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

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

v.

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

Respondents.

**Case No. 61324**

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

v.

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

Respondents.

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

**JOINT APPENDIX  
VOLUME 8**

## **APPENDIX SUMMARY**

### **Chronological Order by Filing Date**

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Letter from State Engineer Approving 3M Plan	June 6, 2012	I	1
Petition for Judicial Review	July 5, 2012	I	2-35
Lisa Morlan's Affidavit of Service of Notice of Petition for Judicial Review and Petition for Judicial Review	July 18, 2012	I	36-38
State Engineer's Record on Appeal Vol. 1	August 3, 2012	I	39
Vol. 1 - SE ROA Summary SE ROA 39-42		I	39-42
Vol. 1 – SE ROA Conti. SE ROA 43-52		I	42-95
Vol. 1 – SE ROA Conti. SE ROA 53-132		II	96-175
Vol. 1 – SE ROA Conti. SE ROA 133-218		III	176-261
Vol. 1 – SE ROA Conti. SE ROA 219-249		IV	262-292
Vol. 1 – SE ROA Conti. SE ROA 250-251		V	293-294
State Engineer's Record on Appeal Vol. 2	August 3, 2012	V	295
Vol. 2 – SE ROA Summary SE ROA 295		V	295

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

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

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### **Alphabetical Order**

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Vol. 2 – SE ROA Conti. SE ROA 377-448		VI	421-492
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Supplemental Record Summary SUP SE ROA	August 15, 2012	VI	493-495
Supplemental Record SUP SE ROA 1-29		VI	495-525
Transcript of Oral Argument	April 15, 2013	VII	647-719

1 Case No: CV1207-178

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

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

16 Petitioners,

17 -vs-

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

24 Respondent.

25 KOBEL VALLEY RANCH, LLC.

26 Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND JUDGMENT

27 **THIS MATTER** came on for hearing before this Court on the Petition for Judicial Review  
28 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 appeal<sup>1</sup>, 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.<sup>2</sup>

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.<sup>3</sup> The State Engineer specifically found, however,  
21 that "because the groundwater flow model is only an approximation of a complex and partially  
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23 <sup>1</sup> 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."

<sup>2</sup> R. 104:23-25, 105:1-2, 106:1-25, 107:1-9, 1079.

<sup>3</sup> PSROA 22.

1 understood flow system, the estimates of interbasin flow and drawdown cannot be considered  
2 absolute values.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> A conflict occurs when a senior water right  
16 cannot be used because of water use by a junior water appropriator.<sup>11</sup> 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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24 <sup>4</sup> PSROA 19.

25 <sup>5</sup> PSROA 42.

26 <sup>6</sup> PSROA 186.

27 <sup>7</sup> 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 <sup>8</sup> SE ROA 181, 195-96, 204, 207-08, 214, 227-41.

<sup>9</sup> SUP SE ROA 27-28.

<sup>10</sup> SE ROA 5.

<sup>11</sup> 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.<sup>12</sup>

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 associations<sup>13</sup> 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.<sup>14</sup>

15 The TAC has numerous responsibilities under the 3M Plan.<sup>15</sup> 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.<sup>16</sup> Any modifications recommended and agreed to by  
19 the WAC, however, will require State Engineer approval.<sup>17</sup> 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.<sup>18</sup>

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 <sup>12</sup> SE ROA 14.

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

27 <sup>14</sup> SE ROA 8.

28 <sup>15</sup> SE ROA 8.

<sup>16</sup> SE ROA 8.

<sup>17</sup> SE ROA 11.

<sup>18</sup> SE ROA 8, 10.

1 actions.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The State  
20 Engineer then reviews the WAC's recommendations and determines which management or  
21 mitigation measures to require of KVR.<sup>29</sup> The TAC reviews the effectiveness of any mitigation  
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23 <sup>19</sup> SE ROA 7-8.

24 <sup>20</sup> SE ROA 11.

25 <sup>21</sup> SE ROA 7.

26 <sup>22</sup> SE ROA 7-8, 10.

27 <sup>23</sup> SE ROA 5, 7-10.

