

1 See, *Banegas* 117 Nev. at 228, 19 P.3d at 249 ("no part of a statute should be rendered
2 nugatory, nor any language turned to mere surplusage, if such consequences can properly
3 be avoided." Citing, *Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530,
4 533 (1970)). The State Engineer urges the Court to reject these calls to add complexity and
5 cost to the administration of water rights in Nevada.

6 Rulings by the State Engineer, including Ruling 6127, are a quasi-judicial function
7 assigned to the State Engineer by the legislature. NRS 533.370(8). Rulings apply only to the
8 application before the State Engineer and do not set rules for future applications. The
9 Nevada Supreme Court has consistently refused to assign controlling authority to prior
10 administrative decisions.

11 Moreover, "even if the [agency] has failed to follow some of its prior
12 decisions, the [agency] has not thereby abused its discretion. In
13 Nevada, administrative agencies are not bound by *stare decisis*." *Motor Cargo v. Public Service Comm'n*, 108 Nev. 335, 337, 830
14 P.2d 1328, 1330 (1992). Thus, no binding effect is given to prior
administrative determinations.

15 *Desert Irr., Ltd. v. State Engineer*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). A ruling
16 that cannot even be used to invoke the doctrine of *stare decisis* can hardly be viewed as a
17 rule of general applicability. Approval of the 3M Plan is not rulemaking and is merely a tool
18 the State Engineer uses to avoid conflicts with existing water rights.

19 D. The 3M Plan is not Vague and is in Compliance with Ruling 6127.

20 The Monitoring, Management and Mitigation plan is based on the idea that monitoring
21 must come first. Etcheverry argues that it is merely a plan to make a plan. This is incorrect.
22 This is a plan to implement specific monitoring measures to detect and predict the effects of
23 pumping. SEROA at 5. The plan allows for local affected parties to have input into
24 management and mitigation options should pumping effects threaten to conflict with existing
25 rights. SEROA at 5-6.

26 Etcheverry seems to be arguing that the plan is inadequate because it allows affected
27 parties, including Etcheverry who is a participant in the 3M Plan, the ability to make
28 recommendations to the State Engineer as to management and mitigation options.

1 Protection of existing rights is required by statute, and the State Engineer must comply with
2 state law. The NRS does not dictate how existing rights are to be protected, and seeking
3 input from the affected parties as to how they feel senior rights might best be protected, or if
4 necessary mitigated, is simply good management practice.

5 The 3M Plan is specific as to what data is to be collected and reported to the State
6 Engineer. SEROA 17-29. The plan was developed over time and the State Engineer had
7 representatives present at meetings between Eureka County and KVR during the
8 development of the plan. As is evident in the record, the State Engineer reviewed several
9 drafts of the plan and required changes before he approved the final plan. ROA at 1, SE
10 Supp ROA at 27.

11 The intent of the plan is clearly to avoid conflicts if possible. The specific monitoring
12 will provide the data needed to manage pumping within the KVR well field to avoid conflicts.
13 Thus, the management of the well field will change from time to time as KVR gains both data
14 and experience as to the reaction of the aquifer to the pumping stress. It is clear from a
15 practical standpoint that management based on predictions is no substitute for management
16 based on actual observations and experience. Thus, the management portion must allow
17 the flexibility to provide the best management possible. SE Supp ROA at 27.

18 Mitigation measures will be even more tentative at this time. As pumping begins and
19 the stress to the aquifer is known more precisely, the measures needed to mitigate any
20 impacts to existing rights will become more clearly understood. The plan allows the parties
21 to work together to determine mitigation measures that will be suitable to those concerned. If
22 they fail to reach agreement, any party can petition the State Engineer to order specific
23 measures.

24 Thus, the 3M Plan is in substantial compliance with State Engineer Ruling 6127 and
25 this Court's decision to affirm that Ruling at this point to accomplish the purpose assigned to
26 it. The plan will accumulate data on the water resources, manage pumping to avoid impacts
27 if possible, and to mitigate impacts if they do occur. The plan is well within the State

28 ///

1 Engineer's discretion to approve and this Court should not require the 3M Plan to be more
2 specific than is warranted at this time.

3 It is also the policy of Nevada's water law in general that the waters of the State
4 should be put to beneficial use and to the extent possible not left idle. *Desert Irrigation, Ltd.*
5 *v. State Engineer*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997)("The concept of
6 beneficial use is singularly the most important public policy underlying the water laws of
7 Nevada and many of the western states."). The State Engineer's interpretation of the water
8 code balances the need to protect existing rights and the long-term sustainability of the
9 resources while allowing for the maximum use of the resource for the benefit of the State and
10 its people. See, *Bacher v. State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793, 797
11 (2006)("state regulation like that in NRS Chapters 533 and 534 is necessary to strike a
12 sensible balance between the current and future needs of Nevada citizens and the stability of
13 Nevada's environment.") The phased nature of the plan complies with the requirement of
14 Ruling 6127.

15 E. This Court Should Affirm the State Engineer's Definition of Conflict and
16 Mitigation.

17 With the understanding that the Motion for Leave to File Amicus has not been
18 granted, the State Engineer makes the following arguments for the Court to consider if the
19 motion is granted. Amicus Eureka argues that "there is little or no guidance in Nevada law
20 regarding the definition, purpose or scope of mitigation. . . ." EAB at 9. The State Engineer
21 has consistently interpreted a conflict with existing rights under NRS 533.370(2) to occur
22 when a senior water right holder's beneficial use cannot be satisfied due to the junior water
23 right holder's use. In addition, mitigation has consistently meant actions that ensure the
24 senior water right can be satisfied.

25 The State Engineer disagrees with the arguments raised by Eureka that the two small
26 springs must be mitigated with water allocated to the mine. The specific measures will be
27 determined when impacts manifest, however as an example, the mine could install a shallow
28 well and pumping system for Etcheverry to bring water to the surface from the same aquifer
source that the springs normally come from.

1 Pumping in Diamond Valley affected both Shipley and Thompson springs and the
2 owners of those springs have applied for groundwater rights to mitigate the effects of
3 pumping in Diamond Valley. If Eureka's argument that there can be no effect whatsoever on
4 spring flow is successful, all pumping in Diamond Valley should cease immediately and until
5 the springs begin to flow again. Thus, in Diamond Valley the 30,000 acre-foot annual
6 perennial yield would remain idle to allow these few users to hopefully have their spring
7 waters begin to flow again. There are many areas of the state that could be faced with the
8 same issue.

9 The definitions are important to this case and the water law in general. As stated
10 earlier, "[a]n agency charged with the duty of administering an act is impliedly clothed with
11 power to construe it as a necessary precedent to administrative action." *Pyramid Lake*
12 *Paiute Tribe of Indians v. Washoe County*, 112 Nev. at 747, 918 P.2d at 700 (1996), citing
13 *State v. State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988). The State Engineer and
14 this Court must balance the need to make water available to the public for appropriation
15 while protecting existing rights; however, the Court should defer to the experience and
16 expertise of the State Engineer and not graft on the artificial constraints advocated by Eureka
17 County.

18 III. CONCLUSION

19 The State Engineer approved the 3M Plan as a specific measure to deal with potential
20 impacts on existing rights. It is specific as to the data that needs to be collected once
21 pumping starts. The plan has adequate provisions to guide the management of pumping to
22 avoid impacts and is subject to modification as conditions warrant for mitigation measures to
23 be taken to ensure that existing rights are satisfied. The State Engineer retains all his
24 authority to order any water user to curtail or cease pumping water at any time that pumping
25 interferes with existing rights that cannot be mitigated. This Court should defer to the
26 expertise of the State Engineer on issues surrounding the administration of water rights.

27 ///

28 ///

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

1 DATED this 20th day of December, 2012.

2 CATHERINE CORTEZ MASTO
3 Attorney General

4 By:



5 BRYAN L. STOCKTON
6 Senior Deputy Attorney General
7 Nevada State Bar No. 4764
8 100 N. Carson Street
9 Carson City, Nevada 89701
10 775-684-1228 Telephone
11 775-683-1103 Facsimile
12 bstockton@ag.nv.gov
13 *Attorneys for Respondent*

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 20th day of December 2012, I sent a copy of the NEVADA STATE ENGINEERS ANSWERING BRIEF via electronic mail and U.S. Mail to the addresses below:

Parsons Behle & Latimer
Ross E. de Lipkau, Esq.
John R. Zimmerman, Esq.
50 West Liberty Street, Suite 750
Reno, Nevada 89701
rdelipkau@parsonsbehle.com
jzimmerman@parsonbehle.com
Attorneys for Intervenor
Kobeh Valley Ranch

Parsons Behle & Latimer
Francis M. Wikstrom, *Pro Hac Vice*
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
fwikstrom@parsonsbehle.com
ecf@parsonsbehle.com
Attorneys for Intervenor
Kobeh Valley Ranch

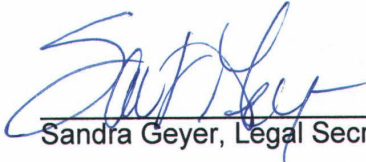
Schroeder Law Offices, P.C.
Therese A. Ure, Esq.
Laura Schroeder, Esq.
440 Marsh Avenue
Reno, Nevada 89509
therese@water-law.com
Attorneys for Benson, Etcheverry
And Diamond Cattle Co.

Allison, MacKenzie, Pavlakis
Wright & Fagan, Ltd.
Karen A. Peterson, Esq.
Jennifer Mahe, Esq.
402 N. Division Street
P.O. Box 646
Carson City, Nevada 89702
kpeterson@allisonmackenzie.com
jmahe@allisonmackenzie.com
Attorneys for Eureka County

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Eureka County District Attorney's Office
Theodore Beutel, Esq.
701 S. Main Street
P.O. Box 190
Eureka, Nevada 89316
Attorneys for Eureka County
TBeutel.ecda@eurekanv.org


Sandra Geyer, Legal Secretary II

Case No. CV1207-128

Dept. No.: II

SCHROEDER LAW OFFICES, P.C.
Laura A. Schroeder, Nevada State Bar #3595
Therese A. Ure, Nevada State Bar #10255
440 Marsh Ave., Reno, Nevada 89509-1515
PHONE: (775) 786-8800; FAX: (877) 600-4971
counsel@water-law.com

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

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

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF EUREKA

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

Petitioners,

v.

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 REPLY BRIEF**



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

REPLY BRIEF 1

I. INTRODUCTION 1

II. ARGUMENT 1

 A. 3M Plan does not cure conflicts with existing water use rights and is contrary to
 Ruling 6127 and NRS § 533.370(2)..... 1

 B. The 3M Plan conflicts with NRS § 534.110(4) and (5)..... 4

 C. Impermissible delegation of authority..... 6

 D. The State Engineer’s approval of the 3M Plan constitutes ad hoc rulemaking
 contrary to law..... 9

 E. The 3M Plan is vague and deficient, and the State Engineer’s approval of the 3M
 Plan was arbitrary, capricious and an abuse of discretion..... 11

III. CONCLUSION..... 13



440 Marsh Avenue
Reno, NV 89509
PHONE (775) 786-8800 FAX (877) 600-4971

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

CASES

Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534, 1868 WL 2014 (1869)..... 2

STATUTES

NRS Chapter 233B..... 10

NRS § 233B.038(1)(a)..... 9

NRS § 532.120..... 9, 10

NRS § 533.024..... 4, 6

NRS § 533.335..... 2

NRS § 533.345..... 2

NRS § 533.370(2)..... 1, 2, 3, 6, 10

NRS § 534.090..... 4

NRS § 534.110..... 4, 5, 6, 7, 8, 9, 10



1 **REPLY BRIEF**

2 Petitioners MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP,
3 DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON (collectively referred to
4 herein as "Petitioners"), by and through their attorneys of record, Schroeder Law Offices, P.C.,
5 file this Reply Brief in support of their Petition for Judicial Review, filed in Case No. CV1207-
6 178 on July 5, 2012, and in response to Respondent State Engineer's and Intervenor-Respondent
7 Kobre Valley Ranch, LLC's ("KVR's") Answering Briefs, separately filed in this matter on
8 December 20, 2012.

9 **I.**

10 **INTRODUCTION**

11 Petitioners submitted their Opening Brief in this matter on November 5, 2012.
12 Respondents filed their separate Answering Briefs on December 20, 2012. Respondents'
13 arguments in response are unpersuasive, and highlight the reasons proffered by Petitioners why
14 the Monitoring, Management and Mitigation Plan ("3M Plan") is defective and contrary to law.
15 This Court should grant Petitioners' Petition for Judicial Review, and should vacate the State
16 Engineer's approval of the 3M Plan.

17 **II.**

18 **ARGUMENT**

19 Petitioners reply to Respondents' Answering Briefs as follows:

20 **A. 3M Plan does not cure conflicts with existing water use rights and is contrary to**
21 **Ruling 6127 and NRS § 533.370(2).**

22 Nevada Revised Statute § 533.370(2) provides: "[W]here its proposed use or change
23 conflicts with existing rights...the State Engineer shall reject the application and refuse to issue
24 the requested permit." Ruling 6127 requires any 3M Plan to "ensure that any existing water
25 rights are satisfied to the extent of the water right permit." See Petitioner's Supplemental Record

26 ///



1 on Appeal (“PSROA”) at 27. Therefore, NRS § 533.370(2) and Ruling 6127 mandate that no
2 conflicts occur and that existing water use rights are capable of satisfaction to their full extent.

3 The State Engineer defines a “conflict” as “a situation wherein the senior user is not able
4 to use his entire water right.” SE Ans. Br. 6 (Dec. 20, 2012). A water right is a property right
5 with several elements, including among other things: 1) source of water, 2) point of diversion, 3)
6 place of use, 4) purpose, or manner of use, and 5) quantity of water. NRS § 533.335. To change
7 any of these elements, a water user must submit a change application to the State Engineer. NRS
8 § 533.345. Not every element of a water use right can be changed; the only elements that may be
9 changed are place of diversion, place of use, or manner of use. *Id.* Thus, according to the State
10 Engineer’s definition of “conflict,” a conflict occurs when a water user is not able to use any
11 single element of his water use right.

12 In Ruling 6127 and subsequent briefing on review, the State Engineer admitted that
13 KVR’s Applications would conflict with existing water use rights, but determined that such
14 conflicts could be mitigated by implementation of a 3M Plan. PSROA 22, 27, 38-39, 898, 910.
15 The State Engineer opines: “Whether the senior user gets his water through his current diversion
16 works or from works constructed as mitigation by a junior user, his water right is whole and the
17 junior user is not in conflict with the senior right.” SE Ans. Br. at 6. This determination
18 overlooks several critical issues, assuming that mitigation can be appropriate at all in cases of
19 conflict: 1) timing of mitigation, and 2) method of mitigation.

20 First, the timing of mitigation is a critical issue under Nevada water law. The doctrine of
21 prior appropriation, adopted by the Nevada State Legislature, provides that “priority of
22 appropriation gives the superior right.” *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 2, 1868
23 WL 2014 (1869). The State Engineer and KVR hypothesize that the 3M Plan will be sufficient to
24 mitigate any conflicts with existing water uses because KVR will monitor water resources for
25 existing and potential conflicts. SE Ans. Br. at 6; KVR Ans. Br. at 12-15 (Dec. 20, 2012).
26 However, both the State Engineer and KVR recognize that KVR’s proposed water use may



1 create conflicts that must be mitigated after-the-fact. *Id.* Such after-the-fact mitigation is in direct
2 conflict with NRS § 533.370(2) and the prior appropriation doctrine. Nevada Revised Statute §
3 533.370(2) does not provide that conflicts may occur, so long as the junior appropriator “makes
4 it up” to the senior water user at some time in the future. The statute provides that the application
5 must be denied. Unless the State Engineer can impose mitigation measures that “ensure that any
6 existing water rights are satisfied to the extent of the water right permit” (Ruling 6127, PSROA
7 at 27) and that no conflicts will occur, the Applications must be denied.

