

SCHROEDER LAW OFFICES, P.C.
Laura A. Schroeder, Nevada State Bar #3595
Therese A. Ure, Nevada State Bar #10255
440 Marsh Ave.
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Attorneys for Appellants

Electronically Filed
May 22 2013 09:18 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**IN THE SUPREME COURT
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,

v.

THE STATE OF NEVADA STATE
ENGINEER; THE STATE OF NEVADA
DIVISION OF WATER RESOURCES; and
KOBEL VALLEY RANCH, LLC, a Nevada
limited liability company,

Appellees.

**AFFIDAVIT OF THERESE A.
URE IN SUPPORT OF
APPELLANTS KENNETH F.
BENSON, DIAMOND
CATTLE COMPANY, LLC,
AND MICHEL AND
MARGARET ANN
ETCHEVERRY FAMILY,
LP,'S MOTION TO
CONSOLIDATE**

STATE OF NEVADA)
County of Washoe) ss.

I, Therese A. Ure, being duly sworn, depose and say:

1. I am one of the attorneys for Appellants Michel and Margaret Ann

Etcheverry Family, LP, Diamond Cattle Company, LLC, and Kenneth F.

Benson in the above-referenced matter, and make this affidavit in support of

Appellants' Motion to Consolidate.

2. Appellants seek to consolidate the pending Nevada Supreme Court Cases (Case No. 61324) with a new case that will be pending before the Nevada Supreme Court on appeal from the Findings of Fact, Conclusions of Law, and Judgment, entered on May 17, 2013 in Case No. CV 1207-178, before the Seventh Judicial District Court in and for the County of Eureka. The Notice of Appeal, and related documents, were filed on May 21, 2013 and are attached hereto as Exhibit 1. The Findings of Fact, Conclusions of Law, and Judgment dated May 17, 2013, is attached hereto as Exhibit 2.
3. The two above named cases concern the same questions of fact and law surrounding Nevada State Engineer Ruling No. 6127.
4. Case Nos. 61324 and CV 1207-178 arise from the same facts, namely the State Engineer's issuance of Ruling No. 6127, his findings of fact and conclusions of law made therein, and his approval of the 3M Plan.
5. Case Nos. 61324 and CV 1207-178 ask this court to resolve the same issues of law, including: 1) Whether the State Engineer violated NRS § 533.370(2) by granting applications which admittedly will conflict with existing water use rights, and failing to cure such conflicts in the 3M Plan; and 2) Whether the State Engineer violated NRS § 534.110 by failing to determine the proposed static water level drawdown is reasonable, failing to impose

express conditions in permits, and failing to include express conditions in the 3M Plan to ensure existing rights will be satisfied.

6. The two cases are currently separate because the 3M Plan (the topic of Case No. CV 1207-178) was not yet approved at the time Appellants sought judicial review of Ruling No. 6127 (Case No. 61324). One of the issues in Case No. 61324 is that the 3M Plan should have been approved before the State Engineer approved applications in Ruling No. 6127.
7. I contacted Bryan Stockton, attorney for the State Engineer to provide notice of this motion; however, the State Engineer's position with regard to this motion is unknown.
8. I contacted John Zimmerman, one of the attorneys for Kobeh Valley Ranch, LLC, to provide notice of this motion. Kobeh Valley Ranch LLC opposes this motion.
9. I contacted Karen Peterson, attorney for Eureka County, to provide notice of this motion. Eureka County has no objection to the consolidation of these matters.

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10.The attached motion to consolidate is not made for the purpose of delay.

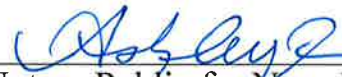
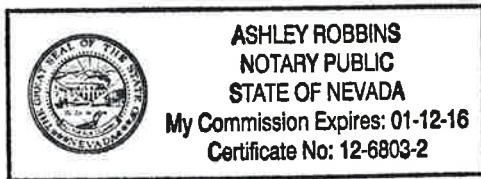
11.Consolidation is requested to avoid unnecessary costs.

DATED this 21st day of May, 2013.



Therese A. Ure

SUBSCRIBED AND SWORN to before me by Therese A. Ure this 21st day of May, 2013.



Notary Public for Nevada
My Commission
expires:

NO. _____
FILED
MAY 21 2013
Eureka County Clerk
By. VO

1 CASE NO: CV 1207-178

2 DEPT. NO: 2

3 SCHROEDER LAW OFFICES, P.C.

Laura A. Schroeder, Nevada State Bar #3595

4 Therese A. Ure, Nevada State Bar #10255

440 Marsh Ave.

5 Reno, Nevada 89509-1515

PHONE: (775) 786-8800; FAX: (877) 600-4971

6 counsel@water-law.com

Attorneys for the Petitioners

7
8 Affirmation: This document does
not contain the social security
9 number of any person.

10 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

11 IN AND FOR THE COUNTY OF EUREKA

12
13 MICHEL AND MARGARET ANN ETCHEVERRY
14 FAMILY, LP, a Nevada Registered Foreign Limited
Partnership, DIAMOND CATTLE COMPANY,
15 LLC, a Nevada Limited Liability Company, and
KENNETH F. BENSON, an individual,

16 Petitioners,

17 v.

18 STATE ENGINEER, OF NEVADA, OFFICE OF
19 THE STATE ENGINEER, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
20 CONSERVATION AND NATURAL RESOURCES,

21 Respondent,

22 KOBEH VALLEY RANCH, LLC, a Nevada limited
liability corporation,

23 Intervenor-Respondent.

**PETITIONERS MICHEL AND
MARGARET ANN ETCHEVERRY
FAMILY, LP, DIAMOND CATTLE
COMPANY, LLC, AND
KENNETH F. BENSON'S NOTICE
OF APPEAL**

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NOTICE OF APPEAL

Notice is hereby given that Petitioners Michel and Margaret Ann Etcheverry Family, LP ("Etcheverry"), Diamond Cattle Company, LLC ("Diamond Cattle"), and Kenneth F. Benson ("Benson") collectively referred to herein as "Petitioners," by and through their attorneys of record, Schroeder Law Offices, P.C., hereby appeal to the Supreme Court of Nevada from the Findings of Fact, Conclusions of Law, and Judgment, entered in this action on the 17th day of May, 2013.

DATED this 20th day of May, 2013.

SCHROEDER LAW OFFICES, P.C.



Laura A. Schroeder, NSB #3595
Therese A. Ure, NSB #10255
440 March Ave., Reno, NV 89509
Phone: (775) 786-8800
Email: counsel@water-law.com
*Attorneys for the Petitioners Michel and
Margaret Ann Etcheverry Family, LP, Diamond
Cattle Company, LLC, and Kenneth F. Benson*



PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 20th day of May, 2013, I caused a copy of the foregoing ***NOTICE OF APPEAL*** to be served on the following parties as outlined below:

VIA US MAIL ONLY

Ross E. de Lipkau, Esq.
John Zimmerman
Parsons, Behle & Latimer
50 West Liberty Street, Suite 750
Reno, NV 89501

Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701

Francis Wikstrom
Parsons, Behle & Latimer
201 South Main Street, Ste. 1800
Salt Lake City, Utah 84111

Dated this 20th day of May, 2013.



