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KOBEH VALLEY RANCH, LLC

**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,

Respondent.

KOBEH VALLEY RANCH, LLC,

Intervenor.

Case No.: CV1207-178

Dept. No.: 2

**NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT**

1 PLEASE TAKE NOTICE that on May 17, 2013, the Court entered its Findings of Fact,
2 Conclusions of Law, and Judgment in the above-entitled action.


3 A copy of the Order is attached hereto as Exhibit 1.
4

5 **AFFIRMATION**

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

8 Dated: May 21, 2013.

PARSONS BEHLE & LATIMER

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle &
3 Latimer, and that on this 21 day of May, 2013, I served a true and correct copy of the
4 foregoing document, **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF**
5 **LAW, AND JUDGMENT**, by hand delivery and by U.S. Mail, at Reno, Nevada, in a sealed
6 envelope, with first-class postage fully prepaid and addressed as follows:

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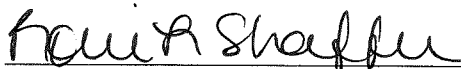
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Exhibit 1

Exhibit 1

Case No: CV1207-178

Dept. No: 2

ORIGINAL

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,

-vs-

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

Respondent.

KOBEH VALLEY RANCH, LLC.

Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

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

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

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

13 **FACTS AND PROCEDURAL HISTORY**

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

18 In Ruling 6127, the State Engineer determined that existing water rights that could potentially
19 be impacted by KVR's pumping are those that exist on the valley floor of Kobeh Valley and are
20 within the predicted water level drawdown area.³ The State Engineer specifically found, however,
21 that "because the groundwater flow model is only an approximation of a complex and partially
22

23 ¹ The record in this case includes the record on appeal from the first State Engineer hearings filed in
24 the prior appeals of Eureka County, Tim Halpin, Eureka Producers' Cooperative, and Cedar Ranches, LLC in
25 2009 under cases CV 0904-122 and -123. The record on appeal from these cases is identified herein as
26 "2009 R" or "2009 R. Tr. Vol. ___ page:line" for transcript citations. The record also includes the record on
27 appeal from the second State Engineer hearings filed in the prior appeals of Eureka County, Conley Land &
28 Livestock, LLC, Lloyd Morrison, and Benson-Etcheverry under cases CV-1108-155; -156; -157; -164; -165;
and -170. The record on appeal from these cases, dated October 27, 2011, is identified herein as "R" or
"R. page:line" for transcript citations. The records on appeal filed in this case are identified as follows: State
Engineer Record on Appeal "SE ROA," State Engineer Supplemental Record on Appeal "SUP SE ROA," and
Benson-Etcheverry's Supplemental Record on Appeal "PSROA."

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

³ PSROA 22.

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

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

14 The purpose of the 3M Plan is to assist the State Engineer with managing KVR’s groundwater
15 use to prevent conflicts with existing water rights.¹⁰ A conflict occurs when a senior water right
16 cannot be used because of water use by a junior water appropriator.¹¹ The impacts from KVR’s
17 groundwater pumping in Kobeh Valley are predicted to manifest over a period of years and the
18 monitoring element of the 3M Plan will provide an early warning of where impacts will appear and
19 allow time to implement specific and effective mitigation measures. If monitoring shows that KVR’s
20 groundwater pumping may impact an existing senior water right holder, including domestic well
21 owners, then the 3M Plan requires KVR to mitigate the effect by ensuring that the existing right has
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23

24 ⁴ PSROA 19.

25 ⁵ PSROA 42.

26 ⁶ PSROA 186.

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

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

⁹ SUP SE ROA 27-28.

¹⁰ SE ROA 5.

¹¹ State Engineer Br. p. 1:26-27.

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

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

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

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

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

27 ¹⁴ SE ROA 8.

28 ¹⁵ SE ROA 8.

¹⁶ SE ROA 8.

¹⁷ SE ROA 11.

¹⁸ SE ROA 8, 10.

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

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

14 The TAC and WAC are both involved in the review process under the 3M Plan. As
15 monitoring data is collected, the TAC must review it to determine if action criteria have been
16 exceeded.²⁶ And, if an action criterion is exceeded, then the WAC, with assistance from the TAC,
17 will determine whether KVR's pumping caused the levels to be exceeded.²⁷ If KVR's pumping is
18 causing an impact, then the WAC determines what management or mitigation measures should be
19 recommended to the State Engineer to protect existing rights from adverse impacts.²⁸ The State
20 Engineer then reviews the WAC's recommendations and determines which management or
21 mitigation measures to require of KVR.²⁹ The TAC reviews the effectiveness of any mitigation
22

23 ¹⁹ SE ROA 7-8.

24 ²⁰ SE ROA 11.

25 ²¹ SE ROA 7.

26 ²² SE ROA 7-8, 10.

27 ²³ SE ROA 5, 7-10.

28 ²⁴ SE ROA 10-11.

29 ²⁵ SE ROA 11, SUP SE ROA 27.

²⁶ SE ROA 9.

²⁷ SE ROA 9-10.

²⁸ SE ROA 10.

²⁹ SE ROA 10-11.

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

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

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

26 ³¹ SE ROA 11.

27 ³² SE ROA 10-11.

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

³⁴ SE ROA 5.

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

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

3 DISCUSSION

4 I. Standard of Review

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

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

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

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22
23 ³⁶ NRS 532.020, 532.110.

³⁷ NRS 533.450(1).

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

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

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

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

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

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

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

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

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

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

22 Further, the State Engineer retains exclusive control over the 3M Plan and it does not change
23 or limit his authority to manage water resources in Nevada. First, a member of the State Engineer's
24

25 ⁴⁴ *Anderson Family Assocs. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (recognizing that
26 the State Engineer "has the implied power to construe the state's water law provisions and great deference
27 should be given to the State Engineer's interpretation when it is within the language of those provisions"); *U.S.*
v. State Eng'r, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112
Nev. 743, 747-48, 918 P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

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

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

⁴⁷ SE ROA 5-6.

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

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

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

26 ⁴⁹ SE ROA 11.

27 ⁵⁰ SE ROA 11.

28 ⁵¹ SE ROA 7-8, 10.

⁵² SE ROA 10.

⁵³ SE ROA 11.

⁵⁴ SE ROA 16.

⁵⁵ SE ROA 5.

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

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

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

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

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

24
25 (6). . . [T]he State Engineer shall conduct investigations in any basin or
26 portion thereof where it appears that the average annual replenishment
to the groundwater supply may not be adequate for the needs of all

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28 ⁵⁶ Br. pp. 18-19.

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

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

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

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

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

24 C. Express Conditions Under NRS 534.110.

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

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

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

NRS 534.110(5) provides:

[t]his 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.

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

⁶⁰ SE ROE 5.

⁶¹ SE ROA 18-26.

⁶² SE ROA 12.

⁶³ SE ROA 18-26.

⁶⁴ SE ROA 24-26.

⁶⁵ SE ROA 19-20, 24-26.

⁶⁶ SE ROA 19-26.

⁶⁷ SE ROA 27-28.

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

18 Through his approval of the 3M Plan, the State Engineer has determined that the conditions
19 and provisions of the 3M Plan are adequate to ensure that existing rights will be satisfied. His
20 decision is supported by the 3M Plan itself since it requires KVR to carefully monitor the effects of
21 its pumping, to forecast potential impacts in cooperation with parties to the 3M, and to prevent or
22 mitigate such impacts from adversely affecting existing water rights. Although Benson-Etcheverry
23 would require the State Engineer to include express measures for mitigating existing water rights,
24 NRS 534.110(5) requires only that the State Engineer include express conditions to ensure that
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26 ⁶⁸ SE ROA 7-8, 10.

27 ⁶⁹ SE ROA 10.

28 ⁷⁰ SE ROA 10.

⁷¹ SE ROA 10.

⁷² SE ROA 7-8, 10.

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

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

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

20 In addition, the Court concludes that the 3M Plan will not delay mitigation. If the WAC
21 determines that KVR's pumping causes action criteria exceedance, then the TAC must expeditiously
22 formulate mitigation or management measures and submit them to the WAC.⁷⁵ Because the 3M Plan
23 provides an early warning system against potential impacts, the WAC will be able to develop and
24 implement mitigation measures. The 3M Plan lists several methods to mitigate adverse impacts,
25 including drilling replacement wells, shifting pumping ratios among the production wells, or stopping
26

27 ⁷³ SE ROA 5, 17-30.

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

⁷⁶ SE ROA 15-16.

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

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

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

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

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

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

⁷⁸ SE ROA 16.

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

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

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

27 ⁸⁰ SE ROA 10.

28 ⁸¹ SE ROA 10.

⁸² SE ROA 14.

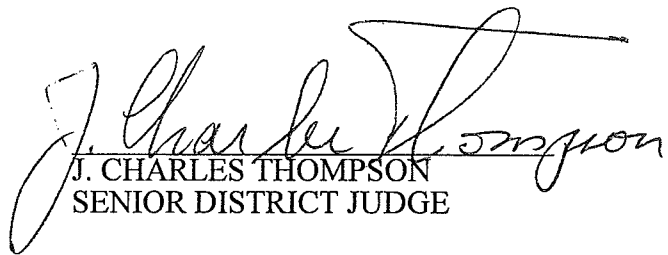
⁸³ *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n. 5, 138 P.3d 433, 444 n. 5 (2006).

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

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

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

8
9 DATED this 15th day of May 2013.

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11 
12 J. CHARLES THOMPSON
13 SENIOR DISTRICT JUDGE
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JUL 26 2012

Eureka County Clerk
By Deanna J. Carstall

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2 BRYAN L. STOCKTON
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3 Senior Deputy Attorney General
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(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 FAMILY, LP, a
9 Nevada Registered Foreign Limited
Partnership, DIAMOND CATTLE
10 COMPANY, LLC, a Nevada Limited
Liability Company, and KENNETH F.
11 BENSON, an individual,

12 *Petitioners,*

13 *vs.*

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

17 *Respondents.*

Case No.: CV 1207-178

Dept. No.: II

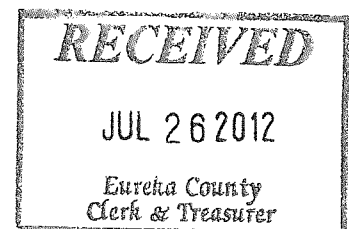
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19 **NOTICE OF INTENT TO DEFEND**

20 The Nevada Department of Conservation, Division of Water Resources, Jason King in
21 his capacity as State Engineer; by and through counsel, Nevada Attorney General Catherine
22 Cortez Masto and Senior Deputy Attorney General Bryan Stockton, herby give notice of their
23 intent to defend in the Petition for Judicial Review served on them on or about July 6, 2012.
24 The Attorney General's office will contact the State Engineer to assemble and prepare the
25 record on appeal for transmittal to the Court as soon as it is complete.

26 ///

27 ///

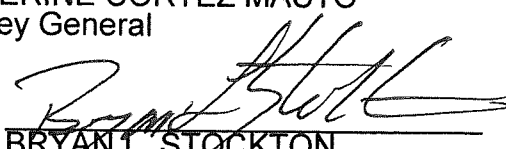
28 ///



1 DATED this 24th day of July 2012.

2 CATHERINE CORTEZ MASTO
3 Attorney General

4 By:


5 BRYAN L. STOCKTON
6 Senior Deputy Attorney General
7 Nevada State Bar # 4764
8 100 N. Carson Street
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11 (775) 684-1103 fax
12 bstockton@ag.nv.gov
13 *Attorneys for Respondents*

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

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

17 DATED this 24th day of July 2012.

18 CATHERINE CORTEZ MASTO
19 Attorney General

20 By:


21 BRYAN L. STOCKTON
22 Senior Deputy Attorney General
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Attorneys for Respondents

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

} SS

I, the Undersigned COUNTY CLERK and Ex-Officio
CLERK of the SEVENTH JUDICIAL DISTRICT COURT do hereby CERTIFY
that the foregoing is a full, true and correct copy of the original on file in
my office and that I have carefully compared the same with the
original.

WITNESS, My Hand and Seal of said
DISTRICT COURT, this 22nd day of May 20 13

County Clerk and Ex-Officio Court Clerk

 Deputy Clerk

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 24th day of July 2012, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing **NOTICE OF INTENT TO DEFEND**, addressed as follows:

SCHROEDER LAW OFFICES, P.C.
Laura A. Schroeder, Esq.
Therese A. Ure, Esq.
440 Marsh Ave.
Reno, Nevada 89509-1515
Attorneys for Petitioners


Sandra Geyer, Legal Secretary II

April 15, 2013

Proceedings Held at a Special Session of the Seventh Judicial District Court, In and For the County of Eureka, State of Nevada, at Eureka, Nevada

The Honorable J Charles Thompson, District Court Judge, Presiding.