8 Second, the method of mitigation is also critical under Nevada water law. The State
9 Engineer has defined “mitigation” to mean “[a]ctions that ensure the senior water right can be
10 satisfied.” SE Ans. Br. at 11. As shown above, this means that all elements of the water use right
11 must be satisfied. The State Engineer also opines: “Whether the senior users gets his water
12 through his current diversion works or from works constructed as mitigation by a junior user, his
13 water right is whole and the junior user is not in conflict with the senior right.” *Id.* at 6. However,
14 the 3M Plan expressly permits mitigation methods such as financial compensation or property
15 exchange. *See* State Engineer’s Record on Appeal (“SEROA”) at 16. Respondents have also
16 suggested trucking in water as a viable mitigation measure. *See* oral argument by Francis M.
17 Wikstrom, attorney for KVR, PSROA at 145. The State Engineer has even suggested drilling a
18 water user a new well in a different location. SE Ans. Br. at 7. None of these methods constitute
19 mitigation of a water right under Nevada law and Ruling 6127 to “ensure that any existing water
20 rights are satisfied to the extent of the water right permit.” PSROA at 27.

21 These proposed mitigation methods do not allow continued use of senior water use rights.
22 Instead, these methods propose substitutes to fulfillment of water use rights at some time after
23 the conflict has damaged the senior user. If the Court takes Respondents’ arguments to their
24 logical conclusion, Respondents would have affected water right users using water from a
25 different source and different point of diversion, but under the water user’s original water use
26 ///



1 right. The State Engineer does not have the authority to allow different water to be substituted
2 for the water permitted under the existing right.¹

3 KVR's Applications conflict with existing water use rights. The 3M Plan does not
4 mitigate or cure the conflicts because the timing and methods proposed for mitigation are
5 contrary to Nevada water law. This Court must vacate the State Engineer's approval of the 3M
6 Plan for error of law.

7 **B. The 3M Plan conflicts with NRS § 534.110(4) and (5).**

8 Nevada water law provides that groundwater appropriations are subject to "a reasonable
9 lowering of the static water level at the appropriator's point of diversion." NRS § 534.110(4).²
10 The State Engineer must make a determination about what is "reasonable." *Id.* Consistent with
11 that statute, Nevada law also provides that later-in-time appropriations that would cause the
12 ground water level to be lowered at the appropriator's point of diversion may only be permitted
13 "so long as any protectable interests in existing domestic wells...and the rights of holders of
14 existing appropriations can be satisfied under such express conditions." NRS § 534.110(5).³

15
16 ¹ Since an existing water user's right will not allow water use from a different point of diversion
17 without prior approval via a change application, and because no change is allowed for the source
18 of water, KVR must presumably provide the substituted water as part of mitigation. However,
19 KVR does not hold any water use rights for irrigation or stock watering. KVR's Applications are
20 limited to mining, milling and dewatering for mining purposes.

21 An issue also arises from an existing water user's continued use of substitute water provided by
22 KVR. If a water user fails to use water under the conditions of their water use right, their right
23 could be deemed forfeited or abandoned for nonuse. *See* NRS § 534.090 relating to forfeiture
24 and abandonment of groundwater uses.

25 ² It is a condition of each appropriation of groundwater acquired under NRS chapter 534 that the
26 right of the appropriator relates to a specific quantity of water and that the right must allow for a
reasonable lowering of the static water level at the appropriator's point of diversion. In
determining a reasonable lowering of the static water level in a particular area, the State Engineer
shall consider the economics of pumping water for the general type of crops growing and may
also consider the effect of using water on the economy of the area in general. NRS § 534.110(4).

³ This section does not prevent the granting of permits to applicants later in time on the ground
that the diversions under the proposed later appropriations may cause the water level to be
lowered at the point of diversion of a prior appropriator, so long as any protectable interests in
existing domestic wells as set forth in NRS § 533.024 and the rights of holders of existing
appropriations can be satisfied under such express conditions. NRS § 534.110(5).



1 On April 3, 2012, oral argument was held before this court on the Petitions for Judicial
2 Review challenging Ruling 6127 (Case Nos. CV-1108-155, CV-1108-156, CV-1108-157, CV-
3 1112-164, CV-1112-165 and CV-1202-170). At oral argument, the State Engineer conceded that
4 if effects to existing water use rights are known, then NRS § 534.110(5) requires the State
5 Engineer to put express terms in the water use permits to avoid those effects. PSROA at 98-104
6 (“So all these effects that you know about, based on geology, that statute [NRS § 534.110(5)]
7 applies to and you can put in the permit terms.” PSROA at 102-103. “So if we knew what they
8 were going to be, I would agree the statute [NRS § 534.110(5)] would apply and require specific
9 terms.” PSROA at 103).

10 The State Engineer specifically found that KVR’s Applications will conflict with
11 existing, known rights on the floor of Kobeh Valley. PSROA at 22, 27, 38-39, 898, 910. Thus,
12 under the State Engineer’s own reasoning, express conditions to avoid effects/conflicts must be
13 put in the permit terms before issuance. The State Engineer continues to argue that “until the
14 actual effects of pumping are known, the State Engineer cannot determine what to order.” SE
15 Ans. Br. at 7. However, the State Engineer’s argument is contrary to its own findings in Ruling
16 6127. The truth is that certain effects are known. By the State Engineer’s own admission, he was
17 required to put express conditions in the permits to ensure existing rights will be satisfied.

18 KVR argues that this Court affirmed the State Engineer’s decision to merely condition
19 the permits on submission and approval of a 3M Plan. KVR Ans. Br. at 15. However, this Court
20 based its decision on the assumption that it would take time for Respondents to collect additional
21 data to 1) “identify impacts and the extent of those impacts,” and 2) “develop and implement
22 mitigation efforts to ensure impacted existing rights are made whole.” PSROA at 194. The
23 District Court assumed that Respondents would conduct such necessary work prior to submitting
24 and approving the 3M Plan in order to ensure express conditions were imposed on KVR’s water
25 use.

26 ///



1 The District Court's assumption did not come to fruition. The State Engineer approved
2 the 3M Plan after the hearing, and seven days before issuance of the Court's Order. No
3 additional data collection or analysis was performed to identify impacts and develop and
4 implement mitigation efforts.

5 The 3M Plan fails to identify any specific impacts (even known impacts), and the
6 mitigation methods permitted by the 3M Plan do not ensure existing rights will be satisfied.
7 Nevada law requires express conditions be placed in the permits when issued. This Court
8 apparently considered it appropriate in this particular case to allow the State Engineer to put the
9 express conditions in the 3M Plan due to the complexity of identifying impacts and developing
10 appropriate mitigation. However, the 3M Plan was approved by the State Engineer without any
11 additional study, analysis or development, and contains no express conditions. The 3M Plan is
12 merely a plan to create a plan. *See* KVR Ans. Br. at 17 noting, "These thresholds **will be set** at
13 appropriate levels..." (emphasis added). This circular process cannot be allowed to be continued
14 to the detriment of senior water users. This Court must vacate the State Engineer's approval of
15 the 3M Plan for error of law.

16 **C. Impermissible delegation of authority.**

17 The State Engineer is charged with the obligation and duty to administer water
18 appropriations. This entails reviewing water change applications and denying applications where
19 the proposed "use or change conflicts with existing rights or with protectable interests in existing
20 domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public
21 interest." NRS § 533.370(2). With respect to ground water appropriations, NRS § 534.110(5)
22 further provides:

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



1 As reasoned by this Court previously, the import of NRS § 534.110(5) is that new ground water
2 appropriations are permissible so long as express conditions are imposed to protect the rights of
3 prior appropriators. *See* PSROA at 12-13.

4 Within their Answering Briefs, Respondents State Engineer and KVR both stress that the
5 3M Plan simply establishes “Advisory Committees” to assist the State Engineer. SE Ans. Br. at
6 5; KVR Ans. Br. at 19. This, however, is not the case. The State Engineer specifically found
7 that KVR’s Applications will conflict with existing, known rights on the floor of Kobeh Valley.
8 PSROA at 22, 27, 38-39, 898, 910. Therefore, “[t]he 3M is designed to include or develop, as
9 needed or appropriate, *express conditions* that will protect the rights of domestic well owners, if
10 any, and existing appropriations.” SEROA at 5 (3M Plan, Section 2.A)(emphasis added). As a
11 result, the Technical Advisory Committee (“TAC”) and Water Advisory Committee (“WAC”)
12 established by the 3M Plan are more than advisory in nature. Instead, they are specifically
13 charged with the task of establishing the “express conditions” that serve to protect prior
14 appropriators. The 3M Plan, together with the protocol that arises therefrom, collectively
15 constitute the “express conditions” upon which the State Engineer’s approval of KVR’s water
16 rights is predicated under NRS § 534.110(5).

17 A monitoring, management and mitigation plan containing express and particularized
18 plans would not be objectionable if every other aspect of the permit issuance complied with the
19 applicable statutory requirements. In this case, however, the 3M Plan approved by the State
20 Engineer fails to specifically articulate actions that will be undertaken to guard the interests of
21 prior appropriators in the future. It is a plan to plan. Rather than fulfill his statutory obligations
22 *prior* to approving the change permits, the State Engineer has approved a 3M Plan that in turn
23 establishes committees seated by third parties – one of which is the applicant.

24 The plain language of the 3M Plan counsels against finding that the TAC and WAC are
25 simply advisory committees. To develop the express conditions upon which KVR’s Applications
26 must be predicated, the committees are authorized with discretion as follows:



- 1 • “The Water Advisory Committee (WAC) is to establish and carry out policy under
2 this 3M.” SEROA at 6.
- 3 • “After the full WAC has been convened, the WAC will establish policy and define
4 additional roles and responsibilities of the WAC and TAC, such as scheduling of
5 meetings, agenda setting, publication of minutes, receiving input from the public and
6 any other necessary components.” SEROA at 7.
- 7 • Among other things, purposes and functions of the WAC will be to:
- 8 ○ “Make modifications to the Monitoring component of this 3M, including, but
9 not limited to additional data collection and scientific investigations, based on
10 recommendations from the TAC.” SEROA at 7.
- 11 ○ “Establish values for monitored variables (water levels, springs discharges,
12 vegetation responses, etc.) known as ‘action criteria’ which, if exceeded, may
13 be of concern to the Parties and could require mitigation or management
14 actions.” SEROA at 7-8.
- 15 ○ “Determine what constitutes an adverse impact on a case-by-case basis.”
16 SEROA at 8.
- 17 ○ “Form and ensure implementation of groundwater management or mitigation
18 measures approved by the WAC based on recommendations of the TAC.”
19 SEROA at 8.

20 As KVR asserts, “[d]elegation is defined as ‘[t]he act of entrusting another with authority or
21 empowering another to act as an agent or representative.’” KVR Ans. Br. at 19, *citing*, Black’s
22 Law Dictionary (7th ed., 1999). In approving the 3M Plan, the State Engineer has voluntarily
23 displaced his obligation under NRS § 534.110(5) to require express conditions to protect prior
24 appropriators.

25 While the 3M Plan professes to retain the State Engineer’s final decision-making
26 authority, this should not be viewed as a talismanic proclamation that preserves the integrity of



1 the 3M Plan. The tasks imposed upon the WAC and TAC exceed being ministerial in nature.
2 The Committees are vested with discretion to develop and establish policies to implement the
3 express conditions of KVR's permit. Finally, the risk of impartiality is elevated given KVR's
4 inclusion within the advisory committees.

5 The very need for "advisory committees" confirms that the State Engineer has not yet
6 developed or imposed the requisite conditions necessary under NRS § 534.110(5) to approve the
7 KVR permits. The 3M Plan should be overturned as an improper delegation of the State
8 Engineer's authority and obligation under NRS § 534.110(5).

9 **D. The State Engineer's approval of the 3M Plan constitutes ad hoc rulemaking**
10 **contrary to law.**

11 The State Engineer has the power: "[to] make such reasonable rules and regulations as
12 may be necessary for the proper and orderly execution of the powers conferred by law." NRS §
13 532.120. A regulation is defined by statute as: "An agency rule, standard, directive or statement
14 of general applicability which effectuates or interprets law or policy, or describes the
15 organization, procedure or practice requirements of any agency." NRS § 233B.038(1)(a).

16 The State Engineer and KVR argue the following: 1) the 3M Plan does not constitute a
17 rule, 2) the State Engineer is not required to follow APA rulemaking procedures, and 3) the 3M
18 Plan is not contrary to the State Engineer's statutory duties. SE Ans. Br. at 7-11; KVR Ans. Br.
19 at 24-26.

20 First, the 3M Plan is a plan of general applicability that will affect all water users in the
21 Kobeh and Diamond Valleys that may be impacted by KVR's proposed water use. The stated
22 purpose of the plan is to create a process for avoiding "adverse impacts" caused by KVR's
23 proposed water use, and imposing "express conditions" on KVR's water use.⁴ SEROA at 5.
24 Nevada water law mandates avoidance of conflicts with existing rights and the imposition of

25 ⁴ Although the stated purpose in the 3M Plan is to impose express conditions, no express
26 conditions required by law are provided in the 3M Plan. See argument *supra*.



1 express conditions if junior appropriators will lower the ground water level. NRS §§ 533.370(2),
2 534.110(5). Thus, the 3M Plan promulgates the procedure and policy the State Engineer will
3 follow when regulating KVR's water use for conflicts with all other water uses in Kobeh and
4 Diamond Valleys. The 3M Plan determines the process by which the State Engineer will
5 determine conflicts and what express conditions are required. By approving the 3M Plan, the
6 State Engineer, in substance, adopted a new rule for water regulation in Kobeh and Diamond
7 Valleys.

8 Second, the State Engineer relies heavily on the fact that the State Engineer is exempt
9 from NRS Chapter 233B as to rulemaking (other than for procedure in contested cases). The
10 State Engineer fails to recognize that Petitioners have not relied on Chapter 233B in their
11 Opening Brief. Instead, Petitioners' arguments focus on the statutory duties of the State
12 Engineer, and how the State Engineer violated his duties by adopting the 3M Plan as a new rule.

13 Third, the State Engineer violated his duties by adopting the 3M Plan as a policy/rule
14 because the 3M Plan is contrary to Nevada law. The State Engineer does not have authority to
15 promulgate rules or regulations that are contrary to Nevada law. NRS § 532.120. As explained
16 above, the 3M Plan violates Nevada law by allowing conflicts with existing water use rights and
17 failing to impose express conditions that ensure satisfaction of existing water use rights. Further,
18 the 3M Plan creates an entirely new process for regulation of KVR's water use when conflicts
19 occur in Kobeh and Diamond Valleys. As fully explained in Petitioners' Opening Brief and
20 *supra*, the new process created by the 3M Plan departs from current State Engineer enforcement
21 (under, in part, NRS § 534.110) because it delegates enforcement decisions to an outside body,
22 creating a lengthy, nebulous process preceding actual enforcement.

23 The State Engineer and KVR argue that the 3M Plan does not limit the State Engineer's
24 ability to act independently from the 3M Plan process when regulating KVR's water use in the
25 face of conflicts with other water uses. KVR states that other water rights holders "may avail
26 themselves of the processes created by the 3M Plan, but they are not required to do so." KVR



1 Ans. Br. at 24. KVR also states: “Nowhere, however, does the 3M Plan state that the State
2 Engineer will or must wait for the WAC and TAC to review a potential impact before taking
3 action.” KVR Ans. Br. at 25. This position is disingenuous because, logically, what is the point
4 of adopting the 3M Plan if no one needs to follow the 3M Plan? How can Respondents argue that
5 the 3M Plan imposes mandatory express conditions on KVR, while at the same time arguing that
6 neither the State Engineer nor water users need to follow the procedure imposed by the 3M Plan?

7 The State Engineer adopted the 3M Plan as a rule of policy/procedure for addressing
8 conflicts between KVR’s water use and other water uses. The policies and procedure in the 3M
9 Plan are fatally flawed and contrary to law. This Court should vacate the State Engineer’s
10 approval of the 3M Plan because it constitutes ad hoc rulemaking contrary to Nevada law.

11 **E. The 3M Plan is vague and deficient, and the State Engineer’s approval of the 3M**
12 **Plan was arbitrary, capricious and an abuse of discretion.**

13 KVR incorrectly informs this Court that Petitioners merely reargue in this section items
14 already discussed above. KVR Ans. Br. at 26. Contrary to KVR’s misreading of Petitioners’
15 Opening Brief, the sections above relate to legal errors committed by the State Engineer that are
16 reviewed by this Court *de novo* and without deference to the State Engineer’s decision below.
17 The current section highlights the deficiencies in the 3M Plan itself that are so pervasive that the
18 State Engineer’s approval of the 3M Plan was arbitrary, capricious and an abuse of discretion
19 (necessitating a different standard of review).

