**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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No. 61324

District Court Case Nos.
CV 1108-155; CV 1108-156;
CV 1108-157; CV 1112-164;
CV 1112-165; CV 1202-170



# APPELLANT EUREKA COUNTY'S RESPONSE TO *AMICI CURIAE* BRIEFS

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**APPELLANT EUREKA COUNTY'S RESPONSE TO *AMICI CURIAE* BRIEFS**

Appellant, EUREKA COUNTY, by and through its counsel, ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY, files its Response to the *Amici Curiae* Brief of the Truckee Meadows Water Authority, the Southern Nevada Water Authority, the Cities of Fernley, Minden, Carson City, Henderson,

North Las Vegas, and Las Vegas, the Gardnerville Ranchos General Improvement District, and the Nevada Mining Association (collectively the "Municipal Water Purveyors"), and the Brief of *Amicus Curiae* NV Energy. *Amici Curiae* ignore the specific facts of this case highlighting quantified known impacts to existing senior water rights. The "quantified known impacts" in this case are those impacts identified by KVR's own experts, disputed by no one, acknowledged by the STATE ENGINEER, and quantified by the best available science. See JA Vol. 2 at 338-339, 363, 371-374; JA Vol. 3 at 436-438, 525, 531, 544-545; JA Vol. 9 at 1687a-1687d; JA Vol. 26 at 5003-5006, 5011.

## I.

## RESPONSE TO *AMICI CURIAE* BRIEF OF THE MUNICIPAL WATER PURVEYORS

In their *Amici Curiae* Brief, the Municipal Water Purveyors claim they are responsible for serving water to approximately 90% of Nevada's population, and allege they have a "significant interest in ensuring that Nevada courts maintain the State Engineer's full statutory authority to grant and administer water rights in the state." See *Amici Curiae* Brief at page 1 (emphasis added). In this appeal, none of the Appellants, including EUREKA COUNTY, is seeking to divest the STATE ENGINEER of his statutory authority. Instead, the Appellants are asking this Court to direct the STATE ENGINEER to comply with his statutory authority and

the mandates of NRS 533.370(2) to reject the Applications of Respondent, KOBEH VALLEY RANCH ("KVR"), which conflict with existing rights as shown by the undisputed expert testimony of KVR's own witnesses. See JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545 (KVR's experts testified that existing water rights, i.e., springs and stockwatering wells, will dry up and cease to flow as a result of KVR's proposed pumping).

The Municipal Water Purveyors' *Amici Curiae* Brief ignores the evidence specific to this case of quantified known impacts to existing senior water rights from KVR's proposed pumping. This case does not involve "theoretical impacts" to existing rights, as asserted by the Municipal Water Purveyors, but the drying up of existing water rights. These senior rights will cease to flow. On these facts the STATE ENGINEER does not have statutory or any other recognized authority to grant KVR's Applications. In addition, the STATE ENGINEER has no authority to rely upon an undefined, future mitigation plan that was never part of the administrative record for him to claim senior water rights holders will be made whole because this undefined plan will purportedly eliminate all the statutorily prohibited conflicts.

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## A. The Municipal Water Purveyors Misstate the Issues on Appeal and EUREKA COUNTY's Arguments Concerning the Authority of the STATE ENGINEER.

The issues on appeal ask: (1) whether the STATE ENGINEER has authority to grant KVR's Applications where the proposed use or change conflicts with existing rights on the reliance of a future, undefined plan that is not part of the record; (2) whether Nevada water law and the prior appropriation doctrine preclude the STATE ENGINEER from granting groundwater applications later in time when these junior appropriations would impact prior senior surface water and groundwater rights and these prior senior rights would dry up and cease to flow; and (3) whether the STATE ENGINEER applied the correct standard when he granted KVR's Applications and claimed that an interbasin transfer of 11,300 acre feet annually ("afa") of water from Kobeh Valley to Diamond Valley was environmentally sound pursuant to NRS 533.370(3)(c). See EUREKA COUNTY's Opening Brief at page 3.

The arguments of the Municipal Water Purveyors do not reach these issues or reflect the facts of this case, or the evidence presented to the STATE ENGINEER, and should therefore be rejected by this Court. See Powers v. United Services Auto Association, 115 Nev. 38, 45, 978 P.2d 1286, 1290 (1999) (upon review of the "parade of horribles" alleged in the briefs of the respondent and

*amici curiae* involving fraud investigations, this Court explained that "[i]n a different case, with different facts, a different result might have been reached. Sweeping conclusions about new causes of action and a chilling effect . . . are simply not warranted by the somewhat unique facts of this case.").

