Case No. 61324

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,

Appellees.

APPEAL

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

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

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Reply 1

I. Issues 1

II. Statement of Facts 2

A) The Applications will conflict with more than two springs and one domestic well 2

B) Appellants did not admit that mitigation would cure any conflicts with existing water use rights 4

C) The State Engineer admitted that Applications will conflict with existing rights 4

D) The State Engineer admitted Permits contain no express conditions 6

E) Appellants do not ask for imposition of a "no impact" rule 7

F) Appellants do not question the State Engineer's authority, in general, to impose conditions in water use permits 7

III. Argument 8

A) The State Engineer erred by granting Applications that will conflict with existing water use rights 8

1. The State Engineer admitted conflicts with existing rights 8

2. The State Engineer's finding that all conflicts can be fully mitigated is not supported by substantial evidence 9

3. The State Engineer's interpretation of mitigation violates Nevada water law 15

B) The State Engineer erred by failing to determine whether the static water drawdown is reasonable, and failing to impose express conditions to ensure existing rights will be satisfied..... 18

1. The State Engineer erred by failing to include express conditions in Permits..... 19

2. The State Engineer failed to determine "reasonable lowering."..... 20

C) The State Engineer erred by approving a larger place of use than that intended for "mining, milling, and dewatering."..... 21

D) The State Engineer erred by failing to include a condition in the Permits required by State Engineer Ruling No. 6127..... 24

E) The State Engineer erred by relying on evidence that was not part of the administrative record, thus violating Appellants' due process rights..... 25

1. The district court affirmed Ruling No. 6127 on the mistaken belief that post-hearing procedures would afford Appellants due process... 26

2. Appellants' ability to appeal the State Engineer's approval of the 3M Plan does not cure the due process violation..... 27

3. Appellants assert a violation of procedural due process, not a property taking..... 28

4. The State Engineer's ability to forego a hearing does not allow the State Engineer to forego due process..... 30

IV. Conclusion..... 32

///

///

///

///

///

///

TABLE OF AUTHORITIES

CASES

Anderson Family Assocs. v. Hugh Ricci, P.E., 124 Nev. 182, 179 P.3d 1201 (2008)..... 22

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 29

City of Reno v. Estate of Wells, 110 Nev. 1218, 885 P.2d 545 (1994)..... 10

In re Waters of Horse Springs v. State Engineer, 99 Nev. 776, 671 P.2d 1131 (1983)..... 9, 16

Jim L. Shetakis Distributing Co., v. Dept. of Taxation, 108 Nev. 901, 839 P.2d 1315 (1992)..... 14

Mathews v. Eldridge, 424 U.S. 319 (1976)..... 27

Revert v. Ray, 95 Nev. 782, 603 P.2d 262 (1979)..... 10, 29, 31

Town of Eureka v. Office of State Engineer, 108 Nev. 163, 826 P.2d 948 (1992)..... 21

STATUTES

Nevada Revised Statute § 533.060(4-5)..... 17

Nevada Revised Statute § 533.085(1)..... 9, 18

Nevada Revised Statute § 533.325..... 22

Nevada Revised Statute § 533.335..... 16

Nevada Revised Statute § 533.370(2)..... 1, 8, 9, 14, 15, 21

Nevada Revised Statute § 534.100(1)..... 19

Nevada Revised Statute § 534.110(4-5)..... 1, 6, 18, 19, 20

REPLY

Appellants MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON (collectively herein, "Appellants"), by and through their attorneys, Schroeder Law Offices, P.C., file this Reply Brief on appeal from the Order Denying Petitions for Judicial Review of the Eureka County District Court in Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-1112-164, CV-1112-165, and CV-1202-170, June 13, 2012.

I.

ISSUES

1) Did the State Engineer err by granting Applications that will admittedly conflict with existing rights, contrary to NRS § 533.370(2)?
2) Did the State Engineer err by failing to determine reasonable lowering of the static water level and omitting express conditions to ensure existing rights will be satisfied pursuant to NRS § 534.110(4) and (5)?
3) Did the State Engineer err by approving a place of use for "mining, milling, and dewatering" Applications that is larger than the anticipated mining activities, and are for non-mining uses that are admittedly speculative?

/ / /

4) Did the State Engineer err by failing to include a permit condition expressly required by State Engineer Ruling No. 6127?

5) Did the State Engineer err by relying on evidence not part of the administrative record to determine Applications should be approved?

II.

STATEMENT OF FACTS

Respondents assert several incorrect and misleading facts in their Answering Briefs. Appellants correct those statements here.

A. Applications will conflict with more than two springs and one domestic well.

In State Engineer[1] Ruling No. 6127, the State Engineer made the following findings of fact regarding conflicts:

1) "Water rights that could potentially be impacted are those rights on springs and streams in hydrologic connection with the water table. That would include valley floor springs." JA Vol. 26 at 5005.