20 Upon previous Petitions for Judicial Review, this Court affirmed the State Engineer’s
21 decision to condition the permits on submission and approval of a 3M Plan. This Court’s
22 decision was based on the following analysis:

23 The key to protecting existing rights will be the 3M Plan which
24 will first serve to identify impacts and the extent of those impacts,
25 and second, to develop and implement mitigation efforts to ensure
26 impacted existing rights are made whole. As inferred from the
record, test pumping and analysis of pumping data, as it relates to
impacts to existing rights, obviously takes time to complete. That
data will form the basis of a 3M Plan ultimately submitted to the



1 State Engineer for approval. The specifics of a 3M Plan not known
2 at the time of the hearings will be made known after the data is
3 collected and analyzed with input from Eureka County.
4 (PSROA 194).
5 However, no additional tests or analysis were completed prior to submission of the 3M Plan. The
6 3M Plan does not identify impacts or implement mitigation efforts. The 3M Plan merely creates
7 a plan to create a plan based on future monitoring activities. The 3M Plan does not meet this
8 Court's expectations for content or sufficiency, and thus the State Engineer abused his discretion
9 when approving the 3M Plan.
10 The 3M Plan creates a plan for monitoring water resources as well as for management
11 and mitigation of conflicts with existing water uses. However, the State Engineer and KVR now
12 contend, upon judicial review, that the management and mitigation portions of the 3M Plan are
13 not binding. Respondents argue that the State Engineer has the authority to conduct enforcement
14 however he sees fit, and that water users do not need to go through the process outlined in the
15 3M Plan. If that is true, then how does the 3M Plan impose express conditions on KVR's water
16 use, and how can the 3M Plan fulfill its stated purpose of avoiding adverse impacts?
17 Finally, the 3M Plan is clearly deficient on its face. As explained *supra*, the 3M Plan is
18 contrary to Nevada law. The 3M Plan does not cure known conflicts with existing water use
19 rights to ensure existing rights will continue to be satisfied. No express conditions are imposed
20 due to the known lowering of the water level at appropriators' points of diversion. The State
21 Engineer has impermissibly delegated authority to an outside body, and the 3M Plan is in
22 substance a rule that conflicts with Nevada law. Further, the 3M Plan's circular process is not
23 designed for addressing conflicts that require immediate action. This Court should vacate the
24 State Engineer's approval of the 3M Plan.
25 ///
26 ///



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

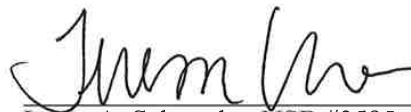
III.

CONCLUSION

Approval of the 3M Plan constitutes error by the State Engineer. In the absence of particularized conditions of monitoring, management and mitigation, the 3M Plan fails to include the express conditions necessary to approve the KVR transfers. Instead the 3M Plan is permeated with non-committal and aspirational provisions that accomplish little else other than to kick the can down the road. Given its general applicability to nearly all water rights of use existing within the basin, the 3M Plan constitutes ad hoc rulemaking. This Court should vacate the State Engineer's approval of the 3M Plan.

DATED this 1st day of February, 2013.

SCHROEDER LAW OFFICES, P.C.



Laura A. Schroeder, NSB #3595

Therese A. Ure, NSB #10255

440 March Ave.

Reno, NV 89509

Phone: (775) 786-8800

Email: counsel@water-law.com

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



CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2013, I caused a copy of the foregoing
Petitioners Michel and Margaret Ann Etcheverry Family, LP, Diamond Cattle Company, LLC, and Kenneth F. Benson's Reply Brief to be deposited for mailing, postage prepaid, with a copy by electronic mail to the following:

Ross E. de Lipkau, Esq.
Parsons, Behle & Latimer
50 West Liberty Street, Suite 750
Reno, NV 89501
rdelipkau@parsonsbehle.com
jzimmerman@parsonsbehle.com
fwikstrom@parsonsbehle.com

Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701
bstockton@ag.nv.gov
SGeyer@ag.nv.gov (courtesy copy)

Further, I hereby certify that on the 1st day of February, 2013, I caused a courtesy copy of the above-named document to be sent by electronic and US mail to the following interested parties:

Karen A. Peterson
Allision, Mackenzie, Pavlakis, Wright & Fagan Ltd.
P.O. Box 646
Carson City, NV 89701
kpeterson@allisonmackenzie.com

Theodore Beutel, Esq.
Eureka County District Attorney
701 South Main Street
P.O. Box 190
Eureka, NV 89316
tbeutel.ecda@eurekanv.org

Dated this 1st day of February, 2013.



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



ORIGINAL

Case No. CV1207-178

Department No. II

SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF EUREKA
THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE

---o0o---

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

Petitioners,

-vs-

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.

ORAL ARGUMENTS
Monday, April 15th, 2013
Eureka, Nevada

Transcribed by:

KATE MURRAY, CCR #599

APPEARANCES:**For the Petitioners:**

SCHROEDER LAW OFFICES, PC
Attorneys at Law
LAURA A. SCHROEDER, ESQ.
THERESE A. URE, esq.
440 Marsh Avenue
Reno, Nevada 89509

For the State of Nevada:

OFFICE OF THE ATTORNEY GENERAL
BRYAN STOCKTON, ESQ.
100 North Carson Street
Carson City, Nevada 89701

For Kobeh Valley Ranch, LLC:

PARSONS BEHLE & LATIMER
Attorneys at Law
FRANCIS WIKSTROM, ESQ.
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111

1 EUREKA, NEVADA; MONDAY, APRIL 15TH, 2013; 1:30 P.M.

2 ---o0o---

3
4
5 THE COURT: On the record. Counsel, for
6 the record.

7 MS. SCHROEDER: Laura Schroeder for
8 petitioners. Matthew Etcheverry is in the gallery
9 here, and also Ken Benson. My co-counsel is Therese
10 Ure.

11 THE COURT: Good morning or afternoon.

12 MR. STOCKTON: Good morning, Your Honor.
13 Bryan Stockton from the Office of the Attorney
14 General representing the state engineer (inaudible).

15 THE COURT: All right. Good afternoon,
16 gentlemen.

17 Ms. Schroeder, this is your petition.

18 MS. SCHROEDER: Thank you, Your Honor.
19 As to surface water, the Nevada State adopted the
20 prior appropriation system early in the 1900s, and
21 it adopted this, a more comprehensive system
22 (inaudible), but like other western states, it
23 didn't adopt a ground water protocol until the mid
24 1900s, and naturally, given the experience of the
25 surface water code, it adopted a prior appropriation

1 system of some sort.

2 However, I would suggest to Your Honor
3 that the prior appropriation system for ground water
4 never quite fit the easy model that regulating by
5 priority did with the surface water code because of
6 its hydrology.

7 Because surface water has -- the natural
8 system has the ability to gauge water volumes by
9 looking at the water stream visually, you can look
10 at diversions visually and observe the effects
11 concurrently with the effect of that diversion on
12 the stream.

13 Recharge can also be gauged by the snow,
14 the rain and the runoff, but none of these
15 measurements are needed or were available for the
16 easy regulation of ground water.

17 We cannot see the aquifer nor the effects
18 of diversion on the aquifer, and there are some
19 scientists that tell us that withdrawals below the
20 aquifer, the alluvium aquifer can be minor and never
21 actually replenish.

22 In any case, a massive timing of recharge
23 to the ground water aquifers is largely unknown, and
24 their effect long-term spanning years and decades,
25 not just a season or a year.

1 This is the background we're running
2 against here, Your Honor.

3 Against this hydrological background, the
4 state engineer is charged with regulating ground
5 water and the legislature with perhaps the state
6 engineer's assistance has adopted certain regulatory
7 provisions in the ground water code that are
8 different from the surface water code, and these
9 ground water provisions are important in this
10 particular case.

11 Specifically, there are three provisions
12 in this case that I, in my briefing, have gone over
13 in great detail that I want to highlight now. NRS
14 533.370(2), I will paraphrase that to say where the
15 proposed use or change conflicts with existing
16 rights, the state engineer shall reject the
17 application and refuse to issue the requested
18 permit.

19 But this is modified, Your Honor, by two
20 separate provisions in NRS 534. The first one,
21 110(4), ground water appropriation must allow for a
22 reasonable lowering of the static water level of the
23 appropriator's point of diversion, which reasonable
24 lowering shall be determined by the state engineer.

25 The second one, (5), junior ground water

1 permits can be issued that cause the water level to
2 be lowered, so long as any protectable interest in
3 existing domestic wells and in rights of holders of
4 existing appropriations can be satisfied under such
5 express conditions.

6 This latter part is where my clients
7 fall.

8 The state's engineer's counsel
9 represented to this Court in April of 2012 that if
10 the state engineer knew the effects of ground water
11 pumping, that NRS 534.110(5) would apply and
12 requires specific terms in the permit, and this is
13 at our supplementary record, page 103.

14 Pursuant to that representation, this
15 Court made an order and determined what would be
16 necessary in a 3M plan, and I would ask the Court to
17 turn to the supplementary record at page 194.

18 In its June 13, 2012 order, this Court
19 approved the -- put out and determined some ideas
20 and process by which a 3M plan should be determined.
21 Nevertheless, the state engineer approved the 3M
22 plan seven days before the Court's order in the
23 previous case.

24 Even though it didn't wait for this Court
25 to make its decision or later consider this Court's

1 conclusion, the Court's conclusion is important.

2 This Court said, The key to protecting
3 existing rights will be the 3M plan, which will,
4 number one, serve to identify impacts and the extent
5 of those impacts, and second, to develop and
6 implement mitigation efforts to ensure impacted
7 existing rights are made whole.

8 Then the Court went on to say, this Court
9 went on to say, Test pumping and analysis of pumping
10 data as it relates to impact in existing rights
11 takes time to complete, that this data will form the
12 basis of the 3M plan, not known at the time of the
13 hearings will be known, be made known after the data
14 is collected and analyzed.

15 This Court's order came out seven days
16 after the 3M plan was approved, but the state
17 engineer did not pull it back and reconsider it or
18 look at what this Court had said. Instead, they are
19 here today.

20 Let's circle back to those critical
21 statutes that this Court recognized involved the
22 principle that regulating ground water requires
23 consideration of existing ground water rights at the
24 approval stage in ground water permitting and
25 regulation because the prior appropriation doctrine

1 regulation doesn't quite work as well for the ground
2 water hydrology.

3 The Court recognized this fact when it
4 issued its June 13th, 2012 order, and it said that
5 testing will form the basis of the 3M plan, a plan
6 that the Court expected would identify impacts and
7 the extent of those impacts, and number two, develop
8 and implement mitigation to ensure impacted rights
9 are made whole.

10 Instead, the state engineer approved the
11 3M plan and that was not based on testing and did
12 not identify impacts, the extent of those impacts
13 nor develop or implement mitigation to ensure
14 impacted existing rights were made whole.

15 What we do know is that even though the
16 state engineer and KVR have told us that there are
17 going to be significant impacts to water rights in
18 Kobeh and Diamond Valleys, the state engineer
19 approved a 3M plan that neither follows the Nevada
20 law providing express conditions to satisfy existing
21 rights nor follows this Court's direction and
22 process.

23 What the state engineer and KVR might
24 have done instead is, number one, adopt express
25 conditions such as when the drawdown of existing

1 ground water exceeds five feet, KVR will limit its
2 rate of withdrawal, or should the drawdown exceed 15
3 feet, KVR would cease pumping altogether.

4 These are very common permit conditions
5 we see in ground water permits throughout the west.
6 Should KVR be faced with regulation because an
7 existing water right holder experienced such
8 drawdowns in their well, KVR could protest the state
9 engineer's regulation.

10 The existing water right holder is not
11 faced with the burden of satisfying its existing
12 rights through litigation or by petitioning for
13 regulation as the 3M plan lays out at present.

14 The 3M plan lays out a plan for a plan
15 that requires the petitioner who has existing rights
16 to go the court and to assume the burden of proof
17 and defend his property interests earlier
18 established by Nevada law.

19 In this respect, Your Honor, the 3M plan
20 as it exists turns the table on Nevada statute and
21 expected rules of the state engineer in the
22 permitting phase because the state engineer is
23 charged with satisfying with express conditions the
24 existing rights. The 3M plan, as it exists, doesn't
25 do that.

1 Certainly once this Court issued its
2 decision, the state engineer should have withdrawn
3 its approval of the 3M plan for consideration and
4 forced KVR to comply with this Court's order.

5 Instead, the state engineer and KVR are
6 here before you.

7 Under the circumstances, this Court will
8 not be surprised that my clients are not fully
9 convinced that KVR and its multiple associated
10 companies are to be, quote, good neighbors, or leave
11 their water rights and livelihoods unharmed in the
12 wake of their development path.

13 Legally, for all the reasons outlined in
14 our briefing, the 3M plan fails. Number one, it
15 does not provide express conditions except for one,
16 and it provides an express condition for wildlife
17 surface water supply.

18 Secondly, the 3M plan establishes an
19 advisory, if not regulatory, commission which is
20 outside of the Nevada Constitution, outside of the
21 legislative power given to the state engineer,
22 outside of the state engineer's authority, which
23 only has a power to create commissions by specific
24 legislative dictate and/or its rule making.

25 Thirdly, it establishes legal terms that

1 interpret statute or rule or makes its own terms.
2 It determines regulation as action criteria, adverse
3 impact, and apparently attempts to redefine the
4 statute for express conditions or reasonable
5 lowering or conflict.

6 It also is attempting to establish what
7 mitigation is, even suggesting that private
8 condemnation in the 3M plan would be a kind of
9 appropriate mitigation.

10 Standards to establish these terms of
11 regulation by unknown processes in the 3M plan
12 without any opportunity for the public to be
13 involved are also included in the 3M plan.

14 Fourth, it lawfully empowers an
15 organization called a WAC to make decisions about
16 injury, injury to existing water rights, and
17 mitigation without any review process because this
18 WAC is not an administrative agency of the state and
19 is not required to follow the public processes of
20 public meeting law, public records law that are
21 required to make government transparent and open for
22 criticism.

23 Number five, it lawfully gives rule
24 making authority -- unlawfully gives rule making
25 authority to the WAC and also its Technical Advisory

1 Committee to affect water management and regulation
2 in the whole of Kobre and Diamond Valley, not just
3 the Mount Hope Project, and allows for substitution
4 rather than the required satisfaction -- statutorily
5 required satisfaction of existing rights.

6 Sixth, it is vague and deficient. Both
7 the state engineer and KVR argue in their briefing
8 that the 3M plan is not binding. Then let's go back
9 in the circle. Earlier in their argument they said
10 it was an express condition.

11 THE COURT: It isn't binding, though, is
12 it?

13 MS. SCHROEDER: It is. If it's an order,
14 Your Honor, I would assume it's binding, but they
15 say that because it can be changed, it's not
16 binding.

17 THE COURT: Doesn't the state engineer
18 have ultimate authority over that?

19 MS. SCHROEDER: The state engineer should
20 have ultimate authority over it, and in the 3M plan
21 it says it does, but there is a whole process before
22 the state engineer is involved. The state engineer
23 is the last resort --

24 THE COURT: And he is supposed to be,
25 isn't he? Doesn't he serve on the WAC?

1 MS. SCHROEDER: Yes, he does, but there
2 is nothing --

3 THE COURT: And if the decision of the
4 WAC is not unanimous, then he makes the final
5 decision, right?

6 MS. SCHROEDER: That's right. There is a
7 long involved process that is not statutory. There
8 is no authority under the statute to establish a
9 WAC.

10 The state engineer's authority is limited
11 to defining what a reasonable lowering of the
12 aquifer is and also to establish express conditions.
13 It isn't given the authority to form this WAC or
14 this TAC.

15 THE COURT: I got the impression the TAC
16 and WAC were advisory committees. The TAC is really
17 advisory to the WAC, and the WAC is advisory to the
18 state engineer; isn't that right?

19 MS. SCHROEDER: Yes, Your Honor.

20 THE COURT: Well, there is nothing wrong
21 with receiving advice, is there?

22 MS. SCHROEDER: Well, the legislature
23 establishes by statute advisory committees to the
24 state engineer, and this isn't one of them.

25 The legislature, in our briefing, I

1 outlined for you several statutes where advisory
2 committees are established by the legislature to the
3 state engineer. This is not one of them.

4 THE COURT: They work statewide as
5 opposed to a particular area; do they not?

6 MS. SCHROEDER: Well, they're supposed to
7 be setting policy, but if you read the 3M plan, it
8 is setting policy for this whole valley, two
9 valleys.

