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**IN THE SUPREME COURT
OF THE STATE OF NEVADA**

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

v.

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

Case No. 61324

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

v.

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

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

**APPELLANTS'
OPENING BRIEF**

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

**IN THE SUPREME COURT OF
THE STATE OF NEVADA**

**ETCHEVERRY FAMILY, ET. AL. V.
STATE ENGINEER, DIV. OF WATER RESOURCES**

Case No. 61324

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no parent corporations or publicly-held companies that own 10% or more of the Appellants party's stock. Schroeder Law Offices, P.C., including Laura A. Schroeder and Therese A. Ure, appeared for Appellants in proceedings in the District Court and are expected to appear for Appellants before this Court.

DATED this 26th day of July, 2013.

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OPENING BRIEF

Appellants MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON (collectively referred to herein as “Appellants”), by and through their attorneys of record, Schroeder Law Offices, P.C., file this Opening Brief in their appeal from the Findings of Fact, Conclusions of Law and Judgment of the Seventh District Court of the State of Nevada for the County of Eureka in Case No. CV-1207-178.

I.

STATEMENT OF JURISDICTION

The Nevada Supreme Court has jurisdiction in this case because this is an appeal from the District Court’s denial of the Petition of Judicial Review filed on July 5, 2012, by Petitioners-Appellants Michel and Margaret Ann Etcheverry Family, LP, Diamond Cattle Company, LLC, and Kenneth F. Benson. Pursuant to NRS § 533.450(9) and NRS § 233B.150, an appeal may be taken to this Court from a judgment of the District Court.

This appeal is taken from a final order of the District Court issued on May 15, 2013. Appellants’ Notice of Appeal was timely filed on May 21, 2013 under NRAP 4(a)(1).

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II.

STATEMENT OF ISSUES ON APPEAL

A. Does the State Engineer have authority to approve a monitoring, management, and mitigation plan when the plan conflicts with the requirements of NRS § 533.370(2) and the State Engineer's own Ruling No. 6127?

B. Do the express conditions requirements of NRS § 534.110 preclude the State Engineer's acceptance of the Monitoring, Mitigation, and Management Plan ("3M Plan") submitted by Eureka Moly, LLC?

C. Did the State Engineer exceed his authority when he delegated his administrative authority to non-agency committees?

D. Did the State Engineer engage in impermissible ad hoc rulemaking violating NRS § 532.110 and NRS § 534.110 when he approved the 3M Plan?

E. Did the State Engineer abuse his discretion, acting arbitrarily or capriciously when he approved the 3M Plan?

III.

STATEMENT OF THE CASE (PROCEDURAL HISTORY)

On June 6, 2012, the Division of Water Resources issued a decision, approving Eureka Moly, LLC's 3M Plan. 3MJA 000001¹ In Ruling No. 6127, issued on July 15, 2011, the State Engineer ruled that a monitoring, management

¹ References to "3MJA" refer to the Joint Appendix filed concurrently herewith for this Appeal in Case No. 63258 regarding the 3M Plan.

and mitigation plan had to be prepared in cooperation with Eureka County and approved by the State Engineer prior to any water development. Joint Appendix (“JA”) 4985-5026.²

On May 30, 2012, Eureka Moly, LLC³ submitted the required 3M Plan to the State Engineer. 3MJA . Six days later, the State Engineer, through the Division of Water Resources, issued its approval of the 3M Plan. 3MJA 000001. Appellants filed a Petition for Judicial Review of this decision with the Seventh Judicial District Court on July 5, 2012. 3MJA 000002-000035. On May 17, 2013, the District Court entered its Findings of Fact, Conclusions of Law and Judgment denying the Petition for Judicial Review. 3MJA 000720-000736. Appellants timely filed their Notice of Appeal to the Nevada Supreme Court on May 21, 2013. This Appeal was consolidated with Case No. 61324.

IV.

STATEMENT OF RELEVANT FACTS

This case involves a decision by the State Engineer to approve a monitoring, management, and mitigation plan submitted to the State Engineer by Eureka Moly, LLC as an integral part of its permitting process. Preparation and approval of this

² References to the Joint Appendix “JA” are to that filed under consolidated Case No. 61324.

³ Eureka Moly, LLC and Kobeh Valley Ranch, LLC are subsidiaries of General Moly, Inc. Kobeh Valley Ranch is the water right application/permit holder.

plan was required by Ruling No. 6127 before any water under the permits could be developed for mining.