2) "In Eureka County's Exhibit Nos. 526, 527, 529 and 530, numerous spring and stream water rights are shown. Water rights that could potentially be impacted are those rights on the valley floor where there is

[1] "State Engineer" is referred to herein as Respondent.

predicted drawdown of the water table due to mine pumping." JA Vol. 26 at 5006.

3) "**The Applicant recognizes** 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." JA Vol. 26 at 5006 (emphasis added to highlight that the State Engineer's findings were broad, and recognized the narrower admission by Kobeh Valley Ranch. [2])

Although the State Engineer made all above findings, Respondents choose to focus only on #3 above, regarding conflicts with only the few specific springs admitted by KVR. *See, e.g.*, KVR's Ans. Br. at 18. Respondents' focus misleads in asserting *only* limited conflicts were found in Ruling No. 6127. In fact, the Ruling found that KVR's proposed pumping would impact numerous springs.

As reflected by the record, there are over one-hundred springs located within Diamond Cattle Co.'s BLM grazing allotment in Kobeh Valley, used for stock watering. JA Vol. 4 at 621. Mr. Etcheverry utilizes water from seven underground wells on allotment and private lands. JA Vol. 4 at 623. Other witnesses testified similarly. *See* Testimony of John Colby, JA Vol. 4 at 637-644, JA Vol. 26 at 4935

[2] "Kobeh Valley Ranch" is referred to herein as KVR, Applicant, or Respondent.

and 4938; Testimony of Kenneth Buckingham, JA Vol. 4 at 649-658, JA Vol. 25 at 4933; Testimony of Jim Etcheverry, JA Vol. 4 at 660-666, JA Vol. 26 at 4937-4938; Testimony of Gary Garaventa, JA Vol. 4 at 670-681, JA Vol. 26 at 4936. KVR's expert hydrologist, Thomas Buqo, agreed with Mr. Etcheverry's statement that there are numerous springs all over the Kobeh Valley floor. JA Vol. 36 at 6961. Applications are predicted to conflict with numerous springs on the floor of Kobeh Valley, vital to agriculture in the valley.

B. Appellants did not admit mitigation would cure any conflicts with existing water use rights.

During the December 9, 2010 administrative hearing, counsel for KVR asked Martin Etcheverry if KVR *could* install water tanks near Nichols Springs, and Mr. Etcheverry answered that installation of water tanks at that specific site was feasible due to topography and elevation. JA Vol. 4 at 630-631. Mr. Etcheverry did not state that water tank installation at that single location would mitigate all conflicts with existing rights, as asserted by KVR. KVR Ans. Br. at 32. All assertions by Respondents to the contrary are incorrect and misleading.

C. The State Engineer admitted Applications will conflict with existing rights.

The State Engineer's brief below admitted its finding of "impacts" in Ruling

No. 6127 constituted finding "conflicts" with existing water use rights. The State Engineer's Corrected Answering Brief states:

> 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…

JA Vol. 34 at 6417, 6429; Vol. 35 at 6792, 6804 (emphasis added).

Respondents attempt to argue a difference between "impacts" and "conflicts." *See, e.g.*, SE Ans. Br. at 14; KVR Ans. Br. at 18. Regardless of semantics, the State Engineer admitted Applications "conflict" with existing water use rights on the floor of Kobeh Valley. That admission cannot be withdrawn on appeal.[3]

State Engineer Ruling No. 6127 *ultimately* found no conflicts because, and only because, conflicts could be avoided by implementing a monitoring, management and mitigation plan ("3M Plan"). JA Vol. 26 at 5006. The State Engineer did find conflicts with existing water use rights; he waived those conflicts based upon future implementation of a 3M Plan.

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[3] The conflict finding is consistent with the record, evidencing spring flow on the Kobeh Valley floor will cease. JA Vol. 3 at 490, 531.

D. The State Engineer admitted Permits contain no express conditions.

At oral argument before the district court on April 3, 2012, the State Engineer admitted that if effects to existing rights are known, NRS § 534.110(5) requires express conditions be included in Permits to avoid known effects. JA Vol. 35 at 6694-6700 ("So all these effects that you know about, based on geology, that statute applies to and you can put in the permit terms." JA Vol. 35 at 6698-6699. "So if we knew what they were going to be, I would agree the statute would apply and require specific terms." JA Vol. 35 at 6699). The State Engineer admitted he did not impose any express conditions:

> THE COURT: Did the State Engineer in his ruling expressly state how petitioners' water rights would be satisfied by some lowering of the water table and the impacts to their rights?
>
> MR. STOCKTON: He did not.

JA Vol. 35 at 6694.

