF APPLICATIONS

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

However, the Protestants assert that the points of diversion being analyzed by the State Engineer are not the ultimate points of diversion used by the Applicants. The State Engineer recognizes that well locations may need to be adjusted to obtain water. *See, Bailey v. State Engineer*, 95 Nev. 378, 380, 594 P.2d 734, 735 (1979)("Bailey and her husband had difficulty locating a productive well, drilling three dry holes."). If the final location of the well is not within 300 feet of the original point of diversion and not within the same 160 acre "quarter, quarter section" as depicted on the original map, a change application is required. The State Engineer's interpretation of the statutes reflects "both reason and public policy. . . ." *Bacher v. State Engineer*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006).

The Protestants arguments place onerous and unreasonable requirements by adopting hyper-technical readings of the statutes to defeat KVR's applications and would cripple the ability of a project of this magnitude to move forward. Mining projects require flexibility in their plan of operations. The State Engineer's interpretation of the statute and methods for

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allowing water right applications to go forward based on the availability of water despite unknown changes that may occur is reasonable and should be affirmed.

2. FINANCIAL ABILITY

The State Engineer next considered whether KVR had the financial ability and reasonable expectation to construct the project. NRS § 533.370(1)(c). The State Engineer reviewed the evidence before him and made a summary of his findings in the ruling:

> The chief financial officer of General Moly, Inc. stated that the total expenditure of funds required for the project is $1,154,000,000. The Applicant has expended about $163,000,000 on such things as buying equipment, hydrology, drilling, engineering, permitting, land and water rights. General Moly, Inc. will provide 80% of the funding and partner POSCO, a Korean steel producer, will provide the remaining 20%. General Moly Inc. has arranged much of its financing through its Hanlong transaction. The Hanlong transaction includes a $665,000,000 bank loan from a Chinese bank sourced and fully guaranteed by Hanlong Group. It also includes an $80,000,000 purchase of 25% of General Moly's fully diluted shares, a $20,000,000 bridging loan from Hanlong Group, and a molybdenum supply agreement. Hanlong is a private Chinese company headquartered in Sichaun Province in China with experience in mining projects.

ROA SE 13-14, See also, ROA 3536-3571. NRS 533.370(1)(c)(2) requires proof satisfactory to the State Engineer of the Applicant's financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence. ROA SE 13. The State Engineer carefully considered the evidence presented by KVR and the diligence it had shown to date. Dec. 6, 2010 Transcript pp. 29-33. The State Engineer is not required to have proof that every dollar for the project is available at the onset of a project. The statute requires only a "reasonable expectation actually to construct the work. . . ." NRS 533.370(1)(c)(2) As such, the legislature directed the State Engineer to take a somewhat practical approach to examining financial ability. The findings of the State Engineer as to financial ability are supported by substantial evidence.

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3. PROTECTION OF EXISTING DOMESTIC WELLS

The Legislature has declared "that it is the policy of this State to recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable effects which are caused by municipal, quasi-municipal or industrial uses and which cannot be reasonably mitigated." NRS §533.024. The State Engineer granted no new rights in Diamond Valley, but only allowed the transfer of existing rights. ROA SE 249, 257, 265, 273, 283, 342, 352, 362, 372, and 430. The State Engineer has not changed the status quo in Diamond Valley and the fact that Eureka County feels otherwise may not be used as a basis for reversing the State Engineer, since his decision is based upon substantial evidence.

In addition, the State Engineer has ordered a Monitoring and Mitigation Plan to be implemented as a part of the mine operations. ROA SE 24. If unreasonable impacts upon domestic wells are detected, the State Engineer can order KVR to mitigate those effects as required by NRS 533.024. If the effects cannot be mitigated, the State Engineer can order KVR to cease pumping water that interferes with the existing domestic wells. Id. A water user who refuses to comply is subject to fines of up to $10,000 per day of violation. NRS 533.481(1)(a). The Legislature has given the State Engineer a number of tools to protect domestic water supplies. Finally, if Eureka County's unreasonable fears come to pass, and the State Engineer refuses to perform his statutory duties, the courts are also available to review the actions of the State Engineer. NRS §533.450.

4. PUBLIC INTEREST

The public interest requirement in NRS § 533.370(5) has become the favorite tool of litigators in water rights law. This case serves as a prime example. On the one hand we have farmers who want to grow alfalfa, even though there may not be enough water to keep them all in business indefinitely. On the other hand we have the world's largest molybdenum mine which can rely on the legislature's declaration that mining is important to the state. NRS § 519A.010(1)(a)("The extraction of minerals by mining is a basic and essential activity making an important contribution to the economy of the State of Nevada.").

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> Water level drawdown due to simulated mine pumping is thoroughly documented. Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. In regards to the importance of mining, Protestant Eureka County testified that mining is a life blood of Eureka County and that Eureka County has and always will be a mining and agricultural county. In addition, Protestant Eureka County indicated that the mine will provide an economic benefit in the form of increased employment and tax revenue for the county. The State Engineer finds under these facts and circumstances the proposed use of the water does not threaten to prove detrimental to the public interest.

ROA SE 23-24. This court can clearly see that the State Engineer has crafted his decision in a way that balances the competing interests and protects both to the extent possible. The court may not accept the argument that the State Engineer may not act until perfect knowledge is obtained. The State Engineer's ruling is supported by substantial evidence and must be affirmed.

5. PERMIT TERMS

Eureka County and appear Benson to object to two of the terms in the permits issued to KVR. The first is that the permits use the place of use listed in the applications, the 90,000 acres; but should list only the specific place of use. As noted above, the permit is the first step and the refinements will come during the perfection process, the deadlines for which are listed on page two of each permit. *See,* ROA SE 218.

