

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, a political subdivision of  
the State of Nevada; MICHEL AND MARGARET  
ANN ETCHEVERRY FAMILY, LP, a Nevada  
registered foreign limited partnership; DIAMOND  
CATTLE COMPANY, LLC, a Nevada limited  
liability company; and KENNETH F. BENSON,  
individually,

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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Tracie K. Lindeman  
Clerk of Supreme Court

**APPEAL**

FROM THE SEVENTH JUDICIAL DISTRICT COURT, EUREKA COUNTY  
THE HONORABLE DAN L. PAPEZ, DISTRICT JUDGE  
District Court Case Numbers: CV1108155, CV1108156,  
CV1108157, CV1112164, CV1112165, CV1202170

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***MOTION FOR LEAVE TO FILE RESPONSE TO AMICI BRIEFS  
OF APPELLANTS MICHEL AND MARGARET ANN ETCHEVERRY  
FAMILY LP, DIAMOND CATTLE COMPANY LLC, AND  
KENNETH F. BENSON***

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## **MOTION FOR LEAVE TO FILE RESPONSE TO AMICI BRIEFS**

Appellants MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON (collectively referred to herein as “Appellants”), by and through their attorneys of record, Schroeder Law Offices, P.C., and pursuant to NRAP 27, move this court for leave to respond to the amici curiae briefs in this matter.

### **POINTS AND AUTHORITIES**

By good cause, and pursuant to NRAP 27, Appellants request leave to respond to amici briefs in this matter *in lieu* of responding to 1) the Motion for Leave to File Brief of Amicus Curiae NV Energy, and 2) the Nevada Mining Association’s Motion to Appear as Amicus Curiae and to Join in the Brief of the Municipal Water Purveyors.

Appellants filed their Opening Brief in this matter on December 27, 2012 (Doc. 2012-40976). Appellant Eureka County also filed their Opening Brief on the same date (Doc. 2012-40828). Responsive answering briefs were filed by the Appellee State of Nevada State Engineer (Doc. 2013-03604) on February 4, 2013, and by Intervenor-Appellee Kobeh Valley Ranch, LLC (Doc. 2013-03651) on February 5, 2013.

All amici curiae filed their briefs in support of the Appellee, Nevada State Engineer. On February 13, 2013, NV Energy filed a Motion for Leave to File Brief of Amicus Curiae pursuant to NRAP 29 (Doc. 2013-04741). On February 14, 2013, and pursuant to NRAP 29(a), a group of municipal purveyors, including Carson City, City of Fernley, Gardnerville Ranchos General Improvement District, City of Henderson, City of Las Vegas, Town of Minden, City of North Las Vegas, Southern Nevada Water Authority, and Truckee Meadows Water Authority provided notice of filing of Amicus Curiae Brief (Doc. 2013-04768). And, on February 14, 2013, the Nevada Mining Association filed a motion to appear as Amicus Curiae and join in the brief of the Municipal Water Purveyors (Doc. 2013-04767). The Amicus Curiae Briefs were served on parties on February 13, 2013.

The Amici Curiae briefs fail to consider the relevant factors of this case and attempt to address the issue of mitigation in the abstract. As such, Appellants desire to address those issues and points of law via a responsive brief. For example, in the Municipal Water Purveyors' ("Purveyors") brief, they argue that mitigation is to avoid conflicts with existing water rights. However, what the Purveyors fail to consider, is that in this case, no mitigation measures were proposed, and the permits did not include any specific mitigation measures, but only a plan to create a future monitoring, management and mitigation plan ("3M Plan"). A call for a future 3M Plan, is not an express mitigation condition in a

permit.<sup>1</sup> *See also* NV Energy Brief at 4, arguing that express conditions can protect existing water rights and that development of 3M Plan is an express condition. The Purveyors argue that a mitigation measure can avoid the finding of “conflict with existing rights” yet fail to acknowledge that the statutory analysis is first, if there is a conflict, then there *shall* be no permit issued. Circumventing the order of analysis is not proper, especially when “that mitigation measure to avoid conflict” is not outlined as an express condition in the permit, or even contemplated at the time of permit issuance. That “mitigation measure to avoid conflict” is non-existent.

Further, the Purveyors attempt to argue that a water right is not a property right, but a use right. Purveyors Amicus Brief at 8. Appellants agree that they do not own the molecule of water, but own the right to use the water. *See* Purveyors Amicus Brief at 15, *admitting* that water rights are real property. The Purveyors admit that “successful mitigation ensures the holder of the existing right will receive the same amount of water, at the same point of diversion and place of use, and during the same period.” Purveyors Amicus Brief at 8. However, in this case,

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<sup>1</sup> The 3M Plan was issued on June 6, 2012 and called for no specific mitigation measures to water rights known to be in conflict. The 3M Plan further set up a new scheme to seek enforcement of injured water rights through two advisory committees, and not through the current statutory schemes. Appellants filed a petition for judicial review currently pending before the Seventh Judicial District Court of Nevada, Eureka County Court on July 5, 2012, Case No. CV 1207-178, as they were not provided a seat at the table to establish this 3M Plan.

there is no mitigation via an express condition in the permits. The only hint of mitigation is the requirement of Appellees to develop this 3M Plan in the future.

In addition, Appellants request the opportunity to respond to Purveyors' and NV Energy's amici curiae briefs to further address, among other things, the difference in management via adjudication based on priority prior to conflict, and after-the-fact mitigation once conflict has already occurred. The statutory scheme in NRS Chapters 533 and 534 is in place to protect existing rights. This scheme contemplates a procedure to ensure existing rights are protected, yet Appellees and Purveyors are suggesting a) the State Engineer does not need to issue permits with express conditions, or that the future development of a 3M Plan is an express mitigation condition, b) that Appellants had an opportunity to an administrative hearing to address potential mitigation options effectiveness (yet none were proposed by Appellees), and c) that if Appellants do not like the mitigation proposed, or the mitigation does not protect their water rights, they can file a petition for judicial review. Purveyors Amicus Brief at 16-17. Purveyors are attempting to shift the burden from the State Engineer, to the existing water right holder, to protect their water right from new appropriations, when Nevada Law specifically places this burden on the State Engineer.

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## CONCLUSION

For the reasons stated above, and others, Appellants would request leave to file a responsive brief to the Amicus Curiae briefs filed in this matter. Appellants would request thirty days to file a responsive brief to the new issues raised by the Amicus Curiae briefs in this matter. *See, McKellar Dev. of Nevada, Inc. v. Northern Ins. Co. of New York*, 107 Nev. 562, 816 P.2d 456, 457 (1991) providing respondents thirty days to file a supplemental brief in response to amici curiae; *see also, D'Angelo v. Gardner*, 107 Nev. 104, 807 P.2d 1391 (1991) providing a thirty day response period.

DATED this 25th day of February, 2013.

SCHROEDER LAW OFFICES, P.C.

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## **PROOF OF SERVICE**

Pursuant to NRAP 25(d), I hereby certify that on the 25<sup>th</sup> day of February, 2013, I caused a copy of the foregoing ***MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, AND KENNETH F. BENSON'S MOTION FOR LEAVE TO FILE RESPONSE TO AMICI CURIAE BRIEFS*** to be served on the following parties as outlined below:  
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Dated this 25<sup>th</sup> day of February, 2013.

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