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Tracie K. Lindeman
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**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,

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,

Respondents.

Case No. 61324

MICHEL AND MARGARET ANN
ETCHEVERRY FAMILY, LP, a Nevada
registered foreign limited partnership;
DIAMOND CATTLE COMPANY, LLC, a
Nevada limited liability company; and,
KENNETH F. BENSON, individually,
Appellants,

v.

STATE ENGINEER, OF NEVADA, OFFICE
OF THE STATE ENGINEER,
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCE; and KOBEL
VALLEY RANCH, LLC, a Nevada limited
liability company,

Respondents.

Case No. 63258
*(Consolidated with
Case No. 61324)*

**JOINT APPENDIX
VOLUME 6**

APPENDIX SUMMARY

Chronological Order by Filing Date

Document	Filing Date	Vol.	3MJA Page Nos.
Letter from State Engineer Approving 3M Plan	June 6, 2012	I	1
Petition for Judicial Review	July 5, 2012	I	2-35
Lisa Morlan's Affidavit of Service of Notice of Petition for Judicial Review and Petition for Judicial Review	July 18, 2012	I	36-38
State Engineer's Record on Appeal Vol. 1	August 3, 2012	I	39
Vol. 1 - SE ROA Summary SE ROA 39-42		I	39-42
Vol. 1 – SE ROA Conti. SE ROA 43-52		I	42-95
Vol. 1 – SE ROA Conti. SE ROA 53-132		II	96-175
Vol. 1 – SE ROA Conti. SE ROA 133-218		III	176-261
Vol. 1 – SE ROA Conti. SE ROA 219-249		IV	262-292
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State Engineer's Record on Appeal Vol. 2		August 3, 2012	V
Vol. 2 – SE ROA Summary SE ROA 295	V		295

Document	Filing Date	Vol.	3MJA Page Nos.
Vol. 2 – SE ROA Conti. SE ROA 252-376	August 3, 2012	V	296-420
Vol. 2 – SE ROA Conti. SE ROA 377-448		VI	421-492
State Engineer’s Supplemental Record on Appeal	August 15, 2012	VI	493
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Supplemental Record SUP SE ROA 1-29		VI	495-525
Kobeh Valley Ranch, LLC’s Answer to Petition for Judicial Review	August 17, 2012	VI	526-531
Petitioners’ Opening Brief	November 5, 2012	VI	532-576
Kobeh Valley Ranch’s Answering Brief	Dec. 20, 2012	VI	577-610
State Engineer’s Answering Brief	Dec. 20, 2012	VII	611-629
Petitioner’s Reply Brief	February 1, 2013	VII	630-646
Transcript of Oral Argument	April 15, 2013	VII	647-719
Findings of Fact, Conclusions of Law, and Judgment	May 17, 2013	VIII	720-736
Petitioners’ Notice of Appeal	May 21, 2013	VIII	737-739
Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment	May 23, 2013	VIII	740-761

Document	Filing Date	Vol.	3MJA Page Nos.
Proof of Service of Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment	May 23, 2013	VIII	742

APPENDIX SUMMARY

Alphabetical Order

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Petitioners' Notice of Appeal	May 21, 2013	VIII	737-739
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Supplemental Record Summary SUP SE ROA	August 15, 2012	VI	493-495
Supplemental Record SUP SE ROA 1-29		VI	495-525
Transcript of Oral Argument	April 15, 2013	VII	647-719

11

From: Jake Tibbitts

Sent: Monday, January 09, 2012 11:30 AM

To: rfelling@water.nv.gov; Jason King; kwhicken@water.nv.gov; Adam Sullivan; Pat Rogers

Cc: Dale Bugenig; Lenny Fiorenzi

Subject: Eureka County comment on 12-16-11 EML 3M

Find attached a PDF with Eureka County's comment on the latest EML 3M plan. We reviewed and commented using the pop-out comment boxes in Adobe Reader. Let us know if you have any trouble reading the comments. We feel another face-to-face meeting to discuss the outstanding issues may be worthwhile.

Jake Tibbitts
Natural Resources Manager
Eureka County Department of Natural Resources
PO Box 682
Eureka, NV 89316

Phone: 775-237-6010

Fax: 775-237-6012



EUREKA MOLY

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December 16, 2011

Richard A. Felling
Hydrology Section
Division of Water Resources
Engineer's Office
100 Stewart St. Suite 2002
Elko, NV 89701

Monitoring Management and Mitigation Plan – Mt. Hope Project

Re: Felling:

This transmits Eureka Moly, LLC's (EMLLC) proposed Monitoring, Management and Mitigation Plan (3M) for the Mt Hope Project. This 3M is being provided in accordance with State Engineer (NSE) Ruling 6127. This 3M supersedes and replaces the previous version submitted on October 7, 2011. Modifications to the previous version are those agreed upon during the meeting with NSE staff and Eureka County representatives on December 8, 2011.

If you have any questions, please feel free to contact me at (775) 748-6008.

Sincerely,


C. Roberts

Chief, Environmental and Permitting

Enclosures

Dave Berger, U.S. Geological Survey, with enclosures
Mike Tibbitts, Eureka County Natural Resources Department, with enclosures

DEC 20 2011

SE ROA 0379

3MJA 000423

Summary of Comments on 12 20 11 EML 3M_EC_Comment.pdf

Page: 1

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 9:54:14 AM

We thought it was clear at the meeting in Carson City that EML was to make their changes and submit a draft to the County for comment prior to submitting it to NSE in order to cut back on the amount of times for review.

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 9:55:16 AM

EML may have agreed to make certain changes herein, but it is not correct to state all changes were agreed to by Eureka County. In many instances, Eureka County did not accede to the changes required by the NSE. Instead the County basically had to agree to disagree.

SE ROA 0380

3MJA 000424

**NEVADA DIVISION OF WATER RESOURCES MONITORING, MANAGEMENT,
AND MITIGATION PLAN FOR THE MT. HOPE PROJECT**

BACKGROUND

This Monitoring, Management, and Mitigation Plan (3M) applies to proposed groundwater extraction from Kobeh Valley and Diamond Valley for mining process water as granted in Ruling 6127 of the office of the Nevada State Engineer (NSE) dated July 15, 2011. A condition of this Ruling was that this 3M be prepared with input and cooperation of Eureka County (EC). The groundwater extracted will be consumed in activities related to the Mt. Hope Project (Project), including mineral processing and mine dust control. The groundwater will be developed by Eureka Moly, LLC, (EMLLC) through Kobeh Valley Ranch, LLC (KVR), both of which are subsidiaries of General Moly, Inc. (GMI), with KVR being the water rights holder. The Lessee of the water rights and operator of the Project is EMLLC. The groundwater will be supplied primarily from a wellfield in Kobeh Valley and conveyed via pipelines to the mine and mill site. In addition, groundwater will include water derived from open pit dewatering at rates that are predicted to reach a maximum of 742 af/yr. The distribution of this water from the pit is estimated at 20% from Kobeh Valley Hydrographic Basin and 80% from the Diamond Valley Hydrographic Basin.

PURPOSE OF THE 3M

The purpose of this 3M is to assist the NSE in managing development of groundwater resources within and near the Project area to avoid adverse impacts to existing water rights.

The 3M outlines a process by which adverse impacts will be identified and ultimately mitigated. It is intended to provide the necessary data to assess the response of the aquifer(s) to the stress of water resource exploitation, provide an early warning capability, and provide safeguards for responsible management of water.

AUTHORITIES AND PARTICIPANTS

The NSE has final authority over the 3M, and EMLLC, including all successors and assigns, will be responsible for implementing and complying with the 3M.

In addition to the purpose outlined above, this 3M is intended to provide participation and transparency to the locally affected stakeholders. Eureka County (EC) holds water rights for municipal use in Diamond Valley. Additionally, Eureka County has local natural resource, land-use, and water resource policies, plans, and goals developed under Nevada State Law that obligate County officials, both elected and appointed, to actively participate in the planning and management of resources within Eureka County. Eureka County, and representatives from locally potentially affected farming, ranching, and

This language should be changed to the previous language now that the NSE has correctly indicated that the total combined duty of all permits is 11,300 AFA

domestic interests will be invited to participate in this 3M. In the event there are other rights holders who may be adversely affected by Mt. Hope Project groundwater extraction, these entities could be invited to participate as described under MANAGEMENT and in accordance with this 3M.

The USGS will be invited to participate expressly to provide impartial technical and scientific input, as described herein.

This 3M is separate from the requirements placed upon EMLLC by other agencies including the United States Bureau of Land Management (BLM) and Nevada Department of Wildlife (NDOW). The BLM has claimed Federal Public Water Reserves (PWR 107) within the area of concern. The BLM and EMLLC have entered into a stipulated settlement agreement as a condition of the BLM withdrawal of protests of EMLLC's water right applications and NDOW is included as a party to the settlement agreement.

PRINCIPAL COMPONENTS

consists of three principal components:

Management

Monitoring

Litigation

The network of these components is described in the following sections.

MANAGEMENT

Two committees are established. The Water Advisory Committee (WAC) is to establish and carryout policy under this 3M. The Technical Advisory Committee (TAC) is to provide the technical scientific expertise necessary for collection, evaluation and analysis of data. Separation of the roles and responsibilities of these two bodies is considered crucial to maintaining scientific impartiality of the data collection and analysis program.

Water Advisory Committee:

1. Within 30 days after NSE approval of this 3M, EMLLC, NSE, and Eureka County representatives will convene as the three (3) founding members of the WAC. Upon the three founding members convening, the Diamond Natural Resources Protection and Conservation Association (DNRPCA) and the Eureka Producers Cooperative (EPC) (DNRPCA and EPC represent the bulk of water rights holders in the

Add sentence here to read, "The entities represented under this 3M are hereinafter called "Parties."

Diamond Valley Flow System will each be invited to bring forward one representative nominated from their respective membership for inclusion as members of the WAC (hereinafter "Parties"). Letters of interest will also be accepted from potentially affected ranching interests (i.e., Kobeh Valley rancher) for inclusion as a member of the WAC. Eureka County, NSE, EMLLC, DNRPCA, and EPC will make the determination on the affected ranching interest to be included on the WAC based on letters of interest received. If any of the potentially affected ranching and farming interests ceases to exist, the remaining WAC members will develop a process so that replacement members will be selected to join the WAC. The WAC may also invite other potentially affected water rights holders to participate as members. The WAC will have no more than seven (7) members. The member of the WAC representing the NSE will be invited to participate as the chair of the WAC. If the NSE member representative declines this invitation, the WAC will elect the chairman. Each WAC member, at its sole discretion, may invite such additional staff or consultants to attend WAC meetings as it deems necessary.

After the full WAC has been convened, the WAC will establish policy and define additional roles and responsibilities of the WAC and TAC, such as scheduling of meetings, agenda setting, publication of minutes, receiving input from the public, and any other necessary components.

The WAC will meet no less than one time in each quarter starting at the execution of this 3M with the primary focus to ensure water monitoring is actively in place. Future meeting frequency may then be adjusted as decided by the WAC, but will be no less than once annually.

l. Purposes and Functions of the WAC will be to:

- i. Provide a forum for the WAC to discuss relevant data and analyses.
- ii. Share information regarding modeling efforts and model results.
- iii. Make modifications to the Monitoring component of this 3M, including, but not limited to additional data collection and scientific investigations, based on recommendations from the TAC.
- iv. Provide status reports and recommendations to the Parties.
- v. Establish values for monitored variables (water levels, spring discharges, vegetation responses, etc.) known as "action criteria" which, if exceeded, may be of concern to the Parties and could require mitigation or management actions.
- vi. Determine what constitutes an adverse impact on a case-by-case basis, based on Nevada Water Law.
- vii. Form and ensure implementation of groundwater management or mitigation measures approved by the WAC based on recommendations of the TAC.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 10:35:20 AM
Remove "(hereinafter 'Parties'))" as it does not apply here.

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 10:37:46 AM

We thought this was changed to quarterly beginning with the 1st year of production pumping, not starting execution of the 3M. This is important to us because more frequent meeting will need to take place after the well field is operational and data with pumping is gathered.

Number: 3 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 10:39:04 AM

Should be a reference in this section to an annual meeting where the public is invited to attend.

Number: 4 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 10:39:57 AM

Our notes suggest that "based on Nevada Water Law" was struck by Rick Felling.

- viii. Review financial assurance periodically and make adjustments to amount as appropriate and recommend release of funds for mitigation and/or management measures.
- ix. Provide the NSE, Parties, and the local stakeholders with data and results of any analyses or technical evaluations, along with reports of specific implemented mitigation or management actions.
- x. Develop and implement a procedure to remove and replace WAC and TAC members as it deems necessary, excluding, however, removal of the founding members consisting of the NSE, EC, and EMLCC.

Technical Advisory Committee:

The WAC will appoint a Technical Advisory Committee (TAC) as a subcommittee to the WAC. Each Party represented on the WAC will be entitled to appoint a representative and be responsible for funding the participation of their respective TAC member. In addition, the USGS will be invited to participate as a member of the TAC. Funding for the USGS's participation in the 3M will be borne by EMLLC either through new or through existing joint funding agreements with USGS sponsored by Eureka County to study the Diamond Valley Flow System or by a "pass-through" agreement with the NSE. TAC members must exhibit a professional level of technical or scientific expertise and a background or experience in land management, natural resources, water resources, or other related field. Each Party, at its sole discretion may invite additional staff or consultants to attend TAC meetings.

The TAC will meet within 30 days after WAC appointment to review the proposed monitoring provided as Attachment A to this 3M. Upon completing this review, the TAC will make recommendations to the WAC for any changes to the monitoring components of this 3M. Thereafter, the TAC will meet at intervals deemed appropriate by the TAC to review and analyze data, but not less than twice annually or as instructed by the WAC.

At a minimum, purposes and functions of the TAC will be to:

- i. Review the proposed monitoring and recommend to the WAC implementation, including any changes to the specific monitoring elements, as appropriate.
- ii. Review historic groundwater level trends, spring and stream flows to determine historic hydrologic trends. Where possible, identify wet and dry regimes, climate effects on groundwater recharge rates and base flows in surface waters.
- iii. Review, develop, and refine standards and quality control procedures for data collection, management, and analysis.
- iv. Inform the entity or entities that collect data of standard accepted protocols of data collection, recording and analysis (e.g., USGS) that will be used.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 10:44:02 AM

Our notes show that this entire section (x) was to be removed and a statement included in 5.B.b on page 3. It does not fit where it is because it is not a "purpose and function" of the WAC but a operating guideline.

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 10:45:23 AM

At this point, "will be" can be changed to "is"

- v. Evaluate monitoring data, reports, analyses, etc. to determine whether data gaps exist and make appropriate recommendations to the WAC.
- vi. Develop and recommend action criteria to the WAC for management or mitigation measures based upon available data and analyses.
- vii. Evaluate all monitoring data to determine if any action criterion has been or is predicted to be exceeded, indicating a possible adverse impact and report findings to the WAC.
- viii. Recommend mitigation and management measures and related scope of work details to the WAC. This includes individual resources or a comprehensive list of all resources to support WAC evaluation of the adequacy of mitigation funding.
- ix. Evaluate the effectiveness of mitigation, if implemented, and report findings to the WAC.
- x. Make recommendations to the WAC regarding the numerical groundwater flow model, including appropriate times for any model updates and modes of model output.

Numerical Groundwater Flow Model:

1. EMLLC has developed the Numerical Groundwater Flow Model (FM) to simulate the groundwater flow system and the FM will be updated to incorporate the data collected under this 3M. EMLLC will update the FM after recovering data from the first year of wellfield pumping for mineral processing as recommended under the provisions of this 3M. Thereafter, EMLLC will update the FM on a schedule as determined under the provisions of the 3M.
2. The FM will be used as a management tool to evaluate predictions of drawdown and impacts and to help define action criteria.

Prevention of Interbasin Transfer from Diamond Valley Basin:

1. If excess water is produced within the Diamond Valley Hydrographic Basin which is not consumed in that basin, this water will be returned to the Diamond Valley Hydrographic Basin. As described in Section 6.E., water derived from pit dewatering and consumed will be documented and reported by EMLLC to verify that the volume of water extracted from Diamond Valley is equal to or less than the volume of water consumed in Diamond Valley (e.g. no transfer of water out of Diamond Valley).

Action Criteria:

1. Specific quantitative action criteria will be developed by the WAC with recommendations from the TAC. These criteria will be developed to provide early warning of potential adverse impacts to water rights, determined to be caused by Project groundwater pumping.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:10:31 AM

Although we understand that Rick Felling felt that 1 year of data would be sufficient for beginning to update the model, we still believe that the process of updating the model should begin after recovering 6 months of data. Further, EML is already going to be required to update the model anyway for BLM "after recovering 6 months of post-operational monitoring data."

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:11:06 AM

Should be "i.e." rather than "e.g."

When any action criterion that has been adopted as part of this 3M is reached, the following management actions will be triggered:

- i. The TAC will meet as soon as possible to assess whether the action criterion exceedance is caused by Project groundwater pumping and present their findings to the WAC.
- ii. If the WAC determines that any action criterion exceedance is caused by Project groundwater pumping, the TAC will expeditiously develop mitigation or management measures for the WAC to consider. The TAC will analyze the feasibility of the specific measures to assess alternatives, evaluate the potential effectiveness of the measures, and evaluate potential impacts created by implementation of the measures.
- iii. The WAC will determine whether or not to recommend implementation of the mitigation or management measures and to also recommend if the funds described in MITIGATION will be used to implement such measure.
- iv. The effectiveness of any implemented measure will be evaluated by the TAC to ensure the measure met or exceeded the intended result. Results and recommendations for any additional measures will be reported to the WAC.
- v. Any member of the WAC may propose an additional action criterion or a change to existing action criteria. Any such change must be presented in writing to the WAC and accompanied by analyses to support the proposed change.

Decision-Making Process:

- For technical issues, including, but not limited to monitoring modifications, setting action criteria, and appropriate mitigation, decisions under this 3M will be made after considering the evaluation and recommendations of the TAC. 
- Any decisions made by the WAC under this 3M shall be by unanimous vote with both EMLLC and EC present and all Parties being afforded the opportunity to attend meetings where decisions will be made. If unanimity is not achieved, the Parties may jointly agree to conduct additional data collection and/or data review and analyses directed at resolving the different interpretations or opinions. If that is not successful, the Parties may refer the issue, accompanied by their respective opinions, to the NSE for final determination.
- Decisions made by the WAC regarding recommended modifications to the 3M, implementation of mitigation, or other management actions that would be required of EMLLC will be subject to the jurisdiction and authority of the NSE.
- Nothing herein limits or changes the NSE authority, and any Party can petition the NSE to consider any issue.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:12:24 AM

Insert "of WAC members present" to read "unanimous vote of WAC members present" to clarify what is meant by unanimity.

Modification of the 3M

Nothing herein seeks to limit, alter, modify or change the exclusive authority of the NSE to approve or modify the 3M.

The Parties may individually or jointly petition the NSE to modify this 3M in the event that mutual agreement cannot be reached. Any such petition shall be concurrently provided to the other Parties. Prior to the NSE decision, all Parties will be provided the opportunity to submit a written response to the NSE no later than 60 calendar days following the date of receipt of the petition by NSE.

Any modification to the 3M must be approved by the NSE.

MONITORING

Hydrological related studies for the Project contain data concerning water and related resources in Kobeh Valley, Diamond Valley, Pine Valley, and surrounding areas. These include locations of existing and proposed supply and monitoring wells, groundwater extraction rates, groundwater level measurements, flow from springs and streams, water quality, precipitation data, and wetland/riparian conditions. Additional data relevant to the Project available from other local, state, and federal agencies or other reliable sources will be compiled into a database by EMLLC and expanded as new data are collected under the provisions of this 3M.

The proposed monitoring is provided in Attachment A to this 3M. As described in the MANAGEMENT of this 3M, the TAC will review this proposed monitoring and provide recommendations to the WAC regarding changes and/or implementation. In addition to this initial review, the TAC will review the proposed monitoring and make recommendations to the WAC for changes throughout the Project life based on monitoring data and analysis. Such recommended changes may include, but not be limited to, addition or deletion of monitoring sites, addition or deletion of monitoring parameters, changes to monitoring methods, and increases or decreases in monitoring frequencies. Upon acceptance by the NSE of this 3M, EMLLC will implement the monitoring requirements as set forth in Attachment A.

The term "as is feasible" as used in this 3M relates to mechanical failures or other events/reasons outside the control of the Parties, as agreed upon by the Parties, that interfere with data collection.

Groundwater

- Groundwater pumping will be measured by flow meters installed on each production well, dewatering well and pit dewatering sump.

1. Water levels in all wells included as part of the Project monitoring network will be measured by recording pressure transducers (data loggers). The measurement frequency will depend on distance to the wellfield and based on TAC recommendations.
2. The Project monitoring network will include "sentinel" wells (i.e., wells strategically located to provide early indication of drawdown propagation towards sensitive or important resources). At a minimum these will be located near the boundary between Kobeh, Diamond, Pine and Antelope valleys; between the pumping wells and the headwaters of Henderson and Roberts Creeks and Tyrone Gap; between the wellfield and Gravel Pit Spring, Bartine artesian wells, the Antelope Valley Hot Springs (Klobe Hot Springs), and the stock wells at Hay Ranch. Nested wells that monitor individual aquifers at a single location where more than one hydrostratigraphic unit is present or strong vertical gradients may exist will be completed, as is feasible.
3. Test wells constructed at each Project production well site will be maintained as monitoring wells, as is feasible, and equipped with recording pressure transducers.
4. Several USGS monitoring wells are located near the proposed well field and within the projected drawdown area. If the USGS is not funded to monitor these specific wells, EMLLC will request USGS permission or seek other means to collect data from these wells.

Pit Dewatering

1. Groundwater will be extracted from the Diamond Valley Hydrographic Basin either by wells or pit dewatering sumps. To determine the amount of water from pit dewatering within the Diamond Valley Hydrographic Basin, the total groundwater removed by pit dewatering sumps will be measured by totalizing flow meters and then multiplied by a factor reflecting the portion of the pit area that is located in Diamond Valley Hydrographic Basin. The discharge from dewatering wells will be measured with totalizing flow meters and allocated to the basin in which the well is located. Water truck loads utilized in the pit complex will be counted and recorded to document water used in Diamond Valley for mine environmental dust suppression. The amount of water used in Diamond Valley for other uses will be metered or estimated and recorded in the database.

Surface Water

1. At a minimum, the monitoring of stream flow will be conducted as follows:
 - i. Monitoring will include continuous measurements of stream stage at selected control sections for each stream as is feasible.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:17:49 AM

Our notes and recollection are that is was determined that USGS will be funded by EML to continue monitoring these wells.

- ii. The geometry of the control sections will be measured at the start of monitoring and re-measured at least annually.
- iii. Stage measurements will be collected with recording pressure transducers on a frequency of not less than one hour.
- iv. The flow in the streams at the control sections will be gaged monthly, as is feasible, for the first year of record to establish stage-discharge relationship for each gaging station and following any changes in the control section geometry.
- v. All control sections in streams will be assessed routinely for any changes in the control section geometry and the stage discharge relationship be re-established accordingly.
- vi. Following the first year of gaging, stream-flow measurements will be collected at least quarterly.
- vii. Flow data will be recorded at least quarterly and hydrographs updated at least annually.

Water Quality

Water quality samples will be collected from selected production and monitoring wells, surface waters and pit water and analyzed by a laboratory certified by the State of Nevada using standard accepted protocols and a standard water test. Macroinvertebrate monitoring will take place in select streams as an indicator of general stream ¹ or fishery health.

Biological Resources

- 1. Monitoring of vegetation, including phreatophyte vegetation, riparian zones, and plant succession will be conducted. These locations, as itemized in Attachment A will include sites in Kobeh Valley, Diamond Valley, Pine Valley, Antelope Valley and some surrounding valleys that may be affected by groundwater extraction. Data will be collected using a variety of techniques and will include on-site measurement of vegetation cover, frequency, and type. Shallow wells will be co-located with vegetation monitoring transects. Remote sensing will be employed to help define and monitor the extent of vegetation communities at a larger spatial scale.

Meteorology

- a. Weather/Climate stations will be installed and maintained to continuously monitor wind speed and direction, precipitation, temperature, barometric pressure, humidity, and solar radiation. Existing precipitation stations will be used where possible. The purpose of collecting weather/climate data is to provide the WAC with a basis for evaluating whether changes in groundwater levels or stream and spring flow are due to changes in weather or climate.

Elevation Control/Subsidence

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:29:23 AM

Our notes and recollection show that Rick Felling requested specific details for this monitoring. This is where Eureka County's expertise in vegetation monitoring and rangeland science would be useful. We have made many recommendations to EML on this over the past few years during the BLM process that should be incorporated.

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 12:12:50 PM

Should read "shifts in the state of plant communities" rather than "plant succession." Plant succession is primarily a natural change outside of anthropogenic influences. Current understanding of range science uses Ecological Site Descriptions and States and Transitions rather than linear succession.

Number: 3 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:25:35 AM

These locations were not itemized in Attachment A. Attachment A still reads "locations to be determined." Perhaps it should read "These locations will be determined under this 3M and itemized in Attachment A."

Number: 4 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:32:27 AM

Add sentence, "Monitoring of phreatophyte vegetation on private lands, primarily salt grass meadows, will be included."

Monitoring locations for subsidence, groundwater measuring point elevations and ground surface elevations will be established using survey-grade GPS instrumentation. A standard GPS data collection protocol (i.e. common geographic datum) will be used to allow a comparative base for all elevation associated data. Subsidence monitoring will be augmented using remote sensing technologies (e.g. InSAR). Frequency and methodology of remote sensing to monitor subsidence will be reviewed and determined by the WAC in consideration of TAC recommendation.

Data Management

All monitoring data will be entered into the 3M database on a regular, timely, and continual basis as it is collected and verified using WAC approved quality assurance and quality control (QA/QC). Data collected under or as described in this 3M will be fully and cooperatively shared among the Parties. Verified data within the 3M database will become available to the public, upon request.

In addition to updating the 3M database on a regular and continual basis, EMLLC will provide an annual report that summarizes all information and analysis. This report will be prepared based on recommendations and in cooperation with the TAC. These reports will be provided to the Parties for assessment of impacts to water and water dependent resources resulting from groundwater extraction of the Project.

MITIGATION

EMLLC will mitigate adverse impacts, if any, as agreed upon under the provisions of this 3M. The WAC will take necessary steps, including recommending whether funding described below may be used as outlined in this 3M, to ensure that mitigation actions are feasible, reasonable, timely, and effective.

Effectiveness of implemented mitigation measures will be evaluated under the provisions of this 3M. Additional measures will be implemented if a previous mitigation measure does not meet its intended purpose(s).

To ensure funding exists for any required future mitigation, including monitoring and mitigation after the cessation of active mining, EMLLC will demonstrate its financial capability to complete any such approved mitigation and monitoring by providing reasonable financial assurances under the provisions of this 3M.

EMLLC's financial assurances (FA) funding will be placed into an interest bearing trust account to be established as a part of this 3M. The initial funding will occur in a manner as follows:

1. Initial funding of \$250,000 will occur within 60 days of the GMI Board of Directors' approval to commence construction of the Project.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:36:07 AM

Add sentence to read, "These reports will also be provided by EMLLC to the public, upon request."

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:34:56 AM

Add "c. The WAC will host a public meeting after the annual report has been published to present any findings to the interested public.

Number: 3 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:37:36 AM

Strike "if any." If any impact has already been defined as adverse, it has occurred. "If any" has no place in this sentence and only confuses the reader.

Number: 4 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:38:37 AM

Strike "reasonable" or define it.

Number: 5 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:41:57 AM

As discussed at the meeting in Carson City, this section needs to explicitly state somewhere that mitigation during mining will not be funded through this "financial assurance" but that this funding is in place solely for monitoring and mitigation after cessation of mining.

Number: 6 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:44:29 AM

Our understanding was that the details of this funding would be worked out, or at least proposed, by EMLLC in this 3M draft. There are still many outstanding questions. Who will be the trustee? What is the mechanism to release funding? Where will the \$ reside?

Additional funding of \$750,000 will occur no later than the end of month six of wellfield pumping for mineral processing (plant startup).

Funding will be examined and adjusted, as recommended by the WAC, every three years to ensure sufficient funding is in place to mitigate all potential adverse impacts, including funding for operating and maintenance and long-term replacement costs.

After cessation of mining and groundwater pumping by EMLLC, if the NSE determines that there is no longer a reasonable potential for future impacts attributable to the Project, any excess funds, including interest, remaining in the account will be returned to EMLLC.

This 3M does not outline specific measures to mitigate the occurrence of predicted drawdown, but outlines a procedure to identify and mitigate adverse impacts.

To ensure wildlife have continued access to customary use, adversely impacted surface water sources will be mitigated through such measures including, but not limited to, installation and maintenance of replacement water sources or equal or greater volume (e.g. guzzlers) in the same area as the impacted water source.

EMLLC will mitigate permitted water rights and determined and undetermined claims of vested or reserved rights should adverse impacts occur.

Contingency measures, if necessary, will be developed and implemented on a case-by-case basis under provisions of this 3M.

Potential mitigation measures could include the following:

1. Supply (Project) water will be provided from wells located in Kobeh Valley that are completed in the carbonate and alluvial aquifers. Pumping of these different aquifers will have different impacts to the groundwater and surface water flow systems. Adjustment of carbonate/alluvium groundwater pumping ratio could be employed.
2. Impacts can be greatly influenced by the specific location of groundwater pumping. There could be reduction or cessation of groundwater extraction from one or more wells and/or geographic redistribution of groundwater extraction.
3. Environmentally sound revegetation in selected areas considering utilization of alternative plant biomes. Augmentation of water resources with other groundwater. Alternative sources may be provided to enhance or replace existing sources. For example, replacement wells may be drilled if lowering of groundwater adversely impacts an existing groundwater right. Water could be obtained from alternate groundwater sources and used to mitigate specific adverse impacts to surface water flows (e.g., well and tank). If livestock water sources are adversely impacted, it will

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:45:39 AM

Insert "at least" to read "at least every three years..." This makes it clear that the WAC can determine that additional funding may be necessary on their own accord.

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:46:29 AM

Insert "after cessation of mining" to read "...replacement costs, after cessation of mining."

Number: 3 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:53:25 AM

We are still concerned that NSE is allowing for impacts of water rights that are predicted will occur by avoiding the issue until they do occur. For clarification, this paragraph should read, "This 3M does not outline specific measures to mitigate predicted, potential impacts due to Project pumping but outlines a procedure to identify and mitigate adverse impacts when they occur."

Number: 4 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 11:55:53 AM

It seems like the first sentence in "c" was a replacement to "c" in the previous version "Restoration, modification, or replacement of existing habitat or forage using a variety of means ..." and should be separate from the rest of this paragraph as a stand-alone mitigation measure.

Number: 5 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 12:00:07 PM

Consider rewriting to read, "Environmentally sound revegetation in selected areas with vegetation communities suitable for the state of the ecological site."

be ensured that augmented or replacement water sources are coordinated with the razing permittee's season-of-use.

Any impact to individual water rights determined to be caused by Project groundwater pumping could be compensated financially or, if agreed upon, property (i.e., land and water rights) of equal value could be purchased for replacement.

If adverse impacts to the Diamond Valley Flow System, or other adjacent basins are determined to be caused by Project groundwater pumping, active and current water rights (water currently pumped) within the affected basin could be purchased and retired.

Implement technology to reduce fresh-water consumption of the Project. Pumping rates may be decreased if alternative technology emerges that could reduce water requirements or increase water recycling rates. Water conservation techniques will be proactively employed in order to reduce other mitigation measures (i.e. before any impact is measured).

Other measures as agreed to by the Parties and/or required by the NSE.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 12:04:44 PM

The previous "h" (related to water-dependent recreation) was not discussed as coming out. Since this is a list of possible mitigation, it does not hurt anything to have this previous language included.

Number: 2 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 12:23:58 PM

What about potential mitigation for subsidence? We know that this is touchy, but there should be something at least informing the stakeholders and the public that it has been thought about.

Number: 3 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 12:08:12 PM

It is important to us that curtailing pumping is a legitimate mitigation measure that is listed. One of the themes of the meeting in Carson City was to clearly document the 3M in recognition that many of us will not be around later, given the projected life of the project. If not mentioned here, there will not be any written record that this was a point discussed and understood by those of us in attendance that curtailment is an option. Please include another bullet stating NSE ability to curtail pumping as a mitigation measure.



Mount Hope Mine Project
Attachment A to 3M - Monitoring Plan

This Monitoring Plan has been developed by Eureka Moly, LLC (EMLLC) to provide the monitoring component of the 3M (Monitoring, Management and Mitigation) Plan prepared and submitted to the Nevada State Engineer (NSE). Preparation of the 3M and acceptance by NSE is required by Ruling #6127 dated July 15, 2011.

The purpose of this Monitoring component of the Mt Hope 3M Plan is to identify and characterize changes to the hydrologic environment that could be caused by groundwater withdrawals for the Mt Hope Mine. It is recognized that impacts to water resources may occur from natural processes, non-project related water resource development, and land management practices, as well as from the Mt Hope mining operation.

