

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, A POLITICAL)
SUBDIVISION OF THE STATE OF)
NEVADA; KENNETH F. BENSON,)
INDIVIDUALLY; DIAMOND CATTLE)
COMPANY, LLC, A NEVADA LIMITED)
LIABILITY COMPANY, AND MICHEL)
AND MARGARET ANN ETCHEVERRY)
FAMILY, LP, A NEVADA REGISTERED)
FOREIGN LIMITED PARTNERSHIP,)
Appellants,)

vs.)

THE STATE OF NEVADA STATE)
ENGINEER; THE STATE OF NEVADA)
DIVISION OF WATER RESOURCES,)
AND KOBEH VALLEY RANCH, LLC,)
A NEVADA LIMITED LIABILITY)
COMPANY,)
Respondents.)

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,)
Appellants,)

vs.)

STATE ENGINEER, OF NEVADA,)
OFFICE OF THE STATE ENGINEER,)
DEPARTMENT OF CONSERVATION)
AND NATURAL RESOURCES; AND)
KOBEH VALLEY RANCH, LLC, A)
NEVADA LIMITED LIABILITY)
COMPANY,)
Respondents.)

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RESPONDENT STATE ENGINEER'S ANSWERING BRIEF

On Appeal from the Judgment of the Seventh District Court of the State
of Nevada in and for the County of Eureka, Case No. CV-1207-178

Submitted this 26th day of August, 2013, by:

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STATE ENGINEER'S ANSWERING BRIEF

Respondent State of Nevada State Engineer, Jason King, P.E. and the Nevada Division of Water Resources (collectively referred to herein as the "State Engineer"), by and through their counsel, Nevada Attorney General Catherine Cortez Masto and Senior Deputy Attorney General Cassandra P. Joseph, file this Answering Brief in the appeal from the Findings of Fact, Conclusions of Law and Judgment of the Seventh District Court of the State of Nevada for the County of Eureka in Case No. CV-1207-178.

I. STATEMENT OF ISSUES ON APPEAL

A. Did the district court correctly conclude that the State Engineer's decision to approve the Monitoring, Management and Mitigation Plan (3M Plan) for the Mt. Hope Project did not violate NRS 533.370(2) or conflict with Ruling 6127?

B. Did the district court correctly conclude that the State Engineer's decision to approve the 3M Plan complied with the requirements of NRS 534.110(5)?

C. Did the district court correctly conclude that State Engineer's decision to approve the 3M Plan was not an improper delegation of his authority?

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D. Did the district court correctly conclude that the State Engineer's decision to approve the 3M Plan was not rulemaking and therefore not in violation of NRS 532.110 or NRS 534.110?

E. Did the district court correctly conclude that the State Engineer's decision to approve the 3M Plan was not arbitrary, capricious, or an abuse of discretion?

II. STATEMENT OF THE CASE

This is an appeal from the judgment of the district court's denial of Appellants' Petition for Judicial Review of the State Engineer's approval of a monitoring, management and mitigation plan for the Mt. Hope mining project.

III. STATEMENT OF FACTS

A. Ruling 6127 and Approval of the 3M Plan

In Ruling 6127, issued on July 15, 2011, the State Engineer granted water rights applications by Kobeh Valley Ranch, LLC ("KVR") for the Mt. Hope Project with the condition that a monitoring, management and mitigation plan (3M Plan) must be prepared in cooperation with Eureka County and approved by the State Engineer prior to pumping any groundwater. Joint Appendix, Case No. 61324 ("JA") 5026. The 3M Plan was ordered as a condition to the permits to ensure that once pumping occurs, no conflicts with existing water rights

will result.¹ JA 5022-23. The stated purpose of the 3M Plan is “to assist the [Nevada State Engineer] in managing development of groundwater resources within and near the Project area to avoid adverse impacts to existing water rights.” Joint Appendix, Case No. 63258 (“3MJA”) 000010.

During the course of more than a year, the State Engineer reviewed and commented on several versions of the 3M Plan before approving the version submitted by KVR² on May 30, 2012. 3MJA 000009-35; 44-175, 185, 198-199, 210-211, 221-224, 238-39, 247, 250-51, 257; 270-92, 297-420; 422-492; 509-10. The approved 3M Plan was prepared by KVR with input from Eureka County, the State Engineer and members the public, including Appellants. *Id.*

B. The Components of the 3M Plan

The 3M Plan includes three principal components: monitoring, management, and mitigation. 3MJA 000011.

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¹ In Ruling 6127, the State Engineer found that two springs used for stockwatering and a domestic well were likely to be impacted by pumping. JA 5023. Appellant Michel and Margaret Ann Etcheverry Family, LP owns a stockwatering right to one of the springs and owns the domestic well. JA 5005-5006.