Case No: CV 1207-178

Michel & Margaret Ann Etcheverry Family, LP, a Nevada Foreign Limited Liability Partnership, Diamond Cattle Company, LLC, Nevada Limited Liability Company & Kenneth F. Benson, an individual,
Plaintiff(s),

vs.

State Engineer, of Nevada, Office of the State Engineer, of Nevada, Division of Water Resources, Department of Conservation and Natural Resources,

Respondent(s).

Kobeh Valley Ranch, LLC, a Nevada limited Corporation

Intervenor-Respondent(s)

Appearances:

Laura A. Schroeder, Esq., Attorney for Plaintiff(s)

Therese A. Ure, Esq., Attorney for Plaintiff(s)

Brian L. Stockton, Esq., Senior Deputy Attorney General,

Nevada Attorney General's Office, Attorney for Respondent(s)

John R. Zimmerman, Esq., Attorney for Intervenor-Respondent(s)

Francis M. Wikstrom, Esq., Attorney for Intervenor-Respondent(s)

Kenny Sanders, Bailiff/Deputy

Leanna M. Cantrell, Deputy Court Clerk

Court Convened at 1:30 P.M.

THE COURT: This is Case CV 1207-178, Michel & Margaret Ann Etcheverry Family LP; Diamond Cattle Company & Kenneth F. Benson plaintiff(s) vs. State Engineer, of Nevada, Office of the State Engineer, of Nevada, Division of Water Resources, Department of Conservation and Natural Resources & Kobeh Valley Ranch, LLC as Interveners and Respondents. We have present in Court Michael Etcheverry & Ken Benson. Ms. Schroeder & Ms. Ure are representing the Plaintiffs.

Jason King, Nevada State Engineer is present in Court and represented by Brian Stockton, Senior Deputy Attorney General. Mr. Wikstrom & John Zimmerman are

present in Court and representing Kobeh Valley Ranch, Brian Rosander & Mike Manstead are present for the clients.

THE COURT: Ms. Schroeder this is your Petition.

MS. SCHROEDER: As to surface water Nevada State adopted the prior appropriation system early in the 1900's. It adopted this more comprehensive surface appropriation in 1913, like other western states it didn't adopt ground s water coding until mid-1900s. Naturally given the experience with the surface water code it adopted a prior appropriation system of some sort. The prior appropriation system for ground water never quite fit the model regulated by priority did with the surface water code because of its hydrology. The natural system has the ability to gage water volumes by looking at the water stream visually. You can look at diversion visually and observe the effects concurrently with the effects of that diversion on the stream.

Recharge can also be gaged by the snow and the rain and the run off. None of these measurements were available for the easy regulation of ground water. We cannot see the aquifer not the effects of the diversion done on the aquifer, and there are some scientist who tell us that withdrawals below the alluvium aquifer can be mining and can actually never be replenished. Amounts and time in recharging the water aquifer is largely unknown and their effects long term scanning years, decades not just a season or a year. This is the background that we are running against. Against this hydrological background the State Engineer is charged with regulating ground water, and with the legislature with perhaps the State Engineers assistance has adopted certain regulatory provisions in the ground water code that are different from the surface water code and these ground water provisions are important in this particular case. Specifically there are three provisions in my briefing that I have gone over in great detail that I want to high light.

NRS 533.370,(2) paraphrased where the proposed use change conflicts with existing rights, the State Engineer shall reject the application and refuse to issue the requested permit. This is modified by two separate provisions in NRS 534. 110(4), ground water appropriation must be allowed for a reasonable lowering of the static water level of the appropriator's point of diversion. Which reasonable lowering shall be determined by the State Engineer. The second one junior ground water permits can be issued that cause the water level to be lowered, so long as any protectable interest in any existing domestic wells and the rights holders of existing appropriations can be satisfied under such expressed issues. The later one is where my clients fall.

The State Engineers counsel represented to this court in April of 2012 that if the State Engineer knew the effects of the ground water pumping that NRS 534.110(5) would apply and requires specific terms in the permit. This is in our supplemental record page 103.

Pursuant to that representation this Court made an order and determined what would be necessary in a 3M Plan. I would ask the court to turn to the supplemental record of page 194. In its 2/13/2012 order this Court put out and determined some ideas and a process by which a 3M Plan should be determined. Never the less, the State Engineer approved a 3M Plan seven days before the Courts order in the previous case. Even though it didn't wait for this Court to make its decision or later consider this Courts conclusion.

This Court said the key to protecting existing rights will be the 3M Plan. Number one to serve to identify impacts and the extent of those impacts and second to develop and implement litigation efforts to ensure impacted existing rights are made whole. Tests and analysis as it relates to impacts as it relates to existing rights takes time. This data will form the basis of the 3M Plan not known at the time of the hearings will be made known after the data has been collected and analyzed. This Courts Order came out seven days after the 3M Plan was approved. The State Engineer did not pull it back and reconsider it or look at what this Court had said.

Those critical statutes that this Court recognized that involved the principal regulating ground water requires consideration of existing ground water rights at the approval stage in ground water permitting and regulation. Prior appropriation doctrine regulation doesn't quite work as well for the ground water hydrology. The Court recognized back when it recognized back when it issued its June 13, 2012, Order. It said that testing will form the basis for the 3M Plan that the Court expected would identify impacts and the extent of those impacts. Number two develop and implement mitigation to ensure impacted rights are made whole.

The State Engineer approved the 3M Plan that was not based on testing it did not identify impacts, the extent of those impacts not develop or implement mitigation to ensure impacted existing rights were made whole.

What we do know is that even though the State Engineer and KBR have told us that there are going to be significant impacts to water rights to Kobre and Diamond Valley the State Engineer approved a 3M Plan. That neither follows the Nevada law providing expressed conditions to satisfy existing rights nor follows this Courts direction and process.

What the State Engineer and Kobre might have done was adopt its express conditions. When the drawdown of existing ground water exceeds five feet KBR will limit its rate of withdrawal. Or should the drawdown exceed fifteen feet, KBR would cease pumping all together. These are very common permit conditions we see in permits throughout the west.

Should KBR be faced with a regulation because an existing water rights holder was experiencing such drawdowns in their well? KBR could protest the State Engineers regulation. The Existing water rights holder is not faced with the burden of satisfying its existing rights through litigation or petitioning for regulation as the 3M Plan lies out at present.

The 3M Plan lays out a plan for a plan. That requires the petitioner who has existing rights to go to court, to assume the burden of proof and defend his property of interest earlier established by Nevada law. In this respect the 3M Plan as it exists turns the tables on Nevada statutes and expected rules of the State Engineer in the permitting faze. The State Engineer is charged with expressed condition the existing rights. The 3M Plan as it exists doesn't do that.

Certainly once this Court issued its decision the State Engineer should have withdrawn its approval of the 3M Plan for reconsideration and forced KBR to comply with this Courts order. Instead the State Engineer and KBR are here before you.

My clients are not fully convinced that KBR and its multiple companies are to be quote to be good neighbors. Or leave their water rights and livelihood unharmed in the wake of their development path.

Legally for all the reasons outlined in our briefing the 3M Plan fails. Number one it does not provide express conditions except for one. It provided an expressed condition for wildlife surface water supplies. Secondly the 3M Plan establishes an advisory if not regulatory commission which is outside the Nevada constitution outside the legislative power given to the State Engineer, outside the State Engineers authority which only has the power to commit commission by specific legislative dictate and or its rule making. Thirdly it establishes legal terms that interpret statute or rule or makes its own terms. It determines regulation as action criteria, adverse impact and apparently attempts to redefine the statute for expressed conditions for reasonable lowering or conflict. It is also attempting to establish what mitigation it even suggesting that private condemnation in the 3M Plan would be a kind of appropriate mitigation. Standards to determine these regulations by unknown processes in the 3M Plan without any opportunity for the public to be involved are also included in the 3M Plan. It lawfully empowers an organization called a Whack to make decisions about injury to existing water rights and mitigation without any review processes because this Whack is not an administrative agency of the State it is not required to follow the public processes of public meeting law, public records law that are required to make government transparent and open for criticism. Number five it unlawfully gives rule making authority to the Whack and also its technological advisory committee to affect water management and regulation in the whole of Kobeh and Diamond Valley not just the Mount Hope project. It allows for substitution rather than the required satisfaction statutorily required satisfaction of existing rights. Sixth it is vague and deficient. Both the State Engineer and KBR argue in their briefing the 3 M Plans is not binding. Earlier they argued that it was an expressed condition.

THE COURT: It is a binding condition.

MS. SCHROEDER: Yes Your Honor, I would assume if it is an order it is binding. They say that because it can be changed it is not binding.

THE COURT: Doesn't the State Engineer have the ultimate authority over that?

MS. SCHROEDER: The State Engineer should have authority over it and in the 3M Plan it says it does but there is a whole process before the State Engineer is involved. The State Engineer is the last resort under the agreement.

THE COURT: And he is supposed to be? Doesn't he serve on the Whack?

MS. SCHROEDER: Yes,

THE COURT: If the decision of the Whack is not unanimous, he makes the final decision, right?

MS. SCHROEDER: That is right. There is a long and involved process that is not statutory. There is no authority under statute to establish a Whack. The State Engineers authority is limited to defining what a reasonable lowering of the aquifer is and also to

establish expressed conditions. It isn't given the authority to form this Whack or this Tack.

THE COURT: I got the impression that the Whack and the Tack were advisory committees and actually the Tack is the advisor to the Whack and the Whack is the advisor the State Engineer.

MS. SCHROEDER: That is correct.

THE COURT: There is no problem receiving advise is there?

MS. SCHROEDER: The legislature establishes by statute advisory committees to the State Engineer. And this isn't one of them. The legislature that I outlined for you in our briefing there are several statutes where advisory committees to the State Engineer. This is not one of them.

THE COURT: They work state wide as to a particular area do they not?

MS. SCHROEDER: They are supposed to be setting policy. If you read the 3M Plan it is setting policy for this whole valley, two valleys.

THE COURT: One valley as opposed to the state wide committees? There may be a distinction there.

MS. SCHROEDER: There is that distinction, regional verses state wide but I would argue that it doesn't give the State Engineer the power to legislate itself advisory commissions. The State Engineer and KBRs circular argument coupled with the just trust me statement that we will be express as soon as possible that have been typical here are wearing thin.

This Court already gave the State Engineer and KBR the leeway in its order in June 2012 to do testing first with the development of conditions expressly addressing the results of that testing. In the later issue of the 3M Plan instead of withdrawing its order the State Engineer approved the 3 M Plan and continues to do so to this day without consideration to Courts order requiring testing and conditions that relate to the testing.

We need to go back to the beginning and require the State Engineer to comply with the condition that says we need expressed conditions when there is interference. Not a plan that turns the constitution the division of the powers of government, legislative, executive and judicial on its head. That puts in its own administrative laws, statutes and ground water regulation and at the very minimum we believe that this Court should enforce its April order by remanding the State Engineers approval of the 3 M Plan, and directing it to follow the requirements this Court has already established that are necessary to meet the expressed conditions established by statutes.

THE COURT: Mr. Stockton?

MR. STOCKTON: Thank you, Your Honor, with your indulgence I would like to use a power point. For the record may it please the Court, Brian Stockton, Senior Deputy Attorney General representing the Nevada State Engineer. The State Engineer regulates ground water and surface water in the entire State of Nevada. I would like to address Ms. Schroeder's analogy. She talks about you can see the surface water that is coming down, you measure the snow pack and the rain fall and you know basically how much water is going to come down into the river. It is somewhat similar with ground water you know that amount of precipitation that falls and you know that amount that is going to be recharged to the aquifer and generally the rule of thumb in the State of Nevada is only about 3 percent of that precipitation actually makes it to the aquifer. The State Engineer already knows all of that information and he takes that into account when he does these things and the other thing that he knows is if you look on the State Engineers web site they have what is called reconnaissance reports. These reports are when in the 60's the United States geological survey went out and surveyed all of these valleys in Nevada. In that report by Russian Everett, which is number thirty for Kobey Valley they estimated there are two point seven million acres feet of water in the top one hundred feet of that aquifer in Kobey Valley. That is another way that ground water is different. You have all of this water in what the State Engineer calls transitional storage that helps with the ameular affects from year to year. Once surface water runs off it is gone. Ground water is there and it is replenished every year. The State Engineer found that the perennial yield was fifteen thousand per acre feet in Kobeh Valley so that fifteen thousand acre feet is recharged every year.

We are the dries state in the nation. What this case represents are two goals that are set by legislature and by the case law in Nevada. The first goal is protecting existing rights. We understand the concerns of the Etcheverry's and the State Engineer is dedicated to protecting existing rights. It is his job to protect existing rights and he does not shirk that responsibility.