28 <sup>24</sup> SE ROA 10-11.

29 <sup>25</sup> SE ROA 11, SUP SE ROA 27.

<sup>26</sup> SE ROA 9.

<sup>27</sup> SE ROA 9-10.

<sup>28</sup> SE ROA 10.

<sup>29</sup> SE ROA 10-11.

1 measures and reports its findings to the WAC.<sup>30</sup> 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].”<sup>31</sup> The WAC may recommend certain mitigation or  
8 management actions, but the State Engineer makes the final decision.<sup>32</sup> 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.”<sup>33</sup>

16 The 3M Plan is a condition of KVR’s permits, and therefore, only KVR and its successors are  
17 bound by it.<sup>34</sup> 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-Etcheverry<sup>35</sup> may participate in the 3M Plan process by  
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25 <sup>30</sup> SE ROA 9.

26 <sup>31</sup> SE ROA 11.

27 <sup>32</sup> SE ROA 10-11.

28 <sup>33</sup> SE ROA 11, SUP SE ROA 27, R. 438.

<sup>34</sup> SE ROA 5.

<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> Substantial evidence is defined as "that which a reasonable mind might  
14 accept as adequate to support a conclusion."<sup>40</sup>

15 Unless an administrative agency decision is arbitrary or capricious it should not be disturbed  
16 on appeal.<sup>41</sup> 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."<sup>42</sup> 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.<sup>43</sup>

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23 <sup>36</sup> NRS 532.020, 532.110.

<sup>37</sup> NRS 533.450(1).

24 <sup>38</sup> 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 <sup>39</sup> *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)).

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

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

27 <sup>42</sup> *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 <sup>43</sup> *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.”<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> 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  
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25 <sup>44</sup> *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).

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

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

<sup>47</sup> SE ROA 5-6.

1 staff will serve on the WAC and will be invited to chair the committee.<sup>48</sup> Second, any changes to the  
2 3M Plan or recommended management and mitigation actions from the committees require State  
3 Engineer approval.<sup>49</sup> 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.<sup>50</sup>

6 The WAC will set action criteria levels to provide advance warning of potential adverse  
7 impacts, all subject to State Engineer oversight.<sup>51</sup> If the WAC does not agree on any action criterion,  
8 then the State Engineer will decide the issue.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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 <sup>48</sup> SE ROA 7.

26 <sup>49</sup> SE ROA 11.

27 <sup>50</sup> SE ROA 11.

28 <sup>51</sup> SE ROA 7-8, 10.

<sup>52</sup> SE ROA 10.

<sup>53</sup> SE ROA 11.

<sup>54</sup> SE ROA 16.

<sup>55</sup> 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).<sup>56</sup> 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."<sup>57</sup> 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 <sup>56</sup> Br. pp. 18-19.

28 <sup>57</sup> *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 Kobeh 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. <sup>58</sup> 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).<sup>59</sup> They argue that the 3M Plan will cause long delays if existing water

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27 <sup>58</sup> SE ROA 10.

28 <sup>59</sup> 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.

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

6 NRS 534.110(5) provides:

7 [t]his section does not prevent the granting of permits to applicants later  
8 in time on the ground that the diversions under the proposed later  
9 appropriations may cause the water level to be lowered at the point of  
10 diversion of a prior appropriator, so long as any protectable interests in  
11 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.

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

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24  
25 <sup>60</sup> SE ROE 5.

26 <sup>61</sup> SE ROA 18-26.

27 <sup>62</sup> SE ROA 12.

28 <sup>63</sup> SE ROA 18-26.

<sup>64</sup> SE ROA 24-26.

<sup>65</sup> SE ROA 19-20, 24-26.

<sup>66</sup> SE ROA 19-26.

<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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 <sup>68</sup> SE ROA 7-8, 10.

27 <sup>69</sup> SE ROA 10.

28 <sup>70</sup> SE ROA 10.

<sup>71</sup> SE ROA 10.

<sup>72</sup> 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.<sup>73</sup> This monitoring is  
16 comprehensive and reasonably designed to detect potential impacts because it covers numerous water  
17 sources in several hydrographic basins.<sup>74</sup> 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.<sup>75</sup> 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

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27 <sup>73</sup> SE ROA 5, 17-30.