### 1. EUREKA COUNTY is Not Taking a "No Impacts" or "No Water Development" Position.

In their *Amici Curiae* Brief, the Municipal Water Purveyors assert that EUREKA COUNTY is taking a "no impacts" position, better defined as a position that no additional water should be developed in Nevada. See *Amici Curiae* Brief at pages 2-4. This is simply not true, and is inconsistent with Nevada water law. EUREKA COUNTY is taking a position consistent with Nevada water law that prohibits granting applications which will create conflict. A junior appropriator's proposed use or change that dries up existing rights is a conflict under NRS 533.370(2)—plain and simple. EUREKA COUNTY's position is consistent with the plain language of NRS 533.370(2), Nevada and federal case law, and the prior appropriation doctrine. The assertion of the Municipal Water Purveyors is a feeble attempt to mislead this Court about EUREKA COUNTY's position.

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## 2. EUREKA COUNTY is Not Against Groundwater Development in Nevada.

Despite the Municipal Water Purveyors' assertion to the contrary, EUREKA COUNTY is not against groundwater development in Nevada. EUREKA COUNTY supports the responsible development of water. Responsible development of water does not include drying up existing senior water rights. Further, any argument that EUREKA COUNTY's position in this case precludes groundwater development in Nevada ignores the difficulties KVR has had in locating water to develop in Kobeh Valley. See EUREKA COUNTY's Reply Brief to Respondents' Answering Briefs at pages 4-7.

The "parade of horribles" arguments of the Municipal Water Purveyors regarding the "fallout" from EUREKA COUNTY's allegedly "new rule" are not persuasive because the facts and circumstances of each application to appropriate groundwater, and each change application to change the manner or place of use or point of diversion, should properly be considered on an individual, case by case basis. The STATE ENGINEER should consider and take into account the hydrology and geology of the particular hydrographic groundwater basin, the location and nature of existing rights, the location of each point of diversion, and the nature of and manner of use of each application to appropriate water, and each change application. If under the facts and circumstances of previous applications

made by the Municipal Water Purveyors, the STATE ENGINEER considered the relevant facts and circumstances relating to each application, and on that basis ordered staged development of pumping, further study, or a management, monitoring and mitigation plan to gather more information regarding a particular basin's hydrology and unforeseen impacts from an applicant's proposed pumping, that action by the STATE ENGINEER may have been appropriate in those particular circumstances. However, EUREKA COUNTY's issues in this appeal deal with the facts and circumstances of this case (i.e., KVR's proposed pumping of 11,300 afa from the Kobeh Valley Hydrographic Basin). The unique facts and circumstances of this case are not intended to prejudge the STATE ENGINEER's decision making authority to consider the individual facts and circumstances surrounding the 292 municipal water applications pending before the STATE ENGINEER, or the 69 applications pending in groundwater basins with unappropriated water, or the over 675 pending change applications, of which 197 are for municipal purposes, pending before the STATE ENGINEER. See *Amici Curiae* Brief at pages 4-5 and Appendices A and B.

In this appeal, EUREKA COUNTY is asking this Court to apply the plain language of NRS 533.370(2) to the facts of this case. This is not EUREKA COUNTY's (or any other litigant's) "new rule" and there is no indication this

Court has ever construed NRS 533.370(2) in the manner desired by the Municipal Water Purveyors. If this Court agrees with EUREKA COUNTY's position and reverses the District Court's judgment and vacates Ruling 6127, KVR can still proceed with its project as indicated by EUREKA COUNTY in its Reply Brief at page 4.

### 3. The Facts of this Case Involve Quantified Known Impacts to Existing Rights; These Rights Will Dry Up and Cease to Flow as a Direct Result of KVR's Proposed Pumping.

In its *Amici Curiae* Brief, the Municipal Water Purveyors assert that "theoretical impacts" should not stop the development of groundwater in Nevada. See *Amici Curiae* Brief at page 4. While such assertion may be true, the facts of this case do not involve "theoretical impacts" to existing senior water rights. Rather, the undisputed facts of this case illustrate quantified known impacts to existing rights; in plain language these rights will dry up or cease to flow as a direct result of KVR's proposed pumping. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545. EUREKA COUNTY recognizes the Respondents and the Municipal Water Purveyors would like this Court to treat this appeal as a basis for a procedural rubberstamp of the power of the STATE ENGINEER, but the facts and circumstances of this case do not warrant such a broad and sweeping ruling.

The Municipal Water Purveyors argue that the term "impact" has a distinctly different meaning than "conflict" and that Nevada statutes clearly authorize new groundwater appropriations to reasonably impact existing groundwater rights. See *Amici Curiae* Brief at pages 6-8. The conflict in this case is that the water KVR proposes to appropriate is the water that senior existing rights have already appropriated. KVR's proposed groundwater pumping in wells located in close proximity to existing rights will reduce the water level in the basin such that existing springs and stockwatering wells will dry up and cease to flow. Even under the Municipal Water Purveyors' definition of "conflict," this is a conflict because KVR's proposed pumping is "competitive or opposing action of incompatibles."