The resultant 3M Plan was of particular import to Appellants as their water rights had been identified in Ruling No. 6127 as being impacted by Eureka Moly, LLC's applied for water uses, regardless of any 3M Plan. Appellants' interests, both in terms of water rights and farming and ranching operations are more fully described in the Opening Brief filed by Appellants Kenneth F. Benson, Diamond Cattle Company LLC, and Michel and Margaret Ann Etcheverry Family LP in Case No. 61324 that has been consolidated with this appeal. *See* Appellants Kenneth F. Benson, Diamond Cattle Company LLC, and Michel and Margaret Ann Etcheverry Family LP's Opening Brief, 4-5. In the interests of judicial economy, the description will not be repeated here.

A. Basis for the development of the 3M Plan

Between May of 2005 and June of 2010, numerous applications to appropriate underground water and to change the point of diversion, place of use, and/or manner of use were filed by Idaho General Mines, Inc. and Kobeh Valley Ranch, LLC (collectively herein the "KVR Applications"). The KVR Applications filed by Idaho General Mines, Inc. were thereafter assigned to Kobeh Valley Ranch LLC ("KVR"). The KVR Applications were filed for the purpose of

(Cont.)
Eureka Moly, LLC is the water rights lessee and operator of the Mount Hope

obtaining water for a proposed molybdenum mine, known as the Mount Hope Mine Project that requires underground water for mining, milling and dewatering purposes. The total combined duty under all of the KVR Applications requests 11,300 acre feet annually. JA 4985-4988, 4994-4995.

Even though the State Engineer found that the KVR Applications would conflict with certain existing water rights, particularly those on the floor of Kobeh Valley, the State Engineer issued Ruling No. 6127, granting the majority of the KVR Applications subject to certain terms and conditions. JA 5006, 5011, 5022-5023.

In his Conclusions, the State Engineer acknowledged, pursuant to NRS § 533.370, that he was prohibited from granting an application to appropriate or change the public waters where:

- A. there is no unappropriated water at the proposed source;
- B. the change conflicts with existing rights;
- C. the proposed change conflicts with protectable interests in existing domestic wells set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

JA 5022. The State Engineer further noted that select springs on the floor of Kobeh Valley and one domestic well near Roberts Creek might be impacted by the

(Cont.)
mining project. 3M Plan.

proposed pumping, but that any impacts on existing rights could be detected and adequately and fully mitigated through a comprehensive monitoring, management, and mitigation plan. JA 5023. The State Engineer then reached the conclusion that approval of the applications would not *conflict* with existing rights. *Id.*

The State Engineer's approval of the KVR Applications was conditioned on submission and approval of a monitoring, management, and mitigation plan prior to diverting any water under the issued water use permits. *Id.* State Engineer's Ruling No. 6127 and the State Engineer's approval of KVR Applications is currently under review by this Court in Case No. 61324.

Eureka Moly, LLC prepared and submitted a Nevada Division of Water Resources 3M Plan to the State Engineer on or about May 30, 2012, and the State Engineer approved the 3M Plan within a week's period on June 6, 2012. 3MJA 000001.

B. Relevant 3M Plan Provisions

The 3M Plan is a 12-page document (with an additional attachment) that outlines the background, purposes, participants, and general requirements for monitoring, management, and mitigation of KVR's water use for the Mount Hope Mine. 3MJA 000010-000035.

The stated purpose of the plan is to assist the State Engineer in managing development of groundwater resources within and near the Project area to "avoid

adverse impacts” to existing water rights. 3MJA 000010. “The 3M is designed to *include or develop*, as needed or appropriate, *express conditions* that will protect the rights of domestic well owners, if any, and existing appropriations.” *Id.* (emphasis added).

The management portion of the 3M Plan establishes two committees: the Water Advisory Committee (“WAC”) and the Technical Advisory Committee (“TAC”). 3MJA 000011-000013. According to the 3M Plan, the WAC will meet at least once annually to 1) review data, 2) make modifications to the 3M Plan, 3) create status reports, 4) provide recommendations, 5) create “action criteria” that, if exceeded, “could” require mitigation or management actions, 6) determine what constitutes “adverse impact” on a case-by-case basis, 7) form and implement mitigation measures, 8) review financial assurance, and more. *Id.* The TAC, as envisioned in the 3M Plan, will meet at least twice annually (or as otherwise instructed by the WAC) to 1) recommend data collection techniques, 2) review data and make recommendations (based on available data, but not necessarily the best available data), 3) recommend action criteria to the WAC, 4) determine whether action criteria have or will be exceeded, 5) recommend mitigation and management measures to the WAC, 6) evaluate effectiveness of any mitigation, and more. *Id.*

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As approved by the State Engineer, the WAC will be made up of members from Eureka Moly, LLC, Eureka County, and include the Nevada State Engineer. The Diamond Natural Resources Protection and Conservation Association and the Eureka Producers Cooperative will each be invited to nominate a member of the WAC. Other persons may send letters of interest to be included in the WAC, but the WAC members themselves will decide whether additional persons can join. 3MJA 000012.