² Eureka Moly, LLC and Kobeh Valley Ranch, LLC (KVR) are subsidiaries of General Moly, Inc. 3MJA 000010. Eureka Moly, LLC, which is the operator of the Mt. Hope Project (Project), leases the water rights from the permit holder KVR and is the entity that submitted the 3M Plan for approval. *Id.* For ease of reference, KVR and Eureka Moly, LLC will be referred to collectively as KVR.

1. **Monitoring**

The monitoring component of the 3M Plan requires monitoring of the effects of groundwater pumping in Kobreh Valley, Diamond Valley, Pine Valley, and surrounding areas. 3MJA 000015-18. Monitoring will provide early warning of where impacts may appear in order to allow time to implement specific and effective management and mitigation measures to protect existing water rights. *Id.* Under the 3M Plan, substantial data will be collected through more than 89 wells throughout the valleys and surrounding areas, including 59 wells in Kobreh Valley alone. 3MJA 000017, 22-35. Many of these wells are strategically located to help provide early detection of impact to sensitive or important resources. *Id.* The 3M Plan also requires monitoring of surface waters, including streams and springs in the valleys and surrounding areas, as well as monitoring of several sites for biological and meteorological factors. 3MJA 000018-19, 29-33. The data collected will be entered into a 3M database on a regular and continual basis and submitted to the State Engineer semi-annually. 3MJA 000019. In addition, an annual report summarizing water production, monitoring results, and all management and mitigation actions taken during the prior year will be provided to the State Engineer. *Id.* The verified data will be available to the public. *Id.*

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2. **Management**

The management component of the 3M Plan consists of two committees: the Water Advisory Committee (WAC) and the Technical Advisory Committee (TAC). 3MJA 000011. The WAC will establish and carry out policy under the 3M Plan, namely site-specific actions related to this, the Mt. Hope Project and these permits. *Id.* The TAC will provide the technical and scientific expertise necessary for collection, evaluation and analysis of the data. *Id.* The WAC will initially consist of representatives for the State Engineer, Eureka County, KVR and Diamond Valley farming and ranching associations, with the option for additional members who own potentially affected water rights to join. 3MJA 000012. The TAC is appointed by the WAC and must include members with a professional level of technical or scientific expertise in land management, natural resources, water resources, or related fields. 3MJA 000013. KVR will also fund the USGS' participation as a member of the TAC. *Id.*

The WAC will meet no less than one time in each quarter to set up and confirm monitoring under the 3M Plan, with future frequency adjusted as necessary, but no less than once annually. 3MJA 000013. The WAC therefore provides a forum for stakeholders to meet to discuss relevant data and analyses and to make informed decisions about implementation of the 3M Plan based on recommendations from the TAC. *Id.* TAC recommendations will include, but are

not limited to, decisions regarding additional data collection and scientific investigations, as well as management and mitigation measures. *Id.* Any decision by the WAC must be by unanimous vote, and if unanimity is not attained, the issue may be referred to the State Engineer for final determination. 3MJA 000015. However, even absent referral of an issue, the State Engineer always retains authority over the 3M Plan and any decision under the 3M Plan. 3MJA 000016. Nothing in the 3M Plan “limits or changes the [Nevada State Engineer’s] authority, and any Party can petition the [Nevada State Engineer] to consider any issue.” *Id.*

With recommendations from the TAC, the WAC will develop action criteria (i.e., hydrological and biological standards) that provide “early warning of potential adverse impacts to water rights.” 3MJA 000015. If an action criteria is exceeded, the TAC will meet as soon as possible to assess whether the action criteria is a result of groundwater pumping. *Id.* If the exceedance is determined to be caused by groundwater pumping, “the TAC will expeditiously develop mitigation or management measures for the WAC to consider,” based on an analysis of the feasibility and effectiveness of the specific measures. *Id.* Any member of the WAC may propose action criteria or a change to existing criteria.

Id.

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3. Mitigation

The 3M Plan requires KVR to mitigate, at its expense, adverse impacts before any conflict to an existing water right occurs. 3MJA 000010-11. Further, the mitigation must be feasible, reasonable, timely and effective, as reviewed by the WAC. 3MJA 000019. The State Engineer has full authority to review and approve the mitigation measures conducted, and may, at any time, order additional mitigation measures separate and apart from the 3M Plan as appropriate. 3MJA 000016. The 3M Plan lists potential mitigation measures for potential adverse impacts, including but not limited to “reduction or cessation of groundwater extraction from one or more wells and/or geographic redistribution of groundwater extraction.” 3MJA 000021. Mitigation may also include providing water from another source, financially compensating senior appropriators for costs incurred in obtaining the full extent of their rights or, if agreed upon by the parties, providing replacement property. *Id.*

