transfer statute. The STATE ENGINEER never once in the Ruling describes the hydrologic-related natural resources of Kobeh Valley that are dependent on the water resources in Kobeh Valley and that such hydrologic-related natural resources will not be unreasonably impacted.

Third, KVR alleges that completing an analysis of whether an interbasin transfer is environmentally sound, should such analysis involve anything other than whether there are impacts to existing rights, would require the STATE ENGINEER to complete an analysis in excess of that provided for by statute and an analysis outside the STATE ENGINEER's expertise. See, KVR's Answering Brief, p. 36, ll. 23-27. Obviously, NRS 533.370(3) explicitly obligates the STATE ENGINEER to consider whether an interbasin transfer is environmentally sound, thus it is contrary to law to assert that the statutes do not require the STATE ENGINEER to consider the environment. Further, KVR continues its mistaken presumption that the STATE ENGINEER would be considering the environmental impacts in excess of those related to water resources. EUREKA COUNTY's point is not that the STATE ENGINEER should be completing an analysis of non-water related environmental impacts, but that the STATE ENGINEER should be complying with the statute in addressing the environmental effects associated with water resources when approving interbasin transfers of water.

The STATE ENGINEER's analysis pursuant to NRS 533.370(3) was merely duplicative of his analysis pursuant to NRS 533.370(2), did not apply the standard he articulated, and is thus contrary to law and arbitrary and capricious.

c. KVR Attempts To Transfer The Burden Of Establishing That The Proposed Interbasin Transfer Is Sound To EUREKA COUNTY.

KVR continues its argument that the only evidence required to establish that an interbasin transfer is environmentally sound is evidence associated with the impacts to existing water rights. See, KVR's Answering Brief, p. 37, ll. 23-28 and p. 38, ll. 1-7 and ll. 14-27. Utilizing this argument, KVR refers to the testimony of its experts and consultant regarding the impacts on existing water rights associated with the Applications. See, KVR's Answering Brief, p. 38, ll. 14-21. KVR does not cite to any evidence it presented, or that the STATE ENGINEER considered, regarding the environmental effects of the proposed interbasin transfer on the water resources in

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Kobeh Valley, for example upon recreational resources or wildlife. Obviously KVR, the applicant, failed to provide evidence to the STATE ENGINEER that could support the required finding. Accordingly, there was no evidence in support of such a proposition upon which the STATE ENGINEER could rely.

The only evidence relating to the hydrologic-related natural resources dependent upon the water resources of Kobeh Valley that was presented at the hearing was introduced by EUREKA COUNTY through both Rex Massey and Gary Garaventa. See, ROA Vol. III, pp. 000498-000499 and ROA Vol. IV, pp. 000697-000700. KVR now attempts to undermine the validity of such testimony by challenging the qualifications of Mr. Massey, for example, asserting that he did not have "any experience assessing environmental impacts from groundwater pumping." See, KVR's Answering Brief, p. 38, ll. 8-14. In making such an assertion KVR does not cite to any portions of the record, presumably because a review of the record would establish that Mr. Massey testified that he spent several years doing "environmental impact statements for federal agencies, Army Corps of Engineers, Bureau of Land Management, Department of Defense, Department of Energy" and had thirteen years' experience working in the Lake Tahoe Basin on project entitlements and permitting approvals with the Tahoe Regional Planning Agency. See, ROA Vol. IV, p. 000693. A simple review of Mr. Massey's qualifications makes it apparent that he was qualified to present the evidence in his testimony. KVR did not cross-examine Mr. Massey to any extent regarding environmental issues. See, ROA Vol. IV, p. 000703-000704. Regardless of KVR's sudden concerns about Mr. Massey's qualifications, the simple point remains that the only evidence presented to the STATE ENGINEER regarding the environmentally sound requirement of NRS 533.370(3) showed that there would be impacts from the interbasin transfer to the hydrologic-related natural resources dependent upon the water resources of Kobeh Valley.

There being no evidence in support of the interbasin transfer being environmentally sound, the STATE ENGINEER could not have relied upon substantial evidence in making such a finding and granting the Applications.

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d. Like The STATE ENGINEER, KVR Also Ignores The Issue Of Future Growth And Further Establishes That KVR Failed To Provide Evidence Regarding Future Growth In Kobeh Valley.

The STATE ENGINEER misapplied the requirement of NRS 533.370(3) that he consider "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." Specifically, EUREKA COUNTY asserted that the STATE ENGINEER focused entirely on whether the proposed use was an appropriate long term use for the basin and then, utilizing his finding on that element, circuitously determined that the satisfaction of that element satisfied the element of future growth. See, Opening Brief, p. 36, ll. 15-28 and p. 37, ll. 1-3. Neither the STATE ENGINEER nor KVR dispute that this erroneous analysis occurred nor do they allege that such analysis is appropriate. The lack of dispute regarding this argument should be treated as a concession that such argument is valid and grounds to grant EUREKA COUNTY relief.

Despite having ignored a portion of EUREKA COUNTY's argument, KVR does allege there was evidence submitted that the interbasin transfer would not inhibit future growth in Kobeh Valley.[39] See, KVR's Answering Brief, p. 39, ll. 12-23. KVR does not cite to any evidence submitted by itself, the applicant, in support of such proposition but instead attempts a creative analysis to minimize the evidence submitted by EUREKA COUNTY. Id. For example, KVR says that Mr. Ronald Damele, the Eureka County Public Works Director, testified that there are sufficient water rights to meet anticipated growth. See, KVR's Answering Brief, p. 39, ll. 18-20. Mr. Damele actually testified that in order for anyone to develop property in Eureka County there was a county water ordinance which required dedication of two acre-feet of water for each new parcel. See, ROA Vol. III, p. 000521. KVR's reference to Mr. Damele's testimony is actually a reference to testimony regarding the water available in the town water system which is located in Diamond Valley, not Kobeh Valley, and is unrelated to an analysis of the impacts upon future growth in Kobeh Valley. See, KVR's Answering Brief, p. 39, ll. 18-20 and ROA Vol. III, p. 000526. With the appropriation by KVR, it will be challenging for anyone to subdivide land in Kobeh Valley since they may be unable to obtain the necessary two acre-foot dedication. Additionally, KVR concedes that evidence

[39] As stated above, KVR is not the STATE ENGINEER and as such its analysis regarding an issue cannot be considered an adequate replacement for the analysis required by the STATE ENGINEER before he issues a Ruling.

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was offered to support the proposition that future growth was expected to occur north and west of the Town of Eureka, into Kobeh Valley. See, KVR's Answering Brief, p. 39, ll. 14-16 and ROA Vol. IV, pp. 000702-000703.

Not only is it conceded that the STATE ENGINEER did not appropriately apply the provisions of NRS 533.370(3) regarding future growth in Kobeh Valley, but it is further evident that KVR provided the STATE ENGINEER nothing upon which to rely in considering such requirements. Accordingly, the only evidence available regarding future growth being that the interbasin transfer would unduly limit future growth in Kobeh Valley, the STATE ENGINEER acted arbitrarily and capriciously in determining that there would be no impacts.

10. It Was Clearly Established That A Forfeiture Had Occurred For The Bartine Rights.

In order to avoid a forfeiture, a water right must be put to the beneficial use for which the water right was permitted as required by NRS 534.090(1). In this instance, the issue is whether the simple allowance of natural artesian flow, without any evidence of actual irrigation, is sufficient to avoid a forfeiture of water rights issued for the beneficial use of irrigation.

As Nevada has not yet addressed the issue, EUREKA COUNTY cited several cases from other jurisdictions that addressed the issue and held that naturally occurring seepage without actual irrigation was not sufficient to avoid a forfeiture. State ex. rel. Martinez v. McDermott, 901 P.2d 745, 749 (N.M. App. 1995) and Staats v. Newman, 988 P.2d 439, 440 (Or. App. 1999). KVR initially states that this Court should simply defer to the STATE ENGINEER's decision[40] and then refers to the cases cited by EUREKA COUNTY with apparent approval. See, KVR's Answering Brief, p. 41, ll. 1-28 and p. 42, ll. 1-17. KVR's argument appears to be that there was substantial evidence of irrigation and as such, these cases support the STATE ENGINEER's Ruling. See, KVR's Answering Brief, p. 42, l. 4. Nonetheless, KVR does not point to any evidence of irrigation

[40] As discussed above in detail, this Court is not required to simply defer to the STATE ENGINEER's interpretation of a statute, particularly when the plain language of the statute, reason and public policy oppose the interpretation suggested by the STATE ENGINEER. UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union, 124 Nev. at 89, 178 P.3d at 712 (2008).

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pursuant to the Bartine Rights.[41] Instead, KVR refers this Court to several dictionary definitions to assert that simple artesian flow should be considered irrigation. See, KVR's Answering Brief, p. 41, ll. 25-28 and p. 42, ll. 1-2. KVR provides no evidence or case law to support its argument. EUREKA COUNTY urges the Court to consider the relevant case law from other jurisdictions on this issue cited by EUREKA COUNTY.

Further establishing the flaws in KVR's position is the actual facts presented by EUREKA COUNTY that show the lack of any beneficial use pursuant to the Bartine Rights. Specifically, numerous individuals testified that irrigation had not occurred on the property extending for at least three decades. See, CV0904 ROA Transcript, Vol. 1, p. 117, ll. 7-25, p. 118, ll. 1-7, Vol. 2, p. 401, ll. 7-18 and Vol. 3, p. 423, ll. 9-19 and p. 484, ll. 1-18. Furthermore, the STATE ENGINEER clearly conceded that there was substantial evidence that no crop had been irrigated pursuant to the Bartine Rights, because he relied entirely upon the natural artesian flow to avoid a forfeiture. See, ROA Vol. XVIII, pp. 003601-003602.

In light of the substantial uncontroverted evidence establishing a forfeiture the STATE ENGINEER's Ruling is arbitrary and capricious.

11. KVR Fails To Respond To EUREKA COUNTY's Argument That Only A Portion Of The Bartine Rights Had Any Evidence Of Use.

If the artesian flow can be considered beneficial use, there was only the natural distribution of this artesian flow upon a portion of the Bartine property, namely 65.54 acres. Despite this complete lack of evidence of use for all the Bartine Rights, the STATE ENGINEER did not forfeit even a portion of the Bartine Rights. See, EC ROA 075-078, 0111-0112 and 0135-0136.

KVR's argument is wholly nonresponsive to EUREKA COUNTY's assertions. KVR's argument goes to the consumptive use, and not to the issue of forfeiture. See, KVR's

[41] KVR does respond to EUREKA COUNTY's assertion that the 2008-2010 crop inventories cannot cure the forfeiture acknowledging the status of the law as cited by EUREKA COUNTY but asserting that the claim of forfeiture was not made until the October 2008 hearing, after any alleged crops would have been grown in 2008. See, KVR's Answering Brief, p. 42, ll. 18-24 and p. 43, ll. 1-2. This argument misconstrues the timing of EUREKA COUNTY's claim of forfeiture. EUREKA COUNTY initially raised a claim of forfeiture with regard to KVR's Applications in September, 2007. See, CV0904 ROA 4046-4048. EUREKA COUNTY in its Protest filed on June 27, 2008, specific to the Bartine Rights, stated that the issue of forfeiture had been raised at the March 17, 2008 prehearing conference and that such issue was included in that Protest. See, CV0904 ROA 4028-4031. Even pursuant to KVR's argument, the claim of forfeiture having been raised in March of 2008, with regard to the Bartine Rights, would predate any use that occurred during the 2008 growing season. Accordingly, the crop inventories from 2008-2010 cannot be utilized to cure the forfeiture.

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Answering Brief, p. 43, ll. 5-24. While the consumptive use analysis is associated with approving any change application, it is by no means evidence of use to avoid a forfeiture, and as such, KVR's argument is irrelevant and nonresponsive to EUREKA COUNTY's point. In fact, EUREKA COUNTY already accounted for the consumptive use in addressing this issue. See, Opening Brief, p. 42, ll. 9-18.

There being no evidence that all the Bartine Rights were put to beneficial use, even accepting the natural artesian flow as beneficial use, the STATE ENGINEER's determination not to forfeit a portion of the Bartine Rights was arbitrary and capricious.

12. EUREKA COUNTY Can Raise A Purely Legal Issue Such As The Interpretation Of NRS 533.324 And NRS 533.325 On Appeal.

KVR asks this Court to disregard the STATE ENGINEER's violation of NRS 533.324 and NRS 533.325 because the violation was not raised before the STATE ENGINEER, though such violation did not even occur until the Ruling was issued. See, KVR's Answering Brief, p. 8, ll. 13-26, p. 9, ll. 1-28, p. 10, ll. 1-8 and p. 45, ll. 12-28. The basis for KVR's allegations is that an issue cannot be raised for the first time in a proceeding before the district court. Id.

KVR cites to the Nevada Supreme Court case of State ex rel. State Bd. of Equalization v. Barta, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) in support of its proposition. Barta recognizes the existence of exceptions to the rule, specifically an exception for purely legal issues. Id. at fn. 24. Barta further cited Nevada Power Co. v. Haggerty, 115 Nev. 353, 365, fn. 9, 989 P.2d 870, 877 (1999) in which the Nevada Supreme Court explicitly recognized that the interpretation of a statute was a purely legal issue that was exempt from the rule that an issue could not be raised for the first time on appeal. "The principle behind this exception to the waiver rule is that the reviewing tribunal decides a legal issue on undisputed facts de novo, and therefore it is not essential to the court's review that the agency had an opportunity to address the issue." Bunker v. Labor & Indus. Review Comm'n, 650 N.W. 2d 864, 869 (Wis. App. 2002). Thus, while Nevada does not generally allow an issue to be raised for the first time on appeal, a purely legal issue, such as the interpretation of a statute, can be raised for the first time on appeal.

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Moreover, in applying the rule regarding an issue raised for the first time on appeal to the judicial review of administrative agencies, certain policy considerations are important and should be recognized. Richardson v. Tennessee Bd. of Dentistry, 913 S.W. 2d 446, 457, (Tenn. 1995). One such policy is, "the fact that an agency has exceeded its authority may not be apparent until the agency has issued its final orders." Id. That is exactly the situation here. The violation of NRS 533.324 and NRS 533.325 did not occur until the STATE ENGINEER issued his Ruling. Prior to the issuance of the Ruling, it would have been impossible for EUREKA COUNTY, or any Protestant, to predict that the STATE ENGINEER intended to disregard the limitations upon his statutory authority in the Ruling. Utilizing KVR's argument, the Protestants at every hearing before the STATE ENGINEER would be required to assume the STATE ENGINEER would violate the law and raise and address every statutory obligation or prohibition so as to reserve their right to challenge in Court any statutory violation by the STATE ENGINEER.

In addition, the cases cited by KVR are easily distinguishable from this case. For example, in Red River Broadcasting Co. v. FCC, 98 F.2d 282, 286 (D.C. Cir. 1938), the court focused on the fact that the plaintiff failed to appear at the administrative proceedings and therefore waived its right to object to anything that occurred at the administrative proceeding. In this case, EUREKA COUNTY was a party to the proceedings before the STATE ENGINEER and appeared therein. Moreover, in some of the cases cited by KVR, the new issue being raised on appeal involved facts or evidence in dispute, not purely legal issues as in this case. See, Suprenant v. Bd. for Contractors, 516 S.E.2d 220, 225 (Va. 1999), Bergen Pines Cnty. Hosp. v. N.J. Dep't of Human Serv., 476 A.2d 784, 793 (N.J. 1984) and T.C. v. Review Bd. of Ind. Dep't of Workforce Dev., 930 N.E.2d 29, 31 (Ind. Ct. App. 2010). As an additional example, in King County v. Wash. State Boundary Review Bd. for King County, 860 P.2d 1024, 1035 (Wash.1993)(en banc) cited by KVR, the court relied on a Washington statute to find a waiver of the issue raised by the Plaintiff on appeal. See, KVR's Answering Brief, p. 9, ll. 26-28 and p. 10, ll. 1-4. Such a statute does not exist in Nevada.

Whether the STATE ENGINEER can grant change applications for water appropriations that have not yet been permitted requires an interpretation of NRS 533.324 and NRS

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533.325. There are no facts in dispute with regard to this issue as everyone agrees upon the timing of the filing and granting of the Applications. Accordingly, this is a purely legal issue which the Nevada Supreme Court has held can be addressed by this Court for the first time on judicial review. Haggarty, 115 Nev. at 365, fn. 9, 989 P.2d at 877 (1999).

13. An Individual May Not Apply To The STATE ENGINEER For A Change Application Unless The Water Rights To Be Changed Have Been Appropriated.

KVR uses the same argument as the STATE ENGINEER on this issue. See, KVR's Answering Brief, p. 46, ll. 1-28, p. 47, ll. 1-28 and p. 48, ll. 1-15. Specifically, KVR says that NRS 533.324 and NRS 533.325 do not address the time and process for filing change applications. Id. As discussed in detail above, this argument fails based upon the explicit language of the statute.

