

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; 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 KOBEH
VALLEY RANCH, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Respondents.

MICHEL AND MARGARET ANN
ETCHEVERRY FAMILY, LP, A
NEVADA REGISTERED FOREIGN
LIMITED PARTNERSHIP;
DIAMOND CATTLE COMPANY,
LLC, A NEVADA LIMITED
LIABILITY COMPANY; AND
KENNETH F. BENSON, AN
INDIVIDUAL,

Appellants,

v.

STATE ENGINEER, OF NEVADA,
OFFICE OF THE STATE
ENGINEER, DEPARTMENT OF
CONSERVATION AND NATURAL

Supreme Court Case No. 61324
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Supreme Court Case No. 63258

RESOURCES; AND KOBEH
VALLEY RANCH, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Respondents.

Appeal from a judgment denying a petition for judicial review of a State Engineer decision.

Seventh Judicial District Court of the State of Nevada in and for the County of Eureka, the Honorable J. Charles Thompson, Senior District Judge.

RESPONDENT KOBEH VALLEY RANCH, LLC.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Kobeh Valley Ranch, LLC ("KVR") is a Nevada limited liability company and a wholly-owned subsidiary of General Moly, Inc., which is a publicly traded company. Partners and associates of Parsons, Behle & Latimer have appeared for KVR in the proceedings before the Nevada State Engineer and the District Court and will appear on behalf of KVR in this appeal.

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NEVADA STATE ENGINEER RULING

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I. STATEMENT OF ISSUES

A. Whether the District Court correctly concluded that the State Engineer's approval of the monitoring, management, and mitigation plan ("3M Plan") was supported by substantial evidence and complied with Ruling 6127 and NRS 533.370(2).

B. Whether the District Court correctly determined that the 3M Plan satisfied the express condition requirement under NRS 534.110(5).

C. Whether the District Court correctly determined that the 3M Plan was not an improper delegation of State Engineer authority.

D. Whether the District Court correctly determined that the 3M Plan was not rulemaking by the State Engineer.

E. Whether the District Court correctly determined that the State Engineer's approval of the Plan was not arbitrary, capricious or an abuse of discretion.

II. STATEMENT OF THE CASE

This is an appeal from a judgment denying Appellants' ("Benson-Etcheverry") Petition for Judicial Review of the State Engineer's approval of a 3M Plan that was required under State Engineer Ruling 6127 as a condition to the water rights granted to KVR.¹

III. STATEMENT OF FACTS

The Mount Hope Project and State Engineer Ruling 6127²

In the State Engineer's Ruling granting KVR's applications for the Mt. Hope Project he found that approval of the applications would not conflict with existing water rights because the potential impacts could be detected and fully mitigated through a 3M plan. Joint Appendix, Case No. 61324, ("JA") Vol. 26, 5006, 5023.³

¹ Ruling 6127 is subject to the pending appeal in Case No. 61324, which has been fully briefed and consolidated with this appeal.

² A full recitation of the facts relevant to the Mount Hope Project ("Project") and State Engineer Ruling 6127 is set forth in KVR's Opening Brief in Case No. 61324. For the sake of brevity, those facts will not be repeated here.

³ The State Engineer found that two relatively small springs used for stockwatering and a domestic well may be impacted and that the only other water rights that might potentially be impacted were those on the valley floor of Kobeh Valley and within the predicted groundwater drawdown area. JA Vol. 26, 5006. Eureka County and Benson-Etcheverry in Case No. 61324 assert that the State Engineer was referring to more than just two springs in the Ruling, however, the evidence cited in the Ruling identifies only two springs. JA Vol. 2, 363:7-14; Vol. 3, 526:11-17; Vol. 9, 1552b. These two springs have been dry in the past. JA Vol. 9, 1616. Etcheverry has a stockwatering right to one of the small springs and testified that he uses a well at Roberts Creek Ranch for domestic use. JA Vol. 9, 1687a; Vol. 4, 630:15-25; 623:4-6.

Accordingly, to ensure that KVR's groundwater use would be closely monitored and that existing water rights would be fully satisfied so as to prevent conflicts, the State Engineer granted KVR's applications subject to a 3M Plan to be approved by the State Engineer prior to pumping groundwater for the Project. JA Vol. 26, 5022-23. The District Court in Case No. 61324 (Judge Papez) concluded that the State Engineer's determination was reasonable, within his field of expertise, and supported by substantial evidence. JA Vol. 36, 6834:1-3.⁴

Purpose and Development of the 3M Plan

The purpose of the 3M Plan is to assist the State Engineer in managing KVR's groundwater use in order to avoid conflicts with existing water rights. 3M JA Vol. 1, 48. Because the impacts from KVR's groundwater pumping in Kobeh Valley are predicted to become gradually noticeable over a period of years, the monitoring element of the 3M Plan provides an early warning of where impacts might appear in order to allow time to implement specific mitigation measures.⁵ In

⁴ The District Court in Case No. 63258 (Judge Thompson) denied Benson-Etcheverry's request to revisit Judge Papez's determination and concluded that he had "never seen more a thorough analysis of a petition for judicial review" and that Judge Papez did "a very good analysis." Case No. 63258 Joint Appendix ("3M JA") Vol. 7-1, 715:4-17.

⁵ Withdrawing groundwater from an aquifer through a well creates a cone of depression in the groundwater table surrounding the well that gradually spreads outward until equilibrium is met (i.e. the rate of water flowing into the well equals the rate of water being pumped). On a basin-wide scale, equilibrium is met when the volume of groundwater pumped from the basin annually equals the amount of

the event monitoring shows that KVR's groundwater pumping may impact an existing water right, then the 3M Plan requires KVR to mitigate the impact to ensure that the existing right receives all water to which it is entitled. 3M JA Vol. 1, 57. Mitigation must be feasible, reasonable, timely, effective, and all at KVR's expense. 3M JA Vol. 1, 57.