28 <sup>74</sup> 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).<sup>74</sup>

<sup>76</sup> SE ROA 15-16.

1 pumping from one or more production wells.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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  
27

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28 <sup>77</sup> SE ROA 16.

<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> Finally, the WAC must ensure that mitigation is timely.<sup>82</sup> 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.<sup>83</sup> 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 <sup>79</sup> SE ROA 8.

27 <sup>80</sup> SE ROA 10.

<sup>81</sup> SE ROA 10.

<sup>82</sup> SE ROA 14.

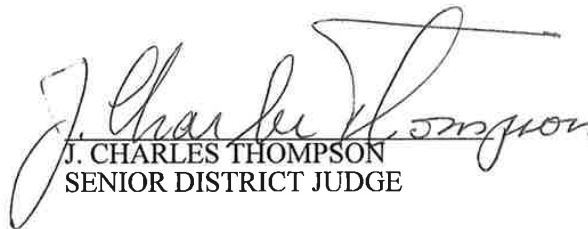
<sup>83</sup> *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n. 5, 138 P.3d 433, 444 n. 5 (2006).

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 15<sup>th</sup> day of May 2013.

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11   
12 J. CHARLES THOMPSON  
13 SENIOR DISTRICT JUDGE  
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NO. \_\_\_\_\_  
FILED  
MAY 21 2013  
Eureka County Clerk  
By VO

1 CASE NO: CV 1207-178

2 DEPT. NO: 2

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*Attorneys for the Petitioners*

7  
8 Affirmation: This document does  
not contain the social security  
9 number of any person.

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

11 IN AND FOR THE COUNTY OF EUREKA

12  
13 MICHEL AND MARGARET ANN ETCHEVERRY  
14 FAMILY, LP, a Nevada Registered Foreign Limited  
Partnership, DIAMOND CATTLE COMPANY,  
15 LLC, a Nevada Limited Liability Company, and  
KENNETH F. BENSON, an individual,

16 Petitioners,

17 v.

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

21 Respondent,

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

23 Intervenor-Respondent.

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

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DATED this 20th day of May, 2013.

Thomke

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

1 **PROOF OF SERVICE**

2 Pursuant to NRAP 25(d), I hereby certify that on the 20<sup>th</sup> 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  
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10 Reno, NV 89501

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

12 Dated this 20<sup>th</sup> day of May, 2013.



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21 *Diamond Cattle Company LLC, and Kenneth F.*  
22 *Benson*  
23  
24  
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ORIGINAL

NO. \_\_\_\_\_  
FILED

MAY 23 2013

Eureka County Clerk  
By *Alanna M. Cantello*

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15 *Attorneys for Intervenor*  
16 KOBEH VALLEY RANCH, LLC

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

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

25 Petitioners,

26 v.

27 STATE ENGINEER OF NEVADA,  
28 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 **AFFIRMATION**

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

7  
8 Dated: May 21, 2013.

PARSONS BEHLE & LATIMER

9 By:   
10 Ross E. de Lipkau, NV Bar No. 1628  
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23 [ecf@parsonsbehle.com](mailto:ecf@parsonsbehle.com)

24 Attorneys for Kobeh Valley Ranch

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:

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](mailto:bstockton@ag.nv.gov)

**By U.S. Mail Only**

*Attorneys for Nevada State Engineer*

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**By Hand Delivery Only**

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

21   
22 Employee of Parsons Behle & Latimer  
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INDEX OF EXHIBITS

<u>Exhibit</u>	<u>Document</u>	<u>Pages</u>
1	Findings of Fact, Conclusions of Law, and Judgment	17

# Exhibit 1

# Exhibit 1

NO. \_\_\_\_\_ FILED  
MAY 17 2013  
Eureka County Clerk  
By VS

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 appeal<sup>1</sup>, 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.<sup>2</sup>

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.<sup>3</sup> The State Engineer specifically found, however,  
21 that "because the groundwater flow model is only an approximation of a complex and partially  
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23 <sup>1</sup> 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."