NRS 533.324 provides that a change application is not appropriately applied for unless the water rights to be changed have been permitted. Thus, NRS 533.324 explicitly addresses the timeline and process for filing change applications by indicating it is inappropriate to even apply to the STATE ENGINEER for a change unless the water to be changed has already been permitted. Furthermore, as discussed above, the simple fact that the STATE ENGINEER has historically violated NRS 533.324 and NRS 533.325, or that properly applying these statutes will be inconvenient for the STATE ENGINEER, is not grounds to disregard the unambiguous plain language of the statutes.

It is undisputed that the STATE ENGINEER granted change applications that were applied for prior to the underlying water having been permitted. Thus, the STATE ENGINEER violated the plain provisions of NRS 533.324 and NRS 533.325. The STATE ENGINEER's actions are in violation of law and must be vacated by the Court.

14. The STATE ENGINEER Abused His Discretion By Accepting KVR's Inventory In Satisfaction Of His Obligation Pursuant To NRS 533.364.

a. EUREKA COUNTY Did Not Fail To Appeal Within The Statutory Time Period.

KVR says that regardless of how the STATE ENGINEER addresses the statutory requirements of NRS 533.364, requiring an inventory in certain interbasin transfers before approving the application for the interbasin transfer, there is no way a party could appeal. See, KVR's

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Answering Brief, p. 51, ll. 1-20. The basis of KVR's argument is that the inventory is a ministerial task that does not require "a separate 'order or decision' of the State Engineer that can be independently challenged."[42] See, KVR's Answering Brief, p. 51, ll. 10-14. KVR thereafter alleges that, if an appeal is possible, the STATE ENGINEER issued the order or decision from which EUREKA COUNTY was required to appeal on June 22, 2011, and thus EUREKA COUNTY's appeal is untimely and must be disregarded. See, KVR's Answering Brief, p. 51, ll. 21-28 and p. 52, ll. 1-5.

NRS 533.364 explicitly provides that the STATE ENGINEER cannot approve an application for interbasin transfer without first obtaining an inventory that complies with NRS 533.364. Accordingly, it is the approval of the application, in this case the issuance of the Ruling, which causes a violation of NRS 533.364 and it is the approval of the application, not a separate order or ruling, from which an appeal must be taken. Accordingly, the Ruling was issued on July 15, 2011 and EUREKA COUNTY filed its Petition for Judicial Review on August 8, 2011, well within the 30 day appeal period recognized by NRS 533.450.

Alternatively, should this Court decide that NRS 533.364 does require the issuance of a separate order or decision from which an appeal can be taken and further accepts KVR's assertion that the June 22, 2011 correspondence was such Order, EUREKA COUNTY's appeal is still timely. As KVR notes, the STATE ENGINEER issued the June 22, 2011 correspondence acknowledging receipt of KVR's inventory and providing that he believed the inventory complied with the statute. See, KVR's Answering Brief, p. 50, ll. 19-25 and SROA 071. As further acknowledged by KVR, the STATE ENGINEER did not, at that time, send the June 22, 2011 correspondence to all the parties, instead choosing to correspond directly with KVR alone.[43] See, KVR's Answering Brief, p.

[42] KVR attempts to utilize this argument for the proposition that the STATE ENGINEER can issue a decision, namely the acceptance of the NRS 533.364 inventory, from which a party can undeniably be aggrieved especially where, as here, the inventory fails to comply with the statute, yet such decision can never be subject to judicial review. KVR provides no legal basis for the opinion that a party can be aggrieved by a decision of the STATE ENGINEER yet have no right to judicial review. Further, this argument is in direct violation of NRS 533.450 which explicitly provides that a party so aggrieved has the right to judicial review.

[43] Though NRS Chapter 233B does not apply to the STATE ENGINEER it is worth noting that in administrative proceedings involving contested cases any member or employee of the deciding authority is expressly prohibited from engaging in communications with one party without first providing notice and opportunity to participate to the other

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50, ll. 25-27 and SROA 071-073. It was not until July 5, 2011, nearly two weeks after the initial correspondence, that the STATE ENGINEER sent correspondence to EUREKA COUNTY enclosing the June 22, 2011 correspondence and the inventory. Id. Obviously, the STATE ENGINEER is obligated to provide notice to all parties and his failure to so provide EUREKA COUNTY with a copy of the June 22, 2011 letter cannot be permitted to negate a portion of the time allotted to EUREKA COUNTY to file an appeal.

Furthermore, the 30 day period within which to file a petition for judicial review does not begin to run until service of the ruling or order to be appealed from. The analogous provision of the Administrative Procedures Act is NRS 233B.130(2)(c). Accordingly, the time period should appropriately run, not from June 22, 2011 but from service of the July 5, 2011 correspondence issuing the June 22, 2011 decision to EUREKA COUNTY. The 30 days did not begin to run until the July 5, 2011 issuance of the correspondence, and allotting 3 days for mailing, the time period expired on August 7, 2011, a Sunday. Should a time period expire on a weekend or non-judicial day then "the period runs until the end of the next day which is not a Saturday, a Sunday, or a non-judicial day." NRCP 6. Thus, EUREKA COUNTY's appeal was due on the following Monday, August 8, 2011, the date that it was filed. Accordingly, EUREKA COUNTY filed its appeal in a timely manner.

Regardless of the argument asserted by KVR that this Court chooses to consider, it is indisputable that EUREKA COUNTY's appeal of the STATE ENGINEER's failure to adequately comply with NRS 533.364 was timely filed.

b. KVR Fails To Address The Adequacy Of The Inventory It Provided And Instead Attempts To Divert This Court By Discussing Other Statutory Requirements.

KVR says that EUREKA COUNTY is simply trying to get a "second bite at the apple" by challenging the sufficiency of the inventory when the real issue is whether there is groundwater available for appropriation. See, KVR's Answering Brief, p. 52, ll. 6-28 and p. 53, ll. 1-16. This argument suffers from several defects.

parties. NRS 233B.126. Accordingly, this direct ex parte communication between the STATE ENGINEER and KVR was likely unlawful under the Administrative Procedures Act.

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EUREKA COUNTY has no need for a second bite at the apple on the issue of whether there is groundwater available for appropriation. NRS 533.370(2) requires the STATE ENGINEER to address whether there is groundwater available for appropriation in a basin before approving an application. EUREKA COUNTY has explicitly challenged whether the STATE ENGINEER's determination that groundwater was available for appropriation in Kobeh Valley was supported by substantial evidence. See, Opening Brief, p. 27, ll. 9-26, p. 28, ll. 1-28 and p. 29, ll. 1-18. Clearly, EUREKA COUNTY has had the opportunity, and will have further opportunity at the hearing on this matter, to argue any aspect of the issue of whether there is groundwater available for appropriation in Kobeh Valley. It would be unnecessary for EUREKA COUNTY to disguise its argument with the NRS 533.364 inventory issue, as KVR says is happening.

Furthermore, KVR alleges the terms of NRS 533.364 are irrelevant since that statute requires an estimate of the water available and NRS 533.370(2) requires an actual determination of whether there is water available. In other words, there is no instance where the STATE ENGINEER could grant an application for appropriation without first complying with NRS 533.370(2), and NRS 533.364 only applies when an application is to be granted. Accordingly, KVR proposes that this Court adopt the idea that the Nevada Legislature adopted NRS 533.364 in order to incorporate a duplicative, redundant and allegedly inferior analysis to that required in NRS 533.370(2). Obviously, the Nevada Legislature did not engage in such pointless action and interpreting the statutes in such a manner would violate the maxim of statutory construction that statutory provisions should not be interpreted in any manner that renders a portion of a statute mere surplusage. Stockmeier, 122 Nev. at 540, 135 P.3d at 810 (2006).

Finally, KVR's twisted interpretation of EUREKA COUNTY's argument disregards the actual argument asserted by EUREKA COUNTY. Nowhere in EUREKA COUNTY's argument that the inventory submitted by KVR was inadequate did EUREKA COUNTY mention the water available in Kobeh Valley to be appropriated. Instead, EUREKA COUNTY included a detailed rendition of the legislative history to allow this Court to interpret the requirements for an inventory and thereafter established that KVR had not complied with those requirements. See, Opening Brief, p. 44, ll. 5-28, p. 45, ll. 1-28, p. 46, ll. 1-28 and p. 47, ll. 1-28. EUREKA COUNTY included in that

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discussion evidence that the inventory was completed in approximately four days, that Kobeh Valley encompasses 868 square miles, that some of the water resources in Kobeh Valley are inaccessible by vehicle and that the inventory submitted to the STATE ENGINEER included blanks where missing information needed to be provided. Id. None of these arguments are even remotely related to whether there is water available to appropriate in Kobeh Valley, all such arguments being associated with the adequacy of the inventory and nearly all such arguments being uncontested by KVR.[44]

In addition to alleging that EUREKA COUNTY's argument regarding the adequacy of the inventory is unnecessary since NRS 533.364 is irrelevant and duplicative of the requirements of NRS 533.370(2), KVR utilizes that same argument to say there could not be a violation of the basic notions of fairness and due process. See, KVR's Answering Brief, p. 52, ll. 26-28 and p. 53, ll. 1-5. This argument is meritless since EUREKA COUNTY and the other Protestants did not get an opportunity to cross examine witnesses with regard to the inventory which was submitted after all of the hearings on this matter were concluded. The Protestants were never given an opportunity to point out the flaws in the inventory to the STATE ENGINEER.

The STATE ENGINEER abused his discretion in accepting an admittedly inadequate inventory to satisfy the requirements of NRS 533.364.

15. KVR Seemingly Agrees With EUREKA COUNTY's Concerns Regarding The Terms Of The Permits.

EUREKA COUNTY raised three concerns regarding the Permit terms.[45] Specifically, EUREKA COUNTY asserted the Diamond Valley Permits did not include the restriction the STATE ENGINEER required in the Ruling, that the Diamond Valley Permit terms were inconsistent in that they included terms both limiting the place of use to Diamond Valley and extending the place of use well outside of Diamond Valley, and the consumptive use Permit terms conflict with the Ruling in that they allow for the potential of increased impacts. See, Opening

[44] KVR admits that it did not complete an independent inventory of Kobeh Valley but instead utilized the information it had compiled in support of its Applications to satisfy NRS 533.370(2), stating "[v]irtually all of the record reported in the inventory relating to the estimate of available groundwater was taken from the record in this proceeding." See, KVR's Answering Brief, p. 53, ll. 1-3. This statement itself establishes that KVR and the STATE ENGINEER failed to satisfy the requirements of NRS 533.364.

[45] EUREKA COUNTY also included arguments regarding the place of use and forfeiture in relation to the issuance of the Permits. The response to KVR's arguments regarding these issues is addressed in more detail above.

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Brief, p. 48, ll. 1-28, p. 49, ll. 1-28 and p. 50, ll. 1-11. KVR seems to concede these issues, at least in one instance stating it would not be opposed to a modification of the Permits to address EUREKA COUNTY's concerns, but also attempts to argue that the inconsistencies between the Permits themselves and the Permits and the Ruling do not indicate that the STATE ENGINEER's actions were arbitrary and capricious. See, KVR's Answering Brief, p. 53, ll. 17-28, p. 54, ll. 1-28, p. 55, ll. 1-28 and p. 56, ll. 1-2.

As an initial point, KVR refers throughout its response to this issue that any inconsistencies are irrelevant as KVR is aware and acknowledges that it is bound by the terms of the Ruling. Id. This argument avoids the issues raised by EUREKA COUNTY. The issues raised by EUREKA COUNTY are associated with inconsistencies created by the STATE ENGINEER's issuance of the Permits, whether they are between the Permits themselves or the Ruling. In a situation in which the Permits and the Ruling provide for two different terms associated with an aspect of the Permits, it is irrelevant that KVR is aware of and acknowledges it is bound by the Ruling. If the Ruling and the Permits are inconsistent, it is impossible to know which would provide the definitive answer on the issues raised by EUREKA COUNTY and, furthermore, in the future it is possible that the Permits, as the actual document granting the right to appropriate water, will control for use of the water.

KVR says that EUREKA COUNTY has misconstrued the "plain meaning of the Ruling" with regard to EUREKA COUNTY's allegation that the Ruling required the Diamond Valley Permits to include a term requiring any excess water produced in Diamond Valley to be returned to Diamond Valley. See, KVR's Answering Brief, p. 54, ll. 7-13. The Ruling itself provides:

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

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See, ROA Vol. XVIII, p. 003595. The Ruling is explicit that a permit term is required to return excess water to the Diamond Valley aquifer.

KVR ignores in part the concern regarding the place of use allowed pursuant to the Diamond Valley Permits. KVR quotes the language from the Permits limiting the place of use to Diamond Valley but does not cite to nor address the permit term providing that "[t]he point of diversion and place of use are as described on the submitted application to support this permit." See, KVR's Answering Brief, p. 54, ll. 14-24 and EC ROA 062, 064, 066, 068, 070, 080, 082, 084, 086, 0152, 0154, 0156, 0158, 0160, 0162 and 0164. KVR appears to assume that an individual reviewing the Diamond Valley Permits at some date in the future would choose to be bound by the more restrictive place of use. Nonetheless, there is no guarantee that the more restricted place of use would be applied, and the terms of the Diamond Valley Permits, as issued by the STATE ENGINEER, also provide that the place of use is the 90,000 acre area of Kobeh, Pine and Diamond Valleys. The inconsistency should not stand when the Permits can be easily amended by order of the Court since the STATE ENGINEER will not voluntarily do so.

With regard to the provision in the Permits that KVR could potentially increase diversions, KVR chooses to point out additional language in the Permits that is inconsistent with the language potentially allowing additional diversions. See, KVR's Answering Brief, p. 55, ll. 11-23 and p. 56, ll. 1-2. This argument does not address the issue. The simple facts are that the language allowing for an additional diversion is in excess of both the language in the Ruling and the other terms of the Permits.

There being no real dispute that the Permit terms are inconsistent, both internally and with the Ruling, it is apparent that the STATE ENGINEER's actions in granting the Permits is arbitrary and capricious.

16. This Is A Situation In Which Remand Would Be A Useless Formality And Thus This Court Should Vacate The Ruling And Deny The Applications.

KVR refers this Court to the general rule that remand is appropriate in most cases involving judicial review and then simply states that this Court should treat this as an average case and remand to the STATE ENGINEER if necessary. See, KVR's Answering Brief, p. 56, ll. 7-28

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and p. 57, ll. 1-7. Interestingly, the Nevada Supreme Court case cited by KVR, Desert Irr., Ltd. v. State, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997), did not involve a remand to an administrative agency. In that case, the Court remanded to the district court and provided that the district court would instruct the administrative agency on how to act rather than simply remand the matter. Id. Furthermore, I.N.S. v. Orlando Ventura, 537 U.S. 12, 16 (2002), as cited by KVR, recognizes that in rare circumstances it is appropriate not to remand to the agency.

Additionally, KVR's argument misses the point made by EUREKA COUNTY. EUREKA COUNTY specifically cited cases recognizing the limited situations in which remand was not appropriate, situations in which remand would be an "idle and useless formality" or result in an endless loop of judicial review regarding subsidiary issues. McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 895 F. Supp. 316, 319 (D.D.C. 1995), People of the State of Ill. v. I.C.C., 722 F.2d 1341, 1349 (7th Cir. 1983) and N. L. R. B. v. Wyman-Gordon Co., 394 U.S. 759, 766, fn. 6 (1969). EUREKA COUNTY is asserting that this is exactly that limited type of situation. This matter has already been before this Court on judicial review on one previous occasion and, following the Court's findings, KVR filed additional Applications, the STATE ENGINEER held hearings at which time all parties were afforded the opportunity to present their cases in support of and against the Applications (not the inventory) and the STATE ENGINEER issued another Ruling granting the Applications. The STATE ENGINEER's Ruling on both occasions was entered despite the substantial evidence presented that established granting the Applications was inappropriate pursuant to the applicable law. It is reasonable to believe the STATE ENGINEER is determined to grant the Applications in their present form, regardless of the evidence and applicable law, necessitating this Court to step in and vacate the STATE ENGINEER's Ruling and Permits, and deny the Applications, or remand to the STATE ENGINEER with instructions to deny the Applications, rather than remand this matter to the STATE ENGINEER for another hearing or to address certain deficiencies in his Ruling with an identical outcome followed by repetitive judicial reviews. KVR, like any other Applicant facing this same fate, will have the opportunity to file new applications with the STATE ENGINEER for its project should it be able to establish the new applications could legally be granted.

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III.

CONCLUSION

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

DATED this 28th day of March, 2012.

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SEVENTH JUDICIAL DISTRICT COURT
COUNTY OF EUREKA, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

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

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

-OR-

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

☐ A specific state or federal law, to wit:

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(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

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

Date: March 28, 2012.