On appeal, Respondents attempt to argue the State Engineer included express conditions because the 3M Plan *is* an express condition. SE Ans. Br. at 21-22; KVR Ans. Br. at 29. However, no 3M Plan existed at that time, and even if it did, the now issued 3M Plan contains no actual requirements to ensure existing rights are satisfied. The State Engineer admitted at hearing no express conditions were included in Permits. Respondents' assertions otherwise are without support.

/ / /

E. Appellants do not ask for imposition of a "no impact" rule.

Appellants ask this Court to uphold Nevada law and rule that when the State Engineer finds applications will "conflict" with existing water use rights, the State Engineer is required by law to deny those applications. App. Op. Br. at 8-11. Appellants also ask this Court to rule that the State Engineer cannot waive conflicts with existing rights by relying on a hypothetical and non-existent 3M Plan, devoid of any and all evidence that conflicts can be avoided. App. Op. Br. at 19-23 (The State Engineer admits: "No 3M Plan existed at the time the applications were considered." SE Ans. Br. at 33).

Respondents argue Appellants' position requires imposition of a "no impact" rule, detrimental to Nevada's development. SE Ans. Br. at 18; KVR Ans. Br. at 21. Appellants do not argue for a policy change, but support Nevada's policy to protect existing rights. In this particular case, the State Engineer found "conflicts" with existing rights, and the State Engineer's authority does not allow waiver of such conflicts without any evidence that existing rights will continue to be satisfied.

F. Appellants do not question the State Engineer's authority, in general, to impose conditions in water use permits.

Respondents expend substantial efforts to convince this Court of the unremarkable and uncontested proposition that the State Engineer has authority to

impose conditions on permits. SE Ans. Br. at 29-30; KVR Ans. Br. at 23-26. Respondents mischaracterize the actual issue: The State Engineer may not waive conflicts with existing water use rights based on a non-existent 3M Plan and lack of any evidence in the record that existing rights will be satisfied. App. Op. Br. at 19-23. The State Engineer must rely on ***actual evidence***, rather than vague, hypothetical future plans. The issue is not whether the State Engineer can impose permit conditions. Statements by Respondents otherwise are irrelevant.

III.

ARGUMENT

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

In Appellants' Opening Brief, Appellants explained that because Applications will conflict with existing water use rights, Applications must be denied pursuant to NRS § 533.370(2). In their Answering Briefs, Respondents argue: 1) "Impacts" are different than "conflicts," and, 2) No conflicts exist because the State Engineer found conflicts could be mitigated. Respondents' arguments are unconvincing.

1. The State Engineer admitted conflicts with existing rights.

As explained *supra*, the State Engineer admitted finding "conflicts" in the

case of these Applications. The State Engineer cannot on appeal recant these admissions. The State Engineer's conflicts finding is consistent with the testimony of KVR's witnesses who testified certain springs would cease flowing ***altogether*** soon after the mine began pumping. *See, e.g.*, JA Vol. 3 at 531. It is unreasonable to argue that such facts do not constitute "conflict."

Further, the attempted distinction between "conflicts" and "impacts" is meaningless when considering vested water rights, wherein statutory protection is even greater. Vested water rights are "water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation." *In Re Waters of Horse Springs v. State Engineer*, 99 Nev. 776, 778, 671 P.2d 1131, 1132 (1983). NRS § 533.085(1) states:

> Nothing contained in this chapter shall ***impair*** the vested right of any person to the use of water, nor shall the right of any person to take and use water be ***impaired or affected*** by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Emphasis added. The legislative policy to protect vested water rights cannot be overturned here by a play on words.

2. The State Engineer's finding that all conflicts can be fully mitigated is not supported by substantial evidence.

The State Engineer is mandated by statute to either deny applications that conflict with existing water use rights (NRS § 533.370(2)), or find that applications

will not conflict with existing water rights based on substantial evidence on the record. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). The State Engineer did neither here.

The State Engineer admits the 3M Plan did not exist at the time the administrative hearings were held and Ruling No. 6127 was issued. SE Ans. Br. at 33 ("No 3M Plan existed at the time the applications were considered."). KVR's witnesses at the administrative hearing admitted that no mitigation plan existed and that testimony about possible mitigation was speculative at best. *See, e.g.*, JA Vol. 2 at 315 (Testimony by Patrick Rogers: "I don't know what we would propose in a mitigation plan. A mitigation plan hasn't been developed yet. It would be speculative to say what we would or would not propose.").

Any reliance on the non-existent, "speculative" 3M Plan to "cure" conflicts with existing water use rights is arbitrary and capricious. A decision is "arbitrary and capricious" if "baseless." *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994). Here, the 3M Plan was not entered in the record. Accordingly, the State Engineer's reliance on the non-existent 3M Plan was baseless.