Additionally, the 3M Plan affords local stakeholders and potentially affected water right holders the ability to participate in the monitoring, management, and mitigation process and to raise issues before they become a problem that would require action by the State Engineer. As stated by the District Court, the 3M Plan is intended to be, and will be, an evolving and dynamic resource to the State Engineer and local stakeholders to manage and prevent adverse impacts to existing water rights as a result of KVR's groundwater pumping. 3M JA Vol. 8, 723:5-7.

KVR, Eureka County, and the State Engineer's staff worked for more than a year to develop the proposed 3M Plan and there were several revisions before the final plan was submitted to the State Engineer for approval. 3M JA Vol. 2, 97-175; Vol. 3, 199, 210, 224, 238-39, 247, 250-51; Vol. 5, 293-354, Vol. 5-1, 355-420; Vol. 6, 509-10. The general public, including Benson and Etcheverry, had an opportunity to review and comment on a draft of the Plan before it was submitted

water replenishing the aquifer annually. At equilibrium, the groundwater table stabilizes at the so-called pumping equilibrium. *See generally*, JA Vol. 7, 1266; JA Vol. 8, 1442-43.

to the State Engineer for approval. 3M JA Vol. 3, 224, 238-39, 250-51, 257; Vol. 4, 270-74; Vol. 4-1, 275-84. Benson-Etcheverry's assertions that KVR alone prepared the 3M Plan or that it was prepared and submitted just one week prior to being approved find no support in the record.

The 3M Plan.

The first part of the 3M Plan requires substantial monitoring and reporting by KVR. Under the Plan, KVR initially must obtain baseline data on numerous springs, streams, and wells in Kobeh Valley and the surrounding basins, even though there was no evidence of potential impact to these basins.⁶ KVR must then monitor those water sources to detect any changes that might occur after KVR begins pumping. 3M JA Vol. 1, 48, 60-73. KVR must monitor water levels in 91 wells, 61 of which are in Kobeh Valley. 3M JA Vol. 1, 61-69. These wells include KVR's production and test wells, USGS⁷ wells, and "sentinel" wells, which will be strategically located to provide early warning of impacts to sensitive or important resources. 3M JA Vol. 1, 55. The depth to water in all wells will be measured continuously. 3M JA Vol. 1, 61-69.

⁶ 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). 3M JA Vol. 1, 48, 60-73.

⁷ United States Geological Survey.

KVR must also monitor the flow of several creeks in the surrounding mountains and hydrographic basins. 3M JA Vol. 1, 67-69.⁸ Measurements will be taken continuously for several streams in the area and quarterly for the other streams and springs. 3M JA Vol. 1, 62-69. Monitoring will also include several biological and meteorological factors for springs and streams in Kobeh Valley, on Roberts Mountain, and at the mine site. 3M JA Vol. 1, 70-71. All of this data will be entered into the 3M database on a regular, timely, and continual basis and submitted to the State Engineer semi-annually. 3M JA Vol. 1, 57. Monitoring data collected under the 3M Plan will be shared among the 3M Plan participants and data that has been verified by quality control procedures will be available to the public. 3M JA Vol. 1, 57. Also, KVR is required to submit yearly a written report to the State Engineer summarizing water production, monitoring results, and all management and mitigation actions taken during the prior year. 3M JA Vol. 1, 57. The required monitoring under the 3M Plan will provide the data necessary to evaluate the aquifer's response to KVR's pumping and create an early warning system of potential impacts. 3M JA Vol. 1, 48.

Other parts of the 3M Plan relate to management and mitigation. The 3M Plan creates a water advisory committee ("WAC") and technical subcommittee ("TAC") whose roles are to review the effects of KVR's groundwater pumping and

⁸ KVR must also monitor 34 springs in Diamond Valley, Kobeh Valley, Antelope Valley, and Pine Valley hydrographic basins. 3M JA Vol. 1, 62-63, 67-69.

recommend action to the State Engineer so that potential adverse impacts to existing water rights will be prevented or mitigated. 3M JA Vol. 1, 49. As the District Court concluded, “[r]eceiving advice from a committee... increases the integrity and quality of such advice...,” especially where such advice is provided by a technical committee. 3M JA Vol. 8, 727:19-21.

The State Engineer, Eureka County, and KVR will be the initial members of the WAC and members from two Diamond Valley farming associations and a Kobeh Valley rancher must be invited to join.⁹ The TAC members will be appointed by the WAC and must have a professional level of technical or scientific expertise in water resources, natural resources, land management, or related fields. 3M JA Vol. 1, 51.

The TAC has numerous responsibilities under the 3M Plan and, at each stage of the review process, is required to take action as quickly as possible. 3M JA Vol. 1, 51-53. The TAC must review existing data and information to identify historic water level trends and wet and dry cycles. 3M JA Vol. 1, 51-52. The TAC also sets the standards and quality control procedures that govern how data is collected, managed, and analyzed under the 3M Plan. 3M JA Vol. 1, 52.

⁹ The Eureka Producers’ Cooperative, Diamond Valley Natural Resources Protection and Conservation Association, and Martin Etcheverry (who represents Diamond Cattle Company, LLC and the Etcheverry Family LP) are members of the WAC.

The WAC will provide a forum for water right holders and local stakeholders to share information and discuss monitoring data, analyses, technical studies, and mitigation and management actions. 3M JA Vol. 1, 50-51. The WAC must meet quarterly and hold an annual meeting open to the public to review the prior year's monitoring data and management and mitigation measures. 3M JA Vol. 1, 50. The WAC may recommend changes to the 3M Plan, but any modification must be approved by the State Engineer who retains sole authority over the Plan and KVR's water rights. 3M JA Vol. 1, 54; Vol. 6, 523.

The WAC, with help from the TAC, will set "action criteria" for monitored water sources (e.g. water table levels and stream or spring flow rates), which, if exceeded, will trigger a response from the WAC and TAC. 3M JA Vol. 1, 50-51, 53.¹⁰ These criteria will be developed to provide early warning of potential impacts. Thus, contrary to Benson-Etcheverry's assertion, the action criteria will not be used after-the-fact to determine whether there has been an adverse impact, but to provide early warning of potential adverse impacts. And the State Engineer retains his authority to review and revise the action criteria levels if he deems it appropriate. 3M JA Vol. 1, 54; Vol. 6, 523. Further, if anyone disagrees with the action criteria levels, then they may seek relief directly from the State Engineer. 3M JA Vol. 1, 54.

