

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA; KENNETH F. BENSON,
INDIVIDUALLY; DIAMOND CATTLE
COMPANY, LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND MICHEL
AND MARGARET ANN ETCHEVERRY
FAMILY, LP, A NEVADA REGISTERED
FOREIGN LIMITED PARTNERSHIP,

Appellants,

vs.

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

Respondents.

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155; CV1108-156; CV1108-157;
CV1112-164; CV1112-165;
CV1202-170

STATE ENGINEER'S ANSWERING BRIEF

**Appeal From the Seventh Judicial District Court of the State of Nevada
in and for Eureka County
The Honorable Daniel L. Papez, District Judge**

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Jason King, P.E., in his capacity as State Engineer of Nevada (the State Engineer), by and through his counsel, Nevada Attorney General Catherine Cortez Masto and Senior Deputy Attorney General Bryan L. Stockton, hereby submits the State Engineer's Answering Brief.

I. ISSUES ON APPEAL

1. Will There Be a Conflict With the Existing Senior Water Rights?
2. Does the State Engineer's Ruling Satisfy NRS 534.110(5)?
3. Will the Interbasin Transfer Be Environmentally Sound?
4. Is the State Engineer Required to Complete a Monitoring, Management and Mitigation Plan Prior to Ruling on Applications?
5. Did the State Engineer Properly Approve Permits for a Place of Use That Includes the Entire Project Area?
6. Will a Property or Liberty Interest Be Taken From the Appellants?
7. Will Existing Domestic Wells Be Protected?

II. FACTS

The applications at issue herein fall into three basic categories:

1. Applications 72695 through 72698, 73545 through 73552, and 74587 were filed as new appropriations to appropriate 22.28 cubic feet per second not to exceed 16,000 acre-feet annually of underground water for mining, milling and dewatering purposes. (Vol. 26 pt. 6) JA 4985–4986.

2. Applications 75988 through 76009, 76483 through 76486, 76744, 76745, 76746, 76989 and 76990 were filed to change the point of diversion, place of use and manner of use of existing water rights to mining, milling and dewatering purposes. JA 4986–4987.

3. Applications 76802 through 76805, 77171, 77174, 77175, 77525, 77526, 77527, 77553, 78424 and 79911 through 79942 were all filed to change the point of diversion for the applications referenced in categories one or two, above. JA 4987–4988.

Various applications were timely protested by David Stine (Conley Land and Livestock, LLC, as Successor), Eureka County, Lloyd Morrison, Cedar Ranches, LLC, Lander County, Kenneth F. Benson, and Baxter Glenn Tackett. JA 4988–4994.

The applications sought to procure 11,300 acre-feet annually for a molybdenum mine near Mount Hope on the border between Kobeh Valley and Diamond Valley, approximately 25 miles northwest of the Town of Eureka. JA 4994–4995.

The State Engineer held the first hearings in this matter on October 13–17, 2008. Some applications were approved and others were denied by State Engineer’s Ruling No. 5966, issued March 26, 2009. JA 4995. The ruling was appealed to the 7th Judicial District Court in and for Eureka County in accordance

with NRS 533.450. JA 4985. State Engineer Ruling No. 5966 was vacated and remanded to allow hearing of additional evidence. JA 4995.

The hearing on remand was held before the State Engineer on December 6, 7, 9 and 10, 2010. JA 4995. The State Engineer granted a motion to adopt the previous record from the 2008 hearing. The State Engineer held an additional day of hearing on May 10, 2011 to consider additional information on water usage at the mine. JA 4995. The hearing resulted in State Engineer Ruling 6127. JA 4985.

In Ruling 6127, the State Engineer approved applications to change existing Diamond Valley and Kobeh Valley water rights and approved new appropriations of water rights within Kobeh Valley for use at the proposed Mount Hope Mine. JA 5026. Numerous restrictions and conditions were placed on the approved permits including but not limited to that (1) no water could be developed until a monitoring, management and mitigation plan was approved; (2) no water developed within Diamond Valley could leave the basin; and (3) the total water that may be developed for the project was limited to 11,300 acre-feet annually from all permits combined. JA 5023–5026. The State Engineer further found that the statutory requirements for interbasin transfer of water from Kobeh Valley to Diamond Valley had been met, that no unreasonable impacts would occur, and that any impacts to existing water rights that may manifest from the use of the water could be mitigated. JA 5023.

Ruling 6127 was appealed to the District Court of the State of Nevada in and for Eureka County. The appeal was briefed by all parties, and oral argument was held on April 3, 2012. The District Court affirmed the State Engineer. JA 6823.