KVR dedicates an entire section of its Answering Brief attempting to support the State Engineer's reliance on the 3M Plan. KVR Ans. Br. at 30-33. To

highlight the fact that the record does not support the finding on mitigation, the cited portions of the Joint Appendix are listed below:

1. KVR asserts, "any potential impacts to [springs] could be mitigated, thereby avoiding any conflicts." KVR Ans. Br. at 30.
    a. JA Vol. 2 at 381:23-25, 382:1-25, 383:1: Statement by KVR witness Terry Katzer that mitigation techniques, in general, include increasing a well, running a pipeline, or trucking water.
    b. JA Vol. 3 at 531:1-20, 490:3-8: Statements by KVR witness Dwight Smith that Mud Spring and Lone Mountain Spring will "cease to flow…fairly soon in the pumping," and that, hypothetically, "there can be mitigation measures taken," including shifting pumping in the well field area.
    c. JA Vol. 4 at 630:20-25, 631:1-8: Statement by Martin Etcheverry that installation of water tanks was feasible Nichols Springs because of the topography and elevation of the site.
2. KVR asserts, "unrebutted evidence showed that there were several techniques available to mitigate any loss from these springs." KVR Ans. Br. at 30. However, no additional evidence other than the statements above is cited.

3. KVR asserts Kobeh Valley ranchers all "conceded that mitigation of their valley floor water rights was possible." KVR Ans. Br. at 31.
    a. JA Vol. 4 at 630:20-25, 631:1-8, 669:8-13: Statements by Martin Etcheverry that installation of water tanks was feasible at Nichols Springs because of the topography and elevation of the site, and that the mine could hypothetically mitigate impacts.
    b. JA Vol. 4 at 647:15-25, 659:15-19: Statement by John Colby that *if* KVR completely mitigated all conflicts he would be satisfied.
4. KVR asserts, "KVR's witnesses acknowledged that some water sources may require mitigation, but they also testified in each instance that mitigation could be accomplished." KVR Ans. Br. at 32.
    a. JA Vol. 3 at 490:3-8: Statement by KVR witness Dwight Smith that "there can be mitigation measures taken," including shifting pumping in the well field area.
    b. JA Vol 2 at 374:4-7: Statement by KVR witness Terry Katzer that "there's also a monitoring plan and mitigation that will take place to provide water for those sources if they're impacted."
    c. JA Vol. 2 at 382:10-12: Statement by KVR witness Terry Katzer that mitigation techniques include increasing a well or running a

pipeline.

5. KVR asserts there was testimony about specific mitigation measures and KVR's financial ability and commitment. KVR Ans. Br. at 32.

    a. JA Vol. 2 at 236:17-23, 258:4-25: Statements by Michael Branstetter, counsel for General Moly, that KVR or its parent corporation would commit to mitigation and would be willing to meet with parties to discuss mitigation in exchange for settling protests.

    b. JA Vol. 2 at 300:3-10, 332:12-19: Statements by Patrick Rogers, General Moly Director of Environmental Permitting, that mitigation means "addressing impacts to minimize or reduce their severity or to offset them," and KVR will "abide by any monitoring mitigation plans that are stipulated."

    c. JA Vol. 2 at 363:17-20: Statement by KVR witness Terry Katzer that he is "sure [KVR] will" agree to mitigate impacted sources.

The only conclusion to be drawn from the above "evidence" is the State Engineer relied on nothing more than a few statements during the hearing that mitigation hypothetically can cure impacts. There was absolutely no evidence in the record that any specific conditions could or would be imposed so conflicts ***will***

be cured, as required by NRS § 533.370(2). A few types of general mitigation techniques were mentioned, but there is no evidence in the record that those techniques would be required or actually implemented, or whether specific techniques would be effective in the real world. KVR's witnesses paid "lip service" to the idea of mitigating conflicts, but no actual evidence was entered about what mitigation techniques would be utilized or effective. KVR's witnesses testified that mitigation was "speculative." The State Engineer had a duty to deny KVR's applications without substantial evidence to support actual express conditions to protect existing rights.

The role of a court reviewing an administrative decision is to "review the evidence before the agency in order to determine whether the agency decision was arbitrary or capricious and thus was an abuse of the agency's discretion." *Jim L. Shetakis Distributing Co., v. Dept. of Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992). The agency's decision is only affirmed if substantial evidence supports the decision, and "substantial evidence" is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.* at 903-904 (internal citations omitted).

Above, KVR listed the most favorable evidence supporting the State Engineer's decision. Even looking at the most favorable evidence, there is

absolutely no evidence to support a determination that anticipated conflicts will be avoided by mitigation. The testimony merely states that a mitigation plan *could* be imposed, and that there are techniques that *can* be used to attempt to mitigate conflicts.

The evidence does not constitute substantial evidence to support the State Engineer's Ruling No. 6127. A reasonable person would not accept a few "off the cuff" remarks about speculative, hypothetical mitigation to support a statutorily required finding that all conflicts with existing water use rights can and will be avoided. There is no mitigation plan in the record and no evidence of specific measures that will be implemented. Without substantial evidence, this Court should reverse Ruling No. 6127.