10 THE COURT: It's just one valley as
11 opposed to the statewide advisory committees.

12 MS. SCHROEDER: I think that's a
13 difference.

14 THE COURT: I don't know. There may be a
15 distinction there.

16 MS. SCHROEDER: Yeah. Well, there is
17 that distinction, a regional versus statewide, but I
18 would argue that that doesn't give the state
19 engineer the power to legislate itself advisory
20 commissions.

21 The state engineer and KVR's circular
22 argument coupled with the "just trust me" statements
23 that we will be express as soon as possible that
24 have been typical here are wearing thin.

25 This Court already gave the state

1 engineer and KVR the leeway in its order of June
2 2012 to do testing first with the development of
3 conditions expressly addressing the results of that
4 testing in the later issued 3M plan, and instead of
5 withdrawing its order, the state engineer approved
6 the 3M plan and continues to do so to this day
7 without consideration of this Court's order
8 requiring testing and conditions that relate to
9 those testings.

10 We simply need to go back to the
11 beginning and require the state engineer to comply
12 with the conditions that says, We need express
13 conditions when there is interference, not a plan
14 that turns the constitution, the division of the
15 powers of government, legislative, executive and
16 judicial on its head, that puts in its own
17 administrative law, statutes and ground water
18 regulation, and at the very minimum, we believe that
19 this Court should enforce its April order by
20 remanding the state engineer's approval of the 3M
21 plan and directing it to follow the requirements
22 this Court has already established that are
23 necessary to meet the express conditions established
24 by statute.

25 Thank you, Your Honor.

1 THE COURT: Thank you, Ms. Schroeder.
2 Mr. Stockton?

3 MR. STOCKTON: Yes, Your Honor. With
4 your indulgence, I'd like to use a little PowerPoint
5 presentation.

6 THE COURT: Certainly.

7 MR. STOCKTON: I would like to start out,
8 Your Honor -- by the way, for the record, Bryan
9 Stockton. May it please the Court, I'm representing
10 the Senior Deputy Attorney General representing the
11 Nevada State Engineer.

12 The state engineer --

13 THE COURT: I have a tough time seeing
14 that. They have got this other stuff here in its
15 way.

16 Oh, it's movable, okay. Don't hurt
17 yourselves. All right. That's fine. That's much
18 better.

19 MR. STOCKTON: The state engineer
20 regulates ground water and surface water in the
21 entire state of Nevada, and I'd like to address
22 Ms. Schroeder's analogy, if I could, at the start.

23 She talks about the fact that you can see
24 the surface water that is coming down. You can
25 measure the snow pack. You can measure the

1 rainfall. You know basically how much water is
2 going to come down into the river.

3 It is somewhat similar with ground water.
4 You know the amount of precipitation that falls.
5 You know the amount that is going to be recharged to
6 the aquifer, and generally the rule of thumb in the
7 United States is about -- not in the United States,
8 in Nevada is about three percent of that
9 precipitation makes it to the aquifer, and so the
10 state engineer knows all that information, and he
11 takes that into account when he does all these
12 things.

13 The other thing he knows is that if you
14 look at the state engineer's website, they have a
15 series of what are called reconnaissance reports,
16 and these are reports when in the 60s, the United
17 States Geological Survey went out and surveyed all
18 these valleys in Nevada.

19 In that report by Rush and Everett, which
20 is number 30 for Kobeh Valley, they estimate there
21 is 2.7 million acre feet of water in the top 100
22 feet of that aquifer in Kobeh Valley, so that's
23 another way that ground water is different.

24 You have all this water in what the state
25 engineer calls transitional storage that helps with

1 the amelioration of effects year to year, whereas
2 surface water, once it runs off, it's gone.

3 Ground water is there and is replenished
4 every year, and the state engineer found that the
5 perennial yield was 15,000 acre feet in Kobeh
6 Valley, and so that 15,000 acre feet is recharged
7 every year.

8 But we are the driest state in the nation
9 and that's in case law. I didn't bring the cite for
10 that, but generally, what you have --

11 THE COURT: There is no question about
12 that. I'm from southern Nevada where I hear a lot
13 about water and how dry we are.

14 MR. STOCKTON: Thank you, Your Honor.

15 What this case represents is the same
16 thing we face in most water law cases in Nevada, and
17 that's the tension between two goals that are set by
18 the legislature and by the case law in Nevada.

19 The first goal is protecting existing
20 rights, and we understand the concerns of the
21 Etcheverrys, and the state engineer is dedicated to
22 protecting existing rights. It's his job to protect
23 existing rights and he does not shirk that
24 responsibility.

25 THE COURT: As I understand it, he

1 determined while there was adequate water for this
2 mining project, he determined in advance that there
3 were two wells that the Etcheverrys have, both of
4 which are likely to be impacted by this pumping.

5 MR. STOCKTON: Two springs, Your Honor.

6 THE COURT: Excuse me. Two water
7 sources.

8 MR. STOCKTON: Correct. One spring and
9 one mountain spring.

10 THE COURT: And mitigation could replace
11 those; is that right?

12 MR. STOCKTON: That is correct, Your
13 Honor, and the mitigation will have to take place
14 before the mine starts pumping, so when the
15 Etcheverrys talk about known impacts, I'm not sure
16 where they come from because the mine hasn't started
17 pumping yet, so we know that they're going to have
18 to probably --

19 THE COURT: They're going to have to do
20 this before they start pumping, right?

21 MR. STOCKTON: Right, and my
22 understanding is they have offered twice to go ahead
23 and drill those wells and put in solar pumps.

24 THE COURT: There is no expense to the
25 Etcheverrys to do this?

1 MR. STOCKTON: Correct.

2 THE COURT: Okay.

3 MR. STOCKTON: Correct. The mine has
4 offered to drill the well, to install a solar pump
5 and maintain the solar pump so there is no expense
6 to the Etcheverrys, and the water will be available
7 at the same location that it's currently available.

8 The reason the state engineer doesn't
9 just order that yet is because the mine hasn't
10 pumped anything yet, so it's a little difficult to
11 order somebody to do something before they have
12 actually gone and had an impact.

13 What I would like to talk about today is
14 back to these two goals of the Nevada water law, and
15 in fact, the Etcheverrys have been talking about
16 existing rights, which is absolutely one of the
17 goals of Nevada water law, but you have also got the
18 goal to make maximum beneficial use of these limited
19 water supplies that we have.

20 I was going to talk about it later, but
21 I'm going to talk about it upfront and I may talk
22 about it later, but Ms. Schroeder talked about the
23 testing that was supposedly envisioned in the order.

24 THE COURT: In Judge Papez's order.

25 MR. STOCKTON: In Judge Papez's order.

1 The problem with that analysis is beneficial use.
2 You can't pump 11,000 acre feet just to test and run
3 it out on the ground. That much water has to be put
4 to beneficial use.

5 They really can't get out there and run
6 test wells and pump 11,300 acre feet until they're
7 able to put that water to beneficial use, so the
8 monitoring and mitigation -- I'm going to make sure
9 I don't get past myself here. I'm sorry. Let me
10 back up here a little bit.

11 Again, in Nevada water law, your water
12 right is a usufructuary right. You don't own
13 specific water. You own the right to make
14 beneficial use of water.

15 Under the mitigation plan, they're going
16 to be able to do that.

17 If I could change the slide here, I would
18 like to use this as an example. It's from another
19 valley. It's not what happened in this case. It's
20 just an illustration to show how the mitigation will
21 have to work as we go along.

22 This is the Lone Tree mine. It's in
23 Pumphernickel Valley, and this black line in the
24 upper right-hand corner is Highway 80. The mine is
25 on a ridge right here, and this is -- (inaudible).

1 When they were dewatering that, they had
2 a similar situation in which you have here. They
3 knew the springs along this boundary ridge that were
4 going to dry up, so as they dewatered, they pumped
5 water into these four black boxes you can see kind
6 of in the middle of the screen, and they also pumped
7 water over to Fruit spring, and that was the
8 mitigation that they had to do upfront.

9 That's the mitigation that the mines have
10 to do, mitigate the Mud, Lone Springs and Lone
11 Mountain Spring before they start pumping, and until
12 they start pumping them -- this is Sulfur Spring
13 over here, and what happened is this is 7.7 miles
14 from the mine pit. That spring went dry as well.

15 They didn't -- it wasn't expected to go
16 dry because it's on the other side of the playa, so
17 it wasn't expected that the water would be
18 connected. It did go dry and the state engineer
19 found out about it. They ordered the mine to
20 mitigate those rights.

21 The way they mitigated that right was the
22 farmer and the mine got together and talked and
23 figured out how much it would cost to install a
24 well, and the farmer elected to accept a check from
25 the mine and put in the well and solar pump on his

1 own. So that's an option.

2 So in that way, the 3M plan is a way to
3 avoid conflict. Let me talk a little bit about
4 conflict, and conflict -- impacts are different than
5 conflict.

6 Impacts are unavoidable. Any time any of
7 us are using water, we're having an impact on
8 somebody else's water rights because any time you
9 pull water out of the aquifer, it's going to have an
10 impact.

11 THE COURT: Not if the person whose water
12 right is still available.

13 MR. STOCKTON: That's the difference
14 between an impact and a conflict.

15 THE COURT: I always assumed it was the
16 same. Tell me what the difference is.

17 MR. STOCKTON: Okay. So my client may
18 hit me for this, but let's say, if you have a
19 100-foot deep well and your pump is set at 90 feet
20 and your static water level is at 50 feet, and I use
21 water so your static water level in your well comes
22 down to 60 feet, well, you have still got 30 feet
23 ahead above.

24 I have had an impact, but I haven't
25 conflicted with your water right. See, so that's

1 the difference between an impact -- there is always
2 going to be impacts any time you take water out of
3 an aquifer.

4 THE COURT: Well, I was using "impact" as
5 having an impact on your water right. It doesn't
6 have an impact on your water right if, in fact,
7 you're able to obtain the number of acre feet of
8 water that you have been allocated.

9 MR. STOCKTON: And the terminology is a
10 little different, so in order to be precise, an
11 impact is an effect and that's not impermissible. A
12 conflict, which is what is the statutory term --

13 THE COURT: Conflict is impermissible. I
14 understand.

15 MR. STOCKTON: Correct. So you can have
16 impacts as long as you don't conflict because,
17 again, you don't own the water. You own the right
18 to use water, so as long as you get the full
19 beneficial use of your water, you may be impacted
20 but not conflicted.

21 I mean, to go back to their example or
22 your example, if the mine started pumping without
23 putting in these mitigation measures on the Lone
24 Mountain and Mud Springs, there would be a conflict,
25 but if the mitigation measures are there before the

1 springs go dry, then there is no conflict, and
2 therefore the requirements of 533.370(2) are
3 satisfied, okay?

4 So that's what this is talking about
5 here. If the senior right has its full beneficial
6 use of water, there is no conflict, and therefore,
7 the use of water is appropriate.

8 Now, as far as NRS 533 -- so this is
9 534.110. This is sub five, and what we talk about
10 here are express conditions and that's in red there
11 on the slide.

12 The state engineer has to make those
13 express conditions before he grants a permit. It's
14 our position that those express conditions are the
15 monitoring, the management and the mitigation.
16 Those are the express conditions.

17 What our position is, is what Etcheverry's
18 are asking for, are express measures, and that's the
19 difference. Express measures are, okay, you put
20 this well in this location, this deep at this time.

21 The monitoring plan is necessary to
22 detect those impacts. I mean, the impacts of the
23 two springs is pretty clear.

24 THE COURT: You probably don't know what
25 the express measures are until you start pumping, do

1 you?

2 MR. STOCKTON: Correct, correct, other
3 than the two springs because --

4 THE COURT: Other than those.

5 MR. STOCKTON: Exactly, and that's our
6 point. That's what the 3M plan calls for. The 3M
7 plan is to -- I like the term 3M plan used in
8 their -- I was reading it again last night.

9 They call them sentinel wells, so the
10 mine will have a production well in one location,
11 and then there will be a water source in another
12 location, and there will be this monitoring well in
13 the middle standing guard, so that as that
14 production well starts pumping, they'll see what is
15 happening at the monitoring well and they can
16 interpolate what is going to happen at the water
17 source.

18 So in Judge Papez's ruling, he talks
19 about the data that is going to be gathered as they
20 get down to this mitigation, to cure the shortages,
21 and so he talked about the data that is going to be
22 gathered.

23 Well, that is what the monitoring plan is
24 all about. That monitoring plan -- and there is
25 nothing to monitor until they start pumping, so that

1 is where the monitoring plan is very specific in the
2 3M plan.

3 The monitoring portion is very specific.
4 They're going to have monitoring wells in certain
5 locations, production wells in other locations.
6 They're going to have monitoring on the creeks that
7 are out there.

8 All those things are going to keep track
9 of what is going on with the water resources in that
10 area to make sure that those senior rights are
11 protected.

12 THE COURT: It's the TAC's job to analyze
13 that and supply that information to the WAC; is that
14 right?

15 MR. STOCKTON: As I understand it, the
16 WAC is -- our position is and this goes to the
17 delegation of authority argument -- they're an
18 advisory committee and they're a forum where
19 everybody can work out their differences.

20 The WAC would get all the data in and
21 they'll look at it, and then my understanding is if
22 it's not clear, then they send it to the Technical
23 Advisory Committee, which is these hydrologists and
24 other experts who look at the data and say, We think
25 it means that this impact is going to propagate to

1 this location.

2 THE COURT: I misunderstood then. I
3 thought the TAC was going to look at the data,
4 analyze it, and explain what it meant to the WAC.

5 MR. STOCKTON: If there is a question.

6 THE COURT: If there is a question? Oh,
7 okay. I thought they were going to do it anyway.
8 Maybe I'm wrong.

9 MR. STOCKTON: That's my understanding,
10 but I hate to --

11 THE COURT: Well, maybe -- no, that's
12 fine. I misunderstood.

13 MR. STOCKTON: (Inaudible).

14 THE COURT: You're correct then. If
15 there's a problem, they're going to use the TAC to
16 figure it out.

17 MR. STOCKTON: Right, because the WAC is
18 the water rights specialists.

19 THE COURT: Right.

20 MR. STOCKTON: The state engineer's
21 hydrologist sits on the WAC, but he is also on the
22 TAC. So the hydrologist and the water managers will
23 look at it, and if they can figure out what to do
24 among themselves, they'll go ahead and implement
25 that, but if there is a question of what the data

1 means, that's when they refer it to the TAC, and
2 those are those technical people who are going to
3 plug all the data into the model and see if they can
4 figure out what is going on with it.

5 So we have got the monitoring in place
6 and that's where the data that Judge Papez is
7 looking for is going to come from.

8 Without the 3M plan, you know, we would
9 have to do it in three stages. To satisfy the
10 arguments of the Etcheverrys, you would have to do
11 the monitoring plan first and then you would have to
12 get the data from that to do the management plan,
13 but the state engineer has the expertise in-house
14 and with the resources supplied by the mine
15 basically to be able to do that, to do that all at
16 once, and that's what is in this monitoring,
17 management and mitigation plan.

18 Until you find out where those shortages
19 are going to be, you don't know what measures are
20 going to be taken, so there's the difference between
21 conditions, which is monitoring, management,
22 mitigation, and measures which are those actual
23 measures that are going to be taken to mitigate any
24 water rights that might be impacted.

25 So again, to go back -- okay. The WAC

1 and the TAC don't have authority to tell anyone to
2 do anything. That is their -- they're like a forum
3 for people to work out their differences.

4 If everybody agrees, then they can go --
5 then they can implement whatever they agree on, and
6 I think probably from your experience on the bench,
7 you'll know it's usually better for people to work
8 out their differences than to have to come into
9 court and fight over every little thing.

10 THE COURT: The one thing that concerns
11 me about that is if the WAC unanimously agrees upon
12 a decision, whatever that might be, who -- can that
13 be appealed because -- here is my question.

14 If the state water engineer makes a
15 decision that adversely impacts somebody, anybody
16 has a right -- any person that is adversely impacted
17 has a right to appeal that to the court, right?

18 MR. STOCKTON: Correct.

19 THE COURT: But if the WAC makes a
20 decision, it isn't the state engineer's decision,
21 it's the WAC's decision.

22 MR. STOCKTON: Correct.

23 THE COURT: Can anybody appeal that?

24 MR. STOCKTON: It wouldn't really be an
25 appeal because the state engineer has de novo

1 authority there, so they would actually file, in
2 essence, a complaint, to use the standard
3 terminology.