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/s/ Nancy Fontenot

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EUREKA COUNTY'S REPLY BRIEF

Petitioner, EUREKA COUNTY, by and through its counsel, ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD. and THEODORE BEUTEL, ESQ., the EUREKA COUNTY DISTRICT ATTORNEY, files this Reply Brief in response to the Answering Brief filed by Respondent, the STATE ENGINEER, and the Answering Brief filed by Intervenor/Respondent, KOBEH VALLEY RANCH, LLC, ("KVR") and in support of its Petitions for Judicial Review as follows:

I.

INTRODUCTION

The STATE ENGINEER and KVR do not adequately address the numerous errors with the STATE ENGINEER's actions and the lack of support for the Ruling as outlined in EUREKA COUNTY's Opening Brief. Instead, both attempt to minimize the errors or misdirect this Court to irrelevant issues to avoid an actual review of the STATE ENGINEER's errors.

The STATE ENGINEER's Answering Brief fails to point this Court to the alleged substantial evidence supporting the Ruling. Instead, the STATE ENGINEER repetitiously restates the positions provided in the Ruling without any further consideration or analysis. Additionally, the STATE ENGINEER ignores numerous issues of error raised by EUREKA COUNTY in its appeal. The STATE ENGINEER's failure to address these issues implies an admission that the issues of error are meritorious.

Likewise, KVR's Answering Brief often concedes, or at a minimum ignores, the facts and law as established by EUREKA COUNTY. To support its position, KVR relies upon erroneous statutory interpretations and the STATE ENGINEER's discretion. KVR additionally attempts to redirect this Court to irrelevant issues in an attempt to avoid obvious abuses of discretion or arbitrary and capricious action by the STATE ENGINEER.

EUREKA COUNTY will address each of the Answering Briefs, beginning with the STATE ENGINEER's Answering Brief. In responding to the Answering Briefs, EUREKA COUNTY will establish that the STATE ENGINEER frequently disregarded his applicable statutory obligations and ruled on many issues without any substantial evidence to support his decision.

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Finally, EUREKA COUNTY will identify the issues that either the STATE ENGINEER or KVR fail to address and reiterate the meritorious position originally asserted by EUREKA COUNTY.

As a result of the STATE ENGINEER's numerous errors as established by this appeal, this Court will be compelled to grant EUREKA COUNTY's Petition for Judicial Review, vacate Ruling 6127 ("Ruling"), vacate the Permits issued pursuant to the Ruling, and deny KVR's Applications.

II.

ARGUMENT

A. Reply to STATE ENGINEER's Answering Brief.

1. The STATE ENGINEER Fails To Address His Violation Of NRS 533.370(2) In Granting Water Rights That Will Conflict With Existing Rights.

EUREKA COUNTY included a substantial argument in its Opening Brief regarding the limitation upon the powers of the STATE ENGINEER, specifically, the explicit provision of NRS 533.370(2)[1] which provides "where ... [an application's] proposed use or change conflicts with existing rights ... the State Engineer **shall** reject the application and refuse to issue the requested permit." (emphasis added). See, Eureka County's Opening Brief ("Opening Brief"), p. 7, ll. 5-28, p. 8, ll. 1-28, p. 9, ll. 1-28, p. 10, ll. 1-28, p. 11, ll. 1-28, p. 12, ll. 1-28, p. 13, ll. 1-28 and p. 14, ll. 1-13. EUREKA COUNTY included in its argument a lengthy discussion of the wealth of evidence presented to the STATE ENGINEER in this case that established the Applications would conflict with existing rights. See, Opening Brief, p. 9, ll. 8-28, p. 10, ll. 1-28, p. 11, ll. 1-28 and p. 12, ll. 1-26. Further, EUREKA COUNTY cited to the STATE ENGINEER's acknowledgment in the Ruling that granting the Applications would likely conflict with existing rights. See, Opening Brief, p. 9, ll. 1-7 and p. 13, ll. 2-5. Finally, EUREKA COUNTY included a discussion of the standard applied by the STATE ENGINEER in Ruling 6127, arbitrarily placing a greater importance on KVR's proposed Applications, versus the statutory standard, which mandates denial of KVR's Applications because they conflict with existing rights. See, Opening Brief, p. 13, ll. 11-23 and p. 14, ll. 1-10.

[1] NRS 533.370 was amended by Assembly Bill 115 in the 2011 Nevada Legislative session. The amendments renumbered the provisions of NRS 533.370. All citations to NRS 533.370 in this Reply Brief use the amended numbering of NRS 533.370 as codified in 2011.

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The STATE ENGINEER fails to address this argument in his Answering Brief. A review of the STATE ENGINEER's Table of Authorities establishes that the STATE ENGINEER never once cites to NRS 533.370(2) in his Answering Brief. The sole implication that EUREKA COUNTY can draw from the STATE ENGINEER's failure to address such a major issue in this judicial review is that, as acknowledged in the Ruling, the STATE ENGINEER concedes that the Applications will conflict with existing rights, and that the Ruling violates the STATE ENGINEER's statutory duty pursuant to NRS 533.370(2). See, 7JDCR 7(7). When the STATE ENGINEER concedes the argument that he exceeded his statutory power in granting the Applications, the Ruling must be overturned and the Applications denied.

2. The STATE ENGINEER's Reliance Upon The Future Unseen 3M Plan Is Arbitrary And Capricious.

The STATE ENGINEER relied upon a future monitoring, management and mitigation plan ("3M Plan") in approving the Applications, holding, in part, that an unseen and undrafted 3M Plan would act to satisfy the STATE ENGINEER's obligation not to grant applications that conflict with existing rights. See, STATE ENGINEER's Summary of Record on Appeal ("ROA") Vol. XVIII, p. 003593. EUREKA COUNTY maintains that the STATE ENGINEER's failure to comply with NRS 533.370(2) and instead granting the Applications and deferring the issue of the 3M Plan into the future, while simply assuming that mitigation will be completely effective, is contrary to his statutory authority and arbitrary and capricious. See, Opening Brief, p. 14, ll. 14-26, p. 15, ll. 1-28, p. 16, ll. 1-28 and p. 17, ll. 1-24.

The STATE ENGINEER's response to such argument is two-fold. First, the STATE ENGINEER alleges that his actions must be appropriate since he is under no statutory obligation to require a mitigation plan. See, STATE ENGINEER's Answering Brief ("SE's Answering Brief"), p. 22, ll. 24-28 and p. 23, ll. 1-22. Second, the STATE ENGINEER claims that any order by this Court on the issue of mitigation would usurp the authority of the STATE ENGINEER. See, SE's Answering Brief, p. 22, ll. 2-4, p. 23, ll. 23-28, p. 24, ll. 1-27, p. 25, ll. 1-28 and p. 26, ll. 1-2. Neither of these arguments address the issue asserted by EUREKA COUNTY. Instead, the STATE

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ENGINEER simply skirts the issue in an attempt to avoid the outcome of arbitrary and capricious administrative action.

a. The STATE ENGINEER Improperly Utilizes The Future 3M Plan To Satisfy His Statutory Obligations.

In its Opening Brief, EUREKA COUNTY cited City of Reno v. Citizens for Cold Springs, 126 Nev. Adv. Op. 27, 236 P.3d 10, 19 (Nev. 2010) for the proposition that the STATE ENGINEER could not defer a required finding based upon broad and evasive conclusions about future actions. See, Opening Brief, p. 14, ll. 16-19. The STATE ENGINEER now attempts to differentiate Citizens for Cold Springs by suggesting that case should only be considered applicable when the future unknown actions are associated with a statutory requirement.[2] See, SE's Answering Brief, p. 23, ll. 9-20. This argument misconstrues the manner in which the STATE ENGINEER utilized the unseen 3M Plan in the Ruling.

As noted above and in EUREKA COUNTY's Opening Brief, the STATE ENGINEER has a statutory obligation to deny applications that conflict with existing rights. NRS 533.370(2). The STATE ENGINEER in this case failed to satisfy this obligation but instead, acknowledging that there would be impacts to existing rights, utilized the future 3M Plan to assert that such impacts should not be considered a violation of the statute.[3] See, ROA Vol. XVIII, p. 003593. Based upon this language, the STATE ENGINEER chose to utilize the future 3M Plan to satisfy his statutory obligations and as such, incorporated the future 3M Plan into his statutory obligations. It is illogical to claim that a future 3M Plan can be utilized to fulfill the STATE ENGINEER's statutory obligations while at the same time asserting that there is no statutory obligation associated with a 3M Plan.

Furthermore, the STATE ENGINEER's argument is apparently that the Nevada Supreme Court would approve of an administrative agency's reliance upon broad and evasive

[2] EUREKA COUNTY also cited numerous other authorities; however, the STATE ENGINEER did not discuss the other authorities in any manner.

[3] The STATE ENGINEER in the Ruling chose to link the statutory prohibition on his authority to the future 3M Plan in the Ruling. See, ROA Vol. XVIII, p. 003593. He now attempts to treat the unseen 3M Plan and the statutory prohibition as separate and distinct concepts. The STATE ENGINEER chose to connect the two concepts when it was convenient for him in the Ruling. He cannot now argue the concepts are disconnected in his Answering Brief since that argument is inconsistent with his Ruling.

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conclusions about future actions in all cases where the reliance is not related to a statutory duty. This position contradicts the long standing case law regarding the standards for judicial review of administrative decisions. Specifically, as noted by the STATE ENGINEER, administrative decisions are reviewed to determine if they are based on substantial evidence and are not arbitrary and capricious, which is defined as being, in part, "baseless or despotic." See, SE's Answering Brief, p. 9, ll. 11-18 and City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994)(citing City Council v. Irvine, 102 Nev. 277, 278-279, 721 P.2d 371, 372 (1986)). By its very nature, reliance upon broad and evasive conclusions about future unknown actions fits within the basic concept of being baseless; the problem being that the future reliance is unsupported by known reason or fact. Every review of an administrative decision being one to determine if the agency acted arbitrarily and capriciously, it is appropriate for every such review, regardless of whether a statute is involved, to include a review of whether the decision relies upon broad and evasive conclusions about unknown future actions.

EUREKA COUNTY understands that there is no statutory obligation by the STATE ENGINEER to explicitly create a 3M Plan. Nonetheless, the STATE ENGINEER is subject to numerous statutory obligations and limitations which he chose to attempt to satisfy in part by utilizing a future 3M Plan. A future 3M Plan, which was not submitted nor even drafted at the hearing, is undeniably a broad and evasive conclusion based upon future action that the STATE ENGINEER utilized to fulfill his statutory obligations. Following the STATE ENGINEER's own argument, the holding of Citizens for Cold Springs is applicable to the STATE ENGINEER's action and supports EUREKA COUNTY's argument that the STATE ENGINEER's Ruling granting the Applications is contrary to law.

b. EUREKA COUNTY Has Not Asked This Court To Usurp The STATE ENGINEER's Authority Or To Dictate The Terms Of A 3M Plan.

The STATE ENGINEER includes an extended discussion regarding his authority to manage the water resources in Nevada. See, SE's Answering Brief, p. 21, ll. 26-28, p. 22, ll. 1-28, p. 23, ll. 1-28, p. 24, ll. 1-27, p. 25, ll. 1-28 and p. 26, ll. 1-2. The basis of such discussion appears to be the STATE ENGINEER's allegations that "the court should not undertake to dictate a monitoring

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plan" and that EUREKA COUNTY is attempting "to usurp this authority from the State Engineer." See, SE's Answering Brief, p. 22, l. 3 and p. 24, ll. 3-4.

These statements by the STATE ENGINEER are misstatements of the argument asserted by EUREKA COUNTY. In no portion of EUREKA COUNTY's Opening Brief did EUREKA COUNTY suggest that this Court should either dictate the terms of a 3M Plan or order the STATE ENGINEER to allow EUREKA COUNTY to dictate the terms of a 3M Plan. Instead, EUREKA COUNTY asserted that the STATE ENGINEER's reliance upon a future unseen 3M Plan was arbitrary and capricious and contrary to law and therefore the Ruling must be overturned by this Court. Seeking judicial review of an administrative agency's action on the basis the action is arbitrary and capricious is not usurping the administrative agency's authority, but instead, the appropriate standard of review as required by the Nevada statutory scheme and the Nevada Supreme Court.

Additionally, the STATE ENGINEER includes in his brief a discussion regarding Devils Hole in the Amargosa Valley, Nevada. See, SE's Answering Brief, p. 24, ll. 13-27 and p. 25, ll. 1-22. The entire discussion regarding Devils Hole seems unrelated to this matter and as such EUREKA COUNTY cannot discern why the STATE ENGINEER opted to include it in his Answering Brief. The sole point that EUREKA COUNTY could draw from the discussion was the proposition that the federal courts allow the STATE ENGINEER to manage water in areas surrounding federally reserved water rights and thus this Court should also allow the STATE ENGINEER to manage water. See, SE's Answering Brief, p. 25, ll. 23-25 and p. 26, l. 1. Assuming this is the STATE ENGINEER's point, EUREKA COUNTY agrees: the STATE ENGINEER is, and should be, responsible for managing the water resources in Nevada. However, lawful management does not equate to unfettered discretion. The STATE ENGINEER's actions are subject to statutory limitations set by the Legislature and judicial review by the Courts.

3. The STATE ENGINEER Ignored The Fact That Future Mitigation In This Case Would Be Ineffective.

EUREKA COUNTY established in its Opening Brief that the STATE ENGINEER did not receive any evidence (other than conclusory statements) detailing actual mitigation that KVR

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proposed to impacted water rights, and that the evidence submitted regarding mitigation showed that any such mitigation was unlikely to be effective. See, Opening Brief, p. 17, ll. 25-28, p. 18, ll. 1-28, p. 19, ll. 1-28, p. 20, ll. 1-28 and p. 21, ll. 1-10. Included in EUREKA COUNTY's argument were numerous citations to the record including citations to KVR's preliminary monitoring plan and the testimony of several local land owners and the EUREKA COUNTY Natural Resource Manager, Mr. Jake Tibbitts. Id.

As in the Ruling, the STATE ENGINEER's Answering Brief ignores the issue raised by EUREKA COUNTY. The STATE ENGINEER makes no attempt to argue that mitigation in this case would be effective or to refer this Court to any substantial evidence supporting this determination by the STATE ENGINEER in the Ruling or in the record. The sole discussion of the actual terms of mitigation in the STATE ENGINEER's brief were references to his authority to order pumping curtailed. See, SE's Answering Brief, p. 22, ll. 12-23. No party submitted any evidence in the 2010 hearing regarding curtailing pumping as a viable mitigation measure. The sole reference to curtailing pumping occurred in the October, 2008 hearings wherein KVR emphatically stated that curtailment of pumping was not a mitigation option in this case. See, CV0904 ROA, Transcript, Vol. 3, p. 582, ll. 4-15, p. 616, ll. 12-20 and Vol. 4, p. 676, ll. 22-24. Further, the STATE ENGINEER's argument that junior appropriators could be curtailed if there are impacts from KVR's pumping is simply wrong. See, SE's Answering Brief, p. 22, ll. 19-21. If KVR's pumping causes impacts, junior appropriators' pumping should not be curtailed --- KVR's pumping should be curtailed. Curtailment does not seem to be a viable mitigation option since the STATE ENGINEER would not be appropriately using pumping curtailment as a mitigation method for impacts resulting from KVR's pumping.

The STATE ENGINEER failed to provide any support for his determination that mitigation would be effective in this situation in either the Ruling or his Answering Brief, and it is irrefutable that he acted arbitrary and capriciously.

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4. The STATE ENGINEER Simply Reiterates The Insufficient Review Of The Adequacy Of The Applications.

The place of use identified by the Applications, as approved by the Ruling, incorporates an approximately 90,000 acre area. KVR's own witnesses and plan of operations identified the area where the mine will be located and the water will be put to beneficial use as an area encompassing approximately 14,000 acres.[4] See, ROA Vol. I, p. 000133. Additionally, KVR cannot say where the wells it will drill will be located. See, e.g., ROA Vol. II, p. 000250. Due to the lack of detail regarding these significant points in the Applications, EUREKA COUNTY raised the issue of the adequacy of the Applications.

In the Ruling, the STATE ENGINEER's sole response was a minimal discussion of the process and information associated with filing an Application, with no analysis of EUREKA COUNTY's issue: that the information contained in the Application does not correlate with the evidence at the hearing regarding place of use. See, ROA Vol. XVIII, p. 003583. The STATE ENGINEER essentially restates that discussion in his Answering Brief, again failing to include any actual discussion of the facts in this case. See, SE's Answering Brief, p. 28, ll. 3-28 and p. 29, ll. 1-2. In fact, the STATE ENGINEER's argument regarding this issue in his Answering Brief never once references either 90,000 acres or 14,000 acres. Id. Instead, the STATE ENGINEER states that EUREKA COUNTY is suggesting a "hyper-technical" reading of the statute, in an attempt to defeat the Applications, which would allegedly have a crippling effect on all large projects in Nevada.[5] See, SE's Answering Brief, p. 28, ll. 25-27. How it is possible to consider a requirement that an applicant accurately describe the place where it intends to utilize water or the well sites it intends to

[4] This case does not involve applications for mine dewatering wherein it would be appropriate to grant applications with points of diversion simply located within a given block area. KVR does not propose a mining project consisting mainly of dewatering, and thus, its Applications, like that of any water appropriator, require specificity.