Benson also objects to the language in the permits concerning consumptive use. It must be noted that the permits clearly contain the limitation that "[t]he total combined duty of water . . . shall not exceed 11,300 acre-feet annually." *See*, Eureka County's Supplemental ROA at 6. The terms allow that, "additional diversion may be granted if it can be shown that the additional diversion will not cause the consumptive use to be exceeded." Eureka County at 36.

Although the permit language was not included in the ruling, it does exist in the statues the State Engineer is required to follow.

> The State Engineer may consider the consumptive use of a water right and the consumptive use of a proposed beneficial use of water in determining whether a proposed change in the place of

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> diversion, manner of use or place of use complies with the provisions of subsection 5 of NRS 533.370.

NRS 533.3703(1). The State Engineer is correct as a matter of law in including the permit term and Benson has cited no authority to the contrary. Thus, the permits must be upheld as being in compliance with Nevada's Water Law.

Benson points out that the State Engineer failed to include a permit term that any water extracted not used in Diamond Valley must be returned to the source. This is another attempt to confuse the court. The Diamond Valley permits were issued with the term that states "the place of use of these permits is limited to the Diamond Valley Hydrographic Basin (153)". The water cannot go anywhere else but Diamond Valley so if it is not physically diverted and used in Diamond Valley, it remains in the Diamond Valley aquifer. In addition the permits were issued subject to Ruling 6127 which states that the water must be returned to Diamond Valley.

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F. CHANGE APPLICATIONS

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.[11]

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.

An example closely related to the applications at issue herein was Application 78487 filed by 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

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

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." *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)). In an area as complex and interconnected as the administration of water law, the court should not upset the delicate balance without good reason.

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.

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___, 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 and the State Engineer's interpretation of the statute is entitled to deference.

G. INVENTORY

NRS 533.364(1) requires an inventory "before approving an application for an interbasin transfer of more than 250 acre-feet of groundwater . . . ." The inventory must include three areas:

> (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.

Id. Eureka County cites legislative history to argue that the inventory should include more than is listed in the statute. "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *McKay v. Board of Sup'rs of Carson City*, 730 P. 2d 438, 441 (1986)(Citations omitted NRS 533.364(1) requires an inventory "before approving an application for an interbasin transfer of more than 250 acre-feet of groundwater . . . ." The State Engineer had the inventory before approving the applications and has fully satisfied the statutory requirements. Eureka County's argument that the inventory had to be completed prior to the administrative hearing is not supported in law. Eureka County's demands that it was entitled to a full hearing on the inventory is also not supported in law..

The inventories were conducted pursuant to the statute. The State Engineer found the inventory adequate for the purposes it served and did not request further data. SROA at 71. Eureka County may want a different inventory and they are free to conduct that inventory, however, the State Engineer did not require additional research for this inventory and the legislature has placed the discretion to review the inventory with the State Engineer. Absent any showing that the inventory was substantially defective, the court is required to defer to the

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State Engineer on this question of fact. NRS 533.450(9)("The decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.").

VI. CONCLUSION

The State Engineer's findings are supported by substantial evidence, his interpretations of law are entitled to deference and Ruling 6127 should be ***affirmed***.

DATED on this 24th day of February 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: Bryan L. Stockton

BRYAN L. STOCKTON
Nevada State Bar #4764
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
775-684-1228 Telephone
775-684-1103 Facsimile
bstockton@ag.nv.gov
Attorneys for Respondent,
Nevada State Engineer

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

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 24 day of February 2012, I have sent an electronic copy and have deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing **ANSWERING BRIEF**, addressed as follows:

Woodburn and Wedge
Gordon H. Depaoli, Esq.
Dale E. Ferguson, Esq.
6100 Neil Road, Suite 500
Reno, Nevada 89511
Attorneys for Petitioner
Conley Land & Livestock LLC
and Lloyd Morrison

Allison, MacKenzie, Pavlakis,
Wright & Fagan, Ltd.
Karen Peterson, Esq.
Jennifer Mahe, Esq.
402 North Division Street
Carson City, Nevada 89702
Attorneys for Petitioners
Eureka County

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

Parsons Behle & Latimer
Ross E. de Lipkau
50 W. Liberty Street, Ste 750
Reno, Nevada 89501
Attorneys for Respondents
Kobeh Valley Ranch

Schroeder Law Offices, P.C. (via e-mail only)
Therese A. Ure, Esq.
440 Marsh Avenue
Reno, Nevada 89509
Attorneys for Kenneth F. Benson, Diamond Cattle Company, LLC and Michel and Margaret Ann Etcheverry Family

Sandra Geyer, Legal Secretary II

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Case No.: CV1108-155
Case No.: CV1108-156
Case No.: CV1108-157
Case No.: CV1112-164
Case No.: CV1112-165
Case No.: CV1202-170

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 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, 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; 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

PARSONS BEHLE & LATIMER

EUREKA COUNTY, a political subdivision of the State of Nevada, Petitioner, v. THE STATE OF NEVADA, EX. REL., STATE ENGINEER, DIVISION OF WATER RESOURCES, Respondent.	Case No. CV1112-164 Dept. No. 2
KENNETH F. BENSON, an individual; DIAMOND CATTLE COMPANY, LLC, a Nevada limited liability company; MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, a Nevada registered foreign limited partnership, Petitioners, v. STATE ENGINEER OF NEVADA, OFFICE OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No. CV1112-165 Dept. No. 2
KENNETH F. BENSON, an individual; DIAMOND CATTLE COMPANY, LLC, a Nevada limited liability company; MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, a Nevada registered foreign limited partnership, Petitioners, v. STATE ENGINEER OF NEVADA, OFFICE OF THE STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Case No.: CV1202-170 Dept. No. 2

RESPONDENT KOBEH VALLEY RANCH, LLC.'S ANSWERING BRIEF

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