4 They would say, Look, state engineer,
5 their decision does not protect my rights, and the
6 state engineer would look at that de novo.

7 He would go out there, find out what's
8 going on in the ground and he would make an
9 independent decision --

10 THE COURT: But somebody adversely
11 impacted could not file a petition for judicial
12 review of a WAC decision, could they?

13 MR. STOCKTON: I wouldn't think so.

14 THE COURT: And that would a decision of
15 the WAC unless somebody on the WAC opposed it.

16 MR. STOCKTON: Right, but under NRS
17 533.450(1) it has to be a decision or order of the
18 state engineer to be appealable to the District
19 Court.

20 THE COURT: I understand that, but you
21 could have significant decisions made by the WAC
22 that are not appealable.

23 MR. STOCKTON: Well, they're significant
24 agreements.

25 THE COURT: I understand. It may be

1 somebody that -- maybe everybody on the WAC agrees
2 to it, but some third person is adversely affected.
3 They can't appeal it. That concerns me.

4 MR. STOCKTON: They can't appeal it
5 directly, but they come to the state engineer and
6 say, My water rights are being impacted.

7 The state engineer will look at those and
8 say, Yes, your water rights are being impacted, or
9 if he says, No, your water rights are not being
10 impacted, then that is directly appealable to the
11 District Court.

12 The state engineer still does that de
13 novo review to satisfy his statutory duty, and if
14 someone is being impacted, they don't have to wait
15 for the WAC to finish.

16 The only party that has to comply with
17 this process is the mine. The mine has to comply
18 with this because this is an express condition on
19 their permit. It's not a condition on anyone else's
20 permit.

21 THE COURT: I just want to make sure that
22 if this is implemented, there is no way that
23 somebody who is adversely impacted is going to be
24 unable to file an appeal which they would be able to
25 file if the state engineer had just made a decision.

1 That's my concern.

2 MR. STOCKTON: Well, and so your concern
3 is that if they --

4 THE COURT: Well, the WAC apparently can
5 act -- if they act with unanimity, then there is no
6 state engineer's decision. It's a WAC decision.

7 MR. STOCKTON: Correct.

8 THE COURT: Okay. A WAC decision isn't
9 appealable, right?

10 MR. STOCKTON: Well, so your concern is
11 it's not directly appealable to the District Court?

12 THE COURT: Right.

13 MR. STOCKTON: The difference is if your
14 water rights --

15 THE COURT: Do you see what I mean?

16 MR. STOCKTON: I do, I do, but I'm trying
17 to make it clear what is happening here, because you
18 have got all this monitoring going on and --

19 THE COURT: Uh-huh.

20 MR. STOCKTON: -- the whole goal of the
21 monitoring is to find out those impacts are coming
22 before they happen.

23 So the WAC comes to its decision before
24 they're being impacted, so if Mr. Etcheverry has a
25 water right or Mr. Benson does out there somewhere,

1 it's being impacted, he doesn't have to go to the
2 WAC. He comes straight to the state engineer. The
3 state engineer makes a decision and that comes
4 straight to District Court.

5 If he chooses to come to the WAC, then
6 they can make their decision. They can come to
7 their unanimous agreement, and he can either abide
8 that, or he can come to the state engineer and say,
9 I don't like it and I want you to change it.

10 So he doesn't have -- they don't have to
11 go through that procedure. If they're being
12 impacted --

13 THE COURT: I understand that. I
14 understand that they don't have to go to the state
15 engineer or the WAC.

16 I'm just concerned that if the WAC makes
17 a decision, that decision is not appealable.
18 Normally, decisions that are made are made by the
19 state engineer and they're all appealable.

20 MR. STOCKTON: And finally, those
21 decisions are always appealable.

22 THE COURT: Right, but the WAC is -- he
23 has -- by adopting this program, he's created an
24 entity whose decisions are not appealable.

25 MR. STOCKTON: They are appealable.

1 THE COURT: And they're making decisions
2 as though they were him, right?

3 MR. STOCKTON: In other words, you can
4 appeal it to the state engineer, but you get de novo
5 review on the appeal to the state engineer.

6 I mean, if you're aggrieved by that and
7 the state engineer does nothing, you can obviously
8 come to District Court.

9 THE COURT: Right, that's true. I just
10 want to make sure we haven't left somebody out.

11 MR. STOCKTON: The reasoning is exactly
12 Ms. Schroeder's argument, the WAC and TAC are not
13 agencies of the state.

14 THE COURT: I understand they're advisory
15 and I approve of getting advice. That's fine.

16 MR. STOCKTON: But if somebody doesn't
17 like it, they come to the state engineer and say, I
18 don't like it. The state engineer takes a fresh
19 look at the facts, makes a decision. If they don't
20 like that, it comes to District Court. If they
21 don't like that, it goes to the Supreme Court.

22 THE COURT: All right.

23 MR. STOCKTON: But they can short-circuit
24 it. Tell the state engineer they're adversely
25 impacted. If they don't like the state engineer's

1 decision, without going through all that -- so it is
2 reviewable. It's just there's an extra step in
3 there where they get another de novo review from the
4 state engineer, so.

5 Ms. Schroeder talked about express
6 conditions in the permit that five feet of lowering
7 would result in certain consequences and 15 feet of
8 lowering of the static water level would result in
9 consequences.

10 I have never -- I have been doing this
11 for five years. I have never seen those conditions
12 on any permit in this state. It has always been
13 done on a fact by fact -- case by case basis -- a
14 factual specific case by case basis, so like I said
15 in my 100-foot well example, if you pump at 90 feet,
16 you have 40 feet ahead above that, are you really
17 impacted if you only have 20 feet ahead above that?

18 That's a factual question the state
19 engineer needs to make to determine the mitigation
20 that needs to be done on each particular water
21 right.

22 All right, so just real quickly, I have
23 most of my points. As far as the rule making
24 issues, the only party that is really bound by this
25 is the mine because this is in their permit terms.

1 This is not a rule of general applicability. It's
2 not going to apply to any water right holder.

3 Each one is fact specific and have to be
4 based on the facts of the hydrology in the area and
5 the other water rights in the area, and each one has
6 to be fact specific, so it's our position that this
7 is not a rule making. It's not a rule of general
8 applicability, and therefore, it was appropriate for
9 the state engineer.

10 Finally, so this is from the (inaudible)
11 and what the Court there said is it goes back to
12 that tension between beneficial use and protecting
13 existing rights, and basically, the state engineer's
14 interpretation of the water code attempts to balance
15 the need to protect existing rights, but also to
16 allow for the sustainability of the resource and to
17 allow the water to be used for the benefit of the
18 people of Nevada, so that is what this 3M plan does.

19 It initiates specific monitoring to
20 determine where impacts are going to occur. It
21 requires the mine to manage their pumping because
22 sometimes they can pump from different wells. If
23 they see there's going to be an impact here, they
24 can pump less on this well and more on that well,
25 and finally, if the impacts can't be avoided, then

1 they can mitigate those impacts to where the senior
2 water right is fully satisfied.

3 We know there is water in Kobeh Valley.
4 Let me get my number right. There is 1,100 acre
5 feet of existing rights in Kobeh Valley, so those
6 are the rights that are potentially impacted by the
7 mine's pumping.

8 That's the total amount that is not owned
9 by the mine in the entire valley, the entire
10 hydrographic basin, so there is 1,100 acre feet.

11 There is 15,000 acre feet of perennial
12 yield in that valley, and the mine has proposed to
13 put 11,300 of that 15 to beneficial use, and so it's
14 our position that in order to satisfy the Nevada
15 goal of getting the maximum beneficial use out of
16 the water, the state engineer's determination that
17 this 3M plan adequately protected existing rights is
18 a factual finding, which as a finding of fact is
19 entitled to deference from the Court, and he found
20 that this will adequately protect those 1,100 acre
21 feet of water rights.

22 Let me just check my notes one quick
23 second. I think I covered everything, but -- thank
24 you, Your Honor. Any questions?

25 THE COURT: No. Mr. Wikstrom?

1 MR. WIKSTROM: Thank you Your Honor. May
2 it please the Court and counsel, the petitioners,
3 the Etcheverry group and Mr. Benson, have a right to
4 get their water.

5 What they don't have a right to do is to
6 tell the state engineer how to do his job. Kobre
7 Valley Ranch has always conceded that priority
8 rights such as the rights of Mr. Benson and the
9 Etcheverry group take priority over our ability to
10 pump and that those rights have to be protected.

11 Mr. Benson, I should note, Your Honor,
12 his rights are in Diamond Valley and it's not even
13 clear -- there is no evidence suggesting that
14 they're even going to be affected, but he still has
15 a right to his water.

16 Before -- if we pump, we have to make
17 sure that their rights, there is no conflict. They
18 have to get the amount of water that they're
19 entitled to under their prior existing rights.

20 The state engineer, of course, has
21 recognized that as well, and the ruling and the
22 permits that issued expressly provide that they are
23 issued subject to existing rights.

24 We would submit, Your Honor, that is an
25 express condition. That means they have to get

1 their water before we can get our water.

2 Not only did the state engineer put that
3 express condition in the permits and in the ruling,
4 he also provided for this -- he conditioned it upon
5 the 3M plan to protect those rights.

6 The 3M plan was not hastily prepared as
7 petitioners would suggest to Your Honor. It was a
8 process that was more than a year long. It just
9 happened to be it was submitted to the state
10 engineer while Judge Papez was considering his
11 ruling.

12 The county had input into the plan, and
13 appellants were fully aware of the process when the
14 3M plan was being developed, and they could have had
15 as much input as they wanted. They chose not to,
16 and now they want to challenge the plan, which
17 really is a tool for the assistant state engineer to
18 do his job.

19 So when they say trust us, we're not
20 asking them to trust us, Kobeh Valley Ranch, but by
21 the same token, what they're really saying to Your
22 Honor is, and to this Court, is don't trust the
23 state engineer to do his job, which is to administer
24 the water of the state of Nevada and to protect
25 those who have prior existing rights.

1 We would submit, Your Honor, that the
2 appellants here have read the 3M plan in a very
3 contorted way by taking bits and pieces out of
4 context, and it's really inconsistent. Their
5 reading is inconsistent with the plain meaning and
6 the intent of the plan.

7 They want to ignore the fact that the
8 state engineer is -- retains complete control at all
9 times, and his job is to protect existing rights.
10 The 3M plan is a tool. It's not the only tool he
11 has, but it's an important tool for him to do his
12 job.

13 It's not a delegation of his authority
14 and it doesn't replace the state engineer as they
15 suggest in their briefing. It merely assists him.

16 They fault the plan because they say it's
17 not specific enough as to what would be done in the
18 future to protect their rights. Well, Your Honor,
19 as Yogi Berra says, Predictions are very difficult,
20 especially about the future.

21 The problem we have here is this is a
22 mine that is going to go on for 44 years. Under the
23 model that now exists, Mr. Etcheverry's water
24 probably wouldn't be impacted for about nine years,
25 and so all of this is because as you start

1 pumping --

2 THE COURT: I didn't know that, but.

3 MR. WIKSTROM: As you start pumping, you
4 create a cone of depression from the wells and it
5 spreads out and gets larger and larger, so the
6 prediction is about nine years, but it could be
7 sooner, and that's why the state engineer has
8 insisted on this plan that has very specific
9 monitoring requirements.

10 THE COURT: Uh-huh.

11 MR. WIKSTROM: And to increase the
12 predictive power. What the plan really is is just
13 an early warning system.

14 THE COURT: Well, they're right, it's a
15 plan to make a plan, but the plan that bases his
16 decision is how to mitigate, right?

17 MR. WIKSTROM: That's right, and who to
18 mitigate because even though appellants say in their
19 brief that the state engineer concluded that those
20 springs would be impacted, well, that is not what it
21 says. As Your Honor noted, it says they're likely
22 to be impacted. We deal with probabilities and
23 likelihood. Could be wrong. Could be right.

24 There are other springs that the state
25 engineer found in his rulings are not likely to be

1 impacted, but they could be too, so what he has done
2 is he has required us to monitor the whole area, so
3 that he can see -- what you see as you start to pump
4 and you start to stress the aquifer, you start to
5 see which way the cone of depression is going, and
6 before it gets to the Etcheverrys, before it gets to
7 the Bensons, before it gets to anybody else, the
8 state engineer can say, You have got to start
9 mitigating this well so that they're not impacted
10 because if they are, I'm going to shut you down. He
11 told us that. He has that power. He can shut us
12 down at any time if we impact somebody else.

13 So that's why if you look at the 3M plan
14 it's very specific about the monitoring, and then as
15 you get to the mitigation, it says what the
16 mitigation devices are.

17 These are all well known mitigation
18 devices, and as Mr. Stockton indicated, my client is
19 perfectly willing to go out to the Etcheverrys
20 tomorrow and improve their wells if they would allow
21 us. We have made that offer before and we will
22 tender that offer today, but we will have in place
23 improvements on their wells whether it's
24 solar-powered pumps or deepening their wells or
25 whatever it is so that they get their water because

1 we have acknowledged and we have always acknowledged
2 that they are entitled to their water right and we
3 can't impact that.

4 What they're basically saying again, as I
5 mentioned, is don't trust the state engineer to do
6 his job right. He's the one, he's the specialist in
7 the state of Nevada for making sure that our water
8 resources are used wisely, beneficially to the best
9 extent possible, and yet, as the law requires,
10 protecting anybody who has prior rights from junior
11 or new appropriators, and it is all under his
12 control.

13 Under the standard of review by which
14 this Court must review the state engineer's
15 decisions, this is an area that is "procurely"
16 within the expertise of the state engineer. How to
17 interpret the statute, how to understand the ground
18 water system, how to protect people that he is
19 charged by law to protect.

20 What appellants have tried to do is
21 suggest that these are really questions of law, but
22 I would submit, Your Honor, to the extent that there
23 is any legal interpretation at all, it is the state
24 engineer's interpretation of his own enabling
25 statute which is entitled or should be entitled to

1 deference by the courts.

2 So as I mentioned, Your Honor, the
3 problem is that appellants want to characterize the
4 plan and the ruling in a way that best fits their
5 argument, but we're talking about the future. We're
6 talking about 44 years in the future. None of us
7 know, as we sit here today, what exactly is going to
8 happen, and so what the state engineer has done is
9 he has incorporated these express conditions in his
10 approval so that he can -- his crystal ball will be
11 better because he'll be continually improving the
12 database, the knowledge base. He can see what is
13 going to happen. He can protect people who are
14 entitled to be protected.

15 A lot of their arguments are just
16 rehashing some of the things that they argued before
17 Judge Papez when we were here a year ago, but as he
18 ruled, this is an area that is uniquely within the
19 state engineer's expertise, particularly when we're
20 dealing with something -- with an area of
21 uncertainty when we don't know in the future.

22 None of us can sit down today and write a
23 3M plan that would absolutely definitively describe
24 what we're going to do for every spring, every water
25 source in this area for 44 years because none of us

1 know what is going to happen, so the legislature has
2 entrusted the state engineer to do his job, and
3 these advisory committees, as their name suggests,
4 are just advisory to him.

5 As I mentioned, they create this early
6 warning system of potential conflicts so that they
7 can be dealt with before they happen and to protect
8 people, and if they don't, the state engineer always
9 has the nuclear sanction.

10 He can come to us at any time and say,
11 Stop, you can't pump another gallon because you're
12 impacting somebody that has prior rights.

13 Whether we improve Mr. Etcheverry's
14 wells, whether we pipe water to him from one of our
15 wells, whether we build him stock tanks and haul in
16 water, he is absolutely entitled to his water, and
17 it's our job to make sure that he gets it, it gets
18 to him, and it's the state engineer's job to make
19 sure that we do that.

20 Kobeh Valley Ranch is the only party that
21 is, quote, bound by the 3M plan. Nobody else is.
22 Mr. Etcheverry is a member, but he's not bound by
23 it. He can appeal and go around the WAC. He can
24 come straight to the state engineer, and if he
25 doesn't like the decision, he can come to this

1 court.

2 Now, Your Honor raised an important
3 issue, and that is, Well, is a WAC decision
4 appealable? As Mr. Stockton said, if the WAC --
5 they don't really make a determination. What they
6 do is reach an agreement. The state engineer has to
7 agree.