[5] The STATE ENGINEER does not cite to a single statute in this section of his argument, thus it is impossible for EUREKA COUNTY to determine to which statute the STATE ENGINEER is referring. See, SE's Answering Brief, p. 28, ll. 3-28 and p. 29, ll. 1-2. As cited in EUREKA COUNTY's Opening Brief, both NRS 533.335 and NRS 533.345 require applications to appropriate water and applications to change the place of use, manner of use or point of diversion of appropriated waters to include specific information such as "information as may be necessary to a full understanding of the proposed change." See. Opening Brief, p. 21, 11. 17-22.

utilize as hyper-technical or as crippling to large projects is beyond EUREKA COUNTY's understanding.

The STATE ENGINEER does include a reference to the requirement that should a well be drilled more than 300 feet from the permitted point of diversion that a change application must be filed. See, SE's Answering Brief, p. 28, ll. 16-24. EUREKA COUNTY recognizes the validity of this statement but believes that it misses the underlying point. This group of Applications are those necessary for the completion of the entire project, which makes up, as the STATE ENGINEER points out, "the world's largest molybdenum mine." See, SE's Answering Brief, p. 30, ll. 25-26. Nonetheless, 56 percent of the proposed production wells have an unknown number, location, depth and pumping rate. See, ROA Vol. II, pp. 000373-000374 and Vol. VII, pp. 001364-001365. This means that with the approval of these Applications, the proposed mine will have obtained approval from the STATE ENGINEER for this project, without an accurate portrayal of the impacts associated with a majority of the production wells. Further, when a change application becomes necessary because the 300 feet radius has been exceeded, and the pumping impacts are better defined, it is unlikely that the STATE ENGINEER would derail this entire project by denying a change application when he approved the project by this Ruling. A 90,000 acre place of use allows the STATE ENGINEER to gloss over impacts of these imprecise Applications and KVR's imprecise plan to place the water to beneficial use.

In his earlier Ruling on this project, the STATE ENGINEER determined the place of use for these Applications would be limited to the 14,000 acre plan of operations area notwithstanding that a 90,000 acre place of use was described as the proposed place of use in the Applications. See, ROA CV0904 ROA, Vol. V, p. 41. There was no discussion in Ruling 6127 whatsoever as to what had changed with regard to the place of use for this project between 2008 and 2010. The project did not suddenly become larger. Most recently, in Ruling 6164, issued March 22, 2012, the STATE ENGINEER scaled down a place of use requested in an interbasin transfer when the evidence at the hearing showed there would be no use of water in the area described in the project's Applications. See, Ruling 6164, pp. 209-211.[6]

[6] Ruling 6164 can be found at http://images.water.nv.gov/images/rulings/6164r.pdf.

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The STATE ENGINEER has never genuinely considered the adequacy of the Applications, which is a crucial issue in granting the Applications and the Ruling is a manifest abuse of discretion.

5. The Model Is Unreliable And Thus The STATE ENGINEER's Reliance Upon It Is An Abuse Of Discretion.

The STATE ENGINEER's response to the model flaws raised by EUREKA COUNTY is to assert that there should be no limit upon the STATE ENGINEER's authority in considering the weight to give a model.[7] See, SE's Answering Brief, p. 15, ll. 1-28 and p. 16, ll. 1-11. This argument fails to recognize the standards imposed upon all administrative agencies, namely that their decisions must be based upon evidence "which a reasonable mind might accept as adequate to support a conclusion." See, City of Reno, 110 Nev. at 1222, 885 P.2d at 548 (1994). Accordingly, the bare assertion that the STATE ENGINEER should make the sole determination as to the validity of the model is insufficient. The STATE ENGINEER's Ruling must be based upon substantial evidence. Id.

The STATE ENGINEER makes no real attempt to establish the existence of substantial evidence associated with the model for this Court. Instead, the STATE ENGINEER recites his holding in the Ruling that he did not believe EUREKA COUNTY had presented convincing evidence and makes a passing reference to his ability to analyze the data files contained in the model rather than being limited to the simple graphic depiction of the ten foot drawdown contour line. See, SE's Answering Brief, p. 15, ll. 14-16 and p. 16, ll. 4-8.

Separate and independent from the testimony of EUREKA COUNTY's witnesses, which the STATE ENGINEER declined to rely upon, EUREKA COUNTY established that the ten foot drawdown contour line was unreliable, that additional impacts were noted utilizing the five foot drawdown contour line, that KVR's witnesses, Mr. Rogers and Mr. Smith, conceded and

[7] The STATE ENGINEER makes several references to this Court having directed the STATE ENGINEER to review the model submitted by KVR to the BLM. See, SE's Answering Brief, p. 4, l. 10 and p. 15, l. 4. This misstates the actual holding of this Court from Case Nos. CV0904-122 and CV0904-123. In those cases, this Court held that the STATE ENGINEER had denied the Protestants, including EUREKA COUNTY, due process by considering the model submitted to the BLM without such model having been produced pursuant to a fair and due process. Nothing from those cases actually directed the STATE ENGINEER that he must review and consider the model submitted by KVR to the BLM. This Court simply informed the STATE ENGINEER that if he chose to review and consider such model, he must comply with the requirements of due process.

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acknowledged the validity of the five foot drawdown contour line and that the decision to utilize the ten foot drawdown contour line was unrelated to any scientific principle. See, ROA Vol. I, p. 000156, Vol. II, pp. 000382-000383 and Vol. XVI, pp. 003275-003276. Furthermore, the STATE ENGINEER's own hydrogeologist recognized there was a calibration failure with the model for Diamond Valley that was a conceptual shortcoming. See, ROA Vol. II, p. 000401. Finally, EUREKA COUNTY's expert established that the model predictions have a low degree of reliability and that the residual error was higher than generally deemed acceptable by the authors of the software utilized to create the model. See, ROA Vol. III, pp. 000592-000593. In light of this sizable evidence establishing the unreliability of the model, the STATE ENGINEER's minimal statements that he did not believe EUREKA COUNTY's witnesses and that he had access to the data files associated with the model is insufficient to support his Ruling. Clearly, the substantial evidence shows that the model is unreliable and should not have been given such significant weight by the STATE ENGINEER.

The STATE ENGINEER failed to provide any genuine evidence to support his reliance upon KVR's model, and the Ruling is an abuse of discretion.

6. The STATE ENGINEER Disregards The Actual Facts Associated With Evapotranspiration In This Case Which Cause The Consumptive Use Of The Basin To Exceed The Perennial Yield.

The STATE ENGINEER addresses EUREKA COUNTY's argument regarding the granting of Applications that exceed the perennial yield with strong rhetoric. For example, the STATE ENGINEER repeatedly refers to EUREKA COUNTY's position as "absurd," something that "cannot be taken seriously" and "illogical." See, SE's Answering Brief, p. 12, ll. 13 and 20 and p. 13, ll. 14-15. Nonetheless, this rhetoric is insufficient to establish that EUREKA COUNTY is wrong and, once removed from the STATE ENGINEER's Answering Brief, leaves nothing but a basic agreement between the STATE ENGINEER and EUREKA COUNTY.

Without the rhetoric, the STATE ENGINEER's position involves a fairly accurate portrayal of the basic concepts of the interplay between perennial yield and evapotranspiration ("ET"). As noted by the STATE ENGINEER, perennial yield is established utilizing discharge calculations. See, SE's Answering Brief, p. 10, ll. 19-20, citing Ruling 6127. Ruling 6127 states

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the perennial yield is then "ultimately limited to the ***maximum amount of natural discharge that can be salvaged ...***".[8] See, SE's Answering Brief, p. 10, ll. 14-15 (emphasis added) and ROA Vol. XVIII, p. 003584. Accordingly, the STATE ENGINEER approves appropriations of underground water with the idea that "the capture of evapotranspiration ... will lower the water table until the top of the aquifer is below the root zone of the phreatophytes and evapotranspiration will cease." See, SE's Answering Brief, p. 12, ll. 5-7. Thus, once the ET ceases, while the pumping continues, the basin reaches a steady state. See, SE's Answering Brief, p. 12, ll. 8-9.

EUREKA COUNTY agrees with the STATE ENGINEER's general description of the relationship of ET to the perennial yield of a basin. If ET will eventually be captured and cease, EUREKA COUNTY believes, as apparently does the STATE ENGINEER, that an underground appropriation should be permitted. Nevertheless, in this situation, KVR explicitly testified that it would initially capture no ET and that, even by the end of the project, the ET that would be captured would only be 4,000 afa. See, ROA Vol. I, pp. 000193-000194. Thus, this is not a situation, as described by the STATE ENGINEER, where ET will cease but is instead a situation where ET will continue along with the pumping pursuant to the Applications granted by the STATE ENGINEER. With both the ET and the pumping continuing, the consumptive use of water in the basin will exceed the perennial yield of the Kobeh Valley Hydrographic Basin ("Kobeh Valley"). While KVR's project is considered a temporary use, the water will come from storage causing groundwater mining. This complicated analysis of the facts of a specific basin is exactly the job tasked to the STATE ENGINEER. It is erroneous for the STATE ENGINEER to downplay the complicated nature of these concepts and instead attempt to treat the determination of whether the perennial yield is exceeded as a simple math equation in which the pumping is deducted from the perennial yield and it is assumed that the ET will be captured.

The STATE ENGINEER failed to address the impact of the continuing ET in both the Ruling and the Answering Brief. Instead, he granted the Applications under the guise that the ET

[8] The STATE ENGINEER utilizes various definitions for perennial yield in different cases. This is the definition the STATE ENGINEER used for perennial yield in this case.

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would be captured. There being no evidence that ET would be captured, the STATE ENGINEER's decision is not based upon substantial evidence.

7. There Is No Support For The STATE ENGINEER's Modification Of The Perennial Yield For Basins In The Diamond Valley Flow System.

In Ruling 6127, the STATE ENGINEER revised the perennial yield of Monitor Valley, Southern Part from 10,000 afa to 9,000 afa; Monitor Valley, Northern Part from 8,000 afa to 2,000 afa; and Kobeh Valley from 16,000 afa to 15,000 afa. See, ROA Vol. XVIII, p. 003586. The revision of the perennial yield of these basins was unrequested and unexpected by the parties as none of them had submitted any evidence associated with or in support of such revision. When asked by the STATE ENGINEER's hydrogeologist at the October, 2008 hearing, KVR stated it was not reevaluating the groundwater ET to change the perennial yield of Kobeh Valley. See, CV08904 ROA, Transcript, Vol. 5, p. 1105, ll. 17-25 and p. 1106, ll. 1-23.

The STATE ENGINEER now alleges that such revisions were necessary to ensure the perennial yield of the Diamond Valley Flow System remained accurate. See, SE's Answering Brief, p. 11, ll. 20-24. Despite such explanation, the STATE ENGINEER is unable to cite to a single piece of evidence upon which he relied in making the revisions. The closest reference to any support that the STATE ENGINEER can make is to state that "[t]he findings on perennial yield are nearly identical to those found for evapotranspiration by Rush and Everett." See, SE's Answering Brief, p. 11, ll. 26-27 (emphasis added). Nevertheless, the STATE ENGINEER provides no explanation or support for why the new perennial yields deviate in any manner from the scientific evidence to which he refers. The decision to revise the perennial yields is even more problematic given the fact that the United States Geological Survey ("USGS") has an ongoing study that when completed will provide additional information regarding the Diamond Valley Flow System, upon which the STATE ENGINEER could rely should he then decide to modify perennial yields. See, ROA Vol. XVIII, p. 003612.

As a general concept, EUREKA COUNTY is not opposed to the STATE ENGINEER revising a perennial yield for a hydrographic basin. However, such a revision needs to be based upon scientific evidence which has been properly submitted to the STATE ENGINEER.

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Furthermore, the basic notions of fairness and due process require that all parties interested in the perennial yield for a particular basin have notice of the proceeding and an opportunity to be heard.

The STATE ENGINEER's modification of the perennial yield is unsupported by substantial evidence, violates the basic notion of due process by not allowing all water users (whether involved in the hearing or not) to comment on the modification and is arbitrary and capricious.

8. The STATE ENGINEER Cannot Establish That The Elements For An Interbasin Transfer Of Water Have Been Met.

a. The STATE ENGINEER Again Ignores The Elements Of An Interbasin Transfer Of Water With Regard To Pine Valley Hydrographic Basin.

The STATE ENGINEER acknowledges both in the Ruling and in his Answering Brief that a portion of the proposed interbasin transfer of water includes a place of use in the Pine Valley Hydrographic Basin ("Pine Valley"). See, SE's Answering Brief, p. 16, ll. 25-27 and ROA Vol. XVIII, pp. 003594-003595. Accordingly, NRS 533.370(3) requires the STATE ENGINEER to consider whether the applicant justified the need to import water from another basin to Pine Valley and whether a conservation plan for Pine Valley is necessary.

Despite the STATE ENGINEER's acknowledgement, in neither the Ruling nor the Answering Brief does he address the need to import water to Pine Valley from Kobeh Valley. The closest the STATE ENGINEER comes to addressing the necessity for a conservation plan in Pine Valley is a very generic discussion of the plan of conservation element in his Answering Brief in which he includes a passing reference to Pine Valley. See, SE's Answering Brief, p. 17, ll. 19-28 and p. 18, ll. 1-15. Such generic discussion does not include specific information regarding Pine Valley nor is there a single citation to any evidence regarding Pine Valley[9]. Id.

Further, the STATE ENGINEER not only fails to address the required elements for an interbasin transfer of water into Pine Valley but in his Answering Brief states that "only exportation of water from Kobeh Valley to Diamond Valley was allowed in the ruling." See, SE's Answering Brief, p. 16, ll. 27-28. This statement does not negate the interbasin transfer approved to

[9] As pointed out in EUREKA COUNTY's Opening Brief, KVR did not submit any evidence associated with the interbasin transfer of water into Pine Valley and as such the STATE ENGINEER could not have included any citations to such nonexistent evidence. See, Opening Brief, p. 32, ll. 1-25.

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Pine Valley and simply highlights the issue raised by EUREKA COUNTY: what the STATE ENGINEER thinks he approved and what he actually approved are two different things. The STATE ENGINEER has consistently treated this project as an interbasin transfer of water into Diamond Valley, ignoring the fact that by approving the Applications as filed, he also granted an interbasin transfer of water to Pine Valley.

The STATE ENGINEER's failure to address the interbasin transfer standards in NRS 533.370(3) for the interbasin transfer he approved to Pine Valley is a manifest abuse of discretion.

b. The STATE ENGINEER Misinterprets The Environmentally Sound Analysis Required By NRS 533.370(3).

The STATE ENGINEER cites to a United States Supreme Court case, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), for the proposition that if a statute is ambiguous the court should only consider whether the agency's interpretation is based upon a permissible construction of the statute. See, SE's Answering Brief, p. 20, ll. 3-6. Nonetheless, this is not the mandatory standard suggested by the Nevada Supreme Court which this Court must follow.

The Nevada Supreme Court has held that "[w]e will defer to an administrative body's interpretations of its governing statutes or regulations only if the interpretation is within the language of the statute." UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union v. Nevada Serv. Employees Union/SEIU Local 1107, AFL-CIO, 124 Nev. 84, 89, 178 P.3d 709, 712 (2008). "When the statutory language is ambiguous or otherwise unclear, we will look beyond the statute's language to construe it according to that which reason and public policy indicate the Legislature intended." Id. at 88-89 and 712. "[E]ven a reasonable agency interpretation of an ambiguous statute may be stricken by a court when a court determines that the agency interpretation conflicts with legislative intent." State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). Thus, while deference should be given to the STATE ENGINEER's interpretation of a statute, such interpretation is not controlling. United States v. State Eng'r, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001).

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NRS 533.370(3) requires the STATE ENGINEER to consider whether an interbasin transfer of water is "environmentally sound as it relates to the basin from which the water is exported." The STATE ENGINEER interprets this statutory requirement as necessitating a determination of "whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources." See, ROA Vol. XVIII, p. 003597. EUREKA COUNTY agrees with the STATE ENGINEER's standard and presented evidence at the hearing using this standard to show the proposed interbasin transfer was not environmentally sound.

However, the STATE ENGINEER did not apply this standard and considered factors associated solely with the impacts upon the existing water rights and springs in Kobeh Valley, the BLM's claims for reserved water rights in Kobeh Valley, and that KVR's project and existing rights will use less water than the perennial yield of the basin, all of which are applicable under an analysis of NRS 533.370(2), not NRS 533.370(3). See, SE's Answering Brief, p. 18, ll. 16-26, p. 19, ll. 1-28, p. 20, ll. 7-14 and ROA Vol. XVIII, p. 003598. Notwithstanding the standard he articulated as the environmentally sound requirement of NRS 533.370(3), the STATE ENGINEER applied the standard he must consider under NRS 533.370(2). The STATE ENGINEER erred as a matter of law in failing to use the standard he articulated. Nowhere in the Ruling does the STATE ENGINEER discuss the "hydrologic-related natural resources" of Kobeh Valley and whether these "hydrologic-related natural resources" will be unreasonably impacted by KVR's proposed pumping.