THE COURT: As I understand it he determined while there was adequate water for this mining project, he determined in advance that there were two wells that the Etcheverry's have both that are likely to be impacted by this pumping.

MR. STOCKTON: Actually two springs, Mudd Spring and Lone Mountain Spring.

THE COURT: Mitigation could replace those, is that right?

MR. STOCKTON: That is correct, Your Honor. Mitigation will have to take place before the mine starts pumping. When the Etcheverry's talk about known impacts I am not sure where they are coming from because the mine has not started pumping yet.

THE COURT: They are going to have to do this before they start pumping, right?

MR. STOCKTON: My understanding is that they have offered twice to go ahead and drill those wells and put in solar pumps.

THE COURT: There is no expense to the Etcheverry's to do this?

MR. STOCKTON: Correct. The mine has offered to drill the well. Install a solar pump and maintain the solar pump so that there is no expense to the Etcheverry's. The water will be available at the same location that it is currently available at. The reason that the State Engineer doesn't order that yet is that the mine hasn't pumped anything yet. It's a little difficult to order somebody to do something before they have actually caused any impact.

These two goals of Nevada water law and you have the Etcheverry's talking about protecting existing rights which is absolutely one of the rules of Nevada water law. We also have the goal to make maximum use of these limited water supplies that we have. Ms. Schroeder talked about the testing that was supposedly envisioned in Judge Papez's order. The problem with that analysis is beneficial use. You cannot pump eleven thousand acre feet just to test and run it out onto the ground. That much water has to be put to beneficial use. They can't get out there and run test wells and pump eleven thousand acre feet until they are able to put that water to beneficial use.

In Nevada water law your water right is a use subfactory right. You don't own specific water you own the right to make beneficial use of water. Under the mitigation plan they are going to be able to do that.

Mr. Stockton shows examples on power point of other situations similar to the situation before the court and talks about mitigation resolutions in other situations that have been used and presented options that have been used before.

MR. STOCKTON: The 3 M Plan is a way to avoid conflict. Impacts are different than conflicts. Impacts are unavoidable. Anytime that someone uses water they are having an impact on someone else's water rights. Anytime that you pull water out of the aquifer it's going to have an impact.

THE COURT: Not if the person's water right is still available.

MR. STOCKTON: That is the difference between an impact and a conflict.

THE COURT: I always assumed that it was the same tell me what the difference is.

MR. STOCKTON: If you have a hundred foot deep well and your pump is set at ninety feet and your static water level is at fifty feet, and I use water so that your static water comes down to sixty feet. I have had an impact but I have not conflicted with your water right. That is the difference there is always going to have impact anytime you take water out of an aquifer.

THE COURT: Alright, I was using impact as having an impact on your water right. It doesn't have an impact on your water right if you are in fact able to obtain the acre feet of water that you have been allocated.

MR. STOCKTON: The terminology is a little different. So in order to be precise, an impact is an affect it is not impermissible.

THE COURT: A conflict is impermissible.

MR. STOCKTON. Correct you can have impact as long as you don't conflict. You don't own the water you own the right to use the water. As long as you get the full beneficial use of your water you may be impacted but not conflicted. To go back to your example, if the mine started pumping without putting in these mitigation measures for Lone Mountain and Mudd Springs there would be a conflict. If the mitigations measures are there before those springs go dry then there is no conflict. There for the requirements of 370 sub (2) 533370 sub (2) are satisfied. What it is talking about is if the senior right has its full use of water, there is no conflict. Therefor the use of water is appropriate. Expressed conditions the State Engineer has to make those expressed conditions when he grants the permit. It is our position that those expressed conditions are they monitoring, management and mitigation, those are the expressed conditions. What our position is and what Etcheverry's are asking for are expressed measures. That is the difference. Expressed measures are you put this well in this location this deep at this time. The monitoring plan is necessary to detect those impacts. The impacts of those two springs are pretty clear.

THE COURT: You probably don't know what the expressed measures are until you start pumping, do you?

MR. STOCKTON: Correct, other than the two springs. That is our point and that is what the 3M Plan calls for. The 3M plan calls them centennial wells. The mine will have a production well in one location, then there will be a water source in another location and then there will be this monitoring well in the middle standing guard. So as the production well starts pumping they will see what is happening at the monitoring well and they can interpolate what is happening at the water source.

In Judge Papez's ruling he talks about the data that is going to be gathering as they get down to these mitigations to cure the shortages. He talked about the data that is going to be gathered. That is what the monitoring plan is all about. There is nothing to monitor until they start pumping. That is where the monitoring plan is very specific in the 3M Plan. The monitoring plan is very specific they are going monitoring wells in certain locations production wells in other locations. They are going to have monitoring on the creeks that are out there. All of those things are going to keep track of the water resources in that area to make sure that those senior rights are protected.

THE COURT: It's the Tacks job to analysis and supply that information to the Whack is that right?

MR. STOCKTON: As I understand it our position is and this goes to the delegation of authority argument. They are an advisory committee and they are a forum to where everybody can work out their differences. The Whack will get all of the data in and they will look and it and my understanding is if it is not clear they will send it to this technology advisory committee which is these hydrologists and other experts that look at the data and say we think it means this impact is going to propagate to this location.

THE COURT: I misunderstood then I thought the Tack was going to look at the data and analyze it and explain what it meant to the Whack.

MR. STOCKTON: If there is a question, yes.

THE COURT: If there is a problem they are going to use the Tack to figure it out?

MR. STOCKTON: Yes, the Whack is the water rights specialist. The State Engineers hydrologist sits on the Whack but he is also on the Tack. The hydrologist and managers will look at it and if they can figure out what to do among themselves they will go ahead and implement that. If there is a question of what the data means, that is when they refer it to the Tack. It is those technical people who are going to plug all of that data into the model and figure out what is going on.

We have the monitoring in place and that is what Judge Papez was looking for where it was going to come from. Without the 3M Plan we would have to do it in three stages, to satisfy the arguments of the Etcheverry's. You would have to do the monitoring plan first then you would have to get the data from that and then do the management plan. The State Engineer has the expertise in house and with the resources supplied by the mine to basically be able to do all of that at once. That is what is in this management mitigation plan. Until you find out what those shortages are going to be you don't know what measures are going to be taken. There's a difference between conditions which is monitoring management and mitigation and measures that are actually going to be taken to mitigate any water rights that might be impacted.

The Whack and the Tack do not have any authority to tell anybody to do anything they are like a forum for people to work out their differences. If everybody agrees then they can implement whatever they agree on.

THE COURT: The one thing that concerns me about that is if the Whack unanimously agrees upon a decision whatever that might be can that be appealed? Here is my question, if the State Water Engineer makes a decision that adversely impacts somebody; anybody who is adversely impacted has the right to appeal that to the Court, right?

MR. STOCKTON: Correct.

THE COURT: If the Whack makes a decision it's not the State Engineers decision it's the Whacks decision? Can anybody appeal that?

MR. STOCKTON: It wouldn't really be an appeal because the State Engineer has no go authority. They would actually file in essence a complaint to use the standard terminology. They would say look State Engineer their decision doesn't protect my rights. The State Engineer would look at that De novo and he would go out and find out what is going on out there on the ground and he would make an independent decision.

THE COURT: But somebody adversely impacted could not file a Petition for Judicial Review over a Whack decision could they?

MR. STOCKTON: No they could not. I wouldn't think so directly.

THE COURT: It would be an ultimate decision of the Whack unless there was somebody on the Whack opposing.

MR. STOCKTON: Under NRS 533.450 sub 1 it has to be a decision or order of the State Engineer to be appealable to the District Court.

THE COURT: I understand that but you have significant decisions made by the Whack that are not appealable. Maybe everybody in the Whack is agreeable to it but there may be a third party that is adversely affected they can't appeal it. That concerns me.

MR. STOCKTON: They can't appeal it directly but they can come to the State Engineer and say my water rights are being impacted and the State Engineer will look at those and say yes your water rights are being impacted or if he says no your water rights are not being impacted then that is directly appealable to the District Court. The State Engineer still does that do novo review to satisfy his statutory duty. If somebody is being impacted they don't have to wait for the Whack to finish. The only party that has to comply with this process is the mine.

The mine has to comply with this because this is an expressed condition on their permit it's not a condition on anybody else's permit.

THE COURT: I just want to make sure that if this is implemented that there is no way that somebody that is adversely impacted is going to be unable to file an appeal, which they would be able to file if the State Engineer had just made a decision. That is my concern. The Whack works with unanimity, then there is no State Engineer's decision it's a Whack decision. The Whack decision isn't appealable, right?

MR. STOCKTON: So your concern is that it is not directly appealable to the District Court. The difference is you have all of this water monitoring going on and the goal of the monitoring is to find out if those impacts are coming before they have. So the Whack comes to their decision before they are being impacted. So if Mr. Etcheverry or Mr. Benson has a water right out there that is being impacted he doesn't have to go to them. He goes to the State Engineer and the State Engineer makes a decision and that comes straight to District Court.

If he chooses to go to the Whack they can make their decision, come to their unanimous agreement and they can either abide that or come to the State Engineer and say I don't like it and I want you to change it. They don't have to go through that procedure. Final decisions are always appealable.

THE COURT: By adopting this program he has created an entity decisions are not appealable.

MR. STOCKTON: You can appeal it to the State Engineer but you get the De novo review on the appeal to the State Engineer. If you are aggrieved by that and the State Engineer does nothing you obviously can come to District Court.

THE COURT: That is true I just want to make sure that we have not left somebody out.

MR. STOCKTON: The reasoning is of Ms. Schroeder is the Whack and the Tack are not agencies of the State. They are a forum.

THE COURT: I understand that they are advisories and I approve of getting advice.

MR. STOCKTON: If somebody doesn't like it they come to the State Engineer say I don't like it and the State Engineer takes a fresh look at the facts, makes a decision and if he doesn't like that he comes to District Court and if they don't like that then it goes to the Supreme Court. They short circuit it by telling the State Engineer that they are adversely impacted and they don't like the State Engineers decision without going through all of that it is reviewable but there is an extra step in there. They get another De novo review from the State Engineer.

Ms. Schroeder talked about expressed conditions in their permit that five feet of lowering would result in certain consequences and fifteen feet of lowering of the static water level would result in consequences. I have been doing this for five years and I have never seen those conditions on any permit in the state. It has always been done by a factually based case by case basis.

The rule making issues with this is the only one bound by this is the mine. Because this is in their permit it is not a general rule of applicability it is not going to apply to any other water right holder. Each one is fact specific and has to be based upon the hydrologic area and the other water rights in the area. Each one has to be fact specific so it is our position this is not a rulemaking this is not a general applicability so it was appropriate for the State Engineer.

This is from the Badger decision what the Court has said there is it goes back to that tension and beneficial use and protecting existing rights. Basically the State Engineers interpretation of the water code attempts to balance the need to protect existing rights, also allow for the sustainability of the resource and allow the water to be used to benefit the people of Nevada.

That is what this 3M Plan does. It initiates specific monitoring to determine where impacts are going to occur it requires the mine to manage their pumping because sometimes they can pump from different wells if they see there is going to be an impact here they can pump less from this well and more on that well. The impacts can't be avoided then they can mitigate those impacts so that the senior water right is fully satisfied.

We know that there is water in Kobeh Valley there is 1,100 acre feet existing rights in Kobeh Valley. So those are the rights that are potentially impacted by the mines pumping that is the total amount that is owned not owned by the mine that is the entire valley.

There is 15,000 feet of perennial yield in that valley.

The mine has proposed to put 11,300 foot of that 15,000 to beneficial use. So it is our position in order to satisfy the Nevada goal of getting the maximum beneficial use out of the water, the State Engineers determination is that this 3M Plan adequately protected existing rights is a factual finding which is a finding of fact which is entitled to deference from the Court. He found that these will adequately protect 11,000 acre feet of water rights.

Thank you, your Honor.

THE COURT: Mr. Wilkerson.

MR. WILKERSON: Thank you, your Honor. May it please the Court? The petitioners, the Etcheverry group and Mr. Benson have the right to get their water. What they don't have the right to do is tell the State Engineer how to do his job.

Kobeh Valley Ranch has always conceded that priority rights such as the Benson and the Etcheverry group take priority over our ability to pump. Those rights have to be protected. Mr. Benson, I should not, your Honor, his rights are in Diamond Valley and it is not clear and there is no evidence suggesting that they are even going to be affected. He still has a right to his water. If we pump we have to be sure that their rights that there is no conflict they have to get the water that they are entitled to under their existing water right.

The State Engineer has recognized that as well and the ruling and the permits that are issued expressly provide that they are issued subject to existing rights. And we would submit that is an expressed condition. That means they have to get their water before we can get our water.