The STATE ENGINEER is given some authority under the groundwater statutes to determine a reasonable lowering of the static water level and may grant a later appropriation which causes the water level to be lowered at the point of diversion of a prior appropriator, so long as the protectable interests in existing domestic wells and the rights of holders of existing appropriations can be satisfied under such express conditions. See NRS 534.110(4) and (5). In this case, the STATE ENGINEER's attorney acknowledged, upon questioning by the District Court, that Ruling 6127 did not expressly state how existing appropriations and existing domestic wells would be satisfied by some lowering of the water table and

the impacts to their rights. JA Vol. 35 at 6694. Drying up a water source is not a reasonable lowering of the water level at the point of diversion of the prior senior appropriator.

In addition, NRS Chapter 534 by its title and terms applies to groundwater and wells and for the administration thereof, and does not apply to surface water. See NRS 534.020(1) and (2). The word mitigation is mentioned in NRS 534.110(5) and NRS 533.024(1)(b) in relation to adverse effects to domestic wells because the Municipal Water Purveyors have gone to the Legislature and amended certain statutes when it was necessary to provide the STATE ENGINEER with authority to consider mitigation when municipal pumping adversely impacted domestic wells. See NRS 533.024(1)(b) and NRS 534.110(5). Under the facts and circumstances of this case, the Municipal Water Purveyors' interpretation of NRS 533.370(2) is not persuasive and should be rejected by the Court.

**B. Based on the Facts of this Case, There is Not Substantial Evidence in the Record to Support the STATE ENGINEER's Finding That Mitigation Will Be Successful.**

The Municipal Water Purveyors acknowledge in their *Amici Curiae* Brief the STATE ENGINEER must make a finding supported by substantial evidence that mitigation will be successful. See *Amici Curiae* Brief at pages 8-9. However, only speculative evidence regarding what potential mitigation might entail was

presented to the STATE ENGINEER. JA Vol. 2 at 267-268, 305-306, 315; JA Vol. 5 at 902; JA Vol. 7 at 1240. The STATE ENGINEER acted in an arbitrary and capricious manner when he relied on such speculative evidence to conclude that mitigation could be "adequately and fully" accomplished even before he had a plan presented to him. JA Vol. 26 at 5006. See State Employment Security Dept. v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (defining substantial evidence as that which a "reasonable mind might accept as adequate to support a conclusion").

No one disputes KVR did not present evidence of a mitigation plan as part of the administrative record before the STATE ENGINEER. JA Vol. 2 at 267-268, 305-306, 315; JA Vol. 5 at 902; JA Vol. 7 at 1240. Instead of providing details about a possible mitigation plan, KVR offered subjective beliefs at the hearing, speculating about what mitigation might entail, for example, augmenting a well, piping in water from the mining distribution system, or trucking in some water. JA Vol. 2 at 382; JA Vol. at 489-490. None of this subjective and speculative testimony presented to the STATE ENGINEER provided any further detail regarding the potential terms of a mitigation plan, or that a chosen form of mitigation could or would be effective. See Bacher v. State Engineer, 122 Nev. 1110, 1122 n.37, 146 P.3d 793, 801 n.37 (2006) (speculative

evidence of a development project is not sufficient to survive a substantial evidence inquiry on review). See also Newsweek v. District of Columbia Comm'n on Human Rights, 376 A.2d 777, 784-785 (D.C. 1977) (conclusory findings based on testimony of subjective belief do not constitute substantial evidence). Further, the conclusory finding the STATE ENGINEER made, that is, that impacts could be mitigated, was not based upon any evidence, nor did the STATE ENGINEER explain his reasoning so a reviewing court could determine upon what basis the ultimate fact or conclusion was reached. See Wyoming Dep't of Transportation v. Legarda, 77 P.3d 708, 713 (Wyo. 2003) (conclusory findings will not be upheld if the reviewing court is unable to determine upon which basis the conclusory findings were made).

The Municipal Water Purveyors claim "[s]uccessful 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 time period." See *Amici Curiae* Brief at page 8. Successful mitigation is neither defined nor explained in Ruling 6127, and no definition or explanation is available in any Nevada statute, rule, or regulation. Any attempt by the Municipal Water Purveyors to define or explain successful mitigation at this point in this appeal is post hoc rationalization of the STATE ENGINEER's prior error of omission. See Revert

v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979) (a post review brief, not part of the record before the STATE ENGINEER, cannot supply a previously omitted finding of fact required by law).

Furthermore, there is no mention of mitigation in NRS 533.370(2). There is also no mention in NRS 533.370(2) of authority for the STATE ENGINEER to find there is no conflict with existing senior rights when a junior appropriator merely promises to "fully mitigate" any impacts to those senior rights. The unprecedented findings of the STATE ENGINEER in Ruling 6127 mandating that senior water rights holders are forced to rely on a future, undefined mitigation plan to receive and protect their existing water rights is contrary to Nevada water law, federal and state case law, and the prior appropriation doctrine. There is no statute, rule or regulation granting the STATE ENGINEER authority to ignore, modify, or condition the plain language of NRS 533.370(2).