IV. SUMMARY OF THE ARGUMENT

The 3M Plan ensures the protection of existing water rights consistent with NRS 533.370(2) and Ruling 6127. The 3M Plan is designed to detect early warning signs of potential adverse impacts to existing water rights, and allow management and mitigation measures to be implemented before any conflict to existing rights occur. Further, the 3M Plan’s mitigation measures, such as

substitution of water from a different source and financial compensation, are wholly consistent with the protection of existing water rights because they allow the senior appropriator to use the full extent of his water right. Accordingly, the 3M Plan does not violate NRS 533.370(2) or Ruling 6127 as asserted by Appellants.

In addition, the 3M Plan meets the “express conditions” requirement of NRS 534.110(5) because the 3M Plan itself is a condition to KVR’s permit. The 3M Plan’s inclusion of mitigation measures that allow for substitution of water from a different source is not prohibited by NRS 534.110. The 3M Plan is designed to gather the best data and apply the best science to effectively respond to specific adverse impacts in order to ensure the protection of existing water rights.

Further, the State Engineer did not delegate his authority by approving the 3M Plan. Rather, the State Engineer invited affected parties to join the 3M Plan committees to help advise him about the specific effects of pumping so that he can most effectively exercise his authority over the 3M Plan. Even Appellants concede that the State Engineer retains full authority over the 3M Plan, including any decisions by the advisory committees and any other issues that any water right holder may petition him to review.

The 3M Plan is not a rule of general applicability because it applies only to KVR for the Mt. Hope Project. Moreover, nothing in the 3M Plan contradicts or

replaces standards as set forth in applicable statutes and regulations.

Finally, the State Engineer did not act arbitrarily or capriciously, or abuse his discretion when he approved the 3M Plan. The mitigation measures included in the 3M Plan are consistent with protecting existing water rights. The State Engineer's determination that the 3M Plan will effectively mitigate any potential impacts to existing water rights is supported by substantial evidence.

V. STANDARD OF REVIEW

“The decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.” NRS 533.450(10). When an order of the State Engineer is challenged, this Court reviews the factual issues for an abuse of discretion, which is the same standard of review as the lower court. *State Eng'r v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985), citing *Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 283, 607 P.2d 581, 582 (1980). In reviewing the order for an abuse of discretion, the Court's function “is to review the evidence upon which the Engineer based his decision and ascertain whether that evidence supports the order, [and] [i]f so, this Court is bound to sustain the Engineer's decision.” *Id.*

Further, this Court may not substitute its judgment for that of the State Engineer. *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991). In reviewing findings of the State Engineer, this Court has stated that “we will not

pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision.” *Id.*, citing *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) .

Purely legal issues or questions may be reviewed without deference to an agency determination. However, the agency’s conclusions of law that are closely related to its view of the facts are entitled to deference and will not be disturbed if they are supported by substantial evidence. *Town of Eureka v. State Eng’r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). Likewise, an agency’s view or interpretation of its statutory authority is persuasive. *State Eng’r v. Morris*, 107 Nev. at 701, 819 P.2d at 205, quoting *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). Any review of the State Engineer’s interpretation of his legal authority must be made with the thought that “[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.” *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996), citing *State v. State Eng’r*, 104 Nev. at 709, 766 P.2d at 263, 266 (1988).

VI. LEGAL ARGUMENT

A. The State Engineer’s Decision to Approve the 3M Plan Did Not Violate NRS 533.370 or Conflict With Ruling 6127

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Under NRS 533.370(2), the State Engineer must deny applications to appropriate water when there is no unappropriated water in the proposed source or when the proposed use conflicts with existing water rights or is detrimental to the public interest.³ *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 204 (1991). In Ruling 6127, the State Engineer identified this statutory limitation on his ability to grant rights and found that the “the approval of the applications will not conflict with existing water rights, will not conflict with protectable interests in existing domestic wells as set forth in NRS 533.024, and will not threaten to prove detrimental to the public interest.” JA 5023. To ensure that no conflicts with existing water rights would occur, the State Engineer granted the applications subject to approval of a 3M Plan before any groundwater is developed. JA 5026. As required by the Ruling, KVR submitted a 3M Plan that the State Engineer approved after more than a year of refinement and input by the State Engineer, Eureka County, KVR and the public. 3MJA 000009-35; 44-175, 185, 198-199, 210-211, 221-224, 238-39, 247, 250-51, 257; 270-92, 297-420; 422-492; 509-10.

³ NRS 533.370(2) provides:

[W]here there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit.