The TAC is similarly restricted, as it is intended to be made up of nominees from each member of the WAC, at the WAC member's expense. The federal agency, United States Geological Survey ("USGS") is invited to join the TAC at Eureka Moly LLC's expense. 3MJA 000013

The 3M Plan does not provide any specific trigger(s) for when mitigation will be required. Instead, the 3M Plan is a "plan for a plan," stating that the WAC will adopt "action criteria" in the future (threshold variables for water levels, spring discharges, vegetation responses, etc.) that will be used to determine after the fact if "adverse impacts" have been, or will be, caused to existing water use rights. 3MJA 000012-000013, 000015.

Once action criteria are developed, and if the criteria are exceeded, or will be exceeded, the TAC will recommend management or mitigation measures that the WAC will decide whether or not to implement. 3MJA 000014-000016. The TAC

will measure the “effectiveness” of any mitigation. 3MJA 000016. There are no standards in the 3M Plan to determine what is considered “effective.” Protecting existing rights, while the statutory mandate, is not incorporated into the “effectiveness” regime.

All decisions made by the WAC must be made by unanimous vote of the group members in attendance. Eureka County and Eureka Moly, LLC must be present for all decisions. There is no similar requirement that the State Engineer be present. 3MJA 000015. If unanimity is not achieved, the attendees may agree to conduct additional data collection, review, and analysis. If unanimity still cannot be reached, then the matter will be referred to the State Engineer for final determination. 3MJA 000015-000016. There are no time limitations or triggers to stop pumping set out in the 3M Plan.

The WAC has the purpose and function to make modifications to the 3M Plan based on recommendations by the TAC. 3MJA 000016. There are no prohibitions on the extent or scope of any permitted modifications. There is no indication in the 3M Plan whether the WAC may take action without recommendation by the TAC. There are no provisions to stop water withdrawals in the event the WAC-TAC committees are ineffective.

The monitoring portion of the 3M Plan proposes locations for measuring the depth to water, water flow, water quality, water pressure, and vegetation “as is

feasible.” 3MJA 000016-000019. “Feasibility” is not defined. Once organized, the 3M Plan contemplates the TAC will make recommendations to the WAC for changes to or implementation of the monitoring plan. There are no requirements for how often certain types of data must be collected, and other types of data may only be collected every two years (SE ROA 27-28), regardless of the fact that data may be affected by the time of year.⁴

The mitigation portion of the 3M Plan provides for one million dollars in funding to pay for both monitoring and mitigation, the sufficiency of which will only be reviewed once every three years. 3MJA 000020. Adversely impacted surface water sources *will* be mitigated for wildlife use by providing replacement water in the same area as the impacted water source. *Id.* Yet, there are no concrete mitigation requirements set out for adversely impacted permitted, vested, or reserved water rights. In fact, mitigation is permissive: Adversely, impacted permitted, vested, or reserved water rights *may* be mitigated with a variety of measures, including financial compensation or the purchase of replacement property. 3MJA 000020-000021. These measures of mitigation are suggested despite the fact that those in charge of such mitigation hold no power of condemnation.

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⁴ Any requirements for data collection may be modified by the WAC. 3MJA 000016.

Even though the Nevada legislature has limited its delegated authority to the State Engineer for such determinations, in the case of the 3M Plan, the WAC decides what constitutes “adverse impact.” 3MJA 000013, 000015. There is *no requirement* in the 3M Plan that KVR must stop withdrawals in any event or even ensure that existing water rights are satisfied within the terms of those water rights. Substitutes for the satisfaction of existing water rights qualifies as adequate mitigation, should the WAC-TAC determine adverse impacts exist at all. There are no required timelines for mitigating impacted water rights or water sources.

V.

SUMMARY OF THE ARGUMENTS

- A.** The State Engineer erroneously concluded as a matter of law that the 3M Plan complied with Nevada law governing approval of water right applications and the requirements of State Engineer’s Ruling No. 6127. Nothing in the 3M Plan remedies address conflicts with existing water rights in a manner consistent with Nevada law. The District Court erred by affirming the State Engineer’s decision and denying Appellants’ Petition for Judicial Review.
- B.** The State Engineer erred as a matter of law when he approved the 3M Plan, as the plan was not consistent with provisions of NRS § 534.110. Nev. Rev. Stat. § 534.110 requires permits of junior appropriators to contain express

conditions that serve to ensure satisfaction of existing rights. Further, the mitigation proposed in the 3M Plan is inconsistent with the requirements of NRS § 534.110(5) and NRS § 533.370(2). The District Court erred by affirming the State Engineer's decision and denying Appellants' Petition for Judicial Review.