Specific objectives of this WRMOP are to:

- Confirm or improve the understanding of the hydro-geologic system.
- Measure changes to surface water flows and groundwater levels caused by the groundwater withdrawals for the project.
- Characterize impacts to streams, seeps and springs caused by the project.
- Evaluate impacts to vegetation and/or wildlife habitat caused by the project.
- Support periodic updates to the hydrologic model to improve the predictive quality of the model.
- Provide an early warning capability to detect adverse impacts before they become unmanageable.

Monitoring locations, parameters, and frequencies have been selected to facilitate identification and assessment of impacts. Thus, an overview of the predicted aquifer response is warranted:

- ▶ Significant ground water consumption in Kobeh Valley is expected to remove water from storage and lower groundwater elevations in portions of Kobeh Valley.
- ▶ Reduction of spring or surface water flows in portions of Kobeh Valley is possible as a result of the lowered groundwater levels.
- ▶ Groundwater drawdown in the extreme western portion of Diamond Valley, in the vicinity of Tyrone Gap, is predicted to occur as the open pit extends below the water table.
- ▶ Predicted affects to the groundwater aquifer in Diamond Valley are minimal. Current data suggests that the hydrologic interconnection between Kobeh Valley and Diamond Valley is limited. Historical data document a significant reduction in water levels in Diamond Valley due to extensive agricultural uses of groundwater.
- ▶ As the cone of groundwater depression propagates to the north from the well field or to the north and northwest from the pit area, it could encroach upon the southernmost or south-easternmost portions of the Roberts Mountains. The regional aquifer is not thought to be connected to the shallow aquifer; however, lowering of the shallow aquifer level in this area could result in reduction of spring or surface water flows or lowering of shallow groundwater tables that support wet meadow complexes and associated wildlife habitat in these areas.

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 12:10:04 PM

Based on the Carson City meeting, Attachment A was supposed to include only the Table and the maps. Having the text from the BLM plan is confusing and contradictory in many circumstances.

Ground subsidence and development of fissures at the ground surface could occur due to removal of interstitial water from a substantial volume of alluvial sediments in Kobeh Valley.

In general, the potential for affects increases both with proximity of a given resource to the proposed well field and with increased duration of pumping.

Figures 1 and 2 depict the area that is predicted to experience groundwater drawdown in excess of ten feet at 44 years following project start-up. Figures 1 and 2 also show monitoring locations selected for this 3M

MLLC will monitor flows in:

- Steiner Creek in southeast Grass Valley, west of Kobeh Valley
- Pine Creek in southern Monitor Valley, south of Kobeh Valley; and
- Allison Creek in Antelope Valley, south of Kobeh Valley.

These regional streams will serve as analogs to provide improved understanding of seasonal or regional conditions that may be impacting the flows in perennial streams. Groundwater flow relationships will be established at these locations and the streams will then be equipped with pressure transducers to allow continuous measurement.

MLLC will implement documented quality assurance and quality control procedures. Monitoring data will be recorded using a standardized (NDEP-compliant) protocol and format for each monitoring event. It is anticipated that protocols will be based on those described by Rantz and others (1982) for surface water flow monitoring, Lapham and (1995) for groundwater level monitoring, and Wilde (2005) for water sampling. Laboratory analyses will be conducted by Nevada-certified laboratories using standard laboratory quality control procedures.

Tables 1 and 2, provided at the end of this document, lists the proposed monitoring site locations, type of monitoring, monitoring frequency and a brief rationale for selecting each location. Wells identified in Table 1 include both existing wells and wells that MLLC proposes to construct upon project approval. Some wells are located within pit limits that would be mined out as the project advances, and these locations would be dropped from the monitoring plan at that time. Site locations are shown on the attached figures. The monitoring sites in Tables-1 and 2 are organized by locations corresponding to those shown on the attached figures.

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REFERENCES

W.W., Wilde, F.D., and Koterba, M.T., 1995, *Ground-water data collection protocols and procedures for the National Water-Quality Assessment Program: Selection, installation, and documentation of wells, and collection of related data*: U.S. Geological Survey Open-File Report 95-398, 70 p.

E., et al., 1982. *Measurement and computation of streamflow*, U.S. Geological Survey Water Supply Paper 2175, Volumes 1 and 2, 631 p.

D., 2005, *National field manual for the collection of water-quality data*: Book 9, Handbooks for Water-Resources Investigations, U.S. Department of the Interior and the U.S. Geological Survey.

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Area	Site Name(s)	Parameters	Frequen	Formation	Rationale
Diamond Valley Groundwater	GMI-PDT-1	Depth to Water	Continuous	Vinini hornfels	Pit area groundwater drawdown monitoring
	GMI-PDT-2	Depth to Water	Continuous	Vinini and hornfels	Pit area groundwater drawdown monitoring
	GMI-PDT-3B	Depth to Water	Continuous	Vinini Hornfels	Pit area groundwater drawdown monitoring
	IGMI-152	Depth to Water	Continuous	Vinini Fm	Pit area groundwater drawdown monitoring
	IGMI-155	Depth to Water	Continuous	Qtz Porphyry	Pit area groundwater drawdown monitoring
	IGMI-156	Depth to Water	Continuous	Vinini Fm	Pit area groundwater drawdown monitoring
	IGMI-157	Depth to Water	Continuous	Vinini Fm	Pit area groundwater drawdown monitoring
	IGM-169	Depth to Water	Continuous	Vinini Hornfels	Pit area groundwater drawdown monitoring
	IGMI-226P	Depth to Water	Continuous	Vinini Fm	Pit area groundwater drawdown monitoring
	IGMI-228P	Depth to Water	Continuous	Vinini Fm	Pit area groundwater drawdown monitoring
	IGMI-230P	Depth to Water	Continuous	Tuff	Pit area groundwater drawdown monitoring
	IGMI-232P	Depth to Water	Continuous	Vinini Fm	Pit area groundwater drawdown monitoring
	IGMI-233P	Depth to Water	Continuous	Tuff	Pit area groundwater drawdown monitoring
	IGMI-MH-248	Depth to Water	Continuous	Bedrock	Pit area groundwater drawdown monitoring
	NDWR-15462	Depth to Water	Continuous	Alluvium	Pit area groundwater drawdown monitoring
	MH-300	Depth to Water	Continuous	Alluvium	Monitoring groundwater gradient changes in Tyrone Gap with MH --

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Diamond Valley Groundwater					301
	MH-301	Depth to Water	Continuous	Alluvium	Monitoring groundwater gradient changes in Tyrone Gap with MH – 300
	MH-302	Depth to Water	Continuous	Alluvium	Monitor influence of potential increased transmissivity zone through Whistler Range.
	MH-303	Depth to Water	Continuous	Alluvium	Monitor groundwater elevation trend on west side of Diamond Valley; Sentinel well.
	MH-304	Depth to Water	Continuous	Alluvium	Monitor groundwater elevation trend on west side of Diamond Valley; Sentinel well.
	MH-305	Depth to Water	Continuous	Alluvium	Monitor drawdown east of pit.
	IGMI-158	Depth to Water	Continuous	Alluvium	Monitor groundwater elevation trend on west side of Diamond Valley; Sentinel well.
	IGMI - 236P	Depth to Water	Continuous	Vinini Fm	Monitor groundwater elevation change in Whistler Range; Sentinel well.
	Romano Well	Depth to Water	Continuous	Vinini Fm	Monitor groundwater elevation trend on west side of Diamond Valley; Sentinel well.
	MH – 306 (153 N21 E52 10AAAC1)	Depth to Water	Continuous		Monitor groundwater elevation trend on west side of Diamond Valley
	MH – 307 (153 N20 E52 26AABC1)	Depth to Water	Continuous		Monitor groundwater elevation changes in Devil's Gate.
	MH – 308 (153 N20 E52 26AABC2)	Depth to Water	Continuous		Monitor groundwater elevation changes in Devil's Gate.
Diamond Valley Springs	KV-059 (Stinking)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	KV-060 (Hash)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts

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	KV-061 (Railroad)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	KV-062 (Trap Corral)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	DV -065 (Shipley)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	SP-1 (McBride)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	SP-2 (Garden pass)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	SP-3 (unnamed)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	SP-4 (Mt Hope)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	SP-7 (unnamed)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
Kobeh Valley Groundwater	All production wells	Flow and Depth to Water	Continuous	Alluvium and carbonate	Measure well field production, individual well response to pumping stress, and drawdown progression in wellfield
	GMI-RWX-228T	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	GMI-RWX-229	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	RWX -205	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH-400	Depth to Water	Continuous	Alluvium	Monitor groundwater elevation change in alluvium on west side of Whistlers paired w/ MH-401 to assess connection between alluvium and bedrock aquifers; assess effect of inferred structure located to the east.
	MH-401	Depth to Water	Continuous	Bedrock	Monitor groundwater elevation

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Kobeh Valley Groundwater				change in bedrock on west side of Whistlers paired w/ MH-400 to assess connection between alluvium and bedrock aquifers; assess effect of inferred structure located to the west.	
	MH-402	Depth to Water	Continuous	Alluvium	Monitor drawdown at east edge of Kobeh Valley.
	MH-403	Depth to Water	Continuous	Alluvium	Monitor potential drawdown in upper Roberts Creek; Sentinel.
	MH-404	Depth to Water	Continuous	Bedrock	Monitor potential drawdown in western part of Robert's Creek watershed; Sentinel.
	MH - 405	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH - 406	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH - 407	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH - 408	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH - 409	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH - 410	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH - 411	Depth to Water	Continuous	Alluvium	Measure drawdown progression in wellfield
	MH - 412	Depth to Water	Continuous	Alluvium	Monitor groundwater elevation change in transition zone between wellfield and pit area
	MH-413	Depth to Water	Continuous	Alluvium	Monitor groundwater elevation change in transition zone between wellfield and pit area

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MH - 414 (139 N21 E49 25BBDA)	Depth to Water	Continuous	Alluvium	Monitoring of west side of KV wellfield drawdown
MH - 415 (139 N21 E50 17BACC)	Depth to Water	Continuous	Alluvium	Monitoring of west side of KV wellfield drawdown
MH - 416 (139 N20 E51 05CBCC)	Depth to Water	Continuous	Alluvium	Monitoring of south side of KV wellfield drawdown
MH - 417 (139 N21 E51 36DCDB1)	Depth to Water	Continuous	Alluvium	Monitoring of southeast side of KV wellfield drawdown
MH - 418 (139 N21 E51 24DDDB1)	Depth to Water	Continuous	Alluvium	Monitoring of southeast side of KV wellfield drawdown
MH - 419 (139 N20 E49 23ACCB1)	Depth to Water	Continuous	Alluvium	Monitoring of drawdown between wellfield and Bean Flat phreatophytes
MH - 420 (139 N20 E49 24ACAB)	Depth to Water	Continuous	Alluvium	Monitoring of drawdown between wellfield and Bean Flat phreatophytes
MH - 421	Depth to Water	Continuous	Alluvium	Monitoring of west side of KV wellfield drawdown
RWX - 209 shallow and deep	Depth to Water	Continuous	Alluvium / Vinini	Monitoring of northwest side of KV wellfield drawdown
MRCMW	Depth to Water	Continuous	Alluvium	Monitoring of potential drawdown in Roberts Creek watershed
LRCMW	Depth to Water	Continuous	Alluvium	Monitoring of potential drawdown in Roberts Creek watershed
IGM-154,	Depth to Water	Continuous	Alluvium	Pit area groundwater monitoring
IGMI-234P	DTW and Chemistry	Continuous	Alluvium	Monitor groundwater elevation change in Whistler Range; Sentinel well.
IGMI-235P	DTW and Chemistry	Continuous	Vinini Fm	Monitor groundwater elevation change in Whistler Range; Sentinel well.
IGMI-237P	DTW and	Continuous	Vinini Fm	Monitor groundwater elevation

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	Chemistry			change in Whistler Range; Sentinel well.
TM1-B	DTW and Chemistry	Continuous	Alluvium	Monitoring of east side of KV wellfield drawdown
Atlas 1	DTW/pressure	Continuous	Alluvium	Monitoring northwest of predicted 10 foot drawdown contour
Bartine Ranch Well 1, 2, 3 (flowing)	DTW/pressure	Continuous	Alluvium	Assess impact of pumping on artesian flows outside predicted 10 foot drawdown contour
Big Windmill	DTW/pressure	Continuous	Alluvium	Monitor groundwater elevation change in transition zone between wellfield and pit area
Colby well	DTW/pressure	Continuous	Alluvium	Assess impact of pumping on artesian flows outside predicted 10 foot drawdown contour
KV 064	DTW/pressure	Continuous	Alluvium	Assess impact of pumping on artesian flows outside predicted 10 foot drawdown contour
Depco INC;	DTW/pressure	Continuous	Alluvium	Monitoring of drawdown between wellfield and Bean Flat phreatophytes
Etchevery Windmill	DTW/pressure	Continuous	Alluvium	Monitoring of west side of KV wellfield drawdown
IGMI-MH-RWX-203 T	DTW/pressure	Continuous	Alluvium	Monitor groundwater elevation change in transition zone between wellfield and pit area
NDWR9211R	DTW/pressure	Continuous	Alluvium	Assess impact of pumping on artesian flows outside predicted 10 foot drawdown contour
RWX- 204	DTW/pressure	Continuous	Alluvium	Monitor groundwater elevation change in transition zone between wellfield and pit area
KFE	DTW/pressure	Continuous	Alluvium	Monitor groundwater elevation change in transition zone between

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					wellfield and pit area
	KFW	DTW/pressure	Continuous	Alluvium	Monitoring northwest of predicted 10 foot drawdown contour
	Treasure Well	DTW/pressure	Continuous	Alluvium	Assess impact of pumping on artesian flows outside predicted 10 foot drawdown contour
	GMI-RWX-223	DTW/pressure	Continuous	Alluvium	Measure drawdown progression in wellfield
Kobeh Valley Streams	LRC (Lower Roberts Creek)	Flow Rate; Water Quality	Continuous		Potential indirect impacts to perennial streams
	URC (Upper Roberts Creek)	Flow Rate; Water Quality	Continuous		Potential indirect impacts to perennial streams
	MH 700 (Cottonwood Canyon)	Flow	Continuous		Potential indirect impacts to perennial streams
	MH 701 (Cottonwood Canyon)	Flow	Continuous		Potential indirect impacts to perennial streams
Kobeh Valley Springs	KV-002 (Potato Canyon)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	KV-026 (Rutabega)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts near wellfield
	KV-034 (Mud)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts near wellfield
	KV-035 (Lone Mtn)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts south of wellfield
	KV-044 (Hot)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	KV-015 (Unnamed)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	KV-016 (Unnamed)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	KV-020 (Unnamed)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts
	OT-6 (Unnamed)	Flow, Photograph	Quarterly		Monitor potential indirect spring impacts

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	OT-7 (Nichols Spring)	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	MH - 702 (Jack Spring)	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts, west side of Roberts Mtn.
	MH - 703 (Klobe Spring)	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts in Antelope Valley
Pine Valley Springs	PV-059 (Dry Creek headwater spring)	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	PV-060	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	PV-061	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	PV-062	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	PV-063	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	PV-064	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	PV-065	Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
	Pine Valley Springs	OT-2	Flow, Photograph	Quarterly
OT-3		Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
OT-5		Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
OT-10A		Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
OT-11		Flow, Photograph	Quarterly	Monitor potential indirect spring impacts
Pine Valley Streams	LBC (Lower Birch Cr.)	Flow Rate	Continuous	Potential indirect impacts to perennial streams
	LHC (Lower Henderson)	Flow Rate	Continuous	Potential indirect impacts to

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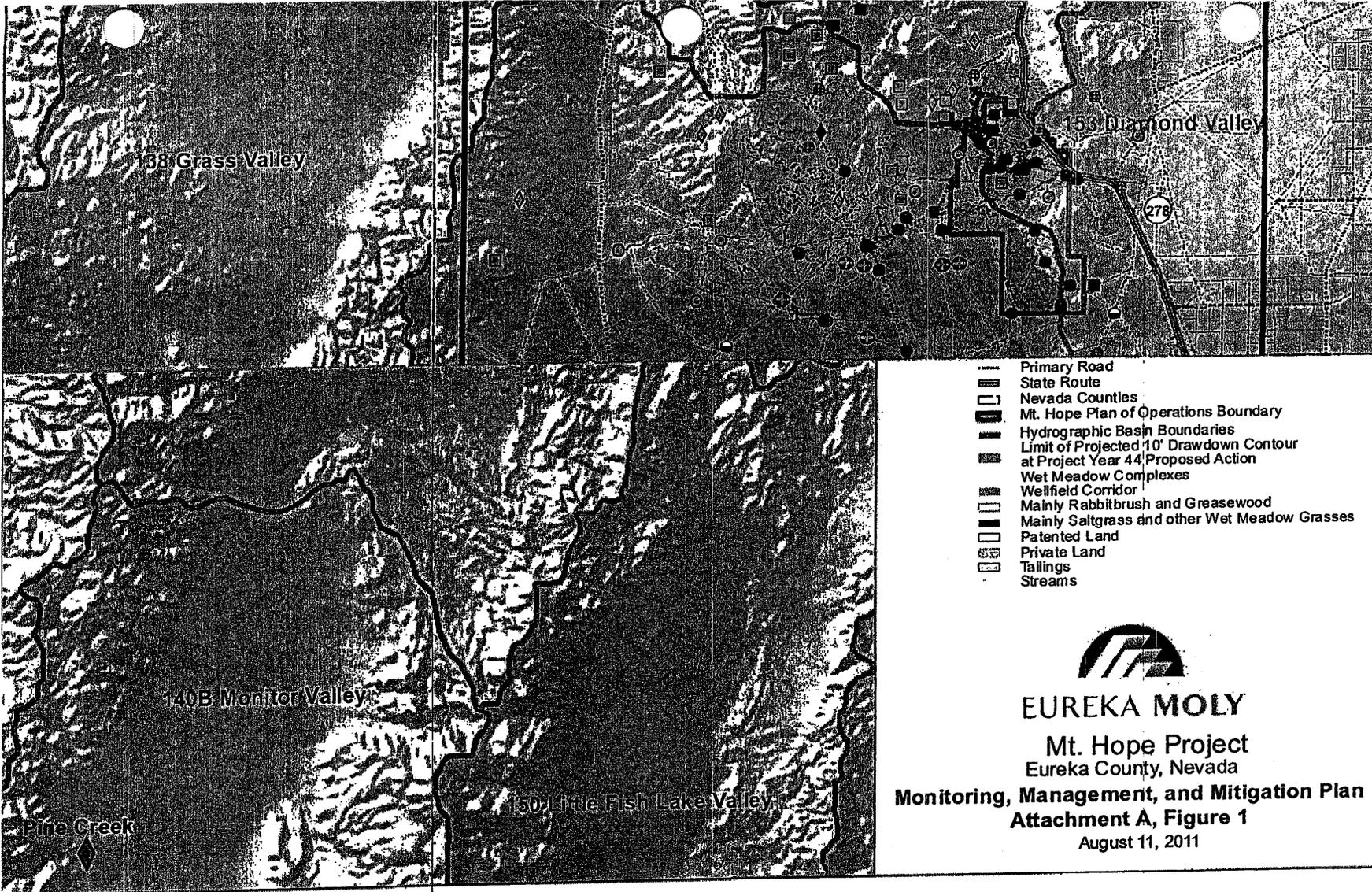
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	Cr.)				perennial streams.
	UHC (Upper Henderson Cr.)	Flow Rate	Continuous		Potential indirect impacts to perennial streams
	LPHC (Lower Pete Hanson Cr.)	Flow Rate	Continuous		Potential indirect impacts to perennial streams.
	UPHC (Upper Pete Hanson Cr.)	Flow Rate	Continuous		Potential indirect impacts to perennial streams.
	Tonkin Springs	Flow Rate	Continuous		Potential indirect impacts to perennial streams
	LVC (Lower Vinini)	Flow Rate	Continuous		Potential indirect impacts to perennial streams.
	UVC (Upper Vinini Cr.)	Flow Rate	Continuous		Potential indirect impacts to perennial streams.
	WC (Willow Cr.)	Flow Rate	Continuous		Potential indirect impacts to perennial streams.
Pine Valley Groundwater	MH-500	Depth to Water	Continuous	Bedrock	Sentinel well in mountain block south of Henderson Creek
	MH-501	Depth to Water	Continuous	Alluvium	Henderson Creek groundwater elevations
	MH-502	Depth to Water	Continuous	Bedrock	Sentinel well in mountain block east of springs in upper Henderson Creek

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Area	Site Name(s)	Parameters	Frequency
Wet Meadow Complexes in Roberts Mountains	Three to five vegetation transects in each of the WMC, locations to be determined;	Species composition, species richness, and plant cover.	Semi-Annually (May and July)
Phreatophytic vegetation in lower Kobeh Valley	Three to five vegetation transects in each of the phreatophyte vegetation communities, locations to be determined;	Species composition, species richness, and plant cover.	Transects - Semi-Annually (April and June);
Phreatophytic and riparian vegetation in lower Roberts Creek	Three to five vegetation transects in the watershed, locations to be determined	Species composition, species richness, and plant cover.	Transects - Semi-Annually (April; June);
Phreatophytic and riparian vegetation in Henderson Creek	Three to five vegetation transects in the watershed, locations to be determined	Species composition, species richness, and plant cover.	Transects - Semi-Annually (April; June);
Roberts Mountain	Not applicable	Remote sensing (Aerial photography or satellite imagery)	Initially for entire mountain; Every two years for riparian areas.
Streams in Roberts Mountains.	Roberts Creek, Vinini Creek, Henderson Creek	Macro-invertebrate monitoring	Annually (late summer/early fall base flow)
Mine site	Existing Mt Hope met station	Temperature, precipitation, humidity, wind speed and wind direction	Hourly
Roberts Mountains	Minimum of 3 high-altitude sites in Roberts Mountains, locations to be determined.	Precipitation	To be determined

Number: 1 Author: Eureka County Subject: Sticky Note Date: 1/9/2012 12:10:46 PM
Was supposed to be fleshed out in more detail. Still says "locations to be determined."



SE ROA 0431

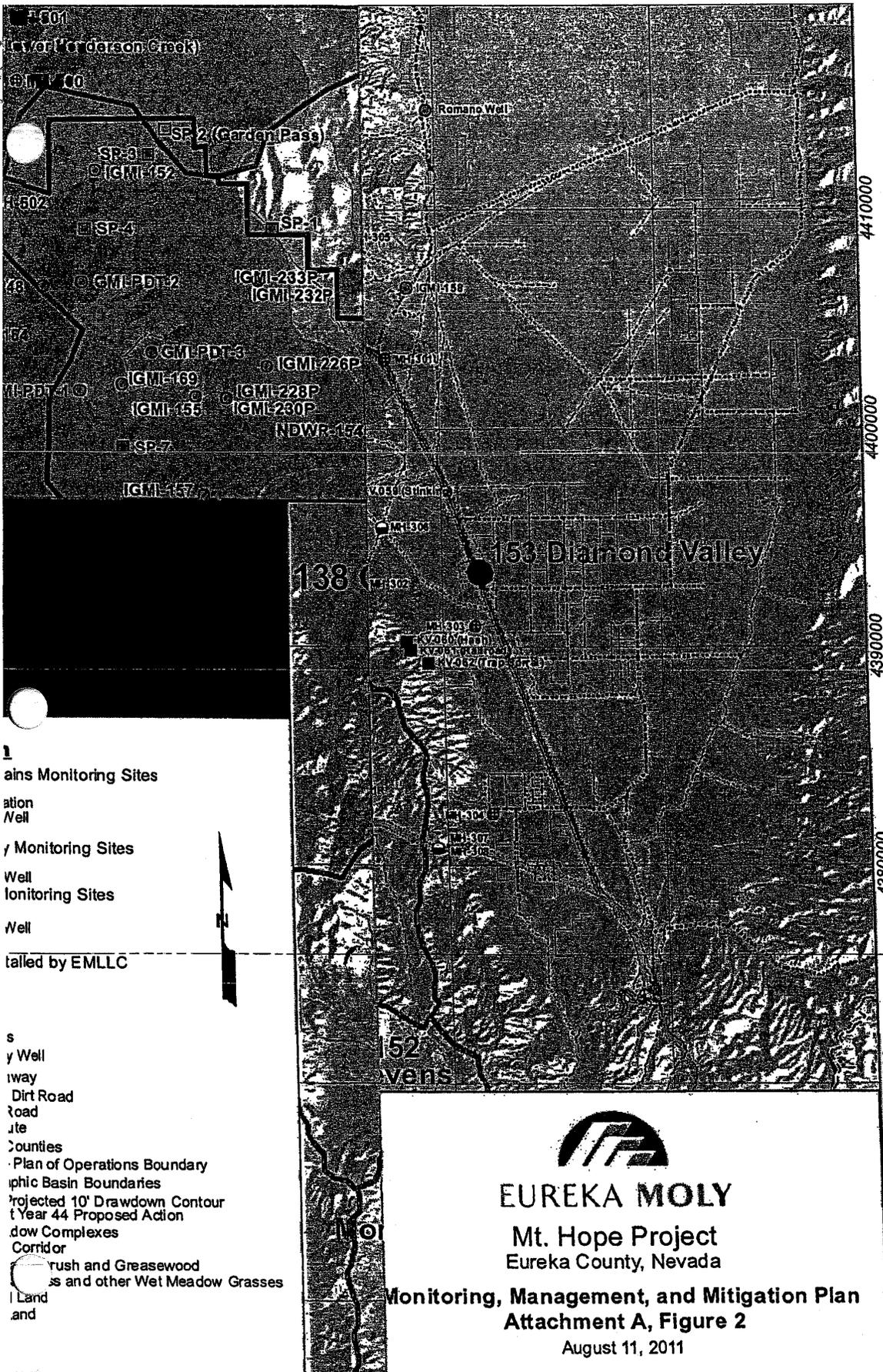
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- 1 Inflow Monitoring Sites
- Springs
- Well
- Springs Monitoring Sites
- Well Monitoring Sites
- Well
- Delineated by EMLLC

- Wells
- Dry Well
- Highway
- Dirt Road
- Road
- Route
- Counties
- Plan of Operations Boundary
- Hydrologic Basin Boundaries
- Projected 10' Drawdown Contour for Year 44 Proposed Action
- Drawdown Complexes
- Corridor
- Rush and Greasewood
- Grasses and other Wet Meadow Grasses
- Land
- and


EUREKA MOLY
 Mt. Hope Project
 Eureka County, Nevada
Monitoring, Management, and Mitigation Plan
Attachment A, Figure 2
 August 11, 2011

SE ROA 0433

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YAHOO! MAIL
Classic

FW: 3M

From: "Pat Rogers" <progers@generalmoly.com>

1 File (126KB)



3M NSE E...

From: Pat Rogers
Sent: Thursday, January 26, 2012 4:51 PM
To: 'Jake Tibbitts'
Cc: Elise Brachtl
Subject: 3M

Jake,

Attached are edits, in redline, made by Rick Felling, after he received your comments of January 9, 2012. We have not responded to Rick, but will copy you with our response, when we make it.

Pat

Pat Rogers
Director, Environmental and Permitting
General Moly, Inc.
2215 North 5th St
Elko, NV 89801

775-397-4448 (c)
775-748-6008 (o)
progers@generalmoly.com



GENERAL MOLY

SE ROA 0436

3MJA 000480

NEVADA DIVISION OF WATER RESOURCES MONITORING, MANAGEMENT,
AND MITIGATION PLAN FOR THE MT. HOPE PROJECT

1. BACKGROUND

A. This Monitoring, Management, and Mitigation Plan (3M) applies to proposed groundwater extraction from Kobeh Valley and Diamond Valley for mining process water rights granted in Ruling 6127 of the office of the Nevada State Engineer (NSE) dated July 15, 2011. A condition of this Ruling was that this 3M be prepared with input and cooperation of Eureka County (EC). The groundwater extracted will be consumed in activities related to the Mt. Hope Project (Project), including mineral processing and mine dust control. The groundwater will be developed by Eureka Moly, LLC, (EMLLC) through Kobeh Valley Ranch, LLC (KVR), both of which are subsidiaries of General Moly, Inc. (GMI), with KVR being the water rights holder. The Lessee of the water rights and operator of the Project is EMLLC. The groundwater will be supplied primarily from a wellfield in Kobeh Valley and conveyed via pipelines to the mine and mill site. In addition, groundwater will include water derived from open pit dewatering at rates that are predicted to reach a maximum of 742 af/yr. The distribution of this water from the pit is estimated at 20% from Kobeh Valley Hydrographic Basin and 80% from the Diamond Valley Hydrographic Basin.

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2. PURPOSE OF THE 3M

- A. The purpose of this 3M is to assist the NSE in managing development of groundwater resources within and near the Project area to avoid adverse impacts to existing water rights.
- B. While it is the goal to avoid any adverse impacts due to the groundwater pumping, the 3M outlines a process by which adverse impacts will be identified and ultimately mitigated. It is intended to provide the necessary data to assess the response of the aquifer(s) to the stress of water resource exploitation, provide an early warning capability, and provide safeguards for responsible management of water.

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3. AUTHORITIES AND PARTICIPANTS

- A. The NSE has final authority over the 3M, and EMLLC, including all successors and assigns, will be responsible for implementing and complying with the 3M.
- B. In addition to the purpose outlined above, this 3M is intended to provide participation and transparency to the locally affected stakeholders. Eureka County (EC) holds water rights for municipal use in Diamond Valley. Additionally, Eureka County has local natural resource, land-use, and water resource policies, plans, and goals developed under Nevada State Law that obligate County officials, both elected and appointed, to actively participate in the planning and management of resources within Eureka County. Eureka

County, and representatives from locally potentially affected farming, ranching, and domestic interests will be invited to participate in this 3M. In the event there are other water rights holders who may be adversely affected by Mt. Hope Project groundwater extraction, these entities could be invited to participate as described under MANAGEMENT and in accordance with this 3M. The entities that participate in this 3M as outlined in the MANAGEMENT section 5.B are hereinafter referred to as "Parties".

- C. The USGS will be invited to participate expressly to provide impartial technical and scientific input, as described herein.
- D. This 3M is separate from the requirements placed upon EMLLC by other agencies including the United States Bureau of Land Management (BLM) and Nevada Department of Wildlife (NDOW). The BLM has claimed Federal Public Water Reserves (PWR 107) within the area of concern. The BLM and EMLLC have entered into a stipulated settlement agreement as a condition of the BLM withdrawal of protests of EMLLC's water right applications and NDOW is included as a party to the settlement agreement.

4. PRINCIPAL COMPONENTS

The 3M consists of three principal components:

- A. Management
- B. Monitoring
- C. Mitigation

The framework of these components is described in the following sections.

5. MANAGEMENT

- A. Two committees are established. The Water Advisory Committee (WAC) is to establish and carryout policy under this 3M. The Technical Advisory Committee (TAC) is to provide the technical scientific expertise necessary for collection, evaluation and analysis of data. Separation of the roles and responsibilities of these two bodies is considered crucial to maintaining scientific impartiality of the data collection and analysis program.

B. Water Advisory Committee:

- a. Within 30 days after NSE approval of this 3M, EMLLC, NSE, and Eureka County representatives will convene as the three (3) founding members of the WAC. Upon

the three founding members convening, the Diamond Natural Resources Protection and Conservation Association (DNRPCA) and the Eureka Producers Cooperative (EPC) (DNRPCA and EPC represent the bulk of water rights holders in the Diamond Valley Flow System) will each be invited to bring forward one representative nominated from their respective membership for inclusion as members of the WAC. Letters of interest will also be accepted from potentially affected ranching interests (i.e., Koberh Valley rancher) for inclusion as a member of the WAC. Eureka County, NSE, EMLLC, DNRPCA, and EPC will make the determination on the affected ranching interest to be included on the WAC based on letters of interest received. If any of the potentially affected ranching and farming interests ceases to exist, the remaining WAC members will develop a process so that replacement members will be selected to join the WAC. The WAC may also invite other potentially affected water rights holders to participate as members. The WAC will have no more than seven (7) members. The member of the WAC representing the NSE will be invited to participate as the chair of the WAC. If the NSE member representative declines this invitation, the WAC will elect the chairman. Each WAC member, at its sole discretion, may invite such additional staff or consultants to attend WAC meetings as it deems necessary.

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- b. After the full WAC has been convened, the WAC will establish policy and define additional roles and responsibilities of the WAC and TAC, such as scheduling of meetings, agenda setting, publication of minutes, receiving input from the public, and any other necessary components.
- c. The WAC will meet no less than one time in each quarter starting at the execution of this 3M with the primary focus to ensure water monitoring is actively in place. Future meeting frequency may then be adjusted as decided by the WAC, but will be no less than once annually.
- d. The WAC will have an annual meeting, open to the public, to review project operations and to review monitoring, management and mitigation actions of the previous year.
- e. Purposes and Functions of the WAC will be to:
 - i. Provide a forum for the WAC to discuss relevant data and analyses.
 - ii. Share information regarding modeling efforts and model results.
 - iii. Make modifications to the Monitoring component of this 3M, including, but not limited to additional data collection and scientific investigations, based on recommendations from the TAC.
 - iv. Provide status reports and recommendations to the Parties.
 - v. Establish values for monitored variables (water levels, spring discharges, vegetation responses, etc.) known as "action criteria" which, if exceeded, may be of concern to the Parties and could require mitigation or management actions.
 - vi. Determine what constitutes an adverse impact on a case-by-case basis,

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- vii. Form and ensure implementation of groundwater management or mitigation measures approved by the WAC based on recommendations of the TAC.
- viii. Review financial assurance periodically and make adjustments to amount as appropriate and recommend release of funds for mitigation and/or management measures.
- ix. Provide the NSE, Parties, and the local stakeholders with data and results of any analyses or technical evaluations, along with reports of specific implemented mitigation or management actions.
- x. Develop and implement a procedure to remove and replace WAC and TAC members as it deems necessary, excluding, however, removal of the founding members consisting of the NSE, EC, and EMLCC.