The 3M Plan approved by the State Engineer is designed to closely monitor the effects of pumping groundwater, manage the pumping as appropriate to prevent adverse impacts and, if necessary, to mitigate against adverse impacts *before* any conflict with existing water rights occurs.

1. The 3M Plan Ensures Protection of Existing Water Rights

Appellants assert that the State Engineer violated NRS 533.370 and Ruling 6127 by approving a 3M Plan that does not sufficiently ensure the protection of existing water rights. Appellants' Opening Brief (OB) at pp. 16-17. Appellants argue that somehow the 3M Plan “downgrades the duty of eliminating conflicts” to something less. OB at p. 17. However, Appellants' arguments are meritless and appear to be based on their misunderstanding of the 3M Plan.

The 3M Plan simply does not—and cannot—change the statutory requirement of avoiding conflicts with existing water rights, regardless of the language used in a 3M Plan. The State Engineer determined that no conflicts with existing water rights will occur, based in part on the requirement for a 3M Plan to ensure the protection of existing water rights. JA 5023; JA 5022 (“[T]he only way to fully ensure that existing water rights are protected is by closely monitoring hydrologic conditions while groundwater pumping occurs.”). The State Engineer approved the 3M Plan only after properly determining that it met the ultimate goal of ensuring the protection of existing water rights. 3MJA 000010 (The 3M Plan is

designed “to protect the rights of domestic well owners . . . and existing appropriations”). The State Engineer’s determination is sound and does not constitute legal error.

The 3M Plan requires extensive monitoring in Kobeh Valley, Diamond Valley, Pine Valley and surrounding areas, and will provide early warning of where impacts may appear in order to allow time to implement specific and effective management and mitigation measures. 3MJA 000015-18. Under the 3M Plan, substantial baseline data will be collected through more than one hundred monitoring sites throughout the valleys and surrounding areas. 3MJA 000016-19. This data will allow the WAC, through recommendations by the TAC, to manage the groundwater pumping in a manner that will avoid adverse impacts on existing water rights. To the extent adverse impacts are predicted using the baseline data, the data will be used to determine the most effective mitigation measures. 3MJA 000011-16.

Further, the 3M Plan’s use of the term “adverse impacts” does not “downgrade” the statutory requirement of avoiding conflicts as asserted by Appellants. The 3M Plan is designed to detect adverse impacts through early detection of the effects of pumping groundwater on the hydrology of the basin. Adverse impacts on the groundwater table will *precede* a conflict to an existing water right, which occurs when the quantity of water to which a water right holder

is entitled is not available. Thus, Appellants' contention that, by the time an adverse impact is detected it will be too late to implement management and mitigation measures, is erroneous. Because adverse impacts are early indicators of potential conflicts, a 3M Plan that focuses on adverse impacts ensures that conflicts to existing water rights do not occur. Accordingly, the 3M Plan ensures the protection of existing water rights and guarantees compliance with NRS 533.370(2).

2. The 3M Plan's Mitigation Measures are Consistent With Protecting Existing Water Rights

Appellants further assert that the State Engineer's approval of the 3M Plan violates NRS 533.370(2) because the Plan allows mitigation measures that are inconsistent with the law of prior appropriation. OB at p. 18. In particular, Appellants object to mitigation through replacement wells, financial compensation or replacement property, regardless of the fact that the water right owner will obtain the full quantity of water to which he is entitled unless he otherwise agrees. OB at p. 18. Appellants' assertions are not supported by the law or facts.

An existing water right is protected so long as the owner of the right receives the full quantity of water to which he is entitled under the water right. See NRS 534.110(4) ("It is a condition of each appropriation of groundwater acquired under this chapter that the 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."); 3MJA 000722:15-16 ("A conflict occurs when a senior water right cannot be used because of water use by a junior appropriator."). Although Appellants rely on *Proctor v. Jenkins* and NRS 533.370 to support the assertion that the law of prior appropriation prohibits the possibility of mitigation through the substitution of water from a different source or point of diversion, those authorities do not support that proposition. OB at p. 19.