C. The State Engineer erred as a matter of law when he approved a plan that expressly delegated policy decisions and mitigation decisions, which impact senior water users' rights, to be made by a non-agency committee. The District Court erred by affirming the State Engineer's decision and denying Appellants' Petition for Judicial Review.

D. The State Engineer erred by exceeding his authority when he approved a plan that created new administrative standards that were distinct from existing statutes and regulations. The District Court erred by affirming the State Engineer's decision and denying Appellants' Petition for Judicial Review.

E. The State Engineer's approval of a plan that was vague and inconsistent with the requirements set out by statute and Ruling No. 6127, was an agency action that is arbitrary and capricious and/or an abuse of discretion. The District Court erred by affirming the State Engineer's decision and denying Appellants' Petition for Judicial Review.

VI.

STANDARD OF REVIEW

The standard of review when this Court examines an order denying a petition for judicial review is the same as for the district court. *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). The standard accorded in an administrative determination depends on whether the issues raised by the decision are more appropriately deemed questions of law or fact. *Id.* This Court reviews pure legal questions de novo, while administrative fact-based determinations are entitled to a deferential standard of review. *Andersen Fam. Assoc. v. Ricci*, 124 Nev. 182, 186, 179 P3d. 1201, 1203 (2008). Therefore, this Court may undertake an independent review of the administrative construction of a statute “without deference to the State Engineer’s determination.” *Id.*

Whether the State Engineer exceeded his statutory authority in approving a monitoring, mitigation, and management plan that was not in compliance with the requirements of NRS § 533.370(2), State Engineer Ruling No. 6127, and NRS § 534.110 are legal questions. Similarly, the issues of whether the State Engineer engaged in ad hoc rulemaking and whether he exceeded his authority when he delegated his duties to a non-agency committee are questions of law.

When the issues are deemed questions of fact, the reviewing court is limited to whether the record contains substantial evidence that supports the decision.

Town of Eureka v. State Engineer, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992), citing to *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). Substantial evidence has been defined by this Court “as that which ‘a reasonable mind might accept as adequate to support a conclusion.’” *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (citing *State Empl. Sec. v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986), quoting *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed. 2d 842 (1971)). However, the agency must present a “rational connection between the facts found and the conclusions made to avoid a finding that its determination was not arbitrary and capricious.” See *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (quoting *Natl. Wildlife Fedn. v. U.S. Army Corps of Engrs.*, 384 F.3d 1163, 1170 (9th Cir. 2004)).

Generally, an agency rule would be considered arbitrary and capricious if the agency relied on factors which the legislature has not intended it to consider, failed to consider an important aspect of the issue, offered an explanation for its decision that is in contradiction with the evidence before the agency, or is so implausible that it could not be ascribed the product of agency expertise. See *Motor Vehicle Mfrs. Assn. v. State Farm Mutl. Auto Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed. 2d 443 (1983). By adopting the 3M Plan and approving the KVR Applications, the State Engineer created a situation for senior appropriators

or existing domestic well users that could result in degradation or destruction of their water rights, a situation which the legislature could not have intended, given the adoption of the prior appropriation doctrine by the State of Nevada.

VII. ARGUMENT

A. The State Engineer erred as a matter of law when he approved a Monitoring, Mitigation, and Management Plan, the terms of which conflict with the requirements of NRS § 533.370 and his own Ruling No. 6127.

In Ruling No. 6127, the State Engineer conditioned the KVR Applications and KVR's ability to develop water for mining on the development of a 3M Plan. JA 5026. The basis for requiring this conditional issuance of the KVR Applications was the State Engineer's conclusion that select springs on the floor of Kobeh Valley and one domestic well near Roberts Creek might be impacted by the proposed pumping activities in Kobeh Valley. JA 5022. As noted by the State Engineer in Ruling No. 6127:

The State Engineer is prohibited by law from granting an application to appropriate or change the public waters where:

- A. there is no unappropriated water at the proposed source;
- B. the change conflicts with existing rights;
- C. the proposed change conflicts with protectable interest in existing domestic well set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

JA 5022. This holding is consistent with NRS § 533.370(2), which specifically provides:

[W]here its [water's] proposed use or change conflicts with *existing rights or with protectable interests in existing domestic wells* as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

NRS § 533.370(2) (emphasis added).