C. Technical Advisory Committee:

- a. The WAC will appoint a Technical Advisory Committee (TAC) as a subcommittee to the WAC. Each Party represented on the WAC is entitled to appoint a representative and is responsible for funding the participation of their respective TAC member. In addition, the USGS will be invited to participate as a member of the TAC. Funding for the USGS's participation in the 3M will be borne by EMLLC either through new or through existing joint funding agreements with USGS sponsored by Eureka County to study the Diamond Valley Flow System or by a "pass-through" agreement with the NSE. TAC members must exhibit a professional level of technical or scientific expertise and a background or experience in land management, natural resources, water resources, or other related field. Each Party, at its sole discretion may invite additional staff or consultants to attend TAC meetings.
- b. The TAC will meet within 30 days after WAC appointment to review the proposed monitoring provided as Attachment A to this 3M. Upon completing this review, the TAC will make recommendations to the WAC for any changes to the monitoring components of this 3M. Thereafter, the TAC will meet at intervals deemed appropriate by the TAC to review and analyze data, but not less than twice annually or as instructed by the WAC.
- c. At a minimum, purposes and functions of the TAC will be to:
 - i. Review the proposed monitoring and recommend to the WAC implementation, including any changes to the specific monitoring elements, as appropriate.
 - ii. Review historic groundwater level trends, spring and stream flows to determine historic hydrologic trends. Where possible, identify wet and dry regimes, climate effects on groundwater recharge rates and base flows in surface waters.
 - iii. Review, develop, and refine standards and quality control procedures for data collection, management, and analysis.

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- iv. Inform the entity or entities that collect data of standard accepted protocols of data collection, recording and analysis (e.g., USGS) that will be used.
- v. Evaluate monitoring data, reports, analyses, etc. to determine whether data gaps exist and make appropriate recommendations to the WAC.
- vi. Develop and recommend action criteria to the WAC for management or mitigation measures based upon available data and analyses.
- vii. Evaluate all monitoring data to determine if any action criterion has been or is predicted to be exceeded, indicating a possible adverse impact and report findings to the WAC.
- viii. Recommend mitigation and management measures and related scope of work details to the WAC. This includes individual resources or a comprehensive list of all resources to support WAC evaluation of the adequacy of mitigation funding.
- ix. Evaluate the effectiveness of mitigation, if implemented, and report findings to the WAC.
- x. Make recommendations to the WAC regarding the numerical groundwater flow model, including appropriate times for any model updates and modes of model output.

D. Numerical Groundwater Flow Model:

- a. EMLLC has developed the Numerical Groundwater Flow Model (FM) to simulate the groundwater flow system and the FM will be updated to incorporate the data collected under this 3M. EMLLC will update the FM after recovering data from the first year of wellfield pumping for mineral processing as recommended under the provisions of this 3M. Thereafter, EMLLC will update the FM on a schedule as determined under the provisions of the 3M.
- b. The FM will be used as a management tool to evaluate predictions of drawdown and impacts and to help define action criteria.

E. Prevention of Interbasin Transfer from Diamond Valley Basin:

- a. If excess water is produced within the Diamond Valley Hydrographic Basin which is not consumed in that basin, this water will be returned to the Diamond Valley Hydrographic Basin. As described in Section 6.E., water derived from pit dewatering and consumed will be documented and reported by EMLLC to verify that the volume of water extracted from Diamond Valley is equal to or less than the volume of water consumed in Diamond Valley (i.e. no transfer of water out of Diamond Valley).

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F. Action Criteria:

- a. Specific quantitative action criteria will be developed by the WAC with recommendations from the TAC. These criteria will be developed to provide early

warning of potential adverse impacts to water rights, determined to be caused by Project groundwater pumping.

- b. When any action criterion that has been adopted as part of this 3M is reached, the following management actions will be triggered:
- i. The TAC will meet as soon as possible to assess whether the action criterion exceedance is caused by Project groundwater pumping and present their findings to the WAC.
 - ii. If the WAC determines that any action criterion exceedance is caused by Project groundwater pumping, the TAC will expeditiously develop mitigation or management measures for the WAC to consider. The TAC will analyze the feasibility of the specific measures to assess alternatives, evaluate the potential effectiveness of the measures, and evaluate potential impacts created by implementation of the measures.
 - iii. The WAC will determine whether or not to recommend implementation of the mitigation or management measures and to also recommend if the funds described in MITIGATION will be used to implement such measure.
 - iv. The effectiveness of any implemented measure will be evaluated by the TAC to ensure the measure met or exceeded the intended result. Results and recommendations for any additional measures will be reported to the WAC.
 - v. Any member of the WAC may propose an additional action criterion or a change to existing action criteria. Any such change must be presented in writing to the WAC and accompanied by analyses to support the proposed change.

G. Decision-Making Process:

- a. For technical issues, including, but not limited to monitoring modifications, setting action criteria, and appropriate mitigation, decisions under this 3M will be made after considering the evaluation and recommendations of the TAC.
- b. All Parties shall be afforded the opportunity to attend meetings where decisions will be made. Any decisions made by the WAC under this 3M shall be by unanimous vote of Parties in attendance, provided both EMLLC and EC are present. If unanimity is not achieved, the Parties may jointly agree to conduct additional data collection and/or data review and analyses directed at resolving the different interpretations or opinions. If that is not successful, the Parties may refer the issue, accompanied by their respective opinions, to the NSE for final determination.
- c. Decisions made by the WAC regarding recommended modifications to the 3M, implementation of mitigation, or other management actions that would be required of EMLLC will be subject to the jurisdiction and authority of the NSE.

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- d. Nothing herein limits or changes the NSE authority, and any Party can petition the NSE to consider any issue.

H. Modification of the 3M

- a. The Parties may individually or jointly petition the NSE to modify this 3M in the event that mutual agreement cannot be reached. Any such petition shall be concurrently provided to the other Parties. Prior to the NSE decision, all Parties will be provided the opportunity to submit a written response to the NSE no later than 60 calendar days following the date of receipt of the petition by NSE.
- b. Any modification to the 3M must be approved by the NSE.
- c. ~~Nothing herein seeks to limit, alter, modify or change the exclusive authority of the NSE to approve or modify the 3M.~~

Deleted: <#>Nothing herein seeks to limit, alter, modify or change the exclusive authority of the NSE to approve or modify the 3M.¶

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6. MONITORING

- A. Hydrological related studies for the Project contain data concerning water and related resources in Kobeh Valley, Diamond Valley, Pine Valley, and surrounding areas. These include locations of existing and proposed supply and monitoring wells, groundwater extraction rates, groundwater level measurements, flow from springs and streams, water quality, precipitation data, and wetland/riparian conditions. Additional data relevant to the Project available from other local, state, and federal agencies or other reliable sources will be compiled into a database by EMLLC and expanded as new data are collected under the provisions of this 3M.
- B. The proposed monitoring is provided in Attachment A to this 3M. As described in MANAGEMENT of this 3M, the TAC will review this proposed monitoring and provide recommendations to the WAC regarding changes and/or implementation. In addition to this initial review, the TAC will review the proposed monitoring and make recommendations to the WAC for changes throughout the Project life based on monitoring data and analysis. Such recommended changes may include, but not be limited to, addition or deletion of monitoring sites, addition or deletion of monitoring parameters, changes to monitoring methods, and increases or decreases in monitoring frequencies. Upon acceptance by the NSE of this 3M, EMLLC will implement the monitoring requirements as set forth in Attachment A.
- C. The term "as is feasible" as used in this 3M relates to mechanical failures or other events/reasons outside the control of the Parties, as agreed upon by the Parties, that interfere with data collection.
- D. Groundwater

- a. Groundwater pumping will be measured by flow meters installed on each production well, dewatering well and pit dewatering sump.
- b. Water levels in all wells included as part of the Project monitoring network will be measured by recording pressure transducers (data loggers). The measurement frequency will depend on distance to the wellfield and based on TAC recommendations.
- c. The Project monitoring network will include "sentinel" wells (i.e., wells strategically located to provide early indication of drawdown propagation towards sensitive or important resources). At a minimum these will be located near the boundary between Kobeh, Diamond, Pine and Antelope valleys; between the pumping wells and the headwaters of Henderson and Roberts Creeks and Tyrone Gap; between the wellfield and Gravel Pit Spring, Bartine artesian wells, the Antelope Valley Hot Springs (Klobe Hot Springs), and the stock wells at Hay Ranch. Nested wells that monitor individual aquifers at a single location where more than one hydrostratigraphic unit is present or strong vertical gradients may exist will be completed, as is feasible.
- d. Test wells constructed at each Project production well site will be maintained as monitoring wells, as is feasible, and equipped with recording pressure transducers.
- e. Several USGS monitoring wells are located near the proposed well field and within the projected drawdown area. If the USGS is not funded to monitor these specific wells, EMLLC will request USGS permission to collect data from these wells. If the WAC determines that continued monitoring at these locations, EMLLC may be required to drill replacement wells.
- f. All water level, spring discharge, and stream flow data shall be submitted semiannually to the NSE in an electronic format specified by the NSE.

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E. Pit Dewatering

Groundwater will be extracted from the Diamond Valley Hydrographic Basin either by wells or pit dewatering sumps. To determine the amount of water from pit dewatering within the Diamond Valley Hydrographic Basin, the total groundwater removed by pit dewatering sumps will be measured by totalizing flow meters and then multiplied by a factor reflecting the portion of the pit area that is located in Diamond Valley Hydrographic Basin. The discharge from dewatering wells will be measured with totalizing flow meters and allocated to the basin in which the well is located. Water truck loads utilized in the pit complex will be counted and recorded to document water used in Diamond Valley for mine environmental dust suppression. The amount of water used in Diamond Valley for other uses will be metered or estimated and recorded in the database.

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F. Surface Water

- a. At a minimum, the monitoring of stream flow will be conducted as follows:
- i. Monitoring will include continuous measurements of stream stage at selected control sections for each stream as is feasible.
 - ii. The geometry of the control sections will be measured at the start of monitoring and re-measured at least annually.
 - iii. Stage measurements will be collected with recording pressure transducers on a frequency of not less than one hour.
 - iv. The flow in the streams at the control sections will be gaged monthly, as is feasible, for the first year of record to establish stage-discharge relationship for each gaging station and following any changes in the control section geometry.
 - v. All control sections in streams will be assessed routinely for any changes in the control section geometry and the stage discharge relationship be re-established accordingly.
 - vi. Following the first year of gaging, stream-flow measurements will be collected at least quarterly.
 - vii. Flow data will be recorded at least quarterly and hydrographs updated at least annually.

G. Water Quality

Water quality samples will be collected from selected production and monitoring wells, surface waters and pit water and analyzed by a laboratory certified by the State of Nevada using standard accepted protocols and a standard water test. Macroinvertebrate monitoring will take place in select streams as an indicator of general stream and/or fishery health.

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H. Biological Resources

Loss of vegetative communities in phreatophytic and riparian areas may result in environmentally unsound conditions. In order to comply with NRS 533.370(6)(c), monitoring of vegetation, including phreatophyte vegetation and riparian zones, will be conducted. Specific locations are to be determined by the WAC and itemized in Attachment A, and will include sites in Kobeh Valley, Diamond Valley, Pine Valley and Antelope Valley that may be affected by groundwater extraction. Data will be collected using a variety of techniques and will include on-site measurement of vegetation cover, frequency, and type. Shallow wells will be co-located with vegetation monitoring transects. Remote sensing will be employed to help define and monitor the extent of vegetation communities at a larger spatial scale.

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I. Meteorology

Weather/Climate stations will be installed and maintained to continuously monitor wind speed and direction, precipitation, temperature, barometric pressure, humidity, and solar

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radiation. Existing precipitation stations will be used where possible. The purpose of collecting weather/climate data is to provide the WAC with a basis for evaluating whether changes in groundwater levels or stream and spring flow are due to changes in weather or climate.

J. Elevation Control/Subsidence

Monitoring locations for subsidence, groundwater measuring point elevations and ground-surface elevations will be established using survey-grade GPS instrumentation. A standard GPS data collection protocol (i.e. common geographic datum) will be used to allow a comparative base for all elevation associated data. Subsidence monitoring will be augmented using remote sensing technologies (e.g. InSAR). Frequency and methodology of remote sensing to monitor subsidence will be reviewed and determined by the WAC in consideration of TAC recommendation.

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K. Data Management

- a. All monitoring data will be entered into the 3M database on a regular, timely, and continual basis as it is collected and verified using WAC approved quality assurance and quality control (QA/QC). Data collected under or as described in this 3M will be fully and cooperatively shared among the Parties. Verified data within the 3M database will become available to the public, upon request.
- b. In addition to updating the 3M database on a regular and continual basis, EMLLC will provide an annual report that summarizes all information and analysis. This report due in the NSE's office by March 31, will be prepared based on recommendations and in cooperation with the TAC. These reports will summarize water production, the results of monitoring, and all management and mitigation actions taken during the year. Copies of the annual report will be provided to each of the Parties.

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7. MITIGATION

- A. EMLLC will mitigate adverse impacts, if any, as agreed upon under the provisions of this 3M. The WAC will take necessary steps, including recommending whether funding described below may be used as outlined in this 3M, to ensure that mitigation actions are feasible, reasonable, timely, and effective.
- B. Effectiveness of implemented mitigation measures will be evaluated under the provisions of this 3M. Additional measures will be implemented if a previous mitigation measure does not meet its intended purpose(s).
- C. To ensure funding exists for any required future monitoring and mitigation after the cessation of active mining, EMLLC will provide financial assurances under the provisions of this 3M.

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D. EMLLC's financial assurances (FA) funding will be placed into an interest bearing trust account to be established as a part of this 3M. The initial funding will occur in a manner as follows:

a. Initial funding of \$250,000 will occur within 60 days of the start of construction of the Project.

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b. Additional funding of \$750,000 will occur no later than the end of month six of wellfield pumping for mineral processing (plant startup).

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c. Funding will be examined and adjusted, as recommended by the WAC, every three years to ensure that sufficient funding is in place to mitigate all potential adverse impacts, including funding for operating and maintenance and long-term replacement costs.

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D. After cessation of mining and groundwater pumping by EMLLC, if the NSE determines that there is no longer a reasonable potential for future impacts attributable to the Project, any excess funds, including interest, remaining in the account will be returned to EMLLC.

E. This 3M does not outline specific measures to mitigate impacts resulting from project pumping, but is intended to outline procedures to identify and mitigate adverse impacts.

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E. To ensure wildlife have continued access to customary use, adversely impacted surface water sources will be mitigated through such measures including, but not limited to, installation and maintenance of replacement water sources of equal or greater volume (e.g. guzzlers) in the same area as the impacted water source.

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F. EMLLC will mitigate permitted water rights and determined and undetermined claims of vested or reserved rights should adverse impacts occur.

G. Mitigation measures, if necessary, will be developed and implemented on a case-by-case basis under provisions of this 3M.

H. Potential mitigation measures include the following:

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a. Supply (Project) water will be provided from wells located in Kobeh Valley that are completed in the carbonate and alluvial aquifers. Pumping of these different aquifers will have different impacts to the groundwater and surface water flow systems. Adjustment of carbonate/alluvium groundwater pumping ratio could be employed to either minimize or mitigate effects.

b. Impacts can be greatly influenced by the specific location of groundwater pumping. Mitigation measures include reduction or cessation of groundwater extraction from one or more wells and/or geographic redistribution of groundwater extraction.

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c. Replacement wells can be constructed to mitigate impacted surface water or groundwater rights, or to supply water for wildlife.

d. Revegetation in affected areas to achieve appropriate vegetative communities.

e. Financial compensation or, if agreed upon, property (i.e., land and water rights) of equal value could be purchased for replacement.

f. If adverse impacts to the Diamond Valley Flow System, or other adjacent basins are determined to be caused by Project groundwater pumping, active and current water rights (water currently pumped) within the affected basin could be purchased and retired.

g. Implement technology to reduce water consumption of the Project. Pumping rates may be decreased if alternative technology emerges that could reduce water requirements or increase water recycling rates. Water conservation techniques will be proactively employed in order to reduce other mitigation measures (i.e. before any impact is measured).

h. If surface fissures develop due to land subsidence, they shall be mitigated by filling with a suitable material to prevent injury to wildlife, livestock or people.

i. Other measures as agreed to by the Parties and/or required by the NSE.

Deleted: Environmentally sound revegetation in selected areas considering utilization of alternative plant biomes. Augmentation of water resources with other groundwater. Alternative sources may be provided to enhance or replace existing sources. For example, replacement wells may be drilled if lowering of groundwater adversely impacts an existing groundwater right. Water could be obtained from alternate groundwater sources and used to mitigate specific adverse impacts to surface water flows (e.g., well and tank). If livestock water sources are adversely impacted, it will be ensured that augmented or replacement water sources are coordinated with the grazing permittee's season-of-use.

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Deleted: Any impact to individual water rights determined to be caused by Project groundwater pumping could be compensated financially

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Nevada Office of the Attorney General
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100 N. Carson Street
4 Carson City, Nevada 89701
(775) 684-1228
5 *Attorneys for Respondents*

6 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR THE COUNTY OF EUREKA**

8 MICHEL AND MARGARET ANN)
ETCHEVERRY FAMIL, LP, a Nevada)
9 Registered Foreign Limited Partnership,)
DIAMOND CATTLE COMPANY, LLC,)
10 a Nevada Limited Liability Company,)
and KENNETH F. BENSON, an)
11 individual,)

Petitioners,

12 vs.

13 STATE ENINGEER OF NEVADA,)
14 OFFICE OF THE STATE ENGINEER,)
DIVISION OF WATER RESOUCES,)
15 DEPARTMENT OF CONSERVATION)
AND NATURAL RESOURCES,)
16

Respondents.

Case No.: CV 1207-178

Dept. No.: II

17
18 **SUPPLEMENTAL**

19 **SUMMARY OF RECORD ON APPEAL**

20 The Record on Appeal in this case is filed concurrently with this summary and consists
21 of a copy of the following documents:

22 **VOLUME I:**

- 23 1. Nevada Division of Water Resources Monitoring, Management and Mitigation Plan for
24 the Mt. Hope Project, dated May 2012. Bates stamped pages 01-12.
- 25 2. Letter composed by Patrick C. Rogers, Eureka Moly, to Richard Felling, Division of
26 Water Resources, dated May 30, 2012. Bates stamped pages 13-14.
- 27 3. Nevada Division of Water Resources Monitoring, Management and Mitigation Plan for
28 the Mt. Hope Project, dated May 2012. Bates stamped pages 15-26.

- 1 4. Letter composed by Richard Felling, Division of Water Resources, to Patrick Rogers,
2 Eureka Moly, dated June 6, 2012. Bates stamped pages 27.
3
4 5. Letter composed by Tim Wilson, Division of Water Resources, to Kobeh Valley Ranch,
5 dated June 14, 2012. Bates stamped pages 28-29.
6

7 DATED this 17TH day of August 2012.

8 CATHERINE CORTEZ MASTO
9 Attorney General

10 By: 

11 BRYAN L. STOCKTON
12 Senior Deputy Attorney General
13 Nevada State Bar # 4764
14 100 N. Carson Street
15 Carson City, Nevada 89701
16 (775) 684-1228
17 (775) 684-1103 fax
18 bstockton@ag.nv.gov
19 *Attorneys for Respondents*

20 **AFFIRMATION (Pursuant to NRS 239B.030)**

21 The undersigned does hereby affirm that the preceding document does not contain the
22 social security number of any person.
23

24 DATED this 17th day of August 2012.

25 CATHERINE CORTEZ MASTO
26 Attorney General

27 By: _____

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CERTIFICATE OF MAILING

I, Sandra Geyer certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 17th day of August 2012, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing **SUPPLEMENTAL RECORD AND SUPPLEMENTAL SUMMARY OF RECORD APPEAL**, A COPY OF THE SUMMARY OF THE RECORD HAS BEEN SENT TO THE FOLLOWING:

Parsons Behle & Latimer
John R. Zimmerman, Esq,
50 West Liberty Street, Suite 750
Reno, Nevada 89701
*Attorneys for Intervenor
Kobeh Valley Ranch*

Schroeder Law Offices, P.C.
Therese A. Ure, Esq.
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440 Marsh Avenue
Reno, Nevada 89509
*Attorneys for Benson, Etcheverry
And Diamond Cattle Co.*



Sandra Geyer, Legal Secretary II

NEVADA DIVISION OF WATER RESOURCES MONITORING, MANAGEMENT,
AND MITIGATION PLAN FOR THE MT. HOPE PROJECT

1. BACKGROUND

- A. This Monitoring, Management, and Mitigation Plan (3M) applies to proposed groundwater extraction from Kobeh Valley and Diamond Valley for mining process water rights granted in Ruling 6127 of the office of the Nevada State Engineer (NSE) dated July 15, 2011. The groundwater extracted will be consumed in activities related to the Mt. Hope Project (Project), including mineral processing and mine dust control. The groundwater will be developed by Eureka Moly, LLC, (EMLLC) through Kobeh Valley Ranch, LLC (KVR), both of which are subsidiaries of General Moly, Inc. (GMI), with KVR being the water rights holder. The Lessee of the water rights and operator of the Project is EMLLC. The groundwater will be supplied primarily from a wellfield in Kobeh Valley and conveyed via pipelines to the mine and mill sites. In addition, groundwater will include water derived from open pit dewatering at rates that are predicted to reach a maximum of 742 of/yr. The distribution of this water from the pit is estimated at 20% from Kobeh Valley Hydrographic Basin and 80% from the Diamond Valley Hydrographic Basin.

2. PURPOSE OF THE 3M

- A. The purpose of this 3M is to assist the NSE in managing development of groundwater resources within and near the Project area to avoid adverse impacts to existing water rights. The 3M is designed to include or develop, as needed or appropriate, express conditions that will protect the rights of domestic well owners, if any, and existing appropriations.
- B. While it is the goal to avoid any adverse impacts due to the groundwater pumping, the 3M outlines a process by which adverse impacts will be identified and ultimately mitigated. It is intended to provide the necessary data to assess the response of the aquifer(s) to the stress of water resource exploitation, provide an early warning capability, and provide safeguards for responsible management of water.

3. AUTHORITIES AND PARTICIPANTS

- A. The NSE has final authority over the 3M, and EMLLC, including all successors and assigns, will be responsible for implementing and complying with the 3M.
- B. In addition to the purpose outlined above, this 3M is intended to provide participation and transparency to the locally affected stakeholders. Eureka County (EC) holds water rights for municipal use in Diamond Valley. Additionally, Eureka County has local natural resource, land-use, and water resource policies, plans, and goals

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developed under Nevada State Law that obligate County officials, both elected and appointed, to actively participate in the planning and management of resources within Eureka County. Eureka County, and representatives from locally potentially affected farming, ranching, and domestic interests will be invited to participate in this 3M. In the event there are other water rights holders who may be adversely affected by Mt. Hope Project groundwater extraction, these entities could be invited to participate as described under MANAGEMENT and in accordance with this 3M. The entities that participate in this 3M as outlined in the MANAGEMENT section 5.B are hereinafter referred to as "Parties".

- C. The USGS will be invited to participate expressly to provide impartial technical and scientific input, as described herein.
- D. This 3M is separate from the requirements placed upon EMLLC by other agencies including the United States Bureau of Land Management (BLM) and Nevada Department of Wildlife (NDOW). The BLM has claimed Federal Public Water Reserves (PWR 107) within the area of concern. The BLM and EMLLC have entered into a stipulated settlement agreement as a condition of the BLM withdrawal of protests of EMLLC's water right applications and NDOW is included as a party to the settlement agreement.

4. PRINCIPAL COMPONENTS

The 3M consists of three principal components:

- A. Management
- B. Monitoring
- C. Mitigation

The framework of these components is described in the following sections.

5. MANAGEMENT

- A. Two committees are established. The Water Advisory Committee (WAC) is to establish and carryout policy under this 3M. The Technical Advisory Committee (TAC) is to provide the technical scientific expertise necessary for collection, evaluation and analysis of data. Separation of the roles and responsibilities of these two bodies is considered crucial to maintaining scientific impartiality of the data collection and analysis program.
- B. Water Advisory Committee:

- a. Within 30 days after NSE approval of this 3M, EMLLC, NSE, and Eureka County representatives will convene as the three (3) founding members of the WAC. Upon the three founding members convening, the Diamond Natural Resources Protection and Conservation Association (DNRPCA) and the Eureka Producers Cooperative (EPC) (DNRPCA and EPC represent the bulk of water rights holders in the Diamond Valley Flow System) will each be invited to bring forward one representative nominated from their respective membership for inclusion as members of the WAC. Letters of interest will also be accepted from potentially affected ranching interests (i.e., Kobeh Valley rancher) for inclusion as a member of the WAC. Eureka County, NSE, EMLLC, DNRPCA, and EPC will make the determination on the affected ranching interest to be included on the WAC based on letters of interest received. If any of the potentially affected ranching and farming interests ceases to exist, the remaining WAC members will develop a process so that replacement members will be selected to join the WAC. The WAC may also invite other potentially affected water rights holders to participate as members. The WAC will have no more than seven (7) members. The member of the WAC representing the NSE will be invited to participate as the chair of the WAC. If the NSE member representative declines this invitation, the WAC will elect the chairman. Each WAC member, at its sole discretion, may invite such additional staff or consultants to attend WAC meetings as it deems necessary.
- b. After the full WAC has been convened, the WAC will establish policy and define additional roles and responsibilities of the WAC and TAC, such as scheduling of meetings, agenda setting, publication of minutes, receiving input from the public, and any other necessary components.
- c. The WAC will meet no less than one time in each quarter starting at the execution of this 3M with the primary focus to ensure water monitoring is actively in place. Future meeting frequency may then be adjusted as decided by the WAC, but will be no less than once annually.
- d. The WAC will have an annual meeting, open to the public, to review project operations and to review monitoring, management and mitigation actions of the previous year.
- e. Purposes and Functions of the WAC will be to:
 - i. Provide a forum for the WAC to discuss relevant data and analyses.
 - ii. Share information regarding modeling efforts and model results.
 - iii. Make modifications to the Monitoring component of this 3M, including, but not limited to additional data collection and scientific investigations, based on recommendations from the TAC.
 - iv. Provide status reports and recommendations to the Parties.
 - v. Establish values for monitored variables (water levels, spring discharges, vegetation responses, etc.) known as "action criteria" which, if exceeded,

may be of concern to the Parties and could require mitigation or management actions.

- vi. Determine what constitutes an adverse impact on a case-by-case basis.
- vii. Form and ensure implementation of groundwater management or mitigation measures approved by the WAC based on recommendations of the TAC.
- viii. Review financial assurance periodically and make adjustments to amount as appropriate and recommend release of funds for mitigation and/or management measures.
- ix. Provide the NSE, Parties, and the local stakeholders with data and results of any analyses or technical evaluations, along with reports of specific implemented mitigation or management actions.
- x. Develop and implement a procedure to remove and replace WAC and TAC members as it deems necessary, excluding, however, removal of the founding members consisting of the NSE, EC, and EMLCC.

C. Technical Advisory Committee:

- a. The WAC will appoint a Technical Advisory Committee (TAC) as a subcommittee to the WAC. Each Party represented on the WAC is entitled to appoint a representative and is responsible for funding the participation of their respective TAC member. In addition, the USGS will be invited to participate as a member of the TAC. Funding for the USGS's participation in the 3M will be borne by EMLLC either through new or through existing joint funding agreements with USGS sponsored by Eureka County to study the Diamond Valley Flow System or by a "pass-through" agreement with the NSE. TAC members must exhibit a professional level of technical or scientific expertise and a background or experience in land management, natural resources, water resources, or other related field. Each Party, at its sole discretion may invite additional staff or consultants to attend TAC meetings.
- b. The TAC will meet within 30 days after WAC appointment to review the proposed monitoring provided as Attachment A to this 3M. Upon completing this review, the TAC will make recommendations to the WAC for any changes to the monitoring components of this 3M. Thereafter, the TAC will meet at intervals deemed appropriate by the TAC to review and analyze data, but not less than twice annually or as instructed by the WAC.
- c. At a minimum, purposes and functions of the TAC will be to:
 - i. Review the proposed monitoring and recommend to the WAC implementation, including any changes to the specific monitoring elements, as appropriate.
 - ii. Review historic groundwater level trends, spring and stream flows to determine historic hydrologic trends. Where possible, identify wet and dry

regimes, climate effects on groundwater recharge rates and base flows in surface waters.

- iii. Review, develop, and refine standards and quality control procedures for data collection, management, and analysis.
- iv. Inform the entity or entities that collect data of standard accepted protocols of data collection, recording and analysis (e.g., USGS) that will be used.
- v. Evaluate monitoring data, reports, analyses, etc. to determine whether data gaps exist and make appropriate recommendations to the WAC.
- vi. Develop and recommend action criteria to the WAC for management or mitigation measures based upon available data and analyses.
- vii. Evaluate all monitoring data to determine if any action criterion has been or is predicted to be exceeded, indicating a possible adverse impact and report findings to the WAC.
- viii. Recommend mitigation and management measures and related scope of work details to the WAC. This includes individual resources or a comprehensive list of all resources to support WAC evaluation of the adequacy of mitigation funding.
- ix. Evaluate the effectiveness of mitigation, if implemented, and report findings to the WAC.
- x. Make recommendations to the WAC regarding the numerical groundwater flow model, including appropriate times for any model updates and modes of model output.

D. Numerical Groundwater Flow Model:

- a. EMLLC has developed the Numerical Groundwater Flow Model (FM) to simulate the groundwater flow system and the FM will be updated to incorporate the data collected under this 3M. EMLLC will update the FM after recovering data from the first year of wellfield pumping for mineral processing as recommended under the provisions of this 3M. Thereafter, EMLLC will update the FM on a schedule as determined under the provisions of the 3M.
- b. The FM will be used as a management tool to evaluate predictions of drawdown and impacts and to help define action criteria.

E. Prevention of Interbasin Transfer from Diamond Valley Basin:

- a. If excess water is produced within the Diamond Valley Hydrographic Basin which is not consumed in that basin, this water will be returned to the Diamond Valley Hydrographic Basin. As described in Section 6.E., water derived from pit dewatering and consumed will be documented and reported by EMLLC to verify that the volume of water extracted from Diamond Valley is equal to or less than the volume of water consumed in Diamond Valley (i.e. no transfer of water out of Diamond Valley).

F. Action Criteria:

- a. Specific quantitative action criteria will be developed by the WAC with recommendations from the TAC. These criteria will be developed to provide early warning of potential adverse impacts to water rights, determined to be caused by Project groundwater pumping.
- b. When any action criterion that has been adopted as part of this 3M is reached, the following management actions will be triggered:
 - i. The TAC will meet as soon as possible to assess whether the action criterion exceedance is caused by Project groundwater pumping and present their findings to the WAC.
 - ii. If the WAC determines that any action criterion exceedance is caused by Project groundwater pumping, the TAC will expeditiously develop mitigation or management measures for the WAC to consider. The TAC will analyze the feasibility of the specific measures to assess alternatives, evaluate the potential effectiveness of the measures, and evaluate potential impacts created by implementation of the measures.
 - iii. The WAC will determine whether or not to recommend implementation of the mitigation or management measures and to also recommend if the funds described in MITIGATION will be used to implement such measure.
 - iv. The effectiveness of any implemented measure will be evaluated by the TAC to ensure the measure met or exceeded the intended result. Results and recommendations for any additional measures will be reported to the WAC.
 - v. Any member of the WAC may propose an additional action criterion or a change to existing action criteria. Any such change must be presented in writing to the WAC and accompanied by analyses to support the proposed change.

G. Decision-Making Process:

- a. For technical issues, including, but not limited to monitoring modifications, setting action criteria, and appropriate mitigation, decisions under this 3M will be made after considering the evaluation and recommendations of the TAC.
- b. All Parties shall be afforded the opportunity to attend meetings where decisions will be made. Any decisions made by the WAC under this 3M shall be by unanimous vote of Parties in attendance, provided however, both EMLLC and EC must be present for a vote to occur. If unanimity is not achieved, the Parties may jointly agree to conduct additional data collection and/or data review and analyses directed at resolving the different interpretations or opinions. If that is not successful, the Parties may refer the issue, accompanied by their respective opinions, to the NSE for final determination.

- c. Decisions made by the WAC regarding recommended modifications to the 3M, implementation of mitigation, or other management actions that would be required of EMLLC will be subject to the jurisdiction and authority of the NSE.
- d. Nothing herein limits or changes the NSE authority, and any Party can petition the NSE to consider any issue.

H. Modification of the 3M

- a. The Parties may individually or jointly petition the NSE to modify this 3M in the event that mutual agreement cannot be reached. Any such petition shall be concurrently provided to the other Parties. Prior to the NSE decision, all Parties will be provided the opportunity to submit a written response to the NSE no later than 60 calendar days following the date of receipt of the petition by NSE.
- b. Any modification to the 3M must be approved by the NSE.
- c. Nothing herein seeks to limit, alter, modify or change the exclusive authority of the NSE to approve or modify the 3M.