¹⁰ The TAC will recommend action criteria to the WAC based on its review of existing data and scientific studies. 3M JA Vol. 1, 52.

Under the 3M Plan the TAC and WAC are both involved in the review process. The TAC must review monitoring data as it is collected to determine if action criteria levels have been exceeded. 3M JA Vol. 1, 52. And, if so, then the WAC, with assistance from the TAC, will determine whether KVR's pumping caused the levels to be exceeded and recommend mitigation or management measures to the State Engineer to protect existing rights from adverse impacts. 3M JA Vol. 1, 53. The State Engineer will review the WAC's recommendations and determine the management or mitigation measures KVR must carry out. 3M JA Vol. 1, 54. Benson-Etcheverry assert the WAC will decide whether and which management or mitigation measures to implement, but the 3M Plan states that the WAC must review and recommend such measures to the State Engineer. Lastly, if any management or mitigation measures are required, the TAC will evaluate whether they are being effective at preventing or mitigating the impact, and report its findings to the WAC. 3M JA Vol. 1, 52.

The State Engineer Retains Control.

The State Engineer retains complete control over the 3M Plan and water resources in Nevada. Benson-Etcheverry argue that the 3M Plan allows the WAC to modify it without State Engineer approval. But all decisions made by the WAC under the 3M Plan "will be subject to the jurisdiction and authority of the [State Engineer]." 3M JA Vol. 1, 54. Thus, while the WAC may recommend certain

actions or changes to the Plan, the State Engineer makes the final decision. Also, the State Engineer may make any order he deems necessary and appropriate based on data he receives under the 3M Plan or from other sources, regardless of whether the WAC has provided him with recommendations. 3M JA Vol. 1, 54. And any existing water right holders may seek relief directly from the State Engineer if they believe KVR's pumping will cause, or has caused, an adverse impact to their water rights and may seek judicial review of any State Engineer response under NRS 533.450(1). The 3M Plan states that it does not limit or change the State Engineer's authority over water resources in Nevada, a point reinforced in his 3M approval notice and KVR's permits. 3M JA Vol. 1, 54; Vol. 6, 523, JA Vol. 33, 6174 (State Engineer "retains the right to regulate the use of the water herein granted *at any and all times.*") (emphasis added).

Lastly, as a condition of KVR's permits, the 3M Plan binds only KVR and its successors and is not a rule of general applicability that governs other water right holders. 3M JA Vol. 1, 48. Existing water right holders may take advantage of the 3M Plan process or they may seek relief under the water law by petitioning the State Engineer regarding any issue affecting their water rights. Any failure to comply with the 3M Plan will be a violation of KVR's permits and the State Engineer will be able to enforce the Plan or force KVR to stop all groundwater pumping. JA Vol. 33, 6175; 3M JA Vol. 1, 48. And, if KVR does not comply

with the 3M Plan, then the State Engineer may seek injunctive relief under NRS 533.482 and levy fines under NRS 533.481.

IV. SUMMARY OF ARGUMENT

The 3M Plan is consistent with NRS 533.370(2) and the Ruling because it closely monitors KVR's water use and creates an early warning system to detect impacts of KVR's pumping so as to prevent those impacts from conflicting with existing water rights. The 3M Plan approved by the State Engineer will ensure that water sources are carefully monitored and that existing water rights are satisfied to the full extent of their permits.

The 3M Plan requirement is an express condition of the Ruling and KVR's permits and will ensure that existing water rights are satisfied as required by NRS 534.110(5). The statute allows satisfaction of water rights by providing water from a different source. Benson-Etcheverry failed to raise in the District Court the argument that the 3M Plan could not allow mitigation for existing water rights and domestic wells because KVR's proposed use is not municipal, quasi-municipal, or industrial or that KVR was required to obtain the consent from domestic well owners within 2,500 feet of its production wells, and therefore, it cannot be raised for the first time on appeal. Further, this condition is not applicable where the proposed use is for mining purposes and the State Engineer was not shown and did

not find that there were any domestic wells within 2,500 feet of KVR's proposed wells.

The State Engineer retains complete authority to control KVR's water use, to manage water resources and to protect existing water rights. The 3M Plan does not delegate the State Engineer's decision-making authority, is consistent with Nevada water law, and does not create new regulations.

Finally, although Benson-Etcheverry failed to raise this argument below, there is a rational connection, supported by substantial evidence, between the State Engineer's findings regarding potential impacts and his conclusion that the 3M Plan would protect existing rights and domestic wells. Accordingly, the State Engineer's decision is not arbitrary or capricious. Moreover, the State Engineer has authority to allow a subsequent appropriator to mitigate an existing right by providing water from a different source.

V. STANDARD OF REVIEW

On appeal, the State Engineer's decision is *prima facie* correct and the burden of proof is on the party attacking it. NRS 533.450(10); *State Eng'r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 203, 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). A decision of the State Engineer will not generally be disturbed on appeal unless it is arbitrary or capricious. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev.

743, 751, 918 P.2d 697, 702 (1996). A decision is not arbitrary or capricious simply because the reviewing court might have reached a different conclusion, but only if it is “‘baseless’ or ‘despotic’” or evidences “‘a sudden turn of mind without apparent motive; a freak, whim, mere fancy.’” *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994) (quoting, *City Council v. Irvine*, 102 Nev. 277, 278-79, 721 P.2d 371, 372 (1986)).

As to questions of fact, a court should not substitute its judgment for that of the State Engineer, pass on the credibility of witnesses, or reweigh the evidence. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). It is the State Engineer’s duty to resolve conflicting evidence, and a court must limit itself to a “determination of whether substantial evidence in the record supports the State Engineer’s decision.” *Id.* (citing *No. Las Vegas v. Pub. Serv. Comm’n*, 83 Nev. 278, 429 P.2d 66 (1967)). Substantial evidence is that which “‘a reasonable mind might accept as adequate to support a conclusion.’” *State, Emp. Sec. v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L.Ed.2d 842 (1971)).