Regardless of his acknowledgment of statutory constraints placed on his ability to issue permits, the State Engineer concluded that any conflicts could be detected and mitigated through a comprehensive monitoring, management, and mitigation plan. JA 5023. The State Engineer determined his ability to issue the permits based on his finding that “the domestic well and spring flow reduction can be adequately and fully mitigated by the Applicant should impacts to the existing rights or domestic well occur” and that the monitoring, management and mitigation plan requirement would somehow preclude conflicts with existing water rights. JA 5023. Noting that, at the time of the State Engineer’s findings within Ruling No. 6127, the monitoring, management and mitigation plan was not drafted nor part of the evidence for consideration.

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The 3M Plan was required to set out the means by which domestic well and spring flow reduction would be mitigated so that there would be no conflict with senior water rights holders and domestic well owners. JA 5023.

Despite stating that mitigation would eliminate conflict, the 3M Plan goes on to provide, “[Eureka Moly] LLC will mitigate *adverse impacts*, if any, as agreed upon under the provisions of this 3M.” 3MJA 000019(emphasis added). Limiting itself to dealing with “adverse” impacts, an undefined term, instead of the required conflicts, it further provides, “This 3M outlines measures and procedures to identify and mitigate *adverse impacts* that may result from project pumping, all of which are uncertain.” 3MJA 000020 (emphasis added). Thus, the 3M Plan may downgrade the duty of eliminating conflicts to identifying what it now terms to be “uncertain” and “adverse,” conditions which it will itself define.

Additionally “[Eureka Moly] LLC will mitigate permitted water rights and determined and undetermined claims of vested or reserve rights should adverse impacts occur.” 3MJA 000020. Lastly, it states, “Mitigation measures, if necessary, will be developed and implemented on a case-by-case basis under the provisions of this 3M.” *Id.* Even though no provisions of the 3M Plan exist, and the definitions were suggested to be determined, the end result is the suggestion that the 3M Plan will take an adjudicatory role as to the application of the rules and definitions itself creates.

The 3M Plan proceeds to list mitigation measures, none of which are consistent with the requirements of NRS § 533.370(2), a statute that precludes the issuance of a permit if there is a conflict with existing water rights, regardless of the possibility of mitigation. 3MJA 000021. One of the measures proposed provides, “[r]eplacement wells can be constructed to mitigate impacted surface water or groundwater rights, or to supply water for wildlife.” *Id.* Another proposal relevant to mitigation of existing senior water right provides:

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

Id. A third proposal suggests, “[f]inancial compensation or, if agreed upon, property (i.e., land and water rights) of equal value could be purchased for replacement.” *Id.*

These proposals are totally in contradiction with the prior appropriation doctrine that governs Nevada water law. *Proctor v. Jennings*, 6 Nev. 83, 87 (1870). Under this doctrine, a “subsequent appropriator only acquires what has not been secured by those prior to him in time.” *Id.* Nev. Rev. Stat. § 533.370 embraces this doctrine, which provides that applications must be rejected if a proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells. NRS § 533.370(2). Subsequent appropriators are not entitled to require water users with senior rights to allow substitution of different water or

replacement wells to mitigate surface water rights. With regard to groundwater, as will be discussed in Section B below, certain appropriators may mitigate adverse effects on existing domestic wells when their wells are located within 2,500 feet of the domestic appropriator; however, the owner of the domestic well must agree to the alternative measure proposed by the subsequent appropriator. NRS § 534.110(5). While senior water rights holders are certainly free to sell their rights, Eureka Moly LLC's mitigation proposals do not preclude or mitigate ongoing conflicts if the senior water rights holder wishes to use his right to the full extent for the maintenance of livestock, agriculture, or for domestic use.

Despite the State Engineer's stated requirement that the monitoring, mitigation and management plan must preclude conflicts between existing water rights and protectable interests in existing domestic wells⁵ the 3M Plan does not succeed in fulfilling this requirement and should not have been approved by the State Engineer as sufficient to meet the requirements of Ruling No. 6127 and NRS § 533.370(2).

⁵ While this appeal is not the forum to challenge State Engineer Ruling No. 6127, the State Engineer stated in Conclusion II that the State Engineer is prohibited by law from granting an application to appropriate or change the public waters where the change conflicts with existing rights or conflicts with protectable interest of existing domestic wells. He then stated in Conclusion III that impacts can be detected and mitigated through a comprehensive plan and domestic well and spring flow reduction can be mitigated should the Application impact existing rights or domestic wells. The only way his decision may be read as consistent, is that the Plan will preclude KVR's water use from conflicting with existing rights and domestic wells.

B. The State Engineer exceeded his authority when he approved the 3M Plan, a plan that was inconsistent with the requirements of NRS § 534.110.