A. Diamond Valley Water Rights

The State Engineer first designated the Diamond Valley Hydrographic Basin as in need of additional management by State Engineer's Order 277 dated August 2, 1964.¹ The basin designation was later amended by State Engineer's Order 541 dated December 22, 1975, which noted that the basin had 30,000 acre-feet annually of recharge and 127,526 acre-feet annually of permitted water rights.² State Engineer's Order 541 further noted that although 32,650 acres were permitted with water rights, only 17,000 acres had actually been irrigated that year. *Id.* The State Engineer ordered that all applications to appropriate new water rights would be denied in the main agricultural area. The State Engineer also issued Order 809 on December 1, 1982 which requires totalizing meters be placed on all wells.³

Consistent with these management Orders, in this case the State Engineer did not grant Kobeh Valley Ranch (KVR) any new water rights in Diamond Valley. KVR will produce all of its previously acquired Diamond Valley water by

¹ Available at <http://images.water.nv.gov/images/orders/277o.pdf>

² Available at <http://images.water.nv.gov/images/orders/541o.pdf>

³ Available at <http://images.water.nv.gov/images/orders/809o.pdf>

dewatering operations surrounding the mine pit. JA 281. KVR has purchased existing Diamond Valley water rights to transfer to the mine to offset any impact on Diamond Valley. JA 281. KVR has also established a fund to retire Diamond Valley water rights to improve the situation in Diamond Valley—an action not required by law. JA 224–227. The State Engineer found as a factual matter that KVR’s operations will not affect the current overpumping of water in Diamond Valley and KVR is not responsible for correcting the problem. JA 5002–5003. The State Engineer did not grant any new water rights in Diamond Valley, but granted the transfer of existing water rights in the basin to KVR. The State Engineer prohibited exportation of water from Diamond Valley and included terms in KVR’s permits that would restrict the use of Diamond Valley water to Diamond Valley. The State Engineer made detailed findings concerning the public interest:

The State Engineer has found that the Applicant has demonstrated a need for the water and a beneficial use for the water and it does not threaten to prove detrimental to the public interest to allow the use of the water for reasonable and economic mining and milling purposes as proposed. The Applicant has acquired about 16,000 afa of existing water rights within Kobeh Valley and requires 11,300 afa for its project. The Applicant has confirmed its commitment to developing this project, has demonstrated the ability to finance the project, and will be required to monitor any groundwater development. Water level drawdown due to simulated mine pumping is thoroughly documented. Predicted drawdown due to mine pumping at the nearest agricultural well in Diamond Valley is estimated to be less than two feet at the end of mine life. In regards to the importance of

mining, Protestant Eureka County testified that mining is a life blood of Eureka County and that Eureka County has and always will be a mining and agricultural county. In addition, Protestant Eureka County indicated that the mine will provide an economic benefit in the form of increased employment and tax revenue for the county. The State Engineer finds under these facts and circumstances the proposed use of the water does not threaten to prove detrimental to the public interest.

JA 5006–5007.

The State Engineer considered the criteria that must be satisfied to grant an interbasin transfer. JA 5007–5013. The State Engineer found that the Diamond Valley Hydrographic Basin is fully appropriated, no water may be exported from Diamond Valley and that the permit terms would restrict the use of Diamond Valley water to Diamond Valley. JA 5008.

B. Diamond Valley Flow System

The State Engineer examined the Diamond Valley flow system, which includes Monitor Valley South, Monitor Valley North, Kobeh Valley, Antelope Valley, Stevens Basin, Pine Valley, and Diamond Valley. JA 4998–5001. Diamond Valley is the terminus of the groundwater flow system. JA 4998. Groundwater flows from South Monitor Valley to North Monitor Valley, then to Kobeh Valley, and finally a minimal amount of water flows to Diamond Valley. JA 4998. Estimates of subsurface interbasin flow between the basins are uncertain; therefore, the State Engineer limited the perennial yield of all the basins in the Diamond Valley flow system to the amount of estimated evapotranspiration in each basin in order to

leave interbasin flows undiminished and to avoid double counting interbasin flows for the purposes of appropriation. JA 4999. Although the precise amount of subsurface flow is uncertain, all evidence supports the finding that the flow between Kobeh Valley and Diamond Valley is less than 2,000 acre-feet per year. JA 4999.

The State Engineer weighed both testimony and projections from the groundwater flow model submitted to the Bureau of Land Management as part of BLM's Environmental Impact Study as evidence. JA 5001–5005. The State Engineer also reviewed past studies conducted in the Diamond Valley flow system. JA 4998–4999. The model predicted that there would not be a significant change in the amount of subsurface flow from Kobeh Valley to Diamond Valley as a result of the mining project and its associated pumping. JA 5003. Based on this testimony and evidence, the State Engineer found that:

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

JA 5006–5007. The State Engineer found that although Eureka County's experts "testified that the model has shortcomings, [they] failed to present convincing evidence that the model predictions are not substantially valid." JA 5003. The State Engineer found that mining operations in Kobeh Valley would not conflict

with existing rights in Diamond Valley and that drawdown in Diamond Valley will not have an unreasonable impact on existing water rights and domestic wells. JA 5003.