### C. The Statutes and Case Law from Other Jurisdictions Cited by the Municipal Water Purveyors Do Not Support Mitigation Based on the Facts of this Appeal.

The Municipal Water Purveyors assert the principles of the prior appropriation doctrine allow for mitigation to resolve conflicts between junior and senior water rights holders. See *Amici Curiae* Brief at pages 10-11. The Municipal Water Purveyors also argue that statutes and case law from other

jurisdictions support this contention that conflicts can be avoided through mitigation. The Municipal Water Purveyors' claims are baseless. The Nevada Legislature has already declared its policy on this issue in NRS 533.370(2), and the Municipal Water Purveyors misconstrue the law of other jurisdictions.

### 1. Statutes From Other Jurisdictions are Inapplicable to the Specific Facts of this Appeal.

The Municipal Water Purveyors cite to N.M. Stat. § 72-12-3(E) (West 2012) and claim the New Mexico State Engineer must grant an application if "the proposed appropriation would not impair existing water rights from the source." See *Amici Curiae* Brief at page 11. A full reading of that statute, however, makes clear the New Mexico State Engineer only has limited authority to grant applications "if no objections have been filed."[1] KVR's Applications were

[1] In its entirety, N.M. Stat. § 72-12-3(E) (West 2012) states as follows:

> E. After the expiration of the time for filing objections, if no objections have been filed, the state engineer shall, if he finds that there are in the underground stream, channel, artesian basin, reservoir or lake unappropriated waters or that the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state, grant the application and issue a permit to the applicant to appropriate all or a part of the waters applied for, subject to the rights of all prior appropriators from the source.

objected to by the Respondents. For that reason, the Municipal Water Purveyors' reliance in this case upon New Mexico's statutory framework is misplaced.

The Municipal Water Purveyors also cite to Utah Code Ann. § 73-3-3 (West 2012) to claim "a new appropriation or change 'may not be made if it impairs a vested water right without just compensation.'" See *Amici Curiae* Brief at page 12 (quoting Utah Code Ann. § 73-3-3(2)(b) (West 2012)). The foregoing is an inaccurate statement by the Municipal Water Purveyors; Utah Code Ann. § 73-3-3 (West 2012) only applies to change applications and not to new applications to appropriate water. In Utah, new applications to appropriate water are governed by Utah Code Ann. § 73-3-8 (West 2012). In particular, Utah Code Ann. § 73-3-8(1)(a)(ii) (West 2012) provides that "[i]t shall be the duty of the state engineer to approve an application if . . . the proposed use will not impair existing rights or interfere with the more beneficial use of the water." Utah Code Ann. § 73-3-8(1)(a)(ii) (West 2012) (emphasis added). Nevada's nonimpairment statute is inconsistent with Utah's change application statute, Utah Code Ann. § 73-3-3 (West 2012), because the STATE ENGINEER in Nevada is prohibited by law from impairing vested water rights or their use. See NRS 533.085(1); see also

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(Emphasis added.)

Anderson Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (2008) (prestatutory vested rights may be subject to state regulation, but such regulation may not impair the quantity or value of the vested rights).

Finally, the Municipal Water Purveyors cite to Colo. Rev. Stat. Ann. § 37-92-305(3)(a) (West 2012) and claim that an applicant must be afforded the opportunity to propose a plan that would prevent an injurious effect on existing water rights. As set forth by EUREKA COUNTY in its Opening Brief, Colorado has adopted a process by which it authorizes a plan for augmentation to be filed by water appropriators.[2] See Colo. Rev. Stat. Ann. §37-92-302 (West 2012). The intent of the Colorado Legislature in authorizing plans for augmentation was to allow new users of water so long as the vested rights of others are protected. See Upper Eagle Regional Water Authority v. Wolfe, 230 P.3d 1203, 1210-11

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[2] In Colorado, a "plan for augmentation" is:

> [A] detailed program . . . to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means . . . .

Colo. Rev. Stat. Ann. § 37-92-103(a) (West 2012).

(Colo. 2010) ("An augmentation decree holder must replace water to the stream in the amount, time, and location necessary to provide vested water rights and decreed conditional water rights the water that would have been available absent the out-of-priority diversion and resulting depletion.").

Other jurisdictions may have rules and regulations providing for mitigation and setting forth the requirements of a mitigation plan, but Nevada has no laws, rules or regulations the STATE ENGINEER may rely upon for mitigation in response to quantified known impacts to existing rights. Neither the STATE ENGINEER nor KVR has any guidance regarding what must be included in an effective mitigation plan, or ensuring that, or detailing how, impaired senior rights are satisfied by mitigation. If the Municipal Water Purveyors are advocating for mitigation in response to quantified known impacts to existing rights, they should go to the Nevada Legislature and request the necessary statutory framework to address this type of mitigation. As Nevada law currently exists, and existed at the time of Ruling 6127, applications where the proposed use or change conflicts with existing rights must be rejected. See NRS 533.370(2).