The STATE ENGINEER's statutory construction must not only be permissible but he must also comply with reason, public policy and the legislative intent. UMC Physicians' Bargaining Unit of Nevada Serv. Employees, 124 Nev. at 89, 178 P.3d at 712 (2008) and State Farm Mut. Auto. Ins. Co., 116 Nev. at 293, 995 P.2d at 485 (2000). Not only does the STATE ENGINEER's interpretation fail to satisfy the "permissible construction" standard that he asserts should apply, but he certainly fails to satisfy the stricter standards applied by Nevada courts.

The STATE ENGINEER's analysis of whether an interbasin transfer of water is environmentally sound is duplicative of the analysis conducted pursuant to NRS 533.370(2), causing the interbasin transfer statutory provisions to be rendered mere surplusage, in violation of the basic

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maxims of statutory interpretation. Stockmeier v. Psychological Review Panel, 122 Nev. 534, 540, 135 P.3d 807, 810 (2006). Furthermore, the legislative history of NRS 533.370(3) shows that more than a mere review of the impacts to existing rights was necessary in considering whether an action was environmentally sound since the legislative history specifically refers to the impacts of water transfers upon threatened and endangered species, wetland environments, water quality and recreational opportunities. See, Minutes for February 10, 1999, Senate Committee on Natural Resources, pp. 6-9.[10]

The STATE ENGINEER's standard for determining if an interbasin transfer of water is environmentally sound is not permissible as it applied the standard for NRS 533.370(2) and does not comply with reason, public policy or the legislative intent of NRS 533.370(3). Accordingly, the STATE ENGINEER has failed to adequately address whether the interbasin transfer proposed in the Applications is environmentally sound.

c. The STATE ENGINEER's Ruling Regarding The Interbasin Transfer Being Environmentally Sound Is Not Supported By Substantial Evidence.

The STATE ENGINEER relies entirely upon the erroneous standard he proposes regarding an interbasin transfer being environmentally sound, as discussed above, in considering the evidence presented associated with the interbasin transfer. Accordingly, the STATE ENGINEER considers only the impacts upon existing water rights and springs, the BLM's claims for reserved water rights and the perennial yield of Kobeh Valley. See, SE's Answering Brief, p. 18, ll. 16-26, p. 19, ll. 1-28, p. 20, ll. 7-14 and ROA Vol. XVIII, p. 003598.

The STATE ENGINEER failed to consider the evidence regarding the hydrologic-related natural resources in Kobeh Valley.[11] For example, Rex Massey testified regarding the substantial recreational opportunities and wildlife related natural resources in Kobeh Valley. See, ROA Vol. IV, pp. 000695-000700. The Nevada Department of Wildlife and U.S. Fish and Wildlife Services has designated both Henderson and Vinini Creek as potential Lahontan Cutthroat Trout

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

[11] KVR did not submit any evidence associated with the environment to satisfy the requirement of NRS 533.370(3) other than testimony it was complying with all environmental permitting requirements. See, ROA Vol. I, pp. 000095-000099 and ROA Vol. VI, pp. 001058-001059. Accordingly, all evidence submitted regarding whether the proposed interbasin transfer was environmentally sound was submitted by the Protestants.

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recovery streams, something that requires a sufficient and reliable quantity and quality of water, and a fact which was not considered by the STATE ENGINEER. See, ROA Vol. IV, pp. 000736-000737. The STATE ENGINEER failed to consider or address the testimony of Gary Garaventa regarding the expected impacts upon wild horses and local wildlife. See, ROA Vol. III, pp. 000498-000500.

Ruling 6127 acknowledges KVR's groundwater flow model, which the STATE ENGINEER determined was "sound", "predicts water table drawdown at the end of mine life of three feet or more in the general area of Kobeh Valley north of U.S. Highway 50 and east of 3-Bars Road. This includes the well field area, where drawdown is extensive. Drawdown of ten feet or less extends westerly to the Bobcat Ranch and southerly to the Antelope Valley boundary." See, ROA Vol. XVIII, p. 003592. This is an extremely large area, approximately 250 square miles, and extends into Lander County where the Bobcat Ranch is located. Since the water levels are so shallow and close to the surface in Kobeh Valley, water table drawdown of even one foot impacts recreation and local wildlife in Kobeh Valley.

The STATE ENGINEER does not dispute that he did not consider the evidence regarding the environment in Kobeh Valley in his Answering Brief; instead he reiterates that such consideration is unnecessary. Therefore, the STATE ENGINEER's determination regarding the environmental soundness of the interbasin transfer proposed by KVR is not supported by substantial evidence and contrary to the only evidence submitted showing that decreases in the water table will unreasonably impact the water resources of Kobeh Valley and the hydrologic-related natural resources that are dependent upon those water resources.

d. The STATE ENGINEER Completely Ignores The Issue Of Future Growth And Development In His Answering Brief.

The STATE ENGINEER addresses each of the elements necessary to approve an interbasin transfer of water in his Answering Brief, except the requirement regarding impacts to future growth and development, though he recognizes such requirement exists in his citation to the applicable statute. See, SE's Answering Brief, p. 16, ll. 12-28, p. 17, ll. 1-28, p. 18, ll. 1-28, p. 19, ll. 1-28, p. 20, ll. 1-28 and p. 21, ll. 1-4.

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It would be duplicative and unnecessary given the STATE ENGINEER's lack of a response to EUREKA COUNTY's arguments regarding future growth and development, for EUREKA COUNTY to reiterate its arguments associated with this issue. The STATE ENGINEER having failed to oppose EUREKA COUNTY's assertion that the STATE ENGINEER misapplied the statute, this Court should rule that the STATE ENGINEER acted arbitrarily and capriciously.

9. The STATE ENGINEER Ignores The Issue Of Forfeiture In His Answering Brief.

EUREKA COUNTY raised the issue of the forfeiture statute, NRS 534.090(1), to naturally free flowing water that is not put to a beneficial use and the lack of any evidence to support the STATE ENGINEER's decision there was no forfeiture of a portion of the water rights associated with the Bartine Ranch. See, Opening Brief, p. 38, ll. 13-28, p. 39, ll. 1-28, p. 40, ll. 1-28, p. 41, ll. 1-28 and p. 42, ll. 1-21. The STATE ENGINEER acknowledged the existence of this issue in his statement of facts, but failed to actually address any of the arguments associated with forfeiture in his Answering Brief. See, SE's Answering Brief, p. 8, ll. 4-8. Accordingly, this Court should consider the validity of such arguments conceded and rule that the STATE ENGINEER acted arbitrarily and capriciously.

10. NRS 533.324 And NRS 533.325 Explicitly Provide That An Individual May Not Apply For A Change Application Unless The Water Rights To Be Changed Have Been Permitted.

The STATE ENGINEER alleges that he interprets NRS 533.324 as allowing an individual to file a change application for water which has not yet been permitted, thus allowing for the contemporaneous approval of an initial application and a change application. See, SE's Answering Brief, p. 32, ll. 20-23. The STATE ENGINEER attempts to support this argument by saying that his actions must be correct because this is how he has been applying the law for at least the past three years. See, SE's Answering Brief, p. 32, ll. 24-26 and p. 33, ll. 1-7.

Unfortunately, the STATE ENGINEER neglects to review the provisions of NRS 533.325 which identify when a change application may be filed. NRS 533.325 provides in pertinent part as follows: "Any person who wishes ... to change the place of diversion, manner of use or place of use of water already appropriated, shall ... apply to the State Engineer for a permit to do so"

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(emphasis added). The term "water already appropriated" is defined as "water for whose appropriation the State Engineer has issued a permit ....". NRS 533.324 (emphasis added). Accordingly, read together, NRS 533.324 and NRS 533.325 provide that any person who wishes to change the point of diversion, manner of use or place of use of water for which a permit has been issued may apply to the State Engineer for a permit to do so. Thus, the statutory language clearly and unambiguously provides that a change application may not be successfully applied for until after the base water right has been permitted.

"An administrative agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision." State Eng'r, 117 Nev. at 589-90, 27 P.3d at 53 (2001) (internal citations omitted). In this case, the statutory interpretation suggested by the STATE ENGINEER directly contradicts the explicit language of the statutes. As such, the STATE ENGINEER's interpretation is not controlling and instead the statute as written must be applied.

Further, as stated above, any statutory construction by the STATE ENGINEER must comply with reason, public policy and the legislative intent. UMC Physicians' Bargaining Unit of Nevada Serv. Employees, 124 Nev. at 89, 178 P.3d at 712 (2008) and State Farm Mut. Auto. Ins. Co., 116 Nev. at 293, 995 P.2d at 485 (2000). While the statutes are unambiguous and it is unnecessary to consider anything further, it is worth noting that the legislative history does not support the STATE ENGINEER's interpretation. The legislative history includes multiple references to the necessity that change applications may only be applied for upon "permitted water rights". See, e.g., Minutes for March 24, 1993 Assembly Committee on Government Affairs, pp. 693 and 713.[12]

Finally, the mere fact that the STATE ENGINEER has been misapplying this statute for several years is not grounds for this Court to uphold the STATE ENGINEER's erroneous action in this case. The STATE ENGINEER's authority is limited to the grant of powers provided in the statutes. Andrews v. Nevada State Bd. of Cosmetology, 86 Nev. 207, 208, 467 P.2d 96, 96-97 (1970). This Court cannot expand such power simply because the STATE ENGINEER has acted in

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

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excess of his authority on multiple occasions or it is convenient for the STATE ENGINEER to do so.

The STATE ENGINEER abused his powers by exceeding his statutory authority and granting Applications 79911, 79912, 79914, 79916, 79918, 79925, 79928, 79933, 79938, 79939 and 79940.

11. The NRS 533.364 Inventory Is Defective.

The STATE ENGINEER alleges that EUREKA COUNTY is requesting information in addition to that required by NRS 533.364 be required as part of the inventory necessary for some interbasin transfers. See, SE's Answering Brief, p. 34, ll. 12-13. Despite taking this position, the STATE ENGINEER concedes that if there is a "showing that the inventory was substantially defective" then it would be appropriate for the Court to disregard the STATE ENGINEER's Ruling. See, SE's Answering Brief, p. 34, ll. 26-27 and p. 35, l. 1.

The STATE ENGINEER misstates the position actually asserted by EUREKA COUNTY. EUREKA COUNTY does not request that any information in excess of that required by NRS 533.364 be provided. Specifically, NRS 533.364 requires that an inventory include:

> (a) The total amount of surface water and groundwater appropriated in accordance with a decreed, certified or permitted right;
> (b) An estimate of the amount and location of all surface water and groundwater that is available for appropriation in the basin; and
> (c) The name of each owner of record set forth in the records of the Office of the State Engineer for each decreed, certified or permitted right in the basin.

As is obvious from the legislative history, this information is not intended to be a simple short rendition of the status of a basin from the data on the STATE ENGINEER's website, but is instead intended to be fairly detailed. See, e.g., Minutes of the April 3, 2009 Assembly Committee on Government Affairs. On this point, EUREKA COUNTY would be content should the detailed information required by this statute actually be submitted to the STATE ENGINEER prior to his granting of the Applications. EUREKA COUNTY is simply attempting to hold the STATE ENGINEER accountable for actually obtaining the information required by NRS 533.364.

In this case, the STATE ENGINEER accepted an inventory with obvious flaws, such as water sources that were not actually visited but instead simply located on Google Earth and spaces

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for information that were simply left blank. See, e.g., EUREKA COUNTY's Supplemental Summary of Record on Appeal – CV1108-155 ("SROA") 0135, 0139, 0141, 0153, 0186 and 0214. Furthermore, the STATE ENGINEER did not request the inventory until after the hearing and, despite holding a second hearing at least in part on the inventory issue, did not receive the inventory until all hearings in this matter had been complete, preventing any of the Protestants from being able to actually question the validity of the inventory. Finally, the STATE ENGINEER himself appears to have completed little, if any, review of the inventory, having received the inventory on June 16, 2011 and approved it a mere four (4) business days later. See, KVR's Answering Brief, p. 5, ll. 16-24. This list of defects is substantial.

The STATE ENGINEER not only violated the fundamental notions of fairness and due process by failing to allow any party to review the inventory prior to its approval but also manifestly abused his discretion by approving the Applications despite having received an untimely and wholly inadequate inventory of Kobeh Valley.

12. The STATE ENGINEER Provides No Explanation For The Contradiction Between The Permits And The Ruling.

EUREKA COUNTY detailed terms of the Permits that contradict either the Permits themselves or the Ruling.[13] See, Opening Brief, p. 48, ll. 1-28, p. 49, ll. 1-28 and p. 50, ll. 1-11. This causes the STATE ENGINEER to be taking two contradictory positions. Only one of those positions can be correct. Nonetheless, the STATE ENGINEER does not identify which position is correct. Instead, the STATE ENGINEER attempts to maintain both contradictory positions without sufficient explanation.

Specifically, EUREKA COUNTY asserted that the place of use for the Diamond Valley Permits[14] was contradictory within the permits themselves. See, Opening Brief, p. 49, ll. 7-17. The Diamond Valley Permits provide both that the place of use is limited to Diamond Valley

[13] In its Opening Brief, EUREKA COUNTY raised the issues that the Permits' place of use was inaccurate, expansive and nebulous and that several of the Permits had been forfeited. The STATE ENGINEER's failure to respond to either of these arguments has been noted above.

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

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and that the place of use is the approximately 90,000 acre area indicated on the Applications, an area that incorporates more than simply Diamond Valley. See, EUREKA COUNTY's Summary of Record on Appeal – CV1112-164 ("EC ROA") 061-070, 079-086 and 0151-0164. The STATE ENGINEER did not address this issue in his Answering Brief.

EUREKA COUNTY also contends that the terms of the Diamond Valley Permits were required to include language as follows as stated in the Ruling:

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

See, ROA Vol. XVIII, p. 003595.[15] This clearly requires a permit restriction in excess of simply restricting the place of use to Diamond Valley, as the STATE ENGINEER asserts is sufficient. See, SE's Answering Brief, p. 32, ll. 5-12. The Ruling required that the Diamond Valley Permits be limited not only to Diamond Valley but that any excess water not consumed be returned to the groundwater aquifer in Diamond Valley. See, ROA Vol. XVIII, p. 003595. This requirement is not included in the Diamond Valley Permits. Thus, the Diamond Valley Permits conflict with the Ruling in that they merely restrict the place of use but do not require the return of unconsumed water to the Diamond Valley groundwater aquifer.

Finally, EUREKA COUNTY established that the Ruling provided that "[a]ll changes of irrigation rights will be limited to their respective consumptive uses." See, ROA Vol. XVIII, p. 003613. The Permits provide "initially only the net consumptive use amount of the base right ... can be diverted annually. Additional diversion ... may be granted if it can be shown that the additional diversion will not cause the consumptive use ... to be exceeded." See, EC ROA 044, 046, 048, 050, 052, 054, 056, 058, 060-070, 072, 074, 076, 078-086, 092, 096, 0100, 0106, 0108, 0112, 0118, 0120, 0130, 0134, 0136, 0148, 0150-0153 and 0155-0164. This language is contradictory in that the

[15] In his Answering Brief, the STATE ENGINEER cites this exact language in support of his decision regarding interbasin transfers and then somehow manages to fail to comprehend the conflict such language creates with the Permit terms. See, SE's Answering Brief, p. 20, ll. 24-27.

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Ruling requires a strict limitation to the water rights' consumptive use, while the Permits allow for a flexible standard that could allow for additional diversion.[16]

The STATE ENGINEER's sole response to this issue is to refer to NRS 533.3703(1) which allows the STATE ENGINEER to consider the consumptive use when determining if a change application will conflict with existing water rights or is detrimental to the public interest. See, SE's Answering Brief, p. 31, ll. 25-28, p. 32, ll. 1-2. This is wholly nonresponsive to the issue raised by EUREKA COUNTY. EUREKA COUNTY has not asserted that it was inappropriate for the STATE ENGINEER to consider consumptive use, but asserts that the STATE ENGINEER, following his consideration of consumptive use, came to two different conclusions. Either the Permits must be strictly limited to their consumptive use, as determined by the STATE ENGINEER in the Ruling after reviewing the evidence presented, or the flexible standard in the Permits which allows additional diversion must be analyzed to determine the additional impacts from increased diversion.

The STATE ENGINEER issued Permits that are inconsistent and contradictory, both with themselves and the Ruling, an action that must be considered arbitrary and capricious.