In addition, because the State Engineer has the implied power to construe the state’s water law, “‘great deference should be given to the [State Engineer’s] interpretation when it is within the language of the statute.’” *Pyramid Lake*, 112 Nev. at 747-48, 918 P.2d at 700 (quoting *State v. State Engineer*, 104 Nev. 709,

713, 766 P.2d 263, 266 (1988) (citations omitted); *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) (noting that deference is especially important because the State Engineer has a “special familiarity and expertise with water rights issues”). Therefore, even though the State Engineer’s interpretation of a statute is not controlling, this Court “recognizes the State Engineer’s expertise and looks to his interpretation of a Nevada water law statute as persuasive, if not mandatory, authority.” *In re Nevada State Eng’r Ruling No. 5823*, 128 Nev. ___, ___, 277 P.3d 449, 453 (2012), *See also, Andersen Family Assocs. v. Ricci*, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008); *United States v. State Eng’r*, 117 Nev. at 589, 27 P.3d at 53. Similarly, the State Engineer’s conclusions of law, to the extent they are closely related to his view of the facts, are entitled to deference and must not be disturbed if they are supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986) (citing *Barnum v. Williams*, 84 Nev. 37, 436 P.2d 219 (1968)).

VI. ARGUMENT

A. THE 3M PLAN PROTECTS EXISTING RIGHTS, AND THEREFORE, COMPLIES WITH THE RULING AND NRS 533.370(2).

The State Engineer’s decision to approve the 3M Plan should be upheld because the Plan requires KVR to carefully monitor water resources and mitigate

any impacted water rights and protectable interests in domestic wells.¹¹ The State Engineer's approval of the 3M Plan is entitled to deference because it is squarely within his area of expertise and closely related to the findings in the Ruling.

Benson-Etcheverry speculate that the 3M Plan may downgrade the duty of eliminating conflicts because it uses the phrase "adverse impacts" instead of "conflicts" and that the 3M Plan will create an adjudicatory role because it states that mitigation measures will be developed and implemented on a case-by-case basis. Benson-Etcheverry also assert that the mitigation measures listed in the 3M Plan are inconsistent with NRS 533.370(2) and are "totally in contradiction with the prior appropriation doctrine...." For the reasons discussed below, Benson-Etcheverry are simply incorrect and the State Engineer did not err as a matter of law by approving the 3M Plan.

First, using the phrase "adverse impacts" instead of "conflicts" does not downgrade KVR's obligation to ensure that existing rights are fully satisfied if they are impacted by its groundwater pumping. The 3M Plan requires KVR to mitigate potential adverse impacts so that they do not occur or so that existing water right holders are not adversely affected. 3M JA, Vol. 1, 48, 58. This includes permitted water rights, determined or undetermined claims of vested

¹¹ As used herein a domestic well is one that is used to provide water for domestic purposes, as defined by NRS 534.013. A person is not required to obtain a permit to use water from a domestic well, but is limited to only two afa. NRS 534.180(1).

rights, reserved water rights, and domestic wells.¹² 3M JA, Vol. 1, 48, 57-58. The State Engineer interprets mitigation to mean actions that ensure existing rights are satisfied. 3M JA, Vol. 7-1, 625. Accordingly, using the phrase “adverse impacts” does not downgrade or eliminate the State Engineer’s requirement in the Ruling or his obligation under NRS 533.370(2) to prevent conflicts with existing rights.

In particular, the 3M Plan requires KVR to monitor and mitigate potential impacts to Etcheverry’s water rights in Kobeh Valley.¹³ Etcheverry holds a water right to a small spring (“Mud Spring”) that allows him to use water for stockwatering purposes. JA Vol. 9, 1687a. The 3M Plan requires KVR to monitor the flow and photograph Mud Spring quarterly. 3M JA Vol. 1, 67. If monitoring data show that KVR’s pumping is going to impact Mud Spring, then the 3M Plan requires KVR to mitigate the impact and prevent a conflict with the existing right. 3M JA Vol. 1, 58 (Section 7(H)). Likewise, if monitoring data collected under the 3M Plan show that KVR’s pumping will affect the groundwater table at

¹² Permitted rights are any water rights issued by the State Engineer since the enactment of Nevada’s statutory water law. Undetermined or determined claims of vested water rights include water rights that are claimed or proven to have been established by diversion and beneficial use before enactment of the statutory water law. Claims of reserved water rights include rights claimed or proven under the federal reserved water rights doctrine.

¹³ Benson does not hold or claim water rights in Kobeh Valley and the State Engineer found that his Diamond Valley water rights would not be affected by KVR’s groundwater use. JA Vol. 26, 5020. Benson presented no evidence to the contrary.

Etcheverry's domestic well, then KVR will be required to mitigate the impact and satisfy his rights. 3M JA Vol. 1, 48, 57-58. Accordingly, the 3M Plan specifically ensures that Etcheverry's existing rights will be monitored and mitigated, in full compliance with NRS 533.370(2). Benson-Etcheverry have failed to overcome their burden to show that mitigation will not prevent conflicts with existing rights as required by the Ruling and NRS 533.370(2).

Second, stating that KVR must mitigate adverse impacts to permitted water rights, determined and undetermined claims of vested rights, or reserved rights does not mean the 3M Plan will assume an adjudicatory role. As stated above, requiring mitigation of adverse impacts to existing rights or claims of vested or reserved rights means that such rights or claims must be fully satisfied according to the State Engineer's determination of the extent of those rights. And if existing appropriators believe they will not be, or have not been, satisfied by the specific mitigation measures developed and implemented under the 3M Plan, then they may seek relief directly from the State Engineer.