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## 2. The Case Law From Other Jurisdictions Cited by the Municipal Water Purveyors Support EUREKA COUNTY's Argument that Applications Proposing Conflicts With Existing Rights Must be Denied.

In their *Amici Curiae* Brief, the Municipal Water Purveyors attempt to distinguish the case law from New Mexico, Utah and Washington cited by EUREKA COUNTY in its Opening Brief by summarily asserting "[c]ase law and statutes in those states have explored how conflicts with existing rights can be avoided through the mitigation of impacts." See *Amici Curiae* Brief at page 11. This assertion is inaccurate because these cases do not speak about mitigation.

In its Opening Brief, EUREKA COUNTY cited to case law from other states with statutes similar to Nevada's that have strictly construed the statutory mandate that applications proposing conflicts with existing rights must be denied.[3] See EUREKA COUNTY's Opening Brief at pages 37-39. None of these cases cited by EUREKA COUNTY in its Opening Brief mention mitigation, let alone discuss the

[3] See Heine v. Reynolds, 367 P.2d 708, 710 (N.M. 1962) ("[t]he state engineer had a positive duty to determine if e[x]isting rights would be impaired; and having found that they would be, there is no necessity under the statute to further determine the degree or amount of impairment. The burden is on the applicant to show no impairment of existing rights."); Piute Reservoir & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962) (holding that change applications must be denied where evidence showed that existing water users would be denied some quantity of water); Postema v. Pollution Control Hearings Bd., 11 P.3d 726, 741 (Wash. 2000) ("The statutes do not authorize a de minimis impairment of an existing right. RCW 90.03.290 plainly permits no

possibility of how conflicts with existing rights can be avoided through the mitigation of impacts as asserted by the Municipal Water Purveyors. Furthermore, the Municipal Water Purveyors' attempt to argue that "the availability of mitigation measures is an inherent part of the impairment analysis" belies the holdings in these cases and the facts of this appeal. See *Amici Curiae* Brief at page 12.

For example, the Municipal Water Purveyors cite to City of Albuquerque v. Reynolds, 379 P.2d 73, 81 (N.M. 1962), to support the proposition that a power to impose conditions is inherent in the power to deny applications. In City of Albuquerque v. Reynolds, however, the New Mexico Supreme Court did not discuss mitigation measures to purportedly avoid conflicts with existing rights. City of Albuquerque v. Reynolds, 379 P.2d at 80. Rather, the Reynolds Court upheld the New Mexico State Engineer's decision to deny the City's application to drill wells in the underground basin unless the City retired its existing surface water rights, in order to offset the effect of new groundwater pumping on the flows of the Rio Grande River. Id. In reaching this conclusion, the Court determined the State Engineer had authority to promulgate rules requiring surface water right retirements as a condition to new appropriations of underground water from the

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impairment of an existing right.").

Rio Grande River. Id. "[The requirement] that surface rights be retired to the extent necessary to protect prior stream appropriators as a condition of the granting of an application to appropriate from the basin, is within the lawful power and authority of the state engineer." Id. at 81.

The conditions imposed by the New Mexico State Engineer and affirmed by the Court in City of Albuquerque v. Reynolds protect the existing water rights holders because no new appropriations of groundwater would be approved by the State Engineer unless existing surface water rights were first retired. In Ruling 6127, the conditions imposed on KVR by the STATE ENGINEER and approved by the District Court do not protect the existing water rights holders; they are not even defined. See JA Vol. 35 at 6694. Nowhere in Ruling 6127 does the STATE ENGINEER describe what mitigation is, what is considered to be effective mitigation, or how the full extent of a senior water rights holder's beneficial use is satisfied to purportedly avoid the conflict prohibited by NRS 533.370(2).

Similarly, in City of Roswell v. Berry, 452 P.2d 179,181-82 (N.M. 1969), the New Mexico Supreme Court affirmed the State Engineer's approval of a change application where the applicant entered into a stipulation to permanently retire and abandon 1,500 acre-feet of valid water rights. In determining whether to approve or deny the change application, the Court noted the State Engineer had a

"positive duty to determine whether existing rights would be impaired." City of Roswell, 452 P.2d at 181. Since the applicant's purpose in entering into the stipulation, as a condition to approval, was to offset the effects of its proposed pumping on existing rights, the Court affirmed the State Engineer's approval of the change application. Id. at 182. Thus, the conditions imposed by the New Mexico State Engineer were clearly defined for the applicant. Id.