Not only did the State Engineer put that expressed condition in the permit and in the ruling he also provided for the condition of the 3M Plan to protect those rights. The 3M Plan was not hastily prepared as petitioners would suggest to your Honor. It was a process that was more than a year long. It just happened that it was submitted to the State Engineer while Judge Papez was considering his ruling. The County had input into the plan and appellants were fully aware of the process when the 3M Plan was being developed.

They could have had as much input as they wanted and they choose not to and now they want to challenge the plan which is really a tool to assist the State Engineer in his job. So when they say trust us we are not asking them to trust us (Kobeh Valley Ranch) but by the same token what they are really saying your Honor and to this Court is don't trust The State Engineer to do his job; which is to administer the water to the State of Nevada and to protect those whom have acquired existing rights.

We would submit, your Honor, the appellants have read the 3M Plan in a very contorted way by taking bits and pieces out of context and their reading is inconsistent with the plan meaning of the 3M Plan. They want to ignore the fact that the State Engineer retains complete control at all times and his job is to protect existing rights.

The 3M Plan is a tool, it is not the only tool that he has but it is an important tool for him to do his job. It is not a delegation of his authority and it doesn't replace the engineer as they suggest in their briefing it merely assists him. They fault the plan because they say that it is not specific enough as to what would be done in the future to protect their rights. As Yogi Berra says predictions are very difficult especially about the future.

The problem that we have here is this is a mine that is going to go on for forty-four years. Under the model that now exists Mr. Etcheverry's water probably wouldn't be impacted for about nine years.

As you start pumping you create a cogent depression from the wells and it spreads out and gets larger and larger so the prediction is about nine years. It could be sooner and that is why the State Engineer has insisted on this plan that has very specific monitoring requirements and to increase the predictability power.

What the plan really is it's an early warning system.

THE COURT: They are right it is a plan to make a plan to make his decision on how to mitigate, right?

MR. WILKERSON: That is right and who to mitigate. Even though appellant's say in their brief that the State Engineer concluded that those springs would be impacted, well that is not what it said as Your Honor noted. It said that they are likely to be impacted. We deal with probabilities and likely hood. There are other springs that the State Engineer found in his ruling that are not likely to be impacted but they could be too. What he has required us to do is to monitor the whole area. When you start to pump and you start to stretch the aquifer, you see what the cone of depression is doing and before it gets to the Etcheverry's before it gets to the Bensons or anybody else the State Engineer can say, you have got to start mitigating this well so that they are not impacted. If they are, I am going to shut you down. He has told us that, he has that power and he can do that at any time if we impact somebody else.

If you look at the 3M Plan it is very specific about the monitoring and as you get to the mitigation it says what the mitigation vices are, these are all well-known mitigation devices. As Mr. Stockton indicated my client is very willing to go out to the Etcheverry's tomorrow and improve their wells if they would allow us. We have offered before and we will tender that offer today. We will have in place improvements on their wells whether they are solar powered pumps or deepening their wells whatever it is so that they get their water. We acknowledge and we have always acknowledged that they are entitled to their water right.

We can't impact that and what they are basically saying is don't trust the State Engineer to do his job right. He is the specialist in the State of Nevada for making sure that our water resources are used wisely, beneficially to the best extent possible. As the law requires protecting anybody who has prior rights from junior or new appropriators. It is all under his control. Under the standard review by what this Court must review the State Engineer's decisions this is an area which is purely within the expertise of the State Engineer on how to interpret the statue how to understand the ground water system. How to protect people that he has charged by law to protect.

What the appellants have tried to do is suggest that these are questions of law. I would submit Your Honor that the extent there is a legal interpretation at all it is the State Engineers interpolation of his own enabling statute which should be entitled by deference by the courts.

The problem is the appellants want to characterize the plan and the ruling in a way that best fits their argument. We are talking about forty-four years into the future none of us know as we sit here today what exactly what is going to happen so what the State Engineer has done is incorporated these expressed conditions in his approval so he can. He will be continually improving the data base the knowledge base, he can see what is going to happen. He can protect people that are entitled to be protected.

A lot of their arguments are rehashing some of the things before Judge Papez when we were here a year ago. As he ruled this is an area that is uniquely within the State Engineers expertise particularly when dealing with an area of uncertainty when we don't know the future. None of us could sit down today and write a 3M Plan that would absolutely definitively describe what we are going to do for every spring for every water

source in this area for the next forty-four years because none of us know what is going to happen.

The legislature has trusted the State Engineer to do his job and these advisory committees as their names suggest are just advisories to him. They created this early warning of potential conflicts so that they can be dwelt with before they happen, and protect people. If they don't the State Engineer always has nuclear sanction he can come to us at any time and say stop. You cannot pump another gallon because you are impacting someone who has prior rights.

Whether we improve Mr. Etcheverry's wells whether we pipe water to him from one of our wells whether we build him stock tanks and haul in water he is absolutely entitled to his water. It is our job to make sure that it gets to him and it's the State Engineers job to make sure that we do that.

Kobey Valley Ranch quote is the only party that is bound by the 3M Plan. Mr. Etcheverry is a member but he is not bound by it. He can go around the Whack and go straight to the State Engineer. If he doesn't like the decision he can come to this court.

Your Honor raised an important question, is a Whack decision appealable? As Mr. Stockton said The Whack doesn't really make a determination what they do is reach an agreement. The State Engineer has to agree. Mr. Etcheverry sits on the Whack, so if he and the rest of the Whack agree to let's say a mitigation measure for one of his springs over his domestic well arguably no one else in the world is impacted by that decision there would be no reason to appeal because it is an agreement. On the other hand if Mr. Etcheverry says wait a second I am not satisfied with what you are proposing to take care of my water rights. First of all we don't have an agreement by the Whack then it has to go the State Engineer.

So what about Mr. Benson, he is not a member of the Whack so let's use him as a representative of the other third parties who could conceivably be impacted by something that is done. They are not on the Whack they don't participate in the decision or the agreement or whatever comes out of the Whack.

THE COURT: The Whack agreements have to be unanimous to become effective?

MR. WILKERSON: If the Whack agrees to do something and Mr. Benson or somebody else out there say wait a second I am being impacted by Kobeh Valley Ranches pumping they don't go to the Whack, they have no standing before the Whack. They do what any other citizen of the State of Nevada does if he or she feels they are being impacted by junior's pumping. You go straight to the State Engineer and say Kobeh Valley Ranch is pumping and my well is going dry. Then it is the State Engineers duty to investigate that to make a decision then that third party has statutory rights to appeal. That is how I see it, since the Whack is not an adjudicatory body and doesn't make decisions the question of an appeal really doesn't fit.

The appellants argue that it is really a wait and see approach plan and I sort of agree that they are right.

THE COURT: It's a plan to find out what the facts are. Then you advise the Whack or the State Engineer and a decision is made and that is the plan.

MR. WILKERSON: There is some suggestion in one of their briefs that the State Engineer cannot allow the substitution of quote different water. Under the laws of Nevada nobody has the right to any particular molecules of water. What your right is you get certain gallons per minute or acre feet or whatever it is. Whether that comes by way of a pipe by Kobreh Valley Ranch well, whether it comes from deeper in the same aquifer if we put in a pump all they are entitled to are the use of the water not any particular water.

They have offered you no reasons whatsoever why if we supply water for example to Mudd Springs from our well or truck it in daily whatever it does to get them their water that is doesn't satisfy them their existing rights.

They raise the specter that Kobreh Valley you don't have the right to do that, well we do we have 11,000 acre feet of water rights and if we have to divert some of ours to satisfy them that is certainly something that we can do.

The Expressed conditions argument, Your Honor, the language is kind of interesting. The appellants want to read that statute as if the word such doesn't exist. The term says under such expressed conditions. They want to read it as if it says under expressed conditions. The word such has to refer back to something, I have read that statute so many times that I get cross eyed and I am hard pressed to say what it refers back to other than the basic fact that prior users have the right to get their water and I think that is why the State Engineer puts in subject to existing uses.

Here the State Engineer went further with this 3M Plan and required further expressed conditions. It is not something that the State Engineer does frequently as I understand it. This is one of the most comprehensive 3M Plans that the State Engineer has ever promulgated and required. It is clearly within the State Engineers expertise and under the Nevada law we should be giving him deference.

This whole argument about whether test pumping has to occur before and that language came out of Judge Papez's decision, first of all that was not raised in appellants opening brief. By law that argument should be waived, they raised it for the first time in their reply. They did it because they saw it in the Eureka County proposed amici brief and that is when they brought it in. Even if Your Honor wants to consider that argument on the merits thinking about it as Mr. Stockton says you can't test the aquifer you can't test the system until you start pumping. We have to start pumping and to start pumping we need a permit, the permit is subject to these expressed conditions and once we start stressing that aquifer and seeing what happens, then the expressed mitigation measures will be brought to play.

Right now in the year since the 3M has been approved what we have been doing is collecting data. No pumping has taken place so all of that data is establishing the base line so that once we start pumping we can compare it and see how it changes and be in a position to allow the State Engineer to do his job.

THE COURT: Have these monitoring wells been drilled?

MR. WILKERSON: A lot of them have, yes and we are collecting data on them now. We are also collecting data on the streams the stream flow in the Roberts Mountains that surround this area and I believe the first reports were last month.

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

MR. WILKERSON: There is a time table. We need the water to process but all we have started to do out on the site is stripping and starting to do some construction, they have welded about half of the pipe that will carry the water from the wells. We are still a ways off before pumping even starts.

THE COURT: A ways off is months, years?

MR. WILKERSON: They are going to need some water to do construction and that is going to come as soon as that starts.

THE COURT: That would be nominal light?

MR. WILKERSON: Yes. The big demand will be for processing in about two years from now so it is down the road quite a bit. In the mean time we will continue to collect this data.

We take serious issue with this delegation of authority. The Whack does not have any authority it is merely an advisory board. The 3 M Plan says specifically that they are there to assist the State Engineer. It reserves to the State Engineer his final authority. It is clearly only advisory it does not delegate his authority. They have no authority to adjudicate disputes. If there is a dispute nobody has to take that to the Whack. If Mr. Etcheverry wants to can but he is not required to. Kobeh Valley Ranch is the only party that is bound and if anybody doesn't like it they come to the State Engineer and if they don't like his decision then they come to this Court. Another thing that I should point out is that the State Engineer is not shackled by this 3M Plan. He can on his own motion at any time do whatever he is entitled to do under the law. He does not have to wait for a recommendation from the Whack or the Tack. After Your Honor asked the question about who makes recommendations to whom. I was looking at this and your understanding is correct. The technical advisory committee would evaluate the monitoring data, reports and analysis and report it for the 3M Plan to determine whether data gaps exist and make appropriate recommendations. They will also develop and recommend action criteria to the Whack for management or mitigation measures based upon available data.

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

MR. WILKERSON: I think that they meet at least once a year and more often as required.

THE COURT: These are the technical people I thought were going to do the analysis then they would evaluate that analysis then submit that evaluation to the Whack. Apparently if the Whack has a question they give it to the Tack and they go figure it out.

MR. WILKERSON: Right and there are a lot of expertise on the Whack too, because of who is on it. I think there may be an overlap of duties there as far as responsibilities. It is not a rule making this 3M Plan it does not establish a general of applicability. It applies only to KBR and its use of water. Other water users are not bound so this does not fit within the rubric of a ruling making. If we KBR don't comply with the 3M then we are in violation of that and in violation of our permit terms. All of those ramifications will come home to roost. It only applies to Kobey Valley Ranch it doesn't apply to anybody else out there. They argue that it is vague and inefficient. We have made our point clear that this plan is a very robust plan that will develop information so that the State Engineer can do his job and do it well. Kobey Valley Ranch and Eureka Molly can run their mine. Bottom line Benson and the Etcheverry's get the water that they are entitled to. For that reason Your Honor, we ask that you dismiss this appeal and affirm the decision of the State Engineer.

THE COURT: Court is in recess.

2:45 P.M. Court is back in session

MS. SCHROEDER: We are here because the State Engineer issued a ruling failing to protecting existing rights, further issued an order saying that the 3M Plan would protect existing rights. We are here because they did that pursuant to a statute. Everyone wants to define the statute today and ultimately Your Honor it is up to you. But NRS 534.1105 is what we are looking at. It doesn't say we issue a permit and then we take care of existing appropriations. It says that junior water permits can be issued can, not after the fact. They are not to be issued unless expressed conditions can protect them. What are these permits that we are talking about? These permits or existing rights are not a right to a molecule of water. I would agree that water law isn't about molecules of water and that is exactly the point. The molecule of water that comes from the mine over to my client to replace a spring is not his right. That is not his property right. The property right is to the spring to that source of water. He is not entitled to the molecule. The statute requires if you look at it is protection of that existing right to that source of water.