Further, the 3M Plan requires mitigation measures to be developed and implemented on a case-by-case basis because, as pumping begins and the stress to the aquifer becomes more precisely known, the specific measures needed to mitigate any impacts to existing rights will become more clearly understood. Accordingly, this language does not mean that the 3M Plan will assume an

adjudicatory role, but instead recognizes that until the actual effects of pumping are known, the State Engineer cannot determine with reasonable certainty the specific mitigation measures that should be implemented. And because the 3M Plan creates an early warning system to detect the effects of KVR's pumping, the State Engineer and the advisory committees will have sufficient time to develop specific mitigation measures to prevent conflicts. Therefore, Benson-Etcheverry's argument that the 3M Plan will take an adjudicatory role as to certain rules or definitions is incorrect.

Third, the potential mitigation measures described in the 3M Plan comply with NRS 533.370(2) and the doctrine of prior appropriation. NRS 533.370(2) requires the State Engineer to reject an application if its proposed use or change conflicts with existing rights or protectable interests in domestic wells. The State Engineer interprets the phrase "conflicts with" to be a situation where a senior appropriator's use cannot be satisfied because of water use by a junior appropriator. Benson-Etcheverry assert that NRS 533.370(2) and the doctrine of prior appropriation prohibit KVR from supplying groundwater to satisfy an existing appropriator's surface water right because such groundwater is "different," and therefore, KVR should not be allowed to use such water to mitigate any impacted water rights. The doctrine of prior appropriation, however, does not support Benson-Etcheverry's argument because it provides that one does not own

the water itself, but only the right to use water for a beneficial use. *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). A surface water appropriator's right to use water can be satisfied by drilling a well to provide groundwater or by providing water from another source. Therefore, contrary to Benson-Etcheverry's argument, the potential 3M mitigation measures will allow existing appropriators to use the full extent of their existing water right even if their water source is impacted.

Moreover, Benson-Etcheverry's argument is counter to the public policy of protecting existing rights and the long-term sustainability of water resources while allowing for the maximum beneficial use of water for the benefit of the people of Nevada. Benson-Etcheverry's position would result in a "no impact" rule and would prevent new water uses any time there was a potential impact, even if the predicted impacts could be detected and fully mitigated. Under Benson-Etcheverry's argument, no further appropriations could occur. Here, the State Engineer granted groundwater rights to KVR that are well within the perennial yield of the basin, required KVR to satisfy any impacted water rights, and found that KVR's water use would not conflict with any existing water rights. The State Engineer's interpretation of Nevada water law is reasonable and strikes an appropriate balance between protecting existing rights and allowing the maximum beneficial use of water for the benefit of the State.

Through his approval of the 3M Plan, the State Engineer has determined that the conditions and provisions of the Plan are adequate to ensure that existing rights will be protected and satisfied. His decision is supported by the 3M Plan itself because it requires KVR to carefully monitor the effects of its pumping, to forecast potential impacts, and to prevent or mitigate such impacts from adversely affecting existing water rights. The State Engineer's determination that existing rights can be satisfied by the 3M Plan is reasonable, squarely within his area of expertise, and supported by substantial evidence in the record. Accordingly, the State Engineer's approval of the 3M Plan complies with the Ruling and NRS 533.370(2) and the Judgment should be affirmed.

B. THE STATE ENGINEER DID NOT EXCEED HIS AUTHORITY BY APPROVING THE 3M PLAN BECAUSE IT SATISFIES NRS 534.110(5).

Benson-Etcheverry argue that mitigation cannot include providing water from a different source and that the 3M Plan does not ensure that existing rights are satisfied by express conditions as required by NRS 534.110(5). They also contend, for the first time on appeal, that under NRS 534.110(5) the State Engineer could not allow mitigation for KVR because it is a mining use and that users of existing domestic wells within 2,500 feet of KVR's wells must consent to the 3M Plan. For the reasons discussed below, Benson-Etcheverry's assertions are incorrect.

1. The 3M Plan is a condition of the Ruling and states that KVR must mitigate impacts to existing rights and domestic wells.

Benson-Etcheverry admit that under NRS 534.110(5) the State Engineer may grant additional water rights if existing appropriators can be satisfied, but argue that satisfaction may not include supplying groundwater to satisfy an existing surface water right. Benson-Etcheverry's argument fails because their restrictive interpretation is not supported by the statute's plain meaning or the State Engineer's reasonable interpretation. They do not cite to any legal authority in support of their restrictive interpretation.

NRS 534.110(5) allows the State Engineer to grant additional rights that will cause the water table to be lowered if the rights of existing appropriations or domestic wells "can be satisfied under such express conditions." In the Ruling, the State Engineer found that KVR's groundwater use would lower the water table and rights that could be potentially affected were those on the valley floor of Kobeh Valley and within the predicted drawdown area. The State Engineer determined, however, that the potential impacts could be detected and fully mitigated and required a 3M Plan to ensure that existing rights were satisfied. As required by the Ruling, the 3M Plan states that KVR must mitigate adverse impacts to existing rights, which means that KVR is required to satisfy existing rights to the full extent of the water right. Thus, contrary to Benson-Etcheverry's assertion, the 3M Plan does not allow KVR to dictate the terms by which existing rights will be satisfied

and instead states that they must be satisfied to the extent of the water right, which means that KVR will be required to provide a specific amount of water at a specific place for a specific use.

Benson-Etcheverry's argument that NRS 534.110(5) limits mitigation to providing water from the same water source is not supported by the plain language of the statute. The Court first looks to the plain language of a statute to determine legislative intent and only looks beyond the plain language if it is ambiguous or silent on the issue in question. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000). Additionally, the Court reads statutes within a common statutory scheme "harmoniously with one another in accordance with the general purpose of those statutes" and to avoid unreasonable or absurd results. *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008).

Here, the plain language of NRS 534.110(5) does not prohibit the State Engineer from allowing an existing surface water right to be satisfied by groundwater. If a junior appropriator lowers the groundwater table so that a surface spring no longer flows, nothing in the statute prevents the State Engineer from requiring that the existing right be satisfied by providing water from another source so long as the existing right is satisfied. In fact, if a water source is impacted to a point where existing appropriators cannot fulfill their water rights, then the only option may be to provide water from another source. Benson-

Etcheverry's argument, therefore, would lead to absurd results because mitigation would be rendered impossible and not available to subsequent appropriators. The State Engineer's approval of potential mitigation measures that satisfy existing water rights from other water sources is supported by the plain language of NRS 534.110(5) and the State Engineer's interpretation of the statute. Additionally, the State Engineer's interpretation should be given great deference because it is within the meaning of the statute.