C. Kobeh Valley Water Rights

Considerable evidence was presented concerning the effect of mine pumping on Henderson, Vinini and Roberts Creeks. JA 5004. The State Engineer accepted “the expert opinions of the Applicant that mine pumping is unlikely to affect streamflow in Roberts, Henderson or Vinini Creek and found that the applications will not conflict with existing rights on those streams.” JA 5005. However, to ensure existing water rights are not unreasonably impacted, he required a substantial surface and groundwater monitoring program to establish baseline groundwater and stream flow conditions to improve the predictive capability of the model and to increase the ability to detect future changes in the hydrologic regime. JA 5006.

The State Engineer found that the groundwater flow model predicts water table drawdown at the end of mine life of three feet or more in the general mine area. JA 5006. “Drawdown of ten feet or less extends westerly to the Bobcat Ranch and southerly to the Antelope Valley boundary.” JA 5005. The State Engineer recognized that existing water rights on the valley floor could potentially be impacted. JA 5005. However, the duty of water associated with these water

rights is small and any impacts can be easily mitigated by KVR. JA 5006. The State Engineer held that he would order mitigation to be taken if and when impacts appear. JA 5006.

The applications seek to develop 11,300 acre-feet annually, most of it from the Kobeh Valley Hydrographic Basin. Water will be used in the milling circuit and to transport tailings as a slurry to the tailings facility back in Kobeh Valley. JA 5008–5009. A small amount of Diamond Valley water will be used in later years to dewater the mine pit. The State Engineer found that there was sufficient “groundwater to satisfy the demands of the mining project without exceeding the perennial yield of Kobeh Valley,” and that KVR had demonstrated a need to import water. JA 5009. The State Engineer found that KVR justified the need to import water to Diamond Valley from points of diversion located within the Kobeh Valley Hydrographic Basin. JA 5009.

Based on the evidence and testimony provided, the State Engineer found that the interbasin transfer of water is environmentally sound for the basin of origin. JA 5011–5012. The State Engineer has consistently held:

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

JA 5010.

The State Engineer found that the committed water rights in Kobeh Valley, including those held by KVR, equals 12,400 acre-feet annually. JA 5011. The State Engineer determined that the perennial yield of the Kobeh Valley Hydrographic Basin was 15,000 acre-feet annually. JA 5011. Therefore, the amount of existing committed groundwater rights is less than the amount of water that replenishes the basin on an annual basis. JA 5001. The State Engineer also found that there are seventy-one water-righted springs within the Kobeh Valley Hydrographic Basin. JA 5011. Twenty nine of the springs are subject of claims by the United States Bureau of Land Management (BLM) who withdrew its protest based on a stipulation with KVR for a monitoring and mitigation plan. JA 5011. The records showed that “none of the remaining water rights are owned by any of the Protestants in this matter. JA 5011. Most of the remaining springs are either located far away from the proposed well sites or will not be affected due to topography and geology.” JA 5011. The State Engineer also took notice of impacts that may occur:

However, the Applicant’s groundwater model does indicate that there may be an impact to several small springs located on the valley floor of Kobeh Valley near the proposed well locations. These small springs are estimated to flow less than 1 gallon per minute.⁴ Because these springs exist in the valley floor and produce minimal amounts of water, any affect caused by the proposed pumping can be easily mitigated such that there

⁴ Exhibit No. 116, Appendix B, October 2008.

will be no impairment to the hydrologic related natural resources in the basin of origin. The monitoring, management and mitigation plan will allow access for wildlife that customarily uses the source and will ensure that any existing water rights are satisfied to the extent of the water right permit.

JA 5011. The State Engineer found that with proper management and mitigation, “the proposed interbasin transfer of groundwater from the Kobeh Valley Hydrographic Basin remains environmentally sound throughout the life of the project.” JA 5011–5012.

In reviewing the long-term economic impact on Kobeh Valley, the State Engineer noted that “mining is one of the larger industries in Nevada and has traditionally provided many high-paying jobs for local communities and has contributed to the communities in other ways such as investing in infrastructure and services for those communities.” JA 5012. The State Engineer found the water rights granted “in Kobeh Valley is less than the estimated perennial yield of the basin; therefore, substantial water remains within the basin for future growth and development.” JA 5013. Of the 15,000 acre-feet annual perennial yield, 12,400 is currently permitted, which leaves 2,600 acre-feet annually for potential development. JA 5001. The State Engineer compared this with current usage in that “the Town of Eureka currently reports a usage of about 175 [acre-feet annually] out of about 1,226 [acre-feet annually] of available water rights.” JA 5013.

III. STANDARD OF REVIEW

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

Pursuant to NRS 533.450(9), "[t]he decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." On appeal, the function of this Court is to review the evidence on which the State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the Court is bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). Benson, *et al.* cite the Nevada Administrative Procedures Act (NAPA) in connection with the standard of review. However, decisions of the State Engineer are specifically exempted from the NAPA. NRS 233B.039(1)(j).

Review of a decision of the State Engineer is in the nature of an appeal and

is, consequently, limited in nature. NRS 533.450(1) states in pertinent part:

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

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

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

107 Nev. at 701, 819 P.2d at 205 (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)). Any review of the State Engineer’s interpretation of his legal authority must be made with the thought that “[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.” *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996), citing *State v. State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988).