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

MS. SCHROEDER: He is entitled that water from that same source. His water rights state the source on the water right.

THE COURT: I understand that but if that can be mitigated by giving him water from some other source isn't that suffice under the statute?

MS. SCHROEDER: That mitigation under the statute as the State Engineers brief points out is not defined. When you are replacing a property interest Your Honor, I would suggest to you that if you are taking an acre of land and replacing it with another acre of land you simply don't do that by mitigation.

THE COURT: Land is different than water. Water is water it doesn't make any difference where it comes from.

MS. SCHROEDER: We are not talking about water we are talking about a water right. Which is different than that molecule of water as counsel points out? The statutes and the case law in Nevada talk about the water rights not about the molecule.

THE COURT: You are saying is that the water that he has has to come from that source?

MS. SCHROEDER: It has to come from that source and it can be mitigated but those mitigation problems have to be solved with his agreement. Or the State Engineer has to order it some way.

THE COURT: I never understood that the water right was necessarily from the same source.

MS. SCHROEDER: The water right has the source on it.

THE COURT: I understand that the water right is from a source but can it not be mitigated from other sources?

MS. SCHROEDER: That is a question that you can ask the State Engineer. The mitigation it can be, but legally does the statute say it, no. The State Engineers brief says mitigation is not divine. What I would say is mitigation is not going to be slapped on my client by a pipeline; he is going to have to agree to that.

THE COURT: Currently one of your sources comes from a spring right? What you are saying is that one of the water sources is a spring and they have to maintain the water as a spring rather than pumping it from a different aquifer?

MS. SCHROEDER: That is correct and there is the option for mitigation. What I am saying is that the State Engineer doesn't have the authority to slap on any type of mitigation on my client. As KBR pointed out in its argument is this plan is only about them. It's not about me or my clients.

THE COURT: It doesn't bind them it only binds the mine.

MS. SCHROEDER: I cannot bind my clients to accept mitigation unless they agree. This statute says here that the State Engineer has no authority to issue.

THE COURT: Judge Papez's order makes it clear that the 3M Plan can bind your client to accept mitigation.

MS. SCHROEDER: I don't think so Your Honor, what Judge Papez says is the 3M Plan should go through testing and based upon that testing establishes appropriate mitigation. It doesn't say anything about what that mitigation might be.

THE COURT: Mr. Stockton makes the argument that you can't test until you pump. Is that true?

MS. SCHROEDER: That is probably true.

THE COURT: You can't pump until you have a permit.

MS. SCHROEDER: You can get a permit and test pumping. They are capable of getting a temporary permit or another just to do testing. That is the possibility. What I was suggesting instead of involving all of us in this plan to make a plan and no orders that can be appealed. We need to have a draw down condition. That is an easy condition; Mr. Stockton suggested oh he has never seen it. I have been practicing for twenty-five years and I have seen it. Maybe not in Nevada but it happens in all the western states. It's an easy condition to put in. Has KBR said that they would accept that? No they said oh no we will put in a new well for you we don't want a draw down expressed condition but we will put in a new well for you. That isn't the mitigation that is required.

I would like to talk about my clients. KBR suggests that my client is sitting on their Whack. My client has been invited to sit on their Whack. Mr. Benson has not been invited to sit on their Whack if fact he attended a meeting and was kicked out of the meeting because it was not a public meeting and he was not allowed.

Also we talked about whether there orders are appealable. Their orders are not even published how is anyone to know what is happening. No one is to know because it is all private. Just like Mr. Benson being kicked out of the meeting. They get to choose who gets to be there who gets to be unanimous who is going to hear about their decision until someone is injured. That is the hugest problem with this case. There is no public process as the Court noted.

The State Engineer makes the argument through Mr. Stockton that we know that two of the springs of Mr. Etchevery are going to be impacted and the 3M Plan addresses that. It doesn't address it. I went through it again as I was sitting there all fifteen pages of it and there is nothing in there about those springs being mitigated. Nothing about them being injured or impacted or there being a conflict with them. I would suggest this idea of impact and conflict, the word impact is not defined by statute. I don't have a problem of how the State Engineer defined it but it's not in the statute. Conflict is and we do have a conflict as the State Engineer suggested.

THE COURT: He made that binding.

MS. SCHROEDER: Yes he did in his ruling. But there is nothing in the 3M Plan to address that problem. Not specifically maybe some generality that I don't understand. As KBR pointed out I don't know how to read their mitigation plan and if I as a water lawyer practicing for twenty-five years don't understand it I would suspect that most people don't.

We talked about the source of the right. I would like to point out one last thing and I am reading from page fourteen of the decision making process Preens 28; section b. In section 28 in the decision making process of the 3M Plan, in section b it says in the event that any of the parties disagree as to whether the proponents proposed or ongoing groundwater construction are resulting or will result in adverse impacts any party may petition the Nevada State Engineer to request the Nevada State Engineer to determine whether there is or there is not an adverse impact that requires implementation management or mitigation measures. They write statute here. They provide that the parties in this little group if they don't like something or they disagree with something can go ahead and take it to the State Engineer.

What I am going to suggest to you is that the State Engineer does not make advisory opinions. He is required by statute to act on enforcing water law. This is suggesting that he is going to be ongoing basis, on call to KBR and it's Whack to mitigate or decide things on a day by day basis. In reality the State Engineer is only going to receive the monitoring reports according to its ruling to its letter approving this once a year. Once a year it will receive the report once a year and by that time my client's springs will be dry.

THE COURT: I am going to ask Mr. Stockton to address this one issue that she raised and I did not understand this to be the law. A permit holder to a certain amount of water from a particular source must confine that right to that source.

MR. STOCKTON: She is correct and the example that I used with the sulfur spring with the map that I showed you. What happened was the mine paid for and filed an application, a change application on behalf of the owner of the spring; which is what KBR will have to do here.

What the State Engineer did there and will have to do here is issue what is called a supplemental water right. In a normal case, say I have a right to the Carson River and I need four acre feet a year to make my crop of alfalfa. This particular year I only get two point five feet of surface water. I can apply for a supplemental ground water right where I use my surface water right and whatever the surface water doesn't supply I can make up with ground water.

That is what this will be, a supplemental right that is issued to use ground water to make up for the lack of water.

THE COURT: Has this happened before?

MR. STOCKTON: The exact same thing happened on the sulfur spring. She is correct there does have to be an application. The State Engineer does issue a permit for that ground water right as supplemental to the surface water right. If the mine, when the mine gets done mining their stuff and the spring starts flowing again the Etcheverrys will have to use the surface water first if the spring starts flowing again then they can make up any difference from the ground water supplemental right.

The Court inquires if there is anything further from any of the parties, all parties' state they have nothing further.

THE COURT: First of all I spent a lot of time reading Judge Papez's order which authorized the 3M Plan. I must tell you I have never seen a more thorough analysis of a Petition for Judicial Review that was given by Judge Papez in that fifty three page decision. He must have spent an awful lot of time writing that decision and I think doing a very good analysis. I know you would like me to reverse his decision but I am not about to do that because he did a good decision.

Number two, on your delegation of authority argument, in my mind as I look at these two committees, both the Tack and the Whack are really advisory committees with the State Engineer receiving advice. If it be by a committee so better the advice; and if it be by a technical committee even better, the State Engineer still has the final authority.

If somebody on the Whack doesn't like that decision the State Engineer has to make that decision and even if everyone on the Whack makes a decision and there is a complaint by a third person. The State Engineer makes the final decision so he has not delegated any of his authority, he still has it.

On your expressed condition argument, the 3M Plan does have standards, standards for conflicts.

A senior water right permit defines what that right is, any time a senior user is not able to use his or her water, and there is a conflict.

The 3M Plan is designed as a proactive, not a reactive. It's proactive in the sense that it is going to monitor the water, and in advance of a conflict, advise the State Engineer through the Whack that there is a problem or a potential problem and deal with that problem.

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

You're right; it's a plan to create a plan. It is the Tack and the Whack's analysis. That's the plan to submit to the State Engineer sufficient facts so that they can develop an appropriate decision to avoid a conflict. That's the plan.

The last analysis, I think substantial evidence supports the decision of the State Engineer, so if that is the case, I'm requires to deny that petition for judicial review.

I am going to ask the State Engineer to prepare appropriate findings, and if you want to submit them to KBR for their input, that's fine, but if you would submit those to me.

MR. STOCKTON: Your Honor, I would be glad to do that. I'd like to ask for a little time, though.

THE COURT: Time is not particularly of the essence. I would like them in MS Word form so that I can work on them myself and I can give you an e-mail address.

Nothing further, Court is in recess.

Approved:

J Charles Thompson, District Court Judge

Attest:



Leanna M. Cantrell, Deputy Court Clerk

Certification of Copy

STATE OF NEVADA,

COUNTY OF EUREKA,

I, Beverly Conley, County Clerk of Eureka County, in the State of Nevada, and Ex-Officio Deputy Court Clerk of District Court, do hereby certify that the foregoing is a true, full and correct copy of the original, *NOTICE OF APPEAL, CASE APPEAL STATEMENT, DISTRICT COURT DOCKET ENTRIES, CIVIL CASE COVER SHEET, NOTICE OF INTENT TO DEFEND, ORDER ALLOWING INTERVENTION, ORDER ADMITTING TO PRACTICE, NOTICE OF ENTRY OF ORDER ALLOWING INTERVENTION, NOTICE OF INTENT TO FILE RESPONSE TO EUREKA COUNTY'S MOTION FOR LEAVE TO FILE, ORDER DENYING MOTION TO LEAVE TO FILE AMICUS CURIAE BRIEF, NOTICE OF HEARING, NOTICE OF ENTRY OF ORDER, FINDING OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT DENYING THE PETITION FOR JUDICIAL REVIEW, COURT MINUTES OF ORAL ARGUMENT APRIL 15, 2013* which now remains of record in my office at Eureka, County of Eureka and State of Nevada, aforesaid.

**IN WITNESS THEREOF, I have
hereunto set my hand and affixed the
seal of the Court at my office, Eureka,
Nevada, this 22th day of May 2013 A. D.**

Beverly Conley

**County Clerk and Ex-Officio Clerk of
Said Court**

By: *Shanna M. Carwell*

DEPUTY CLERK

Eureka County Clerk
By H. H. H. H. H.

Docket 63258 Document 2013-15332

RECEIVED

FEB 25 2013

Rurka County
Clerk & Treasurer

PARSONS
BEHLE &
LATIMER

1 PLEASE TAKE NOTICE that on April 15, 2013 at 1:30 p.m., a hearing is set before
2 Honorable Judge J. Charles Thompson, Department 2 of the above-entitled Court for the purpose
3 of hearing oral arguments regarding Petitioners' Petition for Judicial Review in the above-
4 referenced matter.

5
6 **AFFIRMATION**

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

9 Dated: February 21, 2013

PARSONS BEHLE & LATIMER

10
11 By: 

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21 Attorneys for Kobeh Valley Ranch
22
23
24
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27
28

1 **CERTIFICATE OF SERVICE**


2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle &
3 Latimer, and that on this 21st day of February, 2013, I served a true and correct copy of the
4 foregoing **NOTICE OF HEARING** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with
5 first-class postage fully prepaid and addressed as follows:

6 Bryan L. Stockton, Esq.
7 Senior Deputy Attorney General
8 NEVADA ATTORNEY GENERAL'S OFFICE
9 100 North Carson Street
10 Carson City NV 89701
11 Courtesy Email: bstockton@ag.nv.gov

12 *Attorneys for Nevada State Engineer*

Therese A. Ure, Esq.
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440 Marsh Avenue
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*Attorneys for Etcheverry Family, Kenneth F.
Benson and Diamond Cattle Company,
LLC*

13 

14 Employee of Parsons Behle & Latimer
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FEB 25 2013

Eureka County Clerk
By [Signature]

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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,

Case No.: CV1207-178
Dept. No.: 2

Petitioners,

v.

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

Respondent.

KOBEH VALLEY RANCH, LLC,

Intervenor.