<sup>2</sup> R. 104:23-25, 105:1-2, 106:1-25, 107:1-9, 1079.

<sup>3</sup> PSROA 22.

1 understood flow system, the estimates of interbasin flow and drawdown cannot be considered  
2 absolute values.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> A conflict occurs when a senior water right  
16 cannot be used because of water use by a junior water appropriator.<sup>11</sup> 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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24 <sup>4</sup> PSROA 19.

25 <sup>5</sup> PSROA 42.

26 <sup>6</sup> PSROA 186.

27 <sup>7</sup> 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 <sup>8</sup> SE ROA 181, 195-96, 204, 207-08, 214, 227-41.

<sup>9</sup> SUP SE ROA 27-28.

<sup>10</sup> SE ROA 5.

<sup>11</sup> 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.<sup>12</sup>

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 associations<sup>13</sup> 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.<sup>14</sup>

15 The TAC has numerous responsibilities under the 3M Plan.<sup>15</sup> 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.<sup>16</sup> Any modifications recommended and agreed to by  
19 the WAC, however, will require State Engineer approval.<sup>17</sup> 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.<sup>18</sup>

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 <sup>12</sup> SE ROA 14.

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

27 <sup>14</sup> SE ROA 8.

28 <sup>15</sup> SE ROA 8.

<sup>16</sup> SE ROA 8.

<sup>17</sup> SE ROA 11.

<sup>18</sup> SE ROA 8, 10.

1 actions.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The State  
20 Engineer then reviews the WAC's recommendations and determines which management or  
21 mitigation measures to require of KVR.<sup>29</sup> The TAC reviews the effectiveness of any mitigation  
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23 <sup>19</sup> SE ROA 7-8.

24 <sup>20</sup> SE ROA 11.

25 <sup>21</sup> SE ROA 7.

26 <sup>22</sup> SE ROA 7-8, 10.

27 <sup>23</sup> SE ROA 5, 7-10.

28 <sup>24</sup> SE ROA 10-11.

<sup>25</sup> SE ROA 11, SUP SE ROA 27.

<sup>26</sup> SE ROA 9.

<sup>27</sup> SE ROA 9-10.

<sup>28</sup> SE ROA 10.

<sup>29</sup> SE ROA 10-11.

1 measures and reports its findings to the WAC.<sup>30</sup> 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].”<sup>31</sup> The WAC may recommend certain mitigation or  
8 management actions, but the State Engineer makes the final decision.<sup>32</sup> 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.”<sup>33</sup>

16 The 3M Plan is a condition of KVR’s permits, and therefore, only KVR and its successors are  
17 bound by it.<sup>34</sup> 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-Etcheverry<sup>35</sup> may participate in the 3M Plan process by  
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25 <sup>30</sup> SE ROA 9.

26 <sup>31</sup> SE ROA 11.

27 <sup>32</sup> SE ROA 10-11.

28 <sup>33</sup> SE ROA 11, SUP SE ROA 27, R. 438.

<sup>34</sup> SE ROA 5.

<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> Substantial evidence is defined as "that which a reasonable mind might  
14 accept as adequate to support a conclusion."<sup>40</sup>

15 Unless an administrative agency decision is arbitrary or capricious it should not be disturbed  
16 on appeal.<sup>41</sup> 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."<sup>42</sup> 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.<sup>43</sup>

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23 <sup>36</sup> NRS 532.020, 532.110.

<sup>37</sup> NRS 533.450(1).

24 <sup>38</sup> 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 <sup>39</sup> *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 <sup>40</sup> *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

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

27 <sup>42</sup> *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 <sup>43</sup> *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.”<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> 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  
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25 <sup>44</sup> *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 <sup>45</sup> *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986).

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

<sup>47</sup> SE ROA 5-6.

1 staff will serve on the WAC and will be invited to chair the committee.<sup>48</sup> Second, any changes to the  
2 3M Plan or recommended management and mitigation actions from the committees require State  
3 Engineer approval.<sup>49</sup> 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.<sup>50</sup>

6 The WAC will set action criteria levels to provide advance warning of potential adverse  
7 impacts, all subject to State Engineer oversight.<sup>51</sup> If the WAC does not agree on any action criterion,  
8 then the State Engineer will decide the issue.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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 <sup>48</sup> SE ROA 7.