3. The State Engineer's interpretation of mitigation violates Nevada water law.

The State Engineer's interpretation of appropriate mitigation to avoid conflicts violates Nevada water law. In its Answering Brief, the State Engineer asserts: "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."[4] SE Ans. Br. at 21 (emphasis added).

In Nevada, administrative water rights are property rights with several distinct elements, including: 1) source of water, 2) point of diversion, 3) place of use, 4) purpose or manner of use, and 5) quantity of water. NRS § 533.335. Vested rights are similarly based upon how pre-code appropriators put certain sources of water to beneficial use. *See, e.g., In re Waters of Horse Springs*, 99 Nev. at 778. Distinctly identifying the water source is a required element.[5]

The State Engineer asks this Court to reverse over a century of water law in Nevada and rule that the source of water is immaterial to a water use right. The State Engineer asks this Court to find that there is no conflict with an appropriator's right, so long as the appropriator is supplied with some water, no matter the source or quality. This argument leads to absurd results. For instance, the "mitigation" contemplated by the State Engineer could subject appropriators to abandonment for failure to use their water use right while relying on delivery of mitigation water from another source. *See, e.g.*, NRS § 533.060(4) (providing that

[4] KVR asserts that "there will be no conflict because senior rights holders whose water may be impacted will receive the same amount of water, at the same point of diversion and place of use and during the same time period, as they would have received in the absence of the new appropriator." KVR Ans. Br. at 22. This assertion is not supported by any evidence, it is contrary to the State Engineer's described mitigation, and it is not required by the approved 3M Plan. App. Op. Br. Attachment 1.

[5] Applications may not name more than one source of water. NRS § 533.335.

proof of use includes proof of delivery of water under the water use right, not from a different source). Additionally, the State Engineer's argument would allow appropriators to use water from new sources without application, transfer, or other right, as required by law. NRS § 533.060(5) ("Any such right to appropriate any of the water must be initiated by applying to the State Engineer for a permit to appropriate the water as provided in this chapter."). Further, under this scheme, water of lesser quality or temperature could be used as replacement water to the detriment of the appropriator, livestock, crops, fish and wildlife. If delivered by truck, the timing of the delivery will impact livestock that anticipate their own timing, location and demand quantities.

The State Engineer admitted Applications will conflict with existing water use rights, but ultimately concluded "no conflict" based upon potential mitigation. Substantial evidence does not support the State Engineer's determination because the only evidence in support is mere "lip service" to the hypothetical idea of mitigation. Moreover, the State Engineer's mitigation theory, allowing water delivery from a different, unknown source, is contrary to Nevada law. This Court should find that Ruling No. 6127 is contrary to law, arbitrary and capricious, not supported by substantial evidence, and an abuse of discretion.

/ / /

B. The State Engineer erred by failing to determine whether the static water drawdown is reasonable, and failing to impose express conditions to ensure existing rights will be satisfied.

NRS § 534.110 subsections (4) and (5) are located within Nevada's groundwater code. NRS § 534.110(4) provides, each new appropriation of groundwater allows a *reasonable* lowering of the static water level at the appropriator's point of diversion. As to prior appropriations affected, NRS § 534.110(5) provides that new groundwater appropriations may be issued that lower a prior appropriator's point of diversion, so long as protectable interests in domestic wells and the rights of holders of existing appropriations can be satisfied by express conditions in the permits. In the case of vested rights (that predate the water code), a more stringent standard applies: Nothing in the water code

> "shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913."[6]

NRS § 533.085. Therefore, while new groundwater appropriations permitted by the

[6] The Nevada code addressing "percolating water" (the underground water not within a defined boundary), was not enacted until March 25, 1939. Thus, vested

groundwater code may lower existing appropriator's points of diversion, they may only do so if existing rights can be satisfied by express permit conditions. Vested rights cannot be "impaired or affected" by post-code appropriations, even arguably with express permit conditions, which are only allowed under the code.

1. The State Engineer erred by failing to include express conditions in Permits.

The State Engineer admitted that if effects to existing rights are known, NRS § 534.110(5) requires express conditions in Permits to avoid those known effects. JA Vol. 35 at 6694-6700. The State Engineer also admitted he did not impose any such express conditions on KVR in Permits:

> THE COURT: Did the State Engineer in his ruling expressly state how petitioners' water rights would be satisfied by some lowering of the water table and the impacts to their rights?
>
> MR. STOCKTON: He did not.

JA Vol. 35 at 6694. Respondents, on appeal, attempt to argue that the requirement to develop a 3M Plan in the future is an "express condition," but the previous admission shows that this argument is not made in good faith. Moreover, even if one were to read the development of a 3M Plan as a permit condition, it does not itself impose any conditions other than the broad, vague plan to create a plan.

(Cont.)
pre-code rights for percolating water may be as late as March 24, 1939. NRS § 534.100(1).