ORDER DENYING
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Eureka County, a political subdivision of the State of Nevada, by and through its counsel
Allison, MacKenzie, Pavlakis, Wright & Fagan, Ltd. and Theodore Beutel, Eureka County
District Attorney, filed Eureka County's Motion for Leave to File Amicus Curiae Brief. The
Court having reviewed and considered the Motion for Leave to File Amicus Curiae Brief filed by

RECEIVED
FEB 25 2013
Eureka County
Clerk & Treasurer

1 Eureka County, the Opposition to Eureka County's Motion for Leave to File Amicus Curiae
2 Brief, filed by Kobeh Valley Ranch LLC and being fully apprised of the facts and law,

3 IT IS HEREBY ORDERED that Eureka County's Motion for Leave to File Amicus
4 Curiae Brief is denied.

5
6 IT IS SO ORDERED:

7 DATED: 2-18-2013

8
9 
10 DISTRICT JUDGE

11
12 Submitted By:

13 PARSONS BEHLE & LATIMER
14 Ross E. de Lipkau, Bar No. 1628
15 John R. Zimmerman, Bar No. 9729
16 50 West Liberty Street, Suite 750
17 Reno, NV 89501
18 Telephone: (775) 323-1601
19 Facsimile: (775) 348-7250
20 Email: rdelipkau@parsonsbehle.com
21 jzimmerman@parsonsbehle.com
22 Attorneys for Respondent
23 Kobeh Valley Ranch, LLC
24
25
26
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28

1 **CERTIFICATE OF SERVICE**

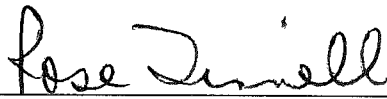
2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle &
3 Latimer, and that on this 21st day of February, 2013, I served a true and correct copy of the
4 foregoing **ORDER DENYING MOTION FOR LEAVE TO FILE AMICUS CURIAE**
5 **BRIEF** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully
6 prepaid and addressed as follows:

7 Bryan L. Stockton, Esq.
8 Senior Deputy Attorney General
9 NEVADA ATTORNEY GENERAL'S OFFICE
10 100 North Carson Street
11 Carson City NV 89701
12 Courtesy Email: bstockton@ag.nv.gov

13 *Attorneys for Nevada State Engineer*

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

14 
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Attorneys for Intervenor
KOBEL VALLEY RANCH, LLC

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
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DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES,

Respondent.

KOBEL VALLEY RANCH, LLC,

Intervenor.

NOTICE OF INTENT TO FILE RESPONSE TO EUREKA COUNTY'S MOTION FOR
LEAVE TO FILE AMICUS CURIAE BRIEF

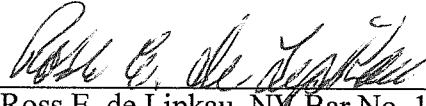
1 Intervenor, KOBEL VALLEY RANCH, LLC, by and through its counsel of record,
2 Parsons Behle & Latimer, hereby gives notice that it intends to file a Response to Eureka
3 County's Motion for Leave to File Amicus Curiae Brief, filed on the 9th day of November, 2012
4 in the above-entitled matter, on or before November 26, 2012.

5 **AFFIRMATION**

6 The undersigned hereby affirms that this document does not contain the social security
7 number of any person.

8 DATED: November 16, 2012.

PARSONS BEHLE & LATIMER

9
10 By: 
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25 ecf@parsonsbehle.com

26 Attorneys for Kobeh Valley Ranch
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 16th day of November, 2012, I served a true and correct copy of the foregoing **NOTICE OF INTENT OF FILE RESPONSE TO EUREKA COUNTY'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as follows:

Bryan L. Stockton, Esq.
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Jennifer Mahe, Esq.
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*Attorneys for Etcheverry Family, Kenneth
F. Benson and Diamond Cattle Company,
LLC*

Theodore Beutel, Esq.
Eureka County District Attorney's Office
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Eureka, Nevada 89316

Attorneys for Eureka County


Employee of Parsons Behle & Latimer

OCT 03 2012

Eureka County Clerk

By Dannan Cantrell

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Attorneys for Intervenor
 KOBEH VALLEY RANCH, LLC

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,

Case No.: CV1207-178

Dept. No.: 2

Petitioners,

v.

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

Respondent.

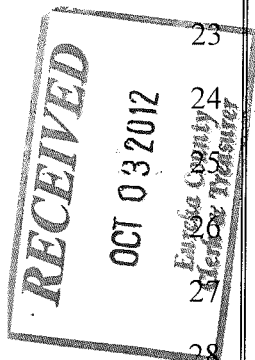
KOBEH VALLEY RANCH, LLC,

Intervenor.

STIPULATION AND ORDER REGARDING BRIEFING SCHEDULE

This Stipulation made and entered into this 30th day of August, 2012 between Petitioner's 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.

4836-0408-8848.2



1 Benson, an individual, by and through its attorney of record Laura Schroeder, Esq. and Therese
2 Ure; the Nevada State Engineer by and through his Deputy Attorney General Bryan Stockton, and
3 Respondent in Intervention Kobre Valley Ranch, LLC, by and through its attorneys Parsons
4 Behle & Latimer.

5 The above parties do hereby stipulate as follows:

6 That the Record on Appeal, together with supplements thereto has been duly submitted to
7 the Clerk of the Seventh Judicial District Court. The parties hereby agree to the following
8 briefing schedule.

9 A. Petitioners shall serve their opening brief within 60 days of the date ~~of~~ this
10 stipulation. *is signed by all parties. TMA*

11 B. Respondents shall have 45 days after date of service of petitioners' opening brief
12 to serve their response briefs.

13 C. Petitioners, should they desire, may serve their reply brief within 30 days after
14 service of respondents' briefs.

15 Thereafter, the parties shall set the matter for hearing before the Court in accordance with
16 local rules.

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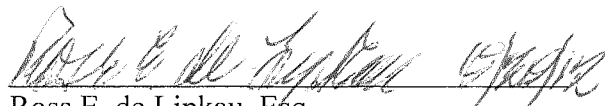
26 . . .

27 . . .

28 . . .

AFFIRMATION

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




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Therese A. Ure, Esq.
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44 Marsh Avenue
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Telephone: (775) 786-8800

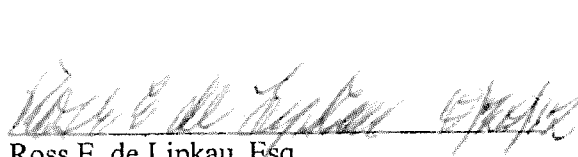
IT IS SO ORDERED.

DATED: September 28, 2012

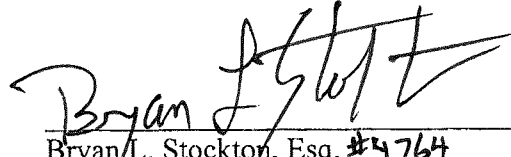

DISTRICT JUDGE

AFFIRMATION

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



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Therese A. Ure, Esq.
Schroeder Law Offices, P.C.
44 Marsh Avenue
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Telephone: (775) 786-8800

IT IS SO ORDERED.

DATED: _____

DISTRICT JUDGE

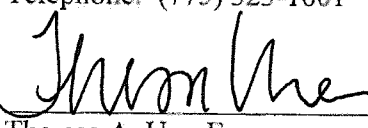
AFFIRMATION

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



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Senior Deputy Attorney General
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Carson City, Nevada 89701
Telephone: (775) 684-1228

 9/6/2012

Therese A. Ure, Esq. (as amended)
Schroeder Law Offices, P.C. (14 para. A)
44 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 786-8800

IT IS SO ORDERED.

DATED: _____

DISTRICT JUDGE

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Rose Tennell
Employee of Parsons Behle & Latimer

ORIGINAL

NO. _____
FILED
AUG 23 2012
Eureka County Clerk
By Jeanne M. Canfield

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Attorneys for Intervenor
KOBEN VALLEY RANCH, LLC

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

MICHEL AND MARGARET ANN
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DIAMOND CATTLE COMPANY, LLC, a
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KENNETH F. BENSON, an individual,

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STATE ENGINEER OF NEVADA,
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DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES,

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Case No.: CV1207-178

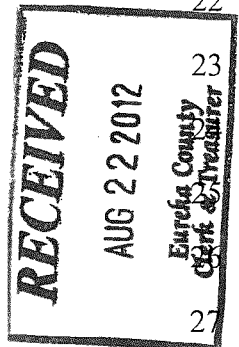
Dept. No.: 2

NOTICE OF ENTRY OF ORDER ALLOWING INTERVENTION

PLEASE TAKE NOTICE that on August 14, 2012, the Court entered an Order Allowing
Intervention in the above-entitled action.

...

...



1 A copy of the Order is attached hereto as Exhibit 1.

2 **AFFIRMATION**

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

5 Dated: August 11, 2012.

PARSONS BEHLE & LATIMER

6
7 By: 

Ross E. de Lipkau, NV Bar No. 1628
John R. Zimmerman, NV Bar No. 9729
50 W. Liberty Street; Suite 750
Reno, NV 89501
Ph: 775.323.1601
Em: rdelipkau@parsonsbehle.com
Em: jzimmerman@parsonsbehle.com

11 Francis M. Wikstrom, *Pro Hac Vice*
12 *Pending*
UT Bar No. 3462
201 South Main Street; Suite 1800
Salt Lake City, UT 84111
Ph: 801.532.1234
Em: fwikstrom@parsonsbehle.com
15 ecf@parsonsbehle.com

16 Attorneys for Kobeh Valley Ranch
17
18
19
20
21
22
23
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25
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle &
3 Latimer, and that on this 21st day of August, 2012, I served a true and correct copy of the
4 foregoing **NOTICE OF ENTRY OF ORDER ALLOWING INTERVENTION** via U.S. Mail,
5 at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as
6 follows:

7 Bryan L. Stockton, Esq.
8 Senior Deputy Attorney General
9 NEVADA ATTORNEY GENERAL'S OFFICE
10 100 North Carson Street
11 Carson City NV 89701
12 Email: bstockton@ag.nv.gov

Attorneys for Nevada State Engineer

13 Therese A. Ure, Esq.
14 SCHROEDER LAW OFFICES, P.C.
15 440 Marsh Avenue
Reno, NV 89509
Email: therese@water-law.com

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

18 
19 Employee of Parsons Behle & Latimer

Exhibit 1

Exhibit 1

Case No.: CV1207-178

Dept. No.: 2

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
WATER RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Respondent.

ORDER ALLOWING INTERVENTION

Based upon a Stipulation of the parties and proposed Intervenor, Kobeh Valley Ranch, LLC, and good cause appearing:

IT IS HEREBY ORDERED that Kobeh Valley Ranch, LLC, is authorized to intervene as a Respondent in the above-captioned action, and to file a responsive pleading to the *Petition for Judicial Review*. All subsequent captions for pleadings filed herein shall reflect Kobeh Valley Ranch, LLC, as a Respondent.

...

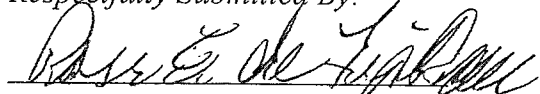
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IT IS SO ORDERED.

Dated: August 9, 2012 By: S. Dan L. Papez
DISTRICT JUDGE

Respectfully Submitted By:



PARSONS BEHLE & LATIMER
Attorneys for Kobeh Valley Ranch, LLC
Ross E. de Lipkau, NV Bar No. 1628
John R. Zimmerman, NV Bar No. 9729
50 W. Liberty St., Suite 750
Reno NV 89501
Ph: 775.323.1601
Fx: 775.348.7250
Em: rdelipkau@parsonsbehle.com
Em: jzimmerman@parsonsbehle.com

NO. _____
FILED
AUG 23 2012
Eureka County Clerk
By *Glenn Campbell*

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,

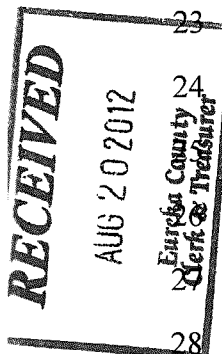
Respondent.

Case No.: CV1207-178

Dept. No.: 2

ORDER ADMITTING TO PRACTICE

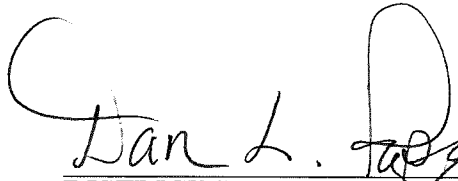
Francis M. Wikstrom, having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Supplement to Verified Application for Association of Counsel (the previous Verified Application for Association of Counsel was approved, and Judge Dan Papez granted Mr. Wikstrom's Motion to Associate Counsel in consolidated judicial review proceedings in CV 1108-155, 156 and 157 which are directly related to this matter), a Certificate



1 of Good Standing for the state of Utah, and the State Bar of Nevada Statement; said application
2 having been noticed, no objections have been made, and the Court being fully apprised in the
3 premises, and good cause appearing,

4 IT IS HEREBY ORDERED that said application is hereby granted, and Francis M.
5 Wikstrom is hereby admitted to practice in the above-entitled Court for the purposes of the above-
6 entitled matter. This admission *pro hac vice* is an extension of Mr. Wikstrom's admission and
7 representation in the consolidated judicial review proceedings referenced above.
8

9 DATED: August 22, 2012
10

11 
12 DISTRICT JUDGE
13
14

15 Submitted By:

16 PARSONS BEHLE & LATIMER
17 Ross E. de Lipkau, Bar No. 1628
18 John R. Zimmerman, Bar No. 9729
19 50 West Liberty Street, Suite 750
20 Reno, NV 89501
21 Telephone: (775) 323-1601
22 Facsimile: (775) 348-7250
23 Email: rdelipkau@parsonsbehle.com
24 jzimmerman@parsonsbehle.com
25 Attorneys for Respondent
26 Kobeh Valley Ranch, LLC
27
28

AUG 14 2012

Eureka County Clerk
By Deanne M. Antel

Case No.: CV1207-178

Dept. No.: 2

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
WATER RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Respondent.