THERESE A. URE, NSB# 10255
Schroeder Law Offices, P.C.
440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800; FAX (877) 600-4971
counsel@water-law.com
*Attorneys for Petitioners Etcheverry Family LP,
Diamond Cattle Company LLC, and Kenneth F.
Benson*



NO. _____
FILED
MAY 21 2013
Eureka County Clerk
By: V

1 Case No.: CV1207-178

2 Dept. No.: 2

3 SCHROEDER LAW OFFICES, P.C.

4 Laura A. Schroeder, Nevada State Bar #3595

5 Therese A. Ure, Nevada State Bar #10255

6 440 Marsh Ave.

7 Reno, Nevada 89509-1515

8 PHONE: (775) 786-8800; FAX: (877) 600-4971

9 counsel@water-law.com

10 *Attorneys for the Petitioners-Appellants Kenneth*

11 *F. Benson, Diamond Cattle Company, LLC, and*

12 *Michel and Margaret Ann Etcheverry Family LP*

13 Affirmation: This document does
14 not contain the social security
15 number of any person.

16 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

17 IN AND FOR THE COUNTY OF EUREKA

18 MICHEL AND MARGARET ANN ETCHEVERRY
19 FAMILY, LP, a Nevada Registered Foreign Limited
20 Partnership, DIAMOND CATTLE COMPANY,
21 LLC, a Nevada Limited Liability Company, and
22 KENNETH F. BENSON, an individual,

23 Petitioners,

24 v.

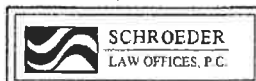
25 STATE ENGINEER, OF NEVADA, OFFICE OF
26 THE STATE ENGINEER, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL RESOURCES,

Respondent,

KOBEH VALLEY RANCH, LLC, a Nevada limited
liability corporation,

Intervenor-Respondent.

PETITIONERS-APPELLANTS
MICHEL AND MARGARET ANN
ETCHEVERRY FAMILY, LP,
DIAMOND CATTLE COMPANY,
LLC, AND KENNETH F.
BENSON'S CASE APPEAL
STATEMENT



1 I. Petitioners-Appellants Kenneth F. Benson ("Benson"), Diamond Cattle Company,
2 LLC ("Diamond Cattle"), and Michel and Margaret Ann Etcheverry Family, LP ("Etcheverry"),
3 collectively referred to herein as "Appellants," by and through their attorneys of record,
4 Schroeder Law Offices, P.C., pursuant to NRAP 3(f), hereby file this Case Appeal Statement.

5 II. This appeal is taken from Honorable J. Charles Thompson's May 15, 2013,
6 issuance of the Findings of Fact, Conclusions of Law, and Judgment. NRAP 3(f)(3)(B).

7 III. Petitioners and their counsel in the proceeding before the District Court included
8 the following parties. NRAP 3(f)(3)(C)-(G).

9 A. Kenneth F. Benson

10 1. Benson is represented in this appeal by Schroeder Law Offices,
11 P.C. Counsel Laura A. Schroeder (NSB #3595) and Therese A.
12 Ure (NSB #10255) are both licensed to practice law in the State of
13 Nevada.

14 2. Schroeder Law Offices, P.C.
15 440 Marsh Ave.
16 Reno, Nevada 89509
17 Phone: 775-786-8800

18 B. Diamond Cattle Company, LLC

19 1. Diamond Cattle is represented in this appeal by Schroeder Law
20 Offices, P.C. Counsel Laura A. Schroeder (NSB #3595) and
21 Therese A. Ure (NSB #10255) are both licensed to practice law in
22 the State of Nevada.

23 2. Schroeder Law Offices, P.C.
24 440 Marsh Ave.
25 Reno, Nevada 89509
26 Phone: 775-786-8800



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C. Michel and Margaret Ann Etcheverry Family, LP

1. Etcheverry is represented in this appeal by Schroeder Law Offices, P.C. Counsel Laura A. Schroeder (NSB #3595) and Therese A. Ure (NSB #10255) are both licensed to practice law in the State of Nevada.
2. Schroeder Law Offices, P.C.
440 Marsh Ave.
Reno, Nevada 89509
Phone: 775-786-8800

IV. The respondent parties and their counsel in the proceeding before the District Court included the following parties. NRAP 3(f)(3)(D),(E).

A. Jason King as Nevada State Engineer, Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources.

1. The State Engineer is represented by the Nevada Attorney General's Office. Counsel Senior Deputy Attorney General Bryan L. Stockton is licensed to practice law in the State of Nevada, NSB #4764.
2. Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701
Phone: 775-684-1228
3. It is unknown if the State Engineer will be represented by Mr. Stockton in this appeal.

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1 B. Kobeh Valley Ranch, LLC

- 2 1. Kobeh Valley Ranch, LLC is represented by Parsons Behle &
3 Latimer. Counsel Ross E. de Lipkau is licensed to practice law in
4 the State of Nevada, NSB #1628.
5 a. Parsons Behle & Latimer
6 50 West Liberty Street, Suite 750
7 Reno, Nevada 89501
8 Phone: 775-323-1601
9 b. It is unknown if Kobeh Valley Ranch, LLC will be represented
10 by Mr. de Lipkau in this appeal.
11 2. Kobeh Valley Ranch, LLC is also represented by Parsons Behle &
12 Latimer. Counsel John R. Zimmerman is licensed to practice law
13 in the State of Nevada, NSB #9729.
14 a. Parsons Behle & Latimer
15 50 West Liberty Street, Suite 750
16 Reno, Nevada 89501
17 Phone: 775-323-1601
18 b. It is unknown if Kobeh Valley Ranch, LLC will be represented
19 by Mr. Zimmerman in this matter.
20 3. Kobeh Valley Ranch, LLC is also represented by Parsons Behle &
21 Latimer. Counsel Francis M. Wikstrom is not licensed to practice
22 law in the State of Nevada. Mr. Wikstrom is licensed to practice
23 law in the State of Utah, USB #3462. A motion was filed on or
24 around August 16, 2012 to allow Mr. Wikstrom permission to
25 appear under SCR 42, however Petitioners were not served with
26 nor have knowledge of an order granting the motion.



1 a. Parsons Behle & Latimer
2 201 South Main Street, Ste. 1800
3 Salt Lake City, Utah 84111
4 Phone: 801-533-0218
5 b. It is unknown if Kobeh Valley Ranch, LLC will be represented
6 by Mr. Wikstrom in this matter.

7 V. The proceedings before the district court commenced as follows (NRAP
8 3(f)(3)(H)): Case No. CV1207-178 Petition for Judicial Review filed July 5, 2012.

9 VI. The description, nature of the action, and result in district court is as follows
10 (NRAP 3(f)(3)(I)): This case relates to the State Engineer's approval of Eureka Moly, LLC's
11 Monitoring, Management and Mitigation Plan ("3M Plan") in association with State Engineer
12 Ruling No. 6127 and issuance of water use permits. The Seventh Judicial District Court denied
13 the petition for judicial review in its Findings of Fact, Conclusions of Law, and Judgment issued
14 May 15, 2013. The Appellants now seek appeal to the Nevada Supreme Court of the District
15 Court's denial.