6. MONITORING

- A. Hydrological related studies for the Project contain data concerning water and related resources in Kobeh Valley, Diamond Valley, Pine Valley, and surrounding areas. These data include locations of existing and proposed supply and monitoring wells, groundwater extraction rates, groundwater level measurements, flow from springs and streams, water quality, precipitation data, and wetland/riparian conditions. Additional data relevant to the Project available from other local, state, and federal agencies or other reliable sources will be compiled into a database by EMLLC and expanded as new data are collected under the provisions of this 3M.
- B. The proposed monitoring is provided in Attachment A to this 3M. As described in MANAGEMENT of this 3M, the TAC will review this proposed monitoring and provide recommendations to the WAC regarding changes and/or implementation. In addition to this initial review, the TAC will review the proposed monitoring and make recommendations to the WAC for changes throughout the Project life based on monitoring data and analysis. Such recommended changes may include, but not be limited to, addition or deletion of monitoring sites, addition or deletion of monitoring parameters, changes to monitoring methods, and increases or decreases in monitoring frequencies. Upon acceptance by the NSE of this 3M, EMLLC will implement the monitoring requirements as set forth in Attachment A.

- C. The term "as is feasible" as used in this 3M relates to mechanical failures or other events/reasons outside the control of the Parties, as agreed upon by the Parties, that interfere with data collection.

D. Groundwater

- a. Groundwater pumping will be measured by flow meters installed on each production well, dewatering well and pit dewatering sump.
- b. Water levels in all wells included as part of the Project monitoring network will be measured by recording pressure transducers (data loggers). The measurement frequency will depend on distance to the wellfield and be based on TAC recommendations.
- c. The Project monitoring network will include "sentinel" wells (i.e., wells strategically located to provide early indication of drawdown propagation towards sensitive or important resources). At a minimum these will be located near the boundary between Kobeh, Diamond, Pine and Antelope Valleys; between the pumping wells and the headwaters of Henderson and Roberts Creeks and Tyrone Gap; between the wellfield and Gravel Pit Spring, Bartine artesian wells, the Antelope Valley Hot Springs (Klobe Hot Springs), and the stock wells at Hay Ranch. Nested wells that monitor individual aquifers at a single location where more than one hydrostratigraphic unit is present or strong vertical gradients may exist will be completed, as is feasible.
- d. Test wells constructed at each Project production well site will be maintained as monitoring wells, as is feasible, and equipped with recording pressure transducers.
- e. Several USGS monitoring wells are located near the proposed well field and within the projected drawdown area. If the USGS is not funded to monitor these specific wells, EMLLC will request USGS permission to collect data from these wells. If the WAC determines that monitoring should continue at these locations, EMLLC may be required to drill replacement wells or develop a suitable alternative.
- f. All water level, spring discharge, and stream flow data shall be submitted annually to the NSE in an electronic format specified by the NSE.

E. Pit Dewatering

Groundwater will be extracted from the Diamond Valley Hydrographic Basin either by wells or pit dewatering sumps. To determine the amount of water from pit dewatering within the Diamond Valley Hydrographic Basin, the total groundwater removed by pit dewatering sumps will be measured by totalizing flow meters and then multiplied by a factor reflecting the portion of the pit area that is located in Diamond Valley Hydrographic Basin. The discharge from dewatering wells will be measured with

totalizing flow meters and allocated to the basin in which the well is located. Water truck loads utilized in the pit complex will be counted and recorded to document water used in Diamond Valley for mine environmental dust suppression. The amount of water used in Diamond Valley for other uses will be metered or estimated and recorded in the database.

F. Surface Water

- a. At a minimum, the monitoring of stream flow will be conducted as follows:
 - i. Monitoring will include continuous measurements of stream stage at selected control sections for each stream, as is feasible.
 - ii. The geometry of the control sections will be measured at the start of monitoring and re-measured at least annually.
 - iii. Stage measurements will be collected with recording pressure transducers on a frequency of not less than one hour.
 - iv. The flow in the streams at the control sections will be gaged monthly, as is feasible, for the first year of record to establish stage-discharge relationship for each gaging station and following any changes in the control section geometry.
 - v. All control sections in streams will be assessed routinely for any changes in the control section geometry and the stage discharge relationship be re-established accordingly.
 - vi. Following the first year of gaging, stream-flow measurements will be collected at least quarterly.
 - vii. Flow data will be recorded at least quarterly and hydrographs updated at least annually.

G. Water Quality

Water quality samples will be collected from selected production and monitoring wells, surface waters and pit water and analyzed by a laboratory certified by the State of Nevada using standard accepted protocols and a standard water test. Macroinvertebrate monitoring will take place in select streams as an indicator of general stream and/or fishery health.

H. Biological Resources

To assess if there is any loss of vegetative communities in phreatophytic and riparian areas, monitoring of vegetation, including phreatophyte vegetation and riparian zones will be conducted. Specific locations are to be determined by the WAC and itemized in Attachment A, and will include sites in Kobeh Valley, Diamond Valley, Pine Valley and Antelope Valley that may be affected by groundwater extraction. Data will be collected using a variety of techniques and will include on-site measurement of vegetation cover, frequency, and type. Shallow wells will be co-located with vegetation monitoring transects. Remote sensing will be employed to help define and monitor the extent of vegetation communities at a larger spatial scale.

I. Meteorology

Weather/Climate stations will be installed and maintained to continuously monitor wind speed and direction, precipitation, temperature, barometric pressure, humidity, and solar radiation. Existing precipitation stations will be used where possible. The purpose of collecting weather/climate data is to provide the WAC with a basis for evaluating whether changes in groundwater levels or stream and spring flow are due to changes in weather or climate.

J. Elevation Control/USubsidence

Monitoring locations for subsidence, groundwater measuring point elevations and ground surface elevations will be established using survey-grade GPS instrumentation. A standard GPS data collection protocol (i.e., common geographic datum) will be used to allow a comparative base for all elevation associated data. Subsidence monitoring will be augmented using remote sensing technologies (e.g. InSAR). Frequency and methodology of remote sensing to monitor subsidence will be reviewed and determined by the WAC in consideration of TAC recommendations.

K. Data Management

- a. All monitoring data will be entered into the 3M database on a regular, timely, and continual basis as it is collected and verified using WAC-approved quality assurance and quality control (QA/QC). Data collected under or as described in this 3M will be fully and cooperatively shared among the Parties. Verified data within the 3M database will become available to the public, upon request.
- b. In addition to updating the 3M database on a regular and continual basis, EMLLC will provide an annual report that summarizes all information and analysis. This report, due in the NSE's office by March 31, will be prepared based on recommendations and in cooperation with the TAC. These reports will summarize water production, the results of monitoring, and all management and mitigation actions taken during the year. Copies of the annual report will be provided to each of the Parties.

7. MITIGATION

- A. EMLLC will mitigate adverse impacts, if any, as agreed upon under the provisions of this 3M. The WAC will take necessary steps, including recommending whether funding described below may be used as outlined in this 3M, to ensure that mitigation actions are feasible, reasonable, timely, and effective.

- B. Effectiveness of implemented mitigation measures will be evaluated under the provisions of this 3M. Additional measures will be implemented if a previous mitigation measure does not meet its intended purpose(s).
- C. To ensure funding exists for any required future monitoring and mitigation after the cessation of active mining, EMLLC will provide financial assurances under the provisions of this 3M.
- D. EMLLC's financial assurances (FA) funding will be placed into an interest bearing trust account to be established as a part of this 3M. The initial funding will occur in a manner as follows:
 - a. Initial funding of \$250,000 will occur within 60 days of GMI's Board of Directors formal approval authorizing the start of construction of the Project.
 - b. Additional funding of \$750,000 will occur no later than the end of month six of wellfield pumping for mineral processing (plant startup).
 - c. Funding will be examined and adjusted, as recommended by the WAC, every three years to ensure that sufficient funding is in place to mitigate all potential adverse impacts, including funding for operating and maintenance and long-term replacement costs.
- E After cessation of mining and groundwater pumping by EMLLC, if the NSE determines that there is no longer a reasonable potential for future impacts attributable to the Project, any excess funds, including interest, remaining in the account will be returned to EMLLC.
- F. This 3M outlines measures and procedures to identify and mitigate adverse impacts that may result from project pumping, all of which are uncertain. Due to the uncertainty, this 3M is intended to set forth procedures and methods for identifying adverse impacts and require mitigation of those identified impacts.
- G. To ensure wildlife have continued access to customary use, adversely impacted surface water sources will be mitigated through such measures including, but not limited to, installation and maintenance of replacement water sources of equal or greater volume (e.g. guzzlers) in the same area as the impacted water source.
- H. EMLLC will mitigate permitted water rights and determined and undetermined claims of vested or reserved rights should adverse impacts occur.
- I. Mitigation measures, if necessary, will be developed and implemented on a case-by-case basis under provisions of this 3M.
- J. Potential mitigation measures include the following:

- a. Supply (Project) water will be provided from wells located in Kobeh Valley that are completed in the carbonate and alluvial aquifers. Pumping of these different aquifers will have different impacts to the groundwater and surface water flow systems. Adjustment of carbonate/alluvium groundwater pumping ratio could be employed to either minimize or mitigate effects.
- b. Impacts can be greatly influenced by the specific location of groundwater pumping. Mitigation measures include reduction or cessation of groundwater extraction from one or more wells and/or geographic redistribution of groundwater extraction.
- c. Replacement wells can be constructed to mitigate impacted surface water or groundwater rights, or to supply water for wildlife.
- d. Revegetation of affected areas to achieve appropriate vegetative communities.
- e. Financial compensation or, if agreed upon, property (i.e., land and water rights) of equal value could be purchased for replacement.
- f. If adverse impacts to the Diamond Valley Flow System, or other adjacent basins are determined to be caused by Project groundwater pumping, active and current water rights (water currently pumped) within the affected basin could be purchased and retired.
- g. Implement technology to reduce water consumption of the Project. Pumping rates may be decreased if alternative technology emerges that could reduce water requirements or increase water recycling rates. Water conservation techniques will be proactively employed in order to reduce other mitigation measures (i.e. before any impact is measured).
- h. If surface fissures develop due to land subsidence, they could be mitigated by filling with a suitable material to prevent injury to wildlife, livestock or people.
- i. Other measures as agreed to by the Parties and/or required by the NSE.



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May 30, 2012

Mr. Richard A. Felling
Chief, Hydrology Section
Division of Water Resources
State Engineer's Office
901 S Stewart St. Suite 2002
Carson City, NV 89701

Re: Revised Monitoring, Management and Mitigation Plan — Mount Hope Project

Dear Mr. Felling:

This letter transmits Eureka Moly, LLC's ("EMLLC") proposed Monitoring, Management and Mitigation Plan ("3M") for the Mount Hope Project, which has been revised per your instructions on May 24, 2012. The changes include changing "annually" to "semi-annually" and adding a second sentence reading, "Data shall be submitted within 30 days of the end of the reporting period," to page 8, Section 6.D., subsection f) and moving the entire subsection f) to Section 6K. as a new subsection c) on page 10, Further, changing "could" to "shall" on page 12, Section 7.J., subsection h),

This 3M is submitted pursuant to the requirements of Nevada State Engineer ("NSE") Ruling 6127. This 3M supersedes and replaces the version submitted by EMLLC on May 10, 2012,

Sincerely,

Patrick C. Rogers
Director, Environmental and Permitting

Enclosures: 3M (text only)

Cc: Dave Berger, US Geological Survey 3M (text only)

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Jake Tibbitts, Eureka County Natural Resources Department - with 3M (text only)
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NEVADA DIVISION OF WATER RESOURCES MONITORING, MANAGEMENT,
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The framework of these components is described in the following sections.

5. MANAGEMENT

- A. Two committees are established. The Water Advisory Committee (WAC) is to establish and carryout policy under this 3M. The Technical Advisory Committee (TAC) is to provide the technical scientific expertise necessary for collection, evaluation and analysis of data. Separation of the roles and responsibilities of these two bodies is considered crucial to maintaining scientific impartiality of the data collection and analysis program.
- B. Water Advisory Committee:

- a. Within 30 days after NSE approval of this 3M, EMLLC, NSE, and Eureka County representatives will convene as the three (3) founding members of the WAC. Upon the three founding members convening, the Diamond Natural Resources Protection and Conservation Association (DNRPCA) and the Eureka Producers Cooperative (EPC) (DNRPCA and EPC represent the bulk of water rights holders in the Diamond Valley Flow System) will each be invited to bring forward one representative nominated from their respective membership for inclusion as members of the WAC. Letters of interest will also be accepted from potentially affected ranching interests (i.e., Koberh Valley rancher) for inclusion as a member of the WAC. Eureka County, NSE, EMLLC, DNRPCA, and EPC will make the determination on the affected ranching interest to be included on the WAC based on letters of interest received. If any of the potentially affected ranching and farming interests ceases to exist, the remaining WAC members will develop a process so that replacement members will be selected to join the WAC. The WAC may also invite other potentially affected water rights holders to participate as members. The WAC will have no more than seven (7) members. The member of the WAC representing the NSE will be invited to participate as the chair of the WAC. If the NSE member representative declines this invitation, the WAC will elect the chairman. Each WAC member, at its sole discretion, may invite such additional staff or consultants to attend WAC meetings as it deems necessary.
- b. After the full WAC has been convened, the WAC will establish policy and define additional roles and responsibilities of the WAC and TAC, such as scheduling of meetings, agenda setting, publication of minutes, receiving input from the public, and any other necessary components.
- c. The WAC will meet no less than one time in each quarter starting at the execution of this 3M with the primary focus to ensure water monitoring is actively in place. Future meeting frequency may then be adjusted as decided by the WAC, but will be no less than once annually.
- d. The WAC will have an annual meeting, open to the public, to review project operations and to review monitoring, management and mitigation actions of the previous year.
- e. Purposes and Functions of the WAC will be to:
 - i. Provide a forum for the WAC to discuss relevant data and analyses.
 - ii. Share information regarding modeling efforts and model results.
 - iii. Make modifications to the Monitoring component of this 3M, including, but not limited to additional data collection and scientific investigations, based on recommendations from the TAC.
 - iv. Provide status reports and recommendations to the Parties.
 - v. Establish values for monitored variables (water levels, spring discharges, vegetation responses, etc.) known as "action criteria" which, if exceeded,

may be of concern to the Parties and could require mitigation or management actions.

- vi. Determine what constitutes an adverse impact on a case-by-case basis.
- vii. Form and ensure implementation of groundwater management or mitigation measures approved by the WAC based on recommendations of the TAC.
- viii. Review financial assurance periodically and make adjustments to amount as appropriate and recommend release of funds for mitigation and/or management measures.
- ix. Provide the NSE, Parties, and the local stakeholders with data and results of any analyses or technical evaluations, along with reports of specific implemented mitigation or management actions.
- x. Develop and implement a procedure to remove and replace WAC and TAC members as it deems necessary, excluding, however, removal of the founding members consisting of the NSE, EC, and EMLCC.

C. Technical Advisory Committee:

- a. The WAC will appoint a Technical Advisory Committee (TAC) as a subcommittee to the WAC. Each Party represented on the WAC is entitled to appoint a representative and is responsible for funding the participation of their respective TAC member. In addition, the USGS will be invited to participate as a member of the TAC. Funding for the USGS's participation in the 3M will be borne by EMLLC either through new or through existing joint funding agreements with USGS sponsored by Eureka County to study the Diamond Valley Flow System or by a "pass-through" agreement with the NSE. TAC members must exhibit a professional level of technical or scientific expertise and a background or experience in land management, natural resources, water resources, or other related field. Each Party, at its sole discretion may invite additional staff or consultants to attend TAC meetings.
- b. The TAC will meet within 30 days after WAC appointment to review the proposed monitoring provided as Attachment A to this 3M. Upon completing this review, the TAC will make recommendations to the WAC for any changes to the monitoring components of this 3M. Thereafter, the TAC will meet at intervals deemed appropriate by the TAC to review and analyze data, but not less than twice annually or as instructed by the WAC.
- c. At a minimum, purposes and functions of the TAC will be to:
 - i. Review the proposed monitoring and recommend to the WAC implementation, including any changes to the specific monitoring elements, as appropriate.
 - ii. Review historic groundwater level trends, spring and stream flows to determine historic hydrologic trends. Where possible, identify wet and dry

regimes, climate effects on groundwater recharge rates and base flows in surface waters.

- iii. Review, develop, and refine standards and quality control procedures for data collection, management, and analysis.
- iv. Inform the entity or entities that collect data of standard accepted protocols of data collection, recording and analysis (e.g., USGS) that will be used.
- v. Evaluate monitoring data, reports, analyses, etc. to determine whether data gaps exist and make appropriate recommendations to the WAC.
- vi. Develop and recommend action criteria to the WAC for management or mitigation measures based upon available data and analyses.
- vii. Evaluate all monitoring data to determine if any action criterion has been or is predicted to be exceeded, indicating a possible adverse impact and report findings to the WAC.
- viii. Recommend mitigation and management measures and related scope of work details to the WAC. This includes individual resources or a comprehensive list of all resources to support WAC evaluation of the adequacy of mitigation funding.
- ix. Evaluate the effectiveness of mitigation, if implemented, and report findings to the WAC.
- x. Make recommendations to the WAC regarding the numerical groundwater flow model, including appropriate times for any model updates and modes of model output.

D. Numerical Groundwater Flow Model:

- a. EMLLC has developed the Numerical Groundwater Flow Model (FM) to simulate the groundwater flow system and the FM will be updated to incorporate the data collected under this 3M. EMLLC will update the FM after recovering data from the first year of wellfield pumping for mineral processing as recommended under the provisions of this 3M. Thereafter, EMLLC will update the FM on a schedule as determined under the provisions of the 3M.
- b. The FM will be used as a management tool to evaluate predictions of drawdown and impacts and to help define action criteria.

E. Prevention of Interbasin Transfer from Diamond Valley Basin:

- a. If excess water is produced within the Diamond Valley Hydrographic Basin which is not consumed in that basin, this water will be returned to the Diamond Valley Hydrographic Basin. As described in Section 6.E., water derived from pit dewatering and consumed will be documented and reported by EMLLC to verify that the volume of water extracted from Diamond Valley is equal to or less than the volume of water consumed in Diamond Valley (i.e. no transfer of water out of Diamond Valley).

F. Action Criteria:

- a. Specific quantitative action criteria will be developed by the WAC with recommendations from the TAC. These criteria will be developed to provide early warning of potential adverse impacts to water rights, determined to be caused by Project groundwater pumping.
- b. When any action criterion that has been adopted as part of this 3M is reached, the following management actions will be triggered:
 - i. The TAC will meet as soon as possible to assess whether the action criterion exceedance is caused by Project groundwater pumping and present their findings to the WAC.
 - ii. If the WAC determines that any action criterion exceedance is caused by Project groundwater pumping, the TAC will expeditiously develop mitigation or management measures for the WAC to consider. The TAC will analyze the feasibility of the specific measures to assess alternatives, evaluate the potential effectiveness of the measures, and evaluate potential impacts created by implementation of the measures.
 - iii. The WAC will determine whether or not to recommend implementation of the mitigation or management measures and to also recommend if the funds described in MITIGATION will be used to implement such measure.
 - iv. The effectiveness of any implemented measure will be evaluated by the TAC to ensure the measure met or exceeded the intended result. Results and recommendations for any additional measures will be reported to the WAC.
 - v. Any member of the WAC may propose an additional action criterion or a change to existing action criteria. Any such change must be presented in writing to the WAC and accompanied by analyses to support the proposed change.

G. Decision-Making Process:

- a. For technical issues, including, but not limited to monitoring modifications, setting action criteria, and appropriate mitigation, decisions under this 3M will be made after considering the evaluation and recommendations of the TAC.
- b. All Parties shall be afforded the opportunity to attend meetings where decisions will be made. Any decisions made by the WAC under this 3M shall be by unanimous vote of Parties in attendance, provided however, both EMLLC and EC must be present for a vote to occur. If unanimity is not achieved, the Parties may jointly agree to conduct additional data collection and/or data review and analyses directed at resolving the different interpretations or opinions. If that is not successful, the Parties may refer the issue, accompanied by their respective opinions, to the NSE for final determination.

- c. Decisions made by the WAC regarding recommended modifications to the 3M, implementation of mitigation, or other management actions that would be required of EMLLC will be subject to the jurisdiction and authority of the NSE.
- d. Nothing herein limits or changes the NSE authority, and any Party can petition the NSE to consider any issue.

H. Modification of the 3M

- a. The Parties may individually or jointly petition the NSE to modify this 3M in the event that mutual agreement cannot be reached. Any such petition shall be concurrently provided to the other Parties. Prior to the NSE decision, all Parties will be provided the opportunity to submit a written response to the NSE no later than 60 calendar days following the date of receipt of the petition by NSE.
- b. Any modification to the 3M must be approved by the NSE.
- c. Nothing herein seeks to limit, alter, modify or change the exclusive authority of the NSE to approve or modify the 3M.

6. MONITORING

- A. Hydrological related studies for the Project contain data concerning water and related resources in Kobeh Valley, Diamond Valley, Pine Valley, and surrounding areas. These data include locations of existing and proposed supply and monitoring wells, groundwater extraction rates, groundwater level measurements, flow from springs and streams, water quality, precipitation data, and wetland/riparian conditions. Additional data relevant to the Project available from other local, state, and federal agencies or other reliable sources will be compiled into a database by EMLLC and expanded as new data are collected under the provisions of this 3M.
- B. The proposed monitoring is provided in Attachment A to this 3M. As described in MANAGEMENT of this 3M, the TAC will review this proposed monitoring and provide recommendations to the WAC regarding changes and/or implementation. In addition to this initial review, the TAC will review the proposed monitoring and make recommendations to the WAC for changes throughout the Project life based on monitoring data and analysis. Such recommended changes may include, but not be limited to, addition or deletion of monitoring sites, addition or deletion of monitoring parameters, changes to monitoring methods, and increases or decreases in monitoring frequencies. Upon acceptance by the NSE of this 3M, EMLLC will implement the monitoring requirements as set forth in Attachment A.

- C. The term "as is feasible" as used in this 3M relates to mechanical failures or other events/reasons outside the control of the Parties, as agreed upon by the Parties, that interfere with data collection.

D. Groundwater

- a. Groundwater pumping will be measured by flow meters installed on each production well, dewatering well and pit dewatering sump.
- b. Water levels in all wells included as part of the Project monitoring network will be measured by recording pressure transducers (data loggers). The measurement frequency will depend on distance to the wellfield and be based on TAC recommendations.
- c. The Project monitoring network will include "sentinel" wells (i.e., wells strategically located to provide early indication of drawdown propagation towards sensitive or important resources). At a minimum these will be located near the boundary between Kobeh, Diamond, Pine and Antelope Valleys; between the pumping wells and the headwaters of Henderson and Roberts Creeks and Tyrone Gap; between the wellfield and Gravel Pit Spring, Bartine artesian wells, the Antelope Valley Hot Springs (Klobe Hot Springs), and the stock wells at Hay Ranch. Nested wells that monitor individual aquifers at a single location where more than one hydrostratigraphic unit is present or strong vertical gradients may exist will be completed, as is feasible.
- d. Test wells constructed at each Project production well site will be maintained as monitoring wells, as is feasible, and equipped with recording pressure transducers.
- e. Several USGS monitoring wells are located near the proposed well field and within the projected drawdown area. If the USGS is not funded to monitor these specific wells, EMLLC will request USGS permission to collect data from these wells. If the WAC determines that monitoring should continue at these locations, EMLLC may be required to drill replacement wells or develop a suitable alternative.

E. Pit Dewatering

Groundwater will be extracted from the Diamond Valley Hydrographic Basin either by wells or pit dewatering sumps. To determine the amount of water from pit dewatering within the Diamond Valley Hydrographic Basin, the total groundwater removed by pit dewatering sumps will be measured by totalizing flow meters and then multiplied by a factor reflecting the portion of the pit area that is located in Diamond Valley Hydrographic Basin. The discharge from dewatering wells will be measured with totalizing flow meters and allocated to the basin in which the well is located. Water truck loads utilized in the pit complex will be counted and recorded to document water used in

Diamond Valley for mine environmental dust suppression. The amount of water used in Diamond Valley for other uses will be metered or estimated and recorded in the database.

F. Surface Water

a. At a minimum, the monitoring of stream flow will be conducted as follows:

- i. Monitoring will include continuous measurements of stream stage at selected control sections for each stream, as is feasible.
- ii. The geometry of the control sections will be measured at the start of monitoring and re-measured at least annually.
- iii. Stage measurements will be collected with recording pressure transducers on a frequency of not less than one hour.
- iv. The flow in the streams at the control sections will be gaged monthly, as is feasible, for the first year of record to establish stage-discharge relationship for each gaging station and following any changes in the control section geometry.
- v. All control sections in streams will be assessed routinely for any changes in the control section geometry and the stage discharge relationship be re-established accordingly.
- vi. Following the first year of gaging, stream-flow measurements will be collected at least quarterly.
- vii. Flow data will be recorded at least quarterly and hydrographs updated at least annually.

G. Water Quality

Water quality samples will be collected from selected production and monitoring wells, surface waters and pit water and analyzed by a laboratory certified by the State of Nevada using standard accepted protocols and a standard water test. Macroinvertebrate monitoring will take place in select streams as an indicator of general stream and/or fishery health.

H. Biological Resources

To assess if there is any loss of vegetative communities in phreatophytic and riparian areas, monitoring of vegetation, including phreatophyte vegetation and riparian zones will be conducted. Specific locations are to be determined by the WAC and itemized in Attachment A, and will include sites in Kobeh Valley, Diamond Valley, Pine Valley and Antelope Valley that may be affected by groundwater extraction. Data will be collected using a variety of techniques and will include on-site measurement of vegetation cover, frequency, and type. Shallow wells will be co-located with vegetation monitoring transects. Remote sensing will be employed to help define and monitor the extent of vegetation communities at a larger spatial scale.

I. Meteorology

Weather/Climate stations will be installed and maintained to continuously monitor wind speed and direction, precipitation, temperature, barometric pressure, humidity, and solar radiation. Existing precipitation stations will be used where possible. The purpose of collecting weather/climate data is to provide the WAC with a basis for evaluating whether changes in groundwater levels or stream and spring flow are due to changes in weather or climate.

J. Elevation Control/Subsidence

Monitoring locations for subsidence, groundwater measuring point elevations and ground surface elevations will be established using survey-grade GPS instrumentation. A standard GPS data collection protocol (i.e., common geographic datum) will be used to allow a comparative base for all elevation associated data. Subsidence monitoring will be augmented using remote sensing technologies (e.g. InSAR). Frequency and methodology of remote sensing to monitor subsidence will be reviewed and determined by the WAC in consideration of TAC recommendations.

K. Data Management

- a. All monitoring data will be entered into the 3M database on a regular, timely, and continual basis as it is collected and verified using WAC-approved quality assurance and quality control (QA/QC). Data collected under or as described in this 3M will be fully and cooperatively shared among the Parties. Verified data within the 3M database will become available to the public, upon request.
- b. In addition to updating the 3M database on a regular and continual basis, EMLLC will provide an annual report that summarizes all information and analysis. This report, due in the NSE's office by March 31, will be prepared based on recommendations and in cooperation with the TAC. These reports will summarize water production, the results of monitoring, and all management and mitigation actions taken during the year. Copies of the annual report will be provided to each of the Parties.
- c. All water level, spring discharge, and stream flow data shall be submitted semi-annually to the NSE in an electronic format specified by the NSE. Data shall be submitted within 30 days of the end of the reporting period.

7. MITIGATION

- A. EMLLC will mitigate adverse impacts, if any, as agreed upon under the provisions of this 3M. The WAC will take necessary steps, including recommending whether funding described below may be used as outlined in this 3M, to ensure that mitigation actions are feasible, reasonable, timely, and effective.

- B. Effectiveness of implemented mitigation measures will be evaluated under the provisions of this 3M. Additional measures will be implemented if a previous mitigation measure does not meet its intended purpose(s).
- C. To ensure funding exists for any required future monitoring and mitigation after the cessation of active mining, EMLLC will provide financial assurances under the provisions of this 3M.
- D. EMLLC's financial assurances (FA) funding will be placed into an interest bearing trust account to be established as a part of this 3M. The initial funding will occur in a manner as follows:
 - a. Initial funding of \$250,000 will occur within 60 days of GMI' s Board of Directors formal approval authorizing the start of construction of the Project.
 - b. Additional funding of \$750,000 will occur no later than the end of month six of wellfield pumping for mineral processing (plant startup).
 - c. Funding will be examined and adjusted, as recommended by the WAC, every three years to ensure that sufficient funding is in place to mitigate all potential adverse impacts, including funding for operating and maintenance and long-term replacement costs.
- E After cessation of mining and groundwater pumping by EMLLC, if the NSE determines that there is no longer a reasonable potential for future impacts attributable to the Project, any excess funds, including interest, remaining in the account will be returned to EMLLC.
- F. This 3M outlines measures and procedures to identify and mitigate adverse impacts that may result from project pumping, all of which are uncertain. Due to the uncertainty, this 3M is intended to set forth procedures and methods for identifying adverse impacts and require mitigation of those identified impacts.
- G. To ensure wildlife have continued access to customary use, adversely impacted surface water sources will be mitigated through such measures including, but not limited to, installation and maintenance of replacement water sources of equal or greater volume (e g guzzlers) in the same area as the impacted water source.
- H. EMLLC will mitigate permitted water rights and determined and undetermined claims of vested or reserved rights should adverse impacts occur.
- I. Mitigation measures, if necessary, will be developed and implemented on a case-by-case basis under provisions of this 3M.
- J. Potential mitigation measures include the following:

- a. Supply (Project) water will be provided from wells located in Kobeh Valley that are completed in the carbonate and alluvial aquifers. Pumping of these different aquifers will have different impacts to the groundwater and surface water flow systems. Adjustment of carbonate/alluvium groundwater pumping ratio could be employed to either minimize or mitigate effects.
- b. Impacts can be greatly influenced by the specific location of groundwater pumping. Mitigation measures include reduction or cessation of groundwater extraction from one or more wells and/or geographic redistribution of groundwater extraction.
- c. Replacement wells can be constructed to mitigate impacted surface water or groundwater rights, or to supply water for wildlife.
- d. Revegetation of affected areas to achieve appropriate vegetative communities.
- e. Financial compensation or, if agreed upon, property (i.e., land and water rights) of equal value could be purchased for replacement.
- f. If adverse impacts to the Diamond Valley Flow System, or other adjacent basins are determined to be caused by Project groundwater pumping, active and current water rights (water currently pumped) within the affected basin could be purchased and retired.
- g. Implement technology to reduce water consumption of the Project. Pumping rates may be decreased if alternative technology emerges that could reduce water requirements or increase water recycling rates. Water conservation techniques will be proactively employed in order to reduce other mitigation measures (i.e. before any impact is measured).
- h. If surface fissures develop due to land subsidence, they shall be mitigated by filling with a suitable material to prevent injury to wildlife, livestock or people.
- i. Other measures as agreed to by the Parties and/or required by the NSE.

BRIAN SANDOVAL
Governor

STATE OF NEVADA



LEO DROZDOFF
Director

JASON KING, P.E.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES

901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
<http://water.nv.gov>

June 6, 2012

Mr. Patrick Rogers
Director, Environmental and Permitting
Eureka Moly, LLC
2215 North 5th Street
Elko, NV 89801

RE: 3M Plan for Mount Hope Project

Dear Mr. Rogers,

We received your Monitoring, Management, and Mitigation Plan (Plan) for your Mount Hope molybdenum mine dated May 30, 2012. The Plan as submitted is approved with the understanding that components of the Plan are subject to modification based on need, prior monitoring results, or changes in the approved water rights. This Plan is authorized by NRS 534.110, and the State Engineer has final authority over the Plan. Eureka Moly LLC and any successors or assigns will be responsible for implementing and complying with the Plan.

Water level and flow data are to be reported semiannually within 30 days of the end of each reporting period. An annual report is required by March 31st of each year. The annual report shall summarize water production, the results of the monitoring, all management and mitigation actions taken, any proposed or needed changes to the Plan, and any changes to project pumping.

Water level and flow data are to be reported electronically in a prescribed format. Instructions for documentation and reporting, and spreadsheets for tabulating and submitting data can be downloaded from our website: <http://water.nv.gov/forms/>.

Sincerely,

Handwritten signature of Richard Felling in black ink.

Richard Felling
Chief, Hydrology Section

SUP SE ROA 27

3MJA 000523

BRIAN SANDOVAL
Governor



LEO DROZDOFF
Director

JASON KING, P.F.
State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
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[MOE/ fwateratv.gov](http://MOE/fwateratv.gov)

June 14, 2012

Kobeh Valley Ranch, LLC
1726 Cole Blvd., Suite 115
Lakewood, Colorado 80401

Re: Applications 72695 etc.

Ladies and Gentlemen:

Enclosed, please find the Monitoring, Management, and Mitigation Plan for the Mount Hope Molybdenum Mine approved by the State Engineer June 6, 2012.

Should you have any questions regarding this matter, please contact me at (775) 684 - 2873.

Sincerely,

A handwritten signature in black ink that reads "Tim Wilson, P.E.".