2. The State Engineer failed to determine "reasonable lowering."

Further, the State Engineer failed to determine what is a "reasonable lowering" of the static water level. KVR presented the State Engineer with evidence regarding predicted drawdown from mine pumping at the administrative hearing. *See, e.g.*, JA Vol. 9 at 1552b (KVR's model predicts that certain springs will cease flowing due to drawdowns of 40-50 feet). The State Engineer granted Applications, allowing the static groundwater level to be lowered, without determining whether the predicted drawdown is *reasonable*. KVR argues that NRS § 534.110(4) only requires the State Engineer to make reasonableness findings after conflict occurs. KVR's interpretation is contrary to the statutory scheme.

First, subsection (3) of NRS § 534.110 requires the State Engineer to determine there is unappropriated water before granting a groundwater use application. Subsection (4) next requires the State Engineer to determine the proposed appropriation will not cause the static water level to be unreasonably lowered at appropriators' points of diversion. When the subsections are read together, it is clear they are part of the permitting scheme, rather than tools to address conflicts after permits are issued. The State Engineer would not grant an application before determining water is available. Similarly, the State Engineer should not grant a permit before determining the predicted resulting drawdown is

reasonable.

Second, NRS § 533.370(2) prohibits the State Engineer from granting applications that will conflict with existing rights. If the applicant predicts the proposed use will lower the static water level to an unreasonable extent, a conflict exists. The legislature enacted this statute to require the State Engineer to make determinations that prevent conflicts before they occur. This is particularly important in a groundwater context where regulation between groundwater users after the fact is practically impossible because the priority system requires chasing to the bottom of an aquifer of unknown depths before regulation by the State Engineer will occur.

C. The State Engineer erred by approving a larger place of use than that intended for "mining, milling, and dewatering."[7]

Applications request water for "mining, milling, and dewatering." JA Vols. 31-33 at 5778-6397. Permits only allow water use for the purposes of "mining, milling, and dewatering." JA Vol. 28 at 5257-5420. The mining plan of operations

[7] KVR incorrectly argues that Appellants waived this argument because not raised below. KVR Ans. Br. at 48. KVR raised the issue before the district court, arguing that the place of use was proper because KVR planned to use water outside the mining operations area for dust control and environmental mitigation. JA Vol. 34 at 6480. The district court recited KVR's reasoning in its decision. JA Vol. 36 at 6847-6848. KVR therefore invited the district court's legal error, and this Court may review errors of law *de novo*. *Town of Eureka v. Office of State Engineer*, 108 Nev. 163, 165, 826 P.2d 948 (1992).

identifies the area for mining water use as a 14,000 acre area. JA Vol. 2 at 309. However, Applications and Permits identify a 96,000 acre area place of use.

The State Engineer erred in approving Applications and issuing Permits with a place of use 76,000 acres larger than the identified place of use for mining, milling and dewatering purposes. App. Op. Br. at 16-18. Respondents argue that Permits for "mining, milling, and dewatering" are not actually limited to those purposes and should include other uses of water, such as restrooms, dust control, environmental mitigation, exploration drilling, and more. SE Ans. Br. at 31-32; KVR Ans. Br. at 46-49.

Nevada law does not support Respondents' arguments. NRS § 533.325 requires an applicant to state the proposed use of water in the application. This Court, in explaining the types of water uses allowed in Nevada, held that water use permits "refer to rights granted after the State Engineer approves a party's 'application for water rights.' Such permits grant the right to develop specific amounts of water ***for a designated purpose***." *Andersen Family Assocs. v. Hugh Ricci, P.E.*, 124 Nev. 182, 188-189, 179 P.3d 1201, 1204-1205 (2008) (emphasis added; internal citation omitted). Nevada law does not allow permit-holders to use water for purposes *other than* those designated in the permit.

Respondents ask this Court to make ***new law*** that Nevada water rights

include all incidental and associated water uses. Such a ruling would be contrary to Nevada water law, and leads to absurd results. Taken to its logical conclusion, Respondents' argument would allow any and all water uses under the guise of "mining, milling, and dewatering." Respondents opine that domestic use is part of "mining, milling and dewatering" because it is necessary for the mine workers. SE Ans. Br. at 31. Tracing this slippery slope, irrigation to grow crops to feed the workers, stockwatering to raise animals to feed the workers, power generation to run the mining operations, and geothermal use to heat the facilities should all be allowed.

Respondents ask this Court to turn Nevada water law on its head and find that a narrow water use for "mining, milling, and dewatering" should include any and all uses of water under the sun.[8] Since that position is not supported by law, this Court should find that the State Engineer erred by approving Applications and issuing Permits with excessively large, speculative places of use. Any water use in the extra 76,000 acres exceeds the scope of Applications and Permits for uses not applied for, and must not be condoned.

