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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 KOBEH 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, DPEARTMENT OF CONSERVATION AND NATURAL RESOURCE; and KOBEH VALLEY RANCH, LLC, a Nevada limited liability company, Respondents.	**Case No. 63258** ***(Consolidated with Case No. 61324)*** **APPELLANTS' REPLY BRIEF** **On Appeal from the Judgment of the Seventh District Court of the State of Nevada in and for the County of Eureka, Case No. CV-1207-178**

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

NRAP 26.1 DISCLOSURE

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

DATED this 20th day of September, 2013.

SCHROEDER LAW OFFICES, P.C.

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REPLY BRIEF

Appellants MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, DIAMOND CATTLE COMPANY, LLC, and KENNETH F. BENSON (collectively referred to as "Appellants Benson and Etcheverry"), by and through their attorneys of record, Schroeder Law Offices, P.C., file this Reply Brief in response to the Answering Briefs filed by Respondent Kobeh Valley Ranch, LLC ("KVR") and Respondent State of Nevada State Engineer ("State Engineer").

I.

APPELLANTS' REPLY ARGUMENT IN RESPONSE TO RESPONDENTS' ANSWERING BRIEFS

Appellants' position is straightforward---KVR's Monitoring, Management and Mitigation Plan ("3M Plan") will not protect senior appropriators' water rights. Pursuant to NRS 533.370(2), the 3M Plan, a condition of KVR's permits, must preclude conflicts with existing rights or KVR's applications must be denied. Mitigation measures proposed under the plan far exceed those measures allowed under NRS 534.110(5).

In replying to the State Engineer and KVR, Appellants outline the following points. *First*, Nevada water law requires a designated and specific source for each water right of use. In protecting existing rights, the right to the source of the water as defined on the permit or certificate must be protected. Replacing a water right of use with "forced mitigation" of alternate source water is in violation of Nevada

water law. *Second*, Nevada's water policy does not extend so far as to require maximum usage of all resources nor does it create a preference to set aside existing law so that maximum development may occur. *Third*, the 3M Plan lacks express conditions to keep existing water use holders whole. *Finally*, there is no statutory scheme that allows for a junior mining water claimant to force mitigation on a senior water right holder.

A. Response to Disputed Facts

In the interest of judicial economy, Appellants Benson and Etcheverry request the Court to refer to their Statement of Facts in Appellants' and Eureka County's Reply Briefs filed in Supreme Court Case No. 61324, for clarification of certain facts presented by Respondents in their Answering Brief. In particular, those facts relating to and considering the anticipated and occurring impacts on water sources and existing vested and permitted water rights. *See*, Appellants' Reply Br. at 2-7; Eureka County's Reply Br. at 13-25.

B. Water Law Primer 2

In its Opening Brief in Supreme Court Case No. 61324, Eureka County provided an overview of Nevada water law. However, the "primer" was incomplete.

Respondents KVR and State Engineer argue points of law inconsistent with Nevada water law, and NRS 533.370 and NRS 543.110 in particular. They

mislead by suggesting a water right is not tied to a specific source of water and that water from essentially any source may be used under the appropriator's right. They have further argued that the beneficial use of water is somehow related to a "policy" that all available water must be put to use. *See* State Engineer's Ans. Br. at 15-16. Therefore, before responding to the Respondents' arguments, a discussion of the law from a historic perspective appears appropriate.

1. Water Use Rights are Tied to a Specific Water Source.

Despite the Respondents' assertions, Appellants do not question the truism that in Nevada "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." NRS 533.025.

> The appropriator acquires no specific property in the particles of water—the *corpus* of the water—while flowing in the stream. What he acquires is a right of diversion and use of some specific quantity of water that at that time may be flowing in the stream. This is a usufructuary right –sometimes termed a usufruct –a right of possession and use only.

Wells A. Hutchins, 1 *Water Rights Laws in the Nineteen Western States* 441 (Dep't of Agriculture 1972).

However, once that public water is by an applicant's use vested, permitted, or certificated into a right of use, the user with the right is confirmed with regard to a specific water source. Nevada law at NRS 533.335 provides that "each

application for a permit to appropriate water shall contain the following information: 1. The name and the post office address of the applicant .... 2. The name of the source from which the appropriation is to be made..." Furthermore, NRS 533.330 states:

> **Application limited to water of one source for one purposes; individual domestic use may be included.** No application shall be for the water of more than one source to be used for more than one purpose; but individual domestic use may be included in any application with the other use named.