Tim Wilson, P.E.
Hearings Officer

FtP. CEIVED

JUN 18 2012

HULL & BRANSETTER
CHARTERED

TW/jm

Enclosures
cc:

Baxter Glenn Tackett
Cedar Ranches, LLC
Conley Land and Livestock, LLC
Diamond Cattle Company, LLC
D. Lloyd Morison
Eureka County
Gordon DePaoli
Karen A. Peterson, Esq., Allison, MacKenzie, Pavlakis, Wright & Fagan, Ltd.

SUP SE ROA 28

3MJA 000524

STATE OF NEVADA

Re: Applications 72695 etc.

Page 2

Kenneth F. Benson
Lander County
Michael K. Branstetter, Esq., Hull & Branstetter Chtd.
Mike Fuller, El-mail
Michel and Margaret Ann Etcheverry Family, LP
Ross de Lipkau, Parsons, Behle & Latimer
Therese Ure, Esq., Schroeder Law Offices, P.C.
Tim Arnold, Eureka Moly, Inc.
William A. Nisbet, Chilton Engineering and Surveying, Ltd.
Elko Branch Office
Southern Nevada Branch Office

SUP SE ROA 29

3MJA 000525

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8 Em: fwikstrom@parsonsbehle.com
ecf@parsonsbehle.com

9 *Attorneys for Intervenor*
10 KOBEH VALLEY RANCH, LLC

11 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR THE COUNTY OF EUREKA**

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

17 Petitioners,

18 v.

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

22 Respondent.

23 -and-

24 KOBEH VALLEY RANCH LLC, a
25 Nevada limited liability company,

26 Intervenor.

Case No.: CV1207-178

Dept. No.: 2

27 **ANSWER TO PETITION FOR JUDICIAL REVIEW**
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COMES NOW, Respondent Kobeh Valley Ranch, LLC, (hereinafter “KVR”) and files its Answer to the Petition for Judicial Review filed herein by Petitioners Michel and Margaret Ann Etcheverry Family, LP, Diamond Cattle Company, LLC, and Kenneth F. Benson, an individual. Petitioners will hereinafter be referred to as “Petitioners.”

1. KVR admits that the Etcheverry family, or members thereof, own land and water rights in Kobeh Valley and Diamond Valley, but does not have sufficient information or knowledge as to the truth or falsity of the remaining allegations contained within paragraph 1 of Petitioners’ for Judicial Review, so therefore denies the allegations therein.

2. KVR does not have sufficient information or knowledge as to the truth or falsity of the allegations contained within paragraph 2 of Petitioners’ Petition for Judicial Review, so therefore denies the allegations therein.

3. KVR admits the allegations contained within paragraph 3 of Petitioners’ Petition for Judicial Review.

4. KVR admits the allegations contained within paragraph 4 of Petitioners’ Petition for Judicial Review.

5. KVR does not have sufficient information or knowledge as to the truth or falsity of the allegations contained within paragraph 5 of Petitioners’ Petition for Judicial Review, so therefore denies the allegations therein.

6. KVR admits the allegations contained within paragraph 6 of Petitioners’ Petition for Judicial Review.

7. KVR admits the allegations contained within paragraph 7 of Petitioners’ Petition for Judicial Review.

8. KVR is without knowledge or information sufficient to form a belief as to the truth of the allegations contained within paragraph 8 of Petitioners’ Petition for Judicial Review, so therefore denies the allegations contained therein.

9. KVR admits the allegations contained within paragraph 9 of Petitioners’ Petition for Judicial Review.

1 10. KVR admits the allegations contained within paragraph 10 of Petitioners' Petition
2 for Judicial Review.

3 11. In response to paragraph 11 of Petition for Judicial Review KVR admits that the
4 State Engineer, on July 15, 2011 issued Ruling 6127, and that such Ruling speaks for itself. KVR
5 further admits that the Monitoring, Mitigation and Management Plan ("3M Plan") must be
6 approved by the State Engineer prior to any diversions of water by KVR, and denies the
7 remaining allegations therein. KVR denies the remaining allegations in paragraph 11.

8 12. KVR admits the allegations contained within paragraph 12 of Petitioners' Petition
9 for Judicial Review.

10 13. KVR admits the allegations contained within paragraph 13 of Petitioners' Petition
11 for Judicial Review.

12 14. KVR admits the allegations contained within paragraph 14 of Petitioners' Petition
13 for Judicial Review.

14 15. KVR admits the allegations contained within paragraph 15 of Petitioners' Petition
15 for Judicial Review.

16 16. KVR denies the allegations contained within paragraph 16 of Petitioners' Petition
17 for Judicial Review.

18 17. KVR denies the allegations contained within paragraph 17 of Petitioners' Petition
19 for Judicial Review.

20 18. KVR denies the allegations contained within paragraph 18 of Petitioners' Petition
21 for Judicial Review.

22 19. KVR denies the allegations contained within paragraph 19 of Petitioners' Petition
23 for Judicial Review.

24 20. KVR denies the allegations contained within paragraph 20 of Petitioners' Petition
25 for Judicial Review.

26 21. KVR denies the allegations contained within paragraph 21 of Petitioners' Petition
27 for Judicial Review.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 17 day of August, 2012, I served a true and correct copy of the foregoing **ANSWER TO PETITION FOR JUDICIAL REVIEW** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as follows:

Bryan L. Stockton, Esq.
Senior Deputy Attorney General
NEVADA ATTORNEY GENERAL'S OFFICE
100 North Carson Street
Carson City NV 89701
EMail: bstockton@ag.nv.gov

Attorneys for Nevada State Engineer

Therese A. Ure, Esq.
SCHROEDER LAW OFFICES, P.C.
440 Marsh Avenue
Reno, NV 89509
Email: therese@water-law.com

Attorneys for Etcheverry Family, Kenneth F. Benson and Diamond Cattle Company, LLC



Employee of Parsons Behle & Latimer

1 Case No. CV1207-178

2 Dept. No.: II

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., Reno, Nevada 89509-1515
7 PHONE: (775) 786-8800; FAX: (877) 600-4971
8 counsel@water-law.com

9 *Attorneys for the Petitioners Michel and*
10 *Margaret Ann Etcheverry Family LP,*
11 *Diamond Cattle Company, LLC, and,*
12 *Kenneth F. Benson.*

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

24 Petitioners,

25 v.

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

Respondents,

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

Intervenor-Respondents.

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

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 1) The State Engineer has no authority to delegate its power in this case to a third party 13

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{P0235594; 1165.02 ALR }

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{P0235594; 1165.02 ALR }

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{P0235594; 1165.02 ALR }

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OPENING BRIEF

Petitioners MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON (collectively referred to herein as “Petitioners”), by and through their attorneys of record, Schroeder Law Offices, P.C., file this Opening Brief in support of their Petition for Judicial Review, filed in Case No. CV1207-178 on July 5, 2012.

I.

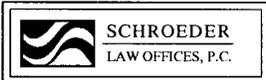
INTRODUCTION

Petitioners filed this Petition for Judicial Review based on the State Engineer’s decision accepting and approving Eureka Moly, LLC’s 3M Plan. This 3M Plan, monitoring, management, and mitigation, is simply “a plan for a plan.” This 3M Plan does not do, as the State Engineer promised: It has no specific provisions or conditions to protect existing rights. This 3M Plan improperly delegates the State Engineer’s authority to two committees who are tasked with determining what an impact or conflict is, then considering impacts and making a plan for mitigation, but only if the committee unanimously agrees on the proposed action. In essence, these committees create an adjudicative body over water right holders in Kobeh, Pine, and/or Diamond valleys that are affected by the groundwater use of the Eureka Moly LLC’s molybdenum mining operations. Further, these committees are impermissibly delegated authority to create rules and regulations, to administer conflicting water uses, and to change rules at the discretion and whim of the committee. The 3M Plan does not comply with Nevada water law, and seeks to go beyond the powers legislated to the State Engineer.

II.

PROCEDURAL HISTORY

On July 15, 2011, the State Engineer issued Ruling No. 6127. On August 11, 2011, Petitioners filed a previous Petition for Judicial Review before this Court, challenging State Engineer Ruling No. 6127 (Case No. CV-1108-157). Because the State Engineer continued to



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{P0235203; 1165.02 SRL }

1 issue permits following State Engineer Ruling No. 6127, Petitioners filed additional Petitions for
2 Judicial Review, designated as Case Nos. CV-1112-165 and CV-1202-170. Petitioners' requests
3 for judicial review were subsequently consolidated with Case Nos. CV-1108-155, CV-1108-156,
4 and CV-1112-164.

5 On June 13, 2012, this Court rendered its Findings of Fact, Conclusions of Law and
6 Order Denying Petitions for Judicial Review (Case Nos. CV-1108-155, CV-1108-156, CV-1108-
7 157, CV-1112-164, CV-1112-165 and CV-1202-170). PSROA 175-233. This denial is currently
8 before the Nevada Supreme Court in Case No. 61324.

9 On or about May 30, 2012, Eureka Moly, LLC¹ submitted a Monitoring, Management
10 and Mitigation Plan ("3M Plan") to the State Engineer. State Engineer Record on Appeal ("SE
11 ROA") 5-30; State Engineer Supplemental Record on Appeal ("SE SROA") 13-14.² The 3M
12 Plan "applies to proposed groundwater extraction from Kobeh Valley and Diamond Valley for
13 mining process water permits granted in Ruling 6127 of the office of the Nevada State Engineer
14 (NSE) dated July 15, 2011." SE ROA 5. On June 6, 2012, Richard Felling, Chief of the
15 Hydrology Section of the Division of Water Resources, sent a letter to Eureka Moly, LLC
16 stating, "The Plan as submitted is approved with the understanding that components of the Plan
17 are subject to modification based on need, prior monitoring results, or changes in the approved
18 water rights." SE SROA 27.

19 On July 5, 2012, Petitioners filed their Petition for Judicial Review with this Court to
20 challenge the State Engineer's approval of the 3M Plan. On August 14, 2012, this Court entered
21 an order allowing KVR to intervene.

22 ///
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25 ¹ Eureka Moly, LLC and Kobeh Valley Ranch, LLC ("KVR") are subsidiaries of General Moly,
26 Inc. KVR is the water right application/permit holder. Eureka Moly, LLC is the water rights
leasee and operator of the Mount Hope mining project. SE ROA 5.



1 **III.**

2 **STATEMENT OF RELEVANT FACTS**

3 **A. Approval of 3M Plan**

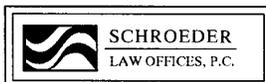
4 Between May of 2005 and June of 2010, numerous applications to appropriate
5 underground water and to change the point of diversion, place of use, and/or manner of use were
6 filed by Idaho General Mines, Inc. and Kobeh Valley Ranch, LLC (collectively herein the
7 "Applications"). The Applications filed by Idaho General Mines, Inc. were thereafter assigned to
8 Kobeh Valley Ranch LLC ("KVR"). The Applications were filed for water use related to a
9 proposed molybdenum mine, known as the Mount Hope Mine Project, that requires underground
10 water for mining, milling and dewatering purposes. The total combined duty under all of the
11 Applications equaled 11,300 acre feet annually (afa). Petitioners' Supplemental Record on
12 Appeal ("PSROA") 1-4, 10-11.

13 Even though the State Engineer found that the Applications would conflict with certain
14 existing water rights, particularly those on the floor of Kobeh Valley, the State Engineer issued
15 Ruling No. 6127, granting the majority of the Applications subject to certain terms and
16 conditions. PSROA 22, 27, 38-39, 898, 910; *see also* Attachment A. The State Engineer
17 approved the Applications determining that such conflicts could be mitigated. *Id.* Thus, the
18 "mitigation" condition required the submission and approval of a Monitoring, Management, and
19 Mitigation Plan ("3M Plan") prior to diverting any water under the issued water use permits. *Id.*
20 State Engineer's Ruling No. 6127 and the State Engineer's issuance of water use permits is
21 currently under review by the Nevada Supreme Court in Case No. 61324.

22 Eureka Moly, LLC prepared and submitted a 3M Plan to the State Engineer on or about
23 May 30, 2012, and the State Engineer approved the 3M Plan on June 6, 2012. SE ROA 5-30; SE

24 _____ (Cont.)

25 ² The State Engineer's Record on Appeal is referred to as "SE ROA" and the State Engineer's
26 Supplemental Record on Appeal is referred to as "SE SROA." Petitioners' Supplemental Record
on Appeal is referred to as "PSROA."



1 SROA 13-14, 27. Petitioners did not participate and were not involved in developing the 3M
2 Plan. The 3M Plan is a 12-page document (with an additional attachment) that outlines the
3 background, purposes, participants, and general requirements for monitoring, management, and
4 mitigation of KVR’s water use for the Mount Hope Mine. SE ROA 5-30.

5 **B. Relevant 3M Plan Provisions**

6 The management portion of the 3M Plan establishes two committees: 1) the Water
7 Advisory Committee (“WAC”), and 2) the Technical Advisory Committee (“TAC”). SE ROA 6-
8 9. According to the 3M Plan, the WAC will meet at least once annually to review data, make
9 modifications to the 3M Plan, create status reports and provide recommendations, create “action
10 criteria” (which, if exceeded, “could” require mitigation or management actions), determine what
11 constitutes “adverse impact” on a case-by-case basis, form and implement mitigation measures,
12 review financial assurance, and more. *Id.* The TAC, as envisioned in the 3M Plan, will meet at
13 least twice annually (or as otherwise instructed by the WAC) to recommend data collection
14 techniques, review data and make recommendations (based on available data, but not necessarily
15 the best available data), recommend action criteria to the WAC and determine whether action
16 criteria have or will be exceeded, recommend mitigation and management measures to the WAC,
17 evaluate effectiveness of any mitigation, and more. *Id.*

18 As approved by the State Engineer, the WAC will be made up of members from Eureka
19 Moly, LLC, Eureka County, and include the Nevada State Engineer. The Diamond Natural
20 Resources Protection and Conservation Association and the Eureka Producers Cooperative will
21 each be invited to nominate a member of the WAC. Other persons may send letters of interest to
22 be included in the WAC, but the WAC members themselves will decide whether additional
23 persons can join.³ SE ROA 7.

24 _____
25 ³ Subsequent to the approval of the 3M Plan, Martin Etcheverry, a representative of two of the
26 Petitioners, was invited by the State Engineer’s office to participate in WAC. Further, the State
Engineer invited Martin Etcheverry to appoint a qualified representative to the TAC at
Etcheverry’s own expense.



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1 The TAC is similarly incestuous, as it is intended to be made up of nominees from each
2 member of the WAC, at the WAC's member's expense. The federal agency, United States
3 Geological Survey ("USGS") will be invited to join the TAC at Eureka Moly LLC's expense. SE
4 ROA 8.

5 The 3M Plan does not provide any specific trigger(s) for when mitigation will be
6 required. Instead, the 3M Plan is another "plan for a plan," stating that the WAC will adopt
7 "action criteria" in the future (threshold variables for water levels, spring discharges, vegetation
8 responses, etc.) that will be used to determine after the fact if "adverse impacts" have been, or
9 will be, caused to existing water use rights. SE ROA 7-8, 10.

10 There are no requirements in the 3M Plan for how the action criteria will be developed.
11 Once developed and if action criteria are exceeded, or will be exceeded, the TAC will
12 recommend management or mitigation measures, which the WAC will decide whether to
13 implement, or not to implement. SE ROA 7-9. The TAC will measure the "effectiveness" of any
14 mitigation. SE ROA 9. There are no standards in the 3M Plan for what is considered "effective."
15 Protecting existing rights, while the mandate, is not incorporated into the "effectiveness" regime.

16 All decisions made by the WAC must be made by unanimous vote. If unanimity is not
17 achieved, additional data collection, review, and analysis will be conducted. If unanimity still
18 cannot be reached, then the matter will be referred to the State Engineer for final determination.
19 SE ROA 10-11. There are no time limitations or triggers to cause a stay of water withdrawals set
20 out in the 3M Plan.

21 The WAC has the purpose and function to make modifications to the 3M Plan based on
22 recommendations by the TAC. SE ROA 11. There are no prohibitions on the extent or scope of
23 the modifications permitted. There is no indication in the 3M Plan whether the WAC may take
24 action without recommendation by the TAC. There are no provisions to stop water withdrawals
25 in the event the WAC-TAC committees are ineffective.

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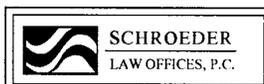
1 The monitoring portion of the 3M Plan proposes locations for measuring the depth to
2 water, water flow, water quality, water pressure, and vegetation “as is feasible.” SE ROA 11-14.
3 “Feasibility” is not defined. Once organized, the 3M Plan contemplates that the TAC will make
4 recommendations to the WAC for changes to or implementation of the monitoring plan. There
5 are no requirements for how often certain types of data must be collected, and other types of data
6 may only be collected every two years (SE ROA 27-28), regardless of the fact that data may be
7 affected by the time of year.⁴

8 The mitigation portion of the 3M Plan provides for one million dollars in funding to pay
9 for both monitoring and mitigation, the sufficiency of which will only be reviewed once every
10 three years. SE ROA 15. Adversely impacted surface water sources *will* be mitigated for wildlife
11 use by providing replacement water in the same area as the impacted water source. *Id.* Yet,
12 adversely impacted permitted, vested, or reserved water rights have no concrete mitigation
13 requirements. In fact, mitigation is permissive: Adversely, impacted permitted, vested, or
14 reserved water rights *may* be mitigated with a variety of measures, including financial
15 compensation or the purchase of replacement property. SE ROA 15-16. Even though the Nevada
16 legislature has delegated authority to the State Engineer for such determinations, in the case of
17 the 3M Plan, the WAC decides what constitutes “adverse impact.” SE ROA 7-8, 10. There is *no*
18 *requirement* in the 3M Plan that KVR must stop withdrawals in any event or even ensure that
19 existing water rights are satisfied within the terms of those water rights. Substitutes for the
20 satisfaction of existing water rights qualifies as adequate mitigation, should the WAC-TAC
21 determine adverse impacts exist at all. There are no required timelines for mitigating impacted
22 water rights or water sources.

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26 ⁴ Any requirements for data collection may be modified by the WAC. SE ROA 11.



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IV.

SUMMARY OF THE ARGUMENTS

The State Engineer erred in approving the 3M Plan. First, the 3M Plan does not comply with NRS § 533.370 or Ruling No. 6127’s requirement that the 3M Plan ensure existing rights are satisfied. Second, the 3M Plan does not comply with NRS § 534.110(5), which allows junior water use rights to lower the static water level at the point of diversion of a prior appropriator *only if* the senior rights can be satisfied under express conditions. Third, the 3M Plan provides for the impermissible delegation of legislative authority. Fourth, the 3M Plan constitutes impermissible ad hoc rulemaking in violation of NRS §§ 532.110 and 534.110. Fifth, the 3M Plan is itself vague and deficient. This Court should reverse the State Engineer’s approval of the 3M Plan because the approval is arbitrary and capricious, affected by an error of law, and constitutes an abuse of discretion.

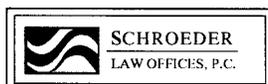
V.

STANDARD OF REVIEW

When a court reviews the decision of a state agency regarding a question of fact, the court is limited to a determination of whether substantial evidence in the record supports the decision. *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). The decision should be affirmed if the court finds the ruling is supported by substantial evidence. *United States v. Alpine Land & Reservoir Co.*, 919 F.Supp. 1470, 1474 (D.Nev. 1996). The Nevada Supreme Court defines “substantial evidence” as “that which a reasonable mind might accept as adequate to support a conclusion.” *State Employment Sec. Dept. v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 496, 498 (1986) (citing *Richardson v. Perales*, 402 U.S. 389 (1971)).

When a court reviews the decision of a state agency regarding a question of law, the court does not give deference to the State Engineer’s decision in any respect. *Town of Eureka*, 108

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1 Nev. at 165; *In re Nevada State Engineer Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv.
2 Op. 22 (Nev. 2012).

3 The decision of an administrative agency will generally not be reversed unless it is
4 arbitrary or capricious. *Hilton Hotels Corp.*, 102 Nev. at 608. A decision is “arbitrary or
5 capricious” if it is “baseless or despotic,” or “a sudden turn of mind without apparent motive; a
6 freak, whim, mere fancy.” *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222. 855 P.2d 545,
7 548 (1994).

8 Nonetheless, an administrative decision may also be reversed, remanded or set aside if it
9 is “affected by an error of law.” *Dredge v. State ex rel. Dep’t Prisons*, 105 Nev. 39, 43, 769 P.2d
10 56, 58-59 (1989) (ruling applied to NRS § 233B.135 by *Pricz Tattoo Studio LLC v. Dep’t of*
11 *Empl. Training & Rehab.-Empl. Sec. Div.*, Slip Copy, 2011 WL 6932405, *1 (Nev. 2011)). An
12 error of law is a “clear error in view of the reliable, probative, and substantial evidence of record
13 or an abuse or clearly unwarranted exercise of discretion.” *Dredge*, 105 Nev. at 43. Further, the
14 administrative decision may be reversed, remanded or set aside if the decision constitutes an
15 “abuse of discretion” because the decision-maker acted arbitrarily or capriciously. *Id.*

16 VI.

17 ARGUMENT

18 A. The 3M Plan contravenes conditions in Ruling No. 6127 and NRS § 533.370, and the 19 State Engineer’s approval of the 3M Plan was affected by an error of law and 20 constitutes an abuse of discretion.

21 While we are not here to re-argue the intricacies of Ruling No. 6127 (currently on appeal to
22 the Nevada Supreme Court), we are here to argue the inadequacies of Eureka Moly, LLC’s, and
23 the State-Engineer-approved, 3M Plan. The facts show that first, the State Engineer issued
24 Ruling No. 6127 without express conditions, and then later, the State Engineer stated it would
25 rely on the 3M Plan to establish those conditions and to protect existing water rights. Now that
26 the 3M Plan is available, those conditions are nowhere to be found. The State Engineer must stop

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1 relying on future possibilities of rectifying prior wrongs, and uphold Nevada’s water law. The
2 3M Plan does not cure the Applications’ conflicts with existing rights (NRS § 533.370).

3 Nevada Revised Statute § 533.370(2) provides, “[W]here its proposed use or change
4 conflicts with existing rights ... the State Engineer shall reject the application and refuse to issue
5 the requested permit.” It is a fundamental principle of the Prior Appropriation System, adopted
6 by Nevada (*see, e.g., United States v. State Engineer*, 117 Nev. 585, 591-592, 27 P.3d 51, 52
7 (2001)), that later-in-time (“junior”) water uses should not injure or conflict with earlier-in-time
8 (“senior”) water uses.⁵

9 In Ruling No. 6127, the State Engineer determined that KVR’s Applications would
10 conflict with existing water rights, but that the Applications could be approved if conflicts are
11 mitigated. PSROA 22, 27, 38-39, 898 and 910; *see also* Attachment A. State Engineer Ruling
12 No. 6127 states: “The monitoring, management and mitigation plan will ... ensure that any
13 existing water rights are satisfied to the extent of the water right permits.” PSROA 27. Thus,
14 Ruling No. 6127 requires the 3M Plan to guarantee that existing rights will be satisfied to their
15 full extent and under the terms of the existing rights. Otherwise, Applications must be denied
16 pursuant to NRS § 533.370(2), or otherwise violate the fundamental principal of prior
17 appropriation, that junior water uses cannot conflict with senior water uses.

18 Contrary to Ruling No. 6127, the 3M Plan does not ensure that existing senior use rights
19 will be satisfied to their full extent. PSROA 27. Under the 3M Plan, if a conflict with an existing
20 use right occurs, the 3M Plan provides that data must be collected and analyzed by the TAC that
21 makes recommendations to the WAC. Accordingly, the State Engineer approved the 3M Plan,
22 that allows the WAC to set “action criteria,” threshold values for water levels, spring flow, and
23 vegetation responses. Then the 3M Plan allows the WAC to determine whether any injury to

24 _____
25 ⁵ Nevada laws permit junior water use rights to reasonably lower the static water level at a
26 senior’s point of diversion. NRS § 534.110(4). However, the junior water user may only lower
the static water level if existing senior rights will be satisfied under “express conditions.” NRS §
534.110(5). Those requirements are discussed *infra* at Section VI(B).



1 right holders (a legal principal) meets the WAC's standard for "adverse impacts." If KVR's
2 activities are found to cause "adverse impacts," the TAC recommends certain management or
3 mitigation measures to the WAC, and the WAC determines the appropriate action (which may
4 include mitigation measures *other than* ensuring existing rights are satisfied). After, completing
5 the circular internal procedure, the TAC finally determines whether mitigation is effective and
6 makes further reports and recommendations to the WAC. Since all decisions must be *unanimous*,
7 and if the committees cannot reach consensus, additional data are collected and analyzed. If
8 consensus still cannot be reached, the matter is finally "kicked out" of the internal, endless circle
9 and referred to the State Engineer for final determination. SE ROA 10-11.

10 The 3M Plan sets forth an arduous, lengthy, and circular process that may culminate in an
11 unknown substitute rather than satisfaction of the right. The assurance and satisfaction of
12 existing water rights, is a fundamental requirement to the State Engineer's Ruling because
13 without that requirement, the State Engineer's approval of the Applications would have violated
14 NRS § 533.370 without question.⁶ This statutory provision clearly provides that applications that
15 conflict with existing rights or protectable interests in existing domestic wells shall be denied.
16 The State Engineer has fallen onto this slippery slope in looking to a future plan to cure a past
17 wrong.

18 The 3M Plan does not rely on legislative mandates to set standards for what constitutes a
19 conflict or "adverse impact," and there are no timelines for mitigating adverse impacts/conflicts.
20 Water users are at the mercy of the WAC and TAC, and may experience long delays and
21 continued drawdown while the committees decide the plan of action. The time delay alone, given
22 no stay in withdrawals will occur, will cause adverse impacts, and irreparable harm, to the
23 affected existing water users. Even if the committees unanimously determine there is a conflict

24 _____
25 ⁶ Petitioners maintain the argument that the State Engineer committed error by relying on a non-
26 existent and hypothetical mitigation plan that was not of record to determine that any conflicts
could be mitigated, in violation of NRS § 533.370. This argument is currently being heard by the
Nevada Supreme Court in Case No. 61324.



1 that should be mitigated, there is no requirement in the 3M Plan that the injured party's water use
2 right be fully satisfied; the 3M Plan allows for mitigation measures such as replacement with
3 other water and financial compensation (i.e., not fulfillment of the existing water right, as
4 required by Ruling No. 6127, and Nevada law), whether the water user agrees with such
5 measures or not. Finally, there are no standard that "adverse impact" must mean the same as
6 "conflict" or an "unreasonable lowering of the static water level" under the Nevada water code,
7 and thus the 3M Plan circumvents the Nevada water code by redefining, omitting, and/or adding
8 statutory terms, such as mitigation "to be determined" by the one at fault as an avenue to satisfy
9 existing rights.

10 The current 3M Plan does not comply with Ruling No. 6127. The 3M Plan does not cure
11 the Applications' conflicts with existing rights (NRS § 533.370). The State Engineer's hasty
12 approval of the 3M Plan, as a method to ensure existing rights are protected, simply fails. The
13 State Engineer's decision is affected by an error of law and constitutes an abuse of discretion.
14 This Court should reverse the State Engineer's approval of the 3M Plan.

15 **B. The 3M Plan does not comply with the requirement in NRS § 534.110(5) to provide**
16 **express conditions for satisfaction of existing rights, and the State Engineer's**
17 **approval of the 3M Plan is affected by an error of law and constitutes an abuse of**
18 **discretion.**

18 The 3M Plan contains no express conditions to protect existing rights. Nevada Revised
19 Statute § 533.370(2) provides: "the State Engineer shall reject the application and refuse to issue
20 the requested permit" if the "proposed use or change conflicts with existing rights." Existing
21 water rights to use underground water are specifically recognized. NRS § 534.100. Groundwater
22 rights "allow for a reasonable lowering of the static water level at the appropriator's point of
23 diversion." NRS § 534.110(4). Later appropriations may be granted that may cause the water
24 level to be lowered at the point of diversion of a prior appropriator, only if the rights of existing
25 appropriators can be satisfied under "express conditions." NRS § 534.110(5).

26 ///



1 The State Engineer determined in Ruling No. 6127 that although the Applications would
2 conflict with existing rights, any conflict could be mitigated with a yet-to-be-developed
3 mitigation plan. PSROA 22, 27, 38-39, 898, 910; *see also* Attachment A. The Permits were
4 issued subject to future approval of a 3M Plan by the State Engineer. PSROA 42. Petitioners
5 challenged the State Engineer’s decision to approve the Applications subject to the requirement
6 to develop a 3M Plan because no “express conditions” were included in the Permits to ensure
7 existing rights would be satisfied, as required by NRS § 534.110(5).⁷

8 After the Applications were approved, and on or about May 30, 2012, Eureka Moly LLC
9 submitted a 3M Plan to the State Engineer. Seven days later on June 6, 2012, the State Engineer
10 approved the 3M Plan. SE SROA 13-14, 27. **The 3M Plan is merely another plan to create a**
11 **plan.** The 3M Plan does not set any thresholds for the lowering of static water levels at the
12 existing points of appropriation, injury, or to address conflicts with existing rights. The 3M Plan
13 does not ensure that existing rights will be satisfied, and allows for substitution (a concept not
14 found in Nevada law) rather than satisfaction of rights. The 3M Plan is extremely vague and
15 devoid of concrete standards.

16 On April 3, 2012, a hearing was held on the Petitions for Judicial Review challenging
17 Ruling No. 6127 (Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-1112-164, CV-
18 1112-165 and CV-1202-170). At hearing, the State Engineer admitted that if effects to existing
19 rights are known, then NRS § 534.110(5) requires express conditions be placed in Permits to
20 avoid those specific effects. PSROA 98-103; *see also* Attachment B. Yet, prior to that hearing,
21 and in Ruling No. 6127, the State Engineer determined that the Applications *will conflict with*
22 *existing rights* in springs on the floor of Kobeh Valley. PSROA 22, 27, 38-39, 898 and 910; *see*
23 *also* Attachment A. The 3M Plan includes only one specific measure: to mitigate interference
24 with wildlife use and access to water sources. SE ROA 15. Why then were no express conditions
25

26 ⁷ This issue is currently being heard by the Nevada Supreme Court in Case No. 61324.



1 included in the Permits or in the 3M Plan to address the known conflicts with existing rights on
2 the floor of Kobeh Valley? According to the State Engineer, express conditions are required
3 when effects are known, as the State Engineer determined was the case here.

4 The State Engineer is not entitled to continue deferring express condition statutory
5 requirements. The State Engineer's approval of the 3M Plan is affected by an error of law and
6 constitutes an abuse of discretion. This Court should reverse the State Engineer's approval of the
7 3M Plan.

8 **C. The 3M Plan is an impermissible delegation of authority, and the State Engineer's**
9 **approval of the 3M Plan is affected by an error of law and constitutes an abuse of**
10 **discretion.**

11 The Nevada Legislature did not confer upon the State Engineer the powers it is
12 attempting to invoke by the 3M Plan process.

13 **1) The State Engineer has no authority to delegate its power in this case to a third**
14 **party.**

15 Pursuant to the Nevada State Constitution, legislative authority may not be delegated to
16 any other body or authority. Nev. Const. Art. 3 § 1. However, limited legislative power may be
17 delegated to agencies to make rules and regulations supplementing legislation, so long as the
18 scope of the power delegated is sufficiently definite. *Banegas v. State Indus. Ins. Sys.*, 117 Nev.
19 222, 227, 19 P.3d 245, 248 (2001). Further, the State Engineer has the power "to conduct
20 hearings, take evidence, and make decisions that determine water rights." *Nevada Indus.*
21 *Commn. v. Reese*, 93 Nev. 115, 120, 560 P.2d 1352, 1355 (1977) considering *Ormsby County v.*
22 *Kearney*, 37 Nev. 314, 142 P. 803 (1914).

23 The Nevada State Legislature delegated the State Engineer the legislative power to "make
24 such reasonable rules and regulations as may be necessary for the proper and orderly execution
25 of the powers conferred by law." NRS § 532.120. This power is conferred on the State Engineer.
26 In *Sawyer v. Dooley*, the Nevada Supreme Court stated: "it would be impossible to administer
the state government were the *officers* not permitted, and required, in many instances, to
discharge duties in their nature judicial, in that they may exercise judgment and discretion in



1 determining the facts concerning that which they are called upon to act, and in construing the
2 laws applicable to them.” 21 Nev. 390, 396, 32 P. 437, 439 (1893) (emphasis added).

3 In this case, we find no authority for further delegation to a third party. The Legislature
4 has conferred power upon the agency only. “*Administrative agencies* have only those powers
5 which the legislature expressly or implicitly delegates.” *Clark County v. Equal Rights Commn.*,
6 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991) (emphasis added). *Agencies* cannot enlarge their
7 own jurisdiction. *City of Reno v. Civil Serv. Commn. of the City of Reno*, 117 Nev. 855, 858, 34
8 P.3d 120, 122 (2001) (emphasis added). “[S]ome functions usually performed by courts are
9 conferred upon an *administrative body*...” *Reese*, 93 Nev. at 121 (emphasis added), quoting,
10 *Mallatt v. Luihn*, 206 Or. 678, 294 P.2d 871 (1956). These cases show that power conferred is
11 upon the administrative body and its officials, only. The power is not expressly, nor is it
12 implicitly, conferred upon the State Engineer to extend that delegation to another person or
13 entity, especially those outside the office of the State Engineer. The extension of the delegation
14 is an improper delegation of power, and contrary to the law.