Further, the holdings in Provo Bench Canal and Irrigation Company v. Linke, 296 P.2d 723, 725 (Utah 1956), and Searle v. Milburn Irrigation Company, 133 P.3d 382, 395 (Utah 2006), are inapplicable to the facts of this appeal because these cases do not involve quantified known impacts to existing rights to the extent that the rights would dry up and cease to flow as a direct result of the applicant's proposed pumping. In Searle, the Utah Supreme Court concluded the applicant made a prima facie showing that no impairment of vested rights would result due to its proposed change application. Searle, 133 P.3d at 395. The Court in Searle espoused the applicant's burden as follows:

> [A] change applicant's burden is satisfied if there is sufficient evidence to support a reasonable belief that the changes outlined in the application can be perfected without impairing vested rights. In other words, to gain application approval, a change applicant must convince the decisionmaker that there is reason to believe that the use proposed in the application can be undertaken without impairing vested rights. However, before

> application approval is warranted, it must be clear that the decisionmaker's determination that there is reason to believe is grounded in evidence sufficient to make that belief reasonable.

Id. at 393-94 (emphasis added). Accordingly, a change application is entitled to approval in Utah only if the State Engineer is persuaded there is no reason to believe vested rights will be impaired if the application is approved. Id. at 395. To make such a showing, "an applicant must produce sufficient evidence to support a reasonable belief that no impairment will result from application approval." Id.

In this appeal, the undisputed expert testimony of KVR's own witnesses shows that existing water rights will dry up and cease to flow as a direct result of KVR's proposed pumping. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545. Further, in Ruling 6127, the STATE ENGINEER acknowledged that "certain water rights on springs in Kobeh Valley are likely to be impacted by [KVR's] proposed pumping" and that "[w]ater level drawdown due to simulated mine pumping is thoroughly documented." JA Vol. 26 at 5002, 5005-5006. Nevertheless, the STATE ENGINEER granted KVR's Applications to pump 11,300 afa of water to the detriment of the holders of existing water rights based on a future, undefined mitigation plan that was not part of the administrative record before the STATE ENGINEER made his ruling. JA Vol. 26 at 5026. There is no substantial evidence in the record to support the STATE ENGINEER's conclusion

that mitigation could be "adequately and fully" accomplished. JA Vol. 26 at 5006. See State Employment Security Dept. v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (substantial evidence is that which a "reasonable mind might accept as adequate to support a conclusion").

### D. The Municipal Water Purveyors Offer Nothing to Assist this Court in Determining Whether the STATE ENGINEER Applied the Correct Environmentally Sound Standard Under NRS 533.370(3).

The assertions made by the Municipal Water Purveyors add nothing to whether the STATE ENGINEER applied the correct environmentally sound standard under NRS 533.370(3). In their *Amici Curiae* Brief, the Municipal Water Purveyors summarily assert the STATE ENGINEER's factual findings regarding the supposed environmental soundness of the interbasin transfer of water are supported by substantial evidence. See *Amici Curiae* Brief at page 14. The Municipal Water Purveyors, however, do not provide a cite to the record regarding the alleged substantial evidence relied upon by the STATE ENGINEER to make such findings. The Municipal Water Purveyors do not provide a cite to the record because there was no evidence to support the STATE ENGINEER's findings. JA Vol. 26 at 5010-5012. In Ruling 6127, the STATE ENGINEER only cited to Exhibit No. 116, Appendix B, October 2008, entitled "Spring Inventory Dataset"[4]

[4] As discussed in EUREKA COUNTY's Reply Brief to Respondents'

and to no other evidence to support his finding the proposed interbasin transfer is environmentally sound. JA Vol. 26 at 5011. See Wyoming Dep't of Transportation v. Legarda, 77 P.3d 708, 713 (Wyo. 2003) (conclusory findings will not be upheld if the reviewing court is unable to determine upon which basis the conclusory findings were reached).

In Ruling 6127, the STATE ENGINEER failed to consider and discuss the hydrologic-related natural resources of Kobeh Valley that are dependent on the water resources. JA Vol. 26 at 5010-5012. At the very least, the STATE ENGINEER should have sufficiently considered the hydrologic-related natural resources of Kobeh Valley that are dependent on the water resources before finding "there will be no impairment to the hydrologic related natural resources in the basin of origin." JA Vol. 26 at 5011.

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Answering Briefs at pages 16 through 22, the Spring Inventory Dataset is an 11-page inventory including more than 200 springs with many in Kobeh Valley but dozens located in numerous hydrographic basins other than Kobeh Valley, including Diamond Valley, Antelope Valley, Little Smoky, and Pine Valley. EUREKA COUNTY's Reply Appendix ("RA") at 05-15. This inventory was prepared and submitted by KVR as part of the 2008 hearing before the STATE ENGINEER.