16 VII. This case has not previously been before the Nevada Supreme Court. NRAP
17 3(f)(3)(J). Related cases are pending before the Nevada Supreme Court under Case No. 61324.

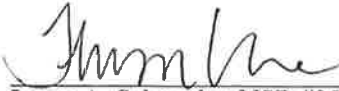
18 VIII. This case does not involve child custody or visitation. NRAP 3(f)(3)(K).

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1 IX. This case does not currently have a possibility of settlement. NRAP 3(f)(3)(L).
2 DATED this 20th day of May, 2013.

3
4 SCHROEDER LAW OFFICES, P.C.

5 

6 Laura A. Schroeder, NSB #3595
7 Therese A. Ure, NSB #10255
8 440 March Ave., Reno, NV 89509
9 Phone: (775) 786-8800
10 Email: counsel@water-law.com
11 *Attorneys for the Petitioners-Appellants*
12 *Kenneth F. Benson, Diamond Cattle Company,*
13 *LLC, and Michel and Margaret Ann Etcheverry*
14 *Family LP*
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VIA US MAIL ONLY

Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701

John W.

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 Schroeder Law Offices, P.C.
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 PHONE (775) 786-8800; FAX (877) 600-4971
counsel@water-law.com
*Attorneys for Petitioners Etcheverry Family LP,
 Diamond Cattle Company LLC, and Kenneth F.
 Benson*

NO. _____
FILED
MAY 21 2013
Eureka County Clerk
By 19

1 CASE NO: CV 1207-178

2 DEPT. NO: 2

3 SCHROEDER LAW OFFICES, P.C.
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5 Therese A. Ure, Nevada State Bar #10255
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7 Reno, Nevada 89509-1515
8 PHONE: (775) 786-8800; FAX: (877) 600-4971
9 counsel@water-law.com
10 *Attorneys for the Petitioners*

11 Affirmation: This document does
12 not contain the social security
13 number of any person.

14 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

15 IN AND FOR THE COUNTY OF EUREKA

16

17 MICHEL AND MARGARET ANN ETCHEVERRY
18 FAMILY, LP, a Nevada Registered Foreign Limited
19 Partnership, DIAMOND CATTLE COMPANY,
20 LLC, a Nevada Limited Liability Company, and
21 KENNETH F. BENSON, an individual,

22 Petitioners,

23 v.

24 STATE ENGINEER, OF NEVADA, OFFICE OF
25 THE STATE ENGINEER, DIVISION OF WATER
26 RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL RESOURCES,

Respondent,

KOBEH VALLEY RANCH, LLC, a Nevada limited
liability corporation,

Intervenor-Respondent.

**PETITIONERS MICHEL AND
MARGARET ANN ETCHEVERRY
FAMILY, LP, DIAMOND CATTLE
COMPANY, LLC, AND
KENNETH F. BENSON'S NOTICE
OF POSTING COST BOND**

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PLEASE TAKE NOTICE that concurrently with the filing of the Notice of Appeal herein, Appellant-Petitioners Michel and Margaret Ann Etcheverry Family, LP (“Etcheverry”), Diamond Cattle Company, LLC (“Diamond Cattle”), and Kenneth F. Benson (“Benson”) are posting Five Hundred Dollars (\$500.00) pursuant to NRAP 7.

SCHROEDER LAW OFFICES, P.C.

From the

Laura A. Schroeder, NSB #3595
Therese A. Ure, NSB #10255
440 March Ave., Reno, NV 89509
Phone: (775) 786-8800
Email: counsel@water-law.com
*Attorneys for the Petitioners Michel and
Margaret Ann Etcheverry Family, LP, Diamond
Cattle Company, LLC, and Kenneth F. Benson*

1 **PROOF OF SERVICE**

2 Pursuant to NRAP 25(d), I hereby certify that on the 20th day of May, 2013, I caused a
3 copy of the foregoing ***NOTICE OF POSTING COST BOND*** to be served on the following
4 parties as outlined below:

5 ***VIA US MAIL ONLY***

6 Ross E. de Lipkau, Esq.
7 John Zimmerman
8 Parsons, Behle & Latimer
9 50 West Liberty Street, Suite 750
10 Reno, NV 89501

Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701

9 Francis Wikstrom
10 Parsons, Behle & Latimer
11 201 South Main Street, Ste. 1800
12 Salt Lake City, Utah 8411

12 Dated this 20th day of May, 2013.



13 THERESE A. URE, NSB# 10255
14 Schroeder Law Offices, P.C.
15 440 Marsh Avenue
16 Reno, NV 89509
17 PHONE (775) 786-8800; FAX (877) 600-4971
18 counsel@water-law.com
19 *Attorneys for Petitioners Etcheverry Family LP,*
20 *Diamond Cattle Company LLC, and Kenneth F.*
21 *Benson*



1 Case No: CV1207-178

2 Dept. No: 2

ORIGINAL

NO. _____
FILED
MAY 17 2013
Eureka County Clerk
By VS

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6 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF
7 NEVADA, IN AND FOR THE COUNTY OF EUREKA
8

9 MICHEL AND MARGARET ANN
10 ETCHEVERRY FAMILY, LP, a
11 Nevada Registered Foreign Limited
12 Partnership; DIAMOND CATTLE
13 COMPANY, LLC, a Nevada Limited
14 Liability Company; and KENNETH F.
15 BENSON, an individual,

16 Petitioners,

17 -vs-

18 STATE ENGINEER OF NEVADA,
19 OFFICE OF THE STATE ENGINEER,
20 DIVISION OF WATER
21 RESOURCES, DEPARTMENT OF
22 CONSERVATION AND NATURAL
23 RESOURCES,

24 Respondent.

25 KOBEB VALLEY RANCH, LLC.

26 Intervenor.
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FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

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THIS MATTER came on for hearing before this Court on the Petition for Judicial Review filed by Petitioners Michel and Margaret Ann Etcheverry Family, LP a Nevada registered foreign limited partnership, Diamond Cattle Company, LLC, a Nevada limited liability company, and Kenneth F. Benson, an individual (hereafter "Benson-Etcheverry") on July 5, 2012.

1 The case was fully briefed and oral argument was heard on April 15, 2013 in Eureka District
2 Court. Benson-Etcheverry are represented by Laura A. Schroeder, Esq. and Therese A. Ure, Esq.;
3 Respondent, State Engineer of Nevada, Office of the State Engineer, Division of Water Resources,
4 Department of Conservation and Natural Resources (hereinafter "State Engineer") are represented by
5 Attorney General Catherine Cortez Masto and Senior Deputy Attorney General Bryan L. Stockton,
6 Esq.; and Respondent in Intervention, Kobeh Valley Ranch, LLC (hereinafter "KVR") is represented
7 by Francis M. Wikstrom, Esq., Ross E. de Lipkau, Esq., and John R. Zimmerman, Esq.

8 The Court having reviewed the records on appeal¹, and this Court's prior Order dated June 13,
9 2012 denying the petitions for judicial review of State Engineer Ruling 6127, and having considered
10 the argument of the parties, the applicable law and findings of fact by the State Engineer, and all
11 pleadings and papers on file in this matter, hereby makes the following findings of fact, conclusions
12 of law, and judgment.