8 Mr. Etcheverry sits on the WAC, so if he
9 and the rest of the WAC agree to, let's say, a
10 mitigation measure for one of his springs or for his
11 domestic well, arguably no one is -- no one else in
12 the world is impacted by that decision and so there
13 would be no reason to appeal because it's an
14 agreement.

15 On the other hand, if Mr. Etcheverry
16 says, No, wait a second, I'm not satisfied with what
17 you're proposing to take care of my water rights,
18 then first of all, we don't have an agreement by the
19 WAC and it has to go to the state engineer for --

20 THE COURT: That I understand.

21 MR. WIKSTROM: So what about Mr. Benson?
22 He is not a member of the WAC, and let's use him as
23 a representative of other third parties out there
24 who could conceivably be impacted by something that
25 is done.

1 They're not on the WAC. They don't
2 participate in the decision or the agreement or
3 whatever comes out of the WAC.

4 THE COURT: The WAC's decisions are
5 really unanimous agreements; are they not?

6 MR. WIKSTROM: They're agreements and --

7 THE COURT: They have to be unanimous in
8 order to be effective?

9 MR. WIKSTROM: That's right. So the WAC
10 agrees to do something, and Mr. Benson or somebody
11 else out there says, Wait a second, I'm being
12 impacted by Kobreh Valley Ranch's pumping --

13 THE COURT: That was my concern. What
14 happens then?

15 MR. WIKSTROM: They don't go to the WAC
16 because they have no standing before the WAC.
17 They're not members of the WAC.

18 They do what any other citizen of the
19 state of Nevada does if he or she feels like he's
20 being impacted by a junior's pumping. You go
21 straight to the state engineer and you say, Kobreh
22 Valley Ranch is pumping and my well is going dry.

23 Then it's the state engineer's duty to
24 investigate that. It's the state engineer's duty to
25 make a decision, and then that third party has

1 statutory rights to appeal, so that's how I see it,
2 Your Honor.

3 It doesn't really set up such that --
4 since the WAC is not an adjudicatory body and
5 doesn't make decisions, then the question of appeal
6 really doesn't fit in that context.

7 Appellants argue that it's really kind of
8 a wait and see approach. It's a plan to make a
9 plan. To a certain degree, they're right because --

10 THE COURT: Well, it is a plan to make a
11 plan. It's a plan to find out what the facts are,
12 and then you would advise the WAC and/or the state
13 engineer and then a decision is made and then that's
14 the plan.

15 MR. WIKSTROM: That's the plan.

16 THE COURT: Okay. I don't have a problem
17 with that. That's not the issue.

18 MR. WIKSTROM: There is some suggestion
19 in one of the briefs or in their brief that the
20 state engineer cannot allow the substitution of,
21 quote, different water.

22 Well, under the laws of Nevada, nobody
23 has the right to any particular molecules of water.
24 What your right is you get a certain number of
25 gallons per minute or acre feet or whatever it is,

1 but whether that comes by way of a pipe from Kobe
2 Valley Ranch's well, whether it comes from deeper in
3 the same aquifer because we put in a pump, all
4 they're entitled to is the use of water and not any
5 particular water.

6 They have offered you no reasons
7 whatsoever why, if we supply water, for example, to
8 Mud Spring from our well or truck it in daily or
9 whatever it does to get them their water, that that
10 doesn't satisfy their existing rights.

11 They raise the spectre, Well, Kobe
12 Valley, you don't have the water rights to do that.
13 Well, we do. We have 11,000 acre feet of water
14 rights, and if we have to divert some of ours to
15 satisfying them, that is certainly something that we
16 can do.

17 The express conditions argument, Your
18 Honor, is -- the statutory language is kind of
19 interesting. The appellants want to read that
20 statute as if the word "such" doesn't exist because
21 it says, Under such express conditions.

22 They want to read it as if it says, Under
23 express conditions, but "such" as a rule of English
24 grammar requires an antecedent. It has to refer
25 back to something and I have read that statute so

1 many times that I get cross-eyed, Your Honor, and
2 I'm hard pressed to say what it refers back to other
3 than just the basic fact that prior users have the
4 right to get their water, and I think that is why
5 the state engineer puts in, Subject to existing
6 uses.

7 Here, the state engineer went further
8 with the 3M plan and required even further express
9 conditions. It's not something that the state
10 engineer does frequently, as I understand it.

11 As I understand it, this is one of the
12 most comprehensive 3M plans that the state engineer
13 has ever promulgated and required.

14 It's clearly something that is within the
15 state engineer's expertise, and under Nevada law, we
16 should be giving him deference.

17 This whole argument about whether test
18 pumping had to occur before, and that language came
19 out of Judge Papez's decision.

20 First of all, Your Honor, that wasn't
21 raised in appellant's opening brief, and by law,
22 that argument should be waived.

23 They raised it for the first time in
24 their reply and they did it because they saw it in
25 the Eureka County proposed amicus brief, and that's

1 when they brought it in.

2 Even if Your Honor wants to consider that
3 argument on the merits, again, thinking about it, as
4 Mr. Stockton says, you can't test the aquifer, you
5 can't test the system until you start pumping, so it
6 becomes we can't put the cart before the horse. We
7 have to start pumping. To start pumping, we need a
8 permit.

9 The permit is subject to these express
10 conditions, and once we start stressing that aquifer
11 and seeing what happens, then the express measures,
12 the express mitigation measures will be brought to
13 play.

14 Right now, in the year since the 3M has
15 been approved, what we have been doing is collecting
16 data. No pumping has taken place. So all that data
17 is establishing the baseline conditions, so that
18 once we start pumping, they can compare it and see
19 how it changes and be in a position to allow the
20 state engineer to do his job.

21 THE COURT: Have these monitoring wells
22 been drilled?

23 MR. WIKSTROM: A lot of them have, yes,
24 and we're collecting data on them right now, and
25 we're also collecting data on the streams, the

1 stream flow, and the streams in the Roberts
2 mountains that surround this area, and I believe we
3 have made our first report last month.

4 THE COURT: Is there a time table for
5 mining and pumping?

6 MR. WIKSTROM: There is a time table. We
7 need the water to process, but all we have started
8 to do out on the site is stripping. They have
9 started to do some construction. They have welded
10 about half, I believe, of the pipe that would carry
11 the water from the wells.

12 I think they have -- but we're still a
13 ways off before pumping even starts.

14 THE COURT: A ways off is months, years?
15 I'm just curious. It has nothing to do with this
16 decision.

17 MR. WIKSTROM: They need water to do some
18 construction and that's going to come as soon as the
19 -- if I can inquire of my client.

20 THE COURT: That would be nominal, I
21 would assume.

22 (Inaudible statement).

23 THE COURT: Okay.

24 MR. STOCKTON: But the big demand for
25 water will be processing in about two years from

1 now, so it's down the road quite a bit.

2 In the meantime, we'll just continue to
3 collect this data.

4 We take serious issue, Your Honor, with
5 this delegation of authority. The WAC does not have
6 any authority. It's merely an advisory board as the
7 name suggests.

8 The 3M plan says specifically it's there
9 to assist the state engineer. It reserves to the
10 state engineer his final authority. It.

11 Is clearly only advisory. It is not a
12 delegation. He has not delegated one iota of his
13 authority.

14 There is no authority to adjudicate
15 disputes. If there is a dispute, nobody has to take
16 that dispute to the WAC. If Mr. Etcheverry wants
17 to, he can, but he is not required to.

18 Again, Kobeh Valley Ranch is the only
19 party that is bound.

20 If anybody, Mr. Etcheverry or anybody
21 doesn't like it, they come to the state engineer,
22 and if they don't like his decision, then they come
23 to this Court.

24 The other thing is -- that I should point
25 out is the state engineer is not even hamstrung or

1 shackled by this 3M. He can, on his own motion, at
2 any time, do whatever he is entitled to do under the
3 law. He doesn't have to wait for a recommendation
4 from the WAC or the TAC.

5 After Your Honor asked the question about
6 who makes recommendations to whom, I was looking at
7 this, and it's clear. I think your understanding is
8 correct too, that the Technical Advisory Committee
9 also would evaluate the monitoring data, reports,
10 analyses -- I'm quoting from the 3M plan -- to
11 determine whether data gaps exist and make
12 appropriate recommendations, and they also will
13 develop and recommend action criteria to the WAC for
14 management or mitigation measures based on available
15 data.

16 THE COURT: I think that's what I read
17 and I got the impression that they were out there
18 looking at this data. Don't they meet quarterly?

19 MR. WIKSTROM: They meet, I think, at
20 least once a year and more often as required, but
21 these are the technical experts that --

22 THE COURT: These are the technical
23 people, and I thought they were going to do the
24 analysis and then they would make -- evaluate that
25 analysis and then submit that, the evaluation to the

1 WAC.

2 MR. WIKSTROM: But there is also a large
3 amount of --

4 THE COURT: Apparently, if the WAC has a
5 question, they give it to the TAC and they go figure
6 it out.

7 MR. WIKSTROM: Right, and there's a lot
8 of expertise on the WAC too because of who is on it,
9 so I think there's going to be a little bit of
10 overlap of duties there and responsibilities.

11 It's not a rule making -- this 3M plan is
12 not a rule making. It doesn't establish a rule of
13 general applicability. It applies only to KVR and
14 its use of water. Other water users are not bound,
15 so it does not fit within the rubric of a rule
16 making.

17 If we don't -- if we, KVR, don't comply
18 with the 3M, then we're in violation of that, in
19 violation of our permit terms, and all of those
20 ramifications will come home to roost, but again, it
21 only applies to Kobre Valley Ranch. It doesn't
22 apply to Mr. Etcheverry, Mr. Benson, or anyone else
23 out there.

24 Certainly, they'll argue that it's vague
25 and deficient. I think we have made our point clear

1 there, Your Honor, that this plan is a very robust
2 plan to develop information so that the state
3 engineer can do his job and do it well, Kobeh Valley
4 Ranch and Eureka Moly can run their mine, and bottom
5 line, Bensons and Etcheverrys get the water they're
6 entitled to.

7 For that reason, Your Honor, we ask you
8 to dismiss this appeal and affirm the decision of
9 the state engineer.

10 THE COURT: Thank you, sir.

11 MR. WIKSTROM: Thank you.

12 THE COURT: Do you need a break?

13 MR. STOCKTON: Yes, we do.

14 THE COURT: You want a break?

15 MS. SCHROEDER: All right. Thank you.

16 THE COURT: That's what I thought.

17 (Break taken)

18 THE COURT: All right. Ms. Schroeder?

19 MS. SCHROEDER: Thank you, Your Honor.

20 We're here because the state engineer
21 issued a ruling to protect existing rights and
22 further issued an order saying that this 3M plan
23 would protect those existing rights.

24 We're here because they did that pursuant
25 to a statute, and everyone wants to define the

1 statute today, and ultimately, Your Honor, it's up
2 to you, but NRS 534.1105 is what we're looking at.

3 It doesn't say that we issue a permit and
4 then we take care of the existing appropriations.
5 It says that junior ground water permits can be
6 issued -- can -- not after the fact, but they are
7 not to be issued unless express conditions can
8 protect them, Your Honor, and what are these permits
9 that we're talking about?

10 Those permits for existing rights are not
11 a right to a molecule of water. I would agree with
12 counsel that water law isn't about molecules of
13 water, and that's exactly the point. The molecule
14 of water that comes from the mine over to my client
15 to replace his spring is not his right. That is not
16 his property right.

17 The property right he has is to the
18 spring, to that source of water. He is not entitled
19 to the molecule.

20 The statute, if you look at it, requires
21 the protection of the existing rights to that source
22 of water, not a molecule from the mine --

23 THE COURT: I didn't understand that he
24 was entitled to water from the exact same source.

25 MS. SCHROEDER: He is entitled to the

1 water from that source. His water right states the
2 source on the water right.

3 THE COURT: I understand that, but if
4 that can be mitigated by getting him water from some
5 other source, doesn't that suffice under the
6 statute?

7 MS. SCHROEDER: That mitigation, under
8 the statute as the state engineer's brief points
9 out, is not defined, and when you are replacing a
10 property interest, Your Honor, I would suggest to
11 you that if you're taking an acre of land and
12 replacing it with another acre of land, you simply
13 don't do that by mitigation.

14 THE COURT: Land is different than water.
15 Water is water. It doesn't make any difference
16 where it comes from so long as you get --

17 MS. SCHROEDER: It's not about water.
18 We're talking about a water right, which is
19 different from that molecule of water as counsel
20 points out.

21 The statutes in Nevada and the case law
22 in Nevada talk about water rights, not about the
23 molecule. We're not talking about molecules of
24 water --

25 THE COURT: You're saying that the water

1 that he has has to come from that source?

2 MS. SCHROEDER: It has to come from that
3 source, and it can be mitigated, but those
4 mitigation problems have to be solved with his
5 agreement, or the state engineer has to order it in
6 some way.

7 THE COURT: I never understood that the
8 water right is from -- is necessarily from the same
9 source. It can be -- I'm going to have the state
10 engineer respond to this because I'm not sure that
11 is accurate.

12 MS. SCHROEDER: The water right has the
13 source on it. It says, You are --

14 THE COURT: No. I understand that the
15 water right is from the source, but can it not be
16 mitigated from other sources?

17 MS. SCHROEDER: That's a question you can
18 ask the state engineer, but I'm --

19 THE COURT: Well, I'm going to ask him
20 that.

21 MS. SCHROEDER: The mitigation, certainly
22 it can be, but legally, does the statute say it?
23 No, the state engineer's brief says, Mitigation is
24 not defined, so what I would say to Your Honor is
25 that mitigation isn't going to be slapped on my

1 client by a pipeline. He is going to have to agree
2 to that.

3 THE COURT: So what you're saying is they
4 have to maintain the spring -- apparently, one of
5 your sources comes from a spring; is that right?

6 MS. SCHROEDER: Yes. Thank you, Your
7 Honor.

8 THE COURT: I knew there were sources. I
9 didn't know whether they were springs or wells, but
10 apparently, one of them is a spring.

11 What you're saying is they have to
12 maintain the water as a spring rather than pumping
13 it from a different aquifer or something?

14 MS. SCHROEDER: That's right, and of
15 course, there is the option for mitigation, but what
16 I'm saying is that the state engineer doesn't have
17 authority to slap on any kind of mitigation on my
18 client because, as KVR pointed out in its argument,
19 this plan is only about them. It's not about me or
20 my clients, Mr. Benson or Mr. Etcheverry.

21 THE COURT: Well, it doesn't bind them.
22 It only binds the mine.

23 MS. SCHROEDER: That's right, and so they
24 cannot bind Mr. Etcheverry or Mr. Benson to accept
25 mitigation unless they agree. This statute says

1 they can't -- the state engineer has no authority to
2 issue --

3 THE COURT: No. Judge Papez's order
4 makes it clear that the 3M plan can bind your client
5 to accept mitigation.

6 MS. SCHROEDER: I don't think so, Your
7 Honor. What it says was -- Mr. Papez, Judge Papez
8 said that the 3M plan should go through testing and
9 then based upon that testing establish appropriate
10 mitigation, but it doesn't say anything about what
11 that mitigation might be.

12 THE COURT: Mr. Stockton makes the
13 argument that you can't test until you pump.

14 MS. SCHROEDER: Mr. --

15 THE COURT: Is that true?

16 MS. SCHROEDER: That's probably true.
17 What I'm suggesting --

18 THE COURT: You can't pump until you get
19 a permit.

20 MS. SCHROEDER: I'm suggesting -- you can
21 get a permit to pump and do testing. They're
22 capable of getting a temporary permit or another
23 permit just to do testing. That's a possibility.

24 That hasn't been happening, but what I
25 was suggesting is that instead of involving all of

1 us in this plan to make a plan with no orders that
2 can be appealed, that we need to have a drawdown
3 condition. That's an easy condition.

4 Counsel for the state engineer,
5 Mr. Stockton suggests, Oh, he has never seen it. I
6 have been practicing 25 years. I have seen it.
7 Maybe not in Nevada, but it happens in all the
8 western states. It's an easy condition to put in.

9 Has KVR suggested they would accept that?
10 They said, Oh, no, we'll put in a new well for you.
11 We don't want a drawdown express condition, but
12 we'll put in a new well for you.