15 When the Legislature intends the State Engineer to further create and extend the State
16 Engineer’s powers to commissions, committees, or third parties, it expressly does so. In fact,
17 NRS Chapter 540 creates a Water Planning Section within the Division of Water Resources
18 (NRS § 540.031), and an Advisory Board on Water Resources Planning and Development (NRS
19 § 540.111). Further, NRS Chapter 540A notes the establishment of a Commission for water
20 planning and management. The Legislative Declaration at NRS § 540.011(1) notes, in part, “It is
21 the policy of the State of Nevada to recognize and provide for the protection of these existing
22 water rights.”

23 The third parties mentioned above are not the same commissions, committees, or boards
24 established by Eureka Moly, LLC’s and the State Engineer approved 3M Plan. The legislature
25 has explicitly created the Advisory Boards and the Planning Sections it determined were

26 ///



1 appropriate for State governance. The Legislature did not create the WAC or TAC, or delegate
2 authority to the State Engineer to create or approve their creation.

3 **2) The State Engineer committed an improper delegation of legislative authority.**

4 The negative impacts of the impermissible delegation of authority will be widespread and
5 disastrous. Under the 3M Plan, the State Engineer will “take a back seat” when it comes to
6 deciding whether existing rights are satisfied, whether junior rights must be restricted, or whether
7 the drilling of new wells must be restricted. The 3M Plan substitutes terms for statutory
8 requirements (such as “action criteria” and “adverse impact” for “conflict” and “reasonable
9 lowering”) and delegates the authority to define those terms to an outside quasi-administrative
10 committee (the WAC), which is in part made up of KVR, the Applicant, now permitted to
11 proceed at will without express conditions. If other water users (including water users not part of
12 this litigation⁸) are injured by KVR’s pumping, the WAC will make decisions about whether the
13 injury meets the designated “action criteria” to be considered an “adverse impact.” SE ROA 7-8,
14 10.

15 The 3M Plan was not created through the State Engineer’s rulemaking authority. The
16 State Engineer has the limited legislative authority to engage in rulemaking to promulgate rules
17 necessary to carry out the statutory duties of the office of the State Engineer. The statutory duties
18 imposed on the State Engineer include the duty to regulate groundwater use to ensure priority
19 rights are satisfied, and that new wells do not cause undue interference with existing wells. NRS
20 § 534.110(6) and (8). Nevada’s water code provides that junior, groundwater applications may
21 be granted that would reasonably lower the static water level, *only if* existing water uses will be
22 satisfied under “express conditions.” NRS § 534.110(4) and (5). Thus, the authority is delegated
23 from the Legislature upon the *State Engineer* (and not the WAC or TAC) to determine what
24 constitutes a “reasonable lowering,” and what “express conditions” are necessary to make sure

25 _____
26 ⁸ The 3M Plan arguably governs all water users in the Greater Diamond Valley Flow System that encompasses five hydrographic basins including Diamond Valley and Kobeh Valley.



1 existing rights will be satisfied. Currently, there are no rules, regulations, or statutes that define
2 reasonable lowering, express conditions, conflict, adverse impact, injury, mitigation, or action
3 criteria within NRS Chapters 532, 533, or 534.

4 The State Engineer was given rulemaking authority by the Legislature. The Legislature
5 did not give this authority to the State Engineer to further delegate to another body created via a
6 3M Plan authored by the water user itself, in direct conflict with existing water users that the 3M
7 Plan will thus regulate. Here, the State-Engineer-approved-3M-Plan impermissibly delegates
8 legislative authority⁹ to an outside commission: the WAC. The 3M Plan was not created through
9 proper rulemaking procedures contemplated by NRS § 532.120.

10 In this case, rather than the State Engineer defining “reasonable lowering,” “conflict,” or
11 “express conditions,” the WAC is tasked with setting “action criteria” (monitored variables, such
12 as water levels, spring discharges, vegetation responses, etc.) that determine when there are
13 “adverse impacts” to water users. SE ROA 7-8, 10. The 3M Plan does not provide standards for
14 guiding the WAC’s setting of action criteria. In addition, the 3M Plan allows the WAC to
15 approve mitigation measures that do not ensure satisfaction of existing water rights or enforce
16 the fundamental principal of Prior Appropriation Doctrine, priority of use, contrary to statute and
17 Ruling No. 6127. SE ROA 15-16. The law does not allow mitigation to sidestep the State
18 Engineer’s mandatory duty to “protect existing rights.” Mitigation is not defined by statute, rule
19 or regulation. Nevertheless, the State Engineer approved KVR and Eureka Moly’s 3M Plan as an
20 avenue to make unauthorized rules and regulations to create a future mitigation scheme and carry
21 out its unknown provisions. Finally, even if the State Engineer had authority to delegate, and
22 even if the 3M Plan provided sufficient standards for the delegation, the 3M Plan allows the
23 WAC to change the terms of the 3M Plan at any time, so any standards are meaningless. SE
24 ROA 11.

25 _____
26 ⁹ Noting that the 3M Plan itself has no legislative authority to begin with.



1 **3) The State Engineer committed an improper delegation of adjudicative authority.**

2 In addition to an improper delegation of legislative authority, the 3M Plan improperly
3 delegates adjudicative authority. The WAC stands in judgment over water users, with unfettered
4 control. If it fails to take action by unanimous vote, KVR continues to pump, regardless of the
5 consequences.

6 The 3M Plan is endorsed by the State Engineer who approves this new adjudicative
7 process for the injured water user to go through, yet the decision itself is by the WAC, and not
8 the State Engineer. Once the WAC makes its determination, water users have no further
9 recourse. Because the decision is not an agency decision, water users cannot petition for judicial
10 review under NRS § 533.450. Water users will be left without remedy and at the mercy of the
11 WAC. It is for this very reason that adjudicative authority may not be delegated to outside quasi-
12 legislative bodies without “sufficiently definite” standards in place to protect the public. *See,*
13 *Banegas*, 117 Nev. at 227. If the State Engineer permits an outside commission to decide what
14 the “action criteria” should be to determine when “adverse impacts” exist, and allows those
15 criteria to be changed by the WAC at any time, then the State Engineer abdicates the Division of
16 Water Resources’ statutory duty and leaves water users without an avenue to challenge WAC
17 decisions. Such consequences cannot be condoned.

18 Proponents of the 3M Plan may argue that the State Engineer has delegated authority
19 because a State Engineer representative will be a member of the WAC. However, it is unclear
20 how much power the State Engineer retains under the 3M Plan. The WAC acts upon
21 recommendations from the TAC. Under the 3M Plan, the WAC does not have the authority to
22 approve “action criteria” or other items not recommended by the TAC. Thus, the State Engineer
23 relinquished the office’s power in the first instance to demand actions not recommended by the
24 TAC or approved by the WAC. Only when the members of the WAC do not reach unanimous
25 agreement on an issue can the State Engineer make an independent decision. However, it is still
26 ///



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{P0235203; 1165.02 SRL }

1 unclear whether the State Engineer’s authority is restricted to merely approving or denying TAC
2 recommendations rather than exercising independent decision-making.

3 The 3M Plan is simply another cyclical attempt to convince water users in the valley that
4 existing rights will be protected, while avoiding the statutory terms legislatively required to
5 protect those rights. The legislature required express conditions. The State Engineer seeks to
6 avoid drafting those express conditions by approving the Applications, but passing off the
7 determination of express conditions to the 3M Plan. The State Engineer then approves the 3M
8 Plan without express conditions and creates new “authorities” to stand in judgment over existing
9 rights, all without legislative authority. The State Engineer cannot continue to avoid the
10 mandates of the law and the legislative delegation to protect existing rights.

11 The 3M Plan is an impermissible delegation of authority because it permits an outside
12 committee to decide what constitutes appropriate “action criteria” and “adverse impact,” without
13 any “sufficiently definite” standards to constrain the committee’s exercise of legislative power.
14 Further, the 3M Plan delegates decision-making in a way that leaves water users without any
15 opportunity to challenge its decisions or seek judicial or even quasi-judicial recourse. This Court
16 should reverse the State Engineer’s approval of the 3M Plan because the approval is affected by
17 an error of law and constitutes an abuse of discretion.

18 **D. The 3M Plan constitutes impermissible ad hoc rulemaking in violation of Nevada**
19 **Revised Statutes §§ 532.110 and 534.110, and the State Engineer’s approval of the**
20 **3M Plan is affected by an error of law and constitutes an abuse of discretion.**

21 The State Engineer has rulemaking authority, but failed to use it in approving the 3M
22 Plan. “The State Engineer shall perform such duties as are or may be prescribed by law and the
23 Director of the State Department of Conservation and Natural Resources.” NRS § 532.110. “The
24 State Engineer may make such reasonable rules and regulations as may be necessary for the
25 proper and orderly execution of the powers conferred by law.” NRS § 532.120. The rules and
26 regulations established by the State Engineer are found in Nevada Administrative Code (“NAC”)

///



1 Chapters 532 through 535. The State Engineer does not have the authority to make new laws or
2 change statutes:

3 The powers of the Government of the State of Nevada shall be
4 divided into three separate departments,—the Legislative,—the
5 Executive and the Judicial; and no persons charged with the
6 exercise of powers properly belonging to one of these departments
7 shall exercise any functions, appertaining to either of the others,
8 except in the cases expressly directed or permitted in this
9 constitution

10 Nev. Const. Art. 3 § 1; *see also, Banegas*, 117 Nev. at 227.

11 As provided by statute, when there is insufficient water to satisfy all existing water rights
12 or use, the State Engineer is directed to take action to restrict withdrawals to conform to priority
13 of rights, or to prohibit the drilling of new wells. NRS § 534.110(6) and (8). The State Engineer
14 has not promulgated any rules interpreting or modifying these statutory requirements.

15 Under the 3M Plan, if KVR's pumping results in an unreasonable drawdown of the static
16 water level, depriving a senior water user of their right to appropriate water, the State Engineer
17 no longer takes direct action to regulate water use. As previously noted, the 3M Plan requires
18 WAC cooperation with TAC to review, analyze data, make determinations and action criteria,
19 determine and/or implement management/mitigation measures, all upon unanimity, noting that, it
20 may take significant time for decisions to be reached because the WAC is only required to meet
21 annually, and the TAC semi-annually. SE ROA 7-8. If further attempts at consensus are not
22 successful, only then is the matter referred to the State Engineer for final determination.

23 Therefore, whereas the State Engineer would previously take direct action to restrict junior water
24 use rights when necessary to ensure senior rights are satisfied, the 3M Plan creates additional and
25 cumbersome processes for regulating KVR's pumping if the Applications conflict with senior
26 water use rights. Finally, it is unclear how an existing water user obtains standing in front of the
WAC-TAC, what avenues (if any) the existing water user has to make a complaint, or if indeed
the existing water user can complain at any level of WAC-TAC decision making.

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1 The 3M Plan creates a new administrative process for how water right priorities will be
2 regulated. The process is inconsistent with NRS § 534.110(6). The 3M Plan provides that a
3 lengthy process will take the place (or at least precede) the State Engineer making a
4 determination that water is insufficient to satisfy all rights, and that junior water users (i.e.,
5 KVR) must be restricted to conform to priority of rights. Only when the lengthy process
6 provided in the 3M Plan does not produce a unanimous decision will the State Engineer be
7 provided the opportunity to make the determination required by NRS § 534.110(6), and only
8 then will the junior water user (KVR) be regulated to protect senior water rights.

9 The State Engineer is restricted to powers prescribed by statute. Nevada Revised Statute
10 § 534.110(6) provides the procedure for regulation of junior priority groundwater rights if senior
11 rights are not able to be satisfied. The State Engineer holds no authority to change that
12 procedure. There are no administrative rules allowing for regulation of junior groundwater rights
13 by a process other than that provided in NRS § 534.110(6). The State Engineer has not followed
14 any formal process to create administrative rules to modify that procedure. At the very least, the
15 State Engineer conducted impermissible ad hoc rulemaking by approving the 3M Plan.

16 Proponents of the 3M Plan may argue that the State Engineer has broad discretion to set
17 conditions for water right permits, and that the 3M Plan itself, is merely a condition for the
18 approval of Applications. However, the 3M Plan is different than a typical condition, such as
19 requiring basic monitoring and mitigation. The 3M Plan created a process for an outside body,
20 that includes the Applicant, to determine “action criteria” and determine existence or the level of
21 “adverse impacts” sufficient to warrant management or mitigation. And, the 3M Plan creates a
22 new procedure to determine whether a junior groundwater right must be regulated. The 3M Plan
23 provides for mitigation other than regulating off the junior user to ensure senior rights are
24 satisfied. The 3M Plan delays the process for the State Engineer to regulate groundwater rights,
25 and will affect water users that are not parties to this proceeding. Therefore, the 3M Plan cannot
26 be read as simply a permit condition over which the State Engineer has broad discretion. The



1 State Engineer's approval of the 3M Plan constitutes impermissible ad hoc rulemaking because it
2 **creates an entirely new administrative process for groundwater regulation**, and provides
3 remedies for conflicts with existing water rights.

4 The State Engineer's approval of the 3M Plan is affected by an error of law and
5 constitutes an abuse of discretion. This Court should reverse the State Engineer's approval of the
6 3M Plan.

7 **E. The 3M Plan itself is vague and deficient, and the State Engineer's approval of the**
8 **3M Plan is arbitrary and capricious and constitutes an abuse of discretion.**

9 An administrative agency's decision may be reversed if it is arbitrary or capricious.
10 *Hilton Hotels Corp.*, 102 Nev. at 608. A decision is "arbitrary or capricious" if it is "baseless or
11 despotic." *City of Reno*, 110 Nev. at 1222. Here, the 3M Plan is arbitrary and capricious because
12 it fails to comply with the requirements in Ruling No. 6127 and is contrary to the law; does not
13 address known conflicts with express conditions; creates an administrative process where injured
14 water users have no recourse against final decisions; is not binding on KVR; and substitutes an
15 administrative process that is not reasonably calculated to timely address urgent mitigation
16 needs, conflicts or grievances.

17 The 3M Plan is deficient in that Ruling No. 6127 found that Applications would conflict
18 with existing rights, especially on the floor of Kobeh Valley, but that conflicts could be "cured"
19 by implementing a monitoring, management and mitigation plan. PSROA 22, 27, 38-39, 898,
20 910; *see also* Attachment A. Ruling No. 6127 held that the mitigation plan must "ensure that any
21 existing water rights are satisfied to the extent of the water right permit." PSROA 27. In
22 contradiction to Ruling No. 6127, the 3M Plan approved by the State Engineer allows mitigation
23 measures that would *not* ensure existing rights will be satisfied. In fact, the 3M Plan allows for
24 financial compensation or property replacement rather than satisfaction of existing water rights.
25 SE ROA 15-16.

26 ///



1 A unilateral decision by a) the State Engineer, b) WAC or c) TAC, as to when mitigation
2 is required or the type of mitigation warranted is contrary to the law. First, the statute is
3 mandatory in that the State Engineer shall deny appropriations if there is a conflict with existing
4 rights. NRS § 533.370(2). Second, the statute does not state that mitigation can properly resolve
5 conflicts. Third, the WAC and TAC have no legal jurisdiction or authority to determine what a
6 conflict is, or what might constitute proper mitigation. It is persuasive when looking at the
7 statutes governing water law, that the only¹⁰ place where mitigation is contemplated is NRS §
8 534.110(5):

9 This section does not prevent the granting of permits to applicants
10 later in time on the ground that the diversions under the proposed
11 later appropriations may cause the water level to be lowered at the
12 point of diversion of a prior appropriator, so long as any
13 protectable interests in existing domestic wells as set forth in NRS
14 533.024 and *the rights of holders of existing appropriations can be*
15 *satisfied under such express conditions.* At the time a permit is
16 granted for a well:

17 (a) For municipal, quasi-municipal or industrial use; and

18 (b) Whose reasonably expected rate of diversion is one-half
19 cubic foot per second or more,

20 the State Engineer *shall* include as a condition of the permit that
21 pumping water pursuant to the permit may be limited or prohibited
22 to prevent any unreasonable adverse effects on an existing
23 domestic well located within 2,500 feet of the well, *unless the*
24 *holder of the permit and the owner of the domestic well have*
25 *agreed to alternative measures that mitigate those adverse effects.*

26 (Emphasis added). In that context, a permit that will conflict with existing rights shall be
conditioned ... unless the permit holder *agreed* to alternate measures. The Legislature did not
contemplate an after-the-fact mitigation scheme that would not be addressed until after the

¹⁰ Mitigation is also discussed in NRS § 533.4385 relating to basin to basin transfers and mitigation of economic impacts caused by the transfer. NRS § 533.024(1)(b) notes that “It is the policy of this State: ... To recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated.”



1 impacts, effects, and conflicts are seen. The State Engineer's approval of the 3M Plan is
2 arbitrary, capricious and an abuse of discretion because the 3M Plan is contrary to Ruling No.
3 6127, express requirements, and the law.

4 The State Engineer admitted that if conflicts are known, express conditions must be
5 provided to avoid such conflicts. PSROA 98-103; *see also* Attachment B. The State Engineer
6 recognized that the Applications would conflict with existing rights on the floor of Kobeh
7 Valley. PSROA 22, 27, 38-39, 898, 910; *see also* Attachment A. However, neither Ruling No.
8 6127 nor the 3M Plan provide express conditions to avoid those known conflicts as required by
9 NRS § 534.110(5). The State Engineer's approval of the 3M Plan is arbitrary, capricious and an
10 abuse of discretion because the 3M Plan fails to provide express conditions to ensure existing
11 rights are satisfied.

12 The State Engineer has the duty to determine when an application will conflict with
13 existing rights, and whether to regulate junior water use if conflicts arise. NRS §§ 533.370,
14 534.110. The 3M Plan abdicates the State Engineer's duty in the context of the Mount Hope
15 Mining Project, delegates that duty to outside commissions (the TAC and WAC), and forecloses
16 the ability of injured parties to challenge the commissions' decisions about whether a conflict is
17 present and/or requires mitigation. SE ROA 6-10. By delegating promulgation of "action
18 criteria" and "adverse impact" to the WAC, which is not an administrative agency, water users
19 cannot challenge those decisions in court under the judicial review procedure. The State
20 Engineer's approval of the 3M Plan is arbitrary, capricious and an abuse of discretion because
21 the 3M Plan abdicates the State Engineer's duty to regulate water use rights, and forecloses
22 injured parties' review rights.

23 Ruling No. 6127 requires that approval of the Applications must be conditioned on
24 approval of a monitoring, management and mitigation plan that "ensure[s] that any existing
25 water rights are satisfied." PSROA 27. However, the 3M Plan approved by the State Engineer
26 does not include terms that are binding on KVR. The 3M Plan merely permits KVR, and others



1 on the committees, to develop its own definition of “adverse impacts” and “action criteria”
2 regarding when response to complaints of injury to existing water use is necessary. SE ROA 6-
3 10. Further, the 3M Plan allows KVR and committee members to determine how it will mitigate
4 adverse impacts, and what actions are sufficient. SE ROA 14-16. Finally, none of the provisions
5 in the 3M Plan are binding, and KVR and committee members can change the terms of the 3M
6 Plan at any time. SE ROA 11. The State Engineer’s approval of the 3M Plan is arbitrary,
7 capricious and an abuse of discretion because the 3M Plan contains no binding terms or
8 conditions to ensure existing rights are satisfied.

9 The 3M Plan creates commissions that meet annually or bi-annually, without regard to
10 the need to meet more frequently based on reported injury to a water user. SE ROA 7-8. An
11 injured water user has no authority to call the WAC-TAC into session, affect the agenda, or to
12 influence decisions. Further, the 3M Plan creates a lengthy process by which the TAC compiles
13 research and develops recommendations to the WAC, and the WAC determines the appropriate
14 course of action. If the WAC cannot reach unanimous agreement, additional research is gathered
15 and recommendations are made by the TAC to WAC. If consensus still cannot be reached, only
16 then is the State Engineer permitted to take the actions as directed by statute (although it is
17 unclear whether the State Engineer is constrained by the TAC-WAC recommendations). SE
18 ROA 10-11. The entire process is devoid of urgency, and is not reasonably calculated to address
19 injury in a timely fashion. The State Engineer’s approval of the 3M Plan is arbitrary, capricious
20 and an abuse of discretion.

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

9 EUREKA COUNTY, a political
subdivision of the State of Nevada,)

10)
11) Petitioner,

12) vs.

13) STATE OF NEVADA, EX. REL.,
14) STATE ENGINEER, DIVISION OF
WATER RESOURCES,)

15) Respondent.

Case No.: CV 1108-155
Case No.: CV 1112-164
Dept. No.: 2

16 CONLEY LAND & LIVESTOCK, LLC)
a Nevada limited liability company)
17 LLOYD MORRISON, an individual)

18)
19) Petitioners,

20) vs.

21) OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA,)
22) DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION)
AND NATURAL RESOURCES,)
23) JASON KING, State Engineer, KOBEH
VALLEY RANCH, LLC, Real Party in)
Interest,)

24)
25) Respondents.

Case No.: CV 1108-156
Dept. No.: 2

Affirmation pursuant to NRS 239B.039

The undersigned does hereby affirm that the following document does not contain the social security number of any person.

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1 KENNETH F. BENSON, an individual,
2 DIAMOND CATTLE COMPANY, LLC,
3 A Nevada Limited Liability Company,
4 and MICHEL AND MARGARET ANN
5 ETCHEVERRY FAMILY, LP, a Nevada
6 Registered Foreign Limited Partnership,
7
8 Petitioners,
9
10 Vs.
11
12 STATE ENGINEER OF NEVADA,
13 OFFICE OF THE State Engineer,
14 DIVISION OF WATER RESOURCES,
15 DEPARTMENT OF CONSERVATION
16 AND NATURAL RESOURCES,
17
18 Respondent,

Case No.: CV 1108-157
Case No.: CV 1112-165

Dept. No.: 2

11 **ANSWERING BRIEF**

12 COMES NOW, JASON KING, P.E., State Engineer, in his official capacity by and
13 through their counsel, Attorney General CATHERINE CORTEZ MASTO and Senior Deputy
14 Attorney General BRYAN L. STOCKTON, hereby submits their Answering Brief in the above
15 entitled matter.

16 DATED this 24th day of February 2012.

18 CATHERINE CORTEZ MASTO
Attorney General

19 By: 

20 BRYAN L. STOCKTON
21 Nevada State Bar #4764
22 Senior Deputy Attorney General
23 100 North Carson Street
24 Carson City, Nevada 89701-4717
25 Attorneys for Respondent,
26 Nevada State Engineer

1 Therefore, the amount of existing committed ground water rights is less than the amount of
2 water that replenishes the basin on an annual basis. ROA SE 16. The State Engineer also
3 found that there are seventy-one water-righted springs within the Kobeh Valley Hydrographic
4 Basin. ROA SE 28. Twenty-nine of the springs are subject of claims by the United States
5 Bureau of Land Management (BLM) who settled with KVR based on a monitoring and
6 mitigation plan. ROA SE 28. The records showed that "none of the remaining water rights are
7 owned by any of the Protestants in this matter. Most of the remaining springs are either
8 located far away from the proposed well sites or will not be affected due to topography and
9 geology." ROA SE 28. The State Engineer also took notice of conflicts that may occur:

10
11 However, the Applicant's groundwater model does indicate that
12 there may be an impact to several small springs located on the
13 valley floor of Kobeh Valley near the proposed well locations.
14 These small springs are estimated to flow less than 1 gallon per
15 minute. Because these springs exist in the valley floor and produce
16 minimal amounts of water, any affect caused by the proposed
17 pumping can be easily mitigated such that there will be no
18 impairment to the hydrologic related natural resources in the basin
19 of origin. The monitoring, management and mitigation plan will
20 allow access for wildlife that customarily uses the source and will
21 ensure that any existing water rights are satisfied to the extent of
22 the water right permit.

23 ROA SE 28. The State Engineer found that with proper management and mitigation, "the
24 proposed interbasin transfer of groundwater from the Kobeh Valley Hydrographic Basin
25 remains environmentally sound throughout the life of the project." ROA SE 28-29.

26 In reviewing the long-term economic impact on Kobeh Valley, the State Engineer noted
27 that "mining is one of the larger industries in Nevada and has traditionally provided many
28 high-paying jobs for local communities and has contributed to the communities in other ways
29 such as investing in infrastructure and services for those communities." ROA SE 29. The
30 State Engineer found the water rights granted "in Kobeh Valley is less than the estimated
31 perennial yield of the basin; therefore, substantial water remains within the basin for future
32 growth and development." ROA at 30. Of the 15,000 acre-feet annual perennial yield,
33 12,400 is currently permitted, which leaves 2,600 acre-feet annually for potential

1 Twenty-nine of the springs are subject of claims by the United States Bureau of Land
2 Management (BLM) who settled with KVR based on a monitoring and mitigation plan. The
3 remaining springs are either located far away from the proposed well sites or will not be
4 affected due to topography and geology.” ROA SE 28. The State Engineer also took notice
5 of conflicts that may occur:

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

13 The legislative history of NRS § 533.370(6)(c) shows that there was
14 minimal discussion regarding the term environmentally sound.
15 However, the State Engineer at that time indicated to the
16 Subcommittee on Natural Resources that he did not consider the
17 State Engineer to be the guardian of the environment, but rather
18 the guardian of the groundwater and surface water. The State
19 Engineer noted that he was not a range manager or environmental
scientist. Senator Mark A. James pointed out that by the language
'environmentally sound' it was not his intention to create an
environmental impact statement process for every interbasin water
transfer application and that the State Engineer's responsibility
should be for the hydrologic environmental impact in the basin of
export.

20 ROA SE 27. Nevada's water law provides little guidance to the State Engineer in defining
21 whether the use of water is environmentally sound to the basin of origin. The State
22 Engineer's limited focus on water issues is consistent with his enabling statutes. Concerns
23 for the detailed analysis of impacts related to the mine project on the environment are
24 properly handled by agencies designed for that purpose. It would be improper for the court to
25 adopt Eureka County's definition of environmentally sound .

26 The United States Supreme Court faces a similar issue in *Chevron USA Inc. v. Natural*
27 *Resources Defense Council, Inc.*, 467 US 837 (1984). In that case, the congress left
28 undefined the term "stationary source" when it enacted provisions of the Clean Air Act.

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

ooOoo

EUREKA COUNTY, a political :
subdivision of the State of Nevada, :

Petitioner, : Case No. CV1108-155

v. : Dept. No. 2

THE STATE OF NEVADA, EX. REL., :
STATE ENGINEER, DIVISION OF :
WATER RESOURCES, and KOBEH :
VALLEY RANCH, LLC, a Nevada :
limited liability company, :

Respondents. :

_____/ :

CONLEY LAND & LIVESTOCK, LLC, a :
Nevada limited liability company; :
LLOYD MORRISON, an individual, :

Petitioners/Plaintiffs, : Case No. CV1108-156

v. : Dept. No. 2

THE OFFICE OF THE STATE ENGINEER OF :
THE STATE OF NEVADA, DIVISION OF :
WATER RESOURCES, DEPARTMENT OF :
CONSERVATION AND NATURAL RESOURCES, :
JASON KING, State Engineer; KOBEH :
VALLEY RANCH, LLC, Real Party in :
Interest, :

1 Respondents/Defendants. :
2 _____/
3 KENNETH F. BENSON, an individual, :
DIAMOND CATTLE COMPANY, LLC, a :
4 Nevada Limited Liability Company, :
and MICHEL AND MARGARET ANN :
5 ETCHEVERRY FAMILY, LP, a Nevada :
Registered Foreign Limited :
6 Partnership, :
7 Petitioners, : Case No. CV1108-157
8 v. : Dept. No. 2
9 STATE ENGINEER OF NEVADA, :
OFFICE OF THE STATE ENGINEER, :
10 DIVISION OF WATER RESOURCES, :
DEPARTMENT OF CONSERVATION AND :
11 NATURAL RESOURCES, and KOBEH VALLEY :
RANCH, LLC, a Nevada limited :
12 liability company, :
13 Respondents. :
14 _____/
15 EUREKA COUNTY, :
a political subdivision of the :
16 State of Nevada, :
17 Petitioner, : Case No. CV1112-164
18 v. : Dept. No. 2
19 THE STATE OF NEVADA, EX. REL., :
STATE ENGINEER, DIVISION OF :
20 WATER RESOURCES, and KOBEH VALLEY :
RANCH, LLC, a Nevada limited :
21 liability company, :
22 Respondents. :
23 _____/
24
25

1 KENNETH F. BENSON, an individual, :
DIAMOND CATTLE COMPANY, LLC, a :
2 Nevada Limited Liability Company, :
and MICHEL AND MARGARET ANN :
3 ETCHEVERRY FAMILY, LP, a Nevada :
Registered Foreign Limited :
4 Partnership, :
5 Petitioners, : Case No. CV1112-165
6 v. : Dept. No. 2
7 STATE ENGINEER OF NEVADA, :
OFFICE OF THE STATE ENGINEER, :
8 DIVISION OF WATER RESOURCES, :
DEPARTMENT OF CONSERVATION AND :
9 NATURAL RESOURCES, and KOBEH :
VALLEY RANCH, LLC, a Nevada :
10 limited liability company, :
11 Respondents. :

12 _____/
13

14 PETITION FOR JUDICIAL REVIEW

15
16 BE IT REMEMBERED that the above-entitled matter
17 came on for hearing on April 3, 2012, at the hour of 10:00
18 a.m. of said day, at the Eureka County Courthouse, Eureka,
19 Nevada, before the HONORABLE DAN L. PAPEZ, District Judge.

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Reported by Lisa M. Manley, CCR #271

1 not to adopt the no-impacts rule because we would have to
2 shut down every farmer pumping water in Diamond Valley
3 because they have dried up springs -- dried up streams in
4 Diamond Valley by pumping in the agricultural area.

5 And what the State Engineer has done there is
6 gone to the owners of the springs' rights and said, you
7 know, "If you want your water, we'll order the producers
8 who dried up your spring to drill you a well and pay for
9 the pumping." And so that's the way we make that spring
10 owner whole.

11 And so if you adopt this no-impacts rule,
12 every one of those farmers out in Diamond Valley that's
13 pumping groundwater is going to have to stop pumping
14 because that would not be allowed under the analysis.

15 THE COURT: NRS 534.110 seems to support what you
16 are saying. Getting back to the argument of Ms.

17 Schroeder -- and I don't mean to get ahead of your
18 argument, but it's on my mind right now.

19 MR. STOCKTON: That's fine.

20 THE COURT: Did the State Engineer in his ruling
21 expressly state how petitioners' water rights would be
22 satisfied by some lowering of the water table and the
23 impacts to their rights?

24 MR. STOCKTON: He did not. And the reason he did
25 not is because, like I said before, we don't know what's

1 really going to happen in the end. You don't know what's
2 going to happen until somebody starts pumping.

3 So we don't know where those impacts -- I
4 mean, we have a pretty good prediction, and we think they
5 are probably going to appear here -- but you don't know, no
6 one in this courtroom knows, where those impacts are going
7 to manifest themselves.

8 And so what the State Engineer is going to do
9 is monitor what's going on out there, keep an eye on it, he
10 has made the mine drill monitoring wells, and keep track of
11 all those, so that once the effects start to propagate we
12 can see where those effects are going to occur and then
13 if -- and manage water so they don't, you know, impact the
14 senior water rights, to the degree we can. And if they do
15 impact it, then you figure out how to mitigate those.

16 I don't think anyone sitting in this courtroom
17 knows where the -- you know, for sure where those -- I
18 mean, we think we know, but we don't know for sure -- where
19 the impacts are going to manifest or what would be the best
20 way to mitigate those -- those impacts if they do occur.

21 And so, you know, usually it's the applicant
22 that wants it locked in stone on -- you know, right at the
23 start so they don't have to spend any more money and you
24 can't make us do anything else. You know, here it's the
25 protestants that want it locked in stone.

1 But the monitoring and mitigation --
2 monitoring and management and mitigation plan does not
3 discharge the State Engineer's duty to protect existing
4 rights. That's a continuing duty. And the monitoring and
5 mitigation plan is just that, it's a guideline for how the
6 State Engineer intends to go forward.

7 But if -- like I said with the Lone Tree Mine,
8 if we get impacts that are not covered in the 3M plan, the
9 State Engineer still retains the authority to protect those
10 existing rights, and that's what he does.

11 THE COURT: I don't disagree with your argument,
12 but I'm trying to reconcile your argument with the statute.
13 The statute doesn't seem to contemplate your argument. The
14 statute seems to ask for the conditions -- the express
15 conditions of satisfying existing rights to be made upon
16 granting the applications. I think that was the argument
17 from Ms. Schroeder.

18 How do you reconcile the language of the
19 statute with your argument?

20 MR. STOCKTON: Well, the way I reconcile it is,
21 if you don't know what's going to happen, how can you order
22 specific measures?

23 You know, if you are going to try to manage
24 the groundwater in a way that those impacts never do
25 manifest, then, you know, how can you know what you're

1 going to do before you know what needs to be done.

2 And that's the problem with this. Because the
3 drawdown is going to be over such an extensive area, as
4 they've talked about, you have to deal with the impacts
5 when you know they are going to happen.