13 **FACTS AND PROCEDURAL HISTORY**

14 On July 15, 2011, the State Engineer issued Ruling 6127, which granted KVR 11,300 acre-
15 feet annually (afa) of groundwater rights to be used for mining purposes for the Mt. Hope Project.
16 Approximately 95% of the groundwater needed for the Project will be supplied by production wells
17 in the Kobeh Valley hydrographic basin.²

18 In Ruling 6127, the State Engineer determined that existing water rights that could potentially
19 be impacted by KVR's pumping are those that exist on the valley floor of Kobeh Valley and are
20 within the predicted water level drawdown area.³ The State Engineer specifically found, however,
21 that "because the groundwater flow model is only an approximation of a complex and partially
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23 ¹ The record in this case includes the record on appeal from the first State Engineer hearings filed in
24 the prior appeals of Eureka County, Tim Halpin, Eureka Producers' Cooperative, and Cedar Ranches, LLC in
25 2009 under cases CV 0904-122 and -123. The record on appeal from these cases is identified herein as
26 "2009 R" or "2009 R. Tr. Vol. ___ page:line" for transcript citations. The record also includes the record on
27 appeal from the second State Engineer hearings filed in the prior appeals of Eureka County, Conley Land &
28 Livestock, LLC, Lloyd Morrison, and Benson-Etcheverry under cases CV-1108-155; -156; -157; -164; -165;
and -170. The record on appeal from these cases, dated October 27, 2011, is identified herein as "R" or
"R. page:line" for transcript citations. The records on appeal filed in this case are identified as follows: State
Engineer Record on Appeal "SE ROA;" State Engineer Supplemental Record on Appeal "SUP SE ROA;" and
Benson-Etcheverry's Supplemental Record on Appeal "PSROA."

² R. 104:23-25, 105:1-2, 106:1-25, 107:1-9, 1079.

³ PSROA 22.

1 understood flow system, the estimates of interbasin flow and drawdown cannot be considered
2 absolute values.”⁴ Accordingly, the State Engineer conditioned his approval of KVR’s applications
3 on the submission of a monitoring, management, and mitigation plan (3M Plan), which he required to
4 be prepared in cooperation with Eureka County and to be approved by the State Engineer prior to
5 pumping any groundwater.⁵ This Court previously analyzed the State Engineer’s decision in this
6 regard by an Order dated June 13, 2012 and concluded that the decision was reasonable, within the
7 State Engineer’s expertise, and supported by substantial evidence.⁶

8 The approved 3M Plan was the result of numerous meetings between KVR, Eureka County,
9 and the State Engineer and went through several revisions.⁷ The public, including Benson and
10 Etcheverry, had an opportunity to comment on a draft of the plan and Eureka County received input
11 from its Natural Resource Department.⁸ The State Engineer approved the 3M Plan with the caveat
12 that it was subject to change based on future need and monitoring results and his continuing authority
13 over the Plan.⁹

14 The purpose of the 3M Plan is to assist the State Engineer with managing KVR’s groundwater
15 use to prevent conflicts with existing water rights.¹⁰ A conflict occurs when a senior water right
16 cannot be used because of water use by a junior water appropriator.¹¹ The impacts from KVR’s
17 groundwater pumping in Kobeh Valley are predicted to manifest over a period of years and the
18 monitoring element of the 3M Plan will provide an early warning of where impacts will appear and
19 allow time to implement specific and effective mitigation measures. If monitoring shows that KVR’s
20 groundwater pumping may impact an existing senior water right holder, including domestic well
21 owners, then the 3M Plan requires KVR to mitigate the effect by ensuring that the existing right has
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24 ⁴ PSROA 19.

25 ⁵ PSROA 42.

26 ⁶ PSROA 186.

27 ⁷ SE ROA 54-167, 178, 181, 195-96, 204, 207-08, 214, 227-41, 295-335, 354-76. SUP SE ROA 13;
SE ROA 5-30, SE ROA 2; SUP SE ROA 14.

28 ⁸ SE ROA 181, 195-96, 204, 207-08, 214, 227-41.

⁹ SUP SE ROA 27-28.

¹⁰ SE ROA 5.

¹¹ State Engineer Br. p. 1:26-27.

1 full beneficial use of the water to which it is entitled according to their specific water right in a
2 manner that is feasible, reasonable, timely, and effective—all at KVR’s expense.¹²

3 The Plan allows for local stakeholders and potentially affected water right holders to
4 participate in the monitoring, management, and mitigation process and work through issues before
5 they become a problem that requires action by the State Engineer. The 3M Plan is intended to be,
6 and will be, an evolving and dynamic resource to the State Engineer and stakeholders for responsible
7 management of water. The 3M Plan creates a water advisory committee (“WAC”) and technical
8 advisory committee (“TAC”). The role of the WAC is to establish and carry out 3M policy. The role
9 of the TAC is to provide technical scientific expertise necessary for collection, evaluation and
10 analysis of data. The State Engineer, Eureka County, and KVR will be the initial members of the
11 WAC and members from the two Diamond Valley farming associations¹³ and a Kobeh Valley
12 rancher must be invited to join as well. The TAC will be appointed by the WAC, which is required
13 to appoint people who have a professional level of technical or scientific expertise in land
14 management, natural resources, water resources, or related fields.¹⁴

15 The TAC has numerous responsibilities under the 3M Plan.¹⁵ The TAC must review the
16 initial monitoring requirements of the 3M Plan within thirty days after WAC appointment and
17 recommend to the WAC whether KVR should monitor additional water sources or modify its
18 monitoring of the currently-identified sources.¹⁶ Any modifications recommended and agreed to by
19 the WAC, however, will require State Engineer approval.¹⁷ The TAC will also meet as soon as
20 possible after any action criteria are triggered, and not less than twice annually or on a schedule
21 required by the WAC.¹⁸

22 The WAC will provide a forum for water right holders and local stakeholders to share
23 information and discuss monitoring data, analyses, technical studies, and mitigation and management
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25 ¹² SE ROA 14.

26 ¹³ The two associations are the Eureka Producers’ Cooperative (EPC) and the Diamond Valley Natural
Resources Protection and Conservation Association (DNRPCA).

27 ¹⁴ SE ROA 8.

28 ¹⁵ SE ROA 8.

¹⁶ SE ROA 8.

¹⁷ SE ROA 11.

¹⁸ SE ROA 8, 10.