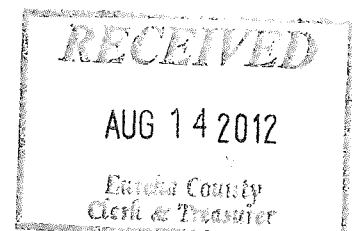
ORDER ALLOWING INTERVENTION

Based upon a Stipulation of the parties and proposed Intervenor, Kobeh Valley Ranch, LLC, and good cause appearing:

IT IS HEREBY ORDERED that Kobeh Valley Ranch, LLC, is authorized to intervene as a Respondent in the above-captioned action, and to file a responsive pleading to the *Petition for Judicial Review*. All subsequent captions for pleadings filed herein shall reflect Kobeh Valley Ranch, LLC, as a Respondent.

...

...



1 IT IS SO ORDERED.

2 Dated: August 9, 2012

3 By: [Signature]
DISTRICT JUDGE

4 Respectfully Submitted By:

5 [Signature]

6 PARSONS BEHLE & LATIMER

Attorneys for Kobeh Valley Ranch, LLC

7 Ross E. de Lipkau, NV Bar No. 1628

John R. Zimmerman, NV Bar No. 9729

8 50 W. Liberty St., Suite 750

Reno NV 89501

9 Ph: 775.323.1601

Fx: 775.348.7250

10 Em: rdelipkau@parsonsbehle.com

11 Em: jzimmerman@parsonsbehle.com

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22
23 SEVENTH JUDICIAL DISTRICT COURT,
IN AND FOR COUNTY OF EUREKA,
STATE OF NEVADA

} SS

24 I, the Undersigned COUNTY CLERK and Ex-Officio
25 CLERK of the SEVENTH JUDICIAL DISTRICT COURT do hereby CERTIFY
26 that the foregoing is a full, true and correct copy of the original on file in
27 my office and that I have carefully compared the same with the
28 original.

WITNESS, My Hand and Seal of said
DISTRICT COURT, this 2nd day of May 20 13

County Clerk and Ex-Officio Court Clerk

[Signature]

Deputy Clerk

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

Electronically Filed
May 24 2013 10:08 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

1 CASE NO: CV 1207-178

2 DEPT. NO: 2

3 SCHROEDER LAW OFFICES, P.C.
4 Laura A. Schroeder, Nevada State Bar #3595
5 Therese A. Ure, Nevada State Bar #10255
6 440 Marsh Ave.
7 Reno, Nevada 89509-1515
8 PHONE: (775) 786-8800; FAX: (877) 600-4971
9 counsel@water-law.com
10 *Attorneys for the Petitioners*

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

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

15 IN AND FOR THE COUNTY OF EUREKA

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

21 Petitioners,

22 v.

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

Respondent,

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

Intervenor-Respondent.

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

///

///



1 **NOTICE OF APPEAL**

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

8 DATED this 20th day of May, 2013.

9
10 SCHROEDER LAW OFFICES, P.C.

11 

12 Laura A. Schroeder, NSB #3595

13 Therese A. Ure, NSB #10255

14 440 March Ave., Reno, NV 89509

15 Phone: (775) 786-8800

16 Email: counsel@water-law.com

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



1 **PROOF OF SERVICE**

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

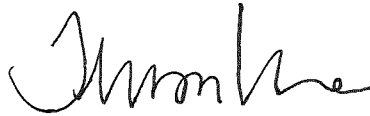
5 ***VIA US MAIL ONLY***

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

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

9 Francis Wikstrom
10 Parsons, Behle & Latimer
11 201 South Main Street, Ste. 1800
12 Salt Lake City, Utah 84111

12 Dated this 20th day of May, 2013.



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



Case No.: CV1207-178

Dept. No.: 2

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-Appellants Kenneth

F. Benson, Diamond Cattle Company, LLC, and

Michel and Margaret Ann Etcheverry Family LP

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,

Respondent,

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

Intervenor-Respondent.

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

///



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

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

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

9 A. Kenneth F. Benson

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

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

18 B. Diamond Cattle Company, LLC

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

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



1 C. Michel and Margaret Ann Etcheverry Family, LP

- 2 1. Etcheverry is represented in this appeal by Schroeder Law Offices,
3 P.C. Counsel Laura A. Schroeder (NSB #3595) and Therese A.
4 Ure (NSB #10255) are both licensed to practice law in the State of
5 Nevada.
6 2. Schroeder Law Offices, P.C.
7 440 Marsh Ave.
8 Reno, Nevada 89509
9 Phone: 775-786-8800

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

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

- 14 1. The State Engineer is represented by the Nevada Attorney
15 General's Office. Counsel Senior Deputy Attorney General Bryan
16 L. Stockton is licensed to practice law in the State of Nevada, NSB
17 #4764.
18 2. Attorney General's Office
19 100 North Carson Street
20 Carson City, Nevada 89701
21 Phone: 775-684-1228
22 3. It is unknown if the State Engineer will be represented by Mr.
23 Stockton in this appeal.

24 ///

25 ///

26 ///



1 B. Kobeh Valley Ranch, LLC

2 1. Kobeh Valley Ranch, LLC is represented by Parsons Behle &
3 Latimer. Counsel Ross E. de Lipkau is licensed to practice law in
4 the State of Nevada, NSB #1628.

5 a. Parsons Behle & Latimer
6 50 West Liberty Street, Suite 750
7 Reno, Nevada 89501
8 Phone: 775-323-1601

9 b. It is unknown if Kobeh Valley Ranch, LLC will be represented
10 by Mr. de Lipkau in this appeal.

11 2. Kobeh Valley Ranch, LLC is also represented by Parsons Behle &
12 Latimer. Counsel John R. Zimmerman is licensed to practice law
13 in the State of Nevada, NSB #9729.

14 a. Parsons Behle & Latimer
15 50 West Liberty Street, Suite 750
16 Reno, Nevada 89501
17 Phone: 775-323-1601

18 b. It is unknown if Kobeh Valley Ranch, LLC will be represented
19 by Mr. Zimmerman in this matter.

20 3. Kobeh Valley Ranch, LLC is also represented by Parsons Behle &
21 Latimer. Counsel Francis M. Wikstrom is not licensed to practice
22 law in the State of Nevada. Mr. Wikstrom is licensed to practice
23 law in the State of Utah, USB #3462. A motion was filed on or
24 around August 16, 2012 to allow Mr. Wikstrom permission to
25 appear under SCR 42, however Petitioners were not served with
26 nor have knowledge of an order granting the motion.



1 a. Parsons Behle & Latimer

2 201 South Main Street, Ste. 1800

3 Salt Lake City, Utah 8411

4 Phone: 801-533-0218

5 b. It is unknown if Kobeh Valley Ranch, LLC will be represented
6 by Mr. Wikstrom in this matter.

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

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

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

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

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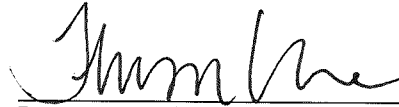
26 ///



1 IX. This case does not currently have a possibility of settlement. NRAP 3(f)(3)(L).

2 DATED this 20th day of May, 2013.

3
4 SCHROEDER LAW OFFICES, P.C.

5 

6 Laura A. Schroeder, NSB #3595

7 Therese A. Ure, NSB #10255

8 440 March Ave., Reno, NV 89509

9 Phone: (775) 786-8800

10 Email: counsel@water-law.com

11 *Attorneys for the Petitioners-Appellants*

12 *Kenneth F. Benson, Diamond Cattle Company,*
13 *LLC, and Michel and Margaret Ann Etcheverry*
14 *Family LP*

1 **PROOF OF SERVICE**

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

5 ***VIA US MAIL ONLY***

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

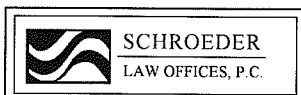
Bryan L. Stockton, Esq.
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701

9 Francis Wikstrom
10 Parsons, Behle & Latimer
11 201 South Main Street, Ste. 1800
12 Salt Lake City, Utah 84111

13 Dated this 20th day of May, 2013.



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



Case #: CV-1207178
Judge: PAPEZ, DAN L.
Date Filed: 07/05/12 **Department:** 02
Case Type: JUDREV JUDICIAL REVIEW

Title/Caption: BENSON, KENNETH F, an individual,
 MICHEL AND MARGARET ANN ETCHEVERRY
 FAMILY, LP, A Nevada Registered foreign
 Limited Partnership, DIAMOND CATTLE
 COMPANY, LLC, a Nevada Limited Liability
 Company - Petitioners,
 v.
 STATE ENGINEER, OF NEVADA, OFFICE OF THE
 STATE ENGINEER, DIVISION OF WATER
 RESOURCES, DEPARTMENT OF CONSERVATION
 AND NATURAL RESOURCES, Respondent.

Defendant(s)	Attorney(s)
STATE WATER ENGINEER	STOCKTON, BRIAN L. ESQ.
Defendant(s)	Attorney(s)
OFFICE OF THE STATE ENGINEER	STOCKTON, BRIAN L. ESQ.
Defendant(s)	Attorney(s)
DIVISION OF WATER RESOURCES	STOCKTON, BRIAN L. ESQ.
Defendant(s)	Attorney(s)
DIV OF CONSERVATION & NAT RES	STOCKTON, BRIAN L. ESQ.
Defendant(s)	Attorney(s)
KOBEY VALLEY RANCH LLC	DE LIPKAU ROSS E, ESQ. WIKSTROM FRANCIS M. ZIMMERMAN JOHN. R.
Plaintiff(s)	Attorney(s)
BENSON, KENNETH F.	SCHRODER, LAURA A URE, THERESE A
Plaintiff(s)	Attorney(s)
ETCHEVERRY MARGARET & MICHAEL	SCHRODER, LAURA A
Plaintiff(s)	Attorney(s)
DIAMOND CATTLE COMPANY, LLC	No "Attorney 1" Listed

Filings:			
Date	Pty Filing		Fees
7/05/12	PETITION FOR JUDICIAL REVIEW		
7/20/12	ASHLEY L. ROBBINS AFFIDAVIT OF SERVICE		
7/20/12	AFFIDAVIT OF SERVICE		
7/26/12	NOTICE OF INTENT TO DEFEND		
7/31/12	STIPULATION TO ALLOW KOBEH VALLEY RANCH, LLC TO INTERVENE AS A RESPONDENT		
8/03/12	SUMMARY OF RECORD ON APPEAL		
8/03/12	VOLUME I BATES STAMPED PAGES SE ROA 01-0251		

8/03/12 VOLUME II BATES STAMPED PAGES SE ROA 0252-448
8/08/12 AFFIDAVIT OF SERVICE
8/14/12 ORDER ALLOWING INTERVENTION
8/20/12 SUPPLEMENTAL SUMMARY OF RECORD ON APPEAL
8/20/12 CERTIFICATE OF RECORD
8/20/12 MOTION FOR ASSOCIATE COUNSEL
8/20/12 ANSWER TO PETITION FOR JUDICIAL REVIEW
8/23/12 ORDER ADMITTING TO PRACTICE
8/23/12 NOTICE OF ENTRY OF ORDER ALLOWING INTERVENTION
10/03/12 STIPULATION AND ORDER REGARDING BRIEFING SCHEDULE
11/05/12 PETITIONERS KENNETH F. BENSON, DIAMOND VALLEY CATTLE
COMPANY, LLC, AND MARGARET ANN ETCHEVERRY FAMILY LP'S
SUMMARY OF SUPPLEMENTAL RECORD ON APPEAL
VOLUME 1
VOLUME II
VOLUME III
11/07/12 PETITIONER MICHAEL AND MARGARET ANN ETCHEVERRY FAMILYS LP.
DIAMOND CATTLE COMPANY, LLC AND KENNETH F. BENSON'S OPENING
BRIEF
11/19/12 NOTICE OF INTENT TO FILE RESPONSE TO EUREKA COUNTY'S MOTION
FOR LEAVE TO FILE
11/26/12 STIPULATION REGARDING SEVICE OF PLEADINGS AND OTHER PAPERS
11/27/12 OPPOSITION TO EUREKA COUNTY'S MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF
12/07/12 REPLY TO INTERVENOR'S OPPOSITION TO EUREKA COUNTY'S MOTION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF
12/21/12 INTERVENOR KOBEH VALLEY RANCH, LLC'S ANSWERING BRIEF
12/24/12 NEVADA STATE ENGINEER'S ANSWERING BRIEF
1/07/13 REQUEST FOR REVIEW
2/01/13 STIPULATION AND ORDER REGARDING AMENDED BRIEFING SCEDULE
2/01/13 CERTIFICATE OF SERVICE
2/25/13 ORDER DENYING MOTION TO LEAVE TO FILE AMICUS CURIAE BRIEF
2/25/13 NOTICE OF HEARING
3/01/13 NOTICE OF ENTRY OF ORDER
5/17/13 FINDINGS OF FACT, CONCLUSIONS OF LAW & JUDGEMENT DENYING THE
PETITION FOR JUDICIAL REVIEW
5/21/13 PETITIONERS MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP
DIAMOND VALLEY CATTLE COMPANY, LLC, AND KENNETH F. BENSON'S
NOTICE OF APPEAL
5/21/13 PETITIONERS-APPEALANTS MICHEL AND MARGARET ANN ETCHEVERRY
FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, AND KENNETH F.
BENSON'S CASE APPEAL STATEMENT
5/21/13 PETITIONERS MICHEL AND MARGARET ANN ETCHEVERRY FAMILU, LP
DIAMOND CATTLE COMPANY, LLC, AND KENNETH F. BENSON'S NOTICE
OF POSTING COST BOND

CIVIL COVER SHEET

Eureka County, Nevada

Case No. CV1207-178

(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): Kenneth E. Benson; Diamond Cattle Company LLC; and Michel and Margaret Ann Etcheverry Limited Family Partnership

See attachment for Petitioners' Contact Information.