6 And so one of the things is the monitoring,
7 mitigation plan. One of the permit terms was it has to be
8 filed with the State Engineer before any water can be
9 pumped.

10 And so we'll -- you know, the protestants,
11 Eureka County, is a participant in there. They have input
12 to it. So they're going to know what's in the plan,
13 they're going to be able to influence what's in the plan,
14 before any water is pumped.

15 And so at the -- you know, at this point,
16 that's it. It's just -- you don't know -- since we don't
17 know what the impacts are going to be, I don't know how you
18 could order specific remedies for impacts you don't know
19 about.

20 THE COURT: Again, I don't disagree with what
21 you're saying. It makes sense. But I would assume that
22 that same testimony would have been presented to the
23 Legislature when they passed that law. It doesn't seem to
24 have much room in the statute to accept that.

25 MR. STOCKTON: Okay. But the statute talks

1 about, you know, putting permit terms for known effects.
2 If you don't know what the effects are going to be,
3 right -- because you -- the statute -- if you know there is
4 going to be an effect somewhere, then, yes, you have to
5 have a permit term that changes that effect.

6 Ms. Schroeder talked about, you know, drilling
7 the wells in the groundwater basin, that Alpine Land &
8 Reservoir case that she talked about. And that's what the
9 State Engineer would kind of -- we look at that on a
10 case-by-case basis.

11 And without trying to digress too far, it goes
12 back to perennial yield. If you look at the Griffin versus
13 Westergard case, which I'm going to talk about a little
14 more in a minute, which is actually one of the best cases
15 of water law that we have out there because it explains so
16 many of these concepts pretty clearly, is that, you know,
17 one thing, if you are trying to drill too close to a river
18 where you are going to capture groundwater, the State
19 Engineer doesn't allow you to drill a well.

20 You know, if you are within a zone of
21 influence, you might have to seal that well down to a
22 certain depth to make sure you are not capturing surface
23 water.

24 So all these effects that you know about,
25 based on the geology, that statute applies to and you can

1 put in the permit terms.

2 THE COURT: Except in this case the State
3 Engineer didn't state, "Well, let's" -- "let's see through
4 our monitoring plan whether or not there are going to be
5 any conflicts or impacts to pre-existing rights." The State
6 Engineer found in the ruling that there would be impacts.

7 Does that make a difference in your argument?

8 MR. STOCKTON: Well, I don't think it does
9 because we don't know where those impacts are going to
10 manifest or what they are going to be. So, again, you'll
11 have a monitoring and -- a monitoring and management plan
12 that is going to try to avoid those conflicts. And then,
13 if they do manifest, then you have the mitigation, you
14 know.

15 And -- I -- I would agree if we knew for sure
16 what the effects were going to be, but because they are so
17 far away from the mine site, you don't know what they are
18 going to be. So if we knew what they were going to be, I
19 would agree the statute would apply and require specific
20 terms.

21 But until you know, I don't know how you can
22 possibly do that. And the law doesn't require futile acts
23 normally, so --

24 THE COURT: All right.

25 MR. STOCKTON: I know it's not a completely

1 STATE OF NEVADA)

2) SS.

3 COUNTY OF ELKO)

4 I, LISA M. MANLEY, Official Court Reporter of the Fourth
5 Judicial District Court, Dept. II, of the State of Nevada,
6 in and for the County of Elko, do hereby certify that I was
7 present in court during all the proceedings had in the
8 matter of Eureka County, et al., Petitioner, versus The
9 Office of the State Engineer, et al., Respondent, heard at
10 Eureka, Nevada, on April 3, 2012, and took verbatim
11 stenotype notes thereof; and that the foregoing 131 pages
12 contain a full, true and correct transcription of my
13 stenotype notes so taken, and a full, true and correct copy
14 of all proceedings had.

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LISA M. MANLEY - CCR-271

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OFFICIAL COURT REPORTER

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2012, I caused a copy of the foregoing
PETITIONERS MICHEL AND MARGARET ANN ETCHEVERRY FAMILY LP,
DIAMOND CATTLE COMPANY LLC, AND KENNETH F. BENSON'S OPENING BRIEF
to be deposited for mailing, postage prepaid, with courtesy copy by electronic mail to the
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Dated this 5th day of November, 2012.



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17 KOBEB VALLEY RANCH, LLC

18 **IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

19 **IN AND FOR THE COUNTY OF EUREKA**

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

Case No.: CV1207-178

Dept. No.: 2

26 Petitioners,

27 v.

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

Respondent.

KOBEB VALLEY RANCH, LLC,

Intervenor.

INTERVENOR KOBEB VALLEY RANCH, LLC'S ANSWERING BRIEF

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1 **I. INTRODUCTION.**

2 Kobeh Valley Ranch, LLC, (“KVR¹”) hereby responds to Petitioners’ brief in the above-
3 entitled matter. This case is once again before the Court on an appeal by the Michel and Margaret
4 Ann Etcheverry Family, LP, Diamond Cattle Company, LLC, and Kenneth F. Benson
5 (collectively, “Benson-Etcheverry²”) from the State Engineer’s decision to approve the
6 monitoring, management, and mitigation plan (“3M Plan”) required by State Engineer Ruling No.
7 6127. The record³ below demonstrates that the decision of the State Engineer is supported by
8 substantial evidence and is not arbitrary, capricious, or in violation of law. The 3M Plan and its
9 creation of the two advisory committees enhance the State Engineer’s ability to manage KVR’s
10 use of water and provide transparency by allowing local participation. The 3M Plan complies
11 with Nevada water law and Ruling 6127 because it will prevent KVR’s water use from
12 conflicting with existing rights by means of comprehensive water monitoring and management to
13 detect and prevent potential adverse impacts and mandatory mitigation of any adverse impacts
14 that occur. The 3M Plan is not a delegation of authority or a rulemaking because the advisory
15 committees do not exercise legislative or adjudicative powers. The Plan applies only to KVR’s
16 water rights and is not a rule of general applicability, and the State Engineer retains control over
17 the Plan and retains his authority to regulate KVR’s water use under Nevada water law. Lastly,
18 the 3M Plan will not delay the State Engineer’s response to the effects of KVR’s water use.

19 _____
20 ¹ KVR is the owner of record of the water rights at issue in this appeal and is a subsidiary of General Moly, Inc.
21 KVR has leased the water rights to Eureka Moly, LLC., which is a joint venture entity formed by General Moly to
operate the Mt. Hope Project.

22 ² At the State Engineer administrative hearings regarding KVR’s water right applications, Martin Etcheverry testified
23 and gave public comment on behalf of the Etcheverry Family LP and Diamond Cattle Company. 2009 R. Tr. Vol I,
6:24-25; 7:1; R. 439:21-24.

24 ³ The record in this case includes the record on appeal from the first State Engineer hearings filed in the prior appeals
25 of Eureka County, Tim Halpin, Eureka Producers’ Cooperative, and Cedar Ranches, LLC in 2009 under cases CV
26 0904-122 and -123. The record on appeal from these cases is identified herein as “2009 R” or “2009 R. Tr. Vol. ____
27 page:line” for transcript citations. The record also includes the record on appeal from the second State Engineer
28 hearings filed in the prior appeals of Eureka County, Conley Land & 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.”

1 Rather, its comprehensive monitoring requirements will ensure that the effects of KVR's
2 pumping are detected so that necessary action can be taken in time to prevent conflicts with
3 existing water rights. Accordingly, this Court should uphold the State Engineer's approval of the
4 3M Plan and deny the Petition for Judicial Review.

5 **II. FACTS AND PROCEDURAL HISTORY.**

6 *The Project*

7 The Mt. Hope Project will be one of the largest primary molybdenum mines in the world
8 and will employ about 400 people. R. 1083; 2009 R. Tr. Vol. III, 535:8-11, 438:12-25. The mine
9 will process approximately 60,000 tons of ore per day ("tpd") and will operate for 44 years.
10 R. 863:12-25. As acknowledged by Eureka County, mining is an important part of the local
11 economy, provides the most revenue to the County, and creates jobs. 2009 R. Vol. III, 437:18-23,
12 438:5-24, 536:1-25. The Project will require 11,300 afa of groundwater to process 60,000 tpd
13 using industry-standard mining and processing methods. R. 144:14-23, 1180; 2009 Tr. Vol. II.
14 395:7-15. Approximately 95% of the groundwater needed for the Project will come from Kobeh
15 Valley and will be used in the Kobeh Valley and Diamond Valley basins. R. 104:23-25, 105:1-2,
16 106:1-25, 107:1-9, 1079.

17 Between May 2005 and August 2006, KVR's predecessor-in-title filed with the State
18 Engineer thirteen applications to appropriate Kobeh Valley groundwater for the Project. R. 1945-
19 1983. KVR also purchased the majority of existing groundwater rights and filed applications to
20 change those rights with the State Engineer in order to use them for the Project. PSROA 17. In
21 Ruling 6127, the State Engineer determined that there was more than enough unappropriated
22 water in Kobeh Valley to grant KVR 11,300 afa because the perennial yield is 15,000 afa and the
23 total volume of existing groundwater rights owned by water rights holders other than KVR was
24 1,100 afa. PSROA 17.

25 *Procedural History*

26 In October 2008, the State Engineer conducted five days of hearings on the applications
27 and, six months later, issued a ruling that granted most of them. PSROA 11. Eureka County and
28 others appealed the decision and it was vacated and remanded by this Court in April 2010.

1 PSROA 11, *See also, Findings of Fact, Conclusions of Law, and Order filed April 21, 2010 in*
2 *consolidated cases CV-0904-122, -123, and CV-0908-127 (hereafter, "Order")*. PSROA 11.
3 While these prior applications were pending before the State Engineer on remand, KVR filed
4 applications to change their points of diversion and expand their place of use. PSROA 11. The
5 new points of diversion were sought because additional exploratory drilling and updated
6 hydrogeology studies identified better well locations. R. 1209.

7 All of KVR's applications were the subject of a second round of hearings before the State
8 Engineer in December 2010 and May 2011. PSROA 11. Mr. Benson only protested the six
9 applications relating to one well in Kobeh Valley on the grounds that pumping from that well
10 would impact Diamond Valley water resources, but he presented no evidence to support his
11 protest. PSROA 10. The Etcheverry group did not protest any applications or present evidence at
12 the State Engineer hearings.

13 The entire record from the 2008 hearing was incorporated into the record of the 2010-11
14 hearings, and the State Engineer took notice of the official records of his office. R. 8:1-3, 21-22.
15 KVR's witnesses included its parent company's (General Moly, Inc.) technical director and
16 project manager, chief financial officer, director of environmental permitting, and outside general
17 counsel. 2009 R. Tr. Vol. III, 559:20-23; R. 27:17-18, 45:25, 46:1, 92:4-5, 227-229. KVR also
18 presented several expert witnesses: Dwight Smith (hydrogeology and groundwater modeling),
19 R. 262:3-9; Terry Katzer (hydrogeology), R. 163:11-13; Tom Buqo (hydrogeology), 2009 R. Tr.
20 Vol. IV. 666:23-25; Jim Rumbaugh (groundwater modeling), 2009 R. Tr. Vol. V. 1058:11-13;
21 and Mark Thomasson (hydrogeology and groundwater modeling), 2009 R. Tr. Vol. IV. 840:19-
22 21. The record also included several reports authored by these experts regarding the potential
23 effect of pumping 11,300 afa from production wells in Kobeh Valley. 2009 R. 3176-3303, 3617-
24 78; R. 1098-1128. KVR's experts created a numeric, groundwater-flow model ("Model") to
25 simulate the effects of its groundwater pumping. The results of this Model are contained in the
26 July 2010 Hydrogeology and Numerical Modeling Report ("Report"). R. 1132-1752. The Model
27 and the Report were the result of years of exploratory drilling and aquifer testing, data collection
28

1 and evaluation, peer-review and collaboration, and refinement, including input from Eureka
2 County. R. 265:4-20, 269:11-21, 273:19-23, 275:16-25, 276:1-9, 277:15-25, 288:2-6, 293:13-20.

3 On July 15, 2011, the State Engineer issued Ruling 6127 which granted KVR 11,300 afa
4 of groundwater rights. The Ruling was conditioned on the submission of a 3M Plan to be
5 prepared in cooperation with Eureka County and to be approved by the State Engineer prior to
6 pumping any groundwater. PSROA 42.

7 ***Ruling 6127***

8 In Ruling 6127, the State Engineer determined that granting KVR's applications would
9 not conflict with existing water rights.⁴ PSROA 39. First, the State Engineer determined that
10 granting KVR 11,300 afa of groundwater rights in Kobeh Valley would not impact existing water
11 rights or domestic wells in Diamond Valley or existing water rights to Roberts, Henderson, or
12 Vinini creeks. PSROA 19, 21. This Court concluded that the State Engineer's determination was
13 supported by substantial evidence, and, therefore, Benson-Etcheverry are barred from reasserting
14 that claim in this appeal. Order, pp. 15:6-10, 16:2-6. Second, the State Engineer determined that
15 the only water rights that might potentially be impacted by KVR's pumping are those that exist
16 on the valley floor of Kobeh Valley and are within the predicted water level drawdown area.
17 PSROA 22. Those valley floor water rights include two springs, which the State Engineer found
18 were likely to be impacted, and a domestic well⁵ at Etcheverry's Roberts Creek Ranch. PSROA
19 39. The springs are Mud Spring and Lone Mountain Spring. PSROA 22, R. 1556.

20 Etcheverry holds a water right to Mud Spring for stockwatering and testified that any
21 impacts to his valley floor water rights could be mitigated. R. 454:20-25, 455:1-4. Mud Spring is
22 used for stockwatering and produces less than a gallon per minute (and has dried up on occasion
23 in the past). PSROA 22, Order p. 11, fn. 18. The State Engineer concluded that any potential
24

25 _____
26 ⁴ Benson-Etcheverry state that the State Engineer found that KVR's applications would conflict with existing rights.
27 Br. p. 3:13. Nowhere in the Ruling, however, does the State Engineer conclude that KVR's applications would
28 conflict with existing rights.

⁵ Domestic use does not require a water right, but is limited to culinary and household purposes directly related to a
single-family dwelling and accessory dwelling and includes watering a family garden, lawn, livestock and other
domestic animals or household pets and is limited to two acre-feet annually. *NRS 534.013; NRS 534.180(1)*.

1 loss of flow to Mud Spring could be mitigated because of its location on the valley floor, its low
2 flow rate, and its use for stockwatering. PSROA 22. BLM holds a water right to Lone Mountain
3 Spring, but it entered into a mitigation agreement with KVR concerning this and other water
4 rights and withdrew its protest. PSROA 27, 2009 R. 3692-3710. The State Engineer determined
5 that there would be no conflicts to the two springs or the domestic well because any impacts
6 could be detected and mitigated through the use of a 3M plan. PSROA 39. This Court concluded
7 that the State Engineer's decision was reasonable, within his field of expertise, and supported by
8 substantial evidence. Order, p. 12:1-2.

9 Finally, the State Engineer reviewed the remaining valley floor water rights and
10 determined that most of them were owned by the BLM, were located far away from KVR's
11 proposed wells, or would not be affected due to topography and geology. PSROA 27. This Court
12 concluded that there was nothing in the record to suggest that the other valley floor water rights
13 were unique or that mitigation would not be possible and ruled that the uncertainty of any impacts
14 to these sources supported the State Engineer's decision to protect them with a 3M plan. Order,
15 p. 10:16-20. This Court also held that NRS 533.370(2) does not prevent the State Engineer from
16 granting applications that potentially impact existing rights if the existing rights can be protected
17 through mitigation. Order, p. 12:7-9. And the Court concluded that the State Engineer's
18 determination that the potentially impacted water rights could be mitigated was reasonable, within
19 his field of expertise, and supported by substantial evidence. Order, p. 12:1-2.

20 ***Development of the 3M Plan***

21 KVR had begun working with Eureka County to prepare a joint 3M plan before the Ruling
22 was issued. SE ROA 139. The record shows that in May 2011, the County accepted KVR's offer
23 to work jointly on a 3M plan and directed its Natural Resource Manager and Hydrogeologist to
24 work with KVR. SE ROA 139. The County itself had proposed a 3M plan during the 2010-11
25 hearings and that plan became the starting point for the 3M Plan that was ultimately approved by
26 the State Engineer. SE ROA 181.

27 KVR and the County met at least six times between June and August 2011 to work on the
28 draft plan and it was discussed at several public County Commission meetings. SE ROA 54-167,

1 178, 181. A draft of the plan was made public in August 2011 and the County directed its District
2 Attorney and NEPA Committee to review and comment on the draft. SE ROA 181.
3 Additionally, the County solicited and received public comments on the draft plan from numerous
4 Eureka County farmers and ranchers, including Benson-Etcheverry and their attorneys. SE ROA
5 195-96, 204, 207-08, 214, 227-41.

6 After extensive work with the County and revisions of drafts, KVR sent a draft plan to the
7 State Engineer in October 2011. SE ROA 295-335. The State Engineer met with KVR and the
8 County to discuss the draft plan and then KVR revised the plan, based on the discussions at that
9 meeting, and submitted an updated draft to the State Engineer in December 2011. SE ROA 354-
10 76. Thereafter, the State Engineer, the County, and KVR continued to suggest revisions to the
11 plan. SE ROA 378-448. KVR submitted a proposed final plan to the State Engineer on May 10,
12 2012. SE ROA 1-2. The State Engineer requested additional changes to the proposed final plan
13 and KVR submitted a revised final plan on May 30, 2012. SUP SE ROA 13; SE ROA 5-30.⁶
14 Both proposed plans were sent to Benson-Etcheverry's attorneys. SE ROA 2; SUP SE ROA 14.

15 The State Engineer approved the 3M Plan in June 2012 with the caveat that it was subject
16 to change based on future need or monitoring results and subject to his continuing authority over
17 the Plan. SUP SE ROA 27-28. The 3M Plan was approved after more than a year of cooperation
18 and collaboration among KVR, the State Engineer, the County, and interested local stakeholders.
19 Although the 3M Plan was developed during the pendency of the prior appeals and was approved
20 prior to this Court's Order dismissing those appeals, the Plan is fully consistent with the Order
21 and Benson-Etcheverry have not asserted otherwise.

22 ***The 3M Plan***

23 The purpose of the 3M Plan is to assist the State Engineer manage KVR's groundwater
24 use to prevent adverse impacts to existing water rights. SE ROA 5. The Plan allows local
25 stakeholders and potentially affected water right holders to participate in the monitoring,
26 management, and mitigation process and express their concerns regarding any potential impact

27 _____
28 ⁶ The record on appeal contains two copies of the approved 3M Plan. The entire plan is identified as SE ROA 5-30
and the text-only copy is identified as SUP SE ROA 15-26.

1 and the recommended response. The 3M Plan is intended to be, and will be, an evolving and
2 dynamic resource to the State Engineer and stakeholders for the management of KVR's
3 groundwater pumping. KVR has extensive monitoring, data collection, and reporting obligations
4 under the 3M Plan that are designed to provide the information and mechanisms to assess whether
5 KVR's groundwater pumping is likely to cause potential adverse impacts to existing water
6 appropriators and to prevent or mitigate them. Under the 3M Plan, KVR is required to manage its
7 pumping and use mitigation measures that prevent adverse impacts to existing water rights. SE
8 ROA 14-16. And, if monitoring indicates adverse impacts appear likely to occur, then the 3M
9 Plan requires KVR to mitigate them in a manner that is feasible, reasonable, timely, and effective.
10 SE ROA 14.

11 The 3M Plan creates a water advisory committee ("WAC") and technical subcommittee
12 ("TAC") whose roles are to review the effects of KVR's groundwater pumping and recommend
13 action to the State Engineer so that adverse impacts to existing water rights will be prevented or
14 mitigated. SE ROA 6. The State Engineer, Eureka County, and KVR will be the initial members
15 of the WAC and members from the two Diamond Valley farming associations⁷ and a Kobeh
16 Valley rancher must be invited to join as well.⁸ SE ROA 7. The TAC will be appointed by the
17 WAC, which is required to appoint people who have a professional level of technical or scientific
18 expertise in land management, natural resources, water resources, or related fields. SE ROA 8.

19 The TAC has numerous responsibilities under the 3M Plan and, at each stage of the
20 monitoring and review process, it is required to take action as quickly as possible. SE ROA 8-10.
21 The TAC must review the initial monitoring requirements of the 3M Plan within thirty days after
22 it is approved by the State Engineer and recommend to the WAC whether KVR should monitor
23 additional water sources or modify its monitoring of the currently-identified sources. SE ROA 8.
24 Any modifications, however, must be based on additional data and studies and require State
25

26 ⁷ The two associations are the Eureka Producers' Cooperative (EPC) and the Diamond Valley Natural Resources
Protection and Conservation Association (DNRPCA).

27 ⁸ The current members of the WAC are the State Engineer's Chief Hydrogeologist, Eureka County Commissioner
28 Fiorenzi, General Moly's Vice President of Permitting and Environmental Compliance, Martin Etcheverry, EPC, and
DNRPCA.

1 Engineer approval. SE ROA 11. Additionally, the TAC must review existing data and
2 information to identify historic water level trends and wet and dry cycles. SE ROA 8-9. The
3 TAC also sets the standards and quality control procedures that govern how data is collected,
4 managed, and analyzed. SE ROA 9. The TAC will meet as soon as possible after any action
5 criteria are triggered or on a schedule required by the WAC, but no less than twice annually. SE
6 ROA 8, 10.

7 The WAC will provide a forum for water right holders and local stakeholders to share
8 information and discuss monitoring data, analyses, technical studies, and mitigation and
9 management actions. SE ROA 7-8. The WAC may recommend changes to the 3M Plan, but any
10 modification must be approved by the State Engineer. SE ROA 11. The WAC must meet
11 quarterly and hold an annual meeting open to the public to review the prior year's monitoring
12 data and management and mitigation measures. SE ROA 7.

13 The WAC must set the "action criteria" for monitored water sources (e.g. water table
14 levels and stream or spring flow rates) that will trigger a response from the WAC and TAC if they
15 are exceeded. SE ROA 7-8, 10. The action criteria will be recommended by the TAC based on
16 available data and analyses and will be set by the WAC at levels that will provide advance
17 warning of potential impacts so that management or mitigation measures can be employed to
18 prevent or mitigate them. SE ROA 5, 7-9. If any WAC or TAC member disagrees with an action
19 criterion, then the 3M Plan requires the issue to be resolved by the State Engineer and also states
20 that any member may petition the State Engineer to consider any issue. SE ROA 10-11. The
21 State Engineer retains his authority to review the action criteria after they are set and to revise
22 them if he deems it appropriate. SE ROA 11, SUP SE ROA 27.

23 As data is collected under the 3M Plan, the TAC must review it to determine if action
24 criteria have been exceeded. SE ROA 9. And, if an action criterion is exceeded (e.g. the flow of
25 a monitored spring or the water level in a monitored well decreases below a certain level), then
26 the WAC, with assistance from the TAC, will determine whether KVR's pumping caused the
27 levels to be exceeded. If so, they will determine what mitigation or management measures should
28 be recommended to the State Engineer to protect existing rights from adverse impacts. SE ROA

1 10. The TAC will analyze the feasibility of the recommended and alternative management or
2 mitigation measures. SE ROA 10. The State Engineer then reviews the WAC's
3 recommendations and determines which management or mitigation measures to require of KVR.
4 SE ROA 11. Ultimately, the TAC will have to determine and report to the WAC whether
5 completed mitigation measures have been effective. SE ROA 9. Because KVR is required to
6 mitigate any adverse impact to existing water rights, the standard for effectiveness is whether the
7 specific mitigation method prevented or mitigated the adverse impact to the existing water right.

8 Benson-Etcheverry assert that the 3M Plan allows the WAC to decide management and
9 mitigation measures, but, the Plan specifically states that the WAC "will determine whether or
10 not to *recommend* implementation of the mitigation or management measures [to the State
11 Engineer]" [Emphasis added]. SE ROA 10. Further, the 3M Plan states that all decisions
12 made by the WAC "will be subject to the jurisdiction and authority of the [State Engineer]." SE
13 ROA 11. The WAC may recommend certain mitigation or management actions, but the State
14 Engineer makes the final decision. SE ROA 10-11. The State Engineer, with or without a
15 recommendation, may make any order he deems necessary and appropriate based on data he
16 receives under the 3M Plan.

17 Further, the 3M Plan is a condition of KVR's permits, and, therefore, only KVR and its
18 successors are responsible for implementing and complying with it. SE ROA 5. Because the 3M
19 Plan is a permit condition, any failure to comply with it will be a violation of KVR's permits and
20 the State Engineer will be able to enforce the 3M Plan requirements or order KVR to stop
21 pumping. And if KVR disobeys the State Engineer's order to comply with the 3M Plan or stop
22 pumping, then the State Engineer may seek injunctive relief from this Court under NRS 533.482,
23 and levy fines under NRS 533.481. Other water right holders may take advantage of the
24 procedure described in the 3M Plan, but they are not required to do so. Benson-Etcheverry⁹ may
25 participate in the 3M Plan process by joining the committees and receiving information developed
26 through the 3M Plan, but they are not obligated to do so.

27 _____
28 ⁹ Martin Etcheverry represents the Etcheverry Family LP and Diamond Cattle Company and is a member of the
WAC.

1 Notwithstanding the 3M Plan, existing water right holders may seek relief directly from
2 the State Engineer if they believe that KVR's pumping has adversely impacted their water rights.
3 The 3M Plan states that it does not limit or change the State Engineer's authority and KVR's
4 permits provide that the State Engineer "retains the right to regulate the use of the water herein
5 granted at any and all times." SE ROA 11, SUP SE ROA 27, R. 438¹⁰. Accordingly, the State
6 Engineer's ability at any time to protect existing rights by ordering KVR to mitigate impacts or
7 stop pumping is not limited by the 3M Plan. As Eureka County's Hydrogeologist admitted, the
8 State Engineer has authority to curtail or stop pumping if adverse impacts occur that prove the
9 water model wrong. SE ROA 207.

10 The 3M Plan will protect existing rights by monitoring groundwater levels, detecting and
11 identifying the effects of KVR's pumping, and responding to potential impacts through
12 management and mitigation measures. Monitoring is required to establish baseline data to (1)
13 improve the accuracy of the groundwater flow model and (2) increase the ability to detect future
14 changes to the hydrologic system. PSROA 21. Under the 3M Plan, KVR must monitor 91 wells
15 (61 of which are located in Kobeh Valley), 34 springs, and 16 stream sites. SE ROA 18-30.
16 KVR must measure depth to water continuously for all monitored wells, as well as the flow rates
17 of its production wells. SE ROA 17-26. KVR must measure the flow of all monitored springs
18 quarterly and streams continuously. SE ROA 17-26. KVR must photograph the springs
19 quarterly. SE ROA 19-26. KVR must measure water quality continuously for Roberts Creek.
20 SE ROA 24. Lastly, KVR must monitor certain biological and meteorological factors in the
21 Roberts Mountains, along Roberts Creek, in Kobeh Valley, and at the mine site. SE ROA 27. All
22 monitoring data will be entered into a database on a regular, timely, and continual basis. SE ROA
23 14. KVR will report all water level, spring discharge, and stream flow data to the State Engineer
24 semi-annually. SE ROA 14. KVR must file a written report with the State Engineer each year
25 that summarize water production, monitoring results, and all management and mitigation actions
26 taken during that year. SE ROA 14.

27

28

¹⁰ See, Record on Appeal dated February 1, 2012 filed under cases CV-1108-155; -156; -157; -164; -165; and -170.
4832-2328-6546.7

1 As explained above, when any action criterion is exceeded, it automatically triggers TAC
2 and WAC review and recommendations. SE ROA 10. The TAC and WAC will assess whether
3 action criteria were triggered by KVR's pumping and, if so, recommend management or
4 mitigation measures to the State Engineer to prevent adverse impacts to existing rights. SE ROA
5 10. The 3M Plan lists several well-known and proven mitigation measures that may be used to
6 prevent adverse impacts and states that mitigation may include any other measure recommended
7 by the WAC and required by the State Engineer. SE ROA 14-16. Cessation of pumping is one of
8 the named mitigation measures. SE ROA 16 (Section 7(J)(b)). The 3M Plan does not state, as
9 asserted by Benson-Etcheverry, that only one mitigation measure may be used or that the
10 mitigation measures are substitutes for fulfilling potentially-impacted water rights holders' water
11 rights. The 3M Plan clearly states that KVR must mitigate adverse impacts to existing water
12 rights if they occur.

13 **III. ARGUMENT.**

14 **A. STANDARD OF REVIEW.**

15 On appeal, the State Engineer's decision is presumed to be correct and the burden of proof
16 is on the party attacking it. *NRS 533.450(10)*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d
17 203, 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992).
18 As to questions of fact, a court should not substitute its judgment for that of the State Engineer,
19 pass on the credibility of witnesses, or weigh the evidence. Instead, a court must limit itself to a
20 determination of whether substantial evidence¹¹ in the record supports the State Engineer's
21 decision. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) (citing *No. Las Vegas v.*
22 *Pub. Serv. Comm'n.*, 83 Nev. 278, 429 P.2d 66 (1967)). Unless the decision of an administrative
23 agency is not supported by substantial evidence and is found to be arbitrary or capricious, such
24 decision should not be disturbed on appeal. *U.S. v. Alpine Land & Reservoir Co.*, 919 F. Supp.
25 1470, 1474 (D. Nev. 1996). A decision is regarded as arbitrary and capricious if it is "baseless or
26

27 ¹¹ Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *State*
28 *Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales*, 402
U.S. 389, 91 S.Ct. 1420 (1971)).

1 despotic” or evidences “a sudden turn of mind without apparent motive; a freak, whim, mere
2 fancy.” *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994). In
3 reviewing a State Engineer decision for an abuse of discretion, the court’s function is “to review
4 the evidence upon which the Engineer based his decision and ascertain whether that evidence
5 supports the order” and, if so, the court is bound to sustain it. *Office of State Eng’r, Div. of Water*
6 *Res. v. Curtis Park Manor Water Users Ass’n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (citing
7 *Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 283, 607 P.2d 581, 582 (1980)).

8 Additionally, the State Engineer’s interpretation of the meaning and legal effect of
9 Nevada’s water law statutes are also entitled to deference and respect by the courts. Therefore,
10 even though the State Engineer’s interpretation of a statute is not controlling, it is presumed to be
11 correct and the party challenging it has the burden of proving error. *See Anderson Family Assocs.*
12 *v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (recognizing that the State Engineer “has
13 the implied power to construe the state’s water law provisions and great deference should be
14 given to the State Engineer’s interpretation when it is within the language of those provisions”);
15 *U.S. v. State Eng’r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Pyramid Lake Paiute Tribe v.*
16 *Washoe Cnty.*, 112 Nev. 743, 747-48, 918 P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709,
17 713, 766 P.2d 263, 266 (1988). Similarly, the State Engineer’s conclusions of law, to the extent
18 they are closely related to his view of the facts, are entitled to deference and must not be disturbed
19 if they are supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805,
20 806 (1986).

21 **B. THE 3M PLAN COMPLIES WITH NRS 533.370(2) AND WITH THE**
22 **RULING.**

23 NRS 533.370(2) requires the State Engineer to reject an application if its proposed use or
24 change conflicts with existing rights or protectable interests in domestic wells. In Ruling 6127,
25 the State Engineer determined there may be impacts to water rights on the valley floor of Kobeh
26 Valley, including likely impacts to Etcheverry’s spring and domestic well, but concluded that
27 there would be no conflicts because any impacts could be detected and mitigated by the 3M Plan.
28 PSROA 39. The 3M Plan requires the WAC to identify potential impacts and their scope and to

1 develop and implement management and mitigation measures to ensure that existing rights are
2 made whole. The 3M Plan ensures that existing rights will be satisfied because it creates an early
3 warning system to detect the effects of KVR's pumping and to prevent potential impacts from
4 adversely affecting existing water rights. SE ROA 5. Benson-Etcheverry claim that the State
5 Engineer is relying on a possible future plan to cure a prior conflict, but that argument ignores the
6 fact that all impacts are predicted, future impacts, not present impacts, and the 3M Plan creates a
7 process to detect the consequences of KVR's pumping and to prevent or mitigate them from
8 conflicting with existing water right holders.

9 As stated above, the 3M Plan requires KVR to monitor springs, streams, and wells to
10 detect any changes to those water sources that occur after KVR begins pumping. SE ROA 5, 17-
11 30. The 3M Plan is comprehensive and covers more than the potentially affected water rights on
12 the valley floor of Kobeh Valley. The 3M Plan requires KVR to monitor numerous streams,
13 springs, and wells in Kobeh Valley and in the four surrounding basins (Diamond, Pine, Antelope,
14 and Grass Valley hydrographic basins). SE ROA 17-30. Monitoring will allow early detection of
15 impacts so that necessary action can be taken to prevent them from conflicting with existing
16 rights. As discussed above, if the monitored resources show that the surface water flows or
17 groundwater table have dropped below the "action criteria" levels, the TAC must meet as soon as
18 possible to determine if KVR's groundwater use caused those effects and reports its findings to
19 the WAC. SE ROA 10. The review process begins as soon as any effects occur, not just when
20 adverse impacts occur, and therefore, provides stakeholders with advance warning of potential
21 adverse impacts.