1 actions.¹⁹ The WAC may recommend changes to the 3M Plan, but any modification must be
2 approved by the State Engineer because he retains sole authority over the Plan.²⁰ The WAC must
3 hold an annual meeting open to the public to review the prior year's monitoring data and
4 management and mitigation measures.²¹

5 The WAC will set the so-called "action criteria" for monitored water sources (e.g. water table
6 levels and stream or spring flow rates) that will trigger a response from the WAC and TAC if they are
7 exceeded.²² The action criteria will be recommended by the TAC based on available data and
8 analyses and will be set by the WAC at levels that will provide advance warning of potential impacts
9 so that management or mitigation measures can be employed to prevent or mitigate them.²³ If any
10 WAC member disagrees with an action criterion, then the 3M Plan requires the issue to be resolved
11 by the State Engineer and also states that any party to the 3M Plan may petition the State Engineer to
12 consider any issue.²⁴ The State Engineer retains his authority to review the action criteria after they
13 are set and to revise them if he deems it appropriate.²⁵

14 The TAC and WAC are both involved in the review process under the 3M Plan. As
15 monitoring data is collected, the TAC must review it to determine if action criteria have been
16 exceeded.²⁶ And, if an action criterion is exceeded, then the WAC, with assistance from the TAC,
17 will determine whether KVR's pumping caused the levels to be exceeded.²⁷ If KVR's pumping is
18 causing an impact, then the WAC determines what management or mitigation measures should be
19 recommended to the State Engineer to protect existing rights from adverse impacts.²⁸ The State
20 Engineer then reviews the WAC's recommendations and determines which management or
21 mitigation measures to require of KVR.²⁹ The TAC reviews the effectiveness of any mitigation
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23 ¹⁹ SE ROA 7-8.

24 ²⁰ SE ROA 11.

25 ²¹ SE ROA 7.

26 ²² SE ROA 7-8, 10.

27 ²³ SE ROA 5, 7-10.

28 ²⁴ SE ROA 10-11.

²⁵ SE ROA 11, SUP SE ROA 27.

²⁶ SE ROA 9.

²⁷ SE ROA 9-10.

²⁸ SE ROA 10.

²⁹ SE ROA 10-11.

1 measures and reports its findings to the WAC.³⁰ Because KVR is required to mitigate any adverse
2 impact to existing water rights, the standard for effectiveness is whether the specific mitigation
3 method prevented or mitigated the adverse impact to the existing water right so that a conflict does
4 not occur.

5 The State Engineer retains exclusive control over the 3M Plan and has not delegated any of
6 his authority. The 3M Plan states that all decisions made by the WAC “will be subject to the
7 jurisdiction and authority of the [State Engineer].”³¹ The WAC may recommend certain mitigation or
8 management actions, but the State Engineer makes the final decision.³² Additionally, the State
9 Engineer, with or without a recommendation, may make any order he deems necessary and
10 appropriate based on data he receives under the 3M Plan or from other sources. Also, any existing
11 water right holder may seek relief directly from the State Engineer if he believes that KVR’s
12 pumping will cause or has caused an adverse impact on his water rights and any State Engineer
13 decision is subject to judicial review. The 3M Plan clearly states that it does not limit or change the
14 State Engineer’s authority and KVR’s permits provide that the State Engineer “retains the right to
15 regulate the use of the water herein granted at any and all times.”³³

16 The 3M Plan is a condition of KVR’s permits, and therefore, only KVR and its successors are
17 bound by it.³⁴ Any failure to comply with the 3M Plan will be a violation of KVR’s permits and the
18 State Engineer will be able to enforce the 3M Plan requirements or order KVR to stop pumping. If
19 KVR disobeys the State Engineer’s order to comply with the 3M Plan or stop pumping, then the State
20 Engineer may seek injunctive relief from this Court under NRS 533.482 and levy fines under NRS
21 533.481. Existing water right holders may take advantage of the procedure described in the 3M Plan,
22 but they are not required to do so. Benson-Etcheverry³⁵ may participate in the 3M Plan process by
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25 ³⁰ SE ROA 9.

26 ³¹ SE ROA 11.

27 ³² SE ROA 10-11.

28 ³³ SE ROA 11, SUP SE ROA 27, R. 438.

³⁴ SE ROA 5.

³⁵ Martin Etcheverry represents the Etcheverry Family LP and Diamond Cattle Company and is a member of the WAC.

1 attending meetings and receiving information developed through the 3M Plan, but they are not
2 obligated to do so.

3 DISCUSSION

4 I. Standard of Review

5 The State Engineer is appointed by and is responsible to the Director of the Nevada
6 Department of Conservation and Natural Resources and performs duties prescribed by law and by the
7 Director.³⁶ The State Engineer duties include administering the appropriation and management of
8 Nevada's public water, both surface and groundwater, under NRS Chapters 533 and 534.

9 Nevada law allows every person aggrieved by an order or decision of the State Engineer to
10 have that matter reviewed on appeal.³⁷ On appeal, the State Engineer's decision is presumed to be
11 correct and the burden of proof to show otherwise is on the party challenging it.³⁸ As to questions of
12 fact, a court must limit its determination to whether substantial evidence in the record supports the
13 State Engineer's decision.³⁹ Substantial evidence is defined as "that which a reasonable mind might
14 accept as adequate to support a conclusion."⁴⁰

15 Unless an administrative agency decision is arbitrary or capricious it should not be disturbed
16 on appeal.⁴¹ A decision is regarded as arbitrary and capricious if it is "baseless or despotic" or
17 evidences "a sudden turn of mind without apparent motive; a freak, whim, mere fancy."⁴² In
18 reviewing a State Engineer decision for an abuse of discretion, the court's function is "to review the
19 evidence upon which the Engineer based his decision and ascertain whether that evidence supports
20 the order" and, if so, the court is bound to sustain it.⁴³

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23 ³⁶ NRS 532.020, 532.110.

³⁷ NRS 533.450(1).

24 ³⁸ NRS 533.450(10); *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992).

25 ³⁹ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) (citing *No. Las Vegas v. Pub. Serv. Comm'n.*, 83 Nev. 278, 429 P.2d 66 (1967)).

26 ⁴⁰ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

⁴¹ *U.S. v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1474 (D. Nev. 1996).

27 ⁴² *Estate of Wells*, 110 Nev. at 1222, 885 P.2d at 548 (citing *City Council v. Irvine*, 102 Nev. 277, 278-79, 721 P.2d 371, 372 (1986)).

28 ⁴³ *Office of State Eng'r, Div. of Water Res. v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (citing *Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 283, 607 P.2d 581, 582 (1980)).

1 Because the State Engineer is authorized by Nevada law to decide and regulate the
2 appropriation of water, “that office has the implied power to construe the State’s water law provisions
3 and great deference should be given to the State Engineer’s interpretation when it
4 is within the language of those provisions.”⁴⁴ Similarly, the State Engineer’s conclusions of law, to
5 the extent they are closely related to his view of the facts, are entitled to deference and must not be
6 disturbed if they are supported by substantial evidence.⁴⁵ A reviewing court, however, is not
7 compelled to defer to the State Engineer’s interpretation of a regulation or statute if the plain
8 language of the provision requires an alternative interpretation.⁴⁶

9 **II. Benson-Etcheverry’s Assignment of Error**

10 **A. Whether The State Engineer’s Approval Of The 3M Plan Is A Delegation Of**
11 **Authority.**

12 Benson-Etcheverry asserts that the State Engineer delegated his quasi-legislative and quasi-
13 judicial authority to the committees created under the 3M Plan. This assertion, however, ignores the
14 plain language of the 3M Plan, which states that the committees are intended to assist the State
15 Engineer in managing KVR’s groundwater pumping to prevent adverse impacts to existing water
16 rights.⁴⁷ Further, as their names imply, the committees are advisory only and the 3M Plan does not
17 give them legislative or adjudicatory authority. The Court concludes that the State Engineer is not
18 prohibited from receiving input and advice from local stakeholders and those with technical expertise
19 in order to better manage water resources in a particular area. Receiving advice from a committee, as
20 the State Engineer has done here, increases the integrity and quality of such advice. This is especially
21 so where, as is the case here, the input and advice are provided by a technical committee.