13. The STATE ENGINEER Did Not Address EUREKA COUNTY's Legal Authority That Remand Is Not Appropriate In This Case.

Though the STATE ENGINEER disputes some of the arguments asserted by EUREKA COUNTY, he does not address EUREKA COUNTY's argument that remand in this matter would be futile and useless and that this Court should take final action with regard to the Applications. See, Opening Brief, p. 51, ll. 1-25. Specifically, EUREKA COUNTY requests that this Court vacate the Ruling and the Permits and deny the Applications as presented.

14. The STATE ENGINEER Discusses Several Issues In His Answering Brief Not Raised By EUREKA COUNTY.

Though he fails to address all of the issues raised by EUREKA COUNTY, the STATE ENGINEER does include in his Answering Brief a discussion of several issues that were not raised by EUREKA COUNTY to this Court. Namely, the STATE ENGINEER discusses the

[16] Further, it is not clear how additional diversion can be granted without exceeding the net consumptive use cap set by the STATE ENGINEER or without causing additional impacts.

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showing of a need to import water for an interbasin transfer, the plan for conservation of water with regard to interbasin transfers,[17] other relevant factors for an interbasin transfer, the existence of a property or liberty interest,[18] the applicant's financial ability to proceed with the project, the protection of existing domestic wells[19] and the impacts of granting the Applications upon the public interest. See, SE's Answering Brief, p. 17, ll. 1-28, p. 18, ll. 1-15, p. 20, ll. 15-28, p. 21, ll. 1-4, p. 26, ll. 3-26, p. 27, ll. 1-28, p. 28, ll. 1-2, p. 29, ll. 3-28, p. 30, ll. 1-28 and p. 31, ll. 1-12.

It is unclear why the STATE ENGINEER requests that this Court spend judicial resources and time addressing these issues. However, if it is the intent of the STATE ENGINEER to include these issues to point out that some of the considerations of the STATE ENGINEER are not challenged, the STATE ENGINEER's point is irrelevant. The STATE ENGINEER has the obligation to comply with the statutory obligations and limitations associated with his position, to issue rulings supported by substantial evidence and not to act in an arbitrary and capricious manner or abuse his discretion. When, as in this instance, the STATE ENGINEER's determinations or actions violate these obligations, the STATE ENGINEER's Ruling must be vacated.

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[17] With regard to the plan for conservation of water, the STATE ENGINEER states that "Eureka County .. [is] misapplying this provision of the water law." See, SE's Answering Brief, p. 18, ll. 12-13. With the exception of noting that there was no discussion of the factors necessary to support an interbasin transfer of water, including the conservation plan, in regard to Pine Valley, EUREKA COUNTY did not raise any issues with the plan for conservation of water. As such, it is unclear to what misapplication the STATE ENGINEER is referring.

[18] EUREKA COUNTY does assert that the STATE ENGINEER failed to comply with the basic notions of fairness and due process by relying upon a future mitigation plan and in accepting the inventory in violation of Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979). Despite these assertions, EUREKA COUNTY did not argue that the STATE ENGINEER had taken a property or liberty interest in violation of the United States Constitution.

[19] EUREKA COUNTY did raise the issue that the Applications will conflict with existing water rights. However, the issue was not specifically associated with the protection of domestic wells as specifically addressed in NRS 533.024 and as addressed by the STATE ENGINEER in his brief.

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B. Reply To KVR's Answering Brief.

1. EUREKA COUNTY Does Not Misinterpret And Misapply The Standard Of Review.

Prior to addressing any of the arguments made by EUREKA COUNTY and not in relation to any specific argument, KVR asserts that EUREKA COUNTY mischaracterizes and misapplies the standard of review.[20] See, KVR's Answering Brief, p. 7, ll. 25-28 and p. 8, ll. 1-12.

EUREKA COUNTY does not "ignore the State Engineer's right, as fact finder, to make factual determinations and to decide which evidence and whose testimony is credible." See, KVR's Answering Brief, p. 8, ll. 9-10. Where appropriate, in the limited situations where the STATE ENGINEER had factual support for his position, EUREKA COUNTY did not challenge the STATE ENGINEER's determinations. Nonetheless, there are numerous situations where there is no evidence to support the STATE ENGINEER's decision and instead all of the evidence is in opposition to the STATE ENGINEER's determination, situations which EUREKA COUNTY is compelled to discuss. Nothing in the applicable standard of review prohibits EUREKA COUNTY from directing this Court to the substantial evidence contrary to the STATE ENGINEER's decision, whether that be as grounds to call into question the lack of support for the STATE ENGINEER's determination or pursuant to a discussion of the only evidence available regarding an issue.

2. KVR Attempts To Place The Entire Burden Of Complying With NRS 533.370(2) Upon Its Unknown And Undefined Mitigation Plan Conceding That It Will Conflict With Existing Rights.

KVR does not allege that the Applications will not conflict with, or impair, existing water rights. See, KVR's Answering Brief, p. 10, ll. 9-28, p. 11, ll. 1-28, p. 12, ll. 1-28 and p. 13, ll. 1-15. Instead KVR attempts to impose an unsupported statutory construction upon NRS 533.370(2) which allows conflicts with existing rights so long as such conflicts are monitored and mitigated. Id.

KVR places the majority of the burden of its unsupported statutory construction upon the distinction it attempts to draw between the words "conflict" and "impact."[21] Id. KVR's point is

[20] KVR asserts that this alleged misinterpretation and misapplication occurs with regard to both issues of fact and law. See, KVR's Answering Brief, p. 7, ll. 26-27. Nonetheless, KVR thereafter only discusses the standard of review applicable to issues of fact. See, KVR's Answering Brief, p. 7, ll. 25-28, p. 8, ll. 1-12.

apparently that the word "conflict" allows for reliance upon mitigation while the word "impact" does not.[22] Id. Nonetheless, by making such argument, KVR concedes that the Applications will impact existing water rights. KVR believes this Court should take the position that it is possible for an application to impact existing water rights without conflicting with those same existing water rights and further take the position that impacts to existing rights are acceptable.

NRS 533.370(2) provides in pertinent part "where ... [an application's] proposed use or change conflicts with existing rights ... the State Engineer shall reject the application and refuse to issue the requested permit." The Nevada Supreme Court addressed this provision in Griffin v. Westergard, 96 Nev. 627, 630, 615 P.2d 235, 237 (1980). The Nevada Supreme Court held that NRS 533.370(4), now codified as NRS 533.370(2) "required respondent [the STATE ENGINEER] to deny any permit that would ***impair existing rights*** and prove detrimental to the public interest" (emphasis added). The Supreme Court equated "conflict" with "impair" in its holding regarding impacts to existing rights. Id. at 631, 237. Further, as explicitly noted by KVR, the Nevada Supreme Court does not consider whether mitigation is appropriate when determining whether NRS 533.370(2) mandates denial of an application. Id. and KVR's Answering Brief, p. 13, ll. 25-27, fn. 7. Thus, it is not that EUREKA COUNTY misperceives a distinction between the terms "impact" and "conflict", but that the Nevada Supreme Court has applied the statute to hold that, when a water right will be "impaired", that is a "conflict" with existing rights pursuant to NRS 533.370(2) and the application must be denied. This Court and the STATE ENGINEER must follow the holding of the Nevada Supreme Court on this issue regardless of KVR's novel argument on this matter.

Since the analysis of the term "conflict" has been addressed by the Nevada Supreme Court, this Court should go no further and apply the Nevada Supreme Court's holding in Griffin in this case and deny KVR's Applications. Nonetheless, in the interests of establishing the error of

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[21] Interestingly, in a later argument in its Answering Brief, KVR provides that the STATE ENGINEER, in addressing NRS 533.370(2), "focused on specific evidence regarding the potential **impacts** to existing rights in Kobeh Valley and Diamond Valley in determining whether there was a **conflict**." See, KVR's Answering Brief, p. 35, ll. 26-28. (emphasis added). Thus, even the STATE ENGINEER, according to KVR, treats the analysis for conflicts with existing rights as an analysis for impacts. Based upon the position taken by KVR throughout its Answering Brief, KVR would certainly suggest to this Court that the STATE ENGINEER's analysis is entitled to substantial deference and must the followed.

[22] KVR's position assumes that a conflict can be avoided if it can be mitigated. This ignores the possibility that mitigation may not actually occur.

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KVR's position, EUREKA COUNTY addresses the other matters asserted by KVR. Specifically, KVR argues that because NRS 534.110 allows an appropriation of groundwater that will cause a "reasonable lowering" of water level and there is a legislative declaration regarding domestic wells, impacts upon existing water rights are permitted in Nevada.[23] See, KVR's Answering Brief, p. 11, ll. 13-28. This allegation by KVR is an attempt to impose the standards discussed in other statutory sections in place of the actual language in NRS 533.370(2). The real point which should be drawn from KVR's citations to these statutory provisions is that the Nevada Legislature was well aware of how to establish and impose a different standard, such as "unreasonable adverse effects" or "reasonable lowering", but chose in NRS 533.370(2) to disallow any "conflicts," a term which has been interpreted as "impair".

Finally, KVR attempts to distinguish the case law cited by EUREKA COUNTY to suggest that these cases allow mitigation rather than mandating denial of applications that conflict with or impair existing rights. See, KVR's Answering Brief, p. 13, ll. 1-12 and fn. 7. Such argument fails.[24] Initially, it should be noted that such cases were cited by EUREKA COUNTY not with regard to mitigation but for the proposition that even a de minimis impact requires denial. See, Opening Brief, p. 7, ll. 19-28 and p. 8, ll. 1-28. Further, a majority of the cases do not discuss mitigation but simply mandate denial, a fact that KVR attempts to downplay by footnoting these cases and implying that they are irrelevant. See, KVR's Answering Brief, p. 13, ll. 25-28, fn. 7 and Griffin, 96 Nev. at 630, 615 P.2d at 237 (1980), Heine v. Reynolds, 367 P.2d 708, 710 (N.M. 1962) and Postema v. Pollution Control Hearings Bd., 11 P.3d 726, 741 (Wash. 2000). Nonetheless, the lack of discussion of mitigation by these courts establishes that these courts do not consider mitigation relevant to the issue of impacts upon existing rights, despite KVR's assertion otherwise. Furthermore, even the cases that KVR cites do not include a discussion of mitigation but instead,

[23] Both of the provisions cited by KVR address standards associated with groundwater, not surface water. KVR's argument regarding NRS 534.110, if appropriate, only applies to groundwater. The springs at issue in this case are surface water and it is impossible to have a "reasonable lowering" of a spring.

[24] As discussed in more detail below, part of KVR's substantial failure in this regard is that it cannot establish that its mitigation will prevent any conflict with, or impact upon, existing rights. The simple reason for KVR's problem is that it did not present a mitigation plan to the STATE ENGINEER or any evidence showing mitigation could or would be effective, but simply proposed that it would submit a mitigation plan in the future. Thus, KVR cannot now allege that, through mitigation, there will be no impact upon, or conflict with, existing rights.

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simply contain phrases that KVR grasps at to support its proposition that mitigation is an appropriate consideration. Piute Reservoir & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962) and Crafts v. Hansen, 667 P.2d 1068, 1070 (Utah 1983).

EUREKA COUNTY highlighted the substantial evidence, submitted by both KVR and the Protestants, establishing that there will be impacts upon existing rights by the Applicant's proposed pumping. See, Opening Brief, p. 9, ll. 1-28, p. 10, ll. 1-28, p. 11, ll. 1-28, p. 12, ll. 1-28, p. 13, ll. 1-28 and p. 14, ll. 1-10. KVR does not dispute that granting the Applications will have impacts upon existing rights. See, KVR's Answering Brief, p. 10, ll. 11-28 and p. 11, ll. 1-3. This concession alone is sufficient to mandate denial of the Applications pursuant to NRS 533.370(2).

Based upon the applicable law, it is undeniable that NRS 533.370(2) requires the STATE ENGINEER to deny any applications that conflict with, or impact, existing rights, regardless of the theoretical possibility that such impacts could be mitigated.[25] There being no factual dispute that the Applications will conflict with existing rights, the STATE ENGINEER was statutorily obligated to deny the Applications and his failure to do so was arbitrary and capricious and an error of law.

3. The STATE ENGINEER Cannot Rely Upon A Future 3M Plan To Satisfy His Statutory Obligation.

The STATE ENGINEER provides repeatedly in the Ruling that a future unseen 3M Plan will remedy the defects in granting Applications that impact existing rights. See, ROA Vol. XVIII, pp. 003592-003593 and 003609-003610. This reliance is without any basis since there was no 3M Plan in existence at the time the STATE ENGINEER entered the Ruling. KVR attempts to defend such arbitrary and capricious action by distinguishing the case law cited by EUREKA COUNTY and asserting that such deferral to a future time complies with the basic notions of fairness and due process because EUREKA COUNTY was allowed to assist with the formation of

[25] The arbitrariness of the STATE ENGINEER's actions in this case is shown by his recent Ruling 6164, issued on March 22, 2012, wherein the STATE ENGINEER denied four applications based solely upon the fact that such applications would conflict with existing rights. See, Ruling 6164, p. 216.

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the 3M Plan.[26] See, KVR's Answering Brief, p. 13, ll. 16-21, p. 14, ll. 1-28, p. 15, ll. 1-28, p. 16, ll. 1-28, p. 17, ll. 1-28 and p. 18, ll. 1-15.

Like the STATE ENGINEER, KVR attempts to allege that the case cited by EUREKA COUNTY, Citizens for Cold Springs, 126 Nev. Adv. Op. 27, 236 P.3d at 19 (Nev. 2010), is distinguishable because the actions required in that case were mandated by municipal code while there is no statute requiring the STATE ENGINEER to adopt a mitigation plan.[27] See, KVR Answering Brief, p. 14, ll. 25-28 and p. 15, ll. 13. As discussed above, the STATE ENGINEER utilized an unseen 3M Plan to comply with his statutory obligations and justify his approval of applications that conflict with existing rights. See, ROA Vol. XVIII, pp. 003592-003593 and 003609-003610. As addressed above, KVR asks this Court to interpret NRS 533.370(2) to incorporate a potential mitigation requirement in the definition of the term conflict. See, KVR's Answering Brief, p. 10, ll. 9-28, p. 11, ll. 1-28, p. 12, ll. 1-28 and p. 13, ll. 1-15. Accordingly, it is inconsistent for KVR to also argue that alleged mitigation used to satisfy the STATE ENGINEER's statutory obligation is unrelated to any statutory obligation of the STATE ENGINEER, so that the Citizens for Cold Springs case does not apply.

KVR further states that the remaining cases cited by EUREKA COUNTY are of no application to the current matter because they are applying different laws. See, KVR's Answering

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[26] KVR also alleges that "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." See, KVR's Answering Brief, p. 4, ll. 26-28, fn. 3. KVR disingenuously cites only a portion of EUREKA COUNTY's sentence, disregarding the portion of the sentence that the citation to the record supports. Specifically, EUREKA COUNTY stated, "Further, EUREKA COUNTY challenged the ability of KVR and/or the STATE ENGINEER to reply upon a mitigation plan that had not been drafted, presented to the STATE ENGINEER or provided to the various protestants so that they could cross-examine witnesses associated with such a mitigation plan, particularly in light of the substantial challenges associated with such mitigation." See, Opening Brief, p. 4, ll. 10-15. The citation to the record incorporates the testimony by local rancher, Mr. Gary Garaventa, establishing the substantial challenges associated with such mitigation. KVR's accusation that the EUREKA COUNTY cite was incorrect is false.

[27] KVR also asserts that Citizens for Cold Springs supports KVR's assertion that it is appropriate to rely upon a future undrafted 3M Plan. 126 Nev. Adv. Op. 27, 236 P.3d at 19 (Nev. 2010). This argument requires one to ignore the actual discussion in Citizens for Cold Springs regarding reliance upon broad and evasive future actions and focus upon the irrelevant discussion regarding the validity of a statute requiring proposed master plan amendments submitted to a regional planning commission for approval. Id. at 16-19. This is wholly inapplicable to the current situation. The STATE ENGINEER did not review a drafted 3M Plan and conditionally approve it pending approval from a different governmental authority. Instead, the STATE ENGINEER approved the Applications based upon an unseen and undrafted 3M Plan which was not yet before him and would not be approved or reviewed by any other governmental entity.

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Brief, p. 15, ll. 14-28 and p. 16, ll. 1-12. EUREKA COUNTY agrees that these cases apply other laws. Nonetheless, these cases deal with exactly the issue being presented herein: whether it is appropriate to rely upon future action, including but not limited to an unseen and undrafted theoretical 3M Plan, when protecting senior water right holders and their water resources. The recurrent holding of these cases is that reliance upon future action or a perfunctory review of mitigation is inadequate to provide the necessary protections or to satisfy statutory requirements, as there is no genuine review of the effectiveness of such action or mitigation. Sw. Ctr. for Biological Diversity v. Babbitt, 939 F. Supp. 49, 52 (D.D.C. 1996), Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998) and S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009). Simply because these cases involve other laws does not require that this Court disregard the policies and reasoning articulated in these cases.