13 That isn't the mitigation that is
14 required. I'd like to talk about my clients too.

15 KVR suggests that my client is sitting on
16 their WAC. My client has been invited to sit on
17 their WAC. Mr. Benson has not been invited to sit
18 on their WAC. In fact, he attended a meeting and
19 was kicked out of the meeting because it's not a
20 public meeting and he was not allowed to speak.

21 Also, we talked about whether their
22 orders are appealable, but their orders aren't even
23 published. How is anyone to know what is happening?
24 No one is to know because it's all private.

25 Just like Mr. Benson being kicked out of

1 the meeting, they get to choose who sits there.
2 They get to choose who is going to be unanimous.
3 They get to choose who is going to hear about their
4 decision until someone is injured, and that's the
5 hugest problem with this case. There is no public
6 process, as the Court noted.

7 Also, the state engineer makes the
8 argument through Mr. Stockton that we know that two
9 of the springs of Mr. Etcheverry are going to be
10 impacted, and the 3M plan addresses that. It
11 doesn't address it. I went through it again. As I
12 was sitting there, I went through all 15 pages of
13 it. There is nothing in there about those springs
14 being mitigated, nothing about them being injured or
15 impacted, or that there being a conflict with them.

16 I would suggest to you this idea of
17 impact and conflict, the word "impact" is not
18 defined by statute. I don't have a problem with the
19 way the state engineer defined it, but it's not in
20 the statute. Conflict is, and we do have a conflict
21 as the state engineer suggested with my two clients
22 and --

23 THE COURT: Well, he made that finding.

24 MS. SCHROEDER: Yes, he did, in his
25 ruling, but there is nothing in the 3M plan to

1 address that problem, not specifically, maybe some
2 generality that I don't understand.

3 Obviously, as KVR pointed out, I don't
4 know how to read their mitigation plan, and if I, as
5 a water lawyer practicing 25 years, don't understand
6 it, I would suspect that most people don't.

7 We talked about the source of your right,
8 and then I would like to point out one last thing.

9 I'm reading from page 14 of the
10 decision-making process, parens 28, section B.

11 THE COURT: Page 14?

12 MS. SCHROEDER: Uh-huh, of the 3M plan.

13 THE COURT: Of the 3M plan?

14 MS. SCHROEDER: This is section 28.

15 There's 19 pages in this 3M plan and --

16 THE COURT: I have got 27.

17 MS. SCHROEDER: Well, you have the -- I'm
18 not talking about anything beyond the monitoring.
19 I'm not talking about the monitoring.

20 THE COURT: Oh, okay.

21 MS. SCHROEDER: I'm just talking about
22 the written part.

23 In section 28, the decision-making
24 process, which Your Honor has been interested in,
25 which of course is very interesting to me.

1 In section B, it says, In the event that
2 any of the parties disagree as to whether the
3 proponent's proposed or ongoing ground water
4 extraction are resulting or will result in
5 unreasonable adverse impacts, any party may petition
6 the Nevada State Engineer to request the Nevada
7 State Engineer to determine whether there is or is
8 not the adverse impact that requires implementation
9 of management or mitigation measures, so they write
10 statute here.

11 They provide that the parties in this
12 little group, if they don't like something or they
13 disagree with something can go ahead and take it to
14 the state engineer.

15 What I'm going to suggest to you is the
16 state engineer does not make advisory opinions. He
17 is required by statute to act on enforcing water
18 law, and this is suggesting that he is going to be
19 on an ongoing basis on-call to KVR and its WAC to
20 mitigate or decide things on a day-by-day basis.

21 In actuality, the state engineer is only
22 going to receive the monitoring reports according to
23 its ruling, to its letter approving this, once a
24 year. Once a year, it's going to receive the
25 monitoring information.

1 By then, my clients' springs are dry.

2 Thank you, Your Honor.

3 THE COURT: All right. I'm going to ask
4 Mr. Stockton just to address this one issue that she
5 raised that she said -- and I did not understand
6 this to be the law, that the permit holder, to a
7 certain amount of water from a particular source,
8 must confine that right to that source.

9 MR. STOCKTON: Correct, and she is
10 correct in that regard. The example I used with the
11 Sulfur Spring with the map I showed you --

12 THE COURT: Yes.

13 MR. STOCKTON: -- what happened was the
14 mine paid for and filed an application, a change
15 application on behalf of the owner of the spring,
16 which is what KVR will have to do here.

17 What the state engineer did there and
18 we'll do here is issue what is called a supplemental
19 water right, so in the normal case where a
20 supplemental right is used, if you have -- let's say
21 I have a right to the Carson River and I need four
22 acre feet a year to make my crop of alfalfa, and
23 this particular year I only get 2.5 feet of surface
24 water.

25 I can apply for a supplemental ground

1 water right where I use my surface water right and
2 then whatever the surface water doesn't supply, I
3 can make up from ground water, so that is what this
4 would be.

5 This would be a supplemental right that
6 is issued to use ground water to make up for the
7 lack of --

8 THE COURT: This has happened before?
9 This isn't the first time?

10 MR. STOCKTON: Exactly the same thing
11 happened on the Sulfur Spring.

12 THE COURT: Okay.

13 MR. STOCKTON: But she is correct, there
14 does have to be an application. The state engineer
15 does issue a permit for that ground water right as
16 supplemental to the surface water right, so when the
17 mine gets done mining their stuff, the spring starts
18 flowing again, the Etcheverrys will have the choice
19 -- well, no, they'll have to use the surface water
20 first if the spring starts flowing again, but then
21 they can make up any difference from the ground
22 water supplemental right.

23 THE COURT: All right. Thank you, Mr.
24 Stockton. Anything further from KVR?

25 MR. WIKSTROM: No, Your Honor.

1 THE COURT: Anything further?

2 MS. SCHROEDER: No, Your Honor. Thank
3 you.

4 THE COURT: All right. Well, let me tell
5 you how I feel about this. First of all, I spent a
6 great deal of time reading Judge Papez's order,
7 which authorized the 3M plan.

8 I must tell you, I have never seen more a
9 thorough analysis of a petition for judicial review
10 than was given by Judge Papez in that, I think,
11 53-page decision.

12 He must have spent an awful lot of time
13 writing that decision, and doing, I think, a very
14 good analysis.

15 While I know that you would like me to
16 change his decision and reverse it, I'm not about to
17 do that because he really did a good decision.

18 Number two, on your delegation of
19 authority argument, in my mind, as I look at these
20 two committees, both the TAC and the WAC are really
21 advisory committees.

22 Now, there is nothing wrong with the
23 state engineer receiving advice, and if it be by a
24 committee, so better the advice, and if it be by a
25 technical committee, even better. The state

1 engineer still has the final authority.

2 If somebody on the WAC doesn't agree with
3 the decision, the state engineer has to make that
4 decision, and even if everybody on the WAC makes a
5 decision and there's a complaint by a third person,
6 the state engineer makes the final decision, so he
7 has not delegated any of his authority. He still
8 has it all.

9 On your express condition argument, the
10 3M plan does have standards, standards for
11 conflicts.

12 Now, a senior water right permit defines
13 what that right is. Any time a senior user is not
14 able to use his or her water, there is a conflict.

15 The 3M plan is designed as proactive, not
16 reactive. It's proactive in the sense that it is
17 going to monitor the water, and in advance of a
18 conflict, advise the state engineer through the WAC
19 that there is a problem or a potential problem and
20 deal with that problem.

21 Now, I think that's good. That's better
22 than waiting to see, waiting to have a conflict and
23 then having to deal with it, so I think that the
24 standard -- the express condition argument is
25 without merit.

1 You're right, it is a plan to create a
2 plan. It is the TAC and the WAC's analysis. That's
3 the plan to submit to the state engineer sufficient
4 facts so that they can develop an appropriate
5 decision to avoid a conflict. That's the plan, and
6 I don't have a problem with that.

7 The last analysis, I think substantial
8 evidence supports the decision of the state
9 engineer, so if that is the case, I'm required to
10 deny the petition for judicial review.

11 I'm going to ask the state engineer to
12 prepare appropriate findings, and if you want to
13 submit them to KVR for their input, that's fine, but
14 if you would submit those to me.

15 MR. STOCKTON: Your Honor, I would be
16 glad to do that. I'd like to ask for a little time,
17 though. I have to be at the Ninth Circuit on
18 Thursday and --

19 THE COURT: Time is not particularly of
20 the essence. I have plenty of time. If you don't
21 have my -- I'd like them in MS Word form so that I
22 can work on them myself and I can give you an e-mail
23 address if you would like that.

24 MR. STOCKTON: That's would be perfect,
25 Your Honor.

1 THE COURT: All right. We'll be in
2 recess and I'll have the clerk give you my business
3 card.

4 (Proceedings concluded at 3:03 p.m.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 STATE OF NEVADA)
2 COUNTY OF WASHOE) ss.
3

4 I, KATE MURRAY, Certified Court Reporter
5 of the Second Judicial District Court, in and for
6 the County of Washoe, State of Nevada, do hereby
7 certify:

8 That I transcribed the recording of the
9 above-entitled hearing held on Monday, April 15th,
10 2013, as herein appears;

11 That the foregoing transcript is a full,
12 true and correct transcription of my stenotype notes
13 of the recording of said hearing.
14

15 DATED: At Reno, Nevada, this 6th day of
16 May, 2013.

17 

18 _____
19 KATE MURRAY, CCR #599
20
21
22
23
24
25

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
Michael Pagni
Jeffrey Barr
Debbie Leonard
Josh Reid
Theodore Beutel
Karen Peterson
John Zimmerman
Francis Flaherty
Paul Taggart
Michael Rowe
Gregory Walch
James Erbeck
Jennifer Mahe
Dawn Ellerbrock
Neil Rombardo
Ross de Lipkau

///

///

***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

Schroeder Law Offices, P.C.

440 Marsh Avenue

Reno, NV 89509

PHONE (775) 786-8800;

FAX (877) 600-4971

counsel@water-law.com

*Attorneys for Appellants Michel and
Margaret Ann Etcheverry Family, LP,
Diamond Cattle Company LLC, and
Kenneth F. Benson*

SCHROEDER LAW OFFICES, P.C.
Laura A. Schroeder, NSB #3595
Therese A. Ure, NSB #10255
440 Marsh Ave.; Reno, Nevada 89509-1515
PHONE: (775) 786-8800; FAX: (877) 600-4971
counsel@water-law.com
Attorneys for Appellants

Electronically Filed
Jul 29 2013 09:54 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**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 7**

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
Vol. 1 – SE ROA Conti. SE ROA 250-251		V	293-294
State Engineer's Record on Appeal Vol. 2	August 3, 2012	V	295
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
Supplemental Record Summary SUP SE ROA		VI	493-495
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

Document	Filing Date	Vol.	3MJA Page Nos.
Findings of Fact, Conclusions of Law, and Judgment	May 17, 2013	VIII	720-736
Kobeh Valley Ranch, LLC's Answer to Petition for Judicial Review	August 17, 2012	VI	526-531
Kobeh Valley Ranch's Answering Brief	Dec. 20, 2012	VI	577-610
Letter from State Engineer Approving 3M Plan	June 6, 2012	I	1
Lisa Morlan's Affidavit of Service of Notice of Petition for Judicial Review and Petition for Judicial Review	July 18, 2012	I	36-38
Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment	May 23, 2013	VIII	740-761
Petition for Judicial Review	July 5, 2012	I	2-35
Petitioners' Notice of Appeal	May 21, 2013	VIII	737-739
Petitioners' Opening Brief	November 5, 2012	VI	532-576
Petitioners' Reply Brief	February 1, 2013	VII	630-646
Proof of Service of Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment	May 23, 2013	VIII	742
State Engineer's Answering Brief	Dec. 20, 2012	VII	611-629

Document	Filing Date	Vol.	3MJA Page Nos.
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
Vol. 1 – SE ROA Conti. SE ROA 250-251		V	293-294
State Engineer's Record on Appeal Vol. 2	August 3, 2012	V	295
Vol. 2 – SE ROA Summary SE ROA 295		V	295
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

Document	Filing Date	Vol.	3MJA Page Nos.
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

Note: Postmarked
12/21/2012

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

1 CATHERINE CORTEZ MASTO
Attorney General
2 BRYAN L. STOCKTON
Nevada State Bar # 4764
3 Senior Deputy Attorney General
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 ENGINEER OF NEVADA,
14 OFFICE OF THE STATE ENGINEER,
DIVISION OF WATER RESOURCES,
15 DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES,
16

Respondents.

Case No.: CV 1207-178

Dept. No.: II

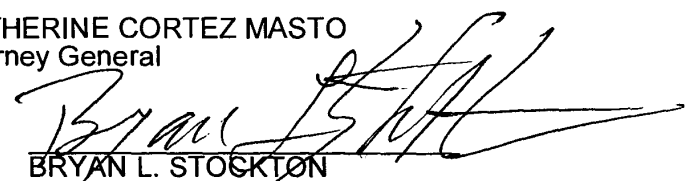
17
18 **NEVADA STATE ENGINEER'S ANSWERING BRIEF**


19 Respondent, Jason King, P.E., Nevada State Engineer ("State Engineer"), by and
20 through his legal counsel, Attorney General CATHERINE CORTEZ MASTO, and Senior
21 Deputy Attorney General BRYAN L. STOCKTON, hereby files his Answering Brief.

22 Submitted this 20th day of December, 2012.

23 CATHERINE CORTEZ MASTO
Attorney General

24
25 By:


26 BRYAN L. STOCKTON
Senior Deputy Attorney General
Nevada Bar No. 4764
27 100 North Carson Street
Carson City, Nevada 89701
28 Tele: (775) 684-1228
Attorneys for Respondent

Received
12/24/2012 

3MJA 000611

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
POINTS AND AUTHORITIES.....	1
I. ISSUES ON APPEAL.....	1
II. FactS	1
III. STANDARD OF REVIEW	3
IV. ARGUMENT	4
A. The State Engineer Did Not Delegate his Statutory Authority	4
B. The Decision to approve the Monitoring, Management and Mitigation (3M) Plan was Supported by Substantial Evidence.....	5
C. The 3M Plan Applies to Only One Situation and Is Not Rulemaking.....	7
D. The 3M Plan is not Vague and is in Compliance with Ruling 6127	9
E. This Court Should Affirm the State Engineer's Definition of Conflict and Mitigation	11
III. CONCLUSION	12
CERTIFICATE OF MAILING	14

TABLE OF AUTHORITIES

Cases

<i>Bacher v. State Engineer,</i> 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006).....	11
<i>Banegas v. State Indus. Ins. System,</i> 117 Nev. 222, 19 P.3d 245 (2001).....	8
<i>Checker, Inc v. Public Service Commission,</i> 84 Nev. 623, 630 (1968).....	5
<i>Desert Irr., Ltd. v. State Engineer,</i> 113 Nev. 1049, 1058, 1059, 944 P.2d 835, 841 (1997).....	6,9,11
<i>Kent v. Smith,</i> 62 Nev. 30, 32, 140 P.2d 357, 358 (1943).....	3
<i>Motor Cargo v. Public Service Comm'n,</i> 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992).....	9
<i>Paramount Ins. v. Rayson & Smitley,</i> 86 Nev. 644, 649, 472 P.2d 530, 533 (1970).....	9
<i>Pyramid Lake Paiute Tribe of Indians v. Washoe County,</i> 112 Nev. 743, 747, 918 P.2d 697, 700 (1996).....	4,12
<i>Revert v. Ray,</i> 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).....	3
<i>Sheriff v. Luqman,</i> 101 Nev. 149, 153-54, 697 P.2d 107, 110-11 (1985)	8
<i>State Engineer v. Curtis Park,</i> 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).....	3
<i>State Engineer v. Morris,</i> 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).....	3,4
<i>State Indus. Ins. System v. Buckley,</i> 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984).....	4
<i>State v. State Engineer,</i> 104 Nev. at 713, 766 P.2d 263, 266 (1988).....	4, 12
<i>State, Emp. Security v. Hilton Hotels,</i> 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).....	5

1	<i>Town of Eureka v. State Engineer,</i>	
2	108 Nev. 163, 826 P.2d 948 (1992).....	4
3	<i>United Exposition Service Co. v. State Indus. Ins. System,</i>	
4	109 Nev. 421, 424, 851 P.2d 423, 424 - 425 (1993).....	5
5	<u>Statutes</u>	
6	NRS 233B.038(1)(a).....	7
7	NRS 233B.039(1)(j)	7
8	NRS 233B.0395.....	8
9	NRS 233B.105.....	8
10	NRS 532.020	3
11	NRS 532.090	5
12	NRS 532.110	3, 5, 8
13	NRS 532.160	5
14	NRS 533 and 534	8
15	NRS 533.270	3
16	NRS 533.365	7
17	NRS 533.370(2).....	1, 11
18	NRS 533.370(8).....	9
19	NRS 533.445	3
20	NRS 533.450(1).....	3
21	NRS 533.450(9).....	3
22	NRS Chapters 533 and 534.....	3
23	<u>Other Authorities</u>	
24	Nev. Const. Art. 3, § 1	8
25		
26		
27		
28		

POINTS AND AUTHORITIES

I. ISSUES ON APPEAL

1. Did the State Engineer Delegate his Statutory Authority to Administer Water Rights in the State of Nevada?
2. Was the State Engineer's Decision to Approve the Monitoring, Management and Mitigation (3M) plan developed by Kobeh Valley Ranch, LLC and Eureka County Supported by Substantial Evidence?
3. Is Requiring a 3M Plan Rulemaking?
4. Is the 3M Plan too Vague or Inadequate to Satisfy Ruling 6127?
5. Should the Court Redefine the terms "Conflict" and "Mitigation"?