22 Further, the State Engineer retains exclusive control over the 3M Plan and it does not change
23 or limit his authority to manage water resources in Nevada. First, a member of the State Engineer’s
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25 ⁴⁴ *Anderson Family Assocs. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (recognizing that
26 the State Engineer “has the implied power to construe the state’s water law provisions and great deference
27 should be given to the State Engineer’s interpretation when it is within the language of those provisions”); *U.S.*
v. State Eng’r, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112
Nev. 743, 747-48, 918 P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

28 ⁴⁵ *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986).

⁴⁶ *Anderson Family Assocs. v. Ricci*, 124 Nev. at 186, 179 P.3d at 1203.

⁴⁷ SE ROA 5-6.

1 staff will serve on the WAC and will be invited to chair the committee.⁴⁸ Second, any changes to the
2 3M Plan or recommended management and mitigation actions from the committees require State
3 Engineer approval.⁴⁹ Therefore, even though the TAC is required to review KVR's monitoring
4 obligations and recommend necessary changes to the WAC, all changes must be approved by the
5 State Engineer.⁵⁰

6 The WAC will set action criteria levels to provide advance warning of potential adverse
7 impacts, all subject to State Engineer oversight.⁵¹ If the WAC does not agree on any action criterion,
8 then the State Engineer will decide the issue.⁵² If the WAC determines that KVR triggered any
9 action criteria, then the State Engineer decides what management or mitigation response is necessary
10 to prevent the potential impact from adversely affecting existing rights.⁵³ The State Engineer is not
11 limited to the WAC's recommended management or mitigation measures and may independently
12 require any other measures, whether or not they are currently listed in the 3M Plan.⁵⁴ And if any
13 existing water right holders believe that KVR's groundwater pumping will cause or has caused an
14 adverse impact to their rights, then the 3M Plan does not prevent them from seeking relief directly
15 from the State Engineer without going to the WAC.

16 Benson-Etcheverry argue that the State Engineer has delegated adjudicative authority by
17 approving the 3M Plan. By its specific terms, the 3M Plan is an express condition of the water rights
18 granted under the Ruling, and, therefore, does not bind anyone other than KVR.⁵⁵ The 3M Plan does
19 not create a new adjudicatory process or require holders of existing water rights to submit their
20 complaints to the WAC for adjudication or to waive any available legal remedy. The 3M Plan does
21 not limit the State Engineer's authority, and, therefore, he will have the ability to consider any
22 complaint by an existing water right holder regarding KVR's use of water. The State Engineer may
23 order any action necessary based on the facts and circumstances of each case. Therefore, any water
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25 ⁴⁸ SE ROA 7.

26 ⁴⁹ SE ROA 11.

27 ⁵⁰ SE ROA 11.

28 ⁵¹ SE ROA 7-8, 10.

⁵² SE ROA 10.

⁵³ SE ROA 11.

⁵⁴ SE ROA 16.

⁵⁵ SE ROA 5.

1 right holder who believes that his water rights have been impacted by KVR's use of groundwater
2 may petition the State Engineer to investigate the matter and can seek judicial relief of the State
3 Engineer's decision if he is dissatisfied. The 3M Plan does not limit or modify any water right
4 holder's legal rights to such remedies.

5 Because the monitoring, management, and mitigation related to KVR's use of water is at all
6 times subject to the State Engineer's review and control, Benson-Etcheverry's argument that he has
7 delegated his authority fails. Therefore, the Court concludes that the 3M Plan does not delegate
8 authority because the committees are advisory only and the State Engineer retains full and exclusive
9 control over the Plan and KVR's water use.

10 **B. Whether The State Engineer's Approval Of The 3M Plan Is Rulemaking.**

11 Benson-Etcheverry argue that the 3M Plan creates a new administrative process for
12 groundwater regulation and provides remedies for conflicts with existing water rights that were not
13 promulgated under the State Engineer's rulemaking authority and that are contrary to his statutory
14 duties under NRS 534.110(6) and (8).⁵⁶ Rulemaking occurs where an agency "promulgates, amends,
15 or repeals "[a]n agency rule, standard, directive or statement of general applicability which
16 effectuates or interprets law or policy, or describes the organization, procedure or practice
17 requirements of any agency."⁵⁷ The 3M Plan is designed to assist the State Engineer with collecting
18 and analyzing data regarding the effects of KVR's water use for the Mt. Hope Project and applies
19 only to KVR's water permits and pumping. Therefore, the 3M Plan does not authorize or require the
20 WAC to make regulations of general applicability and any determination by the WAC will not bind
21 other water right holders in Kobeh Valley or the surrounding basins.

22 Benson-Etcheverry also assert that the 3M Plan transfers the State Engineer's authority under
23 NRS 534.110(6) and (8) to the WAC and TAC. NRS 534.110(6) and (8) provide:

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25 (6). . . [T]he State Engineer shall conduct investigations in any basin or
26 portion thereof where it appears that the average annual replenishment
to the groundwater supply may not be adequate for the needs of all

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28 ⁵⁶ Br. pp. 18-19.

⁵⁷ *Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 39-40, 153 P.3d 26, 29 (2007) (quoting NRS 233B.038(1)(a)-(c)).

1 permittees and all vested-right claimants, and if the findings of the
2 State Engineer so indicate, the State Engineer may order that
3 withdrawals, including, without limitation, withdrawals from domestic
4 wells, be restricted to conform to priority rights.

5 (8) In any basin or portion thereof in the State designated by the State
6 Engineer, the State Engineer may restrict drilling of wells in any
7 portion thereof if the State Engineer determines that additional wells
8 would cause an undue interference with existing wells.

9 The 3M Plan does not give the WAC or TAC the authority to regulate Kobeh Valley, or any other
10 basin, based on priority under NRS 534.110(6). Similarly, the 3M Plan does not empower the WAC
11 or TAC to issue orders restricting the drilling of new wells in any basin based on undue interference
12 under NRS 534.110(8). Therefore, the Court concludes that the State Engineer's approval of the 3M
13 Plan does not violate NRS 534.110(6) or (8).

14 Lastly, Benson-Etcheverry point to Section 5(G) of the 3M Plan, which states that any
15 decisions made by the WAC shall be by unanimous vote, that the WAC may jointly agree to conduct
16 additional data collection and/or data review and analyses directed at resolving the different
17 interpretations or opinions, and that if unanimity is not achieved the WAC may refer the issue to the
18 State Engineer for final determination. ⁵⁸ This language does not preclude the State Engineer from
19 investigating a potential impact at any time, or from taking any other action within his authority. The
20 unanimity requirement is a limitation on the WAC, not on the State Engineer. If the WAC fails to
21 make recommendations regarding a potential impact, any existing water right holder can complain to
22 the State Engineer and the State Engineer can order KVR to mitigate or stop pumping at any time or
23 undertake any other mitigation measure he deems necessary to protect existing water rights.