## II.

## RESPONSE TO *AMICUS CURIAE* BRIEF OF NV ENERGY

In its *Amicus Curiae* Brief, NV Energy states its interest in this litigation is the potential impact this Court's decision may have on NV Energy's pending and future applications for water rights, and its planned future development of water resources. See NV Energy *Amicus Curiae* Brief at page 1. NV Energy wrongly asserts EUREKA COUNTY's position in this appeal is "premised on potential impacts on existing rights." See NV Energy *Amicus Curiae* Brief at page 2. Because NV Energy does not understand EUREKA COUNTY's position and the facts of this appeal, NV Energy's *Amicus Curiae* Brief addresses "potential impacts" or "speculative impacts" to existing water rights and argues that the STATE ENGINEER has authority to condition issuance of permits based on the future development of a monitoring, management, and mitigation plan to address any "potential impacts" to existing water rights. This argument, however, ignores the undisputed evidence of quantified known impacts, not potential or speculative impacts, to existing rights present in this case. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545. NV Energy's argument also ignores the mandates of NRS 533.370(2).

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## A. The STATE ENGINEER Does Not Have Authority to Grant KVR's Applications Based on the Facts of This Case.

In its *Amicus Curiae* Brief, NV Energy claims the STATE ENGINEER may issue a water right permit conditioned on the future development and implementation of a monitoring, management, and mitigation plan to identify and address "potential impacts" to existing rights. See NV Energy *Amicus Curiae* Brief at pages 2-6. EUREKA COUNTY does not dispute the STATE ENGINEER's authority to implement such a plan to address potential unknown impacts to existing water rights based upon the statutory authority given to the STATE ENGINEER allowing further study of a basin, requiring further information to guard the public interest properly, and allowing staged pumping or development of water. See NRS 533.368, 533.375 and 533.3705. In fact, at the 2010 hearing before the STATE ENGINEER, EUREKA COUNTY insisted on a monitoring, management and mitigation plan to capture data in Kobeh Valley to monitor and manage groundwater conditions and the potential ***unknown impacts*** resulting from KVR's pumping. JA Vol. 5 at 890; JA Vol. 14 at 2474-2492; JA Vol. 24 at 4681. Further, EUREKA COUNTY submitted a proposed monitoring, management and mitigation plan to the STATE ENGINEER which was designed to provide additional information and data about the hydrology of the basin and to

address potential unknown impacts to senior water rights holders as a result of KVR's pumping. JA Vol. 14 at 2474-2492.

The facts of this appeal, however, involve quantified known impacts to existing rights; KVR's proposed pumping will dry up senior water rights or cause such senior rights to cease to flow. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545. When undisputed evidence of quantified known conflicts with existing rights is present, the STATE ENGINEER has no authority to grant applications based on reliance of a future, undefined plan, a plan that is not part of the administrative record, to purportedly mitigate these conflicts. See NRS 533.370(2).

NV Energy's argument ignores NRS 533.370(2) and leaps to a circular argument: The STATE ENGINEER has authority to condition approval of an application because there is no express prohibition against him doing so, and absent such an express prohibition, there is no need for a specific grant of authority to the STATE ENGINEER to impose permit conditions. See NV Energy *Amicus Curiae* Brief at pages 4-5.[5] This circular argument by NV Energy is supplemented by NV Energy's claim that statutory mandates that require rejection of an

[5] The errors committed by the District Court in its analysis of the STATE ENGINEER's statutory authority were addressed in EUREKA COUNTY's Opening Brief at pages 41-47.

application in certain situations can be overridden by vague promises of future mitigation imposed as a condition of approval. However, an express statutory mandate to reject an application which is intended to protect senior existing rights cannot be ignored simply because an applicant wants to develop water. This is not a rote, mechanical approach to interpreting NRS 533.370 but is the only reasonable interpretation based on the quantified known conflicts to senior existing rights from KVR's pumping shown in this case.

The cases cited by NV Energy do not support its argument.[6] Southern Pacific Co. v. Olympian Dredging Co., 260 U.S. 205, 209 (1922), involved the question of whether a bridge owner was liable for damages when a dredger struck the old bridge's protruding piers notwithstanding that the bridge owner had complied with permit terms and conditions for removal of the old bridge piers. The central question in Southern Pacific was one of liability to third persons rightfully navigating the river. Southern Pacific, 260 U.S. at 211-12. Thus, Southern Pacific is not helpful to the Court for purposes of this appeal.

In its *Amicus Curiae* Brief, NV Energy cites to the criminal case of State v. Crown Zellerbach Corporation, 602 P.2d 1172 (Wash. 1979), to support its

[6] United States v. Alpine Land & Reservoir Co., 919 F. Supp. 1470 (D. Nev. 1996), was discussed in EUREKA COUNTY's Opening and Reply Briefs and will

assertion the STATE ENGINEER has authority to grant KVR's Applications and issue the requested permits based on the condition of imposing a monitoring, management, and mitigation plan. See NV Energy *Amicus Curiae* Brief at pages 5-6. NV Energy's reliance on Crown Zellerbach is misplaced because the facts of Crown Zellerbach are inapposite to the facts of this case.