Nevada Revised Statutes Chapters 533 and 534 articulate the authority of the State Engineer for permitting water rights and the manner in which he is required to impose conditions upon permits. Permits grant appropriative rights, “described as a state administrative grant that allows the use of specific quantity of water for a specific beneficial purpose if water is available in the source *free from the claims of other with earlier appropriations.*” *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051, 99 P.2d 835, 837 n.1 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law Cases and Materials* 33 (4th ed. 1986)) (emphasis added).

Examples of permit conditions include situations where the State Engineer “limit[s] the applicant to a smaller quantity of water, to a shorter time for the completion of work, and . . . to a shorter time for the perfecting of the application than named in the application.” NRS § 533.380(2). Similarly, NRS § 534.110(4) requires the following permit conditions when groundwater is appropriated: 1) the right of the appropriator relates to a specific quantity of water and 2) the right must allow for *reasonable* lowering of the static water level at the appropriator’s point of diversion.

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- 1) The State Engineer's approval of the 3M Plan was improper because the 3M Plan contained no express conditions to ensure that holders of existing water rights and protectable interests in existing domestic wells would be satisfied.**

In the ground water statutes, NRS § 534.110(4) provides:

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

Nevada law further clarifies requirements for appropriation of ground water as follows:

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

NRS § 534.110(5) (emphasis added).

While NRS § 534.110(5) permits junior water users to utilize water even if the static water level is *reasonably* lowered at a senior user's point of diversion, it conditions permits so that protectable interests in existing domestic wells and existing appropriations can be satisfied under express conditions. Nev. Rev. Stat. § 534.110(5) does not allow for destruction of a senior user's source of water as the

mitigation proposals suggested in the 3M Plan would allow.

Water rights are tied to a specific source. The State Engineer acknowledged in his ruling that the proposed pumping in Kobeh Valley may conflict with water use rights in select springs on the floor of Kobeh Valley and one domestic well.⁶ JA 5023. Contrary to the 3M Plan mitigation proposals, nothing in the statutes governing water rights suggests that a senior appropriator should be expected to accept as substitute for their water right, water from a different source supplied by a junior user on whatever terms of delivery the junior user creates. To require a senior water rights holder to accept this sort of mitigation would result in the destruction of the senior user's existing right, not only physically but legally, as a water right is tied to the specific source from which water was originally appropriated.

The 3M Plan does not insure through express conditions that existing senior use rights will be satisfied to the full extent of their water use authorizations. Under the 3M Plan, the first stated goal is to “avoid” any adverse impacts due to groundwater pumping. 3MJA 000010. However, “adverse impacts” is left for definition by the plan and the application of the definition to be determined on a case by case basis. 3MJA 000013.

⁶ The State Engineer found additional conflicts that are delineated in Appellants Opening Brief under consolidated Case No. 61324. In the interest of brevity, they are not repeated here.

If a conflict with an existing use right occurs, there is no immediate remedy. Instead, the 3M Plan provides that data must be collected and analyzed by the TAC, which makes recommendations to the WAC. 3MJA 000012. The WAC then sets “action criteria,” threshold values for water levels, spring flow, and vegetation responses. 3MJA 000015. With meetings twice a year requiring unanimous approval and appeals, the existing use will likely be long gone.

In detail, this adjudicatory process set forth in the 3M Plan allows the WAC to determine whether an injury to senior water right holders meets the WAC’s standard for “adverse impacts,” thereby triggering the possibility of mitigation. 3MJA 000012-000013. If KVR’s activities are found to cause “adverse impacts,” the TAC recommends certain management or mitigation measures to the WAC, and the WAC determines the appropriate action (which may include mitigation measures *other than* ensuring existing rights are satisfied, such as providing substitution water). 3MJA 000013-000014. After, completing this internal procedure, the TAC finally determines whether mitigation is effective. *Id.* Since all decisions of the WAC must be *unanimous*, if the committees cannot reach consensus, additional data may be collected and analyzed. 3MJA 000015. If consensus still cannot be reached, the matter “may” be referred to the State Engineer for final determination. 3MJA 000015.

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The 3M Plan sets forth an arduous, spiraling process that can culminate in an unknown substitute rather than satisfaction of the right. The State Engineer approved this plan despite the assurance by law that there must be satisfaction of existing water rights. This assurance is the fundamental requirement to the State Engineer's Ruling No. 6127 because unless the NRS § 533.370 requirements are met by the 3M Plan, the State Engineer erred as a matter of law when he approved it. This statutory provision clearly provides that applications that conflict with existing rights or protectable interests in existing domestic wells shall be denied.

The current 3M Plan does not comply with administrative nor statutory requirements. The State Engineer's decision is affected by an error of law and this Court should reverse the State Engineer's approval of the 3M Plan.