IV. ARGUMENT

A. The Permits Will Not Conflict With Existing Senior Water Rights

The State Engineer agrees with the premise urged repeatedly by Eureka County et al. that he cannot grant new water rights that conflict with existing rights. NRS 533.370(2). The issue for this Court to address is whether a predicted “impact” to an existing water right should be treated the same as a “conflict with existing rights” pursuant to NRS 533.370(2). In other words, may the State Engineer find there is no conflict with existing (senior) rights when a junior appropriator is required to fully mitigate any impacts to those rights? In this case, the State Engineer made a proper factual determination that no conflict with

existing rights is present when the full extent of a senior water right's beneficial use can be satisfied.⁵

Eureka County urges this Court to essentially change Nevada water law and declare that impacts and conflicts are legally indistinguishable. Such a construction runs headlong into the historic, fundamental principle that a water right in Nevada is a *usufructuary* right, and would call into question thousands of water rights that exist in the State of Nevada. The State Engineer found that

certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping. These springs produce less than one gallon per minute and provide water for livestock purposes. The State Engineer finds that this flow loss can be adequately and fully mitigated by the Applicant should the predicted impacts occur.

JA 5006. Impacts and conflicts are different. Any time groundwater is used by more than one person in a particular Hydrographic Basin, there will be impacts. Those impacts may be so negligible as to not be noticed by anyone, but there will be impacts.

“Conflicts” with respect to existing water rights are not defined in Nevada water law. The State Engineer has consistently interpreted a conflict with existing rights under NRS 533.370(2) to occur when a senior water right holder's beneficial

⁵ It is not clear why Eureka County, et al. discuss the types of water rights under Nevada law in their Opening Brief. There has been no suggestion by any party that vested, certificated, or permitted water rights—by virtue of such characterizations—would not be “existing” under NRS 533.370(2).

use cannot be satisfied due to the junior water right holder's use. In addition, mitigation has consistently meant actions that ensure the senior water right can be satisfied. NRS 533.024. In this case, although there will likely be impacts, the senior rights can be satisfied through mitigation measures that the State Engineer has determined will be effective and thus avoiding a conflict. JA 5002–5006.

Nevada water law recognizes that there will be impacts from subsequent water users, and that impacts are not necessarily conflicts. NRS 534.110(4) and (5) both contemplate impacts such as a reasonable lowering of the water table at the point of diversion of senior appropriators. Senior water rights must be protected so that they receive the water to the extent of beneficial use under the right. NRS 533.024(1)(b) expressly recognizes mitigation as a valid tool to protect senior water rights.

Griffin v. Westergard, 96 Nev. 627, 615 P. 2d 235 (1980) is not to the contrary. In *Griffin*, the State Engineer found that, if granted, the applications of Griffin would cause pumping from the West Walker River Hydrographic Basin to exceed the perennial yield in dry years. *Id.* at 640. The additional pumping, in conjunction with existing rights, would cause the use of groundwater to exceed the perennial yield, which could lead to infiltration of surface water and thus impact the senior surface rights. *Id.* Although the court used the word “impair” to describe the condition, the real import would be that the additional applications

would be in conflict with the existing rights as there would not be enough water to satisfy the senior rights in the Hydrographic Basin. *Id.* at 631.

Appellants assert that the Etcheverrys' flow from Mud Spring is protected and that no water may be developed that will diminish those flows, even if the Etcheverrys can easily and efficiently be supplied water through mitigation measures that have proven effective in the past. The Springs flow at a rate of less than one gallon per minute. JA 5011. One gallon per minute produces approximately 1.61 acre-feet annually. The policy question is whether the driest state in the union should leave 11,300 acre-feet annually idle, well below the perennial yield of the basin, to allow two springs to flow approximately three acre-feet annually, when those three acre-feet annually can be produced by other means at the sole expense of KVR? The State Engineer interprets his authority to allow him to prescribe mitigation measures that satisfy the senior rights and to allow development of the water. NRS 533.024(1)(b).

Eureka County and Benson are especially hypocritical in this argument as they both pump water from Diamond Valley. Pumping in Diamond Valley impacts both Shipley and Thompson springs and the owners of those springs have applied for groundwater rights to mitigate the effects of pumping in Diamond

Valley.⁶ If Eureka’s argument that there can be no impact whatsoever on spring flow is successful, all pumping in Diamond Valley should cease immediately until the springs begin to flow again. Thus, in Diamond Valley the 30,000 acre-foot perennial yield would remain idle to allow these few users to hopefully have their spring waters begin to flow again. There are many Hydrographic Basins in the state that would face the same consequences.