Examination of KVR's water right applications, water use certificates, and change permits submitted as part of the record on appeal, confirm that applications and certificates, as well as change applications, specify the source of the water that is to be used. *See, e.g.*, JA, Vol. 13 at 2111, 2114, 2117; JA, Vol. 22 at 4209-4214; JA, Vol. 13 at 2222, 2226, 2230.[1] In fact, the first descriptor identified on certificates and permits defining the use right outlined by that document, is the source of the water to which the right of use pertains.

Over time, recognizing the need for the ability to change these rights of use, the legislature codified a change in the prior appropriation doctrine to allow limited change to existing rights of use. The legislature specifically provided that a point

[1] For clarification, reference to documents filed in the Joint Appendix relating to the initial appeal, Case No. 61324 will be referred to as JA, Vol. X at YY. Documents filed in the Joint Appendix for Case No. 63258 consolidated with Case No. 61324 will be referred to as 3M JA, Vol. X at YY.

of diversion, place of use, and manner of use of a water right may be changed pursuant to NRS 533.345[2]. Because the prior appropriation doctrine would be solely upset by changing water sources by means of a change application, the legislature wisely chose not to codify a provision to change a water right source. Notwithstanding Respondents' misleading assertions, a change in source requires a water user to file an application for a new water right. In sum, the water rights, which are valuable property rights[3], held by the Appellants, relate to specific sources of water and those sources cannot be arbitrarily modified under Nevada's adopted and codified version of the prior appropriation doctrine.

2. State Policy Does Not Push Maximum Development of State Waters.

Respondents have overstated the holdings in *Desert Irrigation, Ltd. v. State Eng'r*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) and *Bacher v. State Eng'r*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006) when they suggest that the policy of beneficial use is allied with the requirement that all the waters of the State be fully utilized so none are "left idle." Such a statement is at best, a narrow reading

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[2] **NRS 533.345 Application for permit to change place of diversion, manner of use or place of use: Contents; approval of or hearing on temporary change; period of temporary change.**

1. Every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer. . . .

of the dicta in these cases, and at worst, misleading. These cases addressed the issues of 1) failure to diligently proceed to perfect their appropriation, and 2) failure to justify the need to import water from one basin to another for future beneficial use.

Respondents are correct when they assert that beneficial use is the basis, measure, and limit of the right to use water. NRS 533.035.[4] Like the eleventh commandment, this "universal" statement embodies the whole of the prior appropriation doctrine in one sentence. Beneficial use focuses on actual use that quantifies water appropriated for a particular purpose and the importance of continued beneficial use of that water for that purpose.

> Inherent in the right of appropriation are the requirements that the use made of the appropriated water shall be a beneficial one, and that the right to divert and use the water extends only to the quantity actually applied to such beneficial use. The appropriative right, therefore, is not merely a right to the use of the water; it is a right of *beneficial use*.

Hutchins, *supra* at 440.

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(Cont.)

[3] *Carson City v. Estate of Lompa,* 88 Nev. 541, 501 P.2d 662 (1972).

[4] **NRS 533.035 Beneficial use: Basis, measure and limit of right to use.** Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

As the Court stated in *Bacher*:

> Under NRS 533.070(1), once beneficial use is established, '[t]he quantity of water ... appropriated ... shall be limited to such water as shall reasonably be required for the beneficial use to be served.' Once the party's 'necessity for the use of water' ceases to exist, 'the right to divert [the water] ceases' as well.

Bacher, 122 Nev. at 1116, 146 P.3d at 797.

Generally, the focus of cases dealing with beneficial use addresses whether there was diligent development of a water right for beneficial use, whether the quantity of water appropriated exceeds the need for a particular use (waste), and whether there is an ongoing need for the use of the water, without which the right may be considered abandoned or forfeited. *See, e.g.*, *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 108 P.2d 311 (1940).

However, beneficial use is not at issue in this case. Respondents' assertion that a state policy exists to promote a philosophy that all the waters of the State be fully utilized so none are "left idle," is not supported as discussed above, or by the cases cited by the Respondents. In fact the Court in *Bacher* stated:

> Water in Nevada belongs to the public and is a precious and increasingly scarce resource. Consequently, state regulation like that in NRS Chapters 533 and 534 is necessary to strike a sensible balance between the current and future needs of Nevada citizens and the stability of Nevada's environment.