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[8] While exploration drilling and dust control in the actual mining area are conceivably part of "mining, milling, and dewatering," speculative environmental mitigation and other uses outside the mining area are not part of the actual mining.

D. The State Engineer erred by failing to include a condition in the Permits required by State Engineer Ruling No. 6127.

Ruling No. 6127 states:

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

JA Vol. 26 at 5008. Applications 76005-76009, 76802-76805, and 78424 request diversions from Diamond Valley, but the corresponding Permits issued by the State Engineer do not contain the second permit condition required by Ruling No. 6127. JA Vols. 32-33 at 5984-6025, 6077-6116, 6166-6173.

Respondents argue the second required condition is unnecessary for two reasons: 1) Permits are subject to the Ruling; and 2) Water use is limited to Diamond Valley, so water cannot go anywhere but Diamond Valley. SE Ans. Br. at 37; KVR Ans. Br. at 49-50. These arguments are without merit.[9]

First, as admitted by Respondents, the Permits are *subject to the Ruling*, which requires both conditions be included in the Diamond Valley Permits. Respondents cannot pick and choose which portions of Ruling No. 6127 to follow. If the Ruling is to stand, the condition must be added to Diamond Valley Permits.

[9] KVR previously stated that it does not object to inclusion of the second condition in the Diamond Valley Permits. JA Vol. 34 at 6510.

Second, Respondents overlook the fact that Mount Hope straddles at least two hydrographic basins (Diamond and Kobeh Valleys). *See, e.g.*, JA Vol. 8 at 1357-1358. Water that flows into the Mount Hope mine pit from Diamond Valley, and is co-mingled with water from Kobeh Valley, cannot logically be restricted to use in Diamond Valley. Therefore, Ruling No. 6127 expressly requires that water from Diamond Valley be accounted for, used wholly within Diamond Valley, and that unused water be returned to the Diamond Valley aquifer. This condition will require some specific plumbing, metering and monitoring, perhaps at some additional cost. Enforcing this requirement without inclusion in Permits creates uncertainty that the condition was meant to avoid. This Court should find that the State Engineer erred by issuing Permits without the required condition.

E. The State Engineer erred by relying on evidence that was not part of the administrative record, thus violating Appellants' due process rights.

The State Engineer relied on evidence not within the record to support its conclusion that mitigation would cure any conflicts with existing water use rights. Appellants protested Ruling No. 6127 because they were not provided an opportunity to meet and challenge evidence relied upon by the State Engineer.

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1. The district court affirmed Ruling No. 6127 on the mistaken belief that post-hearing procedures would afford Appellants due process.

When the district court determined Ruling No. 6127 did not violate Appellants' procedural due process rights, it did so based on very specific assumptions. Respondents do not deny that the district court only upheld Ruling No. 6127 because it assumed (incorrectly in hindsight) that Appellants would be afforded procedural due process in the preparation of the 3M Plan. The district court stated:

> The State Engineer granted KVR's applications upon evidence before him that unappropriated water was available in Kobeh Valley and that the water could be appropriated and used by KVR in a mining project without conflict to existing rights because existing rights could be made whole through mitigation. The key to protecting existing rights will be the 3M Plan which will first serve to identify impacts and the extent of those impacts, and second, to develop and implement mitigation efforts to ensure impacted existing rights are made whole. As inferred from the record, test pumping and analysis of pumping data, as it relates to impacts to existing rights, obviously takes time to complete. That data will form the basis of a 3M Plan ultimately submitted to the State Engineer for approval. The specifics of a 3M Plan not known at the time of the hearings will be made known after the data is collected and analyzed with input from Eureka County. The Plan will be submitted to the State Engineer in all transparency and the State Engineer must approve the 3M Plan before production pumping is allowed. In the Court's view, ***that developmental sequence does not violate the due process rights of Eureka County or other Petitioners*** and the Court so finds.

JA Vol. 36 at 6905.

In reality, no additional tests or analysis were completed prior to submitting the 3M Plan, and Appellants were not provided any opportunity to participate in

preparation of the Plan. In fact, the 3M Plan was approved by the State Engineer before the district court issued the above decision that set out a course that might have avoided the due process violation.

The 3M Plan does not identify impacts or implement mitigation efforts. The 3M Plan merely creates a plan to create a plan based on future monitoring activities. App. Op. Br. Attachment 1. The State Engineer's approval of the 3M Plan does not satisfy the district court's holding, and Respondents do not argue otherwise in their Answering Briefs.