26 <sup>49</sup> SE ROA 11.

27 <sup>50</sup> SE ROA 11.

28 <sup>51</sup> SE ROA 7-8, 10.

<sup>52</sup> SE ROA 10.

<sup>53</sup> SE ROA 11.

<sup>54</sup> SE ROA 16.

<sup>55</sup> 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).<sup>56</sup> 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."<sup>57</sup> 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:

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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 <sup>56</sup> Br. pp. 18-19.

28 <sup>57</sup> *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 Koebe 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. <sup>58</sup> 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).<sup>59</sup> They argue that the 3M Plan will cause long delays if existing water

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27 <sup>58</sup> SE ROA 10.

28 <sup>59</sup> 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.”<sup>60</sup> KVR must monitor water levels in 89 wells, 59 of which are in Kobeh Valley.<sup>61</sup> 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.<sup>62</sup> The static water level in all wells will be measured continuously.<sup>63</sup> KVR must monitor the flow of several creeks in the Roberts Mountains and in the Pine Valley and Kobeh Valley hydrographic basins.<sup>64</sup> KVR must monitor 34 springs in the Diamond Valley, Kobeh Valley and Pine Valley hydrographic basins.<sup>65</sup> Measurements will be taken continuously for streams and quarterly for springs.<sup>66</sup> Monitoring will also include several biological and meteorological factors for springs and streams in Kobeh Valley, Roberts Mountain, and at the mine site.<sup>67</sup>

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<sup>60</sup> SE ROE 5.

<sup>61</sup> SE ROA 18-26.

<sup>62</sup> SE ROA 12.

<sup>63</sup> SE ROA 18-26.

<sup>64</sup> SE ROA 24-26.

<sup>65</sup> SE ROA 19-20, 24-26.

<sup>66</sup> SE ROA 19-26.

<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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 <sup>68</sup> SE ROA 7-8, 10.

27 <sup>69</sup> SE ROA 10.

28 <sup>70</sup> SE ROA 10.

<sup>71</sup> SE ROA 10.

<sup>72</sup> 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.<sup>73</sup> This monitoring is  
16 comprehensive and reasonably designed to detect potential impacts because it covers numerous water  
17 sources in several hydrographic basins.<sup>74</sup> 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.<sup>75</sup> 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 <sup>73</sup> SE ROA 5, 17-30.

28 <sup>74</sup> 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).<sup>74</sup>

<sup>76</sup> SE ROA 15-16.

1 pumping from one or more production wells.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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 <sup>77</sup> SE ROA 16.

<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> Finally, the WAC must ensure that mitigation is timely.<sup>82</sup> 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.<sup>83</sup> 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 <sup>79</sup> SE ROA 8.

27 <sup>80</sup> SE ROA 10.

28 <sup>81</sup> SE ROA 10.

<sup>82</sup> SE ROA 14.

<sup>83</sup> *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 15<sup>th</sup> day of May 2013.

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12 J. CHARLES THOMPSON  
13 SENIOR DISTRICT JUDGE  
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## **PROOF OF SERVICE**

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

### ***VIA COURT'S EFLEX ELECTRONIC FILING SYSTEM:***

Francis Wikstrom  
Jessica Prunty  
Cassandra Joseph  
Dana Walsh  
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Jeffrey Barr  
Debbie Leonard  
Josh Reid  
Theodore Beutel  
Karen Peterson  
John Zimmerman  
Francis Flaherty  
Paul Taggart  
Michael Rowe  
Gregory Walch  
James Erbeck  
Jennifer Mahe  
Dawn Ellerbrock  
Neil Rombardo  
Ross de Lipkau

///

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

William E. Nork, Settlement Judge  
825 W. 12<sup>th</sup> Street  
Reno, NV 89503

Dated this 26<sup>th</sup> day of July, 2013.

/s/ Therese A. Ure

\_\_\_\_\_  
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