In addition to attempting to distinguish the case law cited by EUREKA COUNTY, KVR tries to convince this Court that the STATE ENGINEER's deferral of the detail of a yet to be drafted 3M Plan is not a violation of due process.[28] As EUREKA COUNTY notes, the STATE ENGINEER has an express duty pursuant to Revert, 95 Nev. at 787, 603 P.2d at 264 (1979) to comply with the basic notions of fairness and due process. KVR attempts to improperly rewrite the holding of this case so as only to require that the STATE ENGINEER address all crucial issues presented.[29] The STATE ENGINEER failed to comply with the basic notions of fairness and due process by relying upon a 3M Plan which was not presented at the hearing to satisfy his statutory obligation pursuant to NRS 533.370(2). Such action denied everyone involved the opportunity to

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[28] KVR in part alleges that EUREKA COUNTY is prohibited from asserting a violation of the Fourteenth Amendment because it is a governmental entity. See, KVR's Answering Brief, p. 17, ll. 25-28, fn. 8. This is an irrelevant point as EUREKA COUNTY has not asserted a violation of the Fourteenth Amendment, but instead a violation of the STATE ENGINEER's obligation, as reiterated by the Nevada Supreme Court, to comply with the basic notions of fairness and due process. Revert, 95 Nev. at 787, 603 P.2d at 264 (1979).

[29] Further, in attempting to limit the holding of Revert, 95 Nev. at 787, 603 P.2d at 264 (1979), KVR states that the Nevada Supreme Court held "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." See, KVR's Answering Brief, p. 18, ll. 11-13. The situation in Revert, as described by KVR, is strikingly similar to the situation in this case. In this case, the STATE ENGINEER has attempted to defer his statutory obligation to ensure that an application does not conflict with existing rights and rectify that failure to act by approving a 3M Plan following the issuance of the Permits.

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genuinely review, and if necessary, dispute the validity and efficiency of proposed mitigation steps and a 3M Plan.

KVR also includes a discussion of the procedure it predicts will occur with regard to the drafting of the 3M Plan and EUREKA COUNTY's participation pursuant to the Ruling.[30] See, KVR's Answering Brief, p. 17, ll. 8-16. KVR alleges that EUREKA COUNTY's participation in producing a 3M Plan is much greater than actually required by the STATE ENGINEER. See, KVR's Answering Brief, p. 17, l. 14. The STATE ENGINEER merely provided that a 3M Plan would be drafted by KVR with the "assistance" of EUREKA COUNTY. See, ROA Vol. XVIII, pp. 003609 and 003613. Further, KVR asserts that EUREKA COUNTY has been participating in the development of a 3M Plan, implying that EUREKA COUNTY has been allowed meaningful participation. See, KVR's Answering Brief, p. 17, l. 14. EUREKA COUNTY disagrees with any such inference and notes that anything occurring after the Ruling was issued is outside the record in this case. Thus, because KVR's justification for the STATE ENGINEER's action is after the fact in its brief, KVR's justification falls squarely within the Nevada Supreme Court's holding in Revert and the STATE ENGINEER's actions fail to meet the basic concepts of fairness and due process.

The STATE ENGINEER's extensive reliance upon an undrafted and unseen 3M Plan to satisfy his statutory obligations is undeniably arbitrary and capricious.

4. KVR Submits To This Court The Same Promise To Mitigate Only The Best Case Scenario Impacts Omitting Any Details Of Such Mitigation And Disregarding Any Of The Worst Case Impacts.

EUREKA COUNTY has continually advised the parties, and now this Court, of the wealth of evidence regarding the ineffectiveness of mitigation for the impacts caused by the granting of the Applications and KVR's lack of commitment to follow through with mitigation. See, Opening Brief, p. 17, ll. 25-28, p. 18, ll. 1-28, p. 19, ll. 1-28, p. 20, ll. 1-28 and p. 21, ll. 1-8, ROA Vol. III, pp. 000452, 000456, 000466, 000500, 000657-000658, ROA Vol. IV, pp. 000727-000728 and ROA Vol. XVI, p. 003296.

[30] No Protestant other than EUREKA COUNTY was given the opportunity to participate in any manner in a 3M Plan. As such, any argument by KVR that the STATE ENGINEER's allowance that EUREKA COUNTY may have minimal involvement in the drafting of a 3M Plan does nothing to rectify the violation of due process for the other Protestants.

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KVR submits to this Court the same conclusory statements regarding mitigation that it submitted to the STATE ENGINEER. KVR alleges that it intends to mitigate impacts. See, KVR's Answering Brief, p. 21, ll. 6-8. Nonetheless, KVR does not provide any actual detail regarding the form such mitigation will take, simply listing a variety of potential mitigation techniques with no actual application of such techniques to the impacted water rights. Id. and ROA Vol. I, pp. 000206-000207. This is not "substantial evidence" as defined by the Nevada Supreme Court, that is, evidence that "a reasonable mind might accept as adequate to support a conclusion". City of Reno, 110 Nev. at 1222, 885 P.2d at 548 (1994). The statements are conclusory with no support. That deficiency is magnified by the STATE ENGINEER's failure to cite to any evidence in the record in his Ruling to support his conclusions that impacts can be mitigated. See, e.g., ROA, Vol. XVIII, pp. 003592-003593, 003598-003599 and 003610. Further, KVR disregards the fact that it has failed to mitigate the impacts caused by its test pumping, instead attempting to blame the existing water right holder. See, KVR's Answering Brief, p. 20, ll. 19-24, ROA Vol. III, p. 000456 and ROA Vol. IV, pp. 000727-000728. It is important to note that this submission by KVR is not tangible evidence of mitigation measures to be undertaken by KVR but simply empty promises and speculation. Such empty promises and speculation cannot be considered substantial evidence upon which the STATE ENGINEER can rely.

KVR further alleges to this Court that the only impacts which will occur and require mitigation are those upon the valley floor. See, KVR's Answering Brief, p. 19, ll. 9-10. This allegation ignores the evidence that established the potential, if not the likelihood, of impacts in excess of those considered and submitted by KVR in discussing mitigation. See, ROA Vol. III, p. 000576, ROA Vol. VI, pp. 001066-001067 and ROA Vol. XVI, pp. 003275-003276 and p. 003281. Accordingly, the reality of KVR's position is that it is willing to mitigate the best case scenario of impacts resulting from KVR's actions but that KVR is unwilling to address mitigation of any impacts in excess of this best case scenario. See, KVR's Answering Brief, p. 19, ll. 9-10. With this qualification, the undefined mitigation upon which the STATE ENGINEER relies becomes exceedingly limited and insufficient.

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KVR also alleges that the ranchers have conceded that mitigation will be effective. See, KVR's Answering Brief p. 19, ll. 8-10. This allegation relies upon a selective reading of the transcript as well as the assertion that only the best case limited impacts will occur. For example, KVR cites to the testimony of local rancher John Colby suggesting that this Court should only read the portion of his testimony as follows:

> Q. ... this just gets back to the maintenance on pumping, mitigating impacts to stock water wells, putting in pumps, putting in a system that can be maintained by the company without any work on your part. Would that allay your concerns with regard to the stock water rights?
>
> A. Down low it would. But what about on the, up on the mountain?
>
> Q. I'm just talking about on the lower end of your ranch.
>
> A. Well, you know, the mountain is pretty good pasture. That's where, you know – And yeah, that would help ...

See, KVR's Answering Brief, p. 19, l. 10 and ROA Vol. III, p. 000471, ll. 15-25. Citing only to this selective portion of the transcript denies this Court the full scope of the exchange. Mr. Colby's complete testimony clearly indicates that he does not believe mitigation will be effective. A review of the entire cross-examination exchange cited by KVR shows Mr. Colby's position and hesitation to agree that mitigation would be effective:

> Q. Getting back to litigation [sic] and the stock watering, I understand your concern about continued maintenance if you put in a well or deepen – put a pump in an artesian well. But would you still agree that mitigation is possible to put in some sort of pump system to –
>
> A. Well, it would be but what would you do about the lost pasture. What would you do about that? I mean because if you lower the water table I'm not going to have the grass.
>
> Q. My question was just about the stock watering rights that you have in the flat as far as mitigating those, putting in pump wells, stock watering. Would that allay your concerns?
>
> A. You know, anything will help, you know, and like I said, but the thing is if a guy puts those in there you need to have them in there before you lower the water because you can't tell the cows, you know, wait three weeks and I'll get you some water. They kind of need it now.
>
> Q. Understood. This will just get back in to if General Moly had the ranch to maintain these wells stock water for --- This just gets

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> back to the maintenance on pumping, mitigating impacts to stock water wells, putting in pumps, putting in a system that can be maintained by the company without any work on your part. Would that allay your concerns with regard to the stock water rights?
>
> A. Down low it would. But what about on the, up on the mountain?
>
> Q. I'm just talking about on the lower end of your ranch.
>
> A. Well, you know, the mountain is pretty good pasture. That's where, you know – And yeah, that would help down there.

See, ROA Vol. III, p. 000470, ll. 21-25, p. 000471, ll. 1-25 and p. 000472, l. 1. Obviously this is not the testimony of an individual conceding that mitigation is possible as KVR would have this Court believe.

This is simply one example of the selective citations that KVR has provided this Court with regard to purported mitigation concessions by local ranchers. EUREKA COUNTY encourages a full reading of the relevant testimony of EUREKA COUNTY's witnesses regarding potential mitigation, which are provided in the table below, rather than KVR's selective cites for a fair assessment of each witness' testimony.

Witness	KVR's Citation	Citation to Full Exchange
Martin Etcheverry	ROA Vol. III, p. 000454, ll. 20-25 and p. 000455, ll. 1-8.	ROA Vol. III, p. 000450, ll. 1-25, p. 000451, ll. 1-25, p. 000452, ll. 1-20, p. 000454, ll. 6-25 and p. 000455, ll. 1-18.
John Colby	ROA Vol. III, p. 0004714, ll. 15-25.	ROA Vol. III, p. 000470, ll. 21-25, p. 000471, ll. 1-25 and p. 000472, l. 1.
Jim Etcheverry	ROA Vol. III, p. 000493, ll. 8-13.	ROA Vol. III, p. 000488, l. 25, p. 000489, ll. 1-25, p. 000490, ll. 1-25, p. 000491, ll. 1-25, p. 000492, ll. 1-25 and p. 000493, ll. 1-13.

Additionally, KVR asks this Court to consider EUREKA COUNTY's willingness to discuss mitigation and the effectiveness of such mitigation and draw from this an implication that EUREKA COUNTY acknowledges mitigation will be effective. See, KVR's Answering Brief, p. 19, ll. 10-13. EUREKA COUNTY desires to make clear that, as discussed in detail in its Opening Brief, without an actual mitigation plan, EUREKA COUNTY cannot address the validity or

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effectiveness of any mitigation by KVR and furthermore, that the available evidence causes significant questions as to whether such mitigation could ever be effective as the STATE ENGINEER improperly concluded. EUREKA COUNTY's mitigation plan submitted to the STATE ENGINEER was not accepted by the STATE ENGINEER and cannot be the "substantial evidence" that KVR now seeks to support the STATE ENGINEER'S unsupported conclusion. No other implication should be drawn from EUREKA COUNTY's discussion of mitigation.

Finally, KVR identifies for this Court in several instances the irrelevant issue of whether an individual who will experience impacts was a Protestant or party to these cases. See, e.g., KVR's Answering Brief, p. 19, ll. 26, 28, fn. 10 and p. 20, ll. 26-28, fn. 11. It is important to note that the STATE ENGINEER is utilizing an undrafted 3M Plan to satisfy his obligation pursuant to NRS 533.370(2) which requires that there be no conflicts with existing rights in granting KVR's Applications. NRS 533.370(2) does not provide that there be no conflicts with existing rights for which a protest or petition for judicial review are filed. Accordingly, it is irrelevant whether the water rights users filed a protest or a petition for judicial review. The STATE ENGINEER's obligation by law is to protect existing water rights.

No evidence was submitted to the STATE ENGINEER of the mitigation to be proposed or of its effectiveness. Substantial evidence was submitted to the STATE ENGINEER that mitigation would be ineffective.[31] The STATE ENGINEER's reliance upon mitigation to fulfill his statutory obligation pursuant to NRS 533.370(2) is arbitrary and capricious.

5. KVR Cannot Remedy The STATE ENGINEER's Failure To Address The Adequacy Of The Applications.

KVR wants to step into the STATE ENGINEER's role and provide a detailed analysis of the adequacy of the Applications. See, KVR's Answering Brief, p. 21, ll. 21-28, p. 22, ll. 1-28, p. 23, ll. 1-28, p. 24, ll. 1-28 and p. 25, ll. 1-3. Nevertheless, it is the STATE ENGINEER that is charged with approving or denying applications to appropriate water based upon substantial

[31] Two times in its brief, KVR says that it must be established by EUREKA COUNTY that mitigation is "impossible." See, KVR's Answering Brief, p. 21, ll. 9 and 13. There is no requirement that EUREKA COUNTY establish mitigation is impossible. Instead, assuming that NRS 533.370(2) can be satisfied by mitigation, an assumption EUREKA COUNTY opposes, the standard is whether there is substantial evidence that mitigation is likely to be effective to avoid all conflicts with existing rights. There being no evidence of the effectiveness of the mitigation to be proposed, such standard cannot be met.

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evidence and in doing so must address each of the crucial issues associated with the application. NRS 533.325, NRS 533.370, United States v. Alpine Land & Reservoir Co., 919 F. Supp. 1470, 1474 (D. Nev. 1996) and Revert, 95 Nev. at 787, 603 P.2d at 264 (1979). The STATE ENGINEER should have addressed the issue of the adequacy of the applications in his Ruling and had the opportunity to address such issue in his Answering Brief but declined to do so in both instances. KVR, as applicant, cannot step into the role of STATE ENGINEER, after the issuance of the Ruling, and attempt to supply the analysis and determination that the STATE ENGINEER failed to provide, especially since KVR does not actually know what the STATE ENGINEER was thinking.

Moreover, even if KVR could step into the role of STATE ENGINEER, KVR's analysis is flawed. The Applications provide for a place of use that is an approximately 90,000 acre area, despite the fact that the plan of operations for the mine provides for only a 14,000 acre area. See, ROA Vol. I, p. 000133. Patrick Rogers, the director of environmental permitting for General Moly, testified on behalf of KVR that the sole reason for asking for an approximately 76,000 acre area in excess of the plan of operations, was for purposes of what KVR coined, "the hardship", associated with filing change applications, like any other water user in Nevada would be required to file, for use in that additional 76,000 acre area should it be necessary in the future.[32] See, ROA Vol. I, pp. 000093-000094. As EUREKA COUNTY has previously argued, KVR should not be treated as exempt from the requirements to file a change application should it need to utilize water in the 76,000 acre area.

KVR now alleges that it intends to utilize water in the 76,000 acre area for drilling, dust suppression or environmental mitigation. See, KVR's Answering Brief, p. 24, ll. 13-17. KVR says that any such use would be for a "small volume of water." See, KVR's Answering Brief, p. 24, l. 15. Despite such alleged, currently undefinable use, necessitating only a minimal amount of water, KVR's Applications seek to use the entire 11,300 afa over the entire 90,000 acre place of use. If, as

[32] The STATE ENGINEER has revised the place of use described in an application when the applicant cannot show use in that area. See, Ruling 6164, pp. 209-211. Specifically, in Ruling 6164, under his place of use analysis, the STATE ENGINEER discussed the actual evidence presented to establish that water would not be utilized in Lincoln County. Id. The STATE ENGINEER cited to Bacher v. Office of the State Engineer, 122 Nev. 1110, 1122-23, 146 P.3d 793, 801 (2006) as requiring specificity regarding the water necessary for a project. Id. The STATE ENGINEER thereafter held that there was no specific evidence to establish a place of use in Lincoln County and thus declined to include Lincoln County in the place of use. Id.

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KVR now says, it actually has a use that would occur within the 76,000 acre area, and it can identify the minimal amount of water for such use, it should have completed the Applications accurately, indicating the amount of water actually needed for use in the 76,000 acre area, rather than requesting that the entire 11,300 afa be available over the entire 90,000 acre place of use. Furthermore, depending upon the use of such water, KVR may be required to file a change application for the manner of use if it intends to utilize such water for environmental mitigation instead of mining and milling.[33] It is clear from KVR's testimony at the hearings that the Applications do not accurately reflect that the mining and milling activities will occur in a 14,000 acre area, not a 90,000 acre area, and that any use in the extra 76,000 acres will not be for mining and milling, the only use listed in the Applications.

Additionally, KVR poses an argument, similar to the STATE ENGINEER's, with regard to the point of diversion.[34] The issue EUREKA COUNTY has raised with the point of diversion is that 56 percent of the proposed production wells are of an unknown number, location, depth and pumping rate. See, ROA Vol. II, pp. 000373-000374 and ROA Vol. VII, pp. 001364-001365. A project of this size, pumping most of the perennial yield of the basin for forty-four (44) years causes considerable concern regarding the accuracy of the information presented to the STATE ENGINEER associated with the impacts that will result from the granting of the Applications.