24 **C. Express Conditions Under NRS 534.110.**

25 Benson-Etcheverry next contends that the 3M Plan does not contain express conditions as
26 required by NRS 534.110(5).⁵⁹ They argue that the 3M Plan will cause long delays if existing water
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28 ⁵⁸ SE ROA 10.

⁵⁹ Benson-Etcheverry also assert that the Ruling does not contain express conditions. This issue was
raised in Benson-Etcheverry's prior petition for judicial review, which this Court denied.

1 rights must wait for the advisory committees to act and that the State Engineer should adopt specific
2 mitigation measures before the nature and extent of any conflicts are known. The 3M Plan, however,
3 is proactive, not reactive, in that it (1) requires extensive monitoring of numerous water resources, (2)
4 advises the State Engineer in advance, through the WAC and TAC, of potential impacts, and (3) sets
5 up a process to respond to potential impacts before they cause adverse effects to existing water rights.

6 NRS 534.110(5) provides:

7 [t]his section does not prevent the granting of permits to applicants later
8 in time on the ground that the diversions under the proposed later
9 appropriations may cause the water level to be lowered at the point of
10 diversion of a prior appropriator, so long as any protectable interests in
11 existing domestic wells as set forth in NRS 533.024 and the rights of
holders of existing appropriations can be satisfied under such express
conditions.

12 Under the 3M Plan, KVR must monitor water conditions in numerous creeks, springs, and
13 wells “to provide the necessary data to assess the response of the aquifer(s) to the stress of water
14 resource exploitation, provide an early warning capability, and provide safeguards for responsible
15 management of water.”⁶⁰ KVR must monitor water levels in 89 wells, 59 of which are in Kobeh
16 Valley.⁶¹ These wells include KVR’s production and test wells, USGS wells, and “sentinel” wells,
17 which will be located to provide early indication of drawdown propagation towards sensitive or
18 important resources.⁶² The static water level in all wells will be measured continuously.⁶³ KVR must
19 monitor the flow of several creeks in the Roberts Mountains and in the Pine Valley and Kobeh Valley
20 hydrographic basins.⁶⁴ KVR must monitor 34 springs in the Diamond Valley, Kobeh Valley and Pine
21 Valley hydrographic basins.⁶⁵ Measurements will be taken continuously for streams and quarterly for
22 springs.⁶⁶ Monitoring will also include several biological and meteorological factors for springs and
23 streams in Kobeh Valley, Roberts Mountain, and at the mine site.⁶⁷

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25 ⁶⁰ SE ROE 5.

26 ⁶¹ SE ROA 18-26.

27 ⁶² SE ROA 12.

28 ⁶³ SE ROA 18-26.

⁶⁴ SE ROA 24-26.

⁶⁵ SE ROA 19-20, 24-26.

⁶⁶ SE ROA 19-26.

⁶⁷ SE ROA 27-28.

1 In addition, the 3M Plan describes a process for responding to the effects of KVR's pumping
2 based on monitoring results in order to ensure that existing rights are satisfied. The 3M Plan requires
3 the establishment of quantitative thresholds or "action criteria" which, if triggered, serve as early
4 warnings of potential impacts to existing rights.⁶⁸ These thresholds will be set at appropriate levels to
5 provide advance warning of potential impacts to existing water rights that might result from KVR's
6 pumping.⁶⁹ When any threshold is reached, the TAC must meet as soon as possible to assess whether
7 the threshold was caused by KVR's pumping and report its findings to the WAC.⁷⁰ If KVR's
8 pumping caused an action criterion to be exceeded, the WAC must recommend appropriate
9 mitigation or management measures to the State Engineer that it believes will protect existing
10 rights.⁷¹ Therefore, the 3M Plan requires action criteria to be set at levels to detect any effects of
11 pumping that warn of a potential adverse impact.⁷² This early warning system ensures that KVR, the
12 State Engineer, and other 3M Plan participants will have a reasonable amount of time to respond to
13 the effects of KVR's pumping and to prevent or mitigate potential impacts from adversely affecting
14 existing water rights. Accordingly, if the effect of KVR's pumping shows that a certain water right
15 will be impacted, then the 3M Plan requires KVR to implement specific management actions or
16 mitigation measures to satisfy existing rights. The Court concludes that this process satisfies the
17 express conditions requirement of NRS 534.110(5).

18 Through his approval of the 3M Plan, the State Engineer has determined that the conditions
19 and provisions of the 3M Plan are adequate to ensure that existing rights will be satisfied. His
20 decision is supported by the 3M Plan itself since it requires KVR to carefully monitor the effects of
21 its pumping, to forecast potential impacts in cooperation with parties to the 3M, and to prevent or
22 mitigate such impacts from adversely affecting existing water rights. Although Benson-Etcheverry
23 would require the State Engineer to include express measures for mitigating existing water rights,
24 NRS 534.110(5) requires only that the State Engineer include express conditions to ensure that

26 ⁶⁸ SE ROA 7-8, 10.

27 ⁶⁹ SE ROA 10.

28 ⁷⁰ SE ROA 10.

⁷¹ SE ROA 10.

⁷² SE ROA 7-8, 10.

1 existing water rights are satisfied. The 3M Plan is an express condition to monitor the effects of
2 KVR's pumping, to detect and identify potential impacts, and to prevent them from adversely
3 affecting existing water rights through management and mitigation measures recommended by the
4 advisory committees and ordered by the State Engineer. The Court finds that the 3M Plan contains
5 appropriate standards to protect existing water rights and concludes that the State Engineer's approval
6 of the 3M Plan is reasonable, within his area of expertise, and supported by substantial evidence in
7 the record.

8 **D. Whether The 3M Plan Complies With Ruling 6127 And NRS 533.370(2).**

9 Benson-Etcheverry argue that the 3M Plan does not ensure that existing water rights will be
10 fully satisfied, and, therefore, violates Ruling 6127 and NRS 533.370(2). They contend that the 3M
11 Plan is a plan for a plan that allows a conflict to occur before mitigation. As stated above, the 3M
12 Plan is designed to be proactive and requires action in advance of a conflict. The 3M Plan describes
13 concrete requirements of the TAC and WAC, and does not limit or change the authority of the State
14 Engineer. Under the 3M Plan, KVR must monitor numerous springs, streams, and wells to detect any
15 changes to those water sources that occur after KVR begins pumping.⁷³ This monitoring is
16 comprehensive and reasonably designed to detect potential impacts because it covers numerous water
17 sources in several hydrographic basins.⁷⁴ The Court concludes that such monitoring will allow early
18 detection of impacts so that available mitigation measures can be implemented to prevent any
19 impacts from adversely affecting existing water rights.

20 In addition, the Court concludes that the 3M Plan will not delay mitigation. If the WAC
21 determines that KVR's pumping causes action criteria exceedance, then the TAC must expeditiously
22 formulate mitigation or management measures and submit them to the WAC.⁷⁵ Because the 3M Plan
23 provides an early warning system against potential impacts, the WAC will be able to develop and
24 implement mitigation measures. The 3M Plan lists several methods to mitigate adverse impacts,
25 including drilling replacement wells, shifting pumping ratios among the production wells, or stopping
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27 ⁷³ SE ROA 5, 17-30.