In *Proctor v. Jenkins*, 6 Nev. 83, 86-87 (1870), this Court held that a junior appropriator was not liable to a senior appropriator for damages to his water mill where the flow of stream water to which the senior appropriator was entitled was not impaired as a result of the junior appropriator's dam. *Id.* This case simply does not address whether or not a senior appropriator's water right may be mitigated through substitution of water from a different source. At best, the case supports that as long as the senior appropriator receives the water to which he is entitled, no injury occurs. *Id.*

Similarly, NRS 533.370(2) does not prohibit mitigation measures outlined in the 3M Plan. In administering the appropriation and management of Nevada's public water, the State Engineer must balance the doctrine of prior appropriation with the doctrine of beneficial use. *See Bacher v. State Eng'r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006). The doctrine of beneficial use provides that the waters of the State should be put to beneficial use and to the extent possible not left

idle. *Id.*; *Desert Irrigation, Ltd. v. State Eng'r*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) (“The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states.”). Further, while a water right owner is permitted to use water for beneficial use, he does not own the water itself. *Desert Irr., Ltd.*, 113 Nev. at 1059, 944 P.2d at 842 (“Indeed, even those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use.”). Thus, utilizing the best science developed through implementation of the 3M Plan to not only ensure satisfaction of existing water rights, but also allow for maximum beneficial use of water is reasonable and necessary in the driest state in the nation. *See State Eng'r v. Morris*, 107 Nev. at 701, 819 P.2d at 205 (The State Engineer’s interpretation of his legal authority under that statute is persuasive).

Further, Appellants incorrectly interpret the 3M Plan to allow financial compensation to be forced upon a senior appropriator without his permission instead of satisfaction of the water to which he is entitled. OB at p. 18. The 3M Plan provides “financial compensation or, if agreed upon, property (i.e., land and water rights) of equal value could be purchased for replacement.” 3MJA 000021. Financial compensation is provided as a mitigation measure to the extent additional cost is incurred by senior appropriators in obtaining the quantity of water to which they are entitled. *Id.* In other words, if as a result of KVR’s pumping a senior

appropriator must lower a pump in a well, deepen an existing well, drill a new well or transport water to a specific location to satisfy an existing water right, then KVR may be responsible for compensating the senior appropriator for the cost of those actions. *Id.* Therefore, under the mitigation measures provided as part of the 3M Plan, the intent is that the senior appropriator will always receive the full extent of his water rights, unless the senior appropriator agrees to be made whole through property replacement. *Id.*

The State Engineer found that approval of the applications will not conflict with existing water rights, and required the 3M Plan to ensure the protection of existing water rights. JA 5023. The 3M Plan approved by the State Engineer provides an additional safeguard that is consistent with the requirements of NRS 533.370(2)—not in conflict with it. Accordingly, this Court should affirm the State Engineer’s approval of the 3M Plan.

B. The State Engineer’s Decision to Approve the 3M Plan Complied With the Requirements of NRS 534.110

Appellants argue that the State Engineer’s approval of the 3M Plan is inconsistent with NRS 534.110(5) because a) the 3M Plan lacks “express conditions” to satisfy existing water rights, and b) the owners of domestic wells did not agree to the mitigation measures set forth in the 3M Plan. OB at p. 21. Appellants misconstrue both the requirements of NRS 534.110(5) and the protections contained in the 3M Plan.

1. The 3M Plan Satisfies the Express Conditions Requirement of NRS 534.110(5)

The State Engineer required the 3M Plan as an express condition to the approval of the applications. JA 5022, 5026. In Ruling 6127, the State Engineer stated that:

While substantial evidence exists that pumping 11,300 afa of water from Kobeh Valley, which is considerably less than the revised and more conservative perennial yield of 15,000 afa, can be safely carried out, the only way to fully ensure that existing water rights are protected is by closely monitoring hydrologic conditions while groundwater pumping occurs. The State Engineer has wide latitude and broad authority in terms of imposing permit terms and conditions. This includes the authority to require a comprehensive monitoring, management and mitigation plan prepared with assistance from Eureka County.

JA 5022. Because the State Engineer's conditioning of the approval of KVR's applications on a comprehensive 3M Plan that will ensure that existing domestic wells and appropriations are protected, the State Engineer met the statutory obligations of NRS 534.110(5).

a. NRS 534.110 Does Not Prohibit Substitution of Water From a Different Source as a Mitigation Measure

While Appellants concede that NRS 534.110(5) permits a reasonable lowering of the water level at the point of diversion of a prior appropriator, they misinterpret the "express conditions" requirement of the statute to prohibit mitigation through the substitution of water from a different source. Appellants

cite no authority to support this interpretation of NRS 534.110(5), and the State Engineer is unable to find any such authority. OB at p. 21.

Appellants assert that NRS 534.110(5) “does not allow for destruction of a senior user’s source of water as the mitigation proposals suggested in the 3M Plan would allow.” OB at pp. 16-17. As discussed above, the 3M Plan ensures the protection of existing water rights and therefore does not allow for the destruction of a senior appropriator’s right. A senior appropriator’s right is not “destroyed” simply because water to satisfy that right is substituted, if necessary, from a different source. Rather, the senior appropriator’s right is satisfied as long as the senior appropriator receives the quantity of water to which he is entitled. *See* NRS 534.110(4) (“It is a condition of each appropriation of groundwater acquired under this chapter that the 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.”); 3MJA 000722:15-16 (“A conflict occurs when a senior water right cannot be used because of water use by a junior appropriator.”). Nothing in NRS 534.110 prohibits mitigation through substitution of water from a different source and such mitigation measures are also consistent with NRS 533.370(2), as discussed above (Section VI.A.2.). *SIIS v. Bokelman*, 113 Nev. 1116, 1123, 946 P.2d 179, 184 (1997) (legislative intent may be ascertained by reference to the entire statutory scheme).