2) The 3M Plan's heavy reliance on mitigation as means for resolving adverse effects on existing water rights and domestic well use is misplaced as NRS § 534.110(5), which addresses the use of mitigation, provides that adverse effects on domestic wells may be mitigated for municipal, quasi-municipal, and industrial uses, not mining uses.

Nevada law at subsection 5 of NRS § 534.110 additionally provides:

At the time a permit is granted for a well:

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

(b) Whose reasonably expected rate of diversion is one-half cubic foot per second or more, the State Engineer shall include as a condition of the permit that pumping water pursuant to the permit may be limited or prohibited to prevent any unreasonable adverse effects on

an existing domestic well located within 2,500 feet of the well, *unless the holder of the permit and the owner of the domestic well have agreed to alternative measures that mitigate those adverse effects.*

NRS § 534.110(5) (emphasis added).

The 3M Plan inappropriately utilizes self-developed mitigation procedures as a means of “avoiding conflicts” with senior water rights holders. Eureka Moly, LLC is not entitled to rely on NRS § 534.110(5) procedures for two reasons. The first is that KVR Permits designate the use as mining, milling, and dewatering, not municipal, quasi-municipal or industrial uses. *See also*, NRS § 533.024 (restricting the discussion of mitigation to domestic wells and adverse effects that are caused by municipal, quasi-municipal or industrial uses). Secondly, the junior appropriator must agree to alternative measures that are proposed to mitigate adverse effects. There is no evidence in the record that owners of domestic wells have agreed to Eureka Moly LLC’s proposed measures. Because the plan is inconsistent with the requirements of NRS § 534.110 and NRS § 533.370, the State Engineer’s actions were inconsistent with his authority.

C. The State Engineer exceeded his authority when he delegated his decision making authority regarding the monitoring, mitigation, and management of water right permits to a committee.

There is no doubt that the State Engineer in his decision approving the 3M Plan reiterated his final authority over that plan. However the plan as approved leads one to question just how much authority the State Engineer will exert given

his approval of the 3M Plan as it currently exists.

The 3M Plan provides that after the full WAC convenes, the WAC will establish policy and will define additional roles and responsibilities of the WAC and TAC. 3MJA 000012. Some of the WAC's functions as defined include making modifications to the monitoring component of the plan and to "establish values for 'action criteria' which, if exceeded, may be of concern to the Parties and could require mitigation or management actions." 3MJA 000012-000013. In addition to these provisions, the State Engineer approved provisions in the plan that allow the WAC to determine what constitutes an adverse impact on a case-by-case basis.

Despite the fact that the State Engineer reserved the ability to "modify the plan based on need, prior monitoring results, or changes in the approved water rights," never once does the State Engineer suggest that he may monitor the plan based on the "needs" of senior water rights holders, or satisfaction of senior water rights.

Further, the State Engineer approved the 3M Plan despite the fact that it contained the following provisions: WAC shall afford all the parties the opportunity to attend meeting where decisions will be made. 3MJA 000015. However, "any decision made by the WAC under this 3M shall be by unanimous vote of Parties in attendance, provided however, both E[ureka] M[oly] LLC and E[ureka] C[ounty] must be present for a vote to occur." 3MJA 000015. Nothing

precludes a decision of the WAC when the State Engineer is not present.

Under the 3M Plan, specific action criteria will be developed by the WAC. 3MJA 000015. The 3M Plan does not rely on legislative or regulatory mandates to set standards for what constitutes a conflict versus “adverse impact,” and there are no timelines for mitigating adverse impacts or conflicts. Water users are at the mercy of the TAC detecting and recommending action criteria to the WAC, while drawdown continues. 3MJA 000013-000014. Even if the committees unanimously determine there is an adverse impact, there is no requirement in the 3M Plan that the injured party’s water use right be fully satisfied.

As previously addressed, the 3M Plan allows for mitigation measures such as replacement with other water and financial compensation (i.e., not fulfillment of the existing water right, as required by Ruling No. 6127 and NRS § 533.370), whether the water user agrees with such measures or not. Certainly no statutory authority exists for such a right of condemnation to existing water right holders. The approval of this plan rewrites the law.

While the State Engineer is entitled to create advisory boards or committees to assist him with his decisions, the powers of the State Engineer are limited to those proscribed by law. *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006); NRS § 532.110. “While an administrative agency may possess implied powers, such powers are limited as they must be essential to carry out the

agency's express statutory duties." *City of Henderson*, 122 Nev. at 335.