2. The express conditions of the 3M Plan ensure that existing rights will be satisfied.

Here the State Engineer did impose express conditions—both the Ruling and permits state they are subject to existing rights and a 3M Plan to protect those rights. JA Vol. 26, 5026; Vol. 33, 6174-75. The permits were not effective until the 3M Plan was approved by the State Engineer and the terms of the 3M Plan are express conditions of the permits. Thus, the rights of all prior appropriators will be protected by express conditions as required by NRS 534.110(5). If the express conditions are not met, then the State Engineer will exercise his authority to stop or curtail pumping. Nothing more was required.

Benson-Etcheverry contend that the 3M Plan does not ensure that existing water rights will be satisfied by express conditions. First, Benson-Etcheverry reassert that using the phrase “adverse impacts” will reduce the protection afforded to existing rights. As stated above, mitigation means that existing rights must be

satisfied. Therefore, using the phrase “adverse impacts” does not affect KVR’s obligation under the Ruling and NRS 534.110(5) to ensure that existing rights are satisfied.

Second, Benson-Etcheverry misinterpret the clear and plain provisions of the 3M Plan and argue that mitigation will not occur until after existing appropriators are impacted, that the WAC will adjudicate whether KVR has injured an existing appropriator, and that the Plan creates an arduous, spiraling process. The District Court addressed each of these claims and concluded that the 3M Plan is designed to be proactive, not reactive, because it requires extensive monitoring of potentially-affected water sources, provides an early warning of potential impacts, and creates a process to respond to potential impacts before they adversely affect existing water rights. 3M JA, Vol. 8, 731:2-5.

Benson-Etcheverry assert that the action criteria will be triggered only when an adverse impact to an existing water rights occurs. This is simply not true. The 3M Plan requires action criteria to be set at levels to detect any effects of pumping that may cause a potential adverse impact. 3M JA Vol. 1, 50-51. Benson-Etcheverry’s argument is based on their incorrect interpretation that monitoring will be used to detect impacts only after they have adversely affected existing water rights. This early warning system in the 3M Plan ensures that KVR, the State Engineer, and other 3M Plan participants will have a reasonable amount of

time to respond to the effects of KVR's pumping and to prevent or mitigate potential impacts from conflicting with existing water rights. Mitigation may include preventive measures, such as reducing the pumping rate from production wells, or responsive measures such as drilling a well to supply replacement water and satisfy an existing right. 3M JA Vol. 1, 59. Accordingly, if monitoring of KVR's pumping shows that Etcheverry's Mud Spring will be impacted, then the 3M Plan will require KVR to supply enough water to Etcheverry to satisfy his stockwatering water right at that spring location. Likewise, if monitoring shows that Etcheverry's domestic well will be impacted, then the 3M Plan will require KVR to mitigate it by measures such as lowering the pump in the well and paying for the additional pumping costs or drilling Etcheverry a new well to ensure that he obtains his two afa of water. 3M JA Vol. 1, 59.

3. The new arguments under NRS 534.110(5) were not raised below, do not apply to KVR's proposed use, and are not supported by the State Engineer's findings.

For the first time on appeal, Benson-Etcheverry contend that the 3M Plan could not allow mitigation for existing water rights and domestic wells because KVR's proposed use is not "municipal, quasi-municipal, or industrial" and KVR did not obtain the consent from domestic well owners within 2,500 feet of its production wells. This issue was not raised by Benson-Etcheverry before the District Court, and therefore, it cannot be raised for the first time on appeal. *Peot*

v. Peot, 92 Nev. 388, 551 P.2d 242 (1976); *State of Washington v. Bagley*, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998).

Even if Benson-Etcheverry had raised this argument below it would not have affected the Judgment because it does not apply to KVR's proposed use. NRS 534.110(5) requires water right permits for municipal, quasi-municipal, or industrial uses to contain certain conditions to prevent unreasonable adverse effects on domestic wells within 2,500 feet unless the parties agree to alternative mitigation measures. Nothing in this section, however, requires or implies that mitigation is not available for non-listed uses such as mining. The Section merely recognizes common conflicts in an urban setting. Further, the State Engineer was not presented with any evidence of, and did not find that there were, any domestic wells within 2,500 feet of KVR's proposed wells, and therefore, KVR was not required to obtain the consent of any such well owner.

**C. THE STATE ENGINEER DID NOT DELEGATE HIS
DECISION-MAKING AUTHORITY BY APPROVING THE 3M
PLAN.**

The District Court concluded that the 3M Plan does not delegate the State Engineer's decision-making authority because the committees are only advisory and the State Engineer retains full and complete control over the Plan and existing water rights. Benson-Etcheverry concede this point, but question how much of that authority he will exert. In other words, Benson-Etcheverry presume that the

State Engineer will not do his job and will fail to take action to protect existing water rights. Nowhere, however, does the 3M Plan state or imply that the State Engineer will or must wait for the WAC and TAC to review a potential impact before taking action. Rather, it expressly states that “[n]othing herein limits or changes the [State Engineer’s] authority”—a point the State Engineer reiterated in his approval of the Plan. 3M JA Vol. 1, 54; Vol. 6, 523. Therefore, the 3M Plan does not strip the State Engineer’s authority or impair his ability to consider any issue related to KVR’s groundwater pumping at any time. Further, the State Engineer is not prohibited from receiving input and advice from local stakeholders and those with technical expertise in order to better manage water resources. And, as the District Court observed, receiving input and advice from a technical committee only increases the integrity and quality of the advice. 3M JA Vol. 8, 727:19-21.