In its strictest sense, if this Court were to adopt the “no impacts” standard advocated by Eureka County, only a handful of the most senior water right holders in each basin could use water, leaving hundreds of thousands of acre-feet of water unused statewide. In contrast, the State Engineer’s interpretation of conflicts allows a factual examination by the State Engineer to occur to determine whether the senior right’s beneficial use can be satisfied. The cases cited by Eureka County for the proposition that senior water rights cannot be diminished are inapplicable as the State Engineer has ruled that KVR must monitor and manage their water use to avoid conflicts, and mitigate impacts that cannot be avoided. JA 5022. The State Engineer’s ruling is specifically aimed at allowing KVR to beneficially use its water, but also ensure that senior water right holders also retain their right to beneficial use.

⁶ See application 81720 available at <http://water.nv.gov/data/permit/permit.cfm?page=1&app=81720>

There is no reason to deviate from the State Engineer's approach, as it is firmly rooted in the prior appropriation doctrine itself. The prior appropriation doctrine provides that an appropriator holds nothing more than a usufruct in diverted water and does not *own* the water itself. *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) ("Indeed, even those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use."). Whether the senior user gets his water through his current diversion works or from works constructed and paid for as mitigation by a junior user, his water right is whole and the junior user is not in conflict with the senior right.

It is important to note that the Appellants in this case have not been deprived of water, nor will they be deprived of water. They essentially argue that this court should assume they will be deprived of water and apply the types of due process that the court would apply if the water was actually taken by the State. "[D]ecisions sustaining other land-use regulations, which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'. . . ." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978) (citations omitted). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("A regulation permitting a landowner to build a substantial residence on an 18-acre

parcel does not leave the property ‘economically idle.’”). The court should take note that the that the Office of the State Engineer was created over 100 years ago and the case law of Nevada shows no reported cases where a senior water right remained unsatisfied because the State Engineer refused to enforce the water law.

Nevada’s water law provides that the waters of the State should be put to beneficial use and to the extent possible not left idle. *Desert Irrigation, Ltd. v. State Engineer*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) (“The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states.”). The State Engineer’s interpretation of the water law balances the need to protect existing rights and the long-term sustainability of the resources while allowing for the maximum use of the resource for the benefit of the State and its people. *See, Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006) (“state regulation like that in NRS Chapters 533 and 534 is necessary to strike a sensible balance between the current and future needs of Nevada citizens and the stability of Nevada’s environment.”)

In a fully-appropriated groundwater basin, it would be appropriate for the State Engineer to find that new appropriations would conflict with existing rights. *See, Griffin v. Westergard*, 96 Nev. 627, 632, 615 P.2d 235, 238 (1980) (“The state engineer found that the granting of any further permits would impair existing

rights.”). However, Eureka County’s arguments ignore the fact that the State Engineer found that the perennial yield of the Kobeh Valley Hydrographic Basin, was 15,000 acre feet annually and that existing rights, including those granted to KVR, would total 12,400 acre-feet annually. This alone makes the instant situation distinguishable from *Griffin*. The State Engineer also found that the senior rights can be efficiently and economically mitigated if impacted. JA at 5011.

The State Engineer found that although there may be impacts to springs in the Kobeh Valley Hydrographic Basin, those impacts can be mitigated to allow the users their full beneficial use. JA 5011. If the Etcheverrys are able to beneficially use water, whether it is from their historical source or a new source of water via mitigation, there is no conflict under NRS 533.370(2) and the ruling of the State Engineer must be affirmed.

B. Ruling 6127 Satisfies NRS 534.110 (5)

Appellants argue that the State Engineer failed to comply with the statutory provision in NRS 534.110(5) which requires “any protectable interests in existing domestic wells as set forth in NRS 533.024 and the rights of holders of existing appropriations can be satisfied under such express conditions.” The State Engineer imposed express conditions when he ruled that a “monitoring, management, and

mitigation plan must be approved by the State Engineer prior to diverting any water under these applications.” Ruling at 22.⁷

The question of whether the predicted impacts to existing rights can be mitigated is a question of fact, and substantial evidence supports the State Engineer’s finding that mitigation can be successful. The State Engineer found that through monitoring and management, impacts can be avoided if possible and mitigated if the impacts cannot be avoided. Eureka County acknowledges the fact that Mud Spring has already been partially developed by its owners through the use of a “metal casing in the middle. . .” of the spring. Eureka Opening Brief at 16, quoting JA Vol. 3 at 531. Further development of the spring will likely be necessary to mitigate the effects of pumping by KVR, however, when and to what extent remains to be seen. The State Engineer required extensive monitoring to determine what the impacts will actually be. JA 5006. When those impacts appear, the State Engineer must have the flexibility to respond. Appellants argue that the State Engineer should specify all the necessary measures to be taken at this time. However, the specific measures that will be needed will not be known until the effects of pumping begin to manifest. The express provisions imposed by the State Engineer are that KVR will have to mitigate any impacts on existing rights

⁷ The State Engineer’s approval of the Monitoring, Management and Mitigation plan is currently on appeal in the Seventh Judicial District Court in case no. CV-1207-178.

and that it will have to provide financial resources to ensure that mitigation continues beyond the life of the mine. JA 5006. Since the State Engineer's factual finding is supported by substantial evidence, it must be upheld. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

The State Engineer ordered KVR to develop and have approved a 3M plan which satisfies the requirement to protect existing rights prior to pumping any water. However, the State Engineer retains the authority to order those measures necessary to ensure that senior rights can be put to beneficial use, even if the 3M plan proves ineffective. NRS 533.481 and NRS 533.482. No factual showing has been made that these conditions will be inadequate to protect existing right and the Ruling should be affirmed.