Bacher, 122 Nev. at 1116, 146 P.3d at 797. This statement can hardly be construed as endorsing the position that all the water resources *must* be put to use

with its focus on a public resource that provides for the stability of Nevada's environment. Finally, a review of the specific policies the Legislature has declared for water use in the State of Nevada include no such policy. NRS 533.024.[5]

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[5] **NRS 533.024 Legislative declaration.** The Legislature declares that:

1. It is the policy of this State:

(a) To encourage and promote the use of effluent, where that use is not contrary to the public health, safety or welfare, and where that use does not interfere with federal obligations to deliver water of the Colorado River.

(b) To recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated.

(c) To encourage the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada.

(d) To encourage and promote the use of water to prevent or reduce the spread of wildfire or to rehabilitate areas burned by wildfire, including, without limitation, through the establishment of vegetative cover that is resistant to fire.

2. The procedures in this chapter for changing the place of diversion, manner of use or place of use of water, and for confirming a report of conveyance, are not intended to have the effect of quieting title to or changing ownership of a water right and that only a court of competent jurisdiction has the power to determine conflicting claims to ownership of a water right.

C. While NRS 534.110 provides that as a condition of each groundwater appropriation, the appropriator must allow for the reasonable lowering of the static water level, the State Engineer's ability to approve mitigation plans is limited to measures that remediate the lowering of the static water level, not providing water from another source or replacement of lands and water rights.

Respondent KVR boldly states the State Engineer has authority to allow a subsequent appropriator to mitigate an existing right by providing water from a different source. KVR Ans. Br. at 11. This statement misstates the law, and is in direct opposition to NRS 533.370(2)[6], which provides that if a proposed use or change conflicts with exiting rights or with protectable interests in existing domestic wells, the State Engineer shall reject the application. With one exception, there is no statutory authorization providing the State Engineer with authority to

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[6] **NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.** . . . .

> 2. Except as otherwise provided in subsection 10, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the same basin has been rejected on those grounds, the new application may be denied without publication.

require senior water rights holders to undertake mitigation measures so that the conflict with a junior's use is avoided. The State Engineer is limited to duties that are prescribed by law. NRS 532.110.[7]

When the State Engineer approved the 3M Plan, he arbitrarily concluded that a junior appropriator, in addition to providing resources for the lowering of wells and digging new wells, could require the senior appropriator to accept money, property replacement, or substitute water from another source for the loss of the senior's specific property rights. 3M JA, Vol. 1 at 000020-21. In doing so, the State Engineer failed to consider an important aspect of the problem, that being there is no legislative provision that allows the State Engineer to re-open, re-evaluate, and/or re-condition a senior appropriator's existing right upon acceptance of an arbitrarily determined mitigation measure to benefit the junior user who created the conflict in the first instance. This lack of authority and the State Engineer's orders otherwise are particularly egregious in light of the possibility that the mitigation measure could result in a loss of the senior's water use right, either in terms of destruction of the source (*see*, Testimony of Dwight Smith, JA Vol. 3 at 531) or in terms of abandonment and/or forfeiture.

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[7] **NRS 532.110 General duties.** The State Engineer shall perform such duties as are or may be prescribed by law and the Director of the State Department of Conservation and Natural Resources.

D. The 3M Plan Lacks Express Conditions as Required by NRS 534.110.

The State Engineer stated, "Without tangible observations, it is impossible to identify which specific mitigation option will be best suited to reduce or eliminate site-specific impacts in a given case." State Engineer's Ans. Br. at 21. The State Engineer's Answering Brief goes on to comment that Appellants' approach requiring express conditions to ensure that their water rights are protected, and will not be in conflict, is simply absurd. What is absurd is that the State Engineer is statutorily responsible for conducting necessary studies and inventories pursuant to NRS 532.165(1)[8]. The State Engineer shifts the burden to the Appellants to prove that conflicts will occur. If the State Engineer is uncertain as to the conflicts in KVR's appropriation and change applications, as was suggested in the State Engineer's Answering Brief (at 21), the permits should not have been granted. *See*, NRS 533.370(2). It is upon the State Engineer to protect existing rights and the public resource.

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[8] **NRS 532.165 Duties: Studies and inventories; review of governmental proposals for flood control and water development projects; program to map water rights.**

The State Engineer shall: 1. Conduct necessary studies and inventories.

E. The State Engineer and KVR relied on NRS 534.110 to support their arguments below, yet they now argue that the language of the statute should be ignored.