Attorney (name/address/phone):
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Defendant(s) (name/address/phone): State Engineer of the State of Nevada, Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources
901 South Stewart Street, Ste. 202, Carson City, NV 89701-5250

Attorney (name/address/phone):
Nevada Attorney General
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Phone: (775) 684-1100

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ Arbitration Requested

Civil Cases

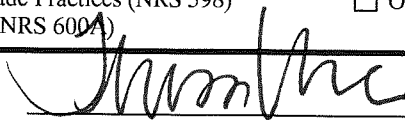
Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence <input type="checkbox"/> Negligence – Auto <input type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence – Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
<input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Civil Petition for Judicial Review <input checked="" type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- | | | |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

7-3-2012

Date



Signature of initiating party or representative

Petitioners' Contact Information:

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Phone: 661-978-9694

Michel and Margaret Ann Etcheverry Family Limited Partnership
c/o Martin Etcheverry
7933 Calloway Drive
Bakersfield, CA 93314
Phone: 661-978-9694

Case No: CV1207-178

Dept. No: 2

ORIGINAL

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,

-vs-

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

Respondent.

KOBEH VALLEY RANCH, LLC.

Intervenor.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT**

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

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

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

13 **FACTS AND PROCEDURAL HISTORY**

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

18 In Ruling 6127, the State Engineer determined that existing water rights that could potentially
19 be impacted by KVR's pumping are those that exist on the valley floor of Kobeh Valley and are
20 within the predicted water level drawdown area.³ The State Engineer specifically found, however,
21 that "because the groundwater flow model is only an approximation of a complex and partially
22

23 ¹ The record in this case includes the record on appeal from the first State Engineer hearings filed in
24 the prior appeals of Eureka County, Tim Halpin, Eureka Producers' Cooperative, and Cedar Ranches, LLC in
25 2009 under cases CV 0904-122 and -123. The record on appeal from these cases is identified herein as
26 "2009 R" or "2009 R. Tr. Vol. ___ page:line" for transcript citations. The record also includes the record on
27 appeal from the second State Engineer hearings filed in the prior appeals of Eureka County, Conley Land &
28 Livestock, LLC, Lloyd Morrison, and Benson-Etcheverry under cases CV-1108-155; -156; -157; -164; -165;
and -170. The record on appeal from these cases, dated October 27, 2011, is identified herein as "R" or
"R. page:line" for transcript citations. The records on appeal filed in this case are identified as follows: State
Engineer Record on Appeal "SE ROA;" State Engineer Supplemental Record on Appeal "SUP SE ROA;" and
Benson-Etcheverry's Supplemental Record on Appeal "PSROA."

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

³ PSROA 22.

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

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

14 The purpose of the 3M Plan is to assist the State Engineer with managing KVR’s groundwater
15 use to prevent conflicts with existing water rights.¹⁰ A conflict occurs when a senior water right
16 cannot be used because of water use by a junior water appropriator.¹¹ The impacts from KVR’s
17 groundwater pumping in Kobeh Valley are predicted to manifest over a period of years and the
18 monitoring element of the 3M Plan will provide an early warning of where impacts will appear and
19 allow time to implement specific and effective mitigation measures. If monitoring shows that KVR’s
20 groundwater pumping may impact an existing senior water right holder, including domestic well
21 owners, then the 3M Plan requires KVR to mitigate the effect by ensuring that the existing right has
22
23

24 ⁴ PSROA 19.

25 ⁵ PSROA 42.

26 ⁶ PSROA 186.

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

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

⁹ SUP SE ROA 27-28.

¹⁰ SE ROA 5.

¹¹ State Engineer Br. p. 1:26-27.

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

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

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

22 The WAC will provide a forum for water right holders and local stakeholders to share
23 information and discuss monitoring data, analyses, technical studies, and mitigation and management
24

25 ¹² SE ROA 14.

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

27 ¹⁴ SE ROA 8.

28 ¹⁵ SE ROA 8.

¹⁶ SE ROA 8.

¹⁷ SE ROA 11.

¹⁸ SE ROA 8, 10.

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

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

14 The TAC and WAC are both involved in the review process under the 3M Plan. As
15 monitoring data is collected, the TAC must review it to determine if action criteria have been
16 exceeded.²⁶ And, if an action criterion is exceeded, then the WAC, with assistance from the TAC,
17 will determine whether KVR's pumping caused the levels to be exceeded.²⁷ If KVR's pumping is
18 causing an impact, then the WAC determines what management or mitigation measures should be
19 recommended to the State Engineer to protect existing rights from adverse impacts.²⁸ The State
20 Engineer then reviews the WAC's recommendations and determines which management or
21 mitigation measures to require of KVR.²⁹ The TAC reviews the effectiveness of any mitigation
22

23 ¹⁹ SE ROA 7-8.

24 ²⁰ SE ROA 11.

25 ²¹ SE ROA 7.

26 ²² SE ROA 7-8, 10.

27 ²³ SE ROA 5, 7-10.

28 ²⁴ SE ROA 10-11.

²⁵ SE ROA 11, SUP SE ROA 27.

²⁶ SE ROA 9.

²⁷ SE ROA 9-10.

²⁸ SE ROA 10.

²⁹ SE ROA 10-11.

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

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

16 The 3M Plan is a condition of KVR’s permits, and therefore, only KVR and its successors are
17 bound by it.³⁴ Any failure to comply with the 3M Plan will be a violation of KVR’s permits and the
18 State Engineer will be able to enforce the 3M Plan requirements or order KVR to stop pumping. If
19 KVR disobeys the State Engineer’s order to comply with the 3M Plan or stop pumping, then the State
20 Engineer may seek injunctive relief from this Court under NRS 533.482 and levy fines under NRS
21 533.481. Existing water right holders may take advantage of the procedure described in the 3M Plan,
22 but they are not required to do so. Benson-Etcheverry³⁵ may participate in the 3M Plan process by
23
24

25 ³⁰ SE ROA 9.

26 ³¹ SE ROA 11.

27 ³² SE ROA 10-11.

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

³⁴ SE ROA 5.

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

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

3 DISCUSSION

4 I. Standard of Review

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

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

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

21
22 ³⁶ NRS 532.020, 532.110.

23 ³⁷ NRS 533.450(1).

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

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

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

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

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

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

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

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

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

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

22 Further, the State Engineer retains exclusive control over the 3M Plan and it does not change
23 or limit his authority to manage water resources in Nevada. First, a member of the State Engineer’s
24

25 ⁴⁴ *Anderson Family Assocs. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008) (recognizing that
26 the State Engineer “has the implied power to construe the state’s water law provisions and great deference
27 should be given to the State Engineer’s interpretation when it is within the language of those provisions”); *U.S.*
v. State Eng’r, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Pyramid Lake Paiute Tribe v. Washoe Cnty.*, 112
Nev. 743, 747-48, 918 P.2d 697, 700 (1996); *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988).

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

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

⁴⁷ SE ROA 5-6.

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

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

16 Benson-Etcheverry argue that the State Engineer has delegated adjudicative authority by
17 approving the 3M Plan. By its specific terms, the 3M Plan is an express condition of the water rights
18 granted under the Ruling, and, therefore, does not bind anyone other than KVR.⁵⁵ The 3M Plan does
19 not create a new adjudicatory process or require holders of existing water rights to submit their
20 complaints to the WAC for adjudication or to waive any available legal remedy. The 3M Plan does
21 not limit the State Engineer's authority, and, therefore, he will have the ability to consider any
22 complaint by an existing water right holder regarding KVR's use of water. The State Engineer may
23 order any action necessary based on the facts and circumstances of each case. Therefore, any water
24

25 ⁴⁸ SE ROA 7.

26 ⁴⁹ SE ROA 11.

27 ⁵⁰ SE ROA 11.

28 ⁵¹ SE ROA 7-8, 10.

⁵² SE ROA 10.

⁵³ SE ROA 11.

⁵⁴ SE ROA 16.

⁵⁵ SE ROA 5.

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

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

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

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

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

24
25 (6). . . [T]he State Engineer shall conduct investigations in any basin or
26 portion thereof where it appears that the average annual replenishment
to the groundwater supply may not be adequate for the needs of all

27 ⁵⁶ Br. pp. 18-19.

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

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

...

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

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

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

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

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

27 ⁵⁸ SE ROA 10.

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

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

NRS 534.110(5) provides:

[t]his 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.

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

⁶⁰ SE ROE 5.

⁶¹ SE ROA 18-26.

⁶² SE ROA 12.

⁶³ SE ROA 18-26.

⁶⁴ SE ROA 24-26.

⁶⁵ SE ROA 19-20, 24-26.

⁶⁶ SE ROA 19-26.

⁶⁷ SE ROA 27-28.

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

18 Through his approval of the 3M Plan, the State Engineer has determined that the conditions
19 and provisions of the 3M Plan are adequate to ensure that existing rights will be satisfied. His
20 decision is supported by the 3M Plan itself since it requires KVR to carefully monitor the effects of
21 its pumping, to forecast potential impacts in cooperation with parties to the 3M, and to prevent or
22 mitigate such impacts from adversely affecting existing water rights. Although Benson-Etcheverry
23 would require the State Engineer to include express measures for mitigating existing water rights,
24 NRS 534.110(5) requires only that the State Engineer include express conditions to ensure that
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26 ⁶⁸ SE ROA 7-8, 10.

27 ⁶⁹ SE ROA 10.

28 ⁷⁰ SE ROA 10.

⁷¹ SE ROA 10.

⁷² SE ROA 7-8, 10.

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

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

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

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

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

⁷⁶ SE ROA 15-16.

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

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

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

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

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

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

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28 ⁷⁷ SE ROA 16.
⁷⁸ SE ROA 16.

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

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

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

27 ⁸⁰ SE ROA 10.

28 ⁸¹ SE ROA 10.

⁸² SE ROA 14.

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

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

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

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

8
9 DATED this 15th day of May 2013.

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11 
12 J. CHARLES THOMPSON
13 SENIOR DISTRICT JUDGE
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MAR 01 2013

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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,

Respondent.

KOBEL VALLEY RANCH, LLC,

Intervenor.

Case No.: CV1207-178

Dept. No.: 2

NOTICE OF ENTRY OF ORDER

1 TO: ALL PARTIES IN INTEREST

2 YOU AND EACH OF YOU are hereby notified that on February 25, 2013, the Honorable
3 J. Charles Thompson entered an Order. A copy of the Order is attached hereto.
4

5 **AFFIRMATION**

6 The undersigned hereby affirms that this document does not contain a social security
7 number.
8

9 Dated: February 27, 2013

PARSONS BEHLE & LATIMER

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28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 27th day of February, 2013, I served a true and correct copy of the foregoing **NOTION OF ENTRY OF ORDER** via U.S. Mail, at Reno, Nevada, in a sealed envelope, with first-class postage fully prepaid and addressed as follows:

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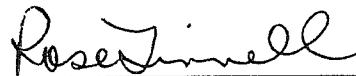
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