C. The Interbasin Transfer Is Environmentally Sound

Nevada Revised Statute section 533.370(3)(c) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider “[w]hether the proposed action is environmentally sound as it relates to the basin from which the water is exported.” KVR requested interbasin transfers of groundwater from both Kobeh Valley and Diamond Valley to a place of use that includes portions of the Kobeh Valley, Diamond Valley and Pine Valley Hydrographic Basins. However, only export of water from Kobeh Valley to Diamond Valley was allowed in the ruling. JA 5026.

The State Engineer analyzed the rights as interbasin transfers, but the court should keep in mind that the transfers allow water to be used in Diamond Valley, but factually, most of the water will return to Kobeh Valley for its ultimate beneficial use. JA 280–282. In addition, the expected life of the mine is 44 years and the interbasin transfer will effectively expire when the water ceases to be put to beneficial use on the mine site. JA 1039.

Eureka County challenges only the State Engineer’s findings in regard to whether the interbasin transfer is environmentally sound. The State Engineer has consistently held:

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

JA 5010. It should be noted that Eureka County is expressly *not* challenging the environmental soundness standard expressed above. Opening Brief at 60. Instead, Eureka County’s quarrel is with the way the State Engineer applied that standard in this case. *Id.* The State Engineer found that KVR owned all of the existing groundwater rights in Kobeh Valley, except 1,100 acre-feet annually. JA 5011. The total groundwater rights equal 12,400 acre-feet annually which is less than the perennial yield of the Kobeh Valley Hydrographic Basin. JA 5011. The State

Engineer also found that there are seventy-one water-righted springs within the Kobeh Valley Hydrographic Basin. JA 5011. Twenty-nine of the springs are the subject of claims by the United States Bureau of Land Management (BLM) who settled with KVR based on a monitoring and mitigation plan. JA 5011. “[T]he remaining springs are either located far away from the proposed well sites or will not be affected due to topography and geology.” JA 5011. The State Engineer also took notice of conflicts that may occur:

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

JA 5011. Nevada’s water law provides little guidance to the State Engineer in defining whether the use of water is environmentally sound for the basin of origin. The State Engineer’s focus on water issues is consistent with his enabling statutes. Concerns for the detailed analysis of impacts related to the mine project on the environment are properly handled by agencies designed for that purpose. It would be improper for the court to expand the definition of environmentally sound to include areas for which the State Engineer has no expertise and no staff.

The United States Supreme Court considered a similar issue in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984). In that case the congress left undefined the term “stationary source” when it enacted provisions of the Clean Air Act. *Id.* at 840. The appeals court had crafted a definition of the term and applied that definition to the facts at issue therein. *Id.* at 841. The Supreme Court reversed and held that:

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

Id. at 843.

Eureka County argues that the State Engineer’s focus on water-related natural resources while conducting the environmental soundness determination treats this statutory provision as “surplusage.” Opening Brief at 61. This is not the case. Putting aside the fact that the Office of the State Engineer is not meant to function as a department of environmental protection, by focusing on water-related natural resources the State Engineer is in reality analyzing a major contributor to a healthy environment in the basin of origin. When the State Engineer protects an existing surface water right the wildlife and plant resources that rely on that water

are also de facto protected. The State Engineer's approach in this case is consistent with Nevada law and should be upheld.

Substantial evidence supports the State Engineer's decision. The amount of water appropriated is less than the perennial yield and the State Engineer is requiring a Monitoring, Mitigation and Management Plan to monitor and identify potential impacts to water rights, including springs. The plan provides for mitigation if impacts are seen and will provide for hydrologically-related protections of both Kobeh and Diamond Valleys that address actual impacts. He determined based on ample and substantial evidence that "the proposed interbasin transfer of groundwater from the Kobeh Valley Hydrographic Basin [will remain] environmentally sound throughout the life of the project." JA 5011–5012.

D. The State Engineer Is Not Required To Have a Completed Monitoring, Management, And Mitigation Plan Before Ruling On Applications

State Engineer's Ruling 6127 found that water was available to approve the applications. The project proposed by KVR is of a size and scope that justifies a comprehensive Monitoring, Management, and Mitigation (3M) Plan that will control development of the applications long after the applications are permitted. JA 5006. The State Engineer has required such plans to effectively manage other large-scale water development projects in Nevada, particularly for the mining industry. The 3M plan is designed to promote sustainable development of the

resource while protecting existing rights. The 3M plan is currently the subject of Judicial Review in the Seventh Judicial District Court, CV 1207–178.