Either NRS 534.110(5) applies or it does not. Both KVR and the State Engineer argue Appellant's failed to raise the following issue on appeal: that agreement from domestic well owners for mitigation is not required because the provision that limits the mitigation requirements relates to municipal, quasi-municipal, and industrial uses.[9] State Engineer Ans. Br. at 23-24; KVR Ans. Br. at 24-25. However, in the instant case, there was no contested case hearing. In this case the State Engineer issued a decision, approving the 3M Plan without a contested case hearing. The initial arguments regarding the validity of the plan were made on appeal to the District Court. Appellant's fully cited NRS

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[9] Both KVR and The State Engineer's reliance on *Peot v. Peot*, 92 Nev. 388, 390, 551 P.2d 242, 244 (1976) and *State of Washington v. Bagley*, 114 Nev. 788,792, 963 P.2d 498, 501 (1998) are misplaced. In *Peot*, a case involving child support issues, the court refused to address issues of statute of limitations and laches, as they had not been raised below. Similarly, in *Bagley,* the appellants raised a statute of limitations issue, arguing that they should be permitted to benefit from the longer statute of limitations provided by the foreign state as opposed to the Nevada statute of limitation under the federal Full Faith and Credit for Child Support Orders Act. Defenses such as these must be asserted in the initial responsive pleadings. NRCP 12 (b).

534.110(5)[10] in their Opening Brief before the District Court filed in Case No. CV1207-178. 3M JA Vol. 6 at 000558. This statute was argued before the District Court. Waiver is not appropriate.

KVR further argues that nothing in the provisions of NRS 534.110(5) suggests that mitigation is not available for uses not listed in the statute such as mining. KVR Ans. Br. at 25. There is no argument that the State Engineer's authority is limited by statute. NRS 532.110. There are only three statutes in Nevada Revised Statutes Chapters 533 and 534 where mitigation is mentioned,

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[10] **NRS 534.110 Rules and regulations of State Engineer; statements and pumping tests; conditions of appropriation; designation of critical management areas; restrictions.** . . . .

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

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

(b) Whose reasonably expected rate of diversion is one-half cubic foot per second or more,

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

NRS 533.024[11] (domestic well use protection when impacts from municipal use cannot be mitigated, i.e. hooking into the municipal water supply), NRS 533.4385[12] (economic mitigation), and NRS 534.110 (mitigation agreement prior to permit issuance). Nevada Revised Statute 534.110 specifically limits its discussion regarding mitigation to uses involving municipal, quasi-municipal, and industrial use. The legislature might have, but did not extend this language to include mining, milling, irrigation, stock watering, fire protection, or other beneficial uses.

When construing statutes, the courts first look to the plain language of the statute. *J.D. Constr., Inc. v. IBEX Int'l Group, LLC*, -- Nev. --, 240 P.3d 1033, 1039 (2010) (quoting *Crestline Inv. Group v. Lewis,* 119 Nev. 365, 368, 75 P.3d 363, 365 (2003)). Where the language is plain and unambiguous, language should

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[11] **NRS 533.024 Legislative declaration.** The Legislature declares that:

1. It is the policy of this State . . .:

(b) To recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated.

[12] **NRS 533.4385 Plan to mitigate adverse economic effects caused by transfer of water; contents of plan; modification of plan by State Engineer.**

1. If a county of origin has not imposed a fee on the transfer of water pursuant to NRS 533.438, an applicant and the governing body of the county of origin may execute a plan to mitigate the adverse economic effects caused by the transfer of water from the county of origin to another county. . . .

not be added to accomplish a purpose not on the face of the statute. *Maxwell v. State Indus. Ins. Sys.,* 109 Nev. 327, 330, 849 P.2d 267, 269-270 (1993) (quoting *Cirac v. Lander County,* 95 Nev. 723, 729, 602 P.2d 1012, 1016 (1979)), KVR is incorrect in its assertion that the opportunity to mitigate adverse impacts to senior appropriators' rights under NRS 534.110(5) are equally applicable to mining uses. The plain language of the statute limits mitigation to municipal, quasi-municipal, and industrial uses.

II.

CONCLUSION

Nevada water law requires a designated and specific source for each water right of use. In protecting existing rights, the right to the source of the water as defined on the permit or certificate must be protected. Replacing a water right of use with "forced mitigation" of alternate source water is in violation of Nevada water law. The 3M Plan lacks express conditions to keep existing water use holders whole. There is no statutory scheme that allows for a junior mining water claimant to force mitigation on a senior water right holder.

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

DATED this 20th day of September, 2013.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(ii), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 2,813 words.

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

Dated this 20th day of September, 2013.

/s/ Therese A. Ure

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PROOF OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 20th day of September, 2013, I caused a copy of the foregoing ***APPELLANTS' REPLY BRIEF*** to be served on the following parties as outlined below:

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Dated this 20th day of September, 2013.

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