Benson-Etcheverry contend that some of the WAC’s functions will include modifying the monitoring component of the 3M Plan and setting action criteria to warn of potential impacts. But any changes to the 3M Plan recommended by the committees require State Engineer approval, and thus, these functions are not a delegation of authority. 3M JA Vol. 1, 54. Next Benson-Etcheverry assert that the 3M Plan allows the WAC to determine adverse impacts on a case-by-case basis. This argument is discussed above at Section A and will not be repeated here.

Benson-Etcheverry also assert that the WAC can make decisions without the State Engineer's WAC member being present. But they ignore the requirement that the State Engineer must approve any decisions made by the WAC, regardless of whether his staff member was present when the decision was made. 3M JA Vol. 1, 54.

Next, Benson-Etcheverry again argue that the 3M Plan does not rely on legislative or regulatory mandates to set standards for what constitutes a "conflict" as opposed to an "adverse impact." Benson-Etcheverry claim that the WAC's determinations regarding action criteria and adverse impacts are substitutes for the State Engineer's statutory determinations regarding conflicts. As explained above, however, the WAC's determinations regarding action criteria are to provide an early warning system to prevent adverse impacts from conflicting with existing water rights. 3M JA Vol. 1, 48, 50-51, 53. The WAC must set action criteria (e.g. water levels, spring discharges, vegetation responses) at levels that will serve as an early warning against potential adverse impacts and that, if exceeded, could be of concern to the 3M Plan participants. 3M JA Vol. 1, 50-51. The action criteria will be developed by the TAC based on available data and analyses. 3M JA Vol. 1, 52. If the action criteria are triggered, then the TAC and WAC assess the impact, determine whether it was caused by KVR, and recommend action to the State

Engineer. 3M JA Vol. 1, 53. And all of these activities are subject to the ultimate authority of the State Engineer. 3M JA Vol. 1, 54.

Benson-Etcheverry also assert that there are no deadlines for developing management or mitigation recommendations for the State Engineer and that water users are at the mercy of the WAC while drawdown occurs. Monitoring will allow early detection of impacts so that necessary action can be taken to prevent them from conflicting with existing rights. If the monitored resources and data show that surface water flow or the groundwater table have dropped below the “action criteria” levels, then the TAC must meet as soon as possible to determine if KVR’s groundwater use caused the drop and report its findings to the WAC. 3M JA Vol. 1, 53. If the WAC concludes that KVR’s pumping is causing a potential impact, then the TAC must expeditiously create mitigation methods and submit them to the WAC to prevent a conflict with existing water rights. 3M JA Vol. 1, 53. This review process begins as soon as potential impacts are detected, not after adverse impacts occur, and therefore, provides the State Engineer, KVR, and stakeholders with advance warning. Accordingly, as the District Court determined, the 3M Plan process will ensure that water sources are carefully monitored and will not delay mitigation. 3M JA Vol. 8, 733:20, 734:2-4. Most importantly, the State Engineer can take action at any time if he determines the situation and circumstances warrant prompt action. 3M JA Vol. 8, 728:20-23.

Moreover, by its specific terms the 3M Plan is an express condition of the water rights granted under the Ruling, and, therefore, does not bind anyone other than KVR. 3M JA Vol. 1, 48 (Section 1(A)). The 3M Plan does not create a new adjudicatory process. And, contrary to Benson-Etcheverry's assertion, the 3M Plan does not require other water rights holders to submit their complaints to the WAC for adjudication or to waive other legal remedies available to them. Because the 3M Plan does not limit the State Engineer's authority, he will have the ability to consider any complaint by an existing appropriator regarding KVR's use of water. And as discussed above, the State Engineer may order any action necessary based on the facts and circumstances of each case. Therefore, any water right holder who believes that his water rights have been impacted by KVR's use of groundwater may petition the State Engineer to investigate the matter and can seek judicial review of the State Engineer's decision if they are dissatisfied. The 3M Plan does not limit or modify any water right holder's rights to such remedies, and thus, Benson-Etcheverry's allegation that existing rights will be at the mercy of the WAC are not supported by the provisions of the 3M Plan.

Finally, Benson-Etcheverry argue that the fact the legislature created certain other committees or boards to assist the State Engineer somehow means that he is prohibited from conditioning his approval of specific water rights on the 3M plan. But Benson-Etcheverry have failed to cite to any law to support their position. As

stated above, when possible, courts must interpret provisions within a common statutory scheme harmoniously in accordance with their general purpose and to avoid unreasonable or absurd results in order to give effect to the Legislature's intent. *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting *Washington*, 117 Nev. at 739, 30 P.3d at 1136). Here, the State Engineer has the authority to decide issues regarding water rights and this authority includes the ability to require a permit holder to abide by a 3M plan to protect existing rights. JA Vol. 36, 6835:5-12 (citing *U.S. v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1479 (1996)). Since the monitoring, management, and mitigation related to KVR's use of water is at all times subject to the State Engineer's review and control, Benson-Etcheverry's argument that he has delegated his authority fails.

D. THE 3M PLAN DOES NOT CIRCUMVENT NEVADA WATER LAW OR CONSTITUTE RULEMAKING.

Benson-Etcheverry contend that the State Engineer's approval of the 3M Plan created new regulations that are inconsistent with, and circumvent, Nevada water law. The 3M Plan, however, is an addition to, not a substitute for, other statutory requirements. It is a tool to assist the State Engineer in his management of the States' water resources. Accordingly, the 3M Plan is consistent with the State Engineer's authority.

Benson-Etcheverry claim that the 3M Plan circumvents Nevada water law because it uses the phrase “adverse impact” instead of “conflict” or “unreasonable lowering” and sets action criteria to provide an early warning of such impacts. As determined by the District Court, however, the WAC’s determinations regarding action criteria are separate from the State Engineer’s statutory determinations. 3M JA Vol. 8, 728:6-15. The WAC will set action criteria levels to provide advance warning of potential adverse impacts, all subject to State Engineer oversight. 3M JA Vol. 1, 48, 50-51. If the WAC does not agree on any action criterion, then the State Engineer will decide the issue. 3M JA Vol. 1, 53. And if the WAC determines that KVR triggered any of the action criteria and recommends management or mitigation actions, the State Engineer decides what mitigation is necessary to prevent the potential impact from adversely affecting existing rights. 3M JA Vol. 1, 54. The State Engineer is not limited to the WAC’s recommended management or mitigation measures and may independently require any other measures, whether or not they are currently listed in the 3M Plan. 3M JA Vol. 1, 59 (Section 7(J)(i)).