The State Engineer has broad statutory authority under NRS 534.110(6) to curtail pumping if the resource is being damaged, or if there are conflicts with senior rights or protected domestic rights and such authority exists whether or not a 3M Plan is required by the State Engineer. The State Engineer takes seriously his responsibility to protect the water resources of Nevada. NRS 533.030. He may order curtailment of pumping regardless of the effect on mining operations. NRS 534.110(6). The State Engineer found that substantial evidence showed that the Diamond Valley would not be harmed by the transfer of existing water rights to the mining operations. JA 5005. The State Engineer has a number of tools to balance the basin. The most drastic measure would be to curtail pumping by junior appropriators until the resource comes into balance, not by shutting down the most unpopular users first. NRS 534.110(6). Thus, the State Engineer exercised his discretion on how best to control water resources by ordering KVR to have an approved 3M plan prior to pumping water for mining operations.

The data collected from the monitoring portion of the 3M Plan will allow the State Engineer to make real-time assessments within the basin as well as making predictions as to the location and magnitude of any drawdowns that may occur in the future under different pumping regimes. 3M Plans are designed to be

adaptable and this 3M Plan will change throughout the life of the project as data is collected and model outputs are analyzed.

Collected hydrologic data can be used in the groundwater model to identify potential areas of impact, to review the appropriate location of new wells, and to optimize pumping at different well locations to avoid impacts. Stressing the aquifer by pumping will increase the model's predictive capability because longer term pumping stresses provide aquifer response parameter data. This information will provide the State Engineer with an important management tool throughout the project life.

The contention of both Eureka County and Benson that a 3M Plan must be approved before ruling on the Applications is not supported by Nevada water law. The State Engineer utilizes such plans, both before and even after applications are approved, as a management tool to effectively carry out his duties.

Eureka County argues that *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470 (D. Nev. 1996) somehow precludes the State Engineer from utilizing a 3M plan to protect senior water rights.⁸ However, the court in *Alpine Land* approved the State Engineer's practical and effective conditions on the
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⁸ Eureka County again argues that the State Engineer ruled that the applications at issue here will conflict with existing rights; however, this is incorrect as argued above.

transfer that were intended to protect existing rights. *Id.* at 1479. The State Engineer is not limited to any enumerated measures to protect existing rights.

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

The effects of pumping on the aquifer are not certain, and although the scientists do their best, no one knows with absolute certainty what is happening in an aquifer. Rock formations that prevent water from moving in a certain direction can occur anywhere within the basin. JA 1950–1951 (Vol. 12. pt. 4.) Faults can change the direction of flow with no evidence being present on the surface. The monitoring plan will require monitoring wells not just in areas where effects are expected, but also in areas where effects are not expected. The 3M plan will have to be adjusted as effects from pumping propagate through the area. New monitoring wells or other monitoring requirements may be needed. The State Engineer is uniquely equipped to perform these functions and the court should not undertake to dictate a monitoring plan. To take away the authority of the State Engineer to make the scientific and fact-based decision on the timing of 3M plans will greatly limit the State Engineer's ability to properly manage the water

resources of the state.

E. The State Engineer Properly Approved the Permits for a Place of Use That Includes the Entire Project Area

Etcheverry et al. argue that the State Engineer impermissibly approved the applications to allow the entire project area as the place of use, rather than the specific area where most of the mining operations will take place. Appellants also argue that KVR may not use water for incidental purposes. The designation of the place of use is a question of fact and Nevada law only requires that an application to change the place of use “contain such information as may be necessary to a full understanding . . . as may be required by the State Engineer.” NRS 533.345(1). The State Engineer was presented with substantial evidence that some water will be used in construction of wells, dust control and other beneficial uses closely related to the mining operation, but not necessarily located in the area where most mining operations will take place. The State Engineer approves water rights for municipalities that include the entire water-service area as the place of use. Irrigation rights are often approved for the entire farm, rather than one specific parcel. Water rights are also issued for incidental purposes, and the mine should not be prohibited from uses such as restrooms or dust control that are no less necessary to the mining process, even though its permits are for mining and milling. Appellants offer no reason why mining uses should be treated any

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differently than municipal water users and point to no statute that requires such rigid specificity.

Etcheverry also argue that the applications were approved in violation of the anti-speculation doctrine without citation. The anti-speculation doctrine is that water may not be granted to one who has no current beneficial use for the water. *Bacher v. State Engineer*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). It is an undisputed fact that the mine will be able to put the entire 11,300 acre-feet annually to beneficial use and the anti-speculation doctrine is inapplicable. JA at 320.

F. No Due Process Violation Occurred

Etcheverry et al. assert that they were denied due process by the State Engineer when the State Engineer required a 3M plan to be in place before pumping began, rather than before the applications were approved. However, no property rights have been taken or will be taken as a result of the State Engineer's approval of KVR's applications. Due process requires the State Engineer to provide due process before taking property, but not before taking steps to *protect* property rights. A 3M plan does not authorize the taking of any property interest; instead it is designed specifically to protect existing water rights. While Nevada law gives Etcheverry et al. the ability, as protestants, to participate in a "full and

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fair” hearing, due process requirements are flexible and vary depending on the property interest involved.