II. FACTS

The State Engineer issued State Engineer's Ruling No. 6127, which approved applications for the use of groundwater in Kobeh Valley and also approved changes to existing water rights in Diamond Valley. In that ruling, the State Engineer found that "Because the groundwater flow model is only an approximation of a complex and partially understood flow system, the estimates of interbasin flow and drawdown cannot be considered absolute values." Ruling 6127 at 19. Recognizing that there cannot be absolute certainty in predicting potential impacts from the pumping of groundwater by the Mount Hope Mine project, the State Engineer required Kobeh Valley Ranch (KVR) to develop a Monitoring, Management and Mitigation plan (3M Plan) for the mine. The impacts from pumping by the mine are predicted to manifest over a period of years. It is expected that the monitoring element of the Plan will provide indicators of where impacts will appear before the impact actually occurs and allow time to implement specific and effective mitigation measures.

The purpose of the 3M Plan is to prevent conflicts with existing water rights as required by NRS 533.370(2). A conflict occurs when a senior water right cannot be used in full because of use by a junior appropriator. In the case that the junior uses by the mine do threaten to conflict with a senior water right holder, the 3M Plan requires the mine to mitigate

1 the affect by ensuring that the senior user has all water to which the senior user is entitled.
2 This must be done at the sole expense of the mine as the junior user. The State Engineer
3 does not specify how mitigation will occur, but gives the junior user the choice to stop
4 pumping, find a way to provide water to the senior user, or reach some other settlement to
5 the satisfaction of the senior user and the State Engineer.

6 The process to develop an acceptable 3M Plan took well over a year to complete and
7 included significant input from Eureka County. The record contains at least three draft
8 versions that were reviewed by various parties and the State Engineer prior to the final
9 submittal. SEROA at 57, 75, and 108.

10 KVR submitted the final version of the plans, tables and maps on May 30, 2012.
11 SEROA 5-30. The State Engineer approved the plan on June 6, 2012. Supp ROA 27. The
12 3M Plan allows the parties to monitor water resources in the area of the Mount Hope Mine
13 and to manage the usage to avoid impacts to existing water rights. SEROA 12-14. If
14 monitoring indicates that senior water rights will be impacted, the 3M Plan allows the parties
15 to work within a framework to provide water to the senior right holder. SEROA 14-16.

16 The State Engineer did not rule that KVR could use its water rights in ways that
17 conflict with those of senior users as suggested by Etcheverry. A conflict will exist if the
18 senior user is not able to use its entire water right as a result of the junior user's pumping. In
19 order to protect any senior water right holder, the State Engineer ruled that through
20 monitoring, impacts can be detected before they happen and mitigation measures can be
21 accomplished either through the 3M Plan or through an order of the State Engineer to ensure
22 that the senior water rights are satisfied. If the senior rights are not satisfied, the State
23 Engineer retains the authority to order pumping to cease. NRS 534.110 (6).

24 Noticeably absent from the plan is any indication that the State Engineer has
25 relinquished any authority over the management of water rights in either Kobeh or Diamond
26 Valley Hydrographic Basins. See generally, Ruling 6127.

27 ///

28 ///

1 **III. STANDARD OF REVIEW**

2 The State Engineer is appointed by and is responsible to the Director of the Nevada
3 Department of Conservation and Natural Resources, and performs duties prescribed by law
4 and by the Director of the Department. NRS 532.020, 532.110. His duties include
5 administering the appropriation and management of Nevada's public water, both surface and
6 ground water, under NRS Chapters 533 and 534.

7 Pursuant to NRS 533.450(9), "[t]he decision of the State Engineer shall be prima facie
8 correct, and the burden of proof shall be upon the party attacking the same." On appeal, the
9 function of this Court is to review the evidence on which the State Engineer based his
10 decision to ascertain whether the evidence supports the decision, and if so, the Court is
11 bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30,
12 32, 692 P.2d 495, 497 (1985).

13 Review of a decision of the State Engineer is in the nature of an appeal and is,
14 consequently, limited in nature. NRS 533.450(1) states in pertinent part:

15 Any person feeling himself aggrieved by any order or decision of
16 the State Engineer, acting in person or through his assistants or the
17 water commissioner, affecting his interests, when such order or
18 decision relates to the administration of determined rights or is
made pursuant to NRS 533.270 to 533.445, inclusive, may have
the same reviewed by a proceeding for that purpose, insofar as
may be in the nature of an appeal

19 The Nevada Supreme Court has interpreted these provisions to mean that a petitioner
20 does not have a right to de novo review or to offer additional evidence at the district court.
21 *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev.
22 30, 32, 140 P.2d 357, 358 (1943) (a court may construe a prior judgment, but cannot
23 properly consider extrinsic evidence); *State Engineer v. Curtis Park*, 101 Nev. at 32, 692
24 P.2d at 497 (function of court is to review evidence relied upon and ascertain whether
25 evidence supports order); *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205
26 (1991) (court should not substitute its judgment for that of the State Engineer).

27 Purely legal issues or questions may be reviewed without deference to an agency
28 determination. However, the agency's conclusions of law that are closely related to its view

1 of the facts are entitled to deference and will not be disturbed if they are supported by
2 substantial evidence. *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948
3 (1992). Likewise, an agency's view or interpretation of its statutory authority is persuasive,
4 even if not controlling. *State Engineer v. Morris*, 107 Nev. at 701, 819 P.2d at 205 (quoting
5 *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)). Any review of the
6 State Engineer's interpretation of his legal authority must be made with the thought that "[a]n
7 agency charged with the duty of administering an act is impliedly clothed with power to
8 construe it as a necessary precedent to administrative action." *Pyramid Lake Paiute Tribe of*
9 *Indians v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996), citing *State v.*
10 *State Engineer*, 104 Nev. at 713, 766 P.2d at 266 (1988).

11 **IV. ARGUMENT**

12 A. The State Engineer Did Not Delegate his Statutory Authority.

13 Etcheverry asserts repeatedly that the State Engineer delegated his authority to
14 administer water to the "Water Advisory Committee" and "Technical Advisory Committee."
15 EOB at 13-18. These arguments are made with no citations to the record and should be
16 disregarded as unsupported. *State Indus. Ins. System v. Buckley*, 100 Nev. 376, 382, 682
17 P.2d 1387, 1390 (1984) ("[T]his Court has been supplied with two pages of conclusory
18 arguments, lacking substantive citation to relevant authority, and failing to address the pivotal
19 issues in the case. Under these circumstances, we decline to consider its assignments of
20 error."). The arguments ignore the plain language of the 3M Plan:

- 21 • "The purpose of this 3M is to assist the NSE [Nevada State Engineer] in
22 managing development of groundwater resources . . . to avoid adverse impacts
23 to existing rights." SEROA 5.
- 24 • "The State Engineer has final authority over the 3M" SEROA 5.
- 25 • "Nothing herein limits or changes the NSE authority, and any Party can petition
26 the NSE to consider any issue." SEROA 11.
- 27 • "Nothing herein seeks to limit, alter, modify or change the exclusive authority of
28 the NSE to approve or modify the 3M." SEROA 11.

- 1 • "Additional measures will be implemented if a previous mitigation measure
- 2 does not meet its intended purpose(s)." SEROA at 15.
- 3 • The 3M Plan sets aside \$250,000 initially and an additional \$750,000 early in
- 4 the life of the mine for mitigation purposes and gives the State Engineer the
- 5 authority to release these funds only upon a finding that "there is no longer a
- 6 reasonable potential for future impacts" SEROA at 15.
- 7 • "Other measures as agreed to by the Parties and/or required by the NSE."
- 8 SEROA at 16.

9 The names of the committees that are set up also show that they are not authoritative
10 bodies. Both bodies are "Advisory Committees" to assist the State Engineer. The State
11 Engineer has reserved all of his authority to manage all the waters in both Kobeh and
12 Diamond Valleys. These arguments are frivolous on their face and should cause grave
13 concern to the Court.

14 B. The Decision to approve the Monitoring, Management and Mitigation (3M) Plan
15 was Supported by Substantial Evidence.

16 Substantial evidence is that which a reasonable mind might accept as adequate to
17 support a conclusion. *United Exposition Service Co. v. State Indus. Ins. System*, 109 Nev.
18 421, 424, 851 P.2d 423, 424 - 425 (1993) *State, Emp. Security v. Hilton Hotels*, 102 Nev.
19 606, 608, 729 P.2d 497, 498 (1986).

20 The day to day management of water resources in Nevada is the responsibility of the
21 State Engineer. NRS 532.110. The State Engineer employs engineers, water resource
22 specialists, attorneys and hydrologists to assist him in these duties. NRS 532.090; 532.160.
23 When the State Engineer determines the best method to execute his duties, deference from
24 the Court should be at its highest. Where a power is conferred by statute, everything
25 necessary to carry out that power and make it effectual and complete will be implied.
26 *Checker, Inc v. Public Service Commission*, 84 Nev. 623, 630 (1968). In this case,
27 Etcheverry provides only speculation that the plan will not work.

28 When the State Engineer determines that a specific, large-scale water use has the
potential to need more intensive monitoring and management to avoid conflicting with

1 existing rights, he may require a 3M Plan, and KVR is not unique in this regard. In this case,
2 the purpose of the committees established by the 3M Plan is to allow KVR, Eureka County,
3 and the other parties to work through issues before they become a problem that requires
4 action by the State Engineer. However, it is clear in the 3M Plan and as demonstrated
5 above, the State Engineer retains his authority to administer these water rights in
6 accordance with statutory constraints and his inherent authority.

7 Etcheverry argues that the 3M Plan is in error and does not rely on "legislative
8 mandates" to determine whether there is a conflict or not. However, the State Engineer has
9 consistently defined conflicts to be a situation wherein the senior user is not able to use his
10 entire water right. There is no reason to deviate from this standard. The prior appropriation
11 doctrine provides that one does not own the water itself, but rather one holds a usufructuary
12 right to use water. *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842
13 (1997)("Indeed, even those holding certificated, vested, or perfected water rights do not own
14 or acquire title to water. They merely enjoy the right to beneficial use."). Whether the senior
15 user gets his water through his current diversion works or from works constructed as
16 mitigation by a junior user, his water right is whole and the junior user is not in conflict with
17 the senior right.

18 Etcheverry argues that the process will cause long delays if senior right holders must
19 wait for committee action. The statement misstates the purpose of the Committees. They
20 have been created to anticipate and deal with potential conflicts to avoid actual conflicts with
21 water rights. SEROA at 7-9. If they fail in that mission, water right holders may petition the
22 State Engineer to order compliance by the junior water right holder.

23 Etcheverry asks this Court to require the State Engineer to adopt specific mitigation
24 measures before the nature and extent of any conflicts are even known. However, the goal
25 of the 3M Plan is to monitor the response of surface and groundwater to pumping by the
26 mine and manage pumping within the well field to avoid conflicts. If the effects of pumping
27 cannot be managed to avoid conflicts, specific mitigation measures be developed by the
28 committees or ordered by the State Engineer. General mitigation measures designated now

1 will not have the advantage of the data that will be gathered and provided regarding actual
2 use in the future.

3 The issue of future impacts to the domestic well has been used by Etcheverry to
4 demand specific mitigation measures. However, until the actual effects of pumping are
5 known, the State Engineer cannot determine what to order. The well may need to be
6 deepened and a new pump installed. Perhaps the mitigation measure would need to be a
7 new well in a different location. For the Court to require the State Engineer to provide
8 specific measures at this point would be to require the State Engineer to guess what the
9 impacts will be. The guess would be based on the best currently available scientific
10 information, however hydrology studies events that often occur far under the earth and the
11 mitigation measures will be more effective if they are based on actual data gathered as the
12 aquifer begins to be stressed by pumping.

13 C. The 3M Plan Applies to Only One Situation and Is Not Rulemaking.

14 The State Engineer is specifically exempted from the requirements of NRS 233B in
15 the discharge of his duties. NRS 233B.039(1)(j) ("The following agencies are entirely
16 exempted from the requirements of this chapter: . . . Except as otherwise provided in NRS
17 533.365 , the Office of the State Engineer."). As the State Engineer is specifically exempted
18 from the mandates of the Nevada Administrative Procedures, Petitioners must provide a
19 reference to a specific law that would require the State Engineer to adopt the 3M Plan
20 through rulemaking. However, they have only provided vague and conclusory statements to
21 support their arguments, and have violated their duty of candor to this Court by failing to
22 even acknowledge this mandatory authority which is contrary to their position.

23 The 3M Plan is designed to assist the State Engineer in the collection of data
24 concerning the effects of water use by Kobeh Valley Ranch in the operation of the Mount
25 Hope Mine. As such, it is not of general applicability, but applies only to the Mount Hope
26 Mine project. "Regulation' means: An agency rule, standard, directive or statement of
27 general applicability which effectuates or interprets law or policy, or describes the
28 organization, procedure or practice requirements of any agency." NRS 233B.038(1)(a). As

1 the 3M Plan applies only to the monitoring and management of water use in Kobeh and
2 Diamond Valley Hydrographic Basins by one water user, no stretch of imagination, other
3 than that possessed by the Petitioners, could view the 3M Plan as a rule of general
4 applicability.

5 Etcheverry cites *Banegas v. State Indus. Ins. System*, 117 Nev. 222, 19 P.3d 245
6 (2001) for the proposition that the 3M Plan was “an impermissible delegation of authority.”
7 *Banegas* was an unmarried cohabitant who relied on the decedent for financial support until
8 his work-related death. . She applied for death benefits as a dependent. *Id.* at 223, 19 P.3d
9 at 246. In *Banegas*, the court noted that:

10 One of the settled maxims in constitutional law is that the power
11 conferred upon the Legislature to make laws cannot be delegated
12 to any other body or authority. See Nev. Const. Art. 3, § 1.
13 However, the Legislature may authorize administrative agencies to
14 make rules and regulations supplementing legislation if the power
given is prescribed in terms sufficiently definite to serve as a guide
in exercising that power. See *Sheriff v. Luqman*, 101 Nev. 149,
153-54, 697 P.2d 107, 110-11 (1985).

15 *Id.* at 227, 19 P.3d at 248. The court held that in that case, *Banegas*’ interpretation of the
16 statute would lead to an “invalid delegation of legislative power . . . would compromise the
17 constitutionality of the statute. *Id.* (Citations omitted). The first weakness of this argument as
18 applied to this case is that the administration of water rights in the State of Nevada is an
19 executive function and not a legislative function.

20 The second and most important distinction lies in the contradictory arguments made
21 by Etcheverry. In Section VI.A., they argue that the “3m Plan sets forth an arduous, lengthy,
22 and circular process . . .” for mitigating impacts on water rights. EOB at 10. In Section VI.D.,
23 they argue that the 3M Plan must be established through the much more arduous and slow
24 process of rulemaking. See, NRS 233B.0395 – NRS 233B.105. The management of
25 individual water rights through the rulemaking process is in direct opposition to the legislative
26 direction that gives the State Engineer the authority to carry out these executive functions.
27 NRS 532.110. If individual water rights had to be managed through the rulemaking process,
28 the process would render nearly all of NRS 533 and 534 completely irrelevant.