In Crown Zellerbach, the defendant was charged with a gross misdemeanor for noncompliance with the conditions of a hydraulic project permit issued by the Department of Fisheries and the Department of Game pursuant to a Washington statute. Crown Zellerbach, 602 P.2d at 1173. These Departments had adopted permit conditions after public hearings, but none of the provisions had been formally promulgated as regulations under the Washington Administrative Code. Id. at 1177. In Crown Zellerbach, the Washington Supreme Court held that it is not an unlawful delegation of the Washington Legislature's power to define crimes by authorizing an administrative agency to issue hydraulic permits when the Legislature has declared it unlawful to undertake certain projects without a hydraulic permit, or in violation of the terms of a permit. Id. at 1176-77. The Court, however, specifically limited its ruling to statutory schemes in which the maximum penalty is a gross misdemeanor. Id. at 1177. The Court further found

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not be addressed again in this Response. See EUREKA COUNTY's Opening

procedural safeguards existed when the maximum penalty is a gross misdemeanor because the defendant was entitled to (1) a "second look" through agency channels; (2) judicial review under the clearly erroneous standard; and (3) procedural safeguards that are normally afforded a defendant in a criminal prosecution. Id. at 1176-77.

In this appeal, KVR has not been charged with a criminal offense for failure to follow a permit condition, nor does this case involve liability to third persons navigating a river. Placing the burden on a senior appropriator to file a complaint sometime in the future to protect and enforce his senior water rights against a junior appropriator's conflicting use because the STATE ENGINEER failed to reject the junior application with quantified known conflicts to existing rights is no procedural safeguard and is against the prior appropriation doctrine and the mandates of NRS 533.370(2).

**B. If Mitigation is an Essential Component to the Development of Water Resources in This State, There Should be Statutes, Rules and Regulations to Safeguard Against Arbitrary, Capricious and Unreasonable Action by the STATE ENGINEER.**

NV Energy contends that mitigation is an essential component to the development of water resources in this State. See NV Energy *Amicus Curiae* Brief at page 6. NV Energy asserts that "[s]uccessful mitigation ensures that the holders

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Brief at pages 42-44, 47; EUREKA COUNTY's Reply Brief at pages 43-44.

of existing rights will continue to enjoy the full benefit of their water rights." See NV Energy *Amicus Curiae* Brief at page 7. If this is the policy NV Energy supports, NV Energy should request statutory changes authorizing the STATE ENGINEER to grant applications subject to mitigation, and request the Legislature to pass laws which define mitigation, provide when it may be imposed as a term or condition of an application's approval, when mitigation must be accepted by a senior appropriator, and what constitutes "full" or "adequate" mitigation so that senior existing rights continue to enjoy the full benefit of their water rights. As NRS 533.370(2) currently reads, the STATE ENGINEER "shall reject" any application where the proposed use or change conflicts with existing rights. Thus, the STATE ENGINEER has no authority to grant applications and condition permits based on mitigation to protect existing rights as the law exists today.

If, however, this Court declares the STATE ENGINEER has authority under the facts of this case to grant KVR's Applications and condition permits based on mitigation, the STATE ENGINEER must promulgate rules and regulations defining and providing for mitigation to safeguard against the arbitrary and unreasonable administrative action that occurred in this case. The STATE ENGINEER has the authority to do so as provided by NRS 532.120(1). In Crown Zellerbach, cited by NV Energy in its *Amicus Curiae* Brief, the Washington

Supreme Court suggested that the administrative agency promulgate rules and regulations regarding requirements and conditions which may be imposed as terms of a hydraulic permit because the "promulgation of rules and regulations is a valuable safeguard against arbitrary and unreasonable administrative action." Crown Zellerbach, 602 P.2d at 1177 (citing K. Davis, 1 Administrative Law Treatise § 3:15 (2d ed. 1978)). Then, as part of the administrative record, KVR must present evidence showing what mitigation will be used, that it will be successful, and that senior rights holders will receive the full benefit of their water rights. These procedures must be followed and evidentiary standards met to ensure that the basic notions of fairness and due process defined in Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 262, 264-65 (1979), are afforded all participants in proceedings before the STATE ENGINEER in which mitigation is an issue.

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## III.

## CONCLUSION

Based on the foregoing, this Court should reject the arguments made by the Municipal Water Purveyors and NV Energy in their respective Briefs because both Briefs ignore the evidence in this case of quantified known conflicts to existing senior water rights from KVR's proposed pumping.

DATED this 24th day of April, 2013.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. 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 Office Word 2007 in 14 point Times New Roman type style.

2. 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 is proportionately spaced, has a typeface of 14 points or more, and contains 6,517 words.

3. 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 24th day of April, 2013.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

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