Further, the 3M Plan does not state that the WAC’s determinations regarding action criteria are substitutes for determinations the State Engineer is authorized to make under Nevada law. First, the determination whether a water right application conflicts with existing rights is made at the time an application is reviewed by the

State Engineer under NRS 533.370(2). In this case, the State Engineer determined that KVR's applications would not conflict with existing rights. The 3M Plan does not change that determination or state that the WAC will determine whether there are any conflicts. Second, the 3M Plan does not require the WAC to decide whether KVR has caused more than a reasonable lowering of the water table. Instead, the WAC will assess the effects of KVR's groundwater pumping and recommend whether and what action should be taken to prevent adverse impacts to existing water rights. Accordingly, the WAC's determination of action criteria and adverse impact are distinct from the State Engineer's statutory determinations regarding conflicts and reasonable lowering.

E. THE STATE ENGINEER'S APPROVAL OF THE 3M PLAN IS NOT ARBITRARY OR CAPRICIOUS OR AN ABUSE OF DISCRETION AND THE JUDGMENT SHOULD BE AFFIRMED.

In their final argument, Benson-Etcheverry assert that there is no rational connection between the State Engineer's findings and his conclusion that the 3M Plan would protect existing rights and domestic wells. Additionally, they assert that there is no legislative provision that allows the State Engineer to condition a senior appropriator's existing right on acceptance of mitigation to prevent conflicts.

First, Benson-Etcheverry's contention that the State Engineer attempted to minimize his finding that two small springs and a domestic well might be impacted

by finding that the impacts could be detected and mitigated by a 3M Plan is unsupported and illogical. There was expert testimony and studies, which showed that these springs produced less than a gallon per minute, were dry at times, and were used for stockwatering purposes—factors that make mitigation readily feasible. JA Vol. 9, 1552b, 1616; Vol. 11, 1901-02. KVR's experts testified that the predicted impacts on the water sources could be mitigated and Etcheverry and the other Kobeh Valley ranchers agreed. JA Vol. 4, 630:15-25, 631:1-8, 647:13-20, 659:11-19, 669:6-13. The experts also testified that any potential impacts to other springs or stockwatering wells on the valley floor could also be fully mitigated if they occur, thereby avoiding any actual conflicts with existing water rights. JA Vol. 2, 382:10-12; Vol. 3, 490:3-8. This evidence included testimony that there were several proven techniques available to mitigate any loss from these springs and wells, including deepening the impacted wells, piping water from KVR's distribution system, and adjusting the volume or rate of water pumped from each of KVR's production wells. JA Vol. 2, 382:10-12; Vol. 3, 490:3-8; Respondent's Appendix, Case No. 61324 ("RA") Vol. 1, 2:1-5.

There are only 1,100 afa of existing rights in Kobeh Valley that are not owned or controlled by KVR, and this limits the amount of mitigation that may be needed to satisfy existing rights. JA Vol. 26, 5011. The State Engineer's determination that existing rights can be mitigated is further supported by the fact

that BLM, which claims water rights on 29 springs in Kobeh Valley, entered into a mitigation agreement with KVR. JA Vol. 26, 5011.

The record shows that all potential impacts to existing rights can be mitigated by KVR so that each existing water right holder will continue to obtain the amount of water to which he is entitled and in the same location as his water right provides. JA Vol. 4, 630:15-25, 631:1-8, 647:13-20, 659:11-19, 669:6-13. The State Engineer will require KVR to mitigate any impacted sources through the 3M Plan and under Nevada water law. JA Vol. 26, 5011, 5022, 5026. And KVR has shown that it has the financial ability and commitment to do so. JA Vol. 2, 208:4-25, 210:10-14, 236:17-23, 258:4-25, 259:1, 300:3-10, 332:12-19; Vol. 26, 4996-97. Accordingly, Benson-Etcheverry's statement that there is no rational connection between the State Engineer findings regarding potential impacts and mitigation is contradicted by the record. As set forth above, the State Engineer's decision is supported by substantial evidence and Benson-Etcheverry have failed to overcome their burden to show otherwise.

Next, Benson-Etcheverry contend that the State Engineer arbitrarily concluded that a junior appropriator could substitute financial compensation, property replacement, or substitute water from a different source as mitigation. Contrary to Benson-Etcheverry's assertion, the 3M Plan does not state that financial compensation can be a substitute for satisfying existing water rights.

Instead financial compensation may be used to compensate any potentially affected water right holder for the cost of lowering a pump in a well, deepening an existing or drilling a new well, increased pumping costs, or transporting water to a specific location to satisfy an existing right. Similarly, the 3M Plan states that other water rights or real property could be purchased for replacement, but only *if agreed* by the senior user. 3M JA Vol. 1, 59 (emphasis added). Accordingly, unless the existing appropriator agrees to accept alternative compensation, KVR must satisfy the existing right. Finally, Benson-Etcheverry's assertion that the State Engineer cannot allow water from a different source to be used to satisfy existing water rights has been addressed above in Section A.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Judgment in its entirety.

DATED: August 21, 2013.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font and Times New Roman type style.

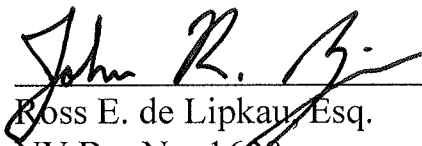
2. I certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 10,153 words.

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

DATED: August 21, 2013.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that I am an employee of Parsons Behle & Latimer, and that on this 21 day of August, 2013, I served a true and correct copy of the foregoing **RESPONDENT KOBEH VALLEY RANCH, LLC'S ANSWERING BRIEF** to be served on the following parties as outlined below:

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