The STATE ENGINEER granted the defective Applications without any analysis associated with the adequacy of the place of use and point of diversion described in the Applications. Accordingly, the STATE ENGINEER abused his discretion and acted arbitrarily and capriciously.

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[33] If "environmental mitigation" includes replacement water for impacted Kobeh Valley water right holders, such use would not be permissible under mining and milling permits. KVR has no water rights in Kobeh Valley it could use for mitigation uses. This is another reason that the STATE ENGINEER's conclusion that impacts could be mitigated is erroneous. KVR would have to apply to appropriate additional water for mitigation purposes. It is patently unreasonable to allow KVR to appropriate more water to mitigate impacts resulting from its pumping since additional pumping will cause additional impacts.

[34] KVR does include a new argument, namely that Mr. Jack Childress, who EUREKA COUNTY cited as stating the number and location of the proposed wells was unknown, did not have any knowledge of this matter nor any responsibility for the location of wells. See, KVR's Answering Brief, p. 22, ll. 18-24 and p. 23, ll. 1-7. Mr. Childress was a senior hydrogeologist with Interflow Hydrology responsible in the previous three and a half years for well field exploration and compiling geologic data on behalf of KVR. See, ROA Vol. II, pp. 000228-000229. KVR's allegation that an individual responsible for well field exploration lacks information regarding the location of wells in the well field is perplexing.

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6. The Model Is Unreliable And The STATE ENGINEER Should Not Have Relied Upon It.

KVR, like the STATE ENGINEER, alleges that the STATE ENGINEER's assessment that he did not deem EUREKA COUNTY's experts credible should be sufficient for this Court to simply uphold the STATE ENGINEER's Ruling. See, KVR's Opening Brief, p. 29, ll. 21-24. Nonetheless, the decisions of the STATE ENGINEER, like all administrative agencies, must be based upon evidence "which a reasonable mind might accept as adequate to support a conclusion". City of Reno, 110 Nev. at 1222, 885 P.2d at 548 (1994) (internal citation omitted). Accordingly, the STATE ENGINEER's Ruling must be based upon substantial evidence and the simple argument that the STATE ENGINEER discredited EUREKA COUNTY's witnesses, is insufficient because it does not address EUREKA COUNTY's issue on appeal.

In an attempt to satisfy the substantial evidence standard, KVR again attempts to provide an analysis on behalf of the STATE ENGINEER. As with the other issues where KVR attempts to act in the place of the STATE ENGINEER, it is the STATE ENGINEER who must complete an analysis, not the applicant, and as such, the STATE ENGINEER's deficiencies, in and of themselves, are sufficient to necessitate this Court granting EUREKA COUNTY's Petition for Judicial Review.

KVR says that "[i]n 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." See, KVR's Answering Brief, p. 25, ll. 10-13. KVR then fails to cite to any such evidence or to any reference of the STATE ENGINEER relying on that evidence.[35]

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[35] KVR does include an analysis of the predicted impacts in Diamond Valley, citing to a variety of testimony and expert reports. See, KVR's Answering Brief, p. 28, ll. 1-26. Nonetheless, this discussion is in response to an issue raised by Protestants Benson and Etcheverry, not EUREKA COUNTY; all such evidence is unrelated to the issue asserted by EUREKA COUNTY that the model did not accurately predict the impacts associated with the granting of the Applications.

Instead, KVR simply reiterates the disputed evidence regarding the validity of the model. See, KVR's Answering Brief, p. 25, ll. 4-28, p. 26, ll. 1-28, p. 27, ll. 1-28, p. 28, ll. 1-28 and p. 29, ll. 1-28. As has been well briefed for this Court, the use of the ten foot drawdown contour caused the model to inaccurately predict and downplay the impacts associated with granting the Applications. See, ROA Vol. I, p. 000156, ROA Vol. II, pp. 000382-000383 and p. 000401, ROA Vol. XVI, pp. 003275-003276 and ROA Vol. XVIII, pp. 003590-003591. This is certainly relevant because the STATE ENGINEER determined (and KVR agrees) with a ten foot drawdown contour, the impacted water rights are few, they can be mitigated and the Applications should be granted. Using the five foot drawdown contour shows more impacted water rights which were apparently not considered and definitely not discussed in the Ruling regarding impacts to existing rights.[36] KVR's simple allegation that the model should be considered accurate is insufficient to cure the STATE ENGINEER's decision to blindly rely on KVR's use of the ten foot drawdown contour to show impacted water rights. As if conceding that the model is inaccurate utilizing a ten foot drawdown contour, KVR asserts that the model could be made to display impacts within a five foot drawdown contour or another interval. See, KVR's Answering Brief, p. 26, ll. 25-28. This point is irrelevant since the STATE ENGINEER does not indicate that he utilized the model to produce such a different display but instead implies that he is relying upon the model output as presented by KVR utilizing a ten foot drawdown contour. See, ROA Vol. XVIII, pp. 003589-003592.

Additionally, KVR cites to the testimony of KVR's own witnesses, Katzer, Buqo, Childress and Smith, for the concept that there will not be impacts in excess of those predicted by the ten foot drawdown contour. See, KVR's Answering Brief, p. 29, ll. 5-16. However, this testimony is, as noted by KVR, limited to impacts only in the Roberts, Henderson or Vinini Creeks, and not the valley floor, and relies, at least in part, on the model. Id. Accordingly, this limited testimony could not be considered as sufficient grounds, independent of the model, upon which the STATE ENGINEER could rely to support the Ruling.

[36] There was considerable testimony and evidence presented regarding whether a ten foot or five foot drawdown contour was appropriate. There was no discussion by the STATE ENGINEER in the Ruling on this issue.

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It is indisputable that the STATE ENGINEER relied upon the model depicting a ten foot drawdown contour and that such drawdown contour caused the model's disclosure of impacts to be insufficient. Thus, the STATE ENGINEER's reliance upon the model is an abuse of discretion.

7. KVR Conceded That It Would Not Capture Most ET Occurring In Kobeh Valley And Thus, The STATE ENGINEER Was Obligated To Consider Such ET In Assuring That Consumptive Use Did Not Exceed The Perennial Yield.

KVR makes the same argument as the STATE ENGINEER with regard to the interrelation between ET and the perennial yield. See, KVR's Answering Brief, p. 30, ll. 1-28, p. 31, ll. 1-28 and p. 32, ll. 1-4. As EUREKA COUNTY stated above, it agrees with the positions asserted by KVR and the STATE ENGINEER that ET does not have to be captured immediately and that the basic premise associated with the capture of ET is that it will occur over time, bringing the basin into equilibrium after such ET is captured and ceases to occur.

Nonetheless, as more fully discussed above, if the actual facts of the proposed pumping are applied to the principles reiterated by KVR and the STATE ENGINEER, KVR has conceded that it will not capture the ET occurring in Kobeh Valley to match KVR's consumptive use over the forty-four (44) year life of the mine. See, ROA Vol. I, pp. 000193-000194. Thus, utilizing the same concepts asserted by KVR and the STATE ENGINEER, such uncaptured ET must be accounted for in determining the perennial yield available for appropriation.

Because ET in the basin will not be captured by the proposed pumping and ET will continue to occur, the perennial yield of the basin will be exceeded by KVR's proposed pumping. Thus, there is not water available for appropriation under the STATE ENGINEER's and KVR's definition of perennial yield. The Applications must be denied pursuant to NRS 533.370(2).

8. The Ruling Was Erroneous With Regard To The Revisions Of The Perennial Yields.

KVR chooses to address only the reduction of the perennial yield in Kobeh Valley stating that the reduction of the perennial yield in Monitor Valley-Southern Part and Monitor Valley-Northern Part are "not relevant to Applicant's permits." See, KVR's Answering Brief, p. 32, ll. 27-

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28, fn. 19. This statement is exactly the position asserted by EUREKA COUNTY and can be viewed as nothing more than a concession by KVR that the STATE ENGINEER's Ruling with regard to those two basins is an abuse of discretion not based upon substantial evidence.

Though conceding that the STATE ENGINEER failed to support the Ruling with substantial evidence in regard to Monitor Valley-Southern Part and Monitor Valley-Northern Part, KVR alleges that there was substantial evidence to support the Ruling with regard to the reduction of the perennial yield in Kobeh Valley. See, KVR's Answering Brief, p. 32, ll. 5-24 and p. 33, ll. 1-8. The primary support for KVR's position is the citations to the STATE ENGINEER's unsupported opinions in the Ruling. Id. Further, the basic premise of such argument is that the STATE ENGINEER was uncertain of the perennial yield and thus chose to limit it to natural discharge.[37] Id. Nonetheless, the definition of perennial yield, as defined by the STATE ENGINEER in the Ruling, is not simply natural discharge. See, ROA Vol. XVIII, p. 003584. Thus, KVR's argument does nothing but further establish the lack of support for the STATE ENGINEER's reduction of the perennial yield in Kobeh Valley. KVR fails to mention that when asked by the STATE ENGINEER at the hearing in 2008, KVR's expert testified that KVR was not reevaluating the groundwater ET to change the perennial yield of Kobeh Valley in these proceedings. See, CV0904 ROA, Transcript, Vol. 5, p. 1105, ll. 17-25 and p. 1106, ll. 1-23.

The STATE ENGINEER's determination to lower the perennial yields was not supported by substantial evidence, an issue conceded, in part, by KVR.

9. The STATE ENGINEER Did Not Adequately Establish The Necessary Factors To Grant An Interbasin Transfer Of Water.

a. KVR Cannot Establish That The STATE ENGINEER Considered The Elements For An Interbasin Transfer Of Water To Pine Valley.

KVR alleges that there is no requirement that the STATE ENGINEER include any express findings in his Ruling regarding the application of the elements of NRS 533.370(3) to Pine Valley. See, KVR's Answering Brief, p. 34, ll. 3-6. This position is contrary to the extensive case law addressing an administrative agency's findings. See, e.g., State, Dep't of Commerce v. Hyt, 96

[37] KVR's position with regard to the recharge to Kobeh Valley has apparently changed since its expert, Mr. Smith, testified that in his professional opinion the recharge to Kobeh Valley was 16,000 afa. See, ROA Vol. I, p. 000175. Mr. Smith also pointed out that 16,000 afa was about the same as the recharge number for Kobeh Valley published by the USGS. Id.

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Nev. 494, 496, 611 P.2d 1096, 1098 (1980) and Public Service Commission v. Continental Tel. Co. of California, 94 Nev. 345, 350, 580 P.2d 467, 470 (1978). Specifically with regard to the STATE ENGINEER, the Nevada Supreme Court has held that the STATE ENGINEER "must prepare findings in sufficient detail to permit judicial review." Revert, 95 Nev. at 787, 603 P.2d at 264 (1979). This requirement avoids the situation occurring here, where KVR is required to attempt to read the STATE ENGINEER's mind in determining whether an issue was addressed and what justified the outcome regarding an issue. Considering this explicit requirement that the STATE ENGINEER prepare findings sufficient to allow judicial review, KVR's position that the STATE ENGINEER did not need to prepare such findings can be considered nothing more than a concession that the STATE ENGINEER violated his duty and manifestly abused his discretion.

In addition to the concession that the STATE ENGINEER failed to prepare sufficient findings, KVR fails to cite to any evidence submitted regarding the application of NRS 533.370(3), the interbasin transfer factors, to Pine Valley. KVR's citation in support of its position that it provided testimony regarding use in Pine Valley is a string cite to testimony as follows: "R. 92:20-25, 93:1-8, 132:24-25, 133:1-2, 135:2-16." See, KVR's Answering Brief, p. 34, l. 12. A review of this testimony establishes that the majority of such testimony never refers to Pine Valley and that the sole reference to Pine Valley in such testimony is a statement that the place of use on the map submitted with the Applications includes a portion of Pine Valley. See, ROA Vol. I, pp. 000132-000133. Thus, not only is KVR required to concede that the STATE ENGINEER's Ruling fails to comply with the applicable law, but KVR also establishes that it did not present any evidence upon which the STATE ENGINEER could rely in regard to Pine Valley.

The STATE ENGINEER's failure to address the elements for an interbasin transfer of water with regard to Pine Valley, as required by NRS 533.370(3), is a manifest abuse of discretion and contrary to law.

b. The STATE ENGINEER's Analysis Of The Environmental Impacts Mirrors His Analysis Of Whether There Are Conflicts With Existing Rights In Violation Of His Statutory Authority.

KVR asks this Court to defer to the STATE ENGINEER's interpretation of the analysis required pursuant to NRS 533.370(3). See, KVR's Answering Brief, p. 36, ll. 17-22.

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Nonetheless, the Nevada Supreme Court does not require blind deference by a court to an administrative agency's interpretation of a statute. UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union, 124 Nev. at 89, 178 P.3d at 712 (2008). If the statutory language is ambiguous or unclear, then any interpretation must consider reason and public policy in ascertaining the Legislative intent. Id. "[E]ven a reasonable agency interpretation of an ambiguous statute may be stricken by a court when a court determines that the agency interpretation conflicts with legislative intent." State Farm Mut. Auto. Ins. Co., 116 Nev. at 293, 995 P.2d at 485 (2000). Thus, KVR and the STATE ENGINEER cannot be allowed to say that the application of the environmentally sound requirement is limited to a determination of the conflicts with existing rights simply because that is the analysis applied by the STATE ENGINEER.

As an initial point, KVR attempts to argue that the analysis completed by the STATE ENGINEER pursuant to NRS 533.370(2), conflicts with existing rights, and the analysis completed by the STATE ENGINEER pursuant to NRS 533.370(3), environmentally sound, are different. See, KVR's Answering Brief, p. 35, ll. 20-28 and p. 36, ll. 1-11. However, by the completion of its argument, KVR is required to acknowledge that such analyses are "similar." Id.

Realizing that there is no tangible distinction between the two analyses and that blind deference is unlikely to be successful, KVR provides several reasons why such a duplicative analysis for NRS 533.370(2) and NRS 533.370(3) should be permitted in violation of the statutory maxim that statutory provisions should not be interpreted in any manner which causes any provision to become "mere surplusage". Stockmeier, 122 Nev. at 540, 135 P.3d at 810 (2006).

First, KVR asserts that the "only comment" in the legislative history is one by Senator James stating that the STATE ENGINEER should not complete an environmental impact statement. See, KVR's Answering Brief, p. 35, ll. 7-10. This statement is simply untrue as EUREKA COUNTY pointed this Court to additional legislative history in its Opening Brief, namely the reference by the State Water Planner, Naomi Duerr, before the Senate Committee on Natural Resource, to an excerpt from the Draft Nevada State Water Plan which, in discussing interbasin transfers of water, identified as an issue the following:

> Nevada has many threatened and endangered species and unique ecosystems, and has lost much of its wetland environments.

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> Protection of water quality and recreation opportunities depend in large part on water availability. Because the water needs for these beneficial uses of water have not been adequately quantified and few water rights have been obtained to support them in the past, a thorough evaluation of the potential environmental impacts must precede any large scale water transfer.

See, Minutes for February 10, 1999, Senate Committee on Natural Resources, pp. 6-9.[38] Recognizing the existence of such additional legislative history, contrary to KVR's previous assertion, KVR then says that the State Water Planner's reference is "not the kind of legislative history" which will override the STATE ENGINEER's analysis. See, KVR's Answering Brief, p. 36, ll. 17-19. Nonetheless, KVR is unable to point to any legal citation which identifies a "kind" of legislative history which should be considered by this Court and a "kind" of legislative history that should not be considered. Thus, undeniably, the legislative history in total must be utilized in interpreting the environmentally sound requirement of NRS 533.370(3).

Second, KVR says that the analysis suggested by Naomi Duerr and EUREKA COUNTY is contrary to the statement by Senator James that the STATE ENGINEER should not complete an environmental impact statement. See, KVR's Answering Brief, p. 36, ll. 22-23. This argument assumes that there is no middle ground between completing an environmental impact statement or simply reviewing applications for impacts to existing rights. Such an assumption is false. An environmental impact statement is an exceedingly detailed report addressing each and every potential environmental impact, ranging from historical preservation to air quality, of a proposed project. Clearly, the STATE ENGINEER could complete an analysis, as suggested by Ms. Duerr, and even articulated by the STATE ENGINEER in Ruling 6127 of "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", without preparing a report detailing every potential environmental impact associated with a project. See, ROA Vol. XVIII, p. 003597. However, the STATE ENGINEER failed to apply his own standard in determining whether the use of the water is environmentally sound as required by the interbasin

[38] Obviously, transferring the lion's share of the water available in Kobeh Valley for use in Diamond Valley and Pine Valley is a large scale interbasin transfer. The entire Legislative History for S.B. 108 can be found at http://leg.state.nv.us/dbtw-wpd/exec/dbtwpub.dll.

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