2. Appellants' ability to appeal the State Engineer's approval of the 3M Plan does not cure the due process violation.

Respondents argue that procedural due process is satisfied because Appellants can appeal the State Engineer's approval of the 3M Plan. SE Ans. Br. at 33; KVR Ans. Br. at 40. The district court relied on the United States Supreme Court case *Mathews v. Eldridge* for the proposition that "due process is flexible and calls for such procedural protections as the particular situation demands." JA Vol. 36 at 6903-6904 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). In weighing the procedural protections called for in this particular case, the district court determined that procedural due process required participation in the creation of the 3M Plan to identify impacts, implement appropriate mitigation measures,

and ensure impacted existing rights are made whole. The district court determined that such a process would take time to complete, and thus it was proper to extend that process beyond the administrative hearings. That participation and continued coordination was the central focus for the district court's determination that procedural due process would be satisfied. Respondents' argument is contrary to the district court's opinion; the district court did not find that due process could be satisfied in this case by the ability to make further, costly appeals.

Moreover, appeal against the State Engineer's approval of the 3M Plan cannot cure the procedural due process violation in issuing Ruling No. 6127. The two appeals have separate and unique remedies. The appeal as to Ruling No. 6127 can result in vacating the Ruling, among other remedies. However, appeal of the 3M Plan can only result in vacating the Plan. As the district court provided in its Order that KVR and the State Engineer impatiently ignored, due process requires meaningful notice and participation not afforded in the chain of events that occurred here.

3. Appellants assert a violation of procedural due process, not a property taking.

The State Engineer argues due process does not apply to the administrative hearing preceding Ruling No. 6127 because Appellants were not deprived of a

property interest. Although the State Engineer is incorrect that no property interest is at stake–Appellants' water use under its vested rights will be taken by KVR's pumping, and KVR's own witnesses stated that certain springs will cease to flow once pumping begins (*See, e.g.*, JA Vol. 3 at 531)–the issue here is ***procedural*** due process during an administrative hearing. This is an appeal, not a suit alleging a property taking without due process. The State Engineer's arguments related to takings cases are irrelevant to the current issues presented for review.

The district court vacated and remanded the State Engineer's first Ruling in this matter (Ruling No. 5966) on procedural due process grounds because the State Engineer relied on evidence submitted by KVR that protestant Eureka County was not given adequate time to review or challenge at administrative hearing. ASJA Vol. 1 at 15. When the State Engineer exercises adjudicatory functions, the "basic notions of fairness and due process" apply. *Revert*, 95 Nev. at 787. Due process "forbids an agency to use evidence in a way that forecloses an opportunity to offer contrary presentation." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 (1974). All evidence used to support a decision must be disclosed to the parties to allow the parties to meet and challenge the evidence. *Id.* A decision should only be based on evidence in the record. ASJA Vol. 1 at 11.

Here, the State Engineer relied on KVR's assertion that a 3M Plan would

cure all conflicts with existing rights, including Appellants' water use rights. JA Vol. 26 at 5006. However, the 3M Plan was never part of the record. Appellants had no opportunity to review or challenge the sufficiency of the Plan. KVR reported it was working on the 3M Plan since before Ruling No. 6127 was issued by the State Engineer. *See* KVR Ans. Br. at 5, filed with the district court in Case No. CV1207-178, December 20, 2012 ("KVR had begun working with Eureka County to prepare a joint 3M plan before the Ruling was issued."). However, the only evidence at administrative hearing were vague, "speculative" conclusions that mitigation would be effective. The State Engineer relied on KVR's conclusions, without any evidence that the 3M Plan would cure all conflicts.

Appellants were denied the opportunity to review KVR's process or conclusions, and in the absence of any evidence about the actual mitigation KVR planned to impose, Appellants were denied the opportunity to challenge the conclusions. The State Engineer's process foreclosed Appellants' opportunity to offer any contrary presentation, thus violating Appellants' due process rights.

4. The State Engineer's ability to forego a hearing does not allow the State Engineer to forego due process.

KVR incorrectly argues that because the State Engineer is not required to hold a hearing at all, the State Engineer does not need to provide procedural due

process in any hearing it may decide to hold. KVR Ans. Br. at 39. This argument is easily extinguished because, when the State Engineer holds a hearing, due process considerations apply. *Revert*, 95 Nev. at 787. As explained above, all evidence used to support a decision must be disclosed to the parties so they have an opportunity to challenge that evidence. It was error for the State Engineer to rely on the 3M Plan and find the Plan would cure all conflicts because the Plan was not part of the record at the administrative hearing.

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IV.

CONCLUSION

For the reasons stated above, this Court should reverse the District Court's denial of the Petitions for Judicial Review, and should remand the case to the District Court for entry of judgment reversing State Engineer Ruling No. 6127.

DATED this 5th day of April, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby 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 using Microsoft Word in 14 point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,543 words.

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Finally, I hereby certify that I have read this appellate 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(e)(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 sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of April, 2013.

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PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 5th day of April, 2013, I caused a copy of the foregoing ***APPELLANTS KENNETH F. BENSON'S, DIAMOND CATTLE COMPANY LLC'S, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP'S REPLY BRIEF*** to be served on the following parties as outlined below:

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