28 ⁷⁴ The 3M Plan requires KVR to monitor numerous streams, springs, and wells in Kober Valley and in
the four surrounding basins (Diamond, Pine, Antelope, and Grass Valley hydrographic basins).⁷⁴

⁷⁶ SE ROA 15-16.

1 pumping from one or more production wells.⁷⁶ The 3M Plan also states that mitigation may include
2 any other measures agreed to by the WAC and/or required by the State Engineer.⁷⁷ The Court
3 concludes that this process will ensure that water sources are carefully monitored and that existing
4 water rights are satisfied to the full extent of their water right permit before an adverse impact occurs.

5 Lastly, Benson-Etcheverry assert that the 3M Plan allows financial compensation as a
6 substitute for satisfying existing water rights. The 3M plan states several potential mitigation
7 measures, one of which is that “Financial compensation or, if agreed upon, property (i.e., land and
8 water rights) of equal value could be purchased for replacement.” The mitigation measures listed in
9 the 3M Plan are not exclusive and any of the Plan participants can recommend, or the State Engineer
10 can independently require, other mitigation measures.⁷⁸ Additionally, the State Engineer retains
11 authority to take action with or without recommendations from the 3M Plan participants.

12 Accordingly, the Court concludes that the State Engineer’s approval of the 3M Plan complies
13 with the Ruling and NRS 533.370(2).

14 **E. Whether The 3M Plan Is Vague Or Deficient, Arbitrary And Capricious, Or An**
15 **Abuse Of Discretion.**

16 Benson-Etcheverry reasserts several contentions to support their argument that the 3M Plan is
17 vague and deficient and that the State Engineer’s decision is arbitrary and capricious or an abuse of
18 discretion. These arguments are fully addressed above in Sections A-D, above. Benson-Etcheverry
19 also disagree with this Court’s prior Order, which concluded that Nevada law does not prevent the
20 State Engineer from granting applications that may impact existing rights so long as the existing right
21 can be mitigated to prevent conflicts. These arguments have already been rejected by this Court in
22 Benson-Etcheverry’s prior appeal of the Ruling and that decision will not be disturbed in this appeal.

23 Additionally, Benson-Etcheverry asserts that because the WAC and TAC set the action
24 criteria levels, it is the committees that make the decision whether it is necessary to respond to
25 complaints by existing water right holders. As discussed above, the action criteria under the 3M Plan
26 are required to be set at levels that will detect the effects of KVR’s pumping and provide an early
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28 ⁷⁷ SE ROA 16.

⁷⁸ SE ROA 16.

1 warning of potential impacts so that the WAC and TAC can respond with recommendations to the
2 State Engineer in time to prevent the impact from occurring or, if the impacts cannot be prevented, to
3 ensure that mitigation is in place to prevent the impacts from adversely affecting existing water
4 rights. The Court concludes that the WAC and TAC are not authorized under the 3M Plan to decide
5 claims by existing water right holders against KVR. The State Engineer retains the authority to
6 decide those claims if they arise.

7 Benson-Etcheverry also contends that the 3M Plan is devoid of urgency and that the WAC
8 and TAC meet annually or bi-annually only and without regard to any reported impact to a water
9 right holder. The Court concludes that this argument lacks merit and is contrary to the plain language
10 of the 3M Plan. The 3M Plan sets forth minimum meeting requirements, but provides that the TAC
11 will meet as frequently as necessary.⁷⁹ The State Engineer may also exercise his authority and
12 require more frequent meetings by amending the 3M Plan. Additionally, if an action criterion is
13 triggered that signals a potential impact, the 3M Plan requires the TAC to meet as soon as possible to
14 investigate why the criterion was triggered.⁸⁰ And if the impact is caused by KVR, then the 3M Plan
15 requires the TAC to expeditiously develop mitigation or management measures to prevent adverse
16 impacts to existing rights.⁸¹ Finally, the WAC must ensure that mitigation is timely.⁸² This Court
17 concludes that Benson-Etcheverry's assertion that the 3M Plan is not reasonably calculated to address
18 impacts in a timely fashion is without merit.

19 Lastly, Benson-Etcheverry assert that this Court's prior order required KVR and the State
20 Engineer to conduct additional test pumping prior to approving a 3M Plan. This argument was not
21 raised in Benson-Etcheverry's Opening Brief, and therefore, has been waived.⁸³ Even if the Court
22 considered Benson-Etcheverry's assertion, it would not affect the outcome of this case because the
23 record shows that KVR conducted extensive test pumping and hydrogeological studies prior to the
24 State Engineer's Ruling and the only way to observe the aquifer's response to pumping 11,300 afa is
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26 ⁷⁹ SE ROA 8.

27 ⁸⁰ SE ROA 10.

28 ⁸¹ SE ROA 10.

⁸² SE ROA 14.

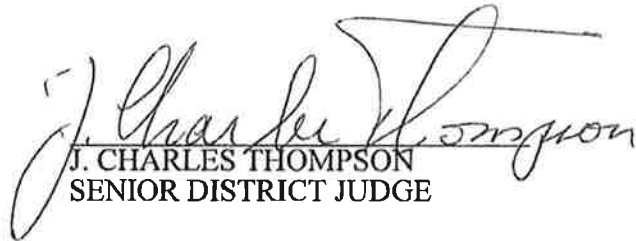
⁸³ *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n. 5, 138 P.3d 433, 444 n. 5 (2006).

1 to allow pumping to begin under the permits. Further, as discussed above, the 3M Plan sets forth a
2 process by which the effects of pumping will be closely monitored and managed to ensure that
3 existing water rights are protected. The 3M Plan fully complies with this Court's prior Order dated
4 June 13, 2012.

5 The Court having considered, analyzed, discussed, and issued its findings and conclusions as
6 to the issues raised in the Petition for Judicial Review; and good cause appearing;

7 **IT IS HEREBY ORDERED** that the Petition for Judicial Review is **DENIED**

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9 DATED this 15th day of May 2013.

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11 
12 J. CHARLES THOMPSON
13 SENIOR DISTRICT JUDGE
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PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 21st day of May, 2013, I caused a copy of the foregoing ***AFFIDAVIT OF THERESE A. URE IN SUPPORT OF APPELLANTS KENNETH F. BENSON, DIAMOND CATTLE COMPANY, LLC, AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, MOTION TO CONSOLIDATE*** to be served on the following parties as outlined below:
VIA COURT'S EFLEX ELECTRONIC FILING SYSTEM:

Francis Wikstrom
Jessica Prunty
Dana Walsh
Gary Kvistad
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Bryan Stockton
John Zimmerman
Francis Flaherty
Paul Taggart
Gregory Walch
James Erbeck
Jennifer Mahe
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Neil Rombardo
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***VIA US MAIL, POSTAGE PRE-PAID
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William E. Nork, Settlement Judge
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Dated this 21st day of May, 2013.

/s/ Therese A. Ure

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