Moreover, as the agency implementing NRS 534.110, the State Engineer's interpretation of his legal authority under that statute is persuasive. *State Eng'r v. Morris*, 107 Nev. at 701, 819 P.2d at 205. The State Engineer's ability to require mitigation against conflicts through substitution of a water source is reasonable and necessary in order for the State Engineer to maximize beneficial use in this driest State. Without such ability, impacts to a single existing water right that could easily be mitigated, such as the stockwatering rights and domestic well at issue here, would greatly diminish the amount of water available for beneficial use statewide. Thus, the State Engineer's interpretation that the express condition requirement of NRS 534.110(5) is satisfied by expressly conditioning KVR's permit on a comprehensive 3M Plan that includes substitution as a mitigation measure should prevail. *Id.*

b. The 3M Plan is a Comprehensive Plan to Ensure the Protection of Existing Water Rights

Appellants also argue that the 3M Plan is adjudicatory and “sets forth an arduous, spiraling process that can culminate in an unknown substitute rather than satisfaction of the right.” OB at p. 24. Appellants repeat the same arguments regarding the speculative failure of the 3M Plan to protect existing water rights because it mitigates against “adverse impacts” based on action criteria not yet set by the WAC and TAC.

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It appears that Appellants contend that in order to satisfy the express conditions requirement, the 3M Plan must list specific management and mitigation actions for each possible effect, including the identifying threshold levels for when mitigation should occur. OB at pp. 22-24. However, the lack of action criteria or “triggers” at this time—before pumping has begun—is proper. The 3M Plan directs that triggers be set once observation data is collected. Appellants acknowledge that the WAC will adopt specific criteria that will trigger mitigation action, but refuse to recognize that it is premature to do so before hydrologic stresses and changes from pumping are tangible. Without tangible observations, it is impossible to identify which specific mitigation option will be best suited to reduce or eliminate site-specific impacts in a given case. These determinations have to be made as part of the ongoing water development process. And water development cannot begin until permits have been issued by the State Engineer. Therefore, the State Engineer must be able to permit groundwater rights subject to a 3M plan that requires triggers to be developed but does not yet include quantitative triggers for action. Appellants’ proposed approach is absurd. While the State Engineer can predict effects of pumping based on substantial modeling evidence, modeling is no substitute for the actual effects of pumping. To require specific management and mitigation actions for every possible effect of pumping would render the 3M Plan a meaningless document full of guesswork. Actions

would be based on prediction and may result in action (or inaction) that is unnecessary or even harmful to existing water rights. For example, an action criteria set now, before pumping occurs, may be set too high, such that waiting for that action criteria may in fact allow existing water rights to be adversely impacted. The more exacting and effective approach is that prepared by KVR, Eureka County and the State Engineer, which is to provide a framework for management and mitigation such that effective measures can be implemented as the best information becomes available when pumping occurs. This approach is not adjudicatory—it is effective and prudent management.

Appellants cannot establish that the 3M Plan will fail to protect existing water rights as a matter of law. The express terms of the 3M Plan, as well as the comprehensive framework for monitoring, management and mitigation measures within the 3M Plan contradict Appellants' assertion. As discussed above, the 3M Plan requires extensive monitoring in Kobeh Valley, Diamond Valley, Pine Valley and surrounding areas, and will provide early warning of where impacts may appear in order to allow time to implement specific and effective mitigation measures. 3MJA 000010-21. Substantial and specific monitoring set forth in the 3M Plan will provide data to allow the WAC, through recommendations by the TAC, to manage the groundwater pumping in a manner that will avoid adverse impacts on existing water rights. *Id.* To the extent adverse impacts are predicted

using the baseline data, the data will be used to determine the most effective mitigation measures. *Id.* Thus, as the district court properly concluded, “[t]he 3M Plan is an express condition to monitor the effects of KVR’s pumping, to detect and identify potential impacts, and to prevent them from adversely affecting existing rights through management and mitigation measures recommended by the advisory committees and ordered by the State Engineer.” 3MJA 000758:1-4.