The only advisory committees/boards designated by the Nevada Legislature as appropriate bodies to serve the State Engineer's office in an advisory board/committee capacity are water districts' advisory boards and the Well Driller's Advisory Board. *See* NRS § 533.300 and NRS § 534.150. Other advisory board/committees are not deemed by the Nevada Legislature to be necessary to carry out the agency's express statutory duties. Nor can the State Engineer argue that the advisory committees created in the 3M Plan are essential for carrying out the agency's express statutory duties. Therefore the State Engineer exceeded his authority when he approved a plan that delegates agency responsibilities to non-agency committees.

D. The State Engineer exceeded his authority when he approved a monitoring, management, and mitigation plan that created another level of administrative regulation via ad hoc rulemaking.

While the State Engineer is exempt from many of the Nevada Administrative Procedure Act requirements, the powers of the State Engineer are limited to those proscribed by law. *City of Henderson*, 122 Nev. at 334, 131 P.3d at 13; NRS § 532.110. As noted above "[w]hile an administrative agency may possess implied powers, such powers are limited as they must be essential to carry out the agency's express statutory duties." *City of Henderson*, 122 Nev. at 335.

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The 3M Plan approved by the State Engineer provides that one of the roles of the WAC is to “establish values for ... ‘action criteria’ which, if exceeded, may be of concern to the Parties and could require mitigation or management actions.”

3MJA 000012-000013. Included in the TAC’s responsibilities is the authority to evaluate all monitoring data to determine if any action criterion has been or is predicted to be exceeded, indicating a possible adverse impact and report findings to the WAC and evaluate the effectiveness of mitigation, if implemented and report findings to the WAC.

Action criteria are not components of the State Engineer’s statutory and regulatory language. There are no standards that suggest “adverse impacts”, as defined in the plan, mean the same as “conflict” or an “unreasonable lowering of the static water level” under the Nevada Revised Statutes. The 3M Plan circumvents the Nevada Revised Statutes Chapters 533 and 534 by redefining, omitting, and/or adding statutory terms, such as mitigation “to be determined” by a junior appropriator. As such, the 3M Plan has created regulations for its governance that are inconsistent with the State Engineer’s statutory and administrative standards, and therefore should not have been approved by the State Engineer or the District Court.

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E. The State Engineer's decision to approve the 3M Plan as part of the terms of the permits was arbitrary and capricious and therefore an abuse of his discretion.

An administrative agency's decision may be reversed if it is arbitrary and capricious. *Hilton Hotels Corp.*, 102 Nev. at 608. The State Engineer failed to establish the required rational connection between the facts he found and his conclusion that the 3M Plan would protect existing water rights holders and protected domestic well users. *See Native Ecosystems*, 418 F.3d at 960 (quoting *Natl. Wildlife Fedn.*, 384 F.3d at 1170 (9th Cir. 2004)). The State Engineer acknowledged that select springs and one domestic well might be impacted by the proposed pumping in Kobreh Valley (JA 5023). He attempted to minimize this finding by suggesting these impacts could be detected and mitigated through a monitoring, management and mitigation plan. *Id.* He concluded that any conflicts with senior appropriators could be "cured" by implementing such a plan. Given the statutory requirements of NRS § 533.370 and NRS § 534.110, there is no rational basis for concluding that the 3M Plan, as presented, could cure such conflicts.

When the State Engineer approved the 3M Plan he failed to distinguish between a water use right, which is a valuable property right held by the Appellants, and replacement/substitute waters. *See Town of Eureka*, 108 Nev. at 167, 826 P.2d at 951. He arbitrarily concluded that a junior appropriator could substitute financial compensation, property replacement or substitute water from

another source for these specific property rights. In doing so, he failed to consider an important aspect of the problem, that being there is no legislative provision that allows the State Engineer to condition a senior appropriator's existing right upon acceptance of an arbitrarily determined mitigation measure to alleviate conflicts. This is particularly true in light of the possibility that the mitigation measure could result in a loss of the senior's water use right, either in terms of destruction of the source or in terms of abandonment and/or forfeiture concerns. Interpreting the existing statutes in such a convoluted manner is not consistent with legislative intent. The State Engineer's approval of the 3M Plan, given the factual findings of the State Engineer, the legal requirements for issuance of applications, and the legislative intent behind those requirements was arbitrary and capricious, and as such an abuse of discretion. The District erred when it dismissed Appellants' Petition for Judicial Review.

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VIII.

CONCLUSION

For the reasons stated above, this Court should reverse the District Court's denial of the Petition for Judicial Review, and should remand the case to the District Court for entry of judgment reversing approval of the 3M Plan.

DATED this 26th day of July, 2013.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(ii), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,947 words.

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

Dated this 26th day of July, 2013.

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PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 26th day of July, 2013, I caused a copy of the foregoing ***APPELLANT'S OPENING BRIEF*** to be served on the following parties as outlined below:

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