In this case, the Appellants suggest that the State Engineer “misused” evidence by making a decision based on evidence not in the record. Etcheverry et al. complain that they never had a chance to review the 3M plan or challenge its provisions. In fact, Etcheverry et al. are currently receiving a full opportunity to be heard in their district court appeal of the State Engineer’s subsequent approval of the 3M Plan. *Bensen v. State Engineer*, 7th Jud. Dist. Case no. CV 1207–178. The cases cited by the Appellant for the proposition that due process forbids an agency to use evidence in a way that forecloses an opposition pre-suppose that said evidence exists. The cases are directed to situations where the administrative agency is holding evidence in secret and not disclosing it to the parties. That is not the case here. No 3M plan existed at the time the applications were considered and therefore, the State Engineer could not have “withheld” it or “misused” it to the detriment of Etcheverry et al. Moreover, in a related case currently pending in the 7th Judicial District Court, Etcheverry et al. are now having that “evidence” reviewed.

Appellants assert that they have been denied due process by the State Engineer in granting the applications without a 3M plan in place without citation to any authority. No property rights have been taken or will be taken as a result of his

actions. In fact, despite the fact that no authority requires a 3M plan, the State Engineer ordered the development of the plan specifically to protect existing water rights. Since constitutional due process concerns are not involved, Appellants are left with the procedure adopted by the Legislature of the State of Nevada, which are more than adequate to protect existing water rights. JA 5006.

Due process generally applies when the government is taking a “life, liberty or property interest.” U.S. CONST. Amend. 14 § 1. Basic notions of due process apply when a person is deprived of those rights. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.”). The State Engineer considered evidence presented by both sides to determine whether the applications could be granted without conflicting with existing senior water rights. JA 5021. (“The State Engineer finds that the applications will not conflict with the Protestant’s existing water rights.”) Despite this finding, the State Engineer required KVR to develop a 3M plan to ensure that impacts do not occur or if they do occur, that they will be mitigated or eliminated. JA 5006. Due process requires the State Engineer to provide due process before taking property, but not before taking steps to protect property rights.

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

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

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

79 Am. Jur. 2D *Waters* § 351 (2002).

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 566 (1972), the United States Supreme Court held that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.* at 577. Eureka County or anyone else can file a complaint with the State Engineer if KVR’s use of water results in a loss of their water rights.

NRS 534.110(6). In essence they have a remedy at the time they claim to suffer actual harm.

All water sources in the State belong to the public. NRS 533.025. Water that is not currently appropriated is available to be put to beneficial use. NRS 533.030. Ruling 6127 clearly protects and supports the existing water rights by requiring a monitoring, management and mitigation plan and notice that pumping must stop if it impacts on senior water rights.

G. Protection of Existing Domestic Wells

The Legislature has declared “that it is the policy of this State to recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable effects which are caused by municipal, quasi-municipal or industrialises and which cannot be reasonably mitigated.” NRS 533.024. The State Engineer granted no new rights in Diamond Valley, but only allowed the transfer of existing rights. The State Engineer ordered a Monitoring, Management and Mitigation Plan to be implemented as a part of the mine operations. JA 5006. If unreasonable effects upon domestic wells are detected, the State Engineer can order KVR to mitigate those effects as required by NRS 533.024. If the effects cannot be mitigated, the State Engineer can order KVR to cease pumping water that interferes with the existing domestic wells. *Id.* A water user who refuses to

comply is subject to myriad of penalties including being fined up to \$10,000 per day of violation and injunctive relief. NRS 533.481(1)(a). The Legislature has given the State Engineer a number of tools to protect domestic water supplies. Finally, if the Etcheverrys' unreasonable fears come to pass, and the State Engineer refuses to perform his statutory duties, the courts are also available to review the actions of the State Engineer. NRS 533.450(1).

H. Permit Terms

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

V. CONCLUSION

The State Engineer's findings are supported by substantial evidence and any interpretations of law are consistent with the statutory language. For the reasons

stated above, Ruling 6127 and the district court's decision in support of Ruling 6127 should be affirmed.

DATED on this 4th day of February 2013.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface

e using Microsoft Office Word 2010 in 14 point Times New Roman type style.

I further certify that this brief complies with the page or type volume of limitations of NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 9,041 words.

I certify that I have read this responsive brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28€(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellant Procedure.

Dated this 4th day of February 2013.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I, Vicki Beavers, am an employee of the Nevada State Attorney General and on the 4th day of February 2013, I submitted with the Nevada Supreme Court by their electronic filing system a searchable pdf copy of the State Engineer's Answering Brief in response to the Opening Briefs on file with this case. All parties associated with the case will be served by electronic means through the Supreme Courts notification system. In addition, I have sent a copy of this brief to all parties associated with this case via electronic e-mail. I have also sent a copy via electronic e-mail as a courtesy to the counsel listed below:

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Dated this 4th day of February 2013.

/s/ Vicki Beavers

Vicki Beavers
Office of the Attorney General