2. Agreement From Domestic Well Owners for Mitigation is Not Required

Finally, Appellants argue, for the first time, that the 3M Plan violates NRS 534.110(5) because KVR failed to obtain permission for mitigation measures from owners of domestic wells within 2,500 feet of its wells. OB at pp. 24-25. As a threshold matter, Appellants failed to raise this issue with any lower court and therefore are precluded from raising it on appeal. *See Peot v. Peot*, 92 Nev. 388, 390, 551 P.2d 242, 244 (1976). Nonetheless, even if Appellants had raised this argument below, it fails because Appellants concede that the provision only applies to municipal, quasi-municipal or industrial use—not mining, milling or dewatering use. *See* OB at p. 25. Appellants’ interpretation of this statutory provision to exclude the possibility of mitigation for impacts caused by wells for uses other than municipal, quasi-municipal or industrial is baseless.

Additionally, even if the provision applied, Appellants’ argument fails because the State Engineer fully complied with the statute when he conditioned

KVR's permit on a 3M Plan that provides that pumping may be limited or prohibited to prevent unreasonable adverse effects.⁴ On its face, the statute only requires, absent agreement from domestic well owners, that the permit shall include a condition that pumping *may* be limited or prohibited. The permit did exactly this through the 3M Plan.

C. The State Engineer Did Not Delegate His Authority Under the 3M Plan

Appellants admit that “[t]here is no doubt that the State Engineer in his decision approving the 3M Plan reiterated his final authority over that plan.” OB at p. 25. Appellants then concede that their objection to the 3M Plan is based on fear that the State Engineer will not in fact exert his authority. OB at pp. 25-26. Appellants’ fear that the State Engineer will not do what he is statutorily required to do—protect existing water rights—is simply no basis for finding error in the State Engineer’s approval of the 3M Plan.

⁴ NRS 534.110(5)(b) states in relevant part:

[T]he State Engineer shall include as a condition of the permit that pumping water pursuant to the permit *may* be limited or prohibited to prevent any unreasonable adverse effects on an existing domestic well located within 2,500 feet of the well, unless the holder of the permit and the owner of the domestic well have agreed to alternative measures that mitigate those adverse effects. *Id.* (emphasis added)

The record clearly supports that the State Engineer did not abdicate his authority over the 3M Plan. The 3M Plan itself repeatedly highlights the State Engineer's involvement and ultimate authority in regulating the water development for the Project. The 3M Plan expressly states that the State Engineer has "final authority" over the Plan and that "[n]othing herein seeks to limit, alter, modify or change the exclusive authority of the [Nevada State Engineer] to approve or modify the 3M." 3MJA 000010, 16. Reiterating his authority in the approval letter of the 3M Plan, the State Engineer reminded KVR that the Plan was "subject to modification based on need, prior monitoring results, or changes in the approved water rights." 3MJA 000009. Despite Appellants' assertion that the State Engineer "never once" suggests that he may monitor the plan based on the "'needs' of senior water rights holders, or the satisfaction of senior water rights," (OB at p. 26) that is precisely the goal of the plan as stated in the plan itself. 3MJA 000010. It is illogical to believe that the State Engineer would abandon his duties to ensure the protection of existing water rights once pumping begins. After all, the reason the State Engineer conditioned KVR's permit on approval of the 3M Plan was to do exactly that—ensure the protection of existing water rights.

The 3M Plan further states that "[n]othing herein limits or changes the [Nevada State Engineer's] authority, and any Party can petition the [Nevada State Engineer] to consider any issue." 3MJA 000016. Thus, the State Engineer has not

relinquished any authority whatsoever to the WAC or TAC. Instead, the advisory committees, comprised of technically proficient individuals and stakeholders who will advise the State Engineer regarding the effects of the Project, are in place to assist the State Engineer to most effectively exercise his authority. 3MJA 000011-16. As the district court concluded, “both the TAC and WAC are advisory committees” and “there is nothing wrong with the State Engineer receiving advice, and if it be by a committee, so better the advice, and if it be by a technical committee, even better.” 3MJA 00715:20-25.

Appellants next complain that “[w]ater users are at the mercy of the TAC detecting and recommending action criteria to the WAC, while drawdown continues.” OB at p. 27. Appellants fail to recognize that the WAC may at any time propose additional action criteria or change action criteria that is not recommended by the TAC. 3MJA 000015. Further, because the State Engineer as well as water users are either members of the WAC or represented by members of the WAC, they have a role in the process. 3MJA 000012. Finally, if any water user is not satisfied with the process, he can petition the State Engineer directly, separate and apart from the 3M Plan, on any issue affecting their water rights. 3MJA 000016.