22 If the WAC determines that KVR's pumping caused the impact, then the TAC must
23 expeditiously create mitigation methods and submit them to the WAC. SE ROA 10. Because the
24 3M Plan provides an early warning system against potential impacts, the WAC will be able to
25 develop and implement mitigation methods to prevent them from conflicting with existing water
26 rights. If the WAC determines that potential impacts would adversely affect existing water rights
27 and the State Engineer agrees with the WAC's findings and recommendations, then the 3M Plan
28 requires KVR to mitigate those potential impacts so that they do not occur or so that the water

1 right holders are not adversely affected. SE ROA 5, 15. The 3M Plan lists several well-known
2 and proven methods to mitigate adverse impacts, including drilling replacement wells, shifting
3 pumping ratios among the ten production wells, or stopping pumping from one or more
4 production wells. SE ROA 15-16. The 3M Plan also states that mitigation may include any other
5 measures required by the WAC or the State Engineer. SE ROA 16. Accordingly, the 3M Plan
6 will assist the State Engineer to ensure that water sources are carefully monitored and that
7 existing water rights are mitigated to the full extent of their water rights as required by the Ruling.

8 In particular, the 3M Plan requires KVR to monitor and mitigate potential impacts to
9 Etcheverry's water rights. Etcheverry holds a permitted water right to Mud Spring that allows
10 him to divert water for stockwatering purposes. PSROA 22. The 3M Plan requires KVR to
11 monitor the flow and photograph Mud Spring quarterly. SE ROA 24. If the monitoring data
12 show that KVR's pumping is going to impact Mud Spring, then the 3M Plan states that KVR
13 must mitigate the impact because it is subject to an existing right. SE ROA 15 (Section 7(H)).
14 Likewise, if monitoring data collected under the 3M Plan on a regular, timely, and continual basis
15 and reported to the State Engineer semi-annually show that KVR's pumping will affect the
16 groundwater table at Etcheverry's domestic well, from which he is allowed to use up to two acre-
17 feet/year for domestic purposes, then KVR will be required to mitigate the impact. SE ROA 5,
18 14-15. Accordingly, the 3M Plan specifically ensures that Etcheverry's existing rights will be
19 monitored and mitigated, in full compliance with NRS 533.370(2) and with the Ruling.

20 At each stage of the monitoring and review process, the 3M Plan requires the TAC to take
21 action as quickly as possible and the WAC to take all necessary steps to ensure that mitigation is
22 "feasible, reasonable, timely, and effective." SE ROA 8, 10, 14. Additionally, after the
23 mitigation methods are completed, the TAC must evaluate them to make certain that they have
24 achieved the desired result. SE ROA 10. Lastly, all of the WAC's actions or failures to act are
25 subject to the State Engineer's jurisdiction and authority. SE ROA 11, SUP SE ROA 27.
26 Accordingly, Benson-Etcheverry are not limited to the WAC's actions since, ultimately, the State
27 Engineer decides whether any mitigation methods fully and adequately satisfied any adversely
28 affected water rights. And all State Engineer rulings are reviewable by this Court.

1 Finally, as stated above, the Ruling and KVR's permits state that they are subject to
2 existing rights and that the State Engineer retains the right to regulate KVR's use of water under
3 the permits at any time. Nothing in the 3M Plan strips the State Engineer of his authority. In the
4 unlikely event that the required monitoring shows that KVR's pumping appears that it will impact
5 Benson-Etcheverry's rights outside of Mud Springs or the domestic well, then Etcheverry may
6 request the State Engineer take action to protect those rights. If the State Engineer fails to
7 respond or takes action that they believe is inadequate, then they have the right to seek relief from
8 this Court. Accordingly, the State Engineer's approval of the 3M Plan is consistent with the
9 Ruling and does not violate NRS 533.370(2).

10 **C. THE 3M PLAN SATISFIES NRS 534.110(5).**

11 NRS 534.110(5) provides: "[t]his section does not prevent the granting of permits to
12 applicants later in time on the ground that the diversions under the proposed later appropriations
13 may cause the water level to be lowered at the point of diversion of a prior appropriator, so long
14 as any protectable interests in existing domestic wells as set forth in NRS 533.024 and the rights
15 of holders of existing appropriations can be satisfied under such express conditions." In Ruling
16 6127, the State Engineer concluded that potentially impacted existing rights could be mitigated
17 and expressly conditioned his approval on the requirement that KVR submit and abide by a 3M
18 plan to protect existing rights. PSROA 22, 27-28, 38-39, 42. This Court upheld the State
19 Engineer's finding that the potentially impacted existing water rights could be mitigated and
20 concluded that the State Engineer was not prohibited from expressly conditioning approval of
21 KVR's permits on the submission and approval of a mitigation plan. Order, pp. 12:1-3, 13:4-9.
22 Accordingly, the Ruling does have express conditions to ensure that existing rights would be
23 satisfied as required by NRS 534.110(5), and Benson-Etcheverry's contention is not supported by
24 the record or this Court's Order. This Court previously concluded that the State Engineer's
25 Ruling was reasonable, within his area of expertise, and supported by substantial evidence. Order
26 p. 12:1-3. Since the State Engineer and the Court have already concluded that Etcheverry's
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1 existing rights on the valley floor of Kobeh Valley¹² can be satisfied and that the 3M Plan is the
2 express condition required by NRS 534.110(5), the only remaining issue is whether the 3M Plan
3 supports those determinations.

4 Through his approval of the 3M Plan, the State Engineer has determined that the
5 conditions and provisions of the Plan are adequate to ensure that existing rights will be satisfied.
6 His decision is supported by the 3M Plan itself since it requires KVR to carefully monitor the
7 effects of its pumping, to forecast potential impacts, and to prevent or mitigate such impacts from
8 adversely affecting existing water rights. The State Engineer's determination that existing rights
9 can be satisfied by the 3M Plan is reasonable, squarely within his area of expertise, and supported
10 by substantial evidence in the record. Benson-Etcheverry have failed to meet their burden to
11 show otherwise.

12 As discussed above, the main purpose of the 3M Plan is to manage KVR's groundwater
13 pumping in order to prevent adverse impacts to existing water rights. SE ROA 5. Under the 3M
14 Plan, KVR must monitor water conditions in numerous creeks, springs, and wells "to provide the
15 necessary data to assess the response of the aquifer(s) to the stress of water resource exploitation,
16 provide an early warning capability, and provide safeguards for responsible management of
17 water." SE ROE 5. KVR must monitor water levels in 89 wells, 59 of which are in Kobeh
18 Valley. SE ROA 18-26. These wells include KVR's production and test wells, USGS wells, and
19 so called "sentinel" wells, which will be located to provide early warning of impacts to sensitive
20 or important resources. SE ROA 12. The static water level in all wells will be measured
21 continuously. SE ROA 18-26. KVR must monitor the flow of several creeks on Roberts
22 Mountain and in the Antelope Valley, Pine Valley, and Grass Valley hydrographic basins. SE
23 ROA 24-26. KVR must monitor 34 springs in the Diamond Valley, Kobeh Valley, Antelope
24 Valley, and Pine Valley hydrographic basins. SE ROA 19-20, 24-26. Measurements will be
25 taken continuously for Roberts Creek and quarterly for the other streams and springs. SE ROA

26 _____
27 ¹² This Court upheld the State Engineer's determination in the Ruling that Etcheverry's surface water rights to
28 sources in the Roberts Mountains and Benson's groundwater rights in Diamond Valley would not be affected. Order,
p. 15:6-9, PSROA 19, 36.

1 19-26. Monitoring will also include several biological and meteorological factors for springs and
2 streams in Kobeh Valley, Roberts Mountain, and at the mine site. SE ROA 27-28. As noted
3 above, all of this data will be entered into the 3M database on a regular, timely, and continual
4 basis and submitted to the State Engineer semi-annually. SE ROA 14. Monitoring data collected
5 under the 3M Plan will be shared among the participants and data that has been verified by
6 quality control procedures will be available to the public on request. SE ROA 14. Also, KVR is
7 required to submit a written report to the State Engineer once a year summarizing water
8 production, monitoring results, and all management and mitigation actions taken during the prior
9 year. SE ROA 14.

10 In addition, the 3M Plan describes a process for responding to the effects of KVR's
11 pumping based on monitoring results in order to ensure that existing rights are satisfied. The 3M
12 Plan requires the establishment of quantitative thresholds or "action criteria" which, if triggered,
13 serve as early warnings of potential impacts to existing rights. SE ROA 7-8. These thresholds
14 will be set at appropriate levels to provide advance notice of potential impacts to existing water
15 rights that might result from KVR's pumping. SE ROA 7-8. When any threshold is reached, the
16 TAC must meet as soon as possible to assess whether the threshold was caused by KVR's
17 pumping and report its findings to the WAC. SE ROA 10. If KVR's pumping caused an action
18 criterion to be exceeded, the WAC must recommend appropriate mitigation or management
19 measures to the State Engineer that it believes will protect existing rights from adverse impacts
20 and ensure that they are satisfied. SE ROA 10.

21 Benson-Etcheverry assert that the action criteria will be triggered only when an adverse
22 impact to an existing water rights occurs. This is simply not true. The 3M Plan requires action
23 criteria to be set at levels to detect any effects of pumping that may be of concern because they
24 forecast a potential adverse impact. SE ROA 7-8. Benson-Etcheverry's assertion is based on
25 their incorrect interpretation that monitoring will be used to detect impacts only after they have
26 adversely affected existing water rights. This early warning system ensures that KVR, the State
27 Engineer, and other 3M Plan participants will have a reasonable amount of time to respond to the
28 effects of KVR's pumping and to prevent or mitigate potential impacts from adversely affecting

1 existing water rights. Mitigation may include preventive measures, such as reducing the pumping
2 rate from production wells, or responsive measures such as drilling a well to supply replacement
3 water and satisfy an existing right. SE ROA 15-16. Accordingly, if the effect of KVR's pumping
4 shows that Etcheverry's Mud Spring will be impacted, then the 3M Plan requires KVR to supply
5 enough water to Etcheverry to satisfy his stockwatering water right to that spring. Likewise, if
6 monitoring shows that Etcheverry's domestic well will be impacted, then the 3M Plan may
7 require KVR to mitigate it by lowering the pump in the well and paying for the additional
8 pumping costs or by drilling Etcheverry a new well to ensure that he obtains two acre feet
9 annually.

10 Contrary to Benson-Etcheverry's assertion, the 3M Plan does not state that financial
11 compensation can be a substitute for satisfying existing water rights. Instead financial
12 compensation may be used to compensate any potentially affected water right holder for the cost
13 of lowering a pump in a well, deepening an existing or drilling a new well, increased pumping
14 costs, or transporting water to a specific location to satisfy an existing right. As stated above, the
15 mitigation measures listed in the 3M Plan are not exclusive and any of the Plan participants can
16 recommend, and the State Engineer can independently require, other mitigation measures. SE
17 ROA 16. Additionally, as stated above, the State Engineer retains the authority to take action
18 with or without any recommendations from the 3M Plan participants.

19 The 3M Plan sets forth express conditions to monitor the effects of KVR's pumping, to
20 detect and identify potential impacts, and to prevent them from adversely affecting existing water
21 rights through management and mitigation measures recommended by the advisory committees
22 and ordered by the State Engineer. The State Engineer's approval of the 3M Plan is a
23 determination that its express conditions will ensure that existing water rights are satisfied and his
24 decision is reasonable, within his area of expertise, and supported by substantial evidence in the
25 record. The State Engineer's decision to approve the 3M Plan is presumed correct and Benson-
26 Etcheverry have failed to overcome their burden to show otherwise. Accordingly, the Court
27 should uphold the State Engineer's decision and deny Benson-Etcheverry's Petition.

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D. THE 3M PLAN IS NOT AN IMPROPER DELEGATION OF AUTHORITY BY THE STATE ENGINEER.

Benson-Etcheverry contend that the 3M Plan is an unlawful delegation of authority by the State Engineer to the WAC and TAC. Benson-Etcheverry ignore that these committees are only advisory and are intended to assist the State Engineer in managing KVR’s groundwater pumping to prevent adverse impacts to existing water rights. SE ROA 5-6. They do not have any rulemaking or adjudicatory authority. Delegation is defined as “[t]he act of entrusting another with authority or empowering another to act as an agent or representative.” *Black’s Law Dictionary* (7th ed., 1999). Here, the 3M Plan has not entrusted the WAC or TAC with rulemaking or adjudicatory authority or empowered them to act as the State Engineer’s agent or representative. Because the 3M Plan does not delegate authority, the State Engineer’s approval of the Plan is not in violation of law and Benson-Etcheverry have failed to overcome their burden to show otherwise.

1. The State Engineer retains authority and control over the advisory committees.

The State Engineer has not delegated his authority by approving the 3M Plan because the committees are intended only to assist the State Engineer and he retains ultimate control over the Plan and KVR’s water use. SE ROA 5, 11, SUP SE ROA 27. As discussed above, the 3M Plan will provide an early warning of potential adverse impacts by monitoring the effects of KVR’s pumping and to involve local stakeholders and Eureka County in that monitoring and any management or mitigation recommendations. Nothing in the Plan on the record supports Benson-Etcheverry’s allegation that the State Engineer will “take a back seat,” nor do the provisions intend or contemplate that he do so. First, a member of the State Engineer’s staff will serve on the WAC and will be invited to chair the committee. SE ROA 7. Second, any changes to the 3M Plan or recommended management and mitigation actions from the committees require State Engineer approval. SE ROA 11. As discussed above, in addition to preventing or mitigating adverse impacts to existing water rights, the 3M Plan allows, but does not require, locally-affected stakeholders, such as Eureka County and Benson-Etcheverry, to participate in committee activities relating to the monitoring, management, and mitigation requirements imposed on KVR

1 by the State Engineer. SE ROA 5. This participation makes KVR's water use, the effects of such
2 use, and the State Engineer's response to any effects open and transparent because local
3 stakeholders can review the process and provide input to the State Engineer about how to respond
4 to prevent adverse impacts to existing rights.

5 The State Engineer's approval of this process in the 3M Plan does not mean, however, that
6 he has relinquished any of his authority under Nevada water law. To the contrary, the 3M Plan
7 expressly states that the advisory committees are intended to assist the State Engineer and that he
8 has final authority over the Plan. SE ROA 5. Therefore, even though the TAC is required to
9 review KVR's monitoring obligations and recommend necessary changes to the WAC, all
10 changes must be approved by the State Engineer. SE ROA 11. The WAC will set action criteria
11 levels to provide advance warning of potential adverse impacts, all subject to State Engineer
12 oversight. SE ROA 7-8. If the WAC does not agree on any action criterion, then the State
13 Engineer will decide the issue. SE ROA 10. And if the WAC determines that KVR triggered any
14 action criteria, the State Engineer decides what management or mitigation response is necessary
15 to prevent the potential impact from adversely affecting existing rights. SE ROA 11. The State
16 Engineer is not limited to the WAC's recommended management or mitigation measures and may
17 independently require any other measures, whether or not they are currently listed in the 3M Plan.
18 SE ROA 16.

19 Benson-Etcheverry argue that the fact the legislature created a Water Planning Section
20 and an Advisory Board on Water Resources Planning and Development to assist the State and
21 local governments and citizens in developing effective plans for the use of water somehow means
22 that the State Engineer is prohibited from conditioning his approval of specific water rights on
23 this 3M plan. But Benson-Etcheverry have failed to cite to any law to support their position.
24 When possible, courts must "interpret provisions within a common statutory scheme
25 'harmoniously with one another in accordance with the general purpose of those statutes' and to
26 avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *Southern*
27 *Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting
28 *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)). Here, the State Engineer

1 has the authority to decide issues regarding water rights and this authority includes the ability to
2 require a permit holder to abide by a 3M plan to protect existing rights. Order, p. 13, *citing U.S.*
3 *v. Alpine Land & Reservoir Co.*, 919 F. Supp. at 1479. Since the monitoring, management, and
4 mitigation related to KVR’s use of water is at all times subject to the State Engineer’s review and
5 control, Benson-Etcheverry’s argument that he has delegated his authority fails.

6 **2. The State Engineer has not delegated his legislative authority to the**
7 **WAC.**

8 The 3M Plan does not delegate the State Engineer’s legislative authority under NRS
9 532.120 to promulgate rules or regulations of general applicability. Benson-Etcheverry contend
10 that by approving the 3M Plan, the State Engineer delegated his legislative authority to the 3M
11 Plan committees to define certain statutory terms such as conflicts, reasonable lowering, and
12 express conditions and to make decisions based on those definitions. Br. p. 15. According to
13 Benson-Etcheverry, the State Engineer will “take a back seat” in determining whether existing
14 rights are satisfied and whether junior rights and the drilling of new wells must be restricted. Br.
15 p. 15. These contentions are not supported by the language in the 3M Plan. The 3M Plan is an
16 addition to, not a substitute for, other statutory requirements and, therefore, does not delegate the
17 State Engineer’s legislative authority. Further, the 3M Plan does not allow the WAC to
18 promulgate rules or regulations of general applicability.

19 Benson-Etcheverry claim that the WAC’s determinations regarding action criteria and
20 adverse impacts are substitutes for the State Engineer’s statutory determinations regarding
21 conflicts, reasonable lowering, and express conditions. As explained above, however, the WAC’s
22 determinations regarding action criteria will provide an early warning system to prevent adverse
23 impacts to existing water rights and is separate from the State Engineer’s statutory
24 determinations. SE ROA 5, 7-8. The WAC must set action criteria (e.g. water levels, spring
25 discharges, vegetation responses) at levels that will serve as an early warning against potential
26 adverse impacts and that, if exceeded, could be of concern to the 3M Plan participants. SE ROA
27 5, 7-8. The action criteria will be developed by the TAC based on available data and analyses.
28 SE ROA 9. Therefore, contrary to Benson-Etcheverry’s assertion, the 3M Plan provides adequate

1 direction to the WAC regarding the levels at which the action criteria must be set. If the action
2 criteria are triggered, then the TAC and WAC assess the impact, determine whether it was caused
3 by KVR, and recommend action to the State Engineer. SE ROA 10. And all of these activities
4 are subject to the ultimate authority of the State Engineer. SE ROA 11.

5 The 3M Plan does not state that the WAC's determinations regarding action criteria are
6 substitutes for determinations the State Engineer is authorized to make under Nevada law and
7 Benson-Etcheverry's argument to the contrary is wrong. First, the determination whether a water
8 right application conflicts with existing rights is made at the time an application is reviewed by
9 the State Engineer under NRS 533.370(2) and, in this case, the State Engineer determined that
10 KVR's applications would not conflict with existing rights. This Court affirmed that
11 determination by upholding the State Engineer's Ruling. The 3M Plan does not change that
12 determination or state that the WAC will determine whether there are any conflicts. Second, the
13 3M Plan does not require the WAC to decide whether KVR has caused more than a reasonable
14 lowering of the water table. Instead, the WAC will assess the effects of KVR's groundwater
15 pumping and recommend whether and what action should be taken to prevent adverse impacts to
16 existing water rights. Accordingly, the WAC's determination of action criteria and adverse
17 impact are distinct from the State Engineer's statutory determinations regarding conflicts and
18 reasonable lowering and he has not delegated his statutory authority to the WAC.

19 Moreover, the 3M Plan does not require or authorize the WAC to promulgate rules or
20 regulation of general applicability under NRS 532.120. Rulemaking occurs where an agency
21 "promulgates, amends, or repeals "[a]n agency rule, standard, directive or statement of general
22 applicability which effectuates or interprets law or policy, or describes the organization,
23 procedure or practice requirements of any agency." *Labor Com'r of State of Nevada v. Littlefield*,
24 123 Nev. 35, 39-40, 153 P.3d 26, 29 (2007). Here, the 3M Plan does not authorize or require the
25 WAC to make rules or regulations of general applicability because it only applies to KVR's water
26 permits and pumping. Further, the WAC is not an agency and, therefore, any determination by
27 the WAC will not be a rule or regulation of general applicability that binds other water right
28 holders in Kobeh Valley or the surrounding basins.

1 Next, Benson-Etcheverry contend that the WAC will decide whether an injury to an
2 existing water right meets the definition of adverse impact and reassert that the 3M Plan allows
3 the WAC to approve mitigation measures that do not ensure satisfaction of existing rights. The
4 3M Plan does not, however, give the WAC the authority to adjudicate whether KVR's
5 groundwater pumping has injured an existing water right. The WAC is merely permitted to
6 examine and assess the matter and provide recommendations to the State Engineer. As stated
7 above, the WAC sets action criteria and recommends management or mitigation measures to the
8 State Engineer. The 3M Plan does not state that the WAC will decide if KVR's pumping
9 constitutes an injury to an existing water right holder under Nevada law. The State Engineer, in
10 response to the WAC's recommendations or on his own volition, is solely responsible for
11 determining whether KVR's pumping has injured an existing water right. The 3M Plan is
12 designed to detect the effects of KVR's pumping and require management or mitigation measures
13 in time to prevent potential impacts from becoming actual impacts existing water rights. The 3M
14 Plan, does not, however, limit or delegate the State Engineer's authority to determine whether a
15 specific water right holder has been injured by KVR's pumping.

16 **3. The State Engineer has not delegated his adjudicatory authority to the**
17 **WAC.**

18 Benson-Etcheverry argue that the State Engineer has delegated adjudicative authority by
19 approving the 3M Plan. Again, Benson-Etcheverry ignore that the WAC and TAC are advisory
20 committees, not adjudicatory bodies. By its specific terms, the 3M Plan is an express condition of
21 the water rights granted under the Ruling, and, therefore, does not bind anyone other than KVR.
22 SE ROA 5 (Section 1(A)). The 3M Plan does not create a new adjudicatory process. And,
23 contrary to Benson-Etcheverry's assertion, the 3M Plan does not require other water rights
24 holders to submit their complaints to the WAC for adjudication or to waive other legal remedies
25 available to them.

26 It is clear that the 3M Plan does not limit the State Engineer's authority, and, therefore, he
27 will have the ability to consider any complaint by an existing water right holder regarding KVR's
28 use of water. As discussed above, the State Engineer may order any action necessary based on

1 the facts and circumstances of each case. Therefore, any water right holder who believes that his
2 water rights have been impacted by KVR's use of groundwater may petition the State Engineer to
3 investigate the matter and can seek judicial relief of the State Engineer's decision if he is
4 dissatisfied. The 3M Plan does not limit or modify any water right holder's legal rights to such
5 remedies. Accordingly, Benson-Etcheverry's assertions that existing water right holders will be
6 at the mercy of the WAC are simply incorrect.

7 **E. THE STATE ENGINEER'S APPROVAL OF THE 3M PLAN IS**
8 **CONSISTENT WITH NRS 532.110 AND NRS 534.110.**

9 Benson-Etcheverry argue that the 3M Plan creates a new administrative process for
10 groundwater regulation and provides remedies for conflicts with existing water rights that were
11 not promulgated under the State Engineer's rulemaking authority and that are contrary to his
12 statutory duties under NRS 534.110(6) and (8). Br. pp. 18-19. But, as discussed above, the 3M
13 Plan imposes duties on KVR, but it does not limit or restrict the rights of other water rights
14 holders. They may avail themselves of the processes created by the 3M Plan, but they are not
15 required to do so. Further, the 3M Plan does not limit the State Engineer's authority to regulate
16 groundwater or to resolve conflicts among water users, including his duties under 534.110(6) or
17 (8).

18 NRS 534.110(6) and (8) provide:

19 (6) . . . [T]he State Engineer shall conduct investigations in any basin or portion
20 thereof where it appears that the average annual replenishment to the groundwater
21 supply may not be adequate for the needs of all permittees and all vested-right
22 claimants, and if the findings of the State Engineer so indicate, the State Engineer
23 may order that withdrawals, including, without limitation, withdrawals from
24 domestic wells, be restricted to conform to priority rights."

23 . . .

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

28 There is nothing in the 3M Plan that interferes with these duties of the State Engineer.

1 To begin with, in Ruling 6127, the State Engineer determined that there was more than
2 enough groundwater available in Kobeh Valley to satisfy KVR's applications and existing rights,
3 a decision this Court upheld. And the State Engineer did not determine that drilling additional
4 wells in Kobeh Valley would cause an undue interference with existing wells. Thus, the State
5 Engineer has already determined that the conditions that would trigger his duties under NRS
6 534.110(6) and (8) do not presently exist.

7 But if such conditions were to develop in the future, the 3M Plan does not in any way
8 limit the State Engineer's authority to take action under NRS 534.110(6) or (8) to restrict
9 groundwater withdrawals or the drilling of new wells if he deems such action to be appropriate.
10 SE ROA 11. If the State Engineer, sua sponte, or on the complaint of any water right holder,
11 determines that annual replenishment in Kobeh Valley is not sufficient or that any of KVR's
12 wells will cause an undue interference with existing wells, he can act immediately under NRS
13 534.110(6) or (8). He does not have to wait for the WAC or the TAC to do anything. The 3M
14 Plan and its committees are tools to assist the State Engineer, not impediments to the exercise of
15 his authority.

16 The 3M Plan does not give the WAC or TAC the authority to regulate Kobeh Valley, or
17 any other basin, based on priority under NRS 534.110(6). Because the 3M Plan does not affect
18 the State Engineer's authority to determine whether a basin should be regulated or transfer that
19 authority to the WAC, the State Engineer did not violate NRS 534.110(6) by approving it.
20 Similarly, the 3M Plan does not empower the WAC or TAC to issue orders restricting the drilling
21 of new wells in any basin based on undue interference under NRS 534.110(8). Therefore, the 3M
22 Plan does not violate NRS 534.110(8).

23 Benson-Etcheverry speculate that the State Engineer will not do his job and take direct
24 action if KVR's applications adversely affect an existing water right but, instead, will wait for the
25 WAC and TAC to review the alleged impact and make recommendations.. Br. p. 19:12-13.
26 Nowhere, however, does the 3M Plan state that the State Engineer will or must wait for the WAC
27 and TAC to review a potential impact before taking action. Rather, it expressly states that
28 "[n]othing herein limits or changes the [State Engineer's] authority"—a point the State Engineer

1 reiterated in his approval of the Plan. SE ROA 11, SUP SE ROA 27. The 3M Plan requires the
2 TAC to provide technical expertise and the WAC to provide recommendations to assist the State
3 Engineer regarding monitoring, management, and mitigation related to KVR's groundwater
4 pumping. The 3M Plan does not strip the State Engineer's authority or impair his ability to
5 consider any issue related to KVR's groundwater pumping at any time.

6 Benson-Etcheverry also point to Section 5(G) of the 3M Plan, which states that the WAC
7 must make decisions by unanimous vote or the disputed issue will be referred to the State
8 Engineer for a decision. SE ROA 10. This language means that if the WAC cannot agree
9 whether to recommend certain monitoring, management, or mitigation actions, then it will either
10 conduct additional research or refer the matter to the State Engineer. This language does not
11 preclude the State Engineer from investigating a potential impact at any time, or from taking any
12 other action within his authority. The unanimity requirement is a limitation on the WAC, not on
13 the State Engineer. The State Engineer does not have to wait for the WAC to decide anything
14 before he can act. If the WAC fails to make recommendations regarding a potential impact, the
15 State Engineer can order KVR to mitigate or stop pumping at any time.

16 Lastly, there is nothing in the 3M Plan that requires existing water right holders to go
17 through the WAC before seeking relief from the State Engineer. If existing water right holders
18 believe they have been or will be adversely affected by KVR's pumping, then they may ask the
19 State Engineer to investigate the alleged impact and order mitigation. And existing water right
20 holders may seek such relief at any time, regardless of the 3M Plan. Existing water right holders
21 may request the State Engineer regulate groundwater rights based on priority under NRS
22 534.110(6) or restrict the drilling of new wells under NRS 534.110(8).

23 **F. THE STATE ENGINEER'S APPROVAL OF THE 3M PLAN IS NOT**
24 **ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION.**

25 In their final, "catch-all" argument, Benson-Etcheverry reassert several arguments set
26 forth previously in their Brief and in their prior appeal. First, Benson-Etcheverry reassert that the
27 Ruling and the 3M Plan do not contain express conditions and allows mitigation measures that
28 will not ensure that existing rights are satisfied. And they reargue that the State Engineer has

1 delegated his statutory duties and given authority to the WAC to determine conflicts and
2 mitigation. These arguments are fully addressed in Sections B-E, above.

3 Second, Benson-Etcheverry attempt to re-litigate this Court's conclusion that Nevada law
4 does not prevent the State Engineer from granting applications that may impact existing rights so
5 long as the existing right can be mitigated to prevent conflicts. They attempt to reargue that the
6 State Engineer must deny applications that impact existing rights and cannot require mitigation
7 unless the existing water right holder agrees to mitigation. These arguments, however, have
8 already been rejected by this Court in Benson-Etcheverry's prior appeal of the Ruling. Order, 12-
9 14. Under the law of the case, they cannot raise these arguments once again.

10 Additionally, Benson-Etcheverry assert that because the WAC and TAC set the action
11 criteria levels, it is the committees that make the decision whether it is necessary to respond to
12 complaints by existing water right holders. This contention is based on their misinterpretation of
13 the 3M Plan. As discussed above, the action criteria under the 3M Plan are required to be set at
14 levels that will detect the effects of KVR's pumping and provide an early warning of potential
15 impacts so that the WAC and TAC can respond with recommendations to the State Engineer in
16 time to prevent the impact from occurring or, if the impacts cannot be prevented, to ensure that
17 mitigation is in place to prevent the impacts from adversely affecting existing water rights. The
18 WAC and TAC are not authorized under the 3M Plan to decide claims by existing water right
19 holders against KVR. The State Engineer retains the authority to decide those claims if they
20 arise.

21 Benson-Etcheverry assert that none of the 3M Plan provisions are binding on KVR and
22 can be changed by the WAC at any time. This is contrary to the express terms of the 3M Plan
23 and the State Engineer's approval letter, which state that the Plan applies to KVR's permits, the
24 State Engineer has final authority over the Plan, and any modification must be approved by the
25 State Engineer. SE ROA 5, 11, SUP SE ROA 27.

26 Lastly, Benson-Etcheverry contend that the 3M Plan is devoid of urgency and that the
27 WAC and TAC meet annually or bi-annually only and without regard to any reported impact to a
28 water right holder. This argument also ignores the plain language of the 3M Plan. The 3M Plan

1 sets forth minimum meeting requirements, but provides that the TAC will meet as frequently as
2 necessary. SE ROA 8. The State Engineer could also exercise his authority and require more
3 frequent meetings by amending the 3M Plan. Additionally, if an action criterion is triggered that
4 signals a potential impact, the 3M Plan requires the TAC to meet as soon as possible to
5 investigate why the criterion was triggered. SE ROA 10. And if the impact is caused by KVR,
6 then the 3M Plan requires the WAC to expeditiously develop mitigation or management measures
7 to prevent adverse impacts to existing rights. SE ROA 10. Finally, the WAC must ensure that
8 mitigation is timely. SE ROA 14. Accordingly, Benson-Etcheverry's assertion that the 3M Plan
9 is not reasonably calculated to address impacts in a timely fashion is without merit and they have
10 failed to overcome their burden to show that the State Engineer's approval of the 3M Plan was
11 arbitrary and capricious.

12 **IV. CONCLUSION.**

13 Based on the facts and the legal arguments presented herein, this Court should deny
14 Benson-Etcheverry's requests and uphold the State Engineer's decision to approve the 3M Plan in
15 its entirety. Benson-Etcheverry have not met their burden to demonstrate on the record that the
16 State Engineer's decision was in violation of statutory provisions; in excess of his statutory
17 authority; clearly erroneous in view of the substantial evidence in the record; arbitrary or
18 capricious; or an abuse of discretion. Rather, the State Engineer's decision is supported by
19 substantial evidence and his interpretations of his own enabling legislation are reasonable,
20 consistent with applicable statutory provisions, and not in excess of his authority. They should be
21 given deference by this Court and the State Engineer's decision should be affirmed.

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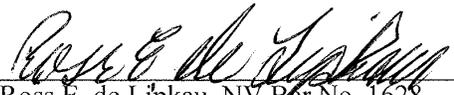
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AFFIRMATION

The undersigned hereby affirms that this document does not contain a social security number.

Dated: December 20, 2012.

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

Pursuant to NRCPC 5(b), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 20th day of December, 2012, I served a true and correct copy of the foregoing document, **INTERVENOR KOBEH VALLEY RANCH, LLC'S ANSWERING BRIEF**, by e-mail and by U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as follows:

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Employee of Parsons Behle & Latimer

PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 26th day of July, 2013, I caused a copy of the foregoing ***JOINT APPENDIX VOLUMES 1 THROUGH 8*** to be served on the following parties as outlined below:

VIA COURT'S EFLEX ELECTRONIC FILING SYSTEM:

Francis Wikstrom
Jessica Prunty
Cassandra Joseph
Dana Walsh
Gary Kvistad
Bradford Jerbic
Daniel Polsenberg
Bradley Herrema
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Theodore Beutel
Karen Peterson
John Zimmerman
Francis Flaherty
Paul Taggart
Michael Rowe
Gregory Walch
James Erbeck
Jennifer Mahe
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Neil Rombardo
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///

///

**VIA US MAIL, POSTAGE PRE-PAID
ADDRESSED AS FOLLOWS:**

William E. Nork, Settlement Judge
825 W. 12th Street
Reno, NV 89503

Dated this 26th day of July, 2013.

/s/ Therese A. Ure

THERESE A. URE, NSB# 10255

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