Appellants also argue that the WAC can decide management or mitigation measures without the vote of the State Engineer. OB at pp. 26-27. However, any

management or mitigation actions recommended by the WAC are always subject to approval by the State Engineer. 3MJA 000016. Finally, Appellants repeat the arguments that inclusion in the 3M Plan of “adverse impacts” and some mitigation measures, such as replacement water and financial compensation, do not comply with NRS 533.370(2). As those issues are fully addressed above, the State Engineer will not repeat them here.

In sum, Appellants’ doubts regarding the State Engineer’s willingness to exercise authority under the 3M Plan are not supported by the record and no basis for finding error exists.

D. The State Engineer’s Decision to Approve the 3M Plan Did Not Constitute Rulemaking

Appellants’ assertion that the State Engineer engaged in ad hoc rulemaking when he approved the 3M Plan is erroneous. A “regulation” is “[a]n agency rule, standard, directive or statement of *general applicability* which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency.” NRS 233B.038(1)(a). The 3M Plan applies only to KVR for the Mt. Hope Project and is therefore not a rule of general applicability. 3MJA 000010. Any determination under the 3M Plan will not bind other water right holders, who may petition the State Engineer at any time regarding an issue involving their water rights. 3MJA 000016. As such, the 3M Plan cannot be construed to be rulemaking.

Appellants essentially restate their argument that because the role of the WAC is to set action criteria to mitigate against adverse impacts instead of conflicts, the 3M Plan is inconsistent with statutes that require the avoidance of conflicts, namely NRS 533.370(2). As explained above, while the 3M Plan is a tool to assist the State Engineer in the collection of data concerning the effects of water development by KVR, it is not a substitute for the standards under Nevada water law. The 3M Plan is designed to detect early warnings of potential adverse impacts to allow management and mitigation measures to be implemented before those impacts occur. 3MJA 000010. Thus, instead of substituting Nevada water law, the 3M Plan will help ensure compliance with Nevada water law by ensuring that existing water rights are protected once pumping begins.

The State Engineer's approval of the 3M Plan did not constitute rulemaking and the 3M Plan does not replace the statutory requirement of avoiding conflicts with existing water rights. As such, the State Engineer's approval of the 3M Plan was not error.

E. The State Engineer's Decision to Approve the 3M Plan Was Not Arbitrary, Capricious, or an Abuse of Discretion

Appellants contend that the State Engineer's conclusion that the 3M Plan will protect existing water rights was arbitrary and capricious. OB at p. 30. The thrust of Appellants' argument is once again that some of the 3M Plan's mitigation measures, such as replacement water, financial compensation and property

replacement (regardless of the fact that the water right owner will obtain the full quantity of water to which he is entitled unless he otherwise agrees), are inconsistent with the statutory requirement of protecting existing water rights because existing rights require that water from the same source be provided. *Id.* Appellants argue, therefore, that no rational basis exists for concluding that the 3M Plan will protect existing water rights.

This argument fails because, as addressed above, conflicts with existing water rights do not occur as long as senior appropriators receive the full quantity of water to which they are entitled. The prior appropriation doctrine provides that while a water right owner is permitted to use water for beneficial use, he does not own the water itself. *Desert Irr., Ltd.*, 113 Nev. at 1059, 944 P.2d at 842 (1997). Thus, a prior appropriator merely has permission to use the water to which he has rights. As such, it is wholly consistent with Nevada water law for the State Engineer to order replacement of water from either the same or a different source in order to satisfy the rights of senior appropriators. Such mitigation measures maximize beneficial use.

Finally, to the extent Appellants argue that the 3M Plan's mitigation measures will fail, even if they accept that the measures are consistent with the law, Appellant's fail to provide any evidence whatsoever to dispute the State Engineer's finding that any impacts to the two springs and domestic well could be

adequately and fully mitigated. JA 5006, 5023. The State Engineer's decision was based on substantial expert and other evidence regarding the ability to mitigate the potential impacts to the existing water rights. *See, e.g.*, JA 630:15-25, 631:1-8, 647:13-20, 659:11-19, 669:6-13. "The decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." NRS 533.450(10). Appellants have simply not met their burden.

VII. CONCLUSION

For the foregoing reasons, the district court's denial of Appellant's Petition for Judicial Review of the State Engineer's approval of the 3M Plan should be affirmed.

DATED this 26th day of August, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

I also hereby certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 30 pages and 7009 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the relied on is to be found. I understand that I may be subject to sanctions

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in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I Rosiland M. Hooper, certify that I am an employee of the Nevada State Attorney General and that on this 26th day of August, 2013, I submitted with the Nevada Supreme Court via its electronic filing system a correct and true copy of the aforementioned **RESPONDENT STATE ENGINEER'S ANSWERING BRIEF**. All the following parties associated with this case will be served via electronic means through the